NORTH CAROLINA COURT OF APPEALS REPORTS

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THE COURT OF APPEALS
OF
NORTH CAROLINA

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1. Appointed and sworn in 15 May 2003 to replace Peter M. McHugh who retired 31 March 2003.
2. Appointed to a new position and sworn in 16 February 2001.
3. Appointed and sworn in 1 April 2003.

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ELTON C. PRIDGEN	Smithfield
SAMUEL M. TATE	Morganton

1. Appointed Chief Judge effective 31 March 2003.
2. Appointed Chief Judge effective 1 February 2003.
3. Appointed Chief Judge effective 1 March 2003.
4. Appointed and sworn in 20 February 2003 to replace Eric Levinson who was elected to the Court of Appeals.
5. Appointed and sworn in 25 April 2003 to replace David S. Cayer who was elected to the Superior Court.
6. Appointed and sworn in 25 February 2003.

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OF

NORTH CAROLINA

AT

RALEIGH

GUILFORD FINANCIAL SERVICES, LLC, PETITIONER v. THE CITY OF BREVARD, A MUNICIPAL CORPORATION, RESPONDENT

No. COA01-206

(Filed 7 May 2002)

Zoning— subdivision approval—quasi-judicial proceeding

A City Council's disapproval of a subdivision plat for affordable housing was remanded for further proceedings where the City Attorney apparently advised the Council that the proceeding was legislative, the Council did not conduct its hearing in accord with fair trial standards, and the Council did not state the facts upon which it based its denial with sufficient specificity to allow review, even with the latitude given to findings made by lay bodies. The City could have adopted a "ministerial" subdivision ordinance, but instead enacted a quasi-judicial process; furthermore, the proceeding did not become legislative due to the type of notice given and, under this ordinance, approval did not become automatic after minimum requirements were met.

Judge TYSON concurring in part and dissenting in part.

Appeal by petitioner from judgment entered 2 November 2000 by Judge J. Marlene Hyatt in Transylvania County Superior Court. Heard in the Court of Appeals 28 November 2001.

Smith, Helms, Mullis & Moore, L.L.P., by James G. Exum, Jr. and Robert R. Marcus, and Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Craig D. Justus, for petitioner-appellant.

Ramsey, Hill, Smart, Ramsey & Pratt, P.A., by Michael K. Pratt and James M. Kimzey, for respondent-appellee.

HUDSON, Judge.

Guilford Financial Services, LLP ("petitioner") appeals from a judgment by the superior court affirming the disapproval by the City of Brevard ("the City") of petitioner's preliminary subdivision plat. For the reasons given below, we vacate and remand to the superior court for remand to the Brevard City Council ("the Council") for further proceedings.

I.

Petitioner seeks to develop an affordable housing community called Laurel Village on approximately five acres located in the City near Outland Avenue. On 28 January 2000, petitioner filed a preliminary subdivision plat with the City's Technical Advisory Committee ("the Committee"). The initial plat showed the site being subdivided into fifteen lots containing a community building and fourteen duplexes. The duplexes comprised twenty-eight units, each having one, two, or three bedrooms. After reviewing the plat, the Committee suggested several changes, none of which are at issue here. Except for the suggested changes, the Committee believed that the preliminary plat complied with the City's Zoning Ordinance and Subdivision Regulations. The Committee recommended that the City's Planning and Zoning Board ("the Planning Board") approve the preliminary plat subject to six enumerated "conditions and/or contingencies."

The Planning Board first considered the preliminary plat at its 15 February 2000 meeting. Some members of the Planning Board and a neighboring resident expressed concerns regarding increased traffic outside the development. The Planning Board tabled consideration of the plat until a later meeting so that traffic information could be obtained.

Subsequent to the 15 February meeting of the Planning Board, petitioner revised the preliminary plat. The revised plat showed sixteen lots containing fifteen duplexes and a community building. The duplexes in the revised plat comprised thirty units: twenty-eight one-bedroom units and two two-bedroom units. The basic lot and street

layout were unchanged. Petitioner explained that the design was changed following a decision to target the elderly and disabled rather than families.

The Planning Board considered the revised preliminary plat at its 21 March 2000 meeting. A neighboring resident presented the Planning Board with a petition containing 147 signatures of those opposed to the development and read a statement detailing the reasons for their opposition. These reasons included traffic impact and safety. Two neighbors addressed the Planning Board and expressed their concerns related to other matters. A member of the Planning Board questioned whether the proposed development complied with the density requirements of the City's Subdivision Regulations and Land Use Plan. Ultimately, the Planning Board approved the preliminary plat with three conditions, none of which is relevant to this appeal.

Following the Planning Board's recommendation to approve the preliminary plat, the Council held a public hearing on the matter on 17 April 2000. The Council listened to a presentation from petitioner's counsel and petitioner's land surveyor and engineer and to a presentation from the attorney representing a group of residents in the affected neighborhood who opposed the plan. The attorney representing the neighborhood group submitted a petition to Council, signed by over 150 people, expressing opposition to the plan. The Council then allowed citizens to comment on the proposed plan and accepted their written comments.[1]

The Council voted to continue the public hearing until 1 May 2000 in order to accommodate all citizens who wanted to be heard. On 15 May 2000, the Council again resumed the public hearing. The City Manager advised the Council that the Planning Board had determined that the proposed subdivision conformed to the City's Zoning Ordinance and Subdivision Regulations; he did not address whether the plat conformed to the density requirements of the Land Use Plan. In the interim between the 17 April and 15 May meetings of the Council, petitioner had submitted a third preliminary plat, in which revisions had been made to address the conditions imposed by the Planning Board on the revised plat. One Council member expressed

1. One citizen submitted a deed showing that he had a right-of-way across the land to be developed, which the proposed development infringed. The City Manager explained to the Council that the "private right-of-way issue is [not] something for the city to be concerned about," because "it's not the city's responsibility to protect a right-of-way."

confusion regarding which of the three plats was actually before the Council. Council members expressed their concerns regarding increased traffic from and the density of the proposed development. Ultimately, the Council voted to disapprove the preliminary plat.

Pursuant to the Subdivision Regulations, the reasons for the Council's disapproval were recorded in a letter to petitioner, dated 13 July 2000 ("the Letter"). The Letter states that the reasons for the Council's decision include:

> (1) Section 90 of the [Subdivision Regulations] provides that the Council may consider a higher standard than those included in the [Subdivision Regulations], if the [Subdivision Regulations] minimum standards do not reasonably protect or provide for the public health safety or welfare. Council considered the public health, safety and welfare in making their decision;
>
> (2) Section 703.1 of the [Zoning Ordinance] speaks to density, and requires that two-family dwellings be "unconcentrated." Council was concerned that the proposed subdivision plat violates this section by concentrating the number of two-family dwellings in one small area;
>
> (3) Your clients confused Council by presenting different versions of the plat for consideration. While it was my opinion that Council was reviewing the preliminary plat dated January 27, 2000, some members of Council apparently thought that they were reviewing the preliminary plat dated February 29, 2000. This confusion made it difficult for Council to make a decision in connection with this matter. In fact, I was somewhat confused on that, and stated at the May 15 meeting, that it was the February 29, 2000, plat that we were reviewing, when I now believe that to be an error;
>
> (4) Council was concerned about the width and present layout of Outland Avenue with regard to the issues of safety, health and general welfare. They were concerned that the new development might present traffic hazards and safety concerns in that neighborhood;
>
> (5) Council wanted further clarification on several issues regarding safety, health and general welfare from the Planning Board;

(6) Council was concerned about how the language of Section 703.1 [of the City's Zoning Ordinance] containing the "unconcentrated" language referred to hereinabove, is modified or affected by Section 703.5112, containing a 10,000 square foot requirement.

Petitioner appealed the Council's disapproval of its preliminary plat to the superior court, which affirmed the Council's decision. Petitioner now appeals the superior court's decision.

II.

The General Assembly authorized cities to regulate the subdivision of land by enacting N.C. Gen. Stat. § 160A-371 (1999). If a city chooses to adopt a subdivision ordinance, that ordinance:

> shall contain provisions setting forth the procedures to be followed in granting or denying approval of a subdivision plat prior to its registration.
>
> The ordinance may provide that final approval of each individual subdivision plat is to be given by
>
> (1) The city council,
>
> (2) The city council on recommendation of a planning agency, or
>
> (3) A designated planning agency.

N.C. Gen. Stat. § 160A-373 (1999).

The City of Brevard has chosen the second alternative provided by N.C.G.S. § 160A-373. Its Subdivision Regulations set out specific requirements with which a developer must comply and vests discretion with the Council in determining whether the application ultimately should be approved or denied. Section 85.8 of the City's Subdivision Regulations provides:

> Upon receipt of the preliminary plat and the planning board's recommendation, the city council shall hold a public hearing in accordance with the provisions of G.S. 160A-364. The city council shall then review the plat at its next regularly scheduled meeting and decide approval or disapproval. If the city council decides disapproval, the reasons for such action shall be stated in writing, and specific references shall be made to regulations with which the preliminary plat does not comply.

By adopting these procedures, the City has provided that these decisions be made in a quasi-judicial forum. The City argues that the process is legislative because of the reference in its Subdivision Regulations to N.C. Gen. Stat. § 160A-364, which specifies that before adopting or amending an ordinance a city must hold a public hearing preceded by notice as prescribed by the statute. *See* N.C. Gen. Stat. § 160A-364 (1999). We do not believe, however, that the type of notice determines the nature of the proceeding. Rather, the type of decision to be made is the critical factor. *See County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 507, 434 S.E.2d 604, 612 (1993) (characterizing quasi-judicial decisions as those "involv[ing] the application of zoning policies to individual situations"); *Northfield Dev. Co. v. City of Burlington*, 136 N.C. App. 272, 282, 523 S.E.2d 743, 750 ("Quasi-judicial decisions involve the application of . . . policies to individual situations rather than the adoption of new policies." (internal quotation marks omitted) (alteration in original)), *aff'd*, 352 N.C. 671, 535 S.E.2d 32 (2000) (per curiam). Thus, while "[t]he purpose of a legislative hearing is to secure broad public comment on the proposed action," the "purpose of a quasi-judicial hearing on an individual project . . . is to gather evidence in order to make factual findings." David W. Owens, *Legislative Zoning Decisions* 53 (2d ed. 1999); *see generally id.* at 10-11 (discussing the various types of zoning decisions).

The dissent would have this Court require approval on the ground that the subdivision approval decision is automatic, and "of right," once minimum requirements are met. While there are cases indicating that in some circumstances a petitioner is entitled to a permit as of right upon a *prima facie* showing of compliance with minimum requirements, those cases are based on different ordinances and do not apply here. *See, e.g., Nazziola v. Landcraft Props., Inc.*, 143 N.C. App. 564, 566, 545 S.E.2d 801, 803 (2001) (characterizing as "ministerial" an ordinance providing that " '[t]he Site Plan or Plot Plan shall be approved when it meets all requirements of this ordinance' "). Here, the Subdivision Regulations specifically give the Council discretion to disapprove the proposed subdivision.

While the City of Brevard could have adopted a "ministerial" subdivision ordinance, it did not. Instead, the City has enacted an ordinance establishing a quasi-judicial process, and specifically giving the City discretion to disapprove a proposed subdivision. The General Assembly clearly granted it the authority to do so, and we are bound to review this case by reference to the particular ordinance involved.

We have not found other similar ordinances in North Carolina, and this analysis does not apply to any municipality whose ordinances establish a different type of process for subdivision approval.

In *Refining Company v. Board of Aldermen*, 284 N.C. 458, 202 S.E.2d 129 (1974), our Supreme Court set out the requirements for a quasi-judicial proceeding. The Council was required to:

> (1) follow the procedures specified in the ordinance; (2) conduct its hearings in accordance with fair-trial standards; (3) base its findings of fact only upon competent, material, and substantial evidence; and (4) in allowing or denying the application, . . . state the basic facts on which it relied with sufficient specificity to inform the parties, as well as the court, what induced its decision.

Id. at 471, 202 S.E.2d at 138. The Council here did not conduct its hearing "in accordance with fair-trial standards," nor did it state the facts upon which it based its denial with "sufficient specificity" to allow the court to review its decision.

The "essential elements" of a fair trial are:

> (1) The party whose rights are being determined must be given the opportunity to offer evidence, cross-examine adverse witnesses, inspect documents, and offer evidence in explanation and rebuttal; (2) absent stipulations or waiver such a board may not base findings as to the existence or nonexistence of crucial facts upon unsworn statements; and (3) crucial findings of fact which are unsupported by competent, material and substantial evidence in view of the entire record as submitted cannot stand.

Id. at 470, 202 S.E.2d at 137 (citation and internal quotation marks omitted). Here, the City Attorney clearly believed and apparently advised the Council that the proceeding was legislative; he has continued to take the position, even before this Court on appeal, that it was a legislative proceeding. Indeed, the City Attorney acknowledged in the hearing before the superior court that "if [the proceeding] should have been a quasi-judicial hearing, I think we have to start from scratch, because the only thing I could see the Court doing is remanding it, to put witnesses under oath and start over again." In response, counsel for petitioner stated that petitioner waived certain procedural rights guaranteed by *Refining Company*.

The proceedings conducted by the Council, believing the process was legislative, do not bear any of the hallmarks of a "fair trial." The

entire process was designed to provide comment and opinion, not to produce evidence or to resolve factual issues.[2] Counsel for petitioner attempted after the fact to waive the right to have witnesses sworn and to cross-examine witnesses. This does not alter the fundamental legislative nature of what should have been a quasi-judicial proceeding.

Additionally, the Council failed to making findings of fact "with sufficient specificity to inform the parties, as well as the court, what induced its decision." *Id.* at 471, 202 S.E.2d at 138. The Council merely stated that it had considered the public health, safety and welfare, expressed its "concerns" regarding density and traffic issues, and expressed its confusion over which plat was before it for review. Moreover, the Council had to revisit the matter once the City Attorney told Council members that they had to give reasons for their denial of the application in accordance with the ordinance; until that point, the Council apparently thought all it had to do was vote.

Our Supreme Court has acknowledged that we should give latitude to "findings" made by lay bodies, such as a city council: "Since . . . city councils are generally composed of laymen who do not always have the benefit of legal advice, they cannot reasonably be held to the standards required of judicial bodies." *Id.* at 470, 202 S.E.2d at 137. However, the Council here did not make any proper findings of fact, and its statements of concern are too generalized for us to conduct a review.

For example, as evidenced by paragraph three of the Letter, the Council specifically declined to decide which plat was before it for review. In addition, the Council stated in its Letter that it was "concerned that the new development might present traffic hazards and safety concerns in that neighborhood." The Council failed to make any specific finding regarding traffic increase due to the development. In its brief, the City cites a memorandum from the City's Planning Director to the Planning Board, in which it is stated that Travis Marshall, a Transportation Engineer with the N.C. Department

2. We find the cases permitting waiver of certain rights, *see, e.g., Jarrell v. Board of Adjustment*, 258 N.C. 476, 128 S.E.2d 879 (1963), distinguishable in this regard. In *Jarrell*, for example, although the Supreme Court recognized that the right to have witnesses sworn could be waived, *see id.* at 481, 128 S.E.2d at 883, it was clear in that case that the Board of Adjustment had conducted a hearing for the purpose of receiving evidence and making findings of fact. *See id.* at 478-79, 128 S.E.2d at 881-82; *see also Burton v. Zoning Board of Adjustment*, 49 N.C. App. 439, 441, 271 S.E.2d 550, 551 (1980) (Board heard "extensive testimony from both sides" and "made findings of fact"), *cert. denied*, 302 N.C. 217, 276 S.E.2d 914 (1981).

of Transportation, opined that the proposed development would generate an average of four daily trips per unit. According to the City, based on calculations that do not appear in that part of the record that was before the Council, this constitutes a 39% increase. Petitioner cites in its brief another memorandum from the City's Planning Director to the Planning Board, observing that Reuben Moore, a Division Engineer with the N.C. Department of Transportation, "[b]ased upon his professional opinion and his familiarity with a similar project in Sylva, . . . estimated two trips per day," which would have an "imperceptible" impact on the existing traffic. The Council neither acknowledged nor resolved this conflicting evidence.

Although the dissent would have us find facts based on the record before us on appeal, it is clear that "[i]t is not the function of the reviewing court, in such a proceeding, to find the facts but to determine whether the findings of fact made by the [governing body] are supported by the evidence before the [governing body] and whether the [governing body] made sufficient findings of fact." *Rentals, Inc. v. City of Burlington*, 27 N.C. App. 361, 364, 219 S.E.2d 223, 226 (1975); *see Long v. Board of Adjustment*, 22 N.C. App. 191, 205 S.E.2d 807 (1974). In *Triple E Associates v. Town of Matthews*, 105 N.C. App. 354, 413 S.E.2d 305, *disc. review denied*, 332 N.C. 150, 419 S.E.2d 578 (1992), cited by the dissent, we remanded the case back to the Town Board "with instructions to conduct a *de novo* evidentiary hearing . . . and to make specific findings of fact," *id.* at 362, 413 S.E.2d at 310, after we determined that some of the evidence on which the Town Board had relied to deny a permit was not competent and material, *see id.* at 360, 413 S.E.2d at 309. "[W]e [were] not prepared to say that all of the Town's evidence regarding the [relevant issue] was not competent and material so as to be insufficient to rebut petitioners' showing of compliance" with the ordinance in question, and we recognized that we do not find the facts, in lieu of the Town Board. *Id.* at 360-61, 413 S.E.2d at 309. On remand, the Council should make factual findings that are sufficiently specific to enable review.

III.

Since the Council did not resolve the critical issues of fact in a quasi-judicial hearing, we cannot adequately review its ultimate decision to disapprove the subdivision application. Accordingly, we remand to the superior court for further remand to the Brevard City Council, so that the Council may conduct additional proceedings con-

sistent with the requirements of *Refining Company*. *See Rentals, Inc.*, 27 N.C. App. at 365, 219 S.E.2d at 227 (remanding to superior court for order directing "that a further hearing be held by the Board [of Adjustment] for a determination, on competent and substantial evidence, of petitioner's asserted rights").

Vacated and remanded.

Judge TIMMONS-GOODSON concurs.

Judge TYSON concurs in part and dissents in part.

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

I concur in part II of the majority opinion to the extent that the proper forum is a quasi-judicial and not a legislative hearing. I respectfully dissent from the remainder of part II and part III of the majority opinion. I would hold that petitioner complied with the requirements in the Zoning Ordinance and Subdivision Regulations and is entitled to approval of its subdivision plat.

Compliance with the requirements of the ordinance and regulations ensures that each application for approval of a subdivision plat will be considered on its own merits, and not granted or denied based on improper or irrelevant factors. *See Clark v. City of Asheboro*, 136 N.C. App. 114, 119, 524 S.E.2d 46, 50 (1999). It also provides predictability of future use, as well as the approval process. *Id.*

An applicant seeking approval for a subdivision plat who produces competent, material, and substantial evidence of compliance with the requirements of the ordinance and regulations, establishes a *prima facie* case of entitlement to approval. *Id.* at 119-20, 524 S.E.2d at 50 (citing *Coastal Ready-Mix Concrete Co. v. Board of Commissioners*, 299 N.C. 620, 625, 265 S.E.2d 379, 382 (1980)); *Triple E Assocs. v. Town of Matthews*, 105 N.C. App. 354, 358-59, 413 S.E.2d 305, 308 (1992). The disapproval of the plat must "be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record." *Id.* (citations omitted).

I concur with the majority that the Brevard City Council's ("Council") decision to disapprove the preliminary subdivision plat was a quasi-judicial action. However, the unique requirement of a

public hearing for subdivision plat approval does not relieve the Council of its legal obligation to approve the plat if the requirements of the Ordinance and Subdivision Regulations are met.

I. Standard of Review

The proper standard of review of a decision by a city council acting in a quasi-judicial capacity in the context of conditional use permits was announced by our Supreme Court in *Coastal Ready-Mix Concrete Co. v. Board of Commissioners*, *supra*. The Court held that the task of the reviewing 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.

In reviewing the sufficiency and competency of the evidence, this Court determines "not whether the evidence before the superior court supported that court's order[,] but whether the evidence before the Town Council supported the Council's action." *Ghidorzi Constr., Inc. v. Town of Chapel Hill*, 80 N.C. App. 438, 440, 342 S.E.2d 545, 547 (1986). The evidence before the Council supported the approval of the preliminary subdivision plat for Laurel Village.

The proper standard for judicial review "depends upon the particular issues presented on appeal." *Amanini v. North Carolina Dep't of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). Reviewing courts conduct a "*de novo*" review when a party alleges an error of law in the Council's determination and use a "whole record test" when sufficiency of the evidence is challenged or when a decision is alleged to have been arbitrary or capricious. *See In re Willis*, 129 N.C. App. 499, 501, 500 S.E.2d 723, 725 (1998).

II. Fair-trial Standards

The majority opinion avoids addressing the complex merits of petitioner's appeal, and seeks to remand to the Council for a new hearing "in accordance with fair-trial standards" and findings of fact with "sufficient specificity to inform the parties, as well as the court, what induced its decision." I would hold that the public hearing before the Council was not procedurally flawed and that remand for a new hearing is unnecessary. *See Howard v. City of Kinston*, — N.C. App. —, —, 558 S.E.2d 221, 226 (2002).

Petitioner in this case does not contend that it was denied the procedural guarantees required in a quasi-judicial hearing. Both the petitioner and the opposition were represented by counsel at all hearings before the Council. Both sides made statements to the Council in explanation for their proposition of approval or denial and rebuttal of statements or information given by the other side or witnesses.

The Council received: (1) the staff reports concerning traffic information and density; (2) a petition signed by neighboring residents opposed to the development; (3) letters from concerned citizens and heard unsworn statements from six concerned citizens, for and against the development, at the 17 April 2000 public hearing; and (4) additional letters from concerned citizens and heard unsworn statements from twenty concerned citizens, for and against the development, at the 1 May 2000 public hearing.

Neither petitioner nor the opposition made a request that those concerned citizens be sworn, that they have the right to cross-examine the witnesses, or that they have the right to present evidence in rebuttal. The right to insist that the witnesses be under oath, the right to cross-examine witnesses, and the right to present evidence in rebuttal are waivable and are not crucial for proper review by this Court. *See Howard, supra*; *Craver v. Zoning Bd. of Adjustment of Winston-Salem*, 267 N.C. 40, 42, 147 S.E.2d 599, 601 (1966); *Burton v. New Hanover County Zoning Bd. of Adjustment*, 49 N.C. App. 439, 442, 271 S.E.2d 550, 552 (1980).

III. Findings of Fact

After receiving, hearing, and reviewing all of the evidence, the Council entered specific findings of fact in support of its conclusion to disapprove the plat. The Council denied approval of the plat for three primary reasons: (1) section 90 of the Subdivision Regulations,

(2) section 703.1 of the Zoning Ordinance, and (3) confusion over which plat was being considered.

The superior court made an additional finding for denial: the requirements of the City's Land Use Plan. Respondent's letter to petitioner, dated 13 July 2000, does not recite noncompliance with the Land Use Plan as a basis for the disapproval. "[A] reviewing court, in dealing with the determination . . . which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *Godfrey v. Zoning Bd. of Adjustment of Union County*, 317 N.C. 51, 64, 344 S.E.2d 272, 279-80 (1986) (citations omitted). It was error for the superior court to substitute this reason and rely on it in affirming the decision of the Council. *See Ballenger Paving Co. v. North Carolina State Highway Comm'n*, 258 N.C. 691, 695, 129 S.E.2d 245, 248 (1963) (review pursuant to *writ of certiorari* of an administrative decision is for error of law only and the superior court judge may not make additional findings).

I disagree with the majority's opinion that the Council failed to make "sufficient" findings of fact and merely expressed "concerns." The fact that the Council expressed "concerns" regarding traffic issues and density does not negate the fact that the Council made specific findings of fact. The record reflects that the "findings contra" to approval were not supported by competent, material, and substantial evidence.

IV. Competent, Material, and Substantial Evidence

In its petition for judicial review, petitioner argued that the decision of the Council was not supported by substantial evidence, was arbitrary and capricious, and was affected by errors of law. Therefore, we apply a *de novo* review as to errors in law and the whole record test as to whether the decision was supported by substantial evidence, or was arbitrary and capricious. *See Willis*, 129 N.C. App. at 501, 500 S.E.2d at 725.

A. Subdivision Regulations

In disapproving the preliminary plat, the Council relied on section 90 of the Subdivision Regulations, stating that:

> Section 90 of the Code provides that the Council may consider a higher standard than those included in the Code, if the Code minimum standards do not reasonably protect or provide for the pub-

> lic health safety or welfare. Council considered the public health, safety and welfare in making their decision.

The Council cited public health, safety, and welfare concerns with respect to the width and layout of Outland Avenue, the public access adjoining the proposed development, and, particularly, an increase in traffic.

There is no evidence in the record to support the disapproval of the plat on the basis of public health, safety, and welfare pursuant to section 90 of the Subdivision Regulations. The information furnished by the Brevard Police Department was before the Council as part of a staff report by the Planning Director, and indicated that the traffic count for Outland Avenue was 290 vehicle trips, within a twenty-four hour period, and that zero to one accident occurred on Outland Avenue between 1995 and 1999. Reuben Moore, Division Engineer with the North Carolina Department of Transportation, informed the Planning Director that the proposed development would average two daily trips per unit. Travis Marshall, Transportation Engineer with the North Carolina Department of Transportation, informed the Planning Director that the proposed development would average four daily trips per unit. Respondent argues and the superior court found that the proposed development would increase traffic by thirty-nine percent. The percentage of traffic increase standing alone without additional evidence of the impact of that increase is irrelevant. Additionally, Reuben Moore stated to the Planning Director that the impact on traffic from the proposed development would be "imperceptible." There was no other evidence before the Council to contradict this opinion. Accordingly, there is no evidence to support this finding by the Council or superior court.

B. Zoning Ordinance

The Council also cited section 703.1 of the Zoning Ordinance as a reason for disapproving the preliminary plat, stating that:

> Section 703.1 of the Code speaks to density, and requires that two-family dwellings be "unconcentrated." Council was concerned that the proposed subdivision plat violates this section by concentrating the number of two-family dwellings in one small area.

The Council raised a concern as to the meaning of "unconcentrated" as stated in the "Purpose" section and the specific minimum lot requirement of 10,000 square feet stated in section 703.51 of the

Zoning Ordinance. 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). This construction is particularly required where petitioner's proposed use is an expressly permitted use of right under the Zoning Ordinance.

The parcel of land upon which petitioner proposes to develop Laurel Village is zoned R-2 Residential. Duplex dwellings are expressly permitted uses of right under section 703.2 of the Zoning Ordinance. The purpose for R-2 zoning is stated in section 703.1:

> Purpose. This district is established to protect areas in which the principal use of the land is for medium density single and unconcentrated two-family dwellings and for related recreational, religious, and educational facilities normally required to provide for an orderly and attractive residential area.

The minimum lot areas for R-2 zoning are defined in section 703.51. Subsection 703.5112 states that the minimum lot area for a duplex is "10,000 square feet."

Respondent argues that "unconcentrated" in the "Purpose" section is an additional requirement to the "minimum lot area" of 10,000 square feet. I disagree. In statutory construction, the sections of the Zoning Ordinance are read in *para materia*, and not in isolation of one another.

This Court held in *C. C. & J. Enterprises, Inc. v. City of Asheville*, 132 N.C. App. 550, 554, 512 S.E.2d 766, 770 (1999), that "a generalized statement of intent of the specifications that follow" cannot be used as a basis to reject a permit that meets all the requirements. The purpose of the R-2 district is "to protect areas in which the principal use of the land is for medium density single and unconcentrated two-family dwellings. . . ." Article IV of the Zoning Ordinance specifically defines density as "[t]he number of dwelling units per acre [of] land developed or used for residential purposes. *Unless otherwise clearly stated, density requirements in this ordinance are expressed in dwelling units per net acre . . . .*" (emphasis supplied). Section 703.5112 specifically states the "minimum lot area" required to meet the purpose of "unconcentrated" two-family dwellings. In light of the definition of density and section 703.5112 of the Zoning Ordinance, I conclude that the statement of purpose in

section 703.1 is "only a generalized statement of intent of the specifications that follow."

Respondent argues that in the case of statutory construction, the word "unconcentrated" must be given its ordinary meaning—"not clustered or gathered together closely." The superior court found that, using the ordinary meaning of "unconcentrated," fifteen duplexes on sixteen lots is not "unconcentrated." There is no evidence to support this finding by the Council and superior court. "Unconcentrated" is a general term set out in the "Purpose" section and, when read in *para materia*, is specifically defined in section 703.51 and subsection 703.5112 of the Zoning Ordinance.

"[W]here a zoning ordinance specifies standards to apply in determining whether to grant a special use permit and the applicant fully complies with the specified standards, a denial of the permit is arbitrary as a matter of law." *Woodhouse v. Board of Comm'rs of Nags Head*, 299 N.C. 211, 219, 261 S.E.2d 882, 887 (1980) (citation omitted). Here, petitioner fully complied with the standards specified in the Subdivision Regulations and Zoning Ordinance. Both the City Manager and the City Attorney advised the Council that the preliminary plat was in full compliance.

Statements by the Council members that "It bothers me to see things like that [children riding their bicycles, skating down the street, playing ball in that street, balls rolling down the street]" or "I've known a number of these people in [the adjoining neighborhood] . . . in my conscience I just cannot vote for this project," opine about possible and subjective effects of the proposed development and are not adequate grounds for disapproval of the preliminary plat. *See id.* at 220, 261 S.E.2d at 888 (speculatory or mere opinion testimony about the possible effects of a permit are insufficient to support the Council's findings); *Triple E*, 105 N.C. App. at 359, 413 S.E.2d at 308 ("The Town Board may not create new requirements not outlined in the ordinance to deny the permit.").

Humble Oil & Refining Co. v. Board of Aldermen of Chapel Hill, 284 N.C. 458, 202 S.E.2d 129 (1974), dealt with a special use permit which has additional requirements not present in this case of subdivision plat approval. In the present case, petitioner made a prima facie showing of compliance with the Subdivision Regulations and Zoning Ordinance. No evidence appears in the record to support the findings for denial of petitioner's preliminary plat. I conclude that the Council acted arbitrarily and capriciously in denying petitioner's

preliminary plat. *Woodhouse*, 299 N.C. at 219, 261 S.E.2d at 887 (if no competent, material evidence appears to support findings for denial, the reviewing body must grant the special use permit when the applicant fully complies with the specified standards and failure to do so is arbitrary as a matter of law).

V. Conclusion

I would reverse the decision of the superior court, affirming the disapproval by the Council and remand, not for a new hearing, but for entry of an order directing the Council to approve petitioner's subdivision plat.

STATE OF NORTH CAROLINA v. J.C. CASTOR

No. COA01-479

(Filed 7 May 2002)

1. **Evidence— redirect examination—scope of direct examination exceeded**

The trial court did not abuse its discretion in a first-degree murder prosecution by allowing the State to elicit evidence on redirect examination that went beyond the scope of the witness's previous testimony where the testimony concerned statements by the victim which were relevant to show a bad relationship between defendant and the victim, to show motive, and to show premeditation and deliberation rather than a spontaneous act of self-defense.

2. **Evidence— residual hearsay exceptions—trustworthiness—unavailability**

The trial court in a first-degree murder case did not err by admitting statements made by a defendant's nephew to the police under the residual exceptions to the hearsay rule set forth in N.C.G.S. § 8C-1, Rules 803(24) and 804(b)(5) where defendant questioned only the trustworthiness of the statement and the unavailability of the nephew; the trial court found the statement to be trustworthy because the nephew knew the officers were investigating a murder in which he was not implicated and that his statement would incriminate his uncle, and the nephew never recanted his statement; and the court found the nephew was

unavailable because the State had made a diligent, unsuccessful effort to locate him but the nephew was secreting himself in order to avoid testifying at the trial.

3. Evidence— 1971 conviction—admissible

The trial court did not err in a first-degree murder prosecution by admitting evidence of defendant's 1971 second-degree murder conviction where the judge found 10 similarities between the 1971 murder and the current murder; the 27 year old murder was not too remote when the 18 years defendant spent in prison are excluded; and the probative value of the evidence far outweighs the possibility of unfair prejudice.

4. Criminal Law— prosecutor's argument—no evidence of victim's convictions—prior motion to exclude victim's convictions

There was no error so egregious as to be grossly improper and warrant intervention ex mero motu in a first-degree murder prosecution where the prosecutor successfully filed a motion in limine to prevent mention of the victim's criminal convictions, then argued to the jury that defendant had produced no evidence of any criminal convictions to support the claim that the victim had been a violent person. Given the evidence, there is no reasonable likelihood that a different result would have been reached had the argument not been made or had the trial court intervened ex mero motu.

Appeal by defendant from judgment entered 11 February 1999 by Judge Thomas W. Ross in Rowan County Superior Court. Heard in the Court of Appeals 14 February 2002.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Thomas F. Moffitt, for the State.

R. Marshall Bickett, Jr., for defendant-appellant.

MARTIN, Judge.

Defendant appeals from a judgment sentencing him to life imprisonment without parole, entered after a jury found him guilty of first degree murder.

The State's evidence tended to show that the murder victim, Golden Billings and his wife, Jennifer Billings, lived in the Graystone

Mobile Home Park in Rowan County in January 1998. Around 6:30 or 6:45 p.m. on 9 January 1998, Jennifer telephoned Golden's sister, Amanda Boss, and asked her to check on Golden. Jennifer told Amanda that she was concerned about Golden because he had been distraught and had taken twenty valium pills. Jennifer also told Amanda that she had been unable to reach Golden by phone. Amanda knew that Golden had been upset because his mother had died less than a month before, and he and Jennifer had been having marital difficulties. Amanda also knew that Golden had a serious drug problem, having been addicted to pain killers since his childhood bouts with polio, and that both he and Jennifer were in a methadone treatment program for their heroin addictions.

Amanda and her friend, Diane Bass, went to Golden's mobile home where they found the front door standing open, the lights on, and the curtains pulled back. Inside, Amanda found her brother sitting on the couch with his hands on his legs, and his feet on the floor. Amanda initially thought that Golden had just nodded off but then saw two gunshot wounds in his chest and realized that he was dead.

Amanda testified about a conversation she had had with Golden before he was killed. Golden had told her that he feared defendant was going to take his life because of an incident that had occurred a few months prior, involving Elic Scercy, the father of defendant's girlfriend, Tia Barringer. Elic blamed Golden for poisoning him with bad drugs and then stealing his poker winnings when paramedics rushed Elic to the hospital.

Deputy Sheriff T.A. Swing testified that Golden was found seated on the couch with his feet under the coffee table. SBI Agent William Lane, an expert in blood spatter analysis, testified that blood spatter was found on the wall directly behind, and on the ceiling directly above, where Golden had been sitting. According to Special Agent Lane, the blood spatter patterns on the wall indicated that Golden had been shot twice, with the first shot releasing a flow of blood and the second spattering the flowing blood onto the wall. Additionally, the investigating officers found no evidence of a forced entry, a struggle, or any spent shotgun shells in the home.

Dr. John D. Butts, an expert in forensic pathology, testified an autopsy revealed that Golden's death was caused by two shotgun wounds to his chest. The two shots had caused partial collapse of Golden's lungs and penetrated Golden's aorta, resulting in massive

bleeding and death. Shotgun wadding and pellets were removed from both wounds.

The victim's wife, Jennifer, testified that earlier on the day of the murder, her husband had shot the telephone in their mobile home and had threatened to shoot himself. Jennifer testified that on the evening of 9 January 1998, defendant and his girlfriend, Tia Barringer, came to her home. Jennifer and Tia left Golden and defendant in the living room while they went into the bedroom to talk. Jennifer informed Tia that she wanted to leave Golden and began gathering her clothes and other items to take with her. Jennifer heard two gunshots. While she and Tia were in the bedroom, Jennifer had not heard any argument, threats, or sounds of a fight or scuffle. After hearing the shots, Jennifer rushed into the living room to find her husband sitting on the couch with a hole in his chest and defendant going out the door. Jennifer testified that there was no weapon in Golden's hands, on the floor, or on the coffee table in front of him. Tia went to the couch and removed a 9 mm pistol from the back of Golden's trousers. Jennifer quickly finished gathering her clothes and ran out the door. By that point, defendant was already in the driver's seat. Jennifer and Tia got into the car and the three of them drove to Kannapolis, where they dropped defendant off at a church. Prior to defendant getting out of the car, Jennifer saw a sawed off shotgun in defendant's lap and saw defendant wiping the gun down or wrapping it up in a sheet. After defendant got out, Tia drove until the car ran out of gas shortly thereafter. Jennifer and Tia then walked to defendant's sister's house to look for defendant. When they found that defendant was not there, they left.

Defendant, Jennifer, and Tia were soon reunited back at the car. Someone eventually stopped and helped them obtain some gasoline. Tia then drove defendant and Jennifer to Elic Scercy's house and left Jennifer there. From Elic's house, Jennifer called her house several times at defendant's suggestion so that it would not look as if she already knew her husband was dead. Jennifer also called Amanda Boss because she wanted somebody to go to the house and find her husband.

Tia Barringer testified that in January 1998 she and defendant were living together in Kannapolis. A few days prior to Golden's death, Tia had been in a traffic accident and was arrested for drunk driving, hit and run, and careless and reckless driving. Tia gave the Kannapolis police officers a false identification. Tia made bond 8 January 1998 and Tia and defendant decided to go to South Carolina

before the police found out about the false identification and came to arrest her. They stopped by Golden's house to get some drugs on the way out of town on 9 January 1998.

Tia testified that when she and defendant arrived at Golden's trailer, Golden motioned them inside. Jennifer was upset and crying. While Tia and Jennifer were in the back bedroom talking, Jennifer told Tia that Golden had been mistreating her and that she wanted to leave him. Tia stated that a few minutes later, they heard two gun shots and that her "first thought was it was Goldie's gun because Jennifer said he'd been shooting up the house." Tia even stated "that's Goldie's gun" when she heard the shots. After running to the living room, Tia saw Golden on the couch with blood on his shirt and then removed the gun from the back of his pants, put it in her purse and left. On the way to Kannapolis, Tia testified that she heard defendant say, "that son of a bitch pulled a gun on me." After defendant and Tia dropped Jennifer off at Elic Scercy's home, they went to a friend's house. Tia drank until she passed out and when she came to, the pistol that she had taken from Golden was missing from her purse. She asked defendant what had happened to it and he told her that he had sold it.

Janie Cook, defendant's sister, testified that on the evening of 9 January 1998 defendant went to her house in Kannapolis looking for someone to help him fix his car. Janie testified that she did not see any weapon on defendant's person. However, she saw defendant pull several shotgun shells from his coat pocket and wipe them with a kitchen towel. Janie provided a bag into which defendant put the shotgun shells. The next day, SBI Agent Gale found a white Eckerd's drug prescription bag, one spent shotgun shell, and five unfired shotgun shells along the road near Janie's house.

SBI Agent Eugene Bishop, an expert in the field of forensic firearm and tool mark identification, examined wadding and shotgun pellets that were removed from Golden's body. Bishop additionally examined the six shotgun shells found near Janie's house. Bishop testified that the waddings were consistent with having come from 12-gauge Remington Peters and Winchester AA shotgun shells. Bishop further testified that for the wadding to have been forced into Golden's chest, the shotgun would have to have been fired at close range. According to Bishop, five of the shotgun shells found near Janie's house were 12-gauge birdshot shells and the sixth was a 12-gauge buckshot shell.

The trial court also admitted into evidence a statement made by Janie Cook's son, Kenneth Gabriel, to Sergeant Agner of the Rowan County Sheriff's Office on 10 January 1998, the day following Golden Billings' death. In the statement, Kenneth Gabriel stated that after defendant had left his mother's house on 9 January 1998, he found defendant near the church where defendant's car had run out of gas. Defendant had blood on his hands and had a sawed-off shotgun with a pistol grip concealed under his coat, which Kenneth saw when defendant was removing cigarettes from his jacket. Kenneth also said that he had seen several shotgun shells drop out of defendant's jacket pocket; defendant picked the shells up off the ground.

The State also offered evidence tending to show that defendant had killed Pearl Walker on 25 June 1971 by shooting her with birdshot from a 12-gauge shotgun, and had been convicted of second degree murder.

Defendant testified in his own defense, claiming that he had killed Golden Billings in self-defense. Defendant testified that when he and Tia arrived at Golden's home, Jennifer was crying and blood was running out of the corner of her mouth. Defendant stated that he and Golden stayed in the living room while Tia and Jennifer went into another room to talk. According to defendant, he was not high on drugs at the time of his visit to Golden's home, even though he had taken some prescription painkillers that day. Defendant also testified that there were no hard feelings between Golden and himself. Defendant admitted that he had taken a sawed-off shotgun, concealed under his coat, into Golden's trailer. Defendant testified that he had been carrying the gun for protection since he was beaten with a ball bat in 1997.

Golden told defendant that he and Jennifer had been fighting that day and that he wanted Jennifer to leave. Golden told defendant that he was tired of people, particularly Tia, interfering in his marriage. After sensing that Golden was becoming antagonistic, defendant told Tia that it was time for them to leave. According to defendant, at that point Golden pulled out his 9 mm pistol and chambered a round. Defendant did not pull his gun out nor make any other overt act towards defendant at that time. Defendant was anxious because he knew Golden was "messed up" and was upset with Jennifer. Defendant had also seen Golden shoot and stab people in the past when he was "messed up." Golden eventually put the pistol away. As Tia entered the living room, defendant stated that it appeared to him

that Golden was reaching for his pistol so he told Tia to get back and he shot Golden. Defendant testified that he only pulled the trigger once but both barrels discharged simultaneously. Defendant acknowledged that he had not actually seen the pistol in Golden's hand at the time he pulled the trigger.

Several witnesses testified that Golden Billings was a violent man. Phillip Frye testified that two years earlier, he had gotten into a fight with Golden. After the altercation, Phillip went to another trailer and fell asleep. Phillip awoke to find Golden standing over him. Golden shot Phillip four times and then hit Phillip in the head with the gun and fled the scene. Phillip admitted on cross-examination that he refused to press charges against Golden and that he told the police another man had shot him.

Eric Black also testified that Golden Billings had a reputation for violence. On 8 January 1998, Eric and Kimberly Hardy saw Golden at a convenience store. Eric and Kimberly followed Golden to his trailer where they drank and used drugs. On this same evening, Golden and Jennifer got into an argument and Golden pulled out a 9 mm pistol, waved it around, and then pointed it at Jennifer's head. Defendant's step-son, Terry Bunn testified that Golden had a bad reputation for violence and "was probably the meanest little man around."

Rule 10(c)(1) of the North Carolina Rules of Appellate Procedure requires that "clear and specific record or transcript references" be included in assignments of error in the record on appeal. N.C.R. App. P. 28(b)(5) requires that immediately following each question presented in the appellant's brief "shall be a reference to the assignments of error pertinent to the question, identified by their numbers and by the pages at which they appear in the printed record on appeal." Defendant's counsel has complied with neither rule. The Rules of Appellate Procedure are designed to facilitate effective appellate review; they are mandatory and a failure to follow the Rules subjects an appeal to dismissal. N.C.R. App. P. 25(b). In the exercise of the discretion granted us by N.C.R. App. P. 2, however, we will suspend the requirements of these rules in the present case and consider the merits of defendant's arguments.

[1] By his first assignment of error, defendant contends the trial court erred by allowing the State to elicit testimony from a witness on redirect examination that went beyond the scope of the witness' testimony during direct and cross-examination. Specifically, defendant

objects to Amanda Boss's testimony concerning statements the murder victim made to her, shortly before his death, expressing his fear that defendant was going to kill him. The trial court ruled, over defendant's objection, that the murder victim's statements made to Amanda were admissible "to show the present state of mind of the alleged victim as one being in fear of [defendant]" under Rule 803(3) of the North Carolina Rules of Evidence and instructed the jury that it could consider the statements solely for that purpose. Amanda testified that the murder victim told her six to eight weeks before his death that he feared defendant was going to kill him because Elic Scercy, father of defendant's girlfriend, believed that Golden had tried to poison him by giving him contaminated drugs and then stole his money while he was sick. Defendant cross-examined Amanda concerning these statements.

A party ordinarily may not question a witness on entirely new matters on redirect examination. *State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988). However, a trial judge has discretion to allow testimony on redirect examination that exceeds the scope of direct and cross-examination provided the testimony is relevant and otherwise admissible. *State v. Barton*, 335 N.C. 696, 441 S.E.2d 295 (1994); *see* N.C. Gen. Stat. § 8C-1, Rule 611(a) (1999) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence . . . .) and N.C. Gen. Stat. § 15A-1226(b) (1999) ("The judge in his discretion may permit any party to introduce additional evidence at any time prior to verdict.")

"Evidence tending to show a presently existing state of mind is admissible if the state of mind sought to be proved is relevant and the prejudicial effect of the evidence does not outweigh its probative value." *State v. Locklear*, 320 N.C. 754, 760, 360 S.E.2d 682, 685 (1987). A murder victim's statements, made shortly before his death in which he expressed fear that the defendant was going to kill him have been held admissible under the state of mind exception to the hearsay rule to show the status of the victim's relationship to the defendant prior to the killing. *See, e.g., State v. Crawford*, 344 N.C. 65, 472 S.E.2d 920 (1996); *State v. Burke*, 343 N.C. 129, 469 S.E.2d 901, *cert denied*, 519 U.S. 1013, 136 L. Ed. 2d 409 (1996); and *State v. Alston*, 341 N.C. 198, 461 S.E.2d 687 (1995), *cert. denied*, 516 U.S. 1148, 134 L. Ed. 2d 100 (1996). A victim's statements have also been held admissible under the state of mind exception to establish the defendant's motive for murder. *See, e.g., State v. Miller*, 344 N.C. 658, 477 S.E.2d 915 (1996).

In the present case, the victim's statements were relevant to show that the relationship between defendant and Golden was not a good one, and to show that defendant had a motive for the killing, i.e., revenge for poisoning Elic Scercy and stealing his money. Finally, the victim's statements of fear were also relevant upon the issue of whether the killing was a deliberate premeditated act rather than a spontaneous act done in self-defense. The probative value of such testimony outweighed any potential prejudice to defendant. Thus, we hold the trial judge did not abuse his discretion in permitting the prosecutor to admit testimony on redirect examination concerning the victim's fear that defendant was going to kill him.

[2] By his second assignment of error, defendant argues the trial court erred in allowing the hearsay statement of Kenneth Gabriel into evidence. On 10 January 1998, Kenneth gave police officers a signed statement describing his encounter with defendant on the night of the alleged murder. After repeated unsuccessful attempts to secure Kenneth's presence at trial to testify, the prosecutor moved to introduce the written statement under one or both of the residual exceptions to the hearsay rule. N.C. Gen. Stat. § 8C-1, Rules 803(24) and 804(b)(5). Following a *voir dire* hearing, the trial judge made findings of fact and conclusions of law and ruled the statement admissible. Defendant contends the ruling was error.

There is no question that the testimony in dispute here was "hearsay" since it was "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. Gen. Stat. § 8C-1, Rule 801(c). Our Supreme Court has set forth six requirements which must be met for a hearsay statement to be admissible under Rule 803(24) where the availability of the declarant is immaterial: (1) the proponent must notify his adversary in writing of his intent to introduce the statement; (2) the statement must not be admissible under any of the listed hearsay exceptions; (3) the statement must possess circumstantial guarantees of trustworthiness equivalent to those of the listed exceptions; (4) the statement must be offered as evidence of a material fact; (5) the statement must be more probative on the point for which it is offered than other evidence which the proponent can produce through reasonable efforts; and (6) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence. *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). The Court has also held that for a hearsay statement to be admissible under Rule 804(b)(5), where the availabil-

ity of the declarant is material, the same six requirements must be met after the proponent first proves that the declarant is unavailable. *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986).

Although defendant discusses the various requirements for admissibility under the residual exceptions to the hearsay rule, he specifically questions only the trustworthiness of Kenneth Gabriel's statement and Kenneth Gabriel's unavailability. Therefore, we will only address these two issues.

The trial judge made specific findings of fact and conclusions of law relating to both the trustworthiness of Kenneth's statements and to his unavailability to testify at trial. Those findings are amply supported by evidence presented during the *voir dire* hearing, and therefore, are conclusive and binding on appeal. *See State v. Parker*, 350 N.C. 411, 516 S.E.2d 106 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000).

In determining whether a hearsay statement is trustworthy under the residual hearsay exceptions, our Supreme Court has directed trial judges to consider the following factors:

> (1) assurance of personal knowledge of the declarant of the underlying event; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant ever recanted the testimony; and (4) the practical availability of the declarant at trial for meaningful cross-examination.

Smith, 315 N.C. at 93, 337 S.E.2d at 845 (citations omitted).

As to the trustworthiness of Kenneth's statement, the trial judge found that Kenneth was interviewed while seated in a law enforcement vehicle. Additionally, Kenneth stated that he had seen defendant carrying a sawed-off shotgun with a black pistol grip and a strap which went over defendant's shoulder the night before. When Kenneth made his statement, he knew that the officers were investigating a homicide in which he was not implicated and that his statement would incriminate defendant, his uncle. Under these circumstances, the trial judge concluded that the testimony bore circumstantial guarantees of trustworthiness. The statement described an event about which Kenneth had first-hand knowledge. Further, Kenneth had no motive to lie to the police since he was providing information that was adverse to the interests of his relative and he was not trying to evade any personal responsibility for the crime. The trial judge also found that there was no evidence that Kenneth ever

recanted his statement. Finally, the trial judge found that "there is no practical availability of [Kenneth] at the trial for purposes of meaningful cross examination since he is unavailable and the Court has so found and concluded."

As to the unavailability of Kenneth to testify at trial, the trial judge concluded that the State made

> every diligent effort to locate [Kenneth] and make the witness available for cross examination; . . . [and that] the evidence shows . . . [Kenneth] is specifically secreting himself and avoiding appearance before the Court in testifying, and that the Court would conclude he is an unavailable witness.

These conclusions were supported by detailed findings of fact. The trial judge found that a subpoena had been issued at the prosecutor's request to compel Kenneth's appearance at trial. The subpoena was left in the hands of Kenneth's mother, Janie Cook, who stated that Kenneth was in the bathroom when the deputy arrived to serve him, and said she would give the subpoena to him. Subsequently, Detective Linda Porter recovered the subpoena, believing that it had not been properly served. Law enforcement officers tried to locate Kenneth by contacting his probation officer and his Department of Social Services (DSS) caseworker. According to his probation officer, there was an outstanding warrant for Kenneth's arrest for a probation violation. Kenneth's DSS caseworker had not seen him recently. Officers also contacted Kenneth's girlfriend and the Kannapolis Police Department for assistance in finding Kenneth but were again unsuccessful. Kenneth's mother, Janie Cook, had spoken with Kenneth by telephone the day before the trial, but he refused to tell her where he was. These findings of fact are supported by evidence presented during the *voir dire* hearing.

We hold that the trial judge properly applied the requirements of Rules 803(24) and 804(b)(5) and correctly ruled that Kenneth's statement was admissible thereunder. This assignment of error is overruled.

[3] Defendant next assigns error to the trial court's admission of evidence that defendant had been convicted of second degree murder for shooting Pearl Forney Walker with a 12-gauge shotgun in 1971. Following a *voir dire* hearing, the trial judge ruled, over defendant's objection, that this evidence was admissible under G.S. § 8C-1, Rule 404(b) as relevant to defendant's intent to kill and defendant's iden-

tity as the perpetrator of the murder in the instant case. Defendant argues the evidence of the 1971 murder should have been excluded because it was too remote in time and insufficiently similar to be relevant, and, even if admissible under Rule 404(b), the evidence was so prejudicial that it should have been excluded under G.S. § 8C-1, Rule 403. We reject defendant's argument.

Generally, under Rule 404(b), 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). It is well established 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, evidence of bad conduct and prior crimes is admissible under Rule 404(b) "as long as it is relevant to any fact or issue other than the defendant's propensity to commit the crime." *State v. White*, 340 N.C. 264, 284, 457 S.E.2d 841, 853, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995).

However, such evidence must be "sufficiently similar and not so remote in time as to be more probative than prejudicial under the balancing test of [ ] Rule 403." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). Our Supreme Court has explained that a crime or bad act is similar under Rule 404(b) if there are " 'some unusual facts present in both crimes or particularly similar acts which would indicate that the same person committed both,' " but the similarities between the two situations do not have to "rise to the level of the unique and bizarre." *State v. Green*, 321 N.C. 594, 603-04, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988) (quoting *State v. Riddick*, 316 N.C. 127, 133, 340 S.E.2d 422, 426 (1986)). Further, remoteness in time is more significant when a prior crime is used to prove a common scheme or plan but less significant when used to prove intent. *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991). In the later instance, "remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Id.*

The trial judge in the case *sub judice* made extensive findings of fact and conclusions of law. He found the following similarities between the murders of Pearl Walker in 1971 and Golden Billings in 1998: (1) both victims died from a shotgun wound to the upper torso; (2) both victims were shot with 12-gauge shotguns; (3) both victims were shot at such close range that the waddings from the shotgun shells were embedded in their wounds; (4) relatively fine shot was found in both victim's bodies; (5) the murder weapons in both instances were never found and there was some evidence that the weapons were disposed of; (6) defendant was alone in a room with each of the victims when they were shot; (7) both victims were killed in their own homes; (8) in both instances co-defendants were involved but were not present in the room when defendant shot the victims; (9) defendant made efforts in both instances to avoid leaving his fingerprints by wiping off the murder weapon or taping his fingertips; and (10) in both instances defendant fled from North Carolina and was captured out-of-state. These findings are supported by the evidence and disclose sufficient similarities between the two killings to render evidence of the earlier murder of Pearl Walker admissible.

The trial judge also addressed the issue of remoteness. He found that during the twenty-seven year period between the two killings, defendant spent approximately eighteen years in prison. This Court has stated that "[i]t is proper to exclude time defendant spent in prison when determining whether prior acts are too remote." *State v. Berry*, 143 N.C. App. 187, 198, 546 S.E.2d 145, 154, *disc. review denied*, 353 N.C. 729, 551 S.E.2d 439 (2001). As noted above, remoteness in time generally affects only the weight to be given evidence of a prior crime and not its admissibility when such evidence is being used to show intent, motive, knowledge, or lack of accident rather than to show that both crimes arose out of a common scheme or plan. *Stager*, 329 N.C. at 307, 406 S.E.2d at 893. We hold the evidence of defendant's 1971 shooting of Pearl Walker was not so remote in time, nine years excluding the eighteen years defendant was imprisoned, as to render it inadmissible. *See State v. Murillo*, 349 N.C. 573, 509 S.E.2d 752 (1998), *cert. denied*, 528 U.S. 838, 145 L. Ed. 2d 87 (1999) (twenty-two years not too remote); *State v. White*, 340 N.C. 264, 457 S.E.2d 841, *cert. denied*, 516 U.S. 994, 133 L. Ed. 2d 436 (1995) (nineteen years not too remote).

Finally, as to this third assignment of error, although the evidence was harmful to defendant's case, its probative value upon the issues

for which it was offered, defendant's intent to kill and his identity as the perpetrator, far outweighed the possibility of unfair prejudice. Therefore, we conclude that the trial court did not err in admitting the evidence pursuant to Rules 404(b) and 403.

[4] By his fourth and final assignment of error, defendant argues the trial judge erred in not preventing the prosecutor from arguing to the jury that defendant had produced no evidence of any criminal convictions to support his claim that the deceased victim was a mean and violent person. Defendant contends the prosecutor's argument was improper since the prosecutor had filed a motion *in limine* to prevent defendant from mentioning Golden Billings' prior criminal convictions, and the trial judge had allowed the motion, ordering:

> the defendant and his counsel and witnesses not to mention or inquire into any prior criminal activity of the victim . . . except that activity for which the door may be opened by the State's own evidence.

Defendant failed to object at trial to the prosecutor's jury argument of which he now complains and the trial court did not intervene *ex mero motu*. Defendant now argues that the prosecutor's comments during closing argument that defendant had not produced any evidence showing that Golden had been convicted of a violent crime was so grossly improper as to require the trial court's intervention, and, failing such intervention, as to entitle him to a new trial. We disagree.

Arguments of counsel are left largely to the control and discretion of the trial judge, and counsel is allowed wide latitude in the argument of hotly contested cases. *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986). When a defendant fails to object to the arguments at trial, he must establish that the remarks were so grossly improper that the trial judge abused his discretion by failing to intervene *ex mero motu*. *State v. Rose*, 339 N.C. 172, 202, 451 S.E.2d 211, 228-29 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). To establish such abuse, defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair. *Id.*

Even if we were to hold that the prosecutor's argument with respect to the absence of evidence of Golden's convictions was improper in light of the motion *in limine* and the trial court's ruling thereon, they were not so egregious as to be grossly improper and

warrant intervention *ex mero motu* by the trial court. In light of the evidence presented at defendant's trial, we do not believe there is any reasonable likelihood that a different result would have been reached had the argument not been made or had the trial court intervened, *ex mero motu*, to stop the argument. Therefore, we hold defendant's right to a fair trial was not compromised, and defendant's assignment of error is overruled.

Defendant received a fair trial, free from prejudicial error.

No error.

Judges HUDSON and CAMPBELL concur.

STATE OF NORTH CAROLINA v. DARRYL MAURICE COBB

No. COA01-501

(Filed 7 May 2002)

1. **Constitutional Law— court-appointed attorney—motion to remove**

The trial court did not err in a prosecution for a first-degree murder at a rest stop by denying defendant's motion to remove one of his court-appointed attorneys where the attorney had represented defendants in more than twenty-five non-capital murder cases and in four capital murder cases during 33 years of practice; the attorney filed 29 pretrial motions, conducted extensive cross-examination of the State's witnesses, and made timely objections; and the conflicts between defendant and his attorney related to trial strategies and tactics.

2. **Evidence— value of murder victim's car—lab technician's testimony**

The trial court did not err in a first-degree murder prosecution by allowing a crime lab technician to testify that the victim's car had a value greater than $1,000. The lab technician's experience and close personal observation of the vehicle, viewed alongside evidence as to how the victim maintained the vehicle, provides an ample foundation for an opinion as to its value.

3. Criminal Law— prosecutor's argument—defendant's failure to contradict evidence

There was no error in a first-degree murder prosecution where defendant contended the prosecutor improperly commented on his decision not to present evidence, but the prosecutor was commenting on defendant's inability to exculpate himself or on his failure to contradict the evidence presented by the State rather than on defendant's failure to testify.

4. Kidnapping— murder victim—sufficiency of evidence

There was substantial evidence to support a conviction for first-degree kidnapping where the evidence indicated that defendant left his home in Havelock intending to travel to Raleigh; he stopped at a particular rest area, as was his habit; and his body was found two miles from the rest area alongside a dirt road which was not within his course of travel. It was reasonable for a jury to infer that the victim was forced to abandon his plan to drive to Raleigh and to drive to the location where his body was found. Furthermore, evidence that defendant was in possession of the victim's vehicle and the murder weapon and that he had been living in an inoperable truck in the rest area reasonably pointed to defendant as the individual who forced the victim to abandon his plan.

5. Robbery— murder victim—sufficiency of evidence

The trial court did not err by submitting armed robbery to the jury where defendant contended that the State never presented any evidence that defendant was in possession of the murder victim's wallet, but the victim carried a wallet containing approximately $100 in cash when he left his home, his body was found in a state of decomposition consistent with being killed on the date he had been reported missing, defendant had been evicted for failing to pay rent and had been living in an inoperable truck, and defendant was found to be in possession of the murder weapon and the victim's vehicle.

6. Larceny— theft of wallet and automobile—no temporal break

Judgment was arrested on a felonious larceny conviction where a murder victim's wallet and automobile were taken, defendant was also convicted of armed robbery, and the circumstances of the case do not support a temporal break between taking the wallet and taking the automobile.

7. Homicide— felony murder—instructions—multiple thefts

There was no error in the instructions in a felony murder prosecution where defendant contended that the court's failure to specifically instruct the jury as to which property was the subject of a robbery charge and which the subject of a felonious larceny charge resulted in an improper determination of which felony formed the basis of the murder conviction.

8. Homicide— first-degree murder—no evidence of how victim killed—no evidence of struggle or provocation—no instruction on second-degree murder

The trial court was not required to instruct on the lesser included offense of second-degree murder where defendant contended that he was entitled to the instruction because the State did not present evidence detailing when or how the victim had been killed, but the record does not indicate a struggle or provocation.

Appeal by defendant from judgments entered 7 August 2000 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 13 February 2002.

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

McCotter, McAfee & Ashton, PLLC, by Rudolph A. Ashton, III, for defendant-appellant.

WALKER, Judge.

Defendant appeals his convictions for first degree murder under the felony murder rule, first degree kidnapping, robbery with a dangerous weapon, and felony larceny. The State's evidence tends to show the following: On 26 May 1999 at approximately 3:30 a.m., Leonard George Baggie (the victim) left his home in Havelock carrying his wallet which contained approximately $100 in cash. From Havelock, he traveled north along Highway 70 driving a black 1990 Honda Accord. He was ultimately heading to the Raleigh-Durham International Airport for a 7:00 a.m. flight to California. According to the victim's wife, the victim had a health condition which required him to urinate frequently. Consequently, he had a habit of stopping at the Clark's Rest Area located on Highway 70 when he traveled in that direction.

Later that evening, the victim's brother telephoned from California and informed the victim's wife that he was not on his scheduled flight. She then called the authorities and reported her husband missing.

Three days earlier, while on patrol at the Clark's Rest Area, an inspector with the North Carolina Division of Motor Vehicles, noticed a silver pickup truck which had been parked there for several hours. Defendant occupied the truck and, upon inquiry, informed the inspector that the master cylinder had broken and he was waiting for a replacement part. The inspector wrote down the truck's license number and left. When he returned for his final patrol of the evening, he noted that defendant and the truck were still at the rest area.

Defendant's uncle testified that he had loaned defendant the truck in January of 1999. He later decided to give the truck to defendant but wanted it returned so that he could remove its license plate. However, he was unable to locate defendant or the truck. In early June of 1999, defendant's uncle was informed that the truck had been abandoned at the Clark's Rest Area. When he went to retrieve it, he discovered it was inoperable and had it towed to his home. Upon searching the truck, investigators discovered defendant's personal mail and other items which suggested he had been living out of the truck.

The State also presented evidence which indicated that in September of 1998, defendant had been renting a duplex in Oriental. However, by December of 1998, defendant had ceased paying rent and was eventually evicted. On 20 May 1999, the sheriff's department padlocked the duplex.

On 7 June 1999, the victim's body was discovered in a wooded area approximately two miles from the Clark's Rest Area. The victim was found in a partially decomposed state about ten feet from the side of a dirt road. A forensic pathologist testified that the victim died from a single gunshot wound to the head and that the degree of decomposition was consistent with the victim having died around the date his wife reported his disappearance.

At approximately 12:30 a.m. on 9 June 1999, while on patrol in the Minnesott Beach area, two sheriff's deputies noticed a dark-colored Honda Accord parked down a deserted dead-end road. One deputy approached the vehicle and observed defendant asleep inside. He tapped on the window and awakened defendant. Defendant then

started the vehicle and attempted to drive away, only to stop when the deputy ordered him to turn off the vehicle.

Upon his arrest, defendant was found to have a .22 caliber handgun in his possession. A firearms expert opined that this handgun was the weapon used to murder the victim. In addition, defendant had replaced the vehicle's license plate and had removed a number of decals and stickers. Nonetheless, investigators traced the vehicle to the victim by using the vehicle identification number. Defendant's clothing, personal mail, and various other personal items were inside the vehicle.

Defendant did not present evidence. Thereafter, the jury found him guilty of murder during the perpetration of a robbery with a dangerous weapon, first degree kidnapping, and felony larceny. The trial court then arrested judgment on the robbery with a dangerous weapon conviction.

I.

[1] Defendant first contends the trial court erred in denying his motion to remove one of his court-appointed attorneys. The record shows that on 19 July 2000, defendant moved the trial court *pro se* to remove one of his two court-appointed attorneys based on his belief that this attorney was not providing adequate representation. In his motion, defendant alleged the attorney had failed to subpoena alibi witnesses, had neglected to replace a private investigator who had an apparent conflict of interest, and had formed an opinion as to his guilt. Defendant also stated his concern that this attorney was merely attempting to prevent his "execution" rather than "win" his case. After hearing evidence, the trial court concluded that defendant had not shown "good and adequate reason for the removal" of his court-appointed attorney and denied the motion.

"While it is a fundamental principle that an indigent defendant in a serious criminal prosecution must have counsel appointed to represent him, . . . an indigent defendant does not have the right to have counsel *of his choice* appointed to represent him." *State v. Thacker*, 301 N.C. 348, 351-52, 271 S.E.2d 252, 255 (1980) (citations omitted) (emphasis in original); *State v. Anderson*, 350 N.C. 152, 166-67, 513 S.E.2d 296, 305, *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999). Nevertheless, where an appointed attorney has demonstrated incompetency or a conflict arises between a defendant and his appointed attorney such that counsel is rendered ineffective, a trial

court is constitutionally obligated to appoint a substitute attorney. *Id.*; *see also State v. Gary*, 348 N.C. 510, 515-16, 501 S.E.2d 57, 61-62 (1998).

When a defendant requests the removal of his court-appointed attorney, the trial court may properly deny the request if it appears "that the original counsel is reasonably competent to present defendant's case and the nature of the conflict between defendant and counsel is not such as would render counsel incompetent or ineffective to represent *that* defendant. . . ." *Thacker*, 301 N.C. at 352, 271 S.E.2d at 255 (emphasis in original). Here, the record shows that the attorney which defendant sought to have removed had represented defendants in more than twenty-five non-capital murder cases and in four capital murder cases during his thirty-three years of practice. The record further shows that this attorney filed approximately twenty-nine pretrial motions, presented opening and closing statements, conducted extensive cross-examination of the State's witnesses, and made timely objections. We conclude the attorney was clearly qualified to represent defendant in this case. Furthermore, the conflicts defendant had with this attorney related to trial strategies and tactics which our Supreme Court has previously held is insufficient to require the removal of court-appointed counsel. *See Gary*, 348 N.C. at 514-16, 501 S.E.2d at 61-62; *see also State v. Robinson*, 290 N.C. 56, 66, 224 S.E.2d 174, 179 (1976). Accordingly, we conclude defendant was provided with effective assistance of counsel and overrule this assignment of error.

II.

[2] Defendant next contends the trial court erred in allowing a crime lab technician to testify that the victim's 1990 Honda Accord had a market value greater than $1,000. He maintains the technician lacked any knowledge or experience so as to "intelligently value" the vehicle.

Generally, "a non-expert witness who has knowledge of value gained from experience, information, and observation may give his opinion of the value of personal property." *Williams v. Chrysler-Plymouth, Inc.*, 48 N.C. App. 308, 317, 269 S.E.2d 184, 190, *disc. rev. denied*, 301 N.C. 406, 273 S.E.2d 451 (1980); *see also Maintenance Equipment Co., Inc. v. Godley Builders*, 107 N.C. App. 343, 355, 420 S.E.2d 199, 206 (1992), *disc. rev. denied*, 333 N.C. 345, 426 S.E.2d 707 (1993). Any weight to be given to the opinion is for the trier-of-fact to determine. *Id.*; *see also State v. Edmondson*, 70 N.C. App. 426, 430,

320 S.E.2d 315, 318 (1983), *aff'd*, 316 N.C. 187, 340 S.E.2d 110 (1986) ("The basis or circumstances behind a non-expert opinion affect only the weight of the evidence, not its admissibility").

Here, the victim's wife testified that the victim kept his vehicle "clean" and "vacuumed to the tee." Thereafter, prior to providing his opinion as to the value of the vehicle, the technician testified as to his having twenty years of experience in law enforcement and that he had closely examined the interior, exterior, and trunk of the vehicle for fingerprints and bloodstains. He then stated that, in his opinion, the vehicle was "worth more than $1,000." The lab technician's experience and close personal observation of the victim's vehicle, when viewed alongside the evidence as to how the victim maintained the vehicle, provides an ample foundation for an opinion as to its value. Therefore, we conclude the trial court did not err in admitting this testimony.

III.

[3] Next, defendant asserts the trial court committed reversible error by permitting the State to argue to the jury that he had failed to testify and that he did not offer any evidence. Defendant identifies nine separate statements made by the prosecutor in closing argument, which he contends were improper comments on his decision not to present evidence:

> A. If either side in this case thought there was important evidence for you to hear that they had, you would have heard it. . . . You can use your common sense and say, well, there must not be any evidence that contradicts it; otherwise, I would have heard it . . . If there was a witness that could come into this courtroom and could contradict the evidence you heard from the state, you know they would have. You know the evidence you've heard in this case is the evidence there is. And if its uncontradicted, that means there has been no evidence offered to contradict it, no evidence to the contrary.
>
> B. Did you hear somebody say, "Yes, I came to the rest stop, picked up the defendant, and gave him a ride to wherever?"
>
> C. And all they have is to say, "We can't answer any of these issues. We can't deny the defendant was there."
>
> D. If there had been that witness that could have testified about where this defendant was or what he was doing, they

would have called him but they didn't. Instead they picked and nitpicked, and are going to try to during their closing arguments, the state's evidence.

E. Have you heard a witness testify that there was anybody else that was living in a car at the rest stop before Mr. Baggie disappeared that left his truck and some of his personal property at the rest stop? No you have not.

F. And you've heard no other explanation for why that gun was in the defendant's waistband and he was in the victim's car by the testimony of other witnesses coming forward in this courtroom.

G. You have not heard any witness testify that is not a fact.

H. If they could of [sic] found somebody to give you a different opinion, you would of [sic] heard it; but you didn't, because there is no question.

I. Why was he living in the truck? Why didn't he call his family? What was he doing there with that gun? . . . I can't answer those questions. I cannot go into that man's mind and answer those questions for you. That's not required ladies and gentlemen. When you step back and look at the big picture that is not required.

A defendant's election to exercise his constitutional protection against self-incrimination may not be used against him. *See State v. Baymon*, 336 N.C. 748, 758, 446 S.E.2d 1, 6 (1994). Accordingly, any commentary by the State directed towards a defendant's failure to testify or present evidence violates the defendant's constitutional rights. *Id.* "A statement that may be interpreted as commenting on a defendant's decision not to testify is improper if the jury would naturally and necessarily understand the statement to be a comment on the failure of the accused to testify." *State v. Mitchell*, 353 N.C. 309, 326, 543 S.E.2d 830, 840-41, *cert. denied*, 389 U.S. 961, 151 L. Ed. 2d 389 (2001) (*citing State v. Rouse*, 339 N.C. 59, 95-96, 451 S.E.2d 543, 563 (1994), *cert. denied*, 516 U.S. 832, 133 L. Ed. 2d 60 (1995)). Notwithstanding this prohibition, our Courts have consistently held that the State is permitted to comment on a defendant's failure to produce exculpatory evidence or to contradict evidence which the State has presented. *See e.g. State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986); *State v. Jordan*, 305 N.C. 274, 287 S.E.2d 827 (1982); *State v. Barfield*, 127 N.C. App. 399, 489 S.E.2d 905 (1997); *State v. Billings*, 104 N.C. App. 362, 409 S.E.2d 707 (1991).

Our review of the above statements leads us to conclude the prosecutor was not commenting on defendant's failure to testify, but rather on his inability to exculpate himself or on his failure to contradict the evidence presented by the State. *See State v. McNair*, 146 N.C. App. 674, 679-80, 554 S.E.2d 665, 669 (2001). Additionally, the record shows that defendant did not object at trial to many of the statements he now claims were improper. *See Mitchell*, 353 N.C. at 324, 543 S.E.2d at 839 ("Where a defendant fails to object to the closing arguments at trial, defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*"). The statements were neither a direct nor an inferential commentary on defendant's constitutionally protected right to refuse to testify, which would have required the trial court to intervene *ex mero moto*. Furthermore, the trial court instructed the jury that defendant's silence was not to influence its decision in any way. We overrule defendant's assignment of error.

IV.

Defendant next contends the trial court erred in failing to grant his motion to dismiss each of the charges. "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). Thus, "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *Powell*, 299 N.C. at 98, 261 S.E.2d at 117. "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

First Degree Kidnapping

[4] Defendant maintains the State failed to provide substantial evidence to support his conviction for first degree kidnapping. N.C. Gen. Stat. § 14-39(a) states in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony . . . .

N.C. Gen. Stat. § 14-39(a) (1999). "If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree . . . ." N.C. Gen. Stat. § 14-39(b).

"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." *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986); *see also State v. Ray*, 149 N.C. App. 137, 149, 560 S.E.2d 211, 219 (2002). Here, the indictment alleges defendant removed the victim from one place to another without his consent for the purpose of committing robbery with a dangerous weapon. Defendant contends the only evidence presented to support this allegation was that the victim's body had been found about two miles from the Clark's Rest Area and that he had been found sleeping in the victim's vehicle approximately two weeks later. Without more evidence, defendant argues that the jury was left to only speculate as to whether he entered the victim's vehicle at the rest area and under what circumstances he removed the victim to the location where the victim's body was found.

In support of his contention, defendant cites our Supreme Court's holdings in *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983) and *State v. Skeels*, 346 N.C. 147, 484 S.E.2d 390 (1997). In *Jackson*, the central issue concerned whether a defendant's false representation amounted to a "coercion of the will" such that it negated a victim's apparent consent. The State's evidence tended to show the defendant had convinced the victim to give him a ride to a nearby town using a ruse that he needed jumper cables for a broken down pickup truck. The victim's body was later discovered in his vehicle. He had been shot twice in the head and his wallet was missing. The State asserted that the defendant's misrepresentation of his intentions upon entering the victim's vehicle constituted fraud such that the victim had not

consented to giving the defendant a ride. Therefore, the State argued that the defendant had unlawfully removed the victim from the place where the defendant had entered the vehicle to the place where the victim had been shot. The Supreme Court disagreed, noting that the evidence equally supported an inference that the victim, for his own reasons, had driven to the location where he had been shot. Thus, the Court held the evidence allowed for no more than a mere conjecture as to whether the defendant's misrepresentation amounted to a confinement, restraint, or removal of the victim against his will. *Jackson*, 309 N.C. at 30, 40-41, 305 S.E.2d at 708, 714.

In *Skeels*, the State's evidence tended to show the defendant shot the victim in the head, neck, and back and stole his pickup truck. On the same day, defendant was arrested when he was observed sitting across the street from a bank with his head wrapped in gauze. He had a gun with him and a note which indicated his intention of robbing the bank. However, the body of the victim was found six days later in an area off the state highway. The only evidence connecting the defendant to the victim's truck was that a witness had seen a man with his head wrapped in gauze driving the truck on the day the defendant was arrested. Citing *Jackson*, the Supreme Court arrested judgment on the defendant's kidnapping conviction. The Court stated, "There was no evidence regarding the circumstances under which the defendant entered the victim's truck or under what circumstances the victim drove to the area where he was killed." *Skeels*, 346 N.C. at 150-51, 484 S.E.2d at 391-92.

We find the circumstances surrounding the victim's killing in this case to be distinguishable from those present in *Jackson* and *Skeels*. In those cases, the evidence failed to show that the victim had been forced to abandon his own plan against his will at the direction of another. *See State v. Barbour*, 278 N.C. 449, 456, 180 S.E.2d 115, 119 (1971), *cert. denied*, 404 U.S. 1023, 30 L. Ed. 2d 673 (1972). In contrast, the evidence here indicates the victim left his home in Havelock with the intention of traveling to Raleigh. As was his habit, the victim stopped at the Clark's Rest Area. His body was found two miles from the rest area alongside a dirt road which was not within his course of travel. From this evidence, it is reasonable for a jury to infer the victim had been forced to abandon his plan to drive to Raleigh and drive to the location where his body was found. Furthermore, the finding of defendant in possession of the victim's vehicle and the murder weapon, along with evidence that he had been living out of an inoperable truck at the Clark's Rest Area, reasonably points to him as the

individual who forced the victim to abandon his plan. Accordingly, we find no error in the trial court's denial of defendant's motion to dismiss the first degree kidnapping charge.

Robbery with a Dangerous Weapon

[5] Defendant contends the trial court should have dismissed the robbery with a dangerous weapon charge based on his assertion that the State had presented no direct evidence that he was ever in possession of the victim's wallet.

Our Supreme Court has held that under N.C. Gen. Stat. § 14-87, robbery with a dangerous weapon is defined as "the taking of the personal property of another in his presence or from his person without his consent by endangering or threatening his life with a firearm or other deadly weapon with the taker knowing that he is not entitled to the property and the taker intending to permanently deprive the owner of the property." *Powell*, 299 N.C. at 102, 261 S.E.2d at 119. "To be found guilty of robbery with a dangerous weapon, the defendant's threatened use or use of a dangerous weapon must precede or be concomitant with the taking, or be so joined by time and circumstances with the taking as to be part of one continuous transaction." *State v. Olson*, 330 N.C. 557, 566, 411 S.E.2d 592, 597 (1992) (*citing State v. Hope*, 317 N.C. 302, 306, 345 S.E.2d 361, 364 (1986)).

When viewed in a light most favorable to the State, the evidence showed that when the victim left his home, he carried with him a wallet containing approximately $100 in cash. The evidence further showed defendant had been evicted from his apartment for failure to pay rent and had been living in an inoperable truck. The victim's body was found in a state of decomposition which was consistent with his having been killed on the date he had been reported missing. Although defendant did not have the victim's wallet at the time of his arrest, he was found to be in possession of the murder weapon and the victim's vehicle. From this evidence, a reasonably jury could conclude defendant had the motive, means, and opportunity such that he had robbed the victim of his wallet using the murder weapon. Thus, we conclude the trial court did not err in submitting the robbery with a dangerous weapon charge to the jury.

Felony Larceny

[6] Defendant argues the charge of felonious larceny should have been dismissed because the evidence did not establish a temporal

break between his alleged taking of the victim's wallet and his alleged larceny of the victim's vehicle.

Felony larceny is a lesser included offense of robbery with a dangerous weapon. *State v. White*, 322 N.C. 506, 518, 369 S.E.2d 813, 819 (1988). As such, the constitutional prohibition against double jeopardy requires that, in order for a defendant to be convicted of both felonious larceny and robbery with a dangerous weapon, the evidence must establish that the defendant committed two separate and distinct takings. *See State v. Jordan*, 128 N.C. App. 469, 474, 495 S.E.2d 732, 736, *disc. rev. denied*, 348 N.C. 287, 501 S.E.2d 914 (1998); *see also State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992) ("A single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place") (citations omitted).

Defendant argues the trial court should have merged the robbery with a dangerous weapon charge with the felony larceny charge because the evidence fails to establish that his alleged taking of the victim's vehicle was separate and apart from his taking of the victim's wallet. In response, the State contends that since the victim's body was found in a heavily wooded area and forensic tests revealed no evidence of blood on the interior, exterior, or trunk of the victim's vehicle, a jury could reasonably conclude that defendant had murdered the victim in the wooded area and thereafter had taken the vehicle. The State further maintains it provided sufficient evidence to support a jury finding that defendant had taken the victim's wallet either at the rest area or shortly after arriving at the wooded area.

We agree with defendant's assertion that the circumstances of this case do not support a conclusion that a temporal break occurred between the taking of the victim's wallet and vehicle but instead involved one continuous transaction. Therefore, the judgment pursuant to defendant's conviction for felonious larceny is arrested.

First Degree Murder

Defendant filed a motion to dismiss the first degree murder charge based on his contention that the first degree kidnapping, robbery with a dangerous weapon, and felony larceny charges should not have been submitted to the jury; therefore, the evidence did not support a finding that he had committed first degree murder under the felony murder rule. As we have already concluded that the trial court

did not err in submitting the charges of first degree kidnapping and robbery with a dangerous weapon, we likewise conclude the trial court did not err in denying defendant's motion to dismiss the first degree murder charge.

V.

[7] Defendant next assigns as error the trial court's failure to specifically instruct the jury as to which of the victim's property was the subject of the robbery with a dangerous weapon and which property was the subject of the felonious larceny. He argues that this error led the jury to confuse the evidence associated with each of these charges and ultimately resulted in its improper determination of which felony formed the basis of his first degree murder conviction.

Prior to its deliberations, the trial court instructed the jury as to the elements of each charge raised by the evidence. With respect to the felony larceny charge, the trial court also instructed on the lesser included offenses of non-felonious larceny, felonious possession of stolen goods, and non-felonious possession of stolen goods. During its instruction on felonious possession of stolen goods, the trial court noted for the jury that the victim's vehicle was the subject of the charge. At the conclusion of all the instructions, the trial court asked the parties whether any "corrections" or "additions" needed to be made before the jury proceeded to deliberate. Defendant responded that as far as he was concerned the instructions were clear and he objected to any further instruction.

Under the law of this State, a trial court, in instructing a jury, must charge every essential element of the offense, but is not required to "state, summarize, or recapitulate the evidence, or to explain the application of the law to the evidence." N.C. Gen. Stat. § 15A-1232; *see also State v. Hairr*, 244 N.C. 506, 509, 94 S.E.2d 472, 474 (1956); *and State v. Wallace*, 104 N.C. App. 498, 504, 410 S.E.2d 226, 230 (1991), *disc. rev. denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992). Here, the trial court provided instructions as to each of the elements of robbery with a dangerous weapon and felonious larceny and referenced the victim's vehicle during its instructions on the lesser included offenses of felony larceny. Moreover, when asked, defendant stated that he found the jury instructions to be clear. *See State v. McClain*, 282 N.C. 396, 400, 193 S.E.2d 113, 115-16 (1972) ("Any error or omission by the court in its review of the evidence in the charge to the jury

must be . . . called to the attention of the court so that the court may have an opportunity to make the appropriate correction"). As the record is devoid of any indication the jury had been confused as to the evidence associated with these two charges, the assignment of error is overruled.

VI.

[8] Defendant next contends the trial court erred in failing to instruct the jury on second degree murder. He maintains sufficient evidence was presented to warrant this instruction as a lesser included offense of first degree murder.

A defendant is "entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (*quoting Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)). Second degree murder is a lesser included offense of first degree murder. *Id.* However, where there is positive, uncontradicted evidence of first degree murder, an instruction on second degree murder is not required. *See State v. Cintron*, 351 N.C. 39, 519 S.E.2d 523 (1999) (per curiam), *cert. denied*, 529 U.S. 1076, 146 L. Ed. 2d 498 (2000); *see also State v. Walker*, 343 N.C. 216, 221-22, 469 S.E.2d 919, 922, *cert. denied*, 519 U.S. 901, 136 L. Ed. 2d 180 (1996).

Defendant argues he was entitled to an instruction on second degree murder because the State did not present evidence detailing "how, when or where" the victim had been killed. However, the record does not show circumstances which would indicate that a struggle took place between defendant and the victim or any other evidence which would permit a jury to conclude that he was provoked into killing the victim. *See State v. Strickland*, 307 N.C. 274, 293, 298 S.E.2d 645, 658 (1983) ("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 . . . 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"); *see also State v. Annadale*, 329 N.C. 557, 568, 406 S.E.2d 837, 844 (1991). Accordingly, we conclude the trial court was not required to instruct the jury on second degree murder; therefore, we overrule defendant's assignment of error.

We have reviewed defendant's remaining assignments of error and find them to be without merit. In sum, we affirm defendant's convictions for first degree murder under the felony murder rule, first degree kidnapping, and robbery with a dangerous weapon.

In 99CRS009436, felony larceny, judgment arrested.

In 99CRS006993, first degree murder, no error.

In 99CRS006991, the judgment is vacated and remanded for resentencing.

Judges HUNTER and BRYANT concur.

STATE OF NORTH CAROLINA v. ROGER DALE DIXON

No. COA01-503

(Filed 7 May 2002)

Evidence— psychologist—testimony that abuse occurred

The trial court erred in a prosecution for first-degree statutory sexual offense by permitting a clinical psychologist to testify to his opinion that the victim had been sexually abused. Although the witness's testimony about the various psychological tests, interviews, and reports upon which he relied may have been a sufficient foundation to support an opinion that the victim did or did not exhibit symptoms or characteristics of victims of child sexual abuse, it was not a sufficient foundation for the admission of his opinion that she had in fact been sexually abused. There is a reasonable possibility that a different result would have been reached without the testimony because there was no evidence of sexual abuse other than the victim's testimony and her credibility was critical.

Judge CAMPBELL dissenting.

Appeal by defendant from judgment entered 3 November 2000 by Judge Kimberly S. Taylor in Iredell County Superior Court. Heard in the Court of Appeals 14 February 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Sue Y. Little, for the State.

Patricia L. Riddick for defendant-appellant.

MARTIN, Judge.

Defendant was charged in a true bill of indictment with first degree statutory sexual offense against his six-year-old step-daughter (hereinafter "S.E."), in violation of G.S. § 14-27.4(a)(1). A jury found defendant guilty as charged. Defendant appeals from the judgment entered upon the verdict.

The State's evidence tended to show that the alleged incident giving rise to this action occurred on an evening between Halloween and Thanksgiving in 1998 when S.E. was in the first grade. On the evening in question, defendant was taking care of S.E. and her younger brother while S.E.'s mother, Martha Dixon, was at work. S.E. testified that while she and defendant were in the living room watching television, defendant told her to sit on his lap and that defendant inserted his finger into her "private part." When S.E. told defendant that it hurt, defendant responded that he was sorry. S.E. then got up and sat on the floor, where she and defendant played cards. S.E. testified that she and defendant later took a bath together and that they went to the bedroom and lay beside each other on the bed and that defendant licked her private part. S.E. testified that she told her mother about the incident on the following day, but that her mother did not believe her.

In December 1998, while S.E. was taking a bath at her grandparents' house, she told her aunt, Victoria Fox, that her "bottom" was hurting. Victoria asked her whether anyone "had touched it," and S.E. responded that defendant had "put his finger down there" and "wiggled it" while she was sitting in defendant's lap. After getting permission from S.E.'s mother, Victoria took S.E. to be examined by Dr. Willhide in Statesville, North Carolina.

Georgina Moose, a guidance counselor at Scotts Elementary School, testified that, in the spring of 2000, S.E. told her that defendant had sexually abused her. Moose stated that S.E. told her that defendant had placed her on his lap and had touched her private part.

Cynthia McCoy, a Child Protective Services Investigator for the Iredell County Department of Social Services investigated the matter

after receiving a report on 15 December 1998 alleging sexual abuse. McCoy spoke to S.E. at her grandparents' home. S.E. told McCoy that she had gone to the doctor that day and that he checked her "bottom." When McCoy asked what she meant by her "bottom," S.E. pointed to her vaginal area. S.E. told McCoy that the doctor checked her bottom because it was hurting since her daddy put his finger in her private part. McCoy asked S.E. if defendant had done anything else to her while he had his finger in her private part and she responded that he kissed her. McCoy also testified that S.E. informed her that defendant had put his mouth on her private part.

Dr. Sarah Sinal, who was the head of the child abuse team at Baptist Hospital, was qualified as an expert witness in pediatrics and child sexual abuse. She performed a child medical examination on S.E. on 1 February 1999. Dr. Sinal noted some redness in S.E.'s genital area but testified that the irritation could be there for a variety of reasons. Dr. Sinal stated that she did not see any definite discharge. Dr. Sinal further indicated that S.E.'s hymen seemed delicate and not worn away. Cultures for sexually transmitted diseases were negative. According to Dr. Sinal, except for the irritation in S.E.'s genital area, S.E.'s exam was normal. Additionally, she explained that because the tissue in the female genital area is very stretchable, digital penetration is not likely to leave damage or permanent physical findings.

Cynthia Stewart, a social worker at North Carolina Baptist Hospital, was qualified as an expert in child sexual abuse. Her responsibilities at Baptist Hospital included initially interviewing the families when they arrived at the clinic. Stewart interviewed S.E. at the clinic on 1 February 1999. During the interview, S.E. told Stewart that her dad had touched her private part where he was not supposed to touch. S.E. told Stewart that she had been sitting on defendant's lap watching television when he put his finger there. When S.E. was asked what her father said, she responded, "[s]orry." When Stewart asked S.E. what happened to her and defendant's clothes while she was sitting on defendant's lap, S.E. stated that their clothes were thrown on the floor. S.E. pointed to the vaginal area of an anatomically correct doll to show where defendant had touched her. When Stewart asked S.E. whether the touching of her private part was outside or inside, S.E. said, "[i]nside." S.E. also indicated through words and an anatomically correct doll that defendant had touched her inside her anus. S.E. further told Stewart that defendant had licked her private part.

S.E. indicated to Stewart that she had seen defendant's private part. Stewart asked S.E. what defendant was doing when she saw his private part and S.E. responded, "I can't remember. I didn't want to see it. He was playing with it." S.E. told Stewart that she had seen something come out of defendant's private part and go into the commode. Stewart asked S.E. where defendant would be when he was playing with his private part, and S.E. responded that he would be sitting in his favorite chair and that he would tell her to go to bed afterward "real angry like."

Judy Herman, an Iredell County Sheriff's Deputy, was assigned to investigate the incident after the Department of Social Services brought the matter to her attention. On 18 December 1998, Herman interviewed S.E. at her office. S.E. told Herman that the incident between her and defendant had occurred between Halloween and Thanksgiving while her mother was working at Lowe's. S.E. told Herman that she was sitting on defendant's lap while they were watching television and that she was not wearing any clothes at the time. S.E. told Herman that she hugged defendant, and ["h]e used his left hand" and "[i]t hurt."

Dr. James A. Powell, a clinical psychologist, was qualified as an expert witness in the field of child sexual abuse and child psychology. Dr. Powell performed a child mental health psychological examination (CMHEP) on S.E. at the request of the Department of Social Services. Dr. Powell reviewed reports from Dr. Sinal and according to him, used them to develop his opinion as to whether S.E. had been abused. Dr. Powell also performed psychological tests on S.E., Martha Dixon, and defendant. Defendant was given a thematic apperception test (T.A.T.); S.E. was given a Michigan pictures test (M.P.T.) and an incomplete sentences test; and Martha Dixon was given a Minnesota multiphasic personality inventory (M.M.P.I.). According to Dr. Powell, defendant's T.A.T. showed the following:

> There were a number of indications of conflicts in male and female relationships. The themes concerned sadness, people who were concerned and troubled, people being arrested because of his excessive drinking. There were suggestions in several stories of positive family interactions, but those appeared somewhat forced and slightly artificial. There were no indications of a preoccupation with young females.

Dr. Powell testified that it is possible for a person who does not have a preoccupation with young females to still molest one. Dr. Powell

explained that this could occur because an individual could molest a young female for a variety of reasons, such as revenge, opportunity, impairment, or trauma. Dr. Powell stated that S.E.'s test results indicated that S.E. had a very positive perception of her grandparents, that she did not feel afraid of the father figures in the stories, but that she did generate several stories that had strong themes of sadness. Dr. Powell said that S.E. did not appear to be clinically depressed. Dr. Powell also found that S.E. did not have any significant distress in her household, felt loved, liked attention, and had normal views and concerns. Dr. Powell concluded that the test results for Mrs. Dixon were not interpretable.

Dr. Powell was permitted to testify that he had an opinion that S.E. had been sexually abused. He based his opinion on interviews with S.E., her grandparents, her aunt, her mother, defendant, reports from Dr. Sinal, the use of the anatomically correct dolls, and the psychological test results. Dr. Powell acknowledged that children can be coached to give responses but testified that the manner in which S.E. presented her story indicated that she was not coached to do so, and that it was stretching the bounds of credulity to say that a seven-year-old could remember in such great detail what had occurred if she were simply being told what to say. Dr. Powell further testified that the sequence of events that S.E. described to him was consistent with the typical approach that most perpetrators of sexual abuse follow in order to gain access to the child and to abuse the child.

On cross-examination, Dr. Powell acknowledged that S.E.'s grandfather told him that S.E. had a vivid imagination, but that the grandparents did not think that S.E. created the story and believed that it had happened because S.E. said it had. In response to further cross-examination, Dr. Powell testified that all the information that he had compiled indicated that defendant was the perpetrator of the abuse.

Defendant testified in his own behalf. He testified that during the time period when the incident was alleged to have occurred, S.E.'s mother worked at night and that his responsibilities in the evenings included fixing supper, feeding his son baby food or a bottle, making sure S.E. got her bath, and putting her to bed. According to defendant, there were several instances in which S.E., who was capable of bathing and drying herself, would come out of the bathroom with a towel and demand that defendant dry her off. Defendant stated that he would tell her to go back into the bathroom and dry herself

off and get dressed. Defendant told S.E.'s mother, who talked with S.E. about her behavior, and the behavior stopped for a while. Defendant denied that there was ever an occasion when S.E. might have seen his penis.

Defendant testified that he did not have a very good relationship with Martha Dixon's sister, Victoria Fox. Defendant recalled an incident prior to his marriage to Martha Dixon in which Victoria Fox told defendant that he was not going to marry her sister, and even if he did, she would see to it that he would not stay married to her.

Martha Dixon testified that when Victoria told her about S.E.'s allegations, she did not believe that defendant was capable of this kind of behavior. She testified that, prior to S.E.'s allegations, defendant and S.E. had a normal father-daughter relationship and she never saw anything that caused her concern about defendant being alone with S.E.

I.

Defendant contends the trial court erred by permitting Dr. Powell to testify as to his opinion that S.E. had been sexually abused. The assignment of error arises out of the following direct examination of Dr. Powell by the prosecutor:

> Q. And did you form an opinion as to whether or not [SE] had been sexually abused?
>
> MR. DARTY: Objection.
>
> . . .
>
> THE COURT: Overruled.
>
> A. Yes, ma'am, I did.
>
> Q. And what was your opinion?
>
> A. My opinion was that she was sexually abused.
>
> Q. And could you tell the jury some of the factors that led you to believe that [SE] was sexually abused.
>
> A. It was both the test and the interview data. She gave very explicit details, which would be highly unusual for a seven year old to be aware of. There were the interactions that she demonstrated with the anatomically correct dolls. The sequence of events that she talked about and how it had occurred. The state-

ments that she had made all were consistent with a child who had been sexually abused and strongly indicated that sexual abuse had occurred.

Defendant contends the foregoing testimony amounts to an impermissible expert opinion as to S.E.'s credibility. His argument has merit.

G.S. § 8C-1, Rule 702(a) states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

Expert opinion testimony is not admissible to establish the credibility of the victim as a witness. *State v. Kim*, 318 N.C. 614, 350 S.E.2d 347 (1986).

"However, those cases in which the disputed testimony concerns the credibility of a witness's accusation of a defendant must be distinguished from cases in which the expert's testimony relates to a diagnosis based on the expert's examination of the witness." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988). With respect to expert testimony in child sexual abuse prosecutions, our Supreme Court has approved, upon a proper foundation, the admission of expert testimony with respect to the characteristics of sexually abused children and whether the particular complainant has symptoms consistent with those characteristics. *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002); *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987). "The fact that this evidence may support the credibility of the victim does not alone render it inadmissible." *Kennedy*, 320 N.C. at 32, 357 S.E.2d at 367.

Moreover, an expert medical witness may render an opinion pursuant to Rule 702 that sexual abuse has in fact occurred if the State establishes a proper foundation, i.e. physical evidence consistent with sexual abuse. *Stancil, supra.* However, in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility. *Id.; State v. Grover*, 142 N.C. App. 411, 418-19, 543 S.E.2d 179, 183-84 , *affirmed*, 354 N.C. 354, 553 S.E.2d 679 (2001) (Expert opinion testimony that a child has been sexually abused based *solely* on the child's statements

lacks a proper foundation where there is no physical evidence of abuse); *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89-90, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997) (Where there was no clinical evidence to support a diagnosis of sexual abuse, experts' opinions that sexual abuse had occurred merely attested to truthfulness of the child witness and were inadmissible).

In the present case, there was no physical evidence to support a diagnosis that S.E. had been sexually abused. Dr. Sinal, who was qualified as an expert witness in pediatrics and child sexual abuse, examined S.E. and testified that her genital examination was normal except for some "nonspecific irritation" which could have been present for a variety of reasons.

Although there were no physical findings to support a diagnosis of sexual abuse, the psychologist, Dr. Powell, was permitted to state his opinion that S.E. had been sexually abused. The opinion was not supported by an adequate foundation and its admission was error. Though Dr. Powell's testimony with respect to the various psychological tests, interviews, and reports upon which he relied may have been a sufficient foundation to support an opinion that S.E. did or did not exhibit symptoms or characteristics of victims of child sexual abuse, it was not a sufficient foundation for the admission of his opinion, under Rule 702, that S.E. had *in fact* been sexually abused.

Error is prejudicial when "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). The burden is upon the defendant to show prejudice. *Id.* This Court has held that it is fundamental to a fair trial that a witness's credibility be determined by a jury, that expert opinion on the credibility of a witness is inadmissible, and that the admission of such testimony is prejudicial when the State's case depends largely on the testimony of the prosecuting witness. *State v. Hannon*, 118 N.C. App. 448, 455 S.E.2d 494 (1995).

In the present case, there was no evidence of sexual abuse other than S.E.'s testimony. There was no evidence that S.E. exhibited any physical manifestations of anxiety after the alleged incident, or that she demonstrated any emotion when she revealed the alleged abuse to her aunt, her guidance counselor, or others. Thus, S.E.'s credibility was of critical importance to the outcome of the case. Under these circumstances, there is a reasonable possibility that Dr. Powell's opinion testimony that S.E. had in fact been abused had great influence

upon the jury's determination of credibility and, consequently, there is a reasonable possibility that a different result would have been reached had his opinion that S.E. had been sexually abused been excluded. Accordingly, we are constrained to grant defendant a new trial. Because defendant's remaining assignments of error may not arise upon retrial, we need not address them.

New trial.

Judge HUDSON concurs.

Judge CAMPBELL dissents.

CAMPBELL, Judge, dissenting.

I respectfully dissent from the majority's conclusion that the State failed to lay an adequate foundation for the admission of Dr. Powell's expert opinion that S.E. had in fact been sexually abused under N.C.G.S. § 8C-1, Rule 702.

The majority interprets the Supreme Court's recent decision in *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002) as prohibiting expert opinion testimony that a child victim has been sexually abused unless there is *physical* evidence to support a diagnosis of sexual abuse. To further support this proposition, the majority cites this Court's opinions in *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179, *affirmed*, 354 N.C. 354, 553 S.E.2d 679 (2001), and *State v. Dick*, 126 N.C. App. 312, 485 S.E.2d 88, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). I disagree with the majority's interpretation of *Stancil*, *Grover*, and *Dick*. In my view, the bright line rule now adopted by the majority, i.e., that expert opinion testimony that a child victim has been sexually abused is *only* admissible under Rule 702 when there is *physical* evidence to support a diagnosis of sexual abuse, is not mandated by *Stancil*, *Grover*, and *Dick*, and is not an appropriate extension of the law on this subject as set forth by our Supreme Court in *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987), and as applied by this Court in numerous cases since *Trent*.

In *Trent*, the Supreme Court set forth the following inquiry for determining whether expert medical opinion is admissible under Rule 702:

> "[I]n determining whether expert medical opinion is to be admitted into evidence the inquiry should be . . . whether the opinion

> expressed is really one based on the special expertise of the expert, that is, whether the witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact."

Trent, 320 S.E.2d at 614, 359 S.E.2d at 465 (quoting *State v. Wilkerson*, 295 N.C. 559, 568-69, 247 S.E.2d 905, 911 (1978)). Applying this test to the record before it, the Court in *Trent* held that the State had failed to lay a sufficient foundation for the admission of an expert diagnosis that the child victim had been sexually abused. The expert in *Trent*—a physician with a specialty in pediatrics—repeatedly testified that his diagnosis was based upon the results of a pelvic exam, which was administered four years after the date of the alleged sexual abuse and standing alone would not support a diagnosis of sexual abuse, and the victim's statements to him concerning the alleged sexual abuse. He cited no other basis for his diagnosis. Given the limited basis for the diagnosis, the Court held that the State had failed to lay a sufficient foundation for the admission of the expert testimony, since there was nothing in the record to support a conclusion that the expert was in a better position than the jury to determine whether the victim had been sexually abused. *Id.* The Court in *Trent* did not adopt a bright line rule that absent *physical* evidence expert opinion testimony that there has been child sexual abuse is *always* inadmissible.

In the instant case, Dr. Powell testified that his opinion that S.E. had been sexually abused was based on his interviews with S.E., her grandparents, her aunt, her mother, and defendant, the reports from Dr. Sinal's physical examination of S.E., S.E.'s use of anatomically correct dolls to illustrate the alleged sexual abuse, and the results of psychological tests conducted on both S.E. and defendant. While the majority focuses on the fact that there was no *physical* evidence to support a diagnosis of sexual abuse, the physical examination by Dr. Sinal was only incidental to, and not the primary basis for, Dr. Powell's conclusion. Further, Dr. Powell testified that Dr. Sinal's findings of no physical signs of penetration were not inconsistent with his own opinion that S.E. had been sexually abused. Dr. Sinal testified, and Dr. Powell agreed, that the alleged acts of abuse in the instant case—digital penetration and cunnilingus—are not likely to leave damage or permanent physical evidence. In addition, Dr. Sinal testified that studies show as few as sixteen percent (16%) of cases of sexual abuse actually result in physical evidence sufficient to support a definite diagnosis of sexual abuse. Thus, in cases like the instant one,

where there is expert testimony that the alleged acts of sexual abuse are not likely to leave physical evidence, the majority sets forth a rule that would totally prevent the use of expert opinion testimony that the victim had been sexually abused. I do not read Rule 702 or *Stancil* as setting up such an absolute prohibition.

In my view, the basis for Dr. Powell's opinion in the instant case was much stronger than the basis for the opinions found to be inadmissible in *Grover* and *Stancil*, and was sufficient to allow the trial judge, as the gatekeeper for scientific evidence, to properly allow Dr. Powell's opinion to be admitted into evidence. In *Grover*, the opinions found to be inadmissible were based solely on the statements provided by the victims. In *Stancil*, the opinion was based on two physical examinations which were normal and a review of one interview with the child by a psychologist. Here, Dr. Powell conducted a series of interviews with all of the individuals involved. He also reviewed the reports of Dr. Sinal's physical examination, and administered psychological tests on both S.E. and defendant. Having been admitted as an expert in the field of child sexual abuse and child psychology, Dr. Powell was in a better position than the jury to understand the significance of his findings and to give an opinion as to whether S.E. had in fact been sexually abused. Therefore, I conclude that the trial court did not err in allowing Dr. Powell's testimony under Rule 702.

Having reviewed defendant's remaining assignments of error, I conclude that they lack merit. Therefore, I would find no error in defendant's trial.

ANDREW H. AUSLEY, D/B/A AUSLEY APPRAISAL SERVICES v. BRYAN M. BISHOP

No. COA01-154

(Filed 7 May 2002)

1. Libel and Slander— true statement—erroneously submitted to jury

The trial court erred in an action arising from the severance of a business relationship by submitting slander to the jury where the evidence showed that the statement was true.

2. Pleadings— amendment—day of trial

The trial court did not err by denying plaintiff's motion to amend in an action arising from the severance of an appraising business where plaintiff made the motion orally for the first time on the day the case was called for trial, and the motion was based on allegations which plaintiff had denied in his reply to the counterclaim.

3. Contracts— breach asserted in counterclaim—evidence of damages sufficient

The trial court did not err by denying plaintiff's motions for a JNOV and a new trial on breach of contract issues arising from the severance of an appraisal business where plaintiff argued that breach of contract was not alleged in the counterclaim and that the award was in excess of the damage amount stated by defendant, but defendant's counterclaim included a claim for breach of a written contract and the jury's award was supported by sufficient evidence.

4. Damages and Remedies— punitive damages—claim remaining after appeal

The trial court did not err on remand by submitting punitive damages where plaintiff contended that defendant's demand for punitive damages had been dismissed by the appellate opinion, but slander remained a triable claim that could provide a basis for a punitive damages award.

5. Damages and Remedies— punitive damages—pleadings—sufficient

The trial court properly submitted to the jury the issue of punitive damages where defendant's counterclaim alleged slander per se and stated that plaintiff made a statement with knowledge that it was false. The pleadings sufficiently comply with N.C.G.S. § 1A-1, Rule 9(k).

6. Damages and Remedies— punitive damages—underlying claims—one wrongly submitted

An award of punitive damages was set aside where the court instructed the jury that it could award punitives if the malice was related to one or both of two slanders, but one of the slanders was erroneously submitted. Moreover, even though defendant elected to recover punitives instead of tripled compensatory damages, the trial court may have determined the issue of unfair

and deceptive trade practices based upon the improperly submitted statements.

7. Damages and Remedies— punitive damages—bifurcated trial—unrelated contract claim not remanded

A contract claim was not remanded where several claims arose from the severance of a business, including contract and slander claims, one of the slander claims was wrongly submitted to the jury, liability and damages were bifurcated, the instructions on punitive damages linked the two slander claims, and the punitive damages award was remanded. Although a trial which is bifurcated on damages must have the same trier of fact, the breach of contract claim was an issue of liability for compensatory damages only and was unrelated to the punitive damages.

Judge WALKER concurring in part and dissenting in part.

Appeal by plaintiff from judgments entered 14 March 2000 and 4 August 2000 by Judge Judson D. DeRamus, Jr. and order entered 1 August 2000 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 5 December 2001.

Haywood, Denny & Miller, L.L.P., by John R. Kincaid, attorney for plaintiff-appellant.

Randolph M. James, P.C., by Randolph M. James, attorney for defendant-appellee.

THOMAS, Judge.

The parties are before this Court for the second time in an action involving breach of contract and claims for compensatory and punitive damages based on slander.

The jury awarded defendant, Bryan M. Bishop, $2,500.00 in his counterclaim for breach of contract against plaintiff, Andrew H. Ausley, d/b/a Ausley Appraisal Services. The jury also agreed with defendant as to two counts of slander and awarded him a combined $14,500.00 in compensatory damages and $85,000.00 in punitive damages. In a separate proceeding, defendant was then awarded $35,000.00 in attorneys' fees.

Plaintiff appeals, and argues seven assignments of error. We affirm in part, vacate in part, and reverse and remand in part.

The facts are as follows: Plaintiff was a licensed residential and commercial appraiser in 1994 when defendant came to work for him as a trainee under an oral contract. In June of 1996, defendant took and passed the state registered trainee exam. As defendant was on the verge of acquiring his own license by finishing his apprenticeship in the spring of 1997, he and plaintiff entered into a written employment contract. Among its provisions were ones for non-competition and confidentiality, as well as language that the "employment shall be at will, terminable at any time by either party."

In June of 1997, the parties opened a branch office for defendant to operate. Approximately three months later, however, a disagreement severed the business relationship. Defendant packed his belongings, and among other items took a Rolodex, notebooks, papers, and apparently some sample reports with the name "Ausley Appraisal Services" on them.

Plaintiff filed suit in October 1997 alleging breach of the non-competition agreement. Defendant answered by denying any violation, and counterclaimed that plaintiff had breached both the 1994 and 1997 contracts, made fraudulent and negligent misrepresentations, engaged in unfair and deceptive trade practices, intentionally or recklessly inflicted emotional distress, engaged in malicious acts of prosecution, and had both libeled and slandered defendant. Plaintiff moved for summary judgment on the counterclaim. In May 1998, the trial court granted the motion.

Defendant appealed to this Court, which affirmed the trial court in *Ausley v. Bishop*, 133 N.C. App. 210, 515 S.E.2d 72 (1999) (hereinafter referred to as "*Ausley I*"), except for the counterclaims of slander and part of the counterclaims of unfair and deceptive trade practices and breach of the written contract.

On remand, the trial court submitted and the jury answered the following six issues in the compensatory damages stage (to "avoid prejudice," defendant was labeled plaintiff and plaintiff was labeled defendant):

1. Did the Defendant Ausley breach the written contract of April 14, 1997?

   ANSWER: Yes.

2. If so, what amount of damages did the Plaintiff Bishop sustain?

   ANSWER: $2,500.00

3. Did the Defendant Ausley slander the Plaintiff Bishop by telling Robert Phillips in substance that the plaintiff had committed loan fraud?

ANSWER: Yes.

4. If so, what amount of damages has the Plaintiff Bishop sustained therefrom?

ANSWER: $7,500.00

5. Did the Defendant Ausley slander the Plaintiff Bishop by telling Jody Leon Thomason that the plaintiff may have stolen files and he had called the police?

ANSWER: Yes.

6. If so, what amount of damages has the Plaintiff Bishop sustained therefrom, not previously included in your answer to Issue Four?

ANSWER: $7,000.00

In the punitive damages stage, the trial court submitted and the same jury answered two issues:

1. Is the Defendant Ausley liable to the Plaintiff Bishop for punitive damages?

ANSWER: Yes.

2. What amount of punitive damages, if any, does the jury in its discretion award to the Plaintiff Bishop?

ANSWER: $85,000.00

The trial court then found that the slanders constituted unfair and deceptive trade practices. Defendant elected in open court to recover the punitive damages instead of treble damages in accordance with N.C. Gen. Stat. § 75-16 (1999).

The trial court denied plaintiff's motions for judgment notwithstanding the verdict under Rule 50(b) of the North Carolina Rules of Civil Procedure and for a new trial under Rule 59. In a separate proceeding before a trial judge different than the one who presided during the jury trial, plaintiff was ordered to pay defendant $35,000.00 in attorneys' fees.

[1] In his first assignment of error, plaintiff contends the trial court erred in submitting the issue of slander involving Jody Thomason to the jury. He argues there was no allegation of the slander in defendant's counterclaim and, even if it had been properly pled, recovery was barred because the statement was true and there were no damages. We agree.

Defendant alleges in his counterclaim two acts of slander by plaintiff: (1) plaintiff verbally conveyed to a third party a defamatory and slanderous statement about defendant in that he told a representative from defendant's personal mortgage lender, among other things, that defendant had provided the lender fraudulent verification of his income; and (2) plaintiff told a representative of the Winston-Salem Police Department that defendant had embezzled files belonging to plaintiff.

The third party referenced in (1) above is Robert Phillips. We note briefly that the record indicates Phillips was actually defendant's mortgage broker, not lender. Thomason, owner of a mortgage company and a client and business associate of both parties, was not mentioned in (2) but it was a conversation plaintiff had with him concerning the police report that formed the basis of the jury's award. Evidence was introduced that plaintiff telephoned Thomason, told him that defendant was no longer employed by him, some files were missing, and that the police were involved. Afterwards, however, Thomason continued to have ongoing business relationships with both parties. Additionally, defendant acknowledged that he may have taken sample files with him when he left.

Rule 8(a) of our Rules of Civil Procedure requires that a claim for relief contain a "short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions . . . intended to be proved showing that the pleader is entitled to relief." N.C.R. Civ. P. 8(a). "The purpose of Rule 8(a) is to establish that the plaintiff will be entitled to some form of relief should he prevail on the claim raised by the factual allegations in his complaint." *Holloway v. Wachovia Bank and Trust Co.*, 339 N.C. 338, 346, 452 S.E.2d 233, 237 (1994).

Here, defendant did not allege in his counterclaim that any slanderous remarks to Thomason were made by plaintiff. Defendant never established that he was entitled to relief based on such statements and provided plaintiff with no notice of the claim. *See Redevelopment Comm. v. Grimes*, 277 N.C. 634, 645, 178 S.E.2d 345,

351-52 (1971) (under principles of notice pleading, a complaint is adequate if it gives a defendant sufficient notice of the nature and basis of the plaintiff's claim and allows the defendant to answer and prepare for trial).

In allowing Thomason to testify, the trial court may have relied on the language used by this Court in *Ausley I*. After defining slander *per se* as defamatory statements about a person with respect to his trade or profession, this Court addressed an allegation of slander that defendant *had* pled. *Ausley*, 133 N.C. App. at 214-15, 515 S.E.2d at 75-76. The allegation pertained to statements made by plaintiff to Phillips, implying that defendant may have committed loan fraud. *Id.* Immediately following the discussion, this Court noted more generally:

> Additionally, defendant stated in his affidavit that "[plaintiff] contacted several of my clients and potential clients and advised them, untruthfully, that I had engaged in various unethical conduct."

Id. at 215, 515 S.E.2d at 76. The trial court referenced *Ausley I* during the jury charge conference with counsel:

> THE COURT: Okay. Did [defendant, Ausley,] tell Jodie Leon Thomason that he suspected plaintiff, Bishop, of taking the files and had called the police? *Again, stating basically the words of the Court of Appeals which they found to constitute a prima facie case, slander per se, as I understand it, saying that was capable of harming in trade or profession.*
>
> . . . .
>
> I do want to hear from you on that if there's a better way to do that without, to separate out any duplicate damages, and yet preserve a good record for an appeal, if there is one, if one of these is submitted in error so that we're not just lumping them together and not knowing which trails from which. *I feel better about the first one which is pled, frankly, the first slander to Mr. Phillips as alleged, than I do about the second one which is not anywhere in the pleading.*

We do not, however, reach the issue of whether this Court's prior opinion directed the submission of the issue of slander regarding statements made to Thomason. We agree with plaintiff's contention that the evidence showed his statement to Thomason was true. A

defamatory statement must be false in order to be actionable and an admission of the truth of the statement is a complete defense. *Parker v. Edwards*, 222 N.C. 75, 78, 21 S.E.2d 876, 878 (1942). Here, Thomason testified that plaintiff called on the phone and said that defendant no longer worked with him, some files may have been stolen, and that the police were involved. In fact, defendant no longer worked with plaintiff, defendant acknowledged that he may have taken sample reports with him when his employment with plaintiff ended, and the police were investigating. Accordingly, the issues of slander regarding a statement made to Thomason should not have been submitted to the jury.

[2] By his second assignment of error, plaintiff argues that the trial court erred in denying his motion to amend to assert a defense of qualified privilege. Plaintiff contends that this defense would have extended to the statements he made to Phillips. Rule 15(a) of our Rules of Civil Procedure states that leave to amend shall be freely given when justice so requires. N.C. Gen. Stat. § 1A-1, Rule 15(a). The trial court's ruling upon a motion to amend pleadings is not reviewable absent an abuse of discretion. *Mosley & Mosley Builders v. Landin Ltd.*, 87 N.C. App. 438, 447, 361 S.E.2d 608, 614 (1987).

Here, plaintiff made the motion orally for the first time on the day the case was called for trial. Moreover, plaintiff's motion was based on allegations in defendant's counterclaim that plaintiff, in his reply, had denied. We find no abuse of discretion and accordingly reject this assignment of error.

[3] By plaintiff's next assignment of error, he contends the trial court erred in denying his motions for judgment notwithstanding the verdict (JNOV), and for a new trial on the breach of contract issues. Plaintiff argues breach of contract was not alleged in the counterclaim and the jury's award was in excess of the damage amount stated by defendant.

Defendant's second claim for relief in his counterclaim is for damages caused by plaintiff's material breach of the written contract between them. Moreover, in *Ausley I*, this Court noted that defendant's alleged breach of written contract in his counterclaim, combined with defendant's statements in his deposition alleging that plaintiff failed to pay him in accordance with the contract from the period of April to June 1997, was an adequate forecast of evidence to allow this issue to survive summary judgment. *Ausley*, 133 N.C. App. at 220, 515 S.E.2d at 79.

At trial, defendant testified that his damages for plaintiff's breach of the contract totaled, "plus or minus," $1,600.00 for his work and $789.80, "plus or minus," for his apprentice's work. Therefore, defendant's damages totaled $2,389.80, "plus or minus." The jury awarded defendant $2,500.00. Applying *de novo* review to the trial court's denial of the motion for JNOV, *see In re Will Buck*, 350 N.C. 621, 624, 516 S.E.2d 858, 860 (1999), we hold that the jury's award was supported by sufficient evidence. For the same reasons, the trial court did not abuse its discretion by denying the motion for a new trial. Accordingly, this assignment of error is rejected.

[4] Plaintiff argues in another assignment of error that the trial court erred in submitting to the jury the issue of punitive damages. He first contends defendant's demand for punitive damages was dismissed in *Ausley I*. We disagree. In his counterclaim, defendant demanded "trial by jury as to all issues so triable and pray[ed] that he have and recover . . . an award of punitive damages . . . ." The holding in *Ausley I* was that the trial court improperly granted summary judgment regarding defendant's claims of slander, breach of written contract, and unfair and deceptive trade practices. *See Ausley*, 133 N.C. App. at 221, 515 S.E.2d at 80. Summary judgment was affirmed "as to all other claims." *Id.* Thus, slander was a triable claim that could provide a basis for an award of punitive damages.

[5] Plaintiff also maintains that defendant's demand for punitive damages does not comply with the requirements set forth in Rule 9(k) of the North Carolina Rules of Civil Procedure. Rule 9(k) states: "A demand for punitive damages shall be specifically stated, except for the amount, and the aggravating factor that supports the award of punitive damages shall be averred with particularity." N.C.R. Civ. P. 9(k). One of the following aggravating factors listed in N.C. Gen. Stat. § 1D-15 must be proved to recover punitive damages: (1) fraud, (2) malice, or (3) willful or wanton conduct. N.C. Gen. Stat. § 1D-15 (1999). In an action for slander, "proof of actual malice (as distinguished from imputed malice) is prerequisite to the recovery of punitive damages." *See, e.g., Stewart v. Check Corp.*, 279 N.C. 278, 287, 182 S.E.2d 410, 416 (1971).

Defendant's counterclaim does not specifically allege actual malice. It does, however, allege slander *per se*. It also states that plaintiff, "with knowledge that the statement was false," told Phillips, defendant's personal mortgage lender, that defendant had provided the lender fraudulent verification of his income. Plaintiff again demands punitive damages in his prayer for relief. The pleadings

sufficiently comply with Rule 9(k) and we reject plaintiff's assignment of error.

[6] For different reasons, however, we agree with plaintiff that the award of punitive damages must be set aside. The trial court instructed the jury that it could award punitive damages if "the malice of the Defendant Ausley was related to the slanders and resulting injury therefrom—*one or both of the slanders* or resulting injuries therefrom that you found in the first phase of this trial, for which you've already awarded compensatory damages to the plaintiff." (Emphasis added). Based on our holding that it was error to submit the claim of slander regarding Thomason, the submission of the issue of punitive damages to the jury based on one or both slander claims was error. The jury may have based its punitive damages award, in whole or in part, on the statements made to Thomason.

Similarly, the trial court may have determined the issue of unfair and deceptive trade practices based in whole or in part on the statements made to Thomason. The issue of unfair and deceptive trade practices was not submitted to the jury, but was properly decided by the trial court after the jury returned its verdict. *Mapp v. Toyota World, Inc.*, 81 N.C. App. 421, 425, 344 S.E.2d 297, 300, *disc. review denied*, 318 N.C. 283, 347 S.E.2d 464 (1986). Defendant then made an election to recover punitive damages instead of trebling the compensable damages awarded for the slanders. *See* N.C. Gen. Stat. § 75.16 (trebling the damages awarded to a person injured by deceptive acts or practices).

[7] Because the issue regarding Thomason should not have been submitted to the jury, a new trial on all remaining issues except breach of contract is required if defendant wishes to proceed with his request for punitive damages. Generally, appellate courts in North Carolina have discretionary authority to decide whether a case should be remanded for a partial new trial. *See, e.g., Robertson v. Stanley*, 285 N.C. 561, 568, 206 S.E.2d 190, 195 (1974). Here, however, the compensatory and punitive damages phases of the trial were bifurcated pursuant to section 1D-30 of our General Statutes, which provides:

> Upon the motion of a defendant, the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried separately from the issues of liability for punitive damages and the amount of punitive damages, if any. Evidence relating solely to punitive damages shall not be admis-

> sible until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. The *same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages.*

N.C. Gen. Stat. § 1D-30 (1999) (emphasis added). "[W]here an appellate court concludes that a case that was bifurcated at trial pursuant to N.C. Gen. Stat. § 1D-30 must be remanded for a new trial on the issues relating to punitive damages, we believe the statute requires that the case must also be remanded for a new trial on the issues of liability for compensatory damages and the amount of compensatory damages, so that the same jury may try all of these issues." *Lindsey v. Boddie-Noell Enterprises, Inc.*, 147 N.C. App. 166, 177, 555 S.E.2d 369, 377 (2001), *disc. review denied*, 355 N.C. 213, 559 S.E.2d 803 (2002). Since the breach of contract claim was an issue of liability for compensatory damages only and was unrelated to the punitive damages, its remand is not required.

Accordingly, we affirm that part of the judgment finding a breach of contract and the award for that breach. We vacate that part of the judgment related to Thomason. We reverse the trial court's order and remand for a new trial consistent with this opinion as to those claims related to Phillips. We also necessarily reverse and remand the award of attorneys' fees. The remaining assignments of error are not considered.

AFFIRMED IN PART, VACATED IN PART, REVERSED AND REMANDED IN PART.

Judge WYNN concurs.

Judge WALKER concurs in part and dissents in part.

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

I concur with that portion of the majority opinion which holds that the trial court erred in submitting the issue of whether plaintiff's statements to Thomason constituted slander and which affirms the judgment on the breach of contract claim. However, I respectfully dissent from that portion of the majority opinion which would require a new trial on the remaining issues. I conclude this Court's holding in *Lindsey v. Boddie-Noell Enterprises, Inc.*, 147 N.C. App. 166, 176-77,

555 S.E.2d 369, 377 (2001), *disc. rev. denied*, 555 N.C. 213, 559 S.E.2d 803 (2002) is inapplicable to the facts of this case.

Here, the trial court initially instructed the jury that it was to answer two questions: (1) "Is the [plaintiff] liable to the [defendant] for punitive damages" and (2) "What amount of punitive damages, if any, does the jury in its discretion award to [defendant]." The trial court then instructed that with respect to the issue of punitive damages defendant must prove plaintiff had acted with malice which was related to "one or both of the slanders." This alternative language supports the award of punitive damages as to the slander claim which is being upheld. Therefore, in my opinion, a new trial is not required.

LOYD M. BURGESS, AND KATIE STANLEY NAPLES AS EXECUTRIX OF THE ESTATE OF FRANK F. STANLEY, DECEASED, PLAINTIFFS v. FIRST UNION NATIONAL BANK OF NORTH CAROLINA, DEFENDANT

No. COA01-775

(Filed 7 May 2002)

Collateral Estoppel and Res Judicata— collateral estoppel— estate administration

The trial court did not err in an estate administration case by granting judgment on the pleadings in favor of defendant executor bank by determining that plaintiffs' civil action was barred by the doctrine of collateral estoppel as a matter of law, because: (1) defendant has met its burden of showing that the issues underlying the present claims were in fact identical with the issues raised in plaintiffs' previous counterclaims; and (2) all of the evidence in this action that allegedly shows the fraudulent conduct by defendant was before the trial court in the previous action.

Appeal by plaintiffs from judgment entered 1 March 2001 by Judge Catherine C. Eagles in Forsyth County Superior Court. Heard in the Court of Appeals 27 March 2002.

Tally, Attorney, P.C., by Robert Tally, for plaintiff appellants.

Kilpatrick Stockton L.L.P., by Mark Stafford and John B. Morris, for defendant appellee.

McCULLOUGH, Judge.

Plaintiffs Loyd M. Burgess and Katie S. Naples, as executrix for the Estate of Frank Stanley, appeal from an order granting judgment on the pleadings in favor of defendant First Union National Bank of North Carolina entered by Judge Catherine Eagles at the 26 February 2001 Session of Forsyth County Superior Court.

This litigation stems from a family business and how it was to pass on after the death of the founder's wife. Roy Burgess founded Salem Spring, Inc., in the 1940's. Salem Spring, Inc., was in the business of automobile and truck repair. Later, Roy's brother, Loyd Burgess, and Frank Stanley, joined the business. These two became long-time employees of the business. Salem Spring, Inc., branched out by forming Mid-South Automotive Parts, Inc., which operated as an auto parts distributor.

When Roy Burgess died, his wife, Nannie Coe Burgess became the majority shareholder. Loyd Burgess and Frank Stanley were the only minority shareholders. In 1989, Phillip Smith purchased the operating assets of both Salem Spring, Inc., and Mid-South Automotive Parts, Inc., and leased the land on which the store was located, awaiting an environmental clean-up before it was also to be purchased. In this transaction, the shares of Loyd and Frank were purchased by the company, leaving Nannie the sole shareholder.

Nannie Coe Burgess died on 5 March 1990. Defendant First Union was appointed executor of her estate. Her will, executed on 13 April 1976, left a conditional bequest to Loyd and Frank. Essentially, as long as the two survived her, they were each to receive five shares of Salem Spring. An additional condition attached to the bequest was that:

> These bequests to Lloyd [sic] M. Burgess and Frank Stanley are conditioned upon their (or either of them who shall survive me in the event one of them shall predecease me) purchasing from my estate at fair market value all the remaining shares of my stock in Salem Springs, Inc. and Mid-South Automotive Parts, Inc. owned by me at the time of my death.

The bequest continued, saying that:

> The terms of payment for such stock shall be made in such manner and amounts as my Executor shall deem requisite or desirable in the businesslike administration of my estate. It is

> my desire that my Executor be liberal in setting the terms of payment . . . .

The residuary of the estate was to pass to Nannie's daughters, Nancy Coe Burgess Maddrey and Brenda Kay Burgess Baker.

A meeting took place on 15 June 1990 between defendant First Union, a lawyer for defendant First Union, Nancy's husband Erwin Maddrey, Loyd and Frank. At this meeting, Loyd and Frank were informed of Nannie's conditional bequest. Defendant First Union presented a valuation of the shares that Loyd and Frank would have to purchase to fulfill the bequest. Loyd and Frank stated that they had no wish to purchase the stock and signed agreements that purported to be renunciations of the bequest.

A few years later, in 1993, Loyd and Frank both filed rescissions with the Forsyth County Superior Court, purporting to rescind the renunciations by each of them back in 1990 alleging that they were "void for want of consideration and for other reasons."

In 1997, Frank Stanley died. In 1998, the land on which Salem Spring was located was sold. This allowed for Nannie's estate to be distributed. However, Loyd and Frank's Estate were still contesting their renunciations and each claimed a stake in the distribution. On 16 November 1998, the Burgess Estate and Loyd and Frank's Estate entered into an agreement that established an escrow fund in case Loyd and Frank's Estate could force their share of the estate to come to them. Defendant was not a party to this agreement. Subsequent to this agreement, on 19 March 1999, the Estate of Nannie Burgess, by and through defendant First Union as executor for the estate, instituted a declaratory judgment action against Loyd and Frank's Estate seeking to determine whether the renunciations were enforceable and not the product of fraudulent misrepresentation. On 24 May 1999, Loyd and Frank's Estate answered and counterclaimed against the Burgess Estate that the renunciations were void on their face as follows:

> 20. Alternatively, if the [renunciations] should appear *prima facie* to eliminate either [Loyd's or Frank's] beneficial interest in the Estate of Nannie Coe Burgess, then those writings should be declared void for (a) want of consideration, (b) for having been effectively rescinded in 1993, (c) for having been procured by the fraudulent misrepresentation of facts, and / or (d) for having been proferred [sic] to—and the signatures thereon obtained from—

[Loyd and Frank] under circumstances of undue influence or duress, as follows:

(a) The so-called "Agreements" were not related to any payments, benefits or other forms of consideration paid or promised to either [Loyd or Frank] at any time.

(b) [First Union] had not acted in reliance upon the integrity and validity of the so-called "Agreements" before the Rescissions . . . were filed, and the latter were effective to undo whatever may have been done by the former.

(c) The so-called "Agreements" describe stock values far higher than those reported and filed by [First Union] with the Clerk of Superior Court, at about the same time. Attached . . . is a page from the 90-day inventory in the Nannie Coe Burgess Estate, showing date-of-death values for 70 shares of Burgess Management Co. (Salem Spring) at $673,428.09 and for 35 shares of Burgess & Associates, Inc. (Mid-South) at $336,714.04. Upon information and belief, the latter corporation had 485 outstanding shares, of which 450 were owned by the former corporation and 35 by Mrs. Burgess directly, at the time of her death. Further upon information and belief, an adjustment of those values accordingly would have resulted in Burgess Management's 70 shares being reported to be worth $985,843.16 and Burgess & Associates' 35 shares being valued at $24,298.97. The offer of 60 shares of the former and all 35 shares of the latter for a total price of $869,307.35, with the financing prescribed in Mrs. Burgess's Will, would have been defensible. The so-called "Agreements' " price of $1,150,616.67 (even with the deceptively-worded future-cost adjustment), with no mention of financing, is not. Upon belief the representation by the authors of those writings, suspected to be persons acting on behalf of the residuary beneficiaries, of that figure as a fair market value was a material misrepresentation of fact, intentionally made, fraudulently misleading and inducing [Loyd and Frank] to sign. Further upon belief, the absence of seller financing, the non-disclosure of cash assets of the companies, and failure to provide for the application of regular rental income (then is [sic] excess of $5,000.00 per month) to any payment plan were material omissions, which fraudulently mislead [sic] and induced [Loyd and Frank] to sign the documents.

(d) The so-called "Agreements" were, upon information and belief, prepared by or for the benefit of residuary beneficiaries of

the Will, neices [sic] of [Loyd], and were profered [sic] to him and [Frank], who was a close friend of the Burgess family, under pressure to sign the writings when presented and not to seek separate counsel concerning the potential import of the writings (despite the recitation to the contrary). No one from [First Union] ever spoke or corresponded with either [Loyd or Frank] about the writings or matters related thereto. Instead, they were forced to deal with Mr. Erwin Maddrey, husband of one of the residuary beneficiaries and an experienced business owner, in matters involving the Estate. [Loyd and Frank] were career automotive mechanics, known by [First Union], the residuary beneficiaries, Mr. Maddrey and their counsel to be unfamiliar with complicated legal and financial matters, subordinate to Mrs. Nannie Burgess's immediate family in the business organizations involved, and reliant upon them for fair treatment. Further, from August 1989 until December 1998, [First Union] and the residuary beneficiaries controlled, directly and indirectly, assets in which [Loyd and Frank] had beneficial interests, which [Loyd and Frank] believed to be in risk of loss, and the signatures on the so-called "Agreements" on June 15, 1990 were thus obtained as a result of duress or undue influence.

. . . .

21. The foregoing Defenses are incorporated herein by reference. [First Union] as a fiduciary has owed to [Loyd and Frank] a duty to ". . . use the authority and powers conferred . . . by [Chapter 28A of the N.C. General Statutes], by the terms of the will under which [it] is acting, . . . and by the rules generally applicable to fiduciaries, for the best interests of all persons interested in the estate, and with due regard for their respective rights." (N.C.G.S. Sec. 28A-13-2) In obtaining or permitting others to obtain the so-called "Agreements," [First Union] has failed in that duty. [First Union] should thus be estopped to deny that [Loyd and Frank] have valid beneficial interests under Mrs. Nanny Burgess's will.

By August of 1999, discovery in the above matter revealed correspondence between defendant First Union and the residuary beneficiaries and certain interoffice memoranda that occurred in the months before the June 1990 meeting. The correspondence and memoranda discussed obtaining renunciations from Loyd and Frank. Apparently none of this correspondence was ever sent to Loyd and

Frank. These letters and memoranda were admitted and entered into evidence in the declaratory judgment matter.

Both parties filed motions for summary judgment. The hearing was held before the Honorable Judge William Z. Wood, Jr., on 8 June 2000. In his order entered 13 June 2000, Judge Wood described Loyd and Frank's Estate's counterclaims as seeking an adjudication "that the Agreements were effectively rescinded because they were obtained without consideration, through fraud and misrepresentation, through breach of fiduciary duty, and through the use of undue influence and duress." Judge Wood's order read in pertinent part:

> Having reviewed all of the materials presented, and having considered all of the arguments and contentions of the parties . . .:
>
> 1. There is no genuine issue of material fact and the claim and counterclaims are to be resolved as issues of law;
>
> 2. The Agreements executed by [Loyd and Frank] on June 15, 1990, were effective renunciations under GS31B-1 and GS31B-2 of the conditional bequests to [Loyd and Frank] in Item IV of the Will of Nannie Coe Burgess, and are valid, enforceable and binding;
>
> 3. The evidence presented by defendants failed to establish a right to rescind the renunciation agreement, in that defendants failed to offer evidence which would support a finding of lack of consideration, fraud, misrepresentation, breach of fiduciary duty, undue influence or duress.

With that, the trial court granted First Union's motion and denied the motion of Loyd and Frank's Estate.

Loyd and Frank's Estate appealed Judge Wood's denial of their motion for summary judgment and the granting of defendant Executor First Union's motion for the same. This Court, in an opinion filed 18 December 2001 upheld the trial court in *First Union Nat. Bank v. Burgess*, No. COA00-1404, (N.C. App. Dec. 18, 2001). That Court said of the counterclaim that it was "alleging *inter alia* that the Agreements were not effective as renunciations, or were void because obtained by fraudulent misrepresentation of facts . . . in the form of a material misrepresentation of facts by First Union." *First Union*, slip op. at 7, 9. Further,

> [s]pecifically, Defendants contend that First Union, as executor of the Estate, failed to fully disclose the terms of the will,

> presented [Loyd and Frank] with a value for the stock that First Union knew was too high, and failed to inform [Loyd and Frank] that the company had substantial cash assets. Defendants further allege that First Union, as executor under the will, had a fiduciary duty to [Loyd and Frank], which it breached, thereby engaging in constructive fraud.

Id., slip op. at 10.

This Court held that Loyd and Frank's Estate "have proffered no evidence that First Union sought to benefit itself from its alleged fraud[,]" this being an essential element of both active and constructive fraud. *Id.*, slip op. at 12; *see Terry v. Terry*, 302 N.C. 77, 273 S.E.2d 674 (1981); *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 488 S.E.2d 215 (1997). Loyd and Frank's Estate abandoned the undue influence and duress argument and the rescission argument. Thus, the Court held that "First Union is entitled to judgment as a matter of law." *First Union*, slip op. at 3.

This did not end the litigation, because Loyd and Frank's Estate had filed a complaint on 2 June 2000 against First Union individually, not as executor, just a week before the summary judgment hearing in the original action. Also, it was at least 9 months after discovery had produced the letters, correspondence and interoffice memos regarding First Union and the residuary beneficiaries. Apparently, the complaint was based upon these items of evidence only:

> 7. In the course of [the previous litigation], writings and facts unknown to [Loyd and Frank's Estate] before August 1999 have been discovered, through the production of documents . . . . Although discovered only within the last 10 months, those relate to actions and omissions to perform duties almost 10 years prior to the filing of this Complaint. The claims arising out of those actions and omissions, as set forth below, are directed against First Union, separate and apart from the Burgess Estate escrow fund.

The complaint's main claim was for "Compensatory Damages for Fraudulent Acts by a Fiduciary." This complaint alleges, among other things, that First Union was a fiduciary who owed Loyd and Frank a duty to act for the best interests of all persons interested in the estate; that First Union was aware that the business valuation would be very important as to the administration of the estate of Nannie; that First Union was aware of an "actual or potential conflict of interests"

between Loyd and Frank and the residuary beneficiaries, in that the businesses would pass to the residuary if they were to renunciate; that First Union corresponded with the residuary beneficiaries about the valuation and pursuing the renunciations; that correspondence to that effect was kept secret from Loyd and Frank; that First Union represented a valuation to Loyd and Frank that was higher than more recent valuations known to First Union; and thus First Union has injured Loyd's and Frank's rights and placed in jeopardy their participation as beneficiaries in the estate.

First Union answered and made its motion for judgment on the pleadings on 17 July 2000. The crux of First Union's motion was that "the substance of [Loyd and Frank's Estate's] allegations and claims in this action was presented in [the previous action], and [it] raises no issue not addressed in the prior action." First Union alleged that the claims of Loyd and Frank's Estate as to the misrepresentation theory are

> totally belied by Plaintiff Loyd Burgess' own deposition testimony given in the Prior Action. Mr. Burgess testified repeatedly and emphatically that he and Mr. Stanley chose not to exercise their rights under the Will of Nannie Coe Burgess not because of any information provided or withheld by First Union or its agents, but rather because both men felt that they should have been given an outright gift.

First Union alleged that Judge Wood had all the evidence before him when he ruled in the previous action, including all the correspondence between First Union and the residuary beneficiaries, and ruled that it failed to support Loyd and Frank's Estate's claims. Thus, First Union was entitled to a judgment on the pleadings because those claims were barred by the doctrines of *res judicata* and collateral estoppel.

The hearing was held before the Honorable Judge Catherine C. Eagles on 26 February 2001. In her order entered 1 March 2001, Judge Eagles allowed First Union's motion for judgment on the pleadings because the action was barred by the doctrines of *res judicata* and collateral estoppel. It is from this order that plaintiffs Loyd Burgess and the Estate of Frank Stanley appeal.

The plaintiffs' sole assignment of error is that the trial court committed reversible error by granting defendant's motion for judg-

ment on the pleadings by determining that their civil action was barred by the doctrines of *res judicata* and collateral estoppel.

I.

We must then address the question of the applicability of the doctrine of collateral estoppel (issue preclusion). Like *res judicata*, collateral estoppel is " ' "designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally." ' " *McCallum v. N.C. Coop. Extension Serv.*, 142 N.C. App. 48, 51, 542 S.E.2d 227, 231, *disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001) (quoting *King v. Grindstaff*, 284 N.C. 348, 356, 200 S.E.2d 799, 805 (1973) (quoting *Commissioner v. Sunnen*, 333 U.S. 591, 599, 92 L. Ed. 898, 907 (1948))).

> In North Carolina a defendant is permitted to "assert collateral estoppel as a defense against a party who has previously had a full and fair opportunity to litigate a matter [in a previous action which resulted in a final judgment on the merits] and now seeks to reopen the identical issues [actually litigated in the prior action] with a new adversary." It is not necessary for the defendant in the present action to have been a party to the previous action. In the event the defense is successfully asserted, the previous judgment constitutes an absolute bar to the subsequent action. . . . *In determining what issues were actually litigated or determined by the earlier judgment, the court in the second proceeding is "free to go beyond the judgment roll, and may examine the pleadings and the evidence [if any] in the prior action."* . . . The burden is on the party asserting issue preclusion to show "with clarity and certainty what was determined by the prior judgment." . . . The party opposing issue preclusion has the burden "to show that there was no full and fair opportunity" to litigate the issues in the first case.

Miller Building Corp. v. NBBJ North Carolina, Inc., 129 N.C. App. 97, 100, 497 S.E.2d 433, 435 (1998) (emphasis added).

> The requirements for the identity of issues to which collateral estoppel may be applied have been established by this Court as follows: (1) the issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the

determination of the issues in the prior action must have been necessary and essential to the resulting judgment.

State v. Summers, 351 N.C. 620, 623, 528 S.E.2d 17, 20 (2000).

The issue in the previous case, which was between the Burgess Estate, by and through defendant as executor, and plaintiffs was whether the renunciations were void because they were obtained by fraudulent misrepresentation of facts by defendant. In that case, the present plaintiffs sought the monetary value of five shares apiece. In the present case, plaintiffs are suing defendant directly, not as the executor of the Estate of Nannie Coe Burgess, and asking for compensatory damages from defendant. Their claim is that defendant, as a fiduciary, fraudulently induced plaintiffs to renounce their interests as beneficiaries under the will to the benefit of the residuary beneficiaries. This is the same fraud theory that failed in the previous case. Defendant has thus met its "burden of showing that the issues underlying the present claims were in fact identical with the issues raised in the plaintiff's previous [counterclaims]." *Miller*, 129 N.C. App. at 100, 497 S.E.2d at 435.

Plaintiffs' argument that they did not have a full and fair opportunity to litigate that issue is unpersuasive. Plaintiffs had the evidence of the letters and memoranda several months before any hearing on the case. Indeed this suit was filed, allegedly based on that correspondence, before the summary judgment hearing in the previous case.

Equally unpersuasive is plaintiffs' argument that the present case of fraud is somehow different because the previous action was based on the misrepresentation at the 1990 meeting while the present suit is based on the correspondence in the months prior to that meeting. Again, all the evidence in this action that allegedly shows the fraudulent conduct by First Union was before the trial court in the previous action.

Because the plaintiffs' action is barred by the doctrine of collateral estoppel as a matter of law, the trial court is

Affirmed.

Judges WYNN and BIGGS concur.

STATE OF NORTH CAROLINA v. STEPHEN ARTEMUS CHRISTIAN

No. COA01-77

(Filed 7 May 2002)

1. Constitutional Law— presence at all stages—noncapital trial—waiver

The trial court did not err in a prosecution for six charges of assault, conspiracy to murder, and discharging a weapon into occupied property by removing a trial juror after a hearing at which defendant's attorney was present but not defendant. A defendant's right to be present at all stages of a noncapital trial is a personal right that can be waived, and defendant's failure to object followed by his counsel's request to have the juror replaced amounted to a waiver.

2. Constitutional Law— double jeopardy—transferred intent—no objection at trial

Defendant waived his right to the double jeopardy defense by not bringing it to the attention of the trial court where he was contending that double jeopardy prohibited use of the transferred intent doctrine to punish him for assaulting unintended victims when he was already being punished for assaulting the intended victim. Moreover, it has been held that an instruction on transferred intent is proper when both intended and the unintended victims are injured or killed.

3. Conspiracy— sufficiency of evidence

There was sufficient evidence of conspiracy to commit murder where defendant and another man named "Chris" entered a car with guns and loaded them as they traveled; defendant remained in the car with Chris and others after Chris said, "we are going to get Kobie"; when they arrived at their destination, defendant was seen exiting the vehicle with a gun that he used to shoot a vehicle; and defendant did not run until a number of shots had been fired, two of which hit Kobie.

4. Appeal and Error— preservation of issues—no objection at trial—plain error not specifically alleged

A defendant in a prosecution for conspiracy to murder and assault waived his right to appellate review of a contention regarding an omission in the conspiracy instructions by not

objecting at trial and by failing to specifically and distinctly allege plain error in his brief.

5. Conspiracy— no merger with substantive offense

The trial court did not err by instructing the jury on both conspiracy to commit murder and acting in concert to assault with intent to kill where the assaults on individuals in a vehicle were substantive offenses resulting from furtherance of the conspiracy. The crime of conspiracy does not merge into the substantive offense which results from the conspiracy's furtherance.

6. Criminal Law— questions by judge—development of witness's memory—no intimation of opinion

A trial judge's questioning of a witness in a conspiracy to murder and assault prosecution was proper where the questions ensured the proper development of the witness's recollection of events and did not intimate to the jury that the judge believed defendant was guilty.

Appeal by Stephen Christian ("defendant") from six judgments entered 28 July 2000 by Judge James M. Webb in Montgomery County Superior Court. Heard in the Court of Appeals 7 January 2002.

Attorney General Roy Cooper, by Assistant Attorney General Daniel S. Johnson, for the State.

Cunningham, Dedmond, Petersen & Smith, L.L.P., by Bruce T. Cunningham, Jr., for defendant-appellant.

CAMPBELL, Judge.

The relevant facts, based on the State's evidence, are as follows: On the afternoon of 14 June 1999, Kobie Wilson ("Kobie") was in Troy, North Carolina visiting the mother ("Mother Jones") of his fiancée, Jenny Jones ("Jenny"). Also in Troy that day were Jenny's minor son, Jaquarius French (also known as "Jay"), and Jenny's sister, Demetrius Ratliff ("Demetrius").

Throughout that afternoon, defendant's twin brothers ("the Christian twins") and Mitchell Hall ("Mitchell") repeatedly drove past Mother Jones' house in a green Honda Accord (the "Honda"). This action stemmed from a confrontation that had taken place earlier that day between Kobie and Mitchell, when Kobie had accused Mitchell and the Christian twins of sexually abusing his sister, resulting in a

fight between the two men. At approximately six o'clock that evening, Demetrius spotted the Christian twins outside Mother Jones' house calling for Kobie to come outside. Demetrius, believing that the Christian twins and Mitchell (who had remained inside the Honda) intended to cause trouble, threatened to call the police if they did not leave. The police were eventually called, but the men left before the police arrived.

Approximately two hours later, Lecia Christian ("Mother Christian"), the mother of defendant and the Christian twins, arrived at Mother Jones' house. Mother Christian was waving a handgun and taunting Kobie and the Jones family. Mother Christian drove away after Kobie threw a bottle at her vehicle.

Shortly thereafter, Mother Christian told the Christian twins about her encounter with Kobie. The Christian twins, who appeared angry and who were now accompanied in the Honda by David Horne ("David"), drove to Wadeville, North Carolina and picked up Christopher Christian ("Chris") and defendant. While these men proceeded to drive back to Troy, Chris stated, "we [are] going to get Kobie." Chris and defendant were each carrying a gun and loaded them during the drive.

The four Christian brothers and David arrived at Mother Jones' house several minutes later. They used the Honda to block in Jenny's vehicle just as it was backing out of the driveway. Jenny was the driver of the vehicle, with Kobie in the front passenger's seat, Jay in the rear seat behind Jenny, and Kobie's cousin, Devon Jones ("Devon"), in the rear seat behind Kobie.

Defendant and Chris were seen exiting the Honda carrying long-barreled weapons. Defendant fired the first shot into the hood of Jenny's vehicle, then both he and Chris proceeded to shoot into the Honda. Kobie was shot twice. Jay was shot in the face, which resulted in severe injuries including a split tongue, obliteration of his hard palate, and loss of bone from his jaw. Once the shooting stopped, defendant ran from the scene, while the other Christian boys and David left in the Honda. The Honda was subsequently stopped by the police.

Defendant was eventually apprehended and indicted for: (1) assaulting Jay with a deadly weapon with intent to kill inflicting serious injury (99 CRS 2489); (2) assaulting Kobie with a deadly weapon with intent to kill inflicting serious injury (99 CRS 2490); (3) conspir-

acy to murder Kobie (99 CRS 3360); (4) discharging a weapon into occupied property, namely, Jenny's vehicle (99 CRS 3361); (5) assaulting Jenny with a deadly weapon with intent to kill (99 CRS 3362); and (6) assaulting Devon with a deadly weapon with intent to kill (99 CRS 3363). Defendant was tried before Judge James M. Webb and a jury at the 24 July 2000 Criminal Session of Montgomery County Superior Court. He pled not guilty and presented no evidence in his defense. On 28 July 2000, the jury found defendant guilty as charged. Defendant received active prison sentences for the convictions. Defendant appeals.

Defendant brings forth six assignments of error. For the following reasons, we find that the trial court committed no error.

I.

[1] By defendant's first assignment of error he argues the trial court erred in removing a trial juror ("Juror Pollard") after a hearing in open court at which defendant's attorney was present, but not defendant. Defendant raises this assigned error based on the Confrontation Clause of the United States Constitution and our state constitution. *See* U.S. Const. amend. IV; *see also* N.C. Const. art. I, § 23. However, this constitutional issue was not raised by defendant during the trial court proceedings. Our state holds that "[t]his 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." *State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985) (citations omitted). Nevertheless, we shall address why we disagree with this assigned error.

Defendant's first assignment of error is based on the following trial events: In open court, but out of the presence of the jury, Juror Pollard asked to be dismissed from the jury because she had become afraid for her life. The trial court cleared the courtroom of all spectators to allow Juror Pollard to elaborate on the reason for her request. However, Juror Pollard stated that she would feel more comfortable speaking to the court if defendant was removed from the courtroom as well. Thus, the court had defendant removed from the hearing, but instructed defense counsel to remain. Neither defendant nor his counsel objected to his removal. Juror Pollard then proceeded to inform the court that she had been told by her niece that Mother Christian would give Juror Pollard $2,000.00 in exchange for finding defendant not guilty. Juror Pollard refused. She did not tell the other jurors about this conversation with her niece. Juror Pollard was then

sent out of the courtroom and defendant was allowed to return. Defense counsel moved to have Juror Pollard removed and replaced with an alternate. The court granted this motion.

"It is well-established that under both the federal and North Carolina constitutions a criminal defendant has the right to be confronted by the witnesses against him and to be present in person at every stage of the trial." *State v. Braswell*, 312 N.C. 553, 558, 324 S.E.2d 241, 246 (1985) (citation omitted). In noncapital cases, however, a "defendant's constitutional right to be present at all stages of the trial [is] a purely personal right that [can] be waived expressly or by his failure to assert it." *Id.* at 559, 324 S.E.2d at 246. Additionally, "[i]n a non-capital case counsel may waive defendant's right to be present through failure to assert it just as he may waive defendant's right to exclude inadmissible evidence by failing to object." *Id.*

Here, we note that defendant was tried in a noncapital case. When defendant was removed from the courtroom, neither defendant nor his counsel objected. Thereafter, the defense counsel moved to have Juror Pollard removed and replaced with an alternate. The inaction of defendant and his counsel, followed by defense counsel's request to have Juror Pollard removed and replaced, amounted to a waiver of defendant's right to be present during the court's questioning of Juror Pollard. Thus, "[w]hile it is the better practice for the trial judge to obtain an explicit waiver from a defendant before conducting a[n] . . . important proceeding in the defendant's absence, it [is] not error for him to fail to do so." *Id.*

II.

[2] By defendant's second assignment of error he argues that the Double Jeopardy Clause of the United States Constitution prohibits the doctrine of transferred intent from being used to punish him for assaulting unintended victims (Jay and Devon) with intent to kill when he has already been punished for assaulting the intended victim (Kobie) with intent to kill. We disagree.

"The constitutional right not to be placed in jeopardy twice for the same offense, like other constitutional rights, may be waived by the defendant and such waiver is usually implied from his action or inaction when brought to trial in the subsequent proceeding." *State v. Hopkins*, 279 N.C. 473, 475-76, 183 S.E.2d 657, 659 (1971) (citations omitted). "To avoid waiving this right, a defendant must properly

raise the issue of double jeopardy before the trial court. Failure to raise this issue at the trial court level precludes reliance on the defense on appeal." *State v. White*, 134 N.C. App. 338, 342, 517 S.E.2d 664, 667 (1999) (citation omitted). In the instant case, defendant failed to bring his double jeopardy defense to the attention of the court. Thus, we need not address this assigned error on appeal because defendant's inaction at the trial level resulted in a waiver of his right to this defense. *See id.* However, had defendant properly and timely raised the double jeopardy issue, this assigned error would be without merit because our Supreme Court has held that an instruction on transferred intent is proper when both the intended victim and an unintended victim are injured and/or killed. *See State v. Locklear*, 331 N.C. 239, 415 S.E.2d 726 (1992) (holding that the trial court properly instructed on transferred intent when defendant killed the intended victim and, in the process, accidently wounded the victim's daughter).

III.

[3] By defendant's third assignment of error he essentially argues that the trial court erred in denying his motion to dismiss the charge of conspiracy to commit murder on the grounds of insufficiency of the evidence. We disagree.

When ruling on a defendant's motion to dismiss, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Whether the evidence presented is substantial is a question of law for the court. *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 434 (1956). Furthermore, the court "must consider such evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *State v. Patterson*, 335 N.C. 437, 450, 439 S.E.2d 578, 585 (1994).

Defendant contends that the state's evidence, particularly David Horne's testimony that "Chris said that we were going to get Kobie[,]" was not substantial enough to constitute a conspiracy between him and any of the men in the Honda. "A conspiracy may be proved by direct or circumstantial evidence and is established by showing the

existence of an express agreement or a mutual implied understanding between defendant and others to do an unlawful act or to do a lawful act by unlawful means." *State v. Lyons*, 102 N.C. App. 174, 183, 401 S.E.2d 776, 781 (1991). Proof of a conspiracy "may [also] be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy." *State v. Whiteside*, 204 N.C. 710, 712, 169 S.E. 711, 712 (1933).

At trial, the State provided sufficient evidence to prove the crime of conspiracy based on a "number of indefinite acts" and not solely on one statement made by David Horne. The evidence showed that: (1) defendant and Chris entered the Honda with guns and proceeded to load them as the vehicle traveled to Mother Jones' house; (2) defendant remained in the vehicle (with Chris, the Christian twins, and David) after Chris made the statement that "we [are] going to get Kobie[;]" (3) upon arriving at Mother Jones' house, defendant was seen exiting the vehicle with a gun, which he used to shoot Jenny's vehicle; and (4) defendant did not run away until after a number of shots were fired at the vehicle, two of which hit Kobie. We find all this evidence is sufficient for reasonable minds to conclude that there was an implied understanding between defendant and at least Chris, if not all of the other men in the Honda, to murder Kobie.

IV.

[4] By defendant's fourth assignment of error he argues the trial court erred when it gave vague and confusing jury instructions that were not in conformity with the conspiracy indictment. In particular, defendant contends that since the trial court's jury instruction on the conspiracy charge did not specifically name those individuals named in the indictment (which named the Christian twins, David, and Chris), the jury may have believed defendant conspired with someone not named in the indictment, such as Mother Christian. We find this assigned error to be without merit.

During the jury charge conference, the court suggested the pattern jury instructions on conspiracy to commit murder be used. Defendant made no objection and did not request a change to the instruction on this issue. Furthermore, defendant made no request for corrections or additions to the jury instruction after the instruction was given to the jury. "In most instances, N.C.R. App. P. 10(b)(2) precludes a party from assigning error to an unobjected-to omitted jury instruction. [Nevertheless], the 'plain error' rule allows for appellate

review of *some* assignments of error normally barred by operation of Rule 10(b)(2)" if defendant specifically and distinctly alleges that the trial court's action amounted to plain error. *State v. Najewicz*, 112 N.C. App. 280, 294, 436 S.E.2d 132, 140 (1993) (citation omitted). *See also* N.C.R. App. P. 10(b)(2), (c)(4) (2001). However, since defendant's brief failed to specifically and distinctly allege that the jury instruction amounted to plain error, he is not entitled to appellate review under this rule either. *See State v. Alston*, 131 N.C. App. 514, 518, 508 S.E.2d 315, 318 (1998). Thus, defendant has waived his right to have this assigned error reviewed on appeal.

V.

[5] By defendant's fifth assignment of error he argues that the trial court erred in instructing the jury on both conspiracy to commit murder and acting in concert with another person to commit assault with intent to kill. However, "[i]t is well established that the crime of conspiracy does not merge into the substantive offense which results from the conspiracy's furtherance and that a defendant may be properly sentenced for both offenses." *State v. Baker*, 112 N.C. App. 410, 416, 435 S.E.2d 812, 816 (1993). In the case *sub judice*, the assaults on the individuals in Jenny's vehicle were the substantive offenses resulting from the furtherance of the conspiracy. Therefore, the trial court did not err in giving both of these instructions.

VI.

[6] By defendant's final assignment of error he argues that the trial judge's questioning of Demetrius, the state's witness, was error because it violated defendant's right to an impartial judge under the Fifth and Fourteenth Amendments of the United States Constitution. *See* U.S. Const. amend. V, XIV. Although defendant again raises a constitutional issue that was not raised and determined in the trial court, we shall address why we disagree with this assigned error as well. *See State v. Creason*, 313 N.C. 122, 127, 326 S.E.2d 24, 27 (1985).

Defendant's argument is based on the following questions asked by the trial judge:

> THE COURT: [Demetrius,] [d]escribe what you saw when the shooting started for the second time.
>
> A. Gunfire, just shots being fired. I saw [Jay] from the chest up holding on to the seat, the driver's seat of the car. And I just [ran] to get him.

THE COURT: Who did you see firing weapons?

A. [Defendant] and [Chris] Christian.

THE COURT: And in what direction?

A. Directly into the vehicle.

THE COURT: And from what distance was the defendant and [Chris] Christian from the vehicle at this time?

A. Five to ten feet.

THE COURT: And on which side of the vehicle?

A. On the passenger's side of the vehicle.

THE COURT: Both on the passenger?

A. Yes, sir.

Our state holds that "[a] judge may not by his questions to a witness intimate an opinion as to whether any fact essential to the State's case has been proved." *State v. Lowe*, 60 N.C. App. 549, 552, 299 S.E.2d 466, 468 (1983). However, the questions asked by the trial judge in the instant case did not intimate to the jury that the judge believed defendant was guilty. Instead, they ensured the proper development of Demetrius' recollection of the events that occurred on the night in question. *See Vick v. Vick*, 80 N.C. App. 697, 700, 343 S.E.2d 245, 247 (1986) (holding that a court my interrogate a witness to either clarify the witness' testimony or to ensure proper development of the facts). The questions were therefore proper and do not amount to error by the trial court.

Accordingly, for the aforementioned reasons, defendant is not entitled to a new trial or to remand of this matter for resentencing because the trial court did not err.

No error.

Chief Judge EAGLES and Judge McCULLOUGH concur.

IN THE MATTER OF: NICHOLAS R. ROBERTS AND THE BUNCOMBE COUNTY BOARD OF EDUCATION

No. COA01-557

(Filed 7 May 2002)

1. **Schools and Education— due process—board of education hearing board—legal counsel not allowed**

   The trial court correctly reversed a board of education hearing board decision to suspend a student for the remainder of the semester for statements that were vulgar and suggestive where both the facts and the nature of the conduct were disputed, petitioner was subjected to a long term suspension from school, and he was not permitted an attorney at the hearing. Due Process requires that petitioner have the opportunity to have counsel present, to confront and cross-examine witnesses, or to call his own witnesses.

2. **Schools and Education— due process—school suspension—hearing without counsel—remedy**

   Although respondent argued that the appropriate remedy for the superior court to apply to a due process violation by a board of education hearing board was remand rather than reversal, N.C.G.S. § 150B-51(b) specifically states that the reviewing court may reverse the agency's decision if the substantial rights of petitioners may have been prejudiced.

Appeal by respondent from order entered 29 January 2001 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 20 February 2002.

Paul Louis Bidwell, for petitioner-appellee.

Root & Root, P.L.L.C. by Allan P. Root, for respondent-appellant.

TYSON, Judge.

The Buncombe County Board of Education ("respondent") appeals from an order reversing its decision to suspend Nicholas R. Roberts ("petitioner") from school for the remainder of the Fall 1996 semester.

I. Facts

On 11 October 1996, petitioner was a sophomore at A.C. Reynolds High School in Buncombe County, North Carolina. While in his first period English class, petitioner was preparing to play a board game. When petitioner asked the teacher if he could be paired with two particular classmates, another student, Chris Meeks ("Meeks") stated "Hey Nick! Juanita [Plemmons] wants to be your partner." Petitioner then walked up to the table where Juanita Plemmons ("Plemmons") was seated, pushed the lower part of his body into her face, grabbed his crotch, and told her "I'll be your partner anytime, and put 'deeze nuts' in your mouth." Petitioner then walked away to play the board game at another table.

Plemmons did not hear petitioner's statement. Plemmons stated that because she was embarrassed upon seeing petitioner grab his crotch, she closed her eyes, put her head down, and covered her ears with her hands. Three students who were seated nearby, Meeks, Adam Lowe ("Lowe"), and John Hefner ("Hefner"), informed Plemmons of the statement made by petitioner. Later that afternoon, Plemmons reported the incident to Assistant Principal Richard Pierce ("Pierce") who conducted an investigation by taking the statements of several students. Meeks, Lowe, and Hefner all confirmed the incident as reported by Plemmons. Four other students stated that although they were seated near Plemmons, they neither saw nor heard petitioner make any offensive gestures or comments.

After obtaining the student's statements, Pierce called petitioner into his office and informed him of the complaint against him. When asked his version of the events, petitioner admitted that he walked over to the table where Plemmons was seated and said that he would like to be her partner, but petitioner denied making any offensive gestures or statements. Later, however, petitioner admitted grabbing his crotch and saying "deeze nuts," but he claimed that the gesture and statement was directed toward Meeks, who had previously insulted him. According to petitioner, "deeze nuts" was an expression commonly used by the students and was similar to "kiss my butt."

Following his investigation, Pierce brought the incident to the attention of Principal Ronald L. Dalton ("Dalton"). Dalton reviewed the statements and concluded that petitioner violated Board Policy 461 regarding sexual harassment which provides in pertinent part:

> Sexual harassment of students is defined as unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:
>
> . . . .
>
> (3) The harassment has a purpose or effect of unreasonably interfering with an individual's academic performance or creating an intimidating, hostile, or offensive learning environment.

Dalton suspended petitioner for five days, with a recommendation to the Reynolds District Hearing Board ("Hearing Board") that he be suspended through the end of the school semester. Dalton notified petitioner's parents of this decision and recommendation by letter dated 11 October 1996.

A hearing was conducted before the Hearing Board on 14 October 1996. The Hearing Board adopted Dalton's recommendation, suspending petitioner for the duration of the 1996 Fall semester. The Superintendent for the Buncombe County School System approved the recommendation that petitioner be suspended for the remainder of the semester. Petitioner appealed the decision to respondent pursuant to N.C.G.S. § 115C-391(e). On 7 November 1996, respondent conducted a review hearing and made the following determination regarding petitioner's conduct:

> The Board of Education does not believe that [petitioner's] behavior was intended to be "sexual harassment," however, the Board feels that his actions and words were both vulgar and obscene, and had the effect of creating an intimidating and offensive learning environment.

Respondent issued a letter, dated 22 November 1996, to petitioner's mother upholding the suspension for the duration of the school semester.

Petitioner filed a petition for judicial review with the Buncombe County Superior Court on 20 December 1996, pursuant to N.C.G.S. §§ 115C-391(e), 150B-43, and 150B-45. The superior court entered a judgment reversing respondent's decision on 28 October 1997. Respondent appealed to this Court. In the prior opinion of this Court, filed 6 April 1999, we reversed the decision and remanded for the entry of an order setting forth the standard of review applied. The superior court, on remand, entered an amended order on 29 January 2001 reversing the decision of respondent. Respondent appeals.

II. Issues

The controlling issues raised on appeal are whether: (1) the superior court erred in concluding that Board Policy prohibiting an attorney's presence at the Hearing Board constitutes a denial of due process and (2) the superior court applied an incorrect remedy in reversing the decision.

III. Standard of Review

The decision of the local board of education in disciplining any student may be appealed to the superior court of the county where the local board made its decision in accordance with Article 4 of Chapter 150B of the General Statutes. N.C. Gen. Stat. § 115C-391(e) (1999). The standard of review on appeal from a decision of a local board of education is set forth in N.C.G.S. § 150B-51(b) which provides that the court reviewing a final decision may:

> reverse or modify the agency's decision, or adopt the administrative law judge'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 . . . in view of the entire record as submitted; or (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2000).

The proper standard for the superior court's judicial review "depends upon the particular issues presented on appeal." *Amanini v. North Carolina Dep't of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). When the petitioner contends that the decision of the agency, here the local school board, was unsupported by the evidence or was arbitrary or capricious, then the reviewing court must apply the "whole record" test. *In re McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). "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. "Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion."

Walker v. North Carolina Dep't of Human Resources, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990) (citation omitted). When the petitioner argues that the decision of the agency violates a constitutional provision, the reviewing court is required to conduct a *de novo* review. *In re Ramseur*, 120 N.C. App. 521, 526, 463 S.E.2d 254, 257 (1995).

As to appellate review of a superior court order regarding an agency decision, "the appellate court examines the trial court's order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118-19 (citations omitted).

IV. Due Process

[1] Here, petitioner alleged that respondent's decision is based on an error of law in that his state and federal constitutional rights of Due Process were violated when he was denied legal representation at the Hearing Board. When petitioner alleges that the agency's decision, here the local school board, is based on an error of law, the proper review is *de novo* review. *Ramseur*, 120 N.C. App. at 526, 463 S.E.2d at 257. "De novo review requires the court to " 'consider a question anew, as if not considered or decided by the agency previously. . . .' " and to "make its own findings of fact and conclusions of law . . ." rather than relying upon those made by the agency. *Jordan v. Civil Serv. Bd. of Charlotte*, 137 N.C. App. 575, 577, 528 S.E.2d 927, 929 (2000) (citation omitted).

The superior court's amended order states that its review was "of the whole record de novo." While "whole record" and *de novo* are separate tests to be applied upon differing issues, the superior court entered a finding of fact that pursuant to Board Policy 460 "Petitioner's attorney was denied access to the hearing room to advise and counsel the Petitioner or his parents. A non-parent adult is permitted in the hearing room upon request of the Petitioner." The superior court reviewed Board Policy 460 which provides in pertinent part:

> Adult Representation in Addition to or in Lieu of Parents. If the parents cannot be present or if the student or his parents think his interests can be protected better by the presence of another adult in addition to the parents, the student may bring another

> adult to the hearing. If the parents are present, the non-parent adult may advise the student, but he may not examine witnesses, make any statement, or in any way actively represent the student before the board. . . . The non-parent adult may not be an attorney.

The superior court then concluded that "[t]he failure of the Reynolds District Hearing Board to allow the mere presence of the Petitioner's attorney as a non-parent adult and the provision of the Board Policy prohibiting an attorneys presence under any circumstance constitutes a denial of due process to the Petitioner . . . ." We conclude that the superior court utilized the correct standard of review. *See Sun Suites Holding v. Town of Garner*, 139 N.C. App. 269, 273, 533 S.E.2d 525, 528 (2000) (more than one standard of review may be used if required, but the standards are to be applied separately) (citations omitted). We review *de novo* the propriety of respondent's policy and the superior court's reversal.

Respondent argues that the superior court's conclusion is erroneous and relies on *Wimmer v. Lehman*, 705 F.2d 1402 (4th Cir. 1983), to support its argument that petitioner was not denied due process. However, *Wimmer* is distinguishable from this case. In *Wimmer*, the petitioner, a cadet at the Naval Academy, was an adult. Even though the petitioner was required to make his own arguments and cross-examine the witnesses, he was permitted to have his attorney present at the hearing. In contrast, petitioner in the present case was a high school student, a minor, and was not permitted to have counsel present at the evidentiary hearing before the Hearing Board.

In *Matthews v. Eldridge*, 424 U.S. 319, 335, 47 L. Ed. 2d 18, 33 (1976), the United States Supreme Court set forth three factors to be considered in determining what process is due when an individual is faced with the deprivation of a property interest:

> [F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

The North Carolina Constitution provides that "[t]he people have a right to the privilege of education . . . ." (Article 1, § 15). The United

States Supreme Court has stated that a student facing suspension has a property interest that qualifies for protection under the Due Process Clause of the Fourteenth Amendment. *Goss v. Lopez*, 419 U.S. 565, 576, 42 L. Ed. 2d 725, 735-36 (1975) (citations omitted). "A student's interest in obtaining an education has been given substantive and procedural due process protection." *Warren County Bd. of Educ. v. Wilkinson*, 500 So.2d 455, 459 (Miss. 1986) (citing *Plyler v. Doe*, 457 U.S. 202, 217, 72 L. Ed. 2d 786 (1982); *Bolling v. Sharpe*, 347 U.S. 497, 500, 98 L. Ed. 2d 884 (1954); *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 69 L. Ed. 1070 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400, 67 L. Ed. 1042 (1923)).

"The student's interest is to avoid unfair or mistaken exclusion from the educational process. . . ." *Goss*, 419 U.S. at 579, 42 L. Ed. 2d at 737. We acknowledge that the State has a substantial interest in maintaining security and order in the schools. "[O]ur schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device." *Id.* at 580, 42 L. Ed. 2d at 738.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution is applicable to long-term suspensions. *See Pervis v. LaMarque Ind. School Dist.*, 466 F.2d 1054 (5th Cir. 1972) (due process applicable to indefinite suspensions); *Sullivan v. Houston Ind. School Dist.*, 475 F.2d 1071 (5th Cir. 1973) (due process applicable to the addition of a 30-day suspension to a 10-day suspension).

In the present case, petitioner was subjected to a long-term suspension from school, for the remainder of the Fall 1996 semester, based on the reports of other students. The facts and the nature of the conduct were all disputed. For these very same reasons, the Court in *Goss* stated that "[t]he risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process." *Goss*, 419 U.S. at 580, 42 L. Ed. 2d at 738. The Hearing Board and respondent's claim that petitioner's conduct constituted harassment turned upon a factual adjudication before the Hearing Board. Respondent concedes that the better practice would be to permit attorney representation before the Hearing Board. We agree. The protections of due process require that

petitioner be apprised of the evidence received and given an opportunity to explain or rebut it. *See Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (where exclusion or suspension for any considerable period of time is a possible consequence of proceedings, modern courts have held that due process requires notice; a full hearing; the right to examine the evidence, the witnesses, and the right to present evidence; and the right to be represented by counsel.)

Under the facts of this case, where respondent sought to impose a long-term suspension and the Board Policy specifically provided for a factual hearing before the Hearing Board, we construe the Due Process Clause of the United States Constitution, applicable to the States through the Fourteenth Amendment, to require that petitioner have the opportunity to have counsel present, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. *Id.* We hold that respondent's decision for long-term suspension of petitioner was affected by error of law.

V. Remedy

[2] Respondent argues that even if the findings and conclusions of the superior court are upheld, the appropriate remedy was to remand the matter to the Board of Education for further proceedings. We disagree.

N.C.G.S. § 150B-51(b) specifically states that the court reviewing the final decision may reverse the agency's decision "if the substantial rights of the petitioners may have been prejudiced . . . ." N.C. Gen. Stat. § 150B-51(b). This argument is overruled.

VII. Conclusion

We hold that petitioner's substantial rights have been violated. Under the facts of this case petitioner's due process rights were violated. We need not address respondent's remaining assignments of error. We affirm the reversal of respondent's decision by the superior court.

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

MARGARET L. KOLB AND LUCY ZANTOUT, PLAINTIFFS v. SCHATZMAN & ASSOCIATES, L.L.C. AND PHILIP KING, DEFENDANTS

No. COA01-277

(Filed 7 May 2002)

Contracts— legality—extrication of individuals from another country

The trial court did not err by granting defendant's motion for summary judgment on its counterclaim for breach of express contract against plaintiff and by concluding that the underlying oral contract requiring defendant to attempt to extricate plaintiff's daughter and three grandchildren from Lebanon and return them to the United States was legal and enforceable, because: (1) defendant performed as agreed under the oral contract, and plaintiff did not; and (2) there is no evidence that plaintiff and defendant entered into an illegal contract.

Appeal by plaintiffs from judgment entered 4 December 2000 by Judge Russell G. Walker, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 9 January 2002.

Law Offices of William F. Maready, by William F. Maready and Celie B. Richardson, for plaintiff-appellants.

Sharpless & Stavola, P.A., by Joseph M. Stavola and Joseph P. Booth, III, for defendant-appellees.

HUDSON, Judge.

Plaintiffs appeal two Orders and Judgments entered in favor of defendants Schatzman & Associates, L.L.C. ("defendant"), a private investigative and security service company, and Philip L. King ("King"). The court granted defendant's motion for summary judgment on plaintiffs' claims and on defendant's counterclaim for breach of contract. The court also granted King's motion for summary judgment on plaintiffs' claims against him. We briefly review the facts and procedural history before addressing the sole issue on appeal.

In April 1986, Lucy Kolb ("Lucy"), the daughter of Margaret Kolb ("Margaret"), married Bassam Zantout ("Bassam"), a citizen of Lebanon, and resided with him in North Carolina until November 1996. The couple had three children who maintained both American

and Lebanese citizenship. Bassam found a job in Dubai, UAE, and the Zantouts and their three children moved there in 1996. When Bassam lost his job, the Zantouts returned to North Carolina in the summer of 1998 and then decided to move to Lebanon in October 1998. Lucy did not have citizenship in Lebanon, where laws required that she obtain her husband's assistance in maintaining her visa so that she could remain in the country. Soon after they arrived in Lebanon, the Zantouts' relationship deteriorated and Bassam became increasingly abusive to Lucy and their three children. Bassam refused to renew Lucy's visa and informed her that she would be expelled from the country on 2 March 1999, but that their children would stay with him.

In February 1999, Lucy escaped with the children from the Zantout family home and sought help at the American embassy in Beirut, Lebanon. Lucy discovered that Bassam had placed a block on Lucy's and the children's passports. Lucy contacted her mother, Margaret, and asked her to help them leave Lebanon. Margaret, fearing that Bassam was tapping her phone, contacted William Schatzman at Schatzman & Associates, L.L.C. When Mr. Schatzman came to her home to check her phone for a wire tap, Margaret explained Lucy's problem to him, and he indicated that his company could help. Margaret and defendant entered into an oral agreement, whereby she agreed to pay defendant a $15,000 retainer plus additional fees and expenses. Defendant agreed to retain King, a former FBI Agent and independent contractor, to "provide assistance to [Lucy and the children] in obtaining exit from Lebanon, if possible."

King found Lucy and the children in Lebanon, and after analyzing possible escape scenarios, decided to take them out of Lebanon through Syria on 1 March 1999. King hired drivers to take him, Lucy, and the children into Syria. They had difficulties at the border, but were allowed to enter. However, when they later attempted to exit Syria, they were stopped because their passports had not been properly stamped at the Lebanon-Syria border. They were not allowed to leave Syria for most of March 1999. During this time, Margaret became increasingly anxious that Lucy and the children would not return home to North Carolina. She retained Michael Taylor of American International Security Corporation in Boston for $155,000 to get Lucy and the children out of Syria. Taylor found King, Lucy, and the children, but encountered difficulty extricating them from Syria. Finally, on 31 March 1999, a Syrian judge deported King, Lucy, and the children, and they flew from Damascus, Syria, to Germany, and then to Greensboro, North Carolina on 1 April 1999.

Margaret and Lucy filed this lawsuit on 15 October 1999. Margaret alleged claims against defendant for (1) negligence, (2) breach of contract, (3) fraud, (4) negligent infliction of emotional distress, and (5) unfair and deceptive trade practices. Margaret alleged claims against King for (1) breach of contract, (2) negligence, and (3) negligent infliction of emotional distress. Lucy alleged claims against defendant and King for negligent infliction of emotional distress. Defendant answered denying all liability, asserting eleven affirmative defenses, and alleging as counterclaims: (1) breach of express contract against Margaret, (2) *quantum meruit* against Margaret, and (3) *quantum meruit* against Lucy. King answered denying all liability and asserting fourteen affirmative defenses. After discovery and preliminary proceedings, the parties argued their dispositive motions before the trial court on 14 November 2000.

The trial court granted defendant's motion for summary judgment on all of both plaintiffs' claims against defendant, and on defendant's counterclaim against Margaret for breach of contract. The court also allowed King's motion for summary judgment as to all claims of both plaintiffs against him. The court entered judgment against Margaret for $47,662.41 plus interest, equal to the balance that she owed defendant under the oral contract, and dismissed the *quantum meruit* claims as moot. Both plaintiffs gave notice of appeal of all rulings.

However, the appellants' brief argues only that the money judgment against Margaret was erroneous because it amounted to enforcement of an illegal contract. All other issues raised by plaintiffs are deemed abandoned. Therefore, pursuant to Rule 10 of the North Carolina Rules of Appellate Procedure (1999), our review is limited to Margaret's appeal of the summary judgment against her on defendant's counterclaim for breach of contract.

On appeal, "[i]t is well established that the standard of review of the grant of a motion for summary judgment requires a two-part analysis of whether, '(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.' " *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000) (citing *Gaunt v. Pittaway*, 139 N.C. App. 778, 784, 534 S.E.2d 660, 664 (2000), *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 261 (2001)), *aff'd*, 353 N.C. 445, 545 S.E.2d 210 (2001); *see also* N.C.R. Civ. Proc. 56 (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). The burden of proof is on the party moving for summary judgment, here the defendant Schatzman & Associates, L.L.C., to show that summary judgment is appropriate. *See Adams v. Jefferson-Pilot Life Ins. Co.*, 148 N.C. App. —, —, 558 S.E.2d 504, 506 (2002). Additionally, the record must be reviewed in the light most favorable to the non-moving party. *See id.*

We first examine whether the record presents any genuine issues of material fact. In both Margaret's complaint and defendant's counterclaims, the parties alleged that there was a contract between Margaret and defendant. In her "Second Claim for Relief: Breach of Contract," Margaret contended:

> 37. In about February 1999, Margaret (plaintiff) entered into an agreement with defendant whereby defendant agreed to extricate Lucy and her children from Beirut, Lebanon and return them to the United States in return for a fee to be paid by Margaret.
>
> 38. Margaret paid the fee required by defendant in accordance with her agreement with defendant.
>
> 39. Defendant failed to return Lucy and the children to the United States and instead, caused them to be detained in Syria.
>
> 40. Defendant's failure to return Lucy and the children to the United States constitutes a breach of its contract with Margaret.

In its "First Counterclaim: Breach of Express Contract," defendant contended:

> 29. By mutual agreement and assent of Ms. Margaret Kolb on behalf o[f] herself, and Mr. Bill Schatzman on behalf of Schatzman & Associates, LLC, on or about February 15, 1999 Ms. Kolb entered into a[n] agreement with Schatzman & Associates, LLC, whereby Schatzman & Associates, LLC, would undertake to assist Ms. Zantout and the Children obtain exit from Lebanon, to include, among other things, one or more of the following tasks ("Contract"):

a. Travel to Beirut, Lebanon, and locate Ms. Lucy Kolb Zantout and the Children;

b. After locating Ms. Zantout and the Children, assist Ms. Zantout and the Children obtain exit from Lebanon before Ms. Zantout's Lebanese travel visa expired sometime during late February, 1999;

c. Obtain or otherwise purchase whatever goods or services were reasonably necessary to assist in the task of helping Ms. Zantout and the Children obtain exit from Lebanon; and

d. Take whatever steps or measures were determined to be reasonably necessary in order to assist Ms. Zantout and the Children in returning from the Middle East to Winston Salem, North Carolina.

Defendant also contended that the parties agreed upon the rates for services at $75.00 per hour for all services not requiring travel outside of the United States, and $750.00 per day plus costs and expenses for all services provided outside of the United States. Margaret admitted that she agreed to the fee schedule asserted by defendant, but that "she agreed to pay the fees stated in this paragraph if defendant met its obligation under her agreement with defendant." The remaining issue is whether defendant completed its portion of the contract with Margaret, thus entitling it to payment.

In her deposition, Margaret testified concerning the oral contract made with defendant:

> Q. Sure. You've told me that Mr. Schatzman made no guaranties to you with respect to when, if at all, Lucy and the children would be back in Forsyth County, correct?
>
> A. Yes. He—he didn't say he could guarantee it, because he wasn't there to make the contacts himself.
>
> Q. And my question to you, then, is, Isn't it fair to say, then, that Mr. Schatzman had told you that Mr. King would go over there and do the best that he could to try and get Lucy and the grandchildren back in—back to Forsyth County as soon as possible, and that's what they would try and do?
>
> A. Yes. That's what they wanted to do, and that's what he told me and that King was very positive in the fact that this would—

was going to work and he had the contacts and it would be no problem.

As indicated by her own testimony, Margaret acknowledged that defendant never promised to get Lucy and her children out of Lebanon, only that defendant and its associate, King, would do the best they could to extricate them. Margaret also acknowledged that defendant and King devised several plans to extricate the family and eventually left Lebanon through the Syria border.

Thus, we conclude that there is no genuine dispute that Margaret entered into a contract with defendant, whereby defendant agreed to attempt to get Lucy and her children out of Lebanon and into the United States, and Margaret agreed to pay a $15,000 retainer fee, hourly and daily rates depending on where the services were provided, plus fees and costs. Margaret paid the retainer fee, and defendant attempted to extricate Lucy and her children from Lebanon. Because defendant performed as agreed under the oral contract, and Margaret did not, the trial court properly allowed defendant's motion for summary judgment on its counterclaim for breach of express contract.

However, Margaret contends that the contract with defendant, if any, was illegal and therefore unenforceable. Defendant argues that the issue of illegality is not properly before us, because it was not raised in the trial court. In that the plaintiff's Reply to the Counterclaims specifically alleges that illegal acts were carried out, we disagree. "Generally, contracts which are illegal are unenforceable." *Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 545, 503 S.E.2d 401, 405 (1998), *disc. rev. improv. allowed*, 351 N.C. 41, 519 S.E.2d 314 (1999). Here, despite the allegations in her Reply, we find no evidence that Margaret and defendant entered into an illegal contract. Margaret testified during her deposition about possible actions that might be taken by defendant's agents, as follows:

> Q. And tell me a little bit about this—You had said that it was your understanding that Mr. Schatzman had instructed Phil King not to do anything illegal himself, I think, is the way you described it.
>
> A. Uh-huh.
>
> Q. What is your understanding of what those instructions were about?

A. Well, obviously, with the children having a block on their passports, however they got out would have to be illegal-

Q. And you knew that?

A. —perhaps, although the embassy issued them new passports. But those new passports, therefore, had no entry stamps into Lebanon for the children. They were just empty passports.

But that King himself was not to do anything illegal that would get King into trouble, that he could arrange, and other people would do the dirty work, should I say, and King would keep his hands clean.

The contract between Margaret and defendant required defendant to attempt to extricate Lucy and her three children from Lebanon and return them to the United States. There was no evidence that the contract, when entered, provided for illegal activity, and no evidence beyond speculation that defendant's agents broke any laws attempting to help Lucy and the children. Eventually, Lucy and the children were deported from Syria by a Syrian judge, apparently in accordance with Syrian law. Even though Margaret states that "obviously, with the children having a block on their passports, however they got out would have to be illegal," the children and Lucy left Lebanon through a border checkpoint with Syria, Syrian officials inspected the family's passports and allowed them to enter the country. The record reflects that they left Lebanon on 1 March 1999, when Lucy's visa had not yet expired, and the record does not reflect what, if any, illegal acts were purportedly committed. Margaret has not shown that she contracted for the performance of illegal acts in entering the contract with defendant to attempt to extricate Lucy and the children. We conclude that the record does not establish that the contract between defendant and Margaret was illegal or unenforceable.

In sum, we find that the trial court properly granted defendant's motion for summary judgment on its counterclaim for breach of express contract against Margaret and that the underlying contract was legal and enforceable.

Affirmed.

Judges WYNN and THOMAS concur.

STATE OF NORTH CAROLINA v. RUSSELL DEAN HUNT

No. COA01-6

(Filed 7 May 2002)

Search and Seizure— warrant—reports of heavy traffic at residence—drugs not observed—affidavit insufficient

The trial court erred in a controlled substance prosecution by not granting defendant's motion to suppress evidence seized pursuant to a search warrant where the affiant stated in his application that drug trafficking was occurring at defendant's premises based on citizen complaints and officer verification of heavy vehicular traffic with short visits, there was no mention of anyone seeing drugs on the premises, and the affidavit was insufficient to establish probable cause.

Appeal by defendant from judgment entered 15 August 2000 by Judge Robert F. Floyd, Jr., in Robeson County Superior Court. Heard in the Court of Appeals 27 November 2001.

Attorney General Roy Cooper, by Assistant Attorney General Grady L. Balentine, Jr., for the State.

Public Defender Angus B. Thompson, II, by Assistant Public Defender Ronald H. Foxworth, for defendant appellant.

McCULLOUGH, Judge.

Defendant Russell Dean Hunt pled guilty to felonious possession with intent to sell and deliver a controlled substance and misdemeanor possession of drug paraphernalia on 15 August 2000. He was sentenced to a minimum term of 9 months and a maximum term of 11 months.

Defendant was arrested on or about 23 September 1997 by Sergeant J. W. Jacobs of the Robeson County Sheriff's Department. Sergeant Jacobs had gone to the magistrate the morning of the 23rd and submitted an affidavit to establish probable cause for a search warrant for defendant's premises. The magistrate found from the affidavit that probable cause existed and issued the search warrant.

Defendant filed a motion to suppress challenging the search warrant on 30 January 1998. In his motion, defendant claimed that the affidavit submitted by Sergeant Jacobs was insufficient to establish

probable cause. The hearing was not held until 11 July 2000 during the 11 July 2000 Session of the Robeson County Superior Court before the Honorable Robert F. Floyd, Jr. In the meantime, defendant had been indicted on the above charges on 8 November 1999.

At the motion to suppress hearing, Sergeant Jacobs testified as to his affidavit in support of probable cause. The following affidavit was read into evidence:

Q. Officer Jacobs, if you would, starting at the beginning of that probable cause affidavit that you have in your hand there, read that through the close of the information you provided pursuant to the probable cause.

A. Everything after the "probable cause"; correct?

Q. That's correct.

A. "The applicant swears to the following facts to establish probable cause for the issuance of a search warrant: I, J.W. Jacobs, am a drug agent with the Robeson County Sheriff's Department Drug Enforcement Division. . . . Continuation page attached to search warrant application by Drug Agent J.W. Jacobs this date, September 23, 1997, to search the premises of Tyrone Hunt, Indian male, Russell Hunt, Indian male, Roger Dale Hunt, Indian male, John Doe, Indian male, also known as Fatboy, Jeff Locklear, Indian male. The Robeson County Sheriff's Department Drug Enforcement Division has been receiving constant complaints from concerned citizens in the Jamestown community which is located near Lumberton in Robeson County reference the illegal sale and distribution of controlled substances at the dwelling of the Defendants as described above. This dwelling is well-known as Pookie's Old Place. The citizen complaints advise that there is [sic] a lot of vehicles going to and from this dwelling. The vehicles respectively only remain at the residence for a very short period of time and then will leave. When the vehicles pull down the dirt road that leads to this dwelling, the vehicle will stop in front of the single-wide mobile home. Either the passenger or the driver of the vehicle will exit and go the (*sic*) front door of the dwelling. Sometimes someone will meet 'customer' "—"customer" in quotation marks—"at car door. The passenger or the driver will talk to someone at this dwelling for about three to five minutes and the drug

> transaction will take place. The driver or the passenger will then leave after the drug transaction has taken place. I, Drug Agent J.W. Jacobs, with the Robeson County Sheriff's Department Drug Enforcement Division observed this dwelling for vehicular traffic on Monday, September 22, 1997. On this date I observed numerous vehicles pull down the dirt road that leads to this dwelling. Someone would exit the vehicle. Someone would usually go into the dwelling, stay about five to eight minutes, and then the vehicle would leave. From my training and experience as a drug agent with the Robeson County Sheriff's Department Drug Enforcement Division, it is of my opinion that from the numerous citizen complaints versus the heavy amount of vehicular traffic observed at this dwelling, that this concludes to be evidence of drug trafficking from this dwelling. Continuation page attached to the search warrant application by Drug Agent J.W. Jacobs, this date, September 23, 1997, to search the premises of Russell Hunt, Indian male, Roger Dale Hunt, Indian male, Tyrone Hunt, Indian male, Jeff Locklear, Indian male, John Doe, Indian male, in Robeson County, North Carolina.

Sergeant Jacobs also testified that he had been a law enforcement officer for ten years prior to October 1997, had aided in over 500 arrests, and had assisted state and federal agencies in surveillance and arrests in substance abuse cases. This information was also in Sergeant Jacobs' affidavit.

The trial court noted that citizens' complaints, by themselves, "would not be enough to rely on" in establishing probable cause for a search warrant. Thus, the trial court looked to other evidence to bolster the complaints. The trial court looked to see "if any investigation or further verified complaint, reliable informant was used, or if the officer himself made any personal investigation."

In ruling that the affidavit did provide probable cause, the trial court reasoned:

> It's noted that the citizens' complaints, there's not a time indication as to the citizens' complaints except it says "constant complaints" of concerned citizens. [Sergeant Jacobs] also went out on September 22nd, '97, the day before the search was done, the day before procuring the search warrant, and made the observations as set forth—specifically, he said he verified what the citizens had complained of, observed numerous vehicles pull down the dirt

road that leads to the dwelling, someone would exit the vehicle, someone would usually go into the dwelling and stay about five to eight minutes, and then the vehicle would leave. And therefore, that is not a conclusory statement. It is a statement of fact of what he did. And based upon his factual statement, he made a conclusion based on his experience and his observation as to what he thought was evidence to support drug trafficking at the dwelling. That, taken together with the citizens' complaints, I think he verified the citizens' complaints, and the Court denies the motion to suppress.

The trial court held the citizens' complaints that had been verified by a law enforcement officer, combined with his belief that the activity was drug related due his law enforcement experience, constituted probable cause to search the residence for drugs. Defendant appeals from this ruling.

Defendant's sole assignment of error is that the trial court erred in denying defendant's motion to suppress evidence obtained pursuant to a search warrant issued by a neutral and detached magistrate based on facts insufficient to support the issuance of the search warrant.

I.

Defendant contends that the trial court erred in denying his motion to suppress evidence because the affidavit supporting the application for the search warrant was insufficient to establish probable cause. Defendant claims the affidavit was insufficient because it contained unsupported conclusory statements by the affiant. The affiant based his conclusion that drug trafficking was occurring at the dwelling on complaints of concerned, anonymous citizens of heavy vehicular traffic with very short visits, officer verification by surveillance thereof, and his lengthy experience as a drug agent.

"A search warrant may be issued only upon a finding of probable cause for the search. This means a reasonable ground to believe that the proposed search will reveal the presence upon the premises to be searched of the object sought and that such object will aid in the apprehension or conviction of the offender." *State v. Crisp*, 19 N.C. App. 456, 458, 199 S.E.2d 155, 156 (1973).

In *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984), North Carolina adopted the "totality of the circumstances" test for examining whether information properly before the magistrate provides a

sufficient basis for finding probable cause and issuing a search warrant. The standard, established by the United States Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 76 L. Ed. 2d 527, *reh'g denied*, 463 U.S. 1237, 77 L. Ed. 2d 1453 (1983), is as follows:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Gates, 462 U.S. at 238-39, 76 L. Ed. 2d at 548; *Arrington*, 311 N.C. at 638, 319 S.E.2d at 257-58. When reviewing a magistrate's determination of probable cause, this Court must pay great deference and sustain the magistrate's determination if there existed a substantial basis for the magistrate to conclude that articles searched for were probably present. *Id.*

Defendant contends that the facts in this case are similar to the facts in *Crisp*, 19 N.C. App. 456, 199 S.E.2d 155. We agree. The *Crisp* case was controlled by *State v. Campbell*, 282 N.C. 125, 191 S.E.2d 752 (1972). These cases hold that affidavits which implicate the premises to be searched solely as a conclusion of the affiant are fatally defective. *Crisp* deals directly with an affidavit somewhat similar with the one before us in that it relies on the affiant's surveillance of heavy vehicular traffic.

In *Crisp*, the officers obtained a search warrant for defendant's residence because they believed drugs were contained therein. During the subsequent search, the officers found marijuana in the house. Defendant sought to suppress the evidence on the grounds that the affidavit was insufficient to justify the issuance of a search warrant. The affidavit read, in pertinent part:

> "The facts which establish probable cause for the issuance of a search warrant are as follows: on 12-19-72 Deputy Roy Chaney, Union County Sheriff Dept. stopped Dana Michael Conlon for improper Equopment, [*sic*] to wit: no lights on vehicle, and after placing Dana Michael Conlon in his, Deputy Chaney's vehicle, he smelled the strong odor of what he believes to be Marijuana. Upon searching Dana M. Conlon, deputy Chaney found over five

> grams of Marijuana, and upon searching the vehicle that Dana M. Conlon was operating, deputy Chaney found over five more grams of Marijuana. Further investigation by deputy Chaney revealed that Dana M. Conlon has been living at the above location for the passed [*sic*] three or four months. During the passed [*sic*] three or four months deputy Chaney has been observing heavy traffic eterning [*sic*] and leaving the above described location. Deputy Chaney states also, that various vehicles, cars and trucks, are in and out at various times of the day and night. But mostly at night. After stopping Dana M. Conlon and finding Controlled Substances on his person and in his vehicle, and after personally observing the various traffic in and out of the above described location, it is the belief of this affiant that drugs are being contained in the above location."

Crisp, 19 N.C. App. at 457-58, 199 S.E.2d at 156. The Court found the affidavit to be fatally defective because it was devoid of underlying circumstances from which probable cause could be determined. Indeed, the Court said:

> The affidavit implicates those premises solely as a conclusion of the affiant. Nowhere in the affidavit is there any statement that marijuana was ever possessed or sold in or about the dwelling to be searched. Nowhere in the affidavit are any underlying circumstances detailed from which the magistrate could reasonably conclude that the proposed search would reveal the presence of any illegal drug in the dwelling. The inference the State seeks to draw from the contents of this affidavit does not reasonably arise from the facts alleged. Nothing in the affidavit in the instant case affords a reasonable basis upon which the issuing magistrate could conclude that any illegal possession or sale of narcotic drugs had occurred or was occurring on the premises to be searched.

Crisp, 19 N.C. App. at 458-59, 199 S.E.2d at 156; *State v. Campbell*, 282 N.C. 125, 130, 191 S.E.2d 752, 757 (1972). Thus, *Crisp* stands for the proposition that unusual traffic at a residence may not, in itself, constitute probable cause to justify the issuance of a warrant authorizing a search of that residence for drugs. *See State v. Ford*, 71 N.C. App. 748, 752, 323 S.E.2d 358, 361, *appeal dismissed, disc. review denied*, 313 N.C. 511, 329 S.E.2d 397 (1985). *Ford*, relying on *Crisp*, and decided subsequent to *Gates*, held that unusual traffic at a residence in itself does not constitute probable cause.

The very same can be said of the affidavit in this case as was said by the Court of the *Crisp* affidavit. All that the affidavit offers are complaints from citizens suspicious of drug activity in a nearby house. There is no mention of anyone ever seeing drugs on the premises. The citizens only reported heavy vehicular traffic to the house. The officer verified the traffic. His verification, as the trial court found, was not a conclusion. What was a conclusion was the determination of the officer, based on his experience and the vehicular traffic, that drug trafficking was taking place. "The inference the State seeks to draw from the contents of this affidavit does not reasonably arise from the facts alleged." *Crisp*, 19 N.C. App. at 458, 199 S.E.2d at 156.

We note that this Court has ruled that probable cause may be established through timely and detailed information by an unfamiliar confidential informant when some of that information has been verified. *State v. Barnhardt*, 92 N.C. App. 94, 373 S.E.2d 461, *disc. review denied*, 323 N.C. 626, 374 S.E.2d 593 (1988). The *Barnhardt* case also held that "[t]he experience and expertise of the affiant officer may be taken into account in the probable cause determination, so long as the officer can justify his belief to an objective third party." *Barnhardt*, 92 N.C. App. at 97, 373 S.E.2d at 462.

The informant in *Barnhardt* had seen drugs inside the house and could describe them. He gave a detailed description of the outside of the house and the suspect. He also gave a detailed description of his knowledge of drugs. The officers verified the informant's description of the house and the identity of the suspect. These facts, along with the officer's experience, were held to be a substantial basis for finding probable cause.

The facts in the present case do not rise to the level of those in *Barnhardt*. All the citizen informants report is the traffic; there was nothing else to verify. No one ever saw drugs on the premises.

We conclude that defendant's motion to suppress should have been allowed.

Reversed and remanded.

Judges GREENE and CAMPBELL concur.

GREGORY BRET BATDORFF, PLAINTIFF-APPELLANT v. NORTH CAROLINA STATE BOARD OF ELECTIONS; CITIZENS FOR TRUTH IN ELECTIONS, A POLITICAL COMMITTEE; AND WAKE COUNTY BOARD OF EDUCATION, DEFENDANT-APPELLEES

No. COA01-304

(Filed 7 May 2002)

1. **Injunction— mandamus to compel Board investigation— quasi-judicial action—mandamus will not lie**

The trial court properly granted a Rule 12(b)(6) dismissal of a complaint seeking a mandatory injunction to compel the Board of Elections to conduct an evidentiary hearing on a complaint letter. A mandatory injunction is identical in purpose and function with a writ of mandamus, which cannot be invoked to control the discretion of a board when the act complained of is quasi-judicial, absent abuse of discretion. The Board of Elections is a quasi-judicial agency, it complied with its statutory duty and investigated this matter to the extent it deemed reasonably necessary, and there was no abuse of discretion.

2. **Elections— mandamus—action already taken in effect**

The trial court did not err by granting a Rule 12(b(6) dismissal of a complaint seeking an injunction to compel the Board of Elections to require a political committee "to file a full complete and accurate report" where the Board investigated and determined that no further investigation was required. The Board, in effect, determined that the reports were full, complete, and accurate.

Judge WALKER concurs.

Appeal by plaintiff from order dated 30 January 2001 by Judge James C. Spencer, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 9 January 2002.

Stam, Fordham & Danchi, P.A., by Paul Stam, for plaintiff-appellant.

Attorney General Roy Cooper, by Susan K. Nichols, Special Deputy Attorney General, for the State.

Tharrington Smith, L.L.P., by Michael Crowell, for defendant-appellee, Citizens for Truth in Elections.

McGEE, Judge.

This action arises from the 1999 Cary town election. Four citizens formed a political committee, Citizens for Truth in Elections (Citizens for Truth), to support "slow growth" candidates in the Cary town elections. Gregory Bret Batdorff (plaintiff), a registered voter in Wake County, sent a letter of complaint dated 12 May 2000 to the North Carolina State Board of Elections (Board of Elections) alleging that Citizens for Truth had violated state campaign finance laws. Specifically, plaintiff alleged three violations: (1) contributions were made to Citizens for Truth by Craig Davis in the name of another person, in violation of N.C. Gen. Stat. § 163-278.14 (stating that "[n]o individual . . . shall make any contribution . . . in the name of another"), (2) contributions were made to Citizens for Truth by Roger Perry in the name of others, in violation of N.C. Gen. Stat. § 163-278.14, and (3) Citizens for Truth failed to report in-kind contributions it made to three candidates in the Cary City Council elections in violation of N.C. Gen. Stat. § 163-278.11(b) (stating that a treasurer's statement "shall reflect anything of value paid for or contributed by any person or individual, both as a contribution and expenditure"). Plaintiff's letter of complaint included approximately 130 pages of exhibits.

The Board of Elections investigated plaintiff's letter of complaint, including review of the exhibits submitted by plaintiff. The Board of Elections obtained affidavits from the four members of Citizens for Truth, in which they affirmed there had been no coordination of campaigns with Citizens for Truth, nor any contributions beyond those reported in the campaign finance reports.

The Board of Elections also contacted Craig Davis for information regarding his contributions. In a letter dated 5 July 2000, Craig Davis stated that he made contributions in the names of his children. Citizens for Truth reimbursed the Board of Elections in the amount of $7,000 for the contributions Mr. Davis made in the names of his children.

Following a meeting to discuss plaintiff's letter of complaint, the Board of Elections issued a decision on 18 September 2000, stating that:

> THIS MATTER came on for hearing before the [Board of Elections] on July 19, 2000, on a complaint filed by Paul Stam, on behalf of Gregory Batdorff alleging violations of election finance laws pertaining to a political committee known as

[Citizens for Truth], citing various statutes . . . and requesting an investigation[.]

Paul Stam, representing Gregory Batdorff, appeared before the Board in support of his complaint. Michael Crowell, representing [Citizens for Truth], appeared on behalf of its members[.]

After consideration of the printed and oral information provided, the Chairman stated that the information was not sufficient evidence of violations of election laws to justify the request for a hearing, and upon motion duly made and seconded, the Board voted unanimously to deny the request.

Plaintiff filed a complaint in Wake County Superior Court dated 17 August 2000. In his complaint, plaintiff alleged in part that:

7. On or before July 19, 2000 the [Board of Elections] did, through its investigators, obtain some written information[.]

8. On July 19, 2000 the [Board of Elections] met and determined not to conduct an evidentiary hearing on plaintiff's complaint.

9. The documentary evidence before the [Board of Elections], together with evidence to be obtained by discovery in this action, demonstrates a reasonable probability that [Citizens for Truth] received (but did not so report) contributions in the name of another and in excess of the legal limitations in apparent violation of G.S. 163-278.14 and 168-278.13.

10. The documentary evidence before the [Board of Elections], together with evidence to be obtained by discovery in this action, demonstrates a reasonable probability that [Citizens for Truth] expended (but did not so report) funds as a coordinated campaign expenditure with Glen D. Lang in apparent violation of G.S. 163.278.11(b).

Plaintiff requested as relief that the trial court issue an injunction requiring that (1) the Board of Elections conduct an evidentiary hearing on his letter of complaint dated 12 May 2000 and (2) Citizens for Truth file "a full complete and accurate report required by statute as the facts may hereafter be determined." Plaintiff also asked the trial court to declare the last clause of N.C. Gen. Stat. § 163-278.14 unconstitutional. This declaratory judgment request was later dismissed by stipulation pursuant to a partial settlement agreement.

The Board of Elections and Citizens for Truth filed answers and motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

Following a hearing, the trial court dismissed plaintiff's claim with prejudice pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) for failure to state a claim upon which relief can be granted in an order dated 30 January 2001. Plaintiff appeals this order.

Plaintiff assigns as error the trial court's dismissal of his claim and argues that his complaint "provided a factual basis" for the equitable remedies requested. A motion to dismiss for failure to state a claim tests the legal sufficiency of a complaint. *Fuller v. Easley*, 145 N.C. App. 391, 397-98, 553 S.E.2d 43, 48 (2001) (citing N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2000)). When ruling on a motion to dismiss, "the trial court must take the complaint's allegation[s] as true and determine whether they 'are sufficient to state a claim upon which relief may be granted under some legal theory.' " *Fuller*, 145 N.C. App. at 397-98, 553 S.E.2d at 48 (quoting *Taylor v. Taylor*, 143 N.C. App. 664, 668, 547 S.E.2d 161, 164 (2001)).

A. Injunction against the Board of Elections

[1] Plaintiff first requests in his complaint that the trial court issue an injunction requiring the Board of Elections to conduct an evidentiary hearing on plaintiff's letter of complaint dated 12 May 2000.

" 'A mandatory injunction, when issued to compel a board or public official to perform a duty imposed by law, is identical in its function and purpose with that of a writ of *mandamus*.' " *Ponder v. Joslin*, 262 N.C. 496, 504, 138 S.E.2d 143, 149 (1964) (quoting *Hospital v. Wilmington*, 235 N.C. 597, 601, 70 S.E.2d 833, 836 (1952)). "A writ of mandamus is 'an order from a court of competent jurisdiction to a board, . . . commanding the performance of a specified official duty imposed by law.' " *Carter v. N.C. State Bd. for Professional Engineers*, 86 N.C. App. 308, 314, 357 S.E.2d 705, 709 (1987) (quoting *Sutton v. Figgatt*, 280 N.C. 89, 93, 185 S.E.2d 97, 99 (1971)). "Mandamus will lie to require a board or tribunal to exercise its discretion, but not to direct or compel the manner in which such discretion or judgment should be exercised." *Carter*, 86 N.C. App. at 315, 357 S.E.2d at 709. Thus, "*mandamus* cannot be invoked to control the exercise of discretion of a board, officer, or court when the act complained of is judicial or *quasi*-judicial, unless it clearly appears that

there has been an abuse of discretion." *Ponder*, 262 N.C. at 504, 138 S.E.2d at 149.

Our General Statutes declare that the Board of Elections "shall be and remain an independent regulatory and quasi-judicial agency[.]" N.C. Gen. Stat. § 163-28 (1999). The Board of Elections has the "duty and power"

> (7) To make investigations *to the extent the Board deems necessary* with respect to statements filed under the provisions of this Article and with respect to alleged failure to file any statement required under the provisions of this Article, and, upon complaint under oath by any registered voter, with respect to alleged violations of any part of this Article; and
>
> (8) After investigation, to report apparent violations by candidates, political committees, referendum committees, individuals or persons to the proper district attorney as provided in G.S. 163-278.27.

N.C. Gen. Stat. § 163-278.22 (1999) (emphasis added). *See also* N.C. Gen. Stat. § 163-22(d) (1999) ("The State Board of Elections shall investigate when necessary or advisable . . . ."). A North Carolina registered voter may request the superior court "to issue injunctions or grant any other equitable relief appropriate to enforce the provisions of this Article[.]" N.C. Gen. Stat. § 163-278.28(a) (1999).

Plaintiff alleges in his complaint that there is a "reasonable probability" of campaign finance violations by Citizens for Truth; however, plaintiff does not dispute that the Board of Elections complied with the applicable statute by investigating the charges levied by plaintiff and exercising its judgment in unanimously determining no further action was required. The record establishes that the Board of Elections did in fact comply with its statutory duty. Upon receipt of plaintiff's 12 May 2000 letter of complaint, the Board of Elections investigated the matter by considering plaintiff's exhibits, as well as other evidence submitted by members of Citizens for Truth, and oral statements made during the 19 July 2000 meeting. We agree with the Board of Elections that it "has already conducted an investigation in this matter to the extent it reasonably and unanimously deemed necessary. [The Board of Elections] clearly was acting in its investigatory and quasi-judicial capacity when it determined that there was not a sufficient basis for further investigation."

Additionally, plaintiff does not allege in his complaint that the Board of Elections abused its discretion in not investigating the matter further, nor do we find an abuse of discretion from our review of the record. Plaintiff states in his brief that the evidence in the record "suggests it was a manifest abuse of discretion for the [Board of Elections] not to have held an evidentiary hearing in the first place" because the evidence shows a reasonable probability of campaign finance violations. We disagree. The record shows the Board of Elections complied with its statutory duty and it is not the role of the trial court or our Court to direct the Board of Elections in what manner to exercise its discretion.

As Citizens for Truth states in its brief to our Court,

> [t]he injunctive power of the court . . . would be relevant to this dispute if the [Board of Elections] had failed to consider [plaintiff's] complaint at all. . . . The statute does not, however, give the court the power to compel a different decision from the [Board of Elections] once it has exercised its duty, which is exactly what [plaintiff] seeks in this lawsuit.

By requesting an injunction be issued to compel the Board of Elections to investigate further, a matter the Board of Elections has already deemed unnecessary, plaintiff has failed to state a cause of action.

B. Injunction against Citizens for Truth

[2] Plaintiff also requests in his complaint that the trial court issue an injunction requiring Citizens for Truth "to file a full complete and accurate report required by statute as the facts may hereafter be determined."

As previously stated, the Board of Elections properly fulfilled its statutory duty and, in its discretion, determined that no further investigation into plaintiff's letter of complaint was required. The Board of Elections therefore, in effect, determined that the reports filed by Citizens for Truth were full, complete and accurate.

Plaintiff has failed to state a claim by requesting an injunction be issued to order Citizens for Truth to file an additional campaign finance report because the Board of Elections, in its discretion, determined that action was unnecessary.

Considering all the allegations in plaintiff's complaint as true, plaintiff has failed to state a claim upon which relief can be granted.

The order of the trial court dismissing plaintiff's complaint for failure to state a claim upon which relief can be granted is affirmed.

Affirmed.

Judge JOHN concurs.

Judge WALKER concurs with a separate opinion.

WALKER, Judge, concurring.

I concur with the majority opinion and write separately to express my concern with the Board's decision wherein it recites, "After consideration of the printed and oral information provided, the Chairman stated that the information was not sufficient evidence of violations of election laws to justify the request for a hearing . . . ." The statutes do not confer upon the Chairman the authority to make this determination. However, it is clear from the decision that this matter was properly passed on by the Board who unanimously agreed with the Chairman.

Finally, I disagree with the statement in the majority opinion that "[t]he Board of Elections therefore, in effect, determined that the reports filed by Citizens for Truth were full, complete and accurate." It appears from the Board's decision that it merely found there was not sufficient evidence of election law violations to warrant further investigation and hearing.

DEBORAH KAY SOWERS v. CHARLES LEE TOLIVER

No. COA01-273

(Filed 7 May 2002)

1. Child Support, Custody, and Visitation— support—visitation rights separate from financial support

The trial court abused its discretion by terminating defendant father's obligation to pay child support even though plaintiff mother went against the trial court's order and allowed the minor child to determine when she wanted to see defendant, because: (1) the duty to provide financial support is independent of visita-

tion rights and one may not be made contingent upon the other; and (2) establishment of child support is guided by concern for the best interests of the child and not by a desire to punish a disobedient parent.

2. Contempt— civil—willfulness

The trial court erred by holding plaintiff mother in civil contempt of court based on an alleged willful interference with or refusal to allow defendant father visitation with the parties' minor child because although it appears the evidence supports the findings of fact made by the trial court, there is no finding as to whether plaintiff's behavior was willful.

3. Trials— judge's expression of opinion—trial without jury

Although plaintiff contends the trial court erred by entering the child support order in its entirety when the trial judge's comments at the beginning and end of the evidence allegedly demonstrated bias and prejudice against plaintiff and resulted in an unfair hearing, there was no jury present to be influenced and the judge merely reacted to the evidence, and the proscription against the expression of opinion by the trial judge does not attach in a trial without a jury.

Judge GREENE concurs.

Appeal by plaintiff from judgment entered 8 August 2000 by Judge Jack E. Klass in Davidson County District Court. Heard in the Court of Appeals 19 February 2002.

Jon W. Myers for plaintiff-appellant.

No brief filed for defendant-appellee.

THOMAS, Judge.

Plaintiff, Deborah Kay Sowers, appeals from an order holding her in contempt of court, terminating the child support obligation of defendant, Charles Lee Toliver, and requiring payments by her of medical expenses and attorney fees. Although plaintiff did not adhere to the North Carolina Rules of Appellate Procedure, we vacate the trial court's order in part and reverse and remand in part.

The procedural history of this case is as follows: On 15 July 1998, plaintiff filed a motion in the cause to modify an earlier custody order. She asked the trial court to change her child's visitation with

defendant so that it would occur only at the child's discretion. The child was eleven years old at the time. To assist in making a determination, the trial court ordered two psychological evaluations of the child, to be equally paid by the parties. Defendant then filed a motion for custody.

The trial court denied plaintiff's motion for modification of visitation as well as defendant's motion for custody. The trial court further ordered the child and the parents into counseling, with the child's counseling to be without either plaintiff or defendant present. Visitation was ordered to resume as previously scheduled.

Visitation, however, did not resume. Despite the trial court's order, plaintiff allowed the child to determine when she wanted to see defendant. Defendant then filed a motion to modify the judgment pursuant to Rule 60(b), claiming plaintiff was frustrating the trial court's orders. In the motion, defendant asked the trial court: (1) to grant defendant immediate visitation every other weekend as well as the missed holiday and summer visitations; (2) to require plaintiff on the visitation weekends to provide transportation for the child; and (3) to enforce its orders by holding plaintiff in contempt.

In its 8 August 2000 order, the trial court, finding there was no evidence that defendant was abusive, held plaintiff in contempt for allowing the child "at an early age" to determine whether she would see her father. The trial court then terminated defendant's child support payments and ordered plaintiff to pay all medical bills for the child's psychological evaluations as well as attorney fees for defendant.

Plaintiff filed notice of appeal on 6 September 2000. On 26 April 2001, plaintiff filed a motion for an extension of time to file her brief, stating that her attorney had a full trial court schedule and that opposing counsel had given his consent. The motion was allowed on 26 April 2001, ordering that plaintiff's brief must be filed on or before 30 May 2001. In bold lettering, this Court stated that "**No further extensions of time to file plaintiff-appellant's brief shall be allowed in the absence of a showing of extraordinary cause.**" Plaintiff's brief was not filed on or before 30 May 2001.

On 1 June 2001, defendant filed a motion to dismiss plaintiff's appeal. On 5 June 2001, plaintiff filed a motion to accept her brief. Both motions were referred to this panel. Then, on 21 June 2001, defendant filed a motion for an extension of time to file his brief. It

was denied on 26 June 2001. There is no defendant-appellee brief filed in this case.

Plaintiff moved for this Court to consider her brief as timely filed. She alleges the due date was missed because her attorney was informed that a capital murder case, in which he was lead counsel, was being moved from October 2001 to 2 July 2001. Plaintiff's attorney, Jon W. Myers (Myers), spent the remainder of May 2001 primarily preparing for the murder trial instead of the instant case. Myers stated that "throughout this process [he] continued to work on the written brief in this matter but despite his best efforts, completed the brief one (1) day after the required filing date." However, the brief was not filed until six days after the due date.

The North Carolina Rules of Appellate Procedure state that:

> Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time.

N.C.R. App. P. 27(c). The Rules of Appellate Procedure are mandatory and violations subject an appeal to dismissal. *Onslow County v. Moore*, 127 N.C. App. 546, 491 S.E.2d 670 (1997), *rev'd on other grounds*, 347 N.C. 672, 500 S.E.2d 88 (1998). This Court previously noted that no other extensions would be granted in the absence of extraordinary circumstances. We hold that a schedule change is not extraordinary when plaintiff's attorney received word of the change more than one month before the brief was due.

Nonetheless, we consider plaintiff's arguments because the egregiousness of the child support payments being terminated fundamentally affects the best interests of the child who is without fault. *See* N.C.R. App. P. 2.

[1] By plaintiff's first argument, she contends that the trial court erred by terminating defendant's obligation to pay child support because defendant is the natural father and has the legal duty to support the child. We agree.

Both parents carry legal responsibility for the financial support of their minor child. "In the absence of pleading and proof that the circumstances otherwise warrant, the father and mother shall be primarily liable for the support of a minor child." N.C. Gen. Stat.

§ 50-13.4(b) (1999). *See also Nisbet v. Nisbet*, 102 N.C. App. 232, 402 S.E.2d 151, *cert. denied*, 329 N.C. 499, 407 S.E.2d 538 (1991); *Plott v. Plott*, 313 N.C. 63, 326 S.E.2d 863 (1985). The duty to provide financial support is independent of visitation rights and one may not be made contingent upon the other. *Appert v. Appert*, 80 N.C. App. 27, 341 S.E.2d 342 (1986). The amount of child support allowed by the trial judge will only be disturbed upon a showing of abuse of discretion. *Dixon v. Dixon*, 67 N.C. App. 73, 312 S.E.2d 669 (1984).

Establishment of child support is guided by concern for the best interests of the child and not by a desire to punish a disobedient parent. The termination of child support in the instant case clearly was beyond the framework of that precept and constituted an abuse of discretion. The order was contrary to both the statutory and common law of North Carolina in that there was no finding to support it beyond the punishment of plaintiff. We therefore vacate the trial court's order as to the termination of defendant's duty to pay child support.

[2] By plaintiff's second, third, and fourth arguments, she contends the trial court erred by holding her in contempt of court when: (a) there was insufficient evidence that she willfully interfered with or refused to allow defendant visitation with the child; and (b) the trial court failed to make proper findings and conclusions. We agree that the findings were insufficient.

In contempt proceedings, the trial court's findings of facts are conclusive on appeal when supported by competent evidence. *Clark v. Clark*, 294 N.C. 554, 243 S.E.2d 129 (1978). The element of willfulness is required for a finding of civil contempt here. *See Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981). Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so. *Bennett v. Bennett*, 21 N.C. App. 390, 204 S.E.2d 554 (1974).

Although it appears the evidence supports the findings of fact made by the trial court, there is no finding as to whether plaintiff's behavior was willful. The only findings of fact related to fault are as follows:

4.

> The Court for days has listened to the testimony of the Plaintiff and the Defendant and their witnesses. The child was evaluated by Dr. Phillip Batten who contends that the minor child

and the father need more counseling to determine whether the minor child will see the father again. The Court further finds as a fact that the minor child resides with her mother and in close proximity of the grandmother as well as the other relatives who are involved in the minor child's life. From the testimony and the times this matter has been in Court, the Court finds as a fact that the minor child has been taught not to associate with her father or any of her half-sisters or other kin on the father's side.

5.

The minor child has been given freedom to decide what she wants to do and when she wants to do it. The minor child has been given this freedom at an early age by being in the household with the Plaintiff and her kin. The minor child will not have anything to do with her father. The Court sees no reason why the minor child and the father should continue for the years to come to go to counseling, but to determine if and when the minor child will ever decide to visit with the father.

As this Court has held in *Cox v. Cox*, 10 N.C. App. 476, 179 S.E.2d 194 (1971), the trial court must make findings as to the ability of the plaintiff to comply with the court order during the period when in default. The trial court failed to make such findings and we therefore remand the issue of contempt to the trial court for specific findings.

[3] By plaintiff's fifth argument, she contends the trial court erred by entering the order in its entirety when the trial judge's comments at the beginning and end of the evidence demonstrated bias and prejudice against her and resulted in an unfair hearing. We disagree.

This hearing was before a judge only. Therefore, nothing else appearing, plaintiff's objections to the comments appear groundless. There was no jury present to be influenced and the judge merely reacted to the evidence. *See Smithwick v. Frame*, 62 N.C. App. 387, 395, 303 S.E.2d 217, 222-23 (1983). "The proscription against the expression of opinion by the trial judge does not attach in a trial without a jury." *Id.* (citing *Everette v. D.O. Briggs Lumber Co.*, 250 N.C. 688, 110 S.E.2d 288 (1959)). Plaintiff's argument is rejected.

Accordingly, we vacate the trial court's order in part and reverse and remand in part. The trial court may, but is not required to, take additional evidence in determining the issue of willfulness.

VACATED IN PART, REVERSED AND REMANDED IN PART.

Judge McGEE concurs.

Judge GREENE concurs in a separate opinion.

GREENE, Judge, concurring.

I fully concur with the majority but write separately to further discuss a party's right to an unbiased and unprejudiced trial judge.

Every party is entitled to an unbiased and unprejudiced trial judge. *See* N.C. Const. art. I, § 18 (guaranteeing that "justice shall be administered without favor"). Disqualification based on a trial judge's bias or prejudice, however, may only result if it stems from an extrajudicial source. *See* Code of Judicial Conduct, Cannon 3C(1). Bias or prejudice developed by a trial judge acting in his official judicial capacity in regard to the case at issue does not support disqualification. *See In re Evans*, 411 A.2d 984, 995 (D.C. 1980) (to support disqualification, the bias or prejudice must derive from an extrajudicial source and result in an opinion on the merits based on something besides what the judge learned during the trial). In some instances, such bias or prejudice may require a new trial, but only if it influenced a jury. *See Smithwick v. Frame*, 62 N.C. App. 387, 395, 303 S.E.2d 217, 222 (1983) ("[t]he proscription against the expression of opinion by the trial judge does not attach in a trial without a jury"). Accordingly, in a non-jury case where the trial judge develops a bias or prejudice toward one party and where there is no evidence this bias or prejudice arose from any source outside the evidence and arguments presented in the case, the judgment entered by the trial court will be affirmed if it is otherwise properly entered.

In this case, the record reveals that any bias or prejudice the trial judge may have displayed arose as he reacted to the evidence presented and the events occurring during the course of the trial. Thus, there was no basis to disqualify the trial judge from deciding the case, and because there was no jury impaneled, there also exists no basis for ordering a new trial.

DOUGLAS JEFFREY LANDRY, EMPLOYEE, PLAINTIFF v. US AIRWAYS, INC., EMPLOYER, RSKCO, CARRIER, DEFENDANTS

No. COA01-724

(Filed 7 May 2002)

Workers' Compensation— injury by accident—unlooked for and untoward event

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff employee did not sustain an injury by accident as required by N.C.G.S. § 97-2(6) and the case is remanded to determine the degree of disability, because: (1) the lifting of an object by an employee that is heavier than expected or heavier than the usual nature of the object may constitute an unlooked for and untoward event not expected or designed by the injured employee; and (2) plaintiff's testimony supports a finding that an unlooked for and untoward event occurred which was not expected by plaintiff when he lifted a mailbag.

Judge HUNTER dissenting.

Appeal by plaintiff from opinion and award filed 22 February 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 March 2002.

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

Brooks, Stevens & Pope, P.A., by Michael C. Sigmon and Matthew P. Blake, for defendant-appellees.

GREENE, Judge.

Douglas Jeffrey Landry (Plaintiff) appeals an opinion and award of the Full Commission of the North Carolina Industrial Commission (the Commission) filed 22 February 2001 denying his workers' compensation claim against US Airways, Inc. (US Airways) and its insurance carrier RSKCO (collectively, Defendants).

On 3 August 1998, Plaintiff filed a claim with the North Carolina Industrial Commission requesting a hearing before a deputy commissioner. The evidence presented at the hearing established that in 1996, Plaintiff was employed by US Airways. His duties involved com-

puter work three times a week and the loading and unloading of cargo twice a week. The cargo handled by Plaintiff typically involved mail, freight, and passenger luggage, ranging in weight from one-to-five-pound packages to 400-pound freight. On 17 July 1996, Plaintiff and his supervisor Robert Drda (Drda) were unloading a Fokker F28, a small jet aircraft with a seating capacity of approximately sixty-five passengers. They did not have a conveyor belt to assist them, which was not unusual for this type of aircraft. Drda was working inside the luggage compartment while Plaintiff was positioned at the rear of the aircraft next to the opening of the luggage compartment. When Drda pushed a large, yellow mailbag toward the opening, Plaintiff reached over his head to grab it. As Plaintiff turned to place the mailbag into a cargo cart, he discovered it was heavier than he had anticipated and felt a sharp pain in his right shoulder. Plaintiff told Drda about his injury, and together, they completed an injury report.

Plaintiff later discovered the mailbag was filled with processed photos instead of regular mail. Although Plaintiff never knew exactly how much an individual item would weigh until lifting it, he could generally estimate its weight "by sight" before picking it up. Plaintiff testified it was not unusual for a mailbag to be overweight.

Dr. Robert C. Martin (Dr. Martin) diagnosed Plaintiff with a torn rotator cuff. Dr. Martin performed arthroscopic surgery on Plaintiff during which he repaired both a torn labral tendon and extensive rotator cuff tear.

The Commission entered the following pertinent findings:

> 3. In the loading and unloading of aircraft, [P]laintiff was required to load and unload mail, freight, and passenger luggage. The weights loaded by [P]laintiff ranged from one to five pounds up through 350 to 400 pounds. Packages would be different sizes and types[,] including mail sacks. Plaintiff moved [U.S.] [P]ost [O]ffice sacks. These sacks were weighed by the [U.S.] [P]ost [O]ffice and the actual weights of these sacks were labeled on the outside of the sacks. However, there was no way for [P]laintiff to know how much these sacks weighed until he picked up the sacks because the weights were printed on small tags. It is not unusual that certain mailbags would be very heavy and that [P]laintiff would be unaware of their excessive weight until he picked up those bags . . . .

4. On July 17, 1996, [P]laintiff and his supervisor were unloading a Fokker F28 aircraft. Plaintiff and his supervisor were not using a conveyer belt . . . [to] unload[] that aircraft for safety reasons . . . .

5. On July 17, 1996, [Drda] was inside the hold of the aircraft and [P]laintiff was at the rear of the aircraft on the ground removing packages. As [P]laintiff reached to pull a mail sack down and turned to put it on the ground, he felt a sharp pain in his right shoulder.

6. Plaintiff sought medical treatment and ultimately underwent arthroscopic surgery on November 25, 1997 for a posterior-superior labral tear. This condition was caused by the incident with the mailbag on July 17, 1996.[1]

7. On July 17, 1996, [P]laintiff was performing his normal job duties in the normal manner when he injured his right shoulder. Plaintiff was performing his normal motion as he lifted the mailbag and turned. Although the mailbag may have been heavier than he anticipated, [P]laintiff never knew the weight of any mailbag until he lifted the bag. Mailbags often varied in weight and were heavier or lighter than anticipated. Plaintiff's job typically required him to handle mailbags of various unknown weights. Plaintiff was not using a conveyer belt loader to unload the Fokker F28 airplane on July 17, 1996. Approximately 75% of the time a conveyer belt loader was not used on this aircraft. Therefore, [P]laintiff's unloading of this aircraft without the use of a conveyer belt was normal procedure and did not cause any unusual or unforeseen event.

Based on these findings, the Commission concluded "[P]laintiff did not sustain an injury by accident" entitling him to workers' compensation benefits because an accident requires "the introduction . . . of unusual conditions likely to result in unexpected consequences."

The issue is whether the Commission's findings, if based on competent evidence, support its conclusion that Plaintiff did not sustain an injury by accident.

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1. While Defendants cross-assign error to the Commission's finding that Plaintiff's condition was caused by the work-related incident with the mailbag on 17 July 1996, Defendants have failed to argue this issue in their brief. Accordingly, it is deemed abandoned. *See* N.C.R. App. P. 28(a).

Review on appeal from an opinion and award of the Commission is limited to a determination of whether its findings are supported by competent evidence and whether the findings support the Commission's conclusions. *Cody v. Snider Lumber Co.*, 328 N.C. 67, 70, 399 S.E.2d 104, 105-06 (1991). In order to be compensable under the Workers' Compensation Act, an injury must result from an "accident arising out of and in the course of the employment." N.C.G.S. § 97-2(6) (1999). In deciding whether there was an accident, the only question on appeal is whether there was "an unlooked for and untoward event which is not expected or designed by the [injured employee]," *Gladson v. Piedmont Stores*, 57 N.C. App. 579, 579, 292 S.E.2d 18, 18, *disc. review denied*, 306 N.C. 556, 294 S.E.2d 370 (1982), or "the interruption of the routine work and the introduction thereby of unusual conditions," *Sanderson v. Northeast Construction Co.*, 77 N.C. App. 117, 121, 334 S.E.2d 392, 394 (1985). The lifting of an object by an employee that is heavier than expected or heavier than the usual nature of the object may constitute an unlooked for and untoward event not expected or designed by the injured employee. *Gladson*, 57 N.C. App. at 580-81, 292 S.E.2d at 19; *see also Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 116, 519 S.E.2d 61, 63 (1999) (holding that while the plaintiff's job responsibilities included assisting patients who received epidurals, her regular work routine did not require lifting the legs of women weighing 263 pounds who had received epidurals), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 124 (2000). But "once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an 'injury by accident.' " *Bowles v. CTS of Asheville*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985) (citation omitted).

In this case, the Commission found that "[m]ailbags often . . . were heavier or lighter than anticipated." This finding is not supported by the evidence. Plaintiff merely testified mailbags were often overweight, not that this fact was unanticipated by him when he lifted them. Furthermore, Plaintiff testified he could generally estimate the weight of mailbags by sight but found this particular mailbag heavier than anticipated. Plaintiff's undisputed testimony supports only one finding, namely that an unlooked for and untoward event occurred which was not expected by Plaintiff. *See Gladson*, 57 N.C. App. at 579, 292 S.E.2d at 18. This finding leads to the conclusion Plaintiff sustained an injury by accident when he lifted the mailbag. Accordingly,

we reverse the Commission's opinion and award and remand this case to determine the degree of disability, if any, *see Saums v. Raleigh Community Hosp.*, 346 N.C. 760, 763, 487 S.E.2d 746, 749 (1997) (a claimant under the Workers' Compensation Act has the burden of proving the existence of his disability and its extent), Plaintiff sustained as a consequence of his 17 July 1996 accident arising out of and in the course of his employment with US Airways.

Reversed and remanded.

Judge TIMMONS-GOODSON concurs.

Judge HUNTER dissents.

HUNTER, Judge, dissenting.

I would hold that the Commission's findings of fact, which are supported by competent evidence, are sufficient to support its conclusion of law that plaintiff did not sustain a compensable injury because there were no "unusual conditions likely to result in unexpected consequences." I therefore respectfully dissent.

The Commission's findings of fact are conclusive on appeal where supported by ". . . 'any competent evidence.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (citation omitted), *reh'g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). "Thus, on appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding.' " *Id.* (citation omitted). Even where the record contains competent evidence to the contrary, we must defer to the findings of the Commission where supported by any competent evidence at all. *Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 259, 540 S.E.2d 768, 773 (2000), *affirmed*, 353 N.C. 520, 546 S.E.2d 87 (2001).

The majority opinion singles out one sentence contained in finding of fact number seven, which sets forth a variety of findings, including that plaintiff was engaged in his normal activities when the injury occurred; that "[a]lthough the mailbag may have been heavier than he anticipated, plaintiff never knew the weight of any mailbag until he lifted the bag"; that plaintiff's job "typically required him to handle mailbags of various unknown weights"; and that the mailbags

"often varied in weight and were heavier or lighter than anticipated." Noting that plaintiff never testified in the exact words that mailbags were often heavier than "anticipated," the majority concludes that the Commission's findings of fact are unsupported and the order must be reversed.

Although plaintiff may not have specifically stated that the mailbags were often heavier or lighter than "anticipated," the evidence as a whole clearly supports the Commission's findings that plaintiff's job required him to lift weights of up to 400 pounds; that plaintiff never knew prior to lifting mailbags how much they weighed; that it was not unusual for mailbags to be extremely heavy and that plaintiff would be unaware of the heavy weight of the bags until he lifted them; and that plaintiff was engaged in his normal duties and using his normal motions when injured.

Although plaintiff testified that he could "guess" at a bag's weight prior to picking it up by looking at its size (plaintiff testified that for example, he could tell the difference in weight between an envelope as compared to a bag or an individual person's luggage), he also testified that he never reads the weight labels for any bags prior to picking them up, and that he does not know how much the bags weigh prior to picking them up. Moreover, both plaintiff and his supervisor, Mr. Drda, testified it was not unusual for the post office to exceed its weight restrictions with mailbags, and that the bags would often be heavier than they should be. Mr. Drda also testified that they received and moved bags of developed film "on a regular basis," and that the only thing he recalled as being unusual about 17 July 1996 was that plaintiff had complained about pain in his shoulder—not that there was anything unusual about the mailbag which plaintiff handled.

The preceding evidence constitutes competent evidence which supports the Commission's findings, which in turn support its conclusion that plaintiff did not sustain a compensable injury. I believe the majority has overly focused on a single sentence contained within a finding of fact to the exclusion of all other findings which are supported by competent evidence and which in and of themselves support the Commission's conclusion that plaintiff was not injured as a result of any unusual condition. Accordingly, I respectfully dissent.

IN THE MATTER OF: CHRISTOPHER BROWN

No. COA00-1501

(Filed 7 May 2002)

Schools and Education— disorderly conduct—juvenile adjudication—insufficient evidence

A middle school student's conduct did not constitute "disorderly conduct" within the meaning of N.C.G.S. § 14-288.4(a)(6) so as to support an adjudication of delinquency because it did not substantially interfere with the operation of the school where the student talked during a test, slammed a door, and begged in the hallway not to be sent to the office, and a class was without a teacher while this occurred.

Appeal by juvenile from order entered 15 August 2000 by Judge Shelly S. Holt in New Hanover County District Court. Heard in the Court of Appeals 4 December 2001.

Hall, Horne & Sullivan, L.L.P., by Patrick J. Mulligan, IV, for juvenile appellant.

Attorney General Roy Cooper, by Assistant Attorney General Donna D. Smith, for the State.

McCULLOUGH, Judge.

Respondent Christopher Brown was adjudicated delinquent on 8 August 2000 upon a violation of N.C. Gen. Stat. § 14-288.4(a)(6), prohibiting disorderly conduct involving schools, at the 8 August 2000 Session of New Hanover County District Court. Respondent was ordered to be placed on probation for a period of 6 months, complete 24 hours of community service, have no similar incidents to occur at school, and to continue in counseling.

The evidence for the State showed that on 17 March 2000, respondent was a student at Myrtle Grove Middle School. The teacher of his class was Katie Carbone, a student teacher at the time. On this day, Ms. Carbone was administering an algebra quiz.

According to Ms. Carbone, the class had been instructed that they would get a zero on the quiz if they talked during the quiz. Respondent was reprimanded "a time or two" for talking. Instead of

giving respondent a zero, however, Ms. Carbone took him to a different classroom to finish the test.

When the time to take the test had expired, Ms. Carbone went to retrieve the respondent and his test. She found the respondent talking to another student also taking the test outside the classroom and became upset. Ms. Carbone reminded respondent that she could give him a zero, to which he replied, "Well give me a zero."

Respondent headed back to the classroom and slammed the door behind him. The slam was described as "really really loud right in [Ms. Carbone's] face." At this point Ms. Carbone called respondent back into the hallway. She began to write a "referral slip" to send respondent to the office. At this point respondent began begging the teacher not to send him to the office. He was crying and attempting to stay in front of her in an attempt to prevent her from going to the office. His actions were described as "kind of throwing a temper tantrum." Respondent held Ms. Carbone's arm in his attempt to block her. After being asked three or four times, respondent released Ms. Carbone after she told him that, "if you don't get your hands on [sic] me you are really gonna be in trouble." Respondent then ran to the office. Ms. Carbone arrived shortly afterward. She finished her referral slip and reported to her superior. She then returned to her class, which had been unattended throughout the incident.

The student that respondent was speaking to in the hallway testified that respondent was reminding her to omit a certain problem on the quiz per Ms. Carbone's instructions when the teacher found them in the hallway. She and another student testified about respondent slamming the door as he entered the classroom and that the teacher got a referral slip and called respondent back out into the hallway. They described respondent's behavior as he and the teacher proceeded to the office. Their description matched that of Ms. Carbone's testimony in that respondent cried and protested being taken to the office.

Respondent testified at the hearing. He admitted slamming the door, although he said it was not his intent to slam the door or to do so in the teacher's face. He admitted to crying and being upset as he was being written up and taken to the office. Respondent explained that he was upset because his stepfather may hold him back a grade. Respondent's stepfather testified as to respondent's punishment and current behavior.

At the time of the hearing, respondent was 13 years old. Respondent made a motion to dismiss the charges which was denied at the close of the State's evidence. The trial court found:

> That there was sufficient evidence to prove the juvenile did as set out in the petition.
>
> That on or about the 17th day of March 2000, the juvenile unlawfully and willfully did intentionally cause a public disturbance at Myrtle Grove Middle School, Wilmington, NC, by engaging in conduct which disturbs the peace, order or discipline at any public educational institution. This conduct consisted of the [respondent's] talking during a quiz, refusing to follow instructions; slamming the door in the teacher's face and tried to restrict her from going to the office. This is in violation of G.S. 14-288.4(a)(6).

I.

Respondent's sole assignment of error is that the trial court abused its discretion by denying respondent's motion to dismiss. Respondent contends that the record is devoid of any evidence of a substantial interruption of the course of instruction at the school.

"[I]n order to withstand a motion to dismiss the charges contained in a juvenile petition, there must be substantial evidence of each of the material elements of the offense charged." *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985). The evidence must be considered in the light most favorable to the State, and the State is entitled to receive every reasonable inference of fact that may be drawn from the evidence. *State v. Easterling*, 300 N.C. 594, 268 S.E.2d 800 (1980).

N.C. Gen. Stat. § 14-288.4(a)(6) prohibits the following:

> (a) Disorderly conduct is a public disturbance intentionally caused by any person who:
>
> * * * *
>
> (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

N.C. Gen. Stat. § 14-288.4(a)(6) (1999).

The definitive case on the meaning of the "disruptive conduct" is *State v. Wiggins*, 272 N.C. 147, 158 S.E.2d 37 (1967), *cert. denied*, 390 U.S. 1028, 20 L. Ed. 2d 285 (1968) (construing N.C. Gen. Stat. § 14-273 (1953) (repealed 1971)). In *Wiggins*, our Supreme Court said,

> [w]hen the words "interrupt" and "disturb" are used in conjunction with the word "school," they mean to a person of ordinary intelligence a substantial interference with, disruption of and confusion of the operation of the school in its program of instruction and training of students there enrolled.

Wiggins, 272 N.C. at 154, 158 S.E.2d at 42.

This Court has continued to follow the *Wiggins* case since the enactment of the current disorderly conduct statute N.C. Gen. Stat. § 14-288.4. In *In re Grubb*, 103 N.C. App. 452, 405 S.E.2d 797 (1991), this Court said, "The fact that the word "interrupt" does not appear in the present statute does not change the plain meaning of the language contained therein. The conduct in question must substantially interfere with the operation of school." *Grubb*, 103 N.C. App. at 454, 405 S.E.2d at 798.

Previous decisions by this Court and the Supreme Court shed light on the level of interference required to sustain a conviction of disorderly conduct in the school scenario. In *Wiggins*, students picketed a high school. The students were protesting alleged racial inequality. Testimony in that case showed that classes stopped because students were leaving their seats and classrooms to see the demonstration. A class that was being conducted outside on the school grounds had to be canceled. The disorder in the entire school created as a direct result of the picketing sustained the convictions of the defendants of disorderly conduct. *Wiggins*, 272 N.C. at 150-52, 158 S.E.2d at 39-41.

In *State v. Midgett*, 8 N.C. App. 230, 174 S.E.2d 124 (1970), defendants took over the school office. In fact, they were so bold as to tell the school's secretary that "they were going to interrupt [the school] that day." *Midgett*, 8 N.C. App. at 231, 174 S.E.2d at 126. Defendants barricaded themselves in the office, overturned cabinets, and operated the school's bell system. *Id.* The disruption of the school's proper functioning was so great that it necessitated early dismissal. *Id.* at 233, 174 S.E.2d at 127. This Court held that the evidence "amply" satisfied the statute and affirmed the convictions. *Id.* at 234, 174 S.E.2d at 128.

On the other hand, this Court reversed a conviction (denial of motion to dismiss) of disorderly conduct under N.C. Gen. Stat. § 14-288.4(a)(6) in *Grubb*, 103 N.C. App. 452, 405 S.E.2d 797. Respondent momentarily disrupted class when she was talking loud during class. She had to be reprimanded several times before she would cease the loud talking. The *Grubb* Court held that this evidence alone was insufficient upon which to base a conviction, and respondent's motion to dismiss should have been granted.

The Supreme Court also reversed a disorderly conduct conviction for substantially interfering with school in *In re Eller*, 331 N.C. 714, 417 S.E.2d 479 (1992). In that case, the teacher saw one defendant swing something at another student. Upon first inquiry, that defendant willingly gave the teacher a carpenter's nail he had in his hand. On another occasion, that same defendant was joined by another student in banging the classroom's radiator while class was being conducted. They did so a couple of times, distracting the class of 15 each time. The Supreme Court held that the evidence did not show substantial interference within the meaning of *Wiggins*. *Id.* at 718, 417 S.E.2d at 482.

The evidence in the case *sub judice* shows a student who talked during a test, slammed a door, and begged a teacher in the hallway that he not be sent to the office. It is probable that some students were briefly distracted by the door slam and the sounds of a student crying in the hallway. We also note that the class was without its teacher while this occurred. The record does not reveal how long the teacher was away, but it does not seem to have lasted more than several minutes. We hold that this evidence is insufficient to show a substantial interference with the operation of the school.

This Court does not doubt that when students act as respondents in this case, they are troublesome and a burden in the classroom. These are the trials faced by teachers in today's schools. But if we were to hold that the present actions are of such gravity that they warrant a conviction of disorderly conduct, every child that is sent to the office for momentary lapses in behavior could be convicted under such precedent.

As the *Eller* Court stated,

> while egregious behavior such as that condemned in *Wiggins* and *Midgett* is not required to violate N.C.G.S. § 14-288.4(a)(6), more than that present in the case at bar is necessary.

Further support for our view is found in the location of N.C.G.S. § 14-288.4(a)(6) within our statute books. The statute is contained within Article 36A, which concerns "Riots and Civil Disorders." This article was passed by our legislature in 1969, amid the concern generated by the tumult of the dramatic civil unrest gripping the nation and this state in the late 1960's. To say that the relatively modest disturbances caused by respondents in the instant case do not rise to this level of concern would appear self-evident.

Eller, 331 N.C. at 719-20, 417 S.E.2d at 483.

Because we hold it was error to deny respondent's motion to dismiss, the adjudication of respondent as a juvenile delinquent is

Reversed.

Judges GREENE and CAMPBELL concur.

HARRY LAND AND KATHY LAND, PLAINTIFFS v. TALL HOUSE BUILDING CO., DEFENDANT, AND TALL HOUSE BUILDING CO., THIRD-PARTY PLAINTIFF v. DRYVIT SYSTEMS, INC.; COLIN W. MCKEAN, INDIVIDUALLY AND D/B/A SOUTHERN SYNTHETIC & PLASTER; EDWARD MCKEAN, INDIVIDUALLY AND D/B/A SOUTHERN SYNTHETIC & PLASTER; PICKARD ROOFING COMPANY, INC.; AND MARVIN WINDOWS, INC., THIRD-PARTY DEFENDANTS

No. COA01-27

(Filed 7 May 2002)

1. Parties— real party in interest—insurance settlement—insurer as necessary party

The trial court erred by granting summary judgment for a third-party defendant where the original parties had settled, the original plaintiffs assigned all of their claims to the insurer of the original defendant, and the insurer did not take any action to have itself substituted as the real party in interest. The insurer was the only party entitled to maintain the litigation after the settlement, but the trial court should have ordered a continuance on its own motion to allow a reasonable time for necessary parties to be joined.

2. Statutes of Limitation and Repose— substituted real party in interest—status of limitations issues unchanged

The status of statutes of limitations and repose issues will not change when an insurer is substituted as the real party in interest after a settlement.

Appeal by defendant/third-party plaintiff from judgment entered 1 August 2000 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 11 February 2002.

Dean & Gibson, L.L.P., by Christopher J. Culp, Esq.; and Brown, Todd & Heyburn, P.L.L.C., for Tall House Building Co., defendant/third-party plaintiff appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Hada V. Haulsee and David J. Mazza, for Dryvit Systems, Inc., third-party defendant appellee.

McCULLOUGH, Judge.

Defendant/third-party plaintiff Tall House Building Co. appeals from an order granting summary judgment to third-party defendant Dryvit Systems, Inc., entered by Judge Orlando F. Hudson, Jr., at the 31 July 2000 Session of Durham County Civil Superior Court.

In 1993, plaintiffs in the original suit, Harry and Kathy Land, contracted with appellant Tall House to be their general contractor and oversee the construction of the Lands' house. The house was completed in 1995. Eventually, the Lands became dissatisfied with the construction of their home, specifically, the exterior stucco that had been installed had begun to cause problems with the integrity and appearance of the house.

On 11 May 1998, the Lands filed a complaint against Tall House for damages arising out of alleged defects in the construction of their house. On 3 June 1998, Tall House answered the Land complaint denying liability. On the same day, Tall House also filed a third-party complaint against Dryvit Systems, Inc., the manufacturer of the stucco applied to the Lands' house, and numerous other subcontractors involved with the application of the stucco, for contribution and indemnity pursuant to Rule 14.

By 28 December 1999, the Lands and Tall House had reached a settlement agreement. In this settlement agreement, Tall House was to pay the Lands $199,900.00 in exchange for the Lands assigning "all

claims, rights and causes of action they may have against any other person or entity concerning any damage to the House to Assurance Company of America ("ACA")." ACA is the insurance carrier for Tall House, and it is the entity that actually paid the settlement money to the Lands. The Lands dismissed their suit against Tall House on 19 April 1999.

The third-party complaint of Tall House against Dryvit Systems and the subcontractors, however, was still active. ACA had not taken any action post-settlement to have itself substituted for Tall House as the real party in interest. On 5 July 2000, third-party defendant Dryvit moved for summary judgment based on the following:

> Tall House Builders has no claim against Dryvit and it is not the real party in interest;
>
> Some or all of the claims are barred by the applicable statutes of limitations;
>
> Some or all of the claims are barred by North Carolina's statute of repose;
>
> The claims are barred pursuant to N.C. Gen. Stat. Chapter 99B; and
>
> Some of the claims and cross claims are barred as a matter of law.

This is the first mention in the record of Dryvit's objection as to Tall House not being a real party in interest.

The hearing on the motion for summary judgment was held on 31 July 2000. The trial court's order, filed 1 August 2000, simply stated that the Court "is of the opinion that there are no genuine issues of material fact in dispute, and that judgment in favor of Third-Party Defendants Dryvit Systems, Inc. . . . is appropriate as a matter of law[.]" It is from this order that Tall House appeals.

Defendant/third-party plaintiff makes the following assignments of error: The trial court erred in granting summary judgment in favor of third-party defendant Dryvit Systems, Inc., on the grounds that there were genuine issues of material fact regarding whether (1) third-party defendant caused or contributed to the water-intrusion damage to plaintiff's house; (2) Tall House Building Company was the real party in interest; and (3) the third-party claims were barred by the applicable statutes of limitations and repose.

I.

[1] We first address the arguments of the parties relating as to who in fact is the real party in interest.

N.C. Gen. Stat. § 1A-1, Rule 17(a) (1999), provides that "[e]very claim shall be prosecuted in the name of the real party in interest[.]" *Id.*

> "The real party in interest is the party who by substantive law has the legal right to enforce the claim in question. More specifically, a real party in interest is '. . . a party who is benefitted or injured by the judgment in the case.' "

Whittaker v. Furniture Factory Outlet Shops, 145 N.C. App. 169, 175, 550 S.E.2d 822, 825 (2001) (citations omitted) (quoting *Parnell v. Ins. Co.*, 263 N.C. 445, 448-49, 139 S.E.2d 723, 726 (1965)).

In addition, N.C. Gen. Stat. § 1-57 also says that "[e]very action must be prosecuted in the name of the real party in interest . . . ." N.C. Gen. Stat. § 1-57 (1999).

Dryvit contends that summary judgment was proper because ACA, and not Tall House, is the sole real party in interest. This is due to the arrangement set forth in the settlement agreement between the Lands, Tall House, and ACA. The facts are that the agreement mandated ACA, as insurer for Tall House, pay $199,900.00 to the Lands, and in return the Lands had to assign all of their rights from the dispute to ACA. Thereafter, Tall House was no longer actually involved in the litigation. Thus, Dryvit filed its summary judgment motion against Tall House because Tall House was maintaining a lawsuit against Dryvit without being the real party in interest.

Tall House contends that it is still a real party in interest because it dismissed its counterclaims against the Lands, thereby contributing to the settlement. The counterclaims were in fact dismissed, however, the agreement itself makes no mention of this fact. The record merely indicates that Tall House voluntarily dismissed its counterclaims against the Lands.

We note that Tall House was entitled to file its contribution and indemnity claims against Dryvit and the other subcontractors pursuant to Rule 14. When the Lands, Tall House, and its insurer ACA entered into the settlement agreement, however, it appears that Tall House indeed ceased being a real party in interest. ACA was the only

one entitled to maintain the pending litigation, and should have substituted itself for Tall House and proceeded accordingly. However, we hold that granting summary judgment was not the appropriate action for the trial court to take at that point in the litigation.

Rule 17(a) states:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest *until a reasonable time has been allowed after objection* for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

N.C. Gen. Stat. § 1A-1, Rule 17(a) (1999) (emphasis added).

The objection was in Dryvit's motion for summary judgment filed 5 July 2000. The trial court could not dismiss this action until a reasonable time had been allowed to pass for ACA to ratify, join, or substitute itself for Tall House. The hearing on this issue was held just over a week later on 13 July 2000. The order was given on 1 August 2000, about two and one-half weeks after the hearing.

Furthermore,

> When a case is not brought in the name of the real party in interest "the court should refuse to deal with the merits of the case until the absent parties are brought into the action, and in the absence of a proper motion by a competent person, the defect should be corrected by *ex mero motu* ruling of the court." *Booker v. Everhart*, 294 N.C. 146, 158, 240 S.E.2d 360, 367 (1978). "This provision is designed to avoid 'needless delay and technical disposition of a meritorious action.' " *Wilson* § 17-8, at 349 (quoting N.C.G.S. § 1A-1, Rule 17 comment). Pursuant to Rule 17, the trial court should have either corrected the plaintiff's error itself or refused to hear the motion for summary judgment until the real party in interest was substituted for plaintiff.

Richland Run Homeowners Assn. v. CHC Durham Corp., 123 N.C. App. 345, 353, 473 S.E.2d 649, 654-55 (1996) (Greene, Judge, dissenting), *as to disc. review issues, disc. review denied*, 344 N.C. 735, 478 S.E.2d 7 (1996), *but rev'd for reasons stated in the dissent*, 346 N.C. 170, 484 S.E.2d 527 (1997). *See also J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 362 S.E.2d 812 (1987); *Crowell*

v. Chapman, 306 N.C. 540, 293 S.E.2d 767 (1982). Essentially, these cases say that a trial court should, on its own motion, order a continuance to provide a reasonable time for necessary parties to be joined. *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978). Unlike Rule 19, absence of a necessary party under Rule 17 does not constitute a "fatal defect" where opposing party failed to show prejudice in not having the real party joined. *Carolina First Nat'l Bank v. Douglas Gallery of Homes*, 68 N.C. App. 246, 251, 314 S.E.2d 801, 804 (1984). Thus, the trial court should have corrected the problem rather than granting summary judgment.

Tall House further contends that it is not fair to allow a party to bring third-party claims against potentially responsible parties, as under Rule 14, but then prevent that party from pursuing those claims after settlement with the original plaintiffs "merely because the defendant/third-party plaintiff had the foresight to maintain liability insurance." In addition, Tall House contends that forcing the insurance company to maintain the action in its own name will prejudice them and lower their recovery. Thus, such a restrictive view of the "real party in interest" requirement would penalize those who pay for and provide liability insurance.

In *Burgess v. Trevathan* our Supreme Court stated:

> Where the insurance paid the insured covers the loss in full, the insurance company, as a necessary party plaintiff, must sue in its own name to enforce its right of subrogation against the tortfeasor. This is true because the insurance company in such case is entitled to the entire fruits of the action, and must be regarded as the real party in interest under the statute codified as G.S. § 1-57, which specifies that "every action must be prosecuted in the name of the real party in interest."

Burgess v. Trevathan, 236 N.C. 157, 160, 72 S.E.2d 231, 233 (1952) (citations omitted).

Because we hold that the trial court erred by entering summary judgment for third-party defendant, third-party plaintiff's assignment of error is sustained.

II.

[2] As to the issue of statutes of limitations and repose, it was conceded by Dryvit that Tall House was not entitled to summary judgment on these issues at the trial court level. Nor did Dryvit brief these

issues to this Court. It is apparent that Dryvit included these issues in their motion in anticipation of ACA asserting the assigned claims.

However, because of the language of Rule 17(a), even when ACA is substituted for Tall House, the status of these issues will not change. "[S]uch ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest." N.C. Gen. Stat. § 1A-1, Rule 17(a) (1999).

Reversed and remanded.

Chief Judge EAGLES and Judge BIGGS concur.

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

No. COA00-616-2

(Filed 7 May 2002)

1. **Appeal and Error— remand to Court of Appeals—determination of issue by Supreme Court**

   There was sufficient evidence to support a conviction for second-degree murder where the dissent in the first Court of Appeals opinion in this matter concluded that the evidence of malice was sufficient to withstand a motion to dismiss and the Supreme Court reversed for the reasons set forth in the dissent. The Supreme Court therefore determined that there was sufficient evidence of an intentional act sufficient to show malice.

2. **Evidence— explanations for prior injuries to child—admissible as to credibility**

   There was no plain error in a conviction for the second-degree murder of a child in an instruction intended to inform the jury that it could consider the credibility of explanations offered by defendant for other injuries sustained by the victim when determining whether the injury that caused the victim's death was inflicted intentionally.

Appeal by defendant from judgment entered 15 December 1999 by Judge J. B. Allen, Jr. in Orange County Superior Court. Originally heard in the Court of Appeals 18 April 2001. An opinion was filed 4

September 2001, *State v. Smith*, 146 N.C. App. 1, 551 S.E.2d 889 (2001). The case was appealed and, by *per curiam* opinion of the North Carolina Supreme Court on 7 March 2002, the opinion was reversed for the reasons stated in the dissenting opinion, and the case was remanded to the Court of Appeals to address the remaining assignments of error. *State v. Smith*, 355 N.C. 268, 559 S.E.2d 786 (2002). Reheard without additional briefing or oral arguments.

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

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

HUNTER, Judge.

James Russell Smith, Jr. ("defendant") appeals the trial court's judgment convicting him of the second degree murder of his wife's two-year-old daughter, Amanda. On remand from the Supreme Court, we address defendant's remaining assignments of error and conclude that there was no error in defendant's trial.

A comprehensive review of the facts of this case may be found in this Court's first opinion in this case. *Smith*, 146 N.C. App. at 3-6, 551 S.E.2d at 890-92. In that opinion, a majority of this panel reversed defendant's conviction for second degree murder on the grounds that the State had failed to produce sufficient evidence on the element of malice to withstand defendant's motion to dismiss. The dissenting opinion disagreed, and concluded that the evidence of malice was sufficient to withstand the motion to dismiss. On appeal from this Court to the Supreme Court pursuant to N.C. Gen. Stat. § 7A-30(2) (1999), the Supreme Court reversed this Court for the reasons stated in the dissenting opinion and remanded to this Court to address the remaining assignments of error. *Smith*, 355 N.C. 268, 559 S.E.2d 786.

As noted in this Court's first opinion, defendant has raised two assignments of error relating to his trial. Defendant contends (1) the trial court erred in denying his motion to dismiss, and (2) the trial court committed plain error in its instruction to the jury on how to assess whether the evidence supported a conclusion that the injury which caused Amanda's death was intentionally inflicted, as required for second degree murder. As to the first assignment of error, defend-

ant argues that there was insufficient evidence: (1) as to him being the perpetrator of Amanda's death (the "identity issue"); (2) as to him having the required malice for second degree murder (the "malice issue"); and (3) as to him having intentionally inflicted a fatal injury upon Amanda (the "intent issue"). In our first opinion, both the majority and the dissent rejected defendant's argument on the "identity issue," but the majority agreed with defendant, and therefore reversed his conviction, on the "malice issue." Neither the majority nor the dissent reached the "intent issue," nor did we reach defendant's second assignment of error. We now address these two issues.

We reiterate the applicable standard of review:

> When a defendant moves for dismissal, the trial court is to determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense. Whether evidence presented constitutes substantial evidence is a question of law for the court. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." The term "substantial evidence" simply means "that the evidence must be existing and real, not just seeming or imaginary." The trial court's function is to determine whether the evidence will permit a reasonable inference that the defendant is guilty of the crimes charged. "In so doing the trial court should only be concerned that the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence." It is not the rule in this jurisdiction that the trial court is required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant's motion to dismiss.
>
> In ruling on a motion to dismiss:
>
> "The evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal; and all of the evidence actually admitted, whether competent or incompetent, which is favorable to the State is to be considered by the court in ruling on the motion."

State v. Vause, 328 N.C. 231, 236-37, 400 S.E.2d 57, 61 (1991) (emphasis omitted) (citations omitted).

I.

[1] Defendant argues that there was insufficient evidence of intent to support his conviction for second degree murder. " 'Second-degree murder is an unlawful killing with malice, but without premeditation and deliberation.' " *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000) (citation omitted). "While an intent to kill is not a necessary element of second degree murder, the crime does not exist in the absence of some intentional act sufficient to show malice and which proximately causes death." *State v. Wilkerson*, 295 N.C. 559, 580, 247 S.E.2d 905, 917 (1978). Thus, although it is necessary to show that the defendant generally intended to engage in the act itself that caused the victim's death, this requirement is generally subsumed within the element of malice. *See id.*

Here, the dissent in our first opinion concluded that the evidence of malice was sufficient to withstand defendant's motion to dismiss. *Smith*, 146 N.C. App. at 23, 551 S.E.2d at 902. Furthermore, the dissent stated that "[i]t was the defendant's 'conscious object' or 'purpose' to strike Amanda," and that "[a] jury could have reasonably concluded that defendant willfully and maliciously struck Amanda's head and violently shook her." *Id.* at 22, 551 S.E.2d at 901. As noted, our Supreme Court reversed for the reasons set forth in the dissent. Therefore, our Supreme Court has already determined that there was sufficient evidence of some intentional act sufficient to show malice, and we need not (and, indeed, may not) revisit the issue of intent here.

II.

[2] Defendant's sole remaining assignment of error is that the trial court committed plain error in its instructions to the jury. The trial court's instructions to the jury included the following statements, in accordance with N.C.P.I., Crim. 206.35:

> If you find from the evidence beyond a reasonable doubt that at the time when the victim, Glasya Lynn Amanda Cook, died, she had sustained multiple injuries at different locations on her body, and that those injuries were at different stages of healing, and if you find that the physical condition of the victim's body was inconsistent with any explanation as to the cause of the victim's injuries, given at or about the time of her death, you may consider such facts, along with all other facts and circumstances, in determining whether the injury which caused the victim's

> death was intentionally inflicted and not the produce of accident or misadventure.

Because defendant did not object to this instruction at trial, defendant is required to show not only that the instruction was error, but further that it had a probable impact on the jury's finding of guilt. *See, e.g., State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Evidence was presented at trial tending to show that defendant told Investigator Ted Thorpe during an interview that Amanda had fallen off a toilet in the bathroom on Monday night and that the fall had resulted in a bump on her head. Defendant argues that, aside from this statement by defendant, no other evidence was presented at trial involving any explanation offered by defendant as to the cause of any of Amanda's multiple injuries. Defendant also notes that the forensic pathologist witness testified that this bump did not contribute to Amanda's death. Thus, defendant contends that the jury likely understood the trial court's instruction to mean that, if the jury found that defendant gave a false explanation for the bump on Amanda's head occurring Monday night, the jury could consider this fact in determining whether defendant intentionally inflicted the fatal injury on Wednesday night or early Thursday morning. Defendant contends that this would have been improper.

N.C.P.I., Crim. 206.35 is entitled "Second Degree Murder (Child Beating) Covering Involuntary Manslaughter as a Lesser Included Offense" (footnote omitted). The notes to this instruction indicate that it is "designed primarily for use in cases where the State seeks to establish second degree murder on the theory that the victim died as a result of child beating by the defendant, and where there is little or no direct evidence of the precise manner of the victim's death or of the defendant's intent." N.C.P.I., Crim. 206.35. The instruction then lists five elements of the offense: (1) the victim received a fatal injury; (2) the injury was a proximate cause of the victim's death; (3) the injury was inflicted intentionally and not by accident or misadventure; (4) the person who inflicted this injury was the defendant; and (5) the defendant acted with malice. N.C.P.I., Crim. 206.35. As to the third of these elements, the instruction provides:

> An injury is inflicted intentionally when the person who caused it intended to apply the force by which it was caused. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred.

> An intent to apply force to the body of another may be inferred from [the act itself] [the nature of the injury] [the conduct or declarations of the person who applied it] [other relevant circumstances].

Id. This explanation of an injury inflicted intentionally is then followed by the language at issue here regarding the jury's consideration of the defendant's explanations for injuries which are inconsistent with the physical condition of the victim's body.

We believe that the instruction at issue is intended to inform the jury that, for purposes of determining whether the injury that caused the victim's death was inflicted intentionally by the defendant, the jury may consider the credibility of any explanations offered by the defendant for *other* injuries sustained by the victim. If the jury believes such explanations are not credible, and that, therefore, defendant likely caused such other injuries, the jury may, in turn, use this determination to conclude that the defendant possessed the requisite intent with regard to the injury or injuries that caused the victim's death. To the extent that defendant argues that the jury, in determining whether defendant had the requisite intent to cause the injury that resulted in Amanda's death, should not have been allowed to consider evidence indicating that defendant may have caused other unrelated injuries to Amanda and subsequently provided false explanations for such injuries, defendant is mistaken. The law in this state allows the jury to do just this.

We find support for this conclusion in cases addressing the distinct but related issue of whether evidence of a defendant's prior acts of physical abuse of a child are admissible at a trial charging defendant with the second degree murder of the child.

> As a general rule, evidence which tends to show that a defendant committed another offense, independent of and distinct from the offense for which the defendant is being prosecuted, is inadmissible on the issue of guilt if its only relevancy is to show the character of the defendant or his disposition to commit an offense of the nature of the one charged.

State v. Hitchcock, 75 N.C. App. 65, 69, 330 S.E.2d 237, 240, *disc. review denied*, 314 N.C. 334, 333 S.E.2d 493 (1985). However, if such evidence "tends to prove any other relevant fact it will not be excluded merely because it also tends to show guilt of another crime." *Id.*

> Where the evidence shows, as it does here, that the victim was a battered child who died as a result of injuries which could have been caused by acts of physical abuse administered by the defendant, evidence of prior acts of physical abuse [by the defendant] is relevant and admissible to show the defendant's intent and to show that the defendant acted with malice.

Id.

The evidence in this case tended to show that Amanda had sustained multiple physical injuries on various occasions and that such injuries could have been caused by physical abuse. Such evidence was admissible for the reasons stated above, and, moreover, defendant's explanations for any of Amanda's other injuries, even if such injuries were not directly related to her death, were relevant and admissible and the veracity of such explanations could be considered by the jury in determining whether defendant intentionally inflicted the injuries that caused Amanda's death. Thus, given the facts of this case, we believe the instruction accurately stated the law and was properly given by the trial court.

In summary, as to the issues remaining after remand from our Supreme Court, we find no error.

No error.

Judges WALKER and TYSON concur.

DIXIE LUMBER COMPANY OF CHERRYVILLE, INC., PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, DIVISION OF ENVIRONMENTAL MANAGEMENT, RESPONDENT

No. COA01-739

(Filed 7 May 2002)

1. Environmental Law— judicial review of final agency decision—commercial underground petroleum tanks—operator

The trial court did not err by affirming defendant Department of Environment, Health, and Natural Resources's final agency decision denying plaintiff company a reimbursement from the

Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund under N.C.G.S. § 143-215.94B for cleanup costs incurred by releases from two underground petroleum storage tanks on plaintiff's property, and the whole record test reveals that the final agency decision deeming plaintiff to be the operator of the commercial underground petroleum tanks under N.C.G.S. § 143-215.94A was supported by substantial, competent, and material evidence, and was not arbitrary and capricious.

2. Environmental Law— judicial review of final agency decision—commercial underground petroleum tanks—operator's failure to pay fees

A de novo review reveals that the trial court did not err by concluding that defendant Department of Environment, Health, and Natural Resources did not exceed its statutory authority or jurisdiction, or commit an error of law in denying plaintiff company reimbursement from the Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund under N.C.G.S. § 143-215.94B for cleanup costs incurred by releases from two underground petroleum storage tanks on plaintiff's property based on plaintiff's failure to pay fees assessed against operators of commercial underground petroleum tanks, because: (1) the Environment Management Commission is specifically authorized under N.C.G.S. § 143-215.3(a)(17) to adopt rules to implement Part 2A of Article 21A of Chapter 143; (2) the Environment Management Commission was empowered to adopt N.C. Admin. Code tit. 15A, r. 2P.0401(b) in an effort to implement N.C.G.S. § 143-215.94A et seq.; and (3) plaintiff's argument that the rule conditioning eligibility for reimbursement from the Commercial Fund upon the payment of fees prior to the discovery of the release conflicts with N.C.G.S. § 143-215.94E(g)(3) is wholly without merit.

Appeal by petitioner from order entered 28 March 2001 by Judge Sanford L. Steelman, Jr., in Superior Court, Gaston County. Heard in the Court of Appeals 17 April 2002.

Moore & Van Allen PLLC, by Peter J. McGrath, Jr., for the petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly W. Duffley, for the respondent.

WYNN, Judge.

Dixie Lumber Company of Cherryville, Inc. appeals the trial court's affirmance of the Final Agency Decision of the North Carolina Department of Environment and Natural Resources ("Environmental Department") denying reimbursement from the Commercial Leaking Petroleum Underground Storage Tank Cleanup Fund, N.C. Gen. Stat. § 143-215.94B (1999) ("Commercial Fund"). We affirm.

In March 1998, Dixie Lumber sought reimbursement from the Commercial Fund for cleanup costs incurred by releases from two underground petroleum storage tanks on Dixie Lumber's property. The Environmental Department denied reimbursement upon concluding that Dixie Lumber was the operator of the tanks, and had failed to pay fees assessed against operators.

Judge Beryl E. Wade, Office of Administrative Hearings, conducted a contested case hearing on 10 February 2000. Judge Wade concluded Dixie Lumber was the operator of the tanks with unpaid fees, and recommended denial of Dixie Lumber's claim for reimbursement by the Final Agency. The Final Agency Decision adopted Judge Wade's Recommended Decision with additional findings of fact and conclusions of law. On judicial review, Superior Court Judge Sanford L. Steelman, Jr. affirmed the Final Agency Decision. Dixie Lumber appeals.

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[1] Dixie Lumber first argues that the trial court erred in concluding that the findings of fact and conclusions of law in the Final Agency Decision were supported by substantial, competent and material evidence in the record, and in concluding that the Final Agency Decision was not arbitrary or capricious. We disagree.

In reviewing an appeal from a trial court's order affirming an agency's final decision, this Court must "(1) determine the appropriate standard of review and, when applicable, (2) determine whether the trial court properly applied this standard." *In re Appeal by McCrary*, 112 N.C. App. 161, 166, 435 S.E.2d 359, 363 (1993). The proper standard of review for the trial court to apply "in reviewing an agency decision depends upon the nature of the alleged error." *Id.* Where an appellant alleges the agency's decision was affected by errors of law, "*de novo*" review is required; however, where an appellant questions whether the agency's decision was supported by substantial evidence or was arbitrary or capricious, the trial court must employ the "whole record" test. *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); *see also* N.C. Gen. Stat. §§ 150B-51(b)(4)-(6) (1999).

In the case at bar, Dixie Lumber alleged in its petition for judicial review that the Final Agency Decision prejudiced its substantial rights as follows: (1) The conclusion in the Final Agency Decision "that [Dixie Lumber] was not eligible for reimbursement because tank fees were not paid and [Dixie Lumber] was the operator of the [underground storage tanks] is unsupported by substantial evidence admissible under N.C. Gen. Stat. § 150B-29(a), -30 or -31, in view of the entire record as submitted, or is arbitrary and capricious"; and (2) The conclusion of law that "The Environmental Management Commission acted within the authority provided by N.C.G.S. § 143B-282(a)(2)(h) in adopting rules in subchapter 2P of Title 15A, including 15A. N.C.A.C. 2P0401(b)" is an error of law. Dixie Lumber does not argue on appeal that the trial court applied the incorrect standards of review in considering Dixie Lumber's arguments, and we conclude that the trial court applied the correct standards of review to Dixie Lumber's challenges to the Final Agency Decision. Our review is therefore limited to determining whether the trial court properly applied the "whole record" and "*de novo*" standards of review to Dixie Lumber's respective arguments.

The trial court states in the findings of fact in its order that, "after applying the whole record test, the Court finds that the Final Agency Decision of the Department of Environment and Natural Resources is supported by substantial, competent and material evidence." Furthermore, the trial court found that "[t]he Final Agency Decision was not arbitrary or capricious." The whole record test requires examination of the entire record to determine whether the agency decision is supported by substantial evidence. *See ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Comr. of Insurance v. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). "If substantial evidence supports an agency's decision after the entire record has been reviewed, the decision must be upheld." *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 473-74, 546 S.E.2d 177, 181 (2001).

As Dixie Lumber acknowledges in its brief, the central legal issue in this appeal is whether Dixie Lumber was properly deemed to be the

"operator" of the tanks under N.C. Gen. Stat. § 143-215.94A (1999). We note that Dixie Lumber did not specifically except to any of the Final Agency Decision's findings of fact before the trial court; thus, the findings of fact in the Final Agency Decision were binding on the trial court and constituted the whole record before it. *See Wiggins v. N.C. Dept. of Human Resources*, 105 N.C. App. 302, 413 S.E.2d 3 (1992). Therefore, "the trial court had to determine whether those findings reflected substantial evidence to support" the Final Agency Decision finding Dixie Lumber to be the operator. *Id.* at 306, 413 S.E.2d at 5.

G.S. § 143-215.94A(8) defines "operator" as "any person in control of, or having responsibility for, the operation of an underground storage tank." After reviewing the record, we conclude that it contains substantial evidence to support the Final Agency Decision that Dixie Lumber was the "operator" of the tanks. Indeed, testimony before Judge Wade indicated that an underground storage tank form on file with the Environmental Department listed Larry Summer, an officer of Dixie Lumber, as the contact person at the tanks' site, indicating a relationship between Dixie Lumber and the tanks. Furthermore, the contact person listed on the form usually indicates the tanks' operator. Evidence before Judge Wade indicated that Dixie Lumber used the two tanks for its business until discontinuing its relationship with its petroleum supplier, McNeely Oil Company. The Final Agency Decision's unchallenged findings reflect that only Dixie Lumber's employees used the tanks; Dixie Lumber's employees maintained the tanks, locking them up nightly; and purchased and installed the second tank in the 1970s. While there may be conflicting evidence in the record, the "whole record" test "does not allow the reviewing 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*." *Mendenhall v. N.C. Dept. of Human Resources*, 119 N.C. App. 644, 650, 459 S.E.2d 820, 824 (1995). We hold Dixie Lumber's first two assignments of error to be without merit.

[2] Dixie Lumber next argues that the trial court erred in concluding that the Environmental Department did not exceed its statutory authority or jurisdiction, or commit an error of law in denying Dixie Lumber reimbursement from the Commercial Fund. We disagree.

As Dixie Lumber alleged an error of law, "*de novo*" review was required; we note that the trial court applied "*de novo*" review to this

argument. We must therefore determine whether the trial court did so properly. *See In re McCrary.*

G.S. § 143-215.94B establishes the Commercial Fund and defines the parameters for the disbursement of funds therein. N.C. Gen. Stat. § 143-215.94C(a) (1999) provides that an:

> operator of a commercial petroleum underground storage tank shall pay to the [North Carolina] Secretary [of Environment and Natural Resources] for deposit into the Commercial Fund an annual operating fee according to the following schedule:
>
> (1) For each petroleum commercial underground storage tank of 3,500 gallons or less capacity—two hundred dollars ($200.00).
>
> (2) For each petroleum commercial underground storage tank of more than 3,500 gallon capacity—three hundred dollars ($300.00).

Additionally, N.C. Gen. Stat. § 143-215.94E (1999) delineates the rights and obligations of operators, providing in relevant part that:

> (g) No . . . operator shall be reimbursed pursuant to this section, and the [Environmental] Department shall seek reimbursement of the appropriate fund or of the [Environmental] Department for any monies disbursed from the appropriate fund or expended by the [Environmental] Department if:
>
> . . .
>
> (3) The . . . operator has failed to pay any annual tank operating fee due pursuant to G.S 143-215.94C.

G.S. § 143-215.94E(g). Dixie Lumber does not contest that past annual tank operating fees were due at the time of discovery of the releases from the tanks. Rather, Dixie Lumber argues that G.S. § 143-215.94E(g)(3) does not impose a time restriction for fee payments, and appears to allow for the "back" payment of fees following the discovery of a release, so long as the fees are paid prior to reimbursement from the Commercial Fund. However, N.C. Admin. Code tit. 15A, r. 2P.0401(b) (September 2001) provides that:

> An . . . operator of a commercial underground storage tank is not eligible for reimbursement for costs related to releases if any annual operating fees due have not been paid in accordance with [N.C. Admin. Code tit. 15A, r. 2P.0301 (2000)] *prior to discovery.*"

(Emphasis added.) Dixie Lumber contends that this rule conditioning eligibility for reimbursement from the Commercial Fund upon the payment of fees prior to the discovery of the release conflicts with G.S. § 143-215.94E(g)(3) and is therefore invalid. We disagree.

The North Carolina Environmental Management Commission is the agency charged with enforcing the "Oil Pollution and Hazardous Substances Control Act of 1978," set forth in Article 21A of Chapter 143 of our General Statutes, including Part 2A thereof, "Leaking Petroleum Underground Storage Tank Cleanup." *See* G.S. § 143-215.94A *et seq.*; *see also* N.C. Gen. Stat. §§ 143-215.77(2) and 143-215.79 (1999); *Carpenter v. Brewer Hendley Oil Co.*, 145 N.C. App. 493, 549 S.E.2d 886 (2001). The Environmental Management Commission is specifically authorized under N.C. Gen. Stat. § 143-215.3(a)(17) (1999) to "adopt rules to implement Part 2A of Article 21A of Chapter 143." *See also* N.C. Gen. Stat. §§ 143B-282(a)(2)(h) and (i) (1999). We conclude that the Environmental Management Commission was empowered to adopt N.C. Admin. Code tit. 15A, r. 2P.0401(b) in an effort to implement G.S. § 143-215.94A *et seq.*; furthermore, Dixie Lumber's argument that the rule conflicts with G.S. § 143-215.94E(g)(3) is wholly without merit.

Accordingly, the trial court's 28 March 2001 order affirming the 7 November 2000 Final Agency Decision is,

Affirmed.

Judges McCULLOUGH and THOMAS concur.

NELSON PAGE TUCKER, PLAINTIFF v. THE BOULEVARD AT PIPER GLEN LLC, DEFENDANT

No. COA01-734

(Filed 7 May 2002)

1. Unfair Trade Practices— sale of townhouse—actual reliance—injury or damage

The trial court did not err in an unfair and deceptive trade practices case by granting summary judgment in favor of defendant builder-seller even though plaintiff townhouse buyer con-

tends defendant misrepresented the townhouse it would build for plaintiff would have a dramatic, spectacular, and panoramic view of a golf course, because: (1) plaintiff could not produce evidence to support the essential element of actual reliance by plaintiff upon the alleged misrepresentations of defendant when the purchase and sale agreement did not include any such descriptions of the townhouse view and included the statement that neither party is relying on any statement or representation made by or on behalf of the other party that is not set forth in the agreement; and (2) plaintiff could not produce evidence to support the essential element of some injury or damage proximately caused by defendant's allegedly unfair or deceptive acts based on his allegations that his townhouse at closing was worth only slightly more than what he paid for it instead of being worth a lot more than what he paid for it.

2. Pleadings— denial of Rule 11 sanctions—findings of fact required

The trial court's decision to deny defendant's motion for Rule 11 sanctions in an unfair and deceptive trade practices case is remanded because the trial court did not make any findings of fact or conclusions of law in support of its denial of defendant's motion for Rule 11 sanctions.

Appeal by plaintiff and defendant from an order entered 12 April 2001 by Judge Clarence E. Horton, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 26 March 2002.

Weaver, Bennett & Bland, P.A., by Michael David Bland and Joseph T. Copeland, for plaintiff-appellant-appellee.

Robinson, Bradshaw & Hinson, P.A., by Thomas Holderness, for defendant-appellee-appellant.

HUNTER, Judge.

Nelson Page Tucker ("plaintiff") appeals from the trial court's 12 April 2001 order granting summary judgment in favor of The Boulevard at Piper Glen LLC ("defendant"), and defendant appeals from the same order denying defendant's motion for sanctions. We affirm the grant of defendant's motion for summary judgment, and we remand to the trial court for entry of findings and conclusions in support of its denial of defendant's motion for sanctions.

On 20 April 2000, plaintiff filed the complaint in this action alleging that defendant had engaged in an unfair and deceptive practice. The complaint sets forth the following factual allegations: that plaintiff and defendant entered into a contract on 15 July 1998 whereby defendant agreed to construct and sell to plaintiff a townhouse for the cost of $344,900.00; that plaintiff's willingness to enter into the contract was based, in part, upon defendant's verbal and written representations that the townhouse would have a "dramatic," "unparalleled," and "panoramic" view "overlooking the ninth green of the Piper Glen RPC Course"; that the townhouse, once constructed, offered a view of the golf course that was partially obscured by "a large number of trees"; that plaintiff complained to defendant about the obscured view but defendant refused to reduce the sales price; that plaintiff closed on the purchase of the townhouse at the agreed price of $344,900.00; that defendant knew or should have known that the townhouse as constructed would not offer the kind of view that defendant represented and promised it would offer; and that, as a result of defendant's misrepresentations, plaintiff suffered damages in excess of $75,000.00 because the townhouse, as constructed, was worth no more than $269,900.00 at the time of closing.

During discovery, plaintiff responded to defendant's request for admissions and admitted that in August of 1999, the townhouse had been appraised by "plaintiff's lender" at a value of $362,500.00, and that this appraisal was available to plaintiff prior to closing on the sale of the townhouse. At his deposition, plaintiff testified that he believed the townhouse was worth at least $350,000.00 at the time of closing (31 August 1999), and that he had been willing to close on the townhouse, and to accept the partially obstructed view, because he believed the property was a "sound investment." He further testified that he believed the townhouse would be worth an additional $75,000.00 if the view were unobstructed, and that this belief was merely his own assumption and was not based upon any appraisal of the property. In addition, plaintiff was specifically asked about his allegation in the complaint that the townhouse was worth no more than $269,900.00 at the time of closing:

Q. So when you told the court that your home was worth no more than $269,900, you didn't really mean that?

A. Right, I'm just using the value minus what I think the view is worth.

Based upon plaintiff's admissions and his deposition testimony, defendant moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, Rule 56 (1999) ("Rule 56"), and for sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, Rule 11 (1999) ("Rule 11"). In response, plaintiff submitted an affidavit from himself alleging that he has suffered damages of $50,000.00 to $75,000.00 as a result of the partially obstructed view. He also submitted an affidavit from a professional appraiser alleging that the townhouse would be worth approximately $45,000.00 more if it had an unobstructed view. Following a hearing on defendant's motions, the trial court granted summary judgment in favor of defendant but denied defendant's motion for Rule 11 sanctions. Plaintiff and defendant both appeal.

[1] On appeal, plaintiff assigns error to the trial court's grant of summary judgment in favor of defendant. We hold that the trial court did not err in granting summary judgment here because the facts are not in dispute, and because the evidence produced during discovery establishes that defendant's conduct does not constitute an unfair or deceptive practice as a matter of law.

Section 75-1.1 of our General Statutes provides that "unfair or deceptive acts or practices in or affecting commerce" are unlawful. N.C. Gen. Stat. § 75-1.1(a) (1999). " 'Under N.C. Gen. Stat. § 75-1.1, the question of what constitutes an unfair or deceptive trade practice is an issue of law.' " *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 363, 533 S.E.2d 827, 830 (2000) (citation omitted). Although a court generally determines whether an act or practice is unfair or deceptive based upon the jury's findings, a court may grant summary judgment if the facts are not disputed and the moving party is entitled to judgment as a matter of law. *Id.* A defendant moving for summary judgment bears the burden of showing that: (1) an essential element of plaintiff's claim is nonexistent; (2) discovery indicates plaintiff cannot produce evidence to support an essential element; or (3) plaintiff cannot surmount an affirmative defense. *Id.* "Once a defendant has met that burden, the plaintiff must forecast evidence tending to show a *prima facie* case exists." *Id.* Here, plaintiff is unable to establish at least two essential elements of his claim.

"To establish a *prima facie* claim for unfair trade practices, the 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." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 664, 464 S.E.2d 47, 58 (1995) (citation omitted). Where an unfair or deceptive practice claim is based upon an alleged misrepresentation by the defendant, the plaintiff must show "actual reliance" on the alleged misrepresentation in order to establish that the alleged misrepresentation "proximately caused" the injury of which plaintiff complains. *Id.* Here, plaintiff's claim is based upon the allegation that defendant represented that the townhouse would have a "dramatic," "spectacular," and "panoramic" view. However, the "Purchase and Sale Agreement" entered into by plaintiff and defendant, which does not include any such descriptions of the townhouse view, includes the following provision: "Neither party is relying on any statement or representation made by or on behalf of the other party that is not set forth in this Agreement." Thus, discovery indicates that plaintiff cannot produce evidence to support the essential element of "actual reliance" by plaintiff upon the alleged misrepresentations of defendant.

Discovery also indicates that plaintiff cannot produce evidence to support the essential element of some injury or damage proximately caused by defendant's allegedly unfair or deceptive acts. In his complaint, plaintiff alleges that he has suffered damages in excess of $75,000.00 because he paid $344,900.00 for the townhouse when it was worth no more than $269,900.00 at closing. However, during his deposition, plaintiff acknowledged that his townhouse was worth at least $350,000.00 at closing. By his affidavit submitted in response to defendant's motion for summary judgment, plaintiff now appears to contend that, although his townhouse at closing was, in fact, worth more than what he paid for it, plaintiff had expected at the time he entered into the contract to pay $344,900.00 for a townhouse that would be worth closer to $400,000.00 at closing. In other words, plaintiff essentially complains that his townhouse at closing was worth only slightly more than what he paid for it instead of being worth a lot more than what he paid for it. These allegations fail to establish that plaintiff has suffered any legally cognizable damage as a result of defendant's acts. For these reasons, we affirm the trial court's grant of summary judgment.

[2] Defendant also appeals from the trial court's order, arguing that the trial court erred in denying defendant's motion for Rule 11 sanctions. A trial court's decision to grant or deny a motion to impose

sanctions is reviewable *de novo* as a legal issue. *See Turner v. Duke University*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989), *disc. review denied*, 329 N.C. 505, 407 S.E.2d 552 (1991). This *de novo* review requires the court to determine: (1) whether the findings of fact of the trial court are supported by a sufficiency of the evidence; (2) whether the conclusions of law are supported by the findings of fact; and (3) whether the conclusions of law support the judgment. *Id.* "As a general rule, remand is necessary where a trial court fails to enter findings of fact and conclusions of law regarding a motion for sanctions pursuant to Rule 11." *Sholar Bus. Assocs. v. Davis*, 138 N.C. App. 298, 303, 531 S.E.2d 236, 240 (2000). " 'However, remand is not necessary when there is no evidence in the record, considered in the light most favorable to the movant, which could support a legal conclusion that sanctions are proper.' " *Id.* at 304, 531 S.E.2d at 240 (citation omitted).

In the present case, the trial court did not make any findings of fact or conclusions of law in support of its denial of defendant's motion for Rule 11 sanctions. Defendant's motion for sanctions was based upon the contention that plaintiff's complaint, which alleges that the townhouse was worth no more than $269,900.00 at the time of closing, was not well grounded in fact. For purposes of Rule 11, a complaint is considered factually insufficient if either (1) the plaintiff failed to undertake a reasonable inquiry into the facts, or (2) the plaintiff, after reviewing the results of his inquiry, could not have reasonably believed that his position was well grounded in fact. *See, e.g., Golds v. Central Express, Inc.*, 142 N.C. App. 664, 669, 544 S.E.2d 23, 27 (2001).

Here, plaintiff admitted during discovery that in August of 1999, the townhouse had been appraised by "plaintiff's lender" at a value of $362,500.00, and that this appraisal was available to plaintiff prior to closing. Furthermore, at his deposition, plaintiff testified that he believed the townhouse was worth at least $350,000.00 at the time of closing. He also testified that he believed the townhouse would be worth an additional $75,000.00 if the view were unobstructed, but admitted that this belief was merely his own assumption and was not based upon any appraisal of the property. In addition, plaintiff was specifically asked about his allegation in the complaint that the townhouse was worth no more than $269,900.00 at the time of closing:

> Q. So when you told the court that your home was worth no more than $269,900, you didn't really mean that?

A. Right, I'm just using the value minus what I think the view is worth.

Considering the record in the light most favorable to defendant, we find at least some evidence that might support an award of sanctions. Therefore, we believe it is necessary to remand the case to the trial court for entry of findings and conclusions in support of its denial of defendant's motion for Rule 11 sanctions.

For the reasons stated herein, we affirm the trial court's grant of summary judgment in favor of defendant, and we remand to the trial court for entry of findings and conclusions in support of its denial of defendant's motion for sanctions.

Affirmed in part and remanded in part.

Judges GREENE and TIMMONS-GOODSON concur.

FAYE BROWN DARROCH, PLAINTIFF-APPELLEE v. REBECCA SNELLING LEA, DEFENDANT

No. COA01-642

(Filed 7 May 2002)

1. Appeal and Error— appealability—interlocutory order—denial of summary judgment—underinsured motorist carrier—service of process—notice

An unnamed defendant insurance company's appeal in an underinsured motorist case from the trial court's denial of its motion for summary judgment is dismissed as an appeal from an interlocutory order even though defendant claims a substantial right is affected based on its right to service of process and notice of a pending lawsuit and exposure to an insurance claim, because: (1) the formal service of process requirement of our Rules of Civil Procedure do not apply to N.C.G.S. § 20-279.21(b)(4); and (2) plaintiff was not required to notify defendant within the three-year statute of limitations for negligence.

2. Appeal and Error— appealability—interlocutory order—denial of summary judgment—possibility of binding arbitration award

An unnamed defendant insurance company's appeal in an underinsured motorist case from the trial court's denial of its motion for summary judgment is dismissed as an appeal from an interlocutory order even though defendant contends a substantial right is affected by the possibility that plaintiff could receive a binding arbitration award before the issue of underinsured motorist coverage is determined, because no substantial right is affected by an appeal from an interlocutory order compelling arbitration since the parties have access to the courts.

Appeal by unnamed appellant (North Carolina Farm Bureau Mutual Insurance Company) from judgment entered 8 February 2001 by Judge E. Lynn Johnson in Harnett County Superior Court. Heard in the Court of Appeals 25 March 2002.

Brent Adams and Associates, by Brenton D. Adams, for plaintiff-appellee.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Reid Russell, for unnamed appellant.

BRYANT, Judge.

This is an action to recover under plaintiff's underinsured motorist coverage. On 11 September 1996, plaintiff was injured in an automobile accident in Moore County. On 9 July 1999, plaintiff filed a negligence action against the driver [defendant] of the other automobile. Defendant answered, denying liability and raising contributory negligence as a defense. On 28 February 2000, Plaintiff notified North Carolina Farm Bureau Mutual Insurance Company [Farm Bureau], her underinsured motorist carrier, of the complaint. On or about 3 May 2000, Farm Bureau filed an answer, raising contributory negligence and the statute of limitations as defenses. On the same day, Allstate Insurance Company, defendant's insurance company, tendered its policy limit of $25,000 to plaintiff. Also on the same day (3 May 2000), Farm Bureau was notified that Allstate had tendered its policy limit. On 1 June 2000, Farm Bureau mailed to plaintiff $25,000 and requested that plaintiff execute an "Advance and Trust Agreement," and that plaintiff's counsel hold the check pending the execution of that agreement. Plaintiff refused to sign

the agreement because it contained provisions with which plaintiff disagreed.

On 25 July 2000, plaintiff filed a motion to compel arbitration pursuant to the insurance policy. In an order filed on 6 October 2000, the trial court concluded that Farm Bureau waived its rights to subrogation and to approve a settlement between plaintiff and Allstate Insurance Company. The court ordered the action stayed and ordered the parties to submit to arbitration. Farm Bureau amended its answer to include defenses of insufficiency of process and insufficiency of service of process. On 19 October 2000, Farm Bureau filed an amended motion for summary judgment which included these defenses. The trial court denied defendant's motion for summary judgment in an order filed 8 February 2001. Farm Bureau appealed.

In its 19 October 2000 amended motion for summary judgment, Farm Bureau states that the basis of its motion

> is that there has been insufficiency of process as to movant, that there has been insufficiency of service of process as to the movant, this [sic] this Court lacks jurisdiction over movant, that movant was never properly served with copies of the Civil Summons and Complaint before the expiration of the statute of limitations, that movant was never provided with notice of the initiation of this lawsuit before the expiration of the statute of limitations, and, therefore, Plaintiff is barred from recovering under her underinsured motorist policy with movant.

We must first address whether this appeal is interlocutory. Generally, there is no right to appeal from an interlocutory order. *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 141, 526 S.E.2d 666, 667 (2000). " 'An order or judgment 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.' " *Id.* at 141, 526 S.E.2d at 669 (quoting *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 733, 460 S.E.2d 332, 334 (1995)). An appeal from an interlocutory order may be taken under two circumstances: 1) the order is final as to some but not all the parties and there is no just reason to delay the appeal; or 2) the order deprives the appellant of a substantial right that would be lost unless immediately reviewed. *Id.*; *see* N.C.G.S. §§ 1-277(a), 7A-27(d) (1999).

I.

[1] Farm Bureau concedes that this appeal is from an interlocutory order. However, Farm Bureau argues that a substantial right is at stake, and that its substantial right will be lost without immediate review. "A substantial right is 'one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.' " *Turner*, 137 N.C. App. at 142, 526 S.E.2d at 670. In this case, Farm Bureau first argues that "as the underinsured motorist carrier, it had a statutory right to be formally served with a Summons and Complaint and to be promptly notified should plaintiff initiate a lawsuit which may invoke underinsured motorist coverage under one of its policies." Farm Bureau argues that the right to service of process and notice of a pending lawsuit and exposure to an insurance claim is a substantial right because "it affords the underinsured motorist carrier the opportunity to appear in the suit as an unnamed party and participate in the suit as fully as if it were a party." (citing N.C.G.S. § 20-279.21(b)(4)). Whether or not a substantial right is affected, as Farm Bureau argues, turns on whether Farm Bureau has a right to formal service of process. Therefore, we must determine whether our Rules of Civil Procedure apply to N.C.G.S. § 20-279.21(b)(4).

N.C.G.S. § 20-279.21(b)(4) provides in pertinent part:

> A party injured by the operation of an underinsured highway vehicle who institutes a suit for the recovery of moneys for those injuries and in such an amount that, if recovered, would support a claim under underinsured motorist coverage shall give notice of the initiation of the suit to the underinsured motorist insurer as well as to the insurer providing primary liability coverage upon the underinsured highway vehicle. Upon receipt of notice, the underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party. The underinsured motorist insurer may elect, but may not be compelled, to appear in the action in its own name and present therein a claim against other parties . . . .

N.C.G.S. § 20-279.21(b)(4) (1999). This Court held in *Liberty Mut. Ins. Co. v. Pennington*, 141 N.C. App. 495, 541 S.E.2d 503 (2000) *cert. allowed*, 353 N.C. 451, 548 S.E.2d 526 (2001), that the Rules of Civil Procedure do not apply such that an underinsured motorist carrier must be served with pleadings as a party. In *Pennington*, the insureds notified their carrier after an automobile accident that they intended

to claim benefits under the policy. The carrier opted not to advance funds to the insureds, and sought a declaratory judgment. The carrier argued that the insureds were not entitled to coverage because: 1) they failed to properly notify the carrier; and, 2) the three-year statute of limitations in the underlying action had expired before the carrier was notified. The trial court granted the carrier's motion for summary judgment. On appeal, this Court reversed, holding that N.C.G.S. § 20-279.21(b)(4)

> does not require that an underinsured motorist carrier be served with pleadings as a party, nor does it require that such carrier appear in the action. Indeed, the subsection allows the underinsured motorist carrier to proceed in an action *as if* it were a party, without being named as such. Further, this provision does not provide a specific time within which an insured must notify her insurer, nor does it dictate how the insured must notify her carrier about the claim.

Pennington, 141 N.C. App. at 498, 541 S.E.2d at 506.

In the instant case, Farm Bureau argues that § 20-279.21(b)(4) provides that the provisions of (b)(3) also apply to coverage required by (b)(4); therefore, formal notice requirements must be met. We disagree. The *Pennington* Court compared (b)(4) with (b)(3) by stating:

> We compare this provision to N.C. Gen. Stat. § 20-279.21(b)(3) (1993), which governs notification to an *uninsured* motorist carrier. That subsection, unlike the underinsured motorist subsection, envisions *serving* the uninsured motorist carrier with a copy of the summons and complaint, and requires that the uninsured motorist carrier be a party to the action. Because these requirements are strikingly absent from subsection (b)(4), which governs the underinsured motorist claims, our General Assembly must have intended for the notification provisions of the two statutes to be construed differently. It follows that subsection (b)(4) does not require that an underinsured motorist carrier be notified of a claim within the statute of limitations governing the tortfeasor.

Pennington, 141 N.C. App. at 498-99, 541 S.E.2d at 506. Based on *Pennington*, we hold that the formal service of process requirement of our Rules of Civil Procedure do not apply to § 20-279.21(b)(4). We further hold that plaintiff was not required to notify Farm Bureau

within the three-year statute of limitations for negligence. As the *Pennington* Court noted, "while the statute of limitations would serve to bar underinsured motorist coverage when the insured fails to bring a timely claim against a tortfeasor, the statute of limitations for tort claims generally does not impact the notification provisions of N.C. Gen. Stat. § 20-279.21(b)(4)." *Id.*

II.

[2] Farm Bureau next argues that it would be deprived of a substantial right if plaintiff received a binding arbitration award before resolving whether plaintiff is covered under the underinsured motorist policy. We disagree.

In *Russell v. State Farm Ins. Co.*, 136 N.C. App. 798, 526 S.E.2d 494 (2000), the insured requested compensation from his uninsured motorist carrier when he was injured in a motorcycle accident. When the carrier denied coverage, the insured requested arbitration under an arbitration clause stating:

> If we and an insured do not agree:
>
> 1. Whether that person is legally entitled to recover compensatory damages from the owner or driver of an uninsured motor vehicle; or
>
> 2. As to the amount of such damages;
>
> the insured may demand to settle the dispute by arbitration.

Id. at 799, 526 S.E.2d at 495. The insured filed a declaratory judgment action seeking that the action be removed to binding arbitration. The carrier asserted that

> [the insured] must commence a civil action against [the carrier] to determine whether there is uninsured motorist coverage before it can resort to the arbitration provision, and that [the insured's] failure to notify police of the accident violated provisions of the policy which constituted 'a condition precedent to making an uninsured motorists claim' against [the carrier].

Id. The trial court denied the carrier's motion for summary judgment and ordered the issues referred to arbitration. On appeal, this Court dismissed the appeal as interlocutory, stating that "[a]n order compelling arbitration and denying a motion for summary judgment, such

as that entered in the instant case, is interlocutory and therefore not immediately appealable." *Id.* at 800, 526 S.E.2d at 496. The *Russell* Court refused to reach the issue of whether a substantial right was affected because the carrier failed to comply with our Rules of Appellate Procedure.

In the instant case, Farm Bureau argues that, although the appeal is from an interlocutory order, the issue of coverage should be decided before the issue of liability because a substantial right is affected. However, this Court previously held in *The Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 285, 314 S.E.2d 291, 293 (1984), that no substantial right is affected by an interlocutory appeal from an order compelling arbitration because the parties have access to the courts. A party may petition the court after arbitration for an order confirming, vacating, modifying or correcting an arbitration award. *Id.* (citing N.C.G.S. §§ 1-567.12 to -567.14). Once granted, the trial court enters a judgment or decree in conformity with that order. *Id.* (citing N.C.G.S. § 1-567.15). A party may then appeal the trial court's order or judgment. *Id.* (citing N.C.G.S. § 1-567.18 (a)(3) to -(6)).

In the instant case, Farm Bureau appealed from the trial court's denial of its motion for summary judgment, claiming that a substantial right is affected because of the possibility that plaintiff could receive a binding arbitration award before the issue of coverage is determined. We find *Russell* and *Wysocki* to be on point and hold that this is an interlocutory appeal which does not affect a substantial right.

APPEAL DISMISSED.

Judges EAGLES and HUDSON concur.

MICHAEL A. COLOMBO, ADMINISTRATOR CTA OF THE ESTATE OF HAZEL PILAND STEVENSON, DECEASED, PLAINTIFF v. GEORGE M. STEVENSON, III, HAZEL S. BRANCH, HOWELL W. BRANCH, BETSY BRANCH LEWIS, WESLEY STEVENSON BRANCH AND SUSAN STEVENSON, DEFENDANTS

No. COA01-745

(Filed 7 May 2002)

Wills— lapsed devises—residuary estate—anti-lapse statute

The trial court erred by ruling that the anti-lapse statute then in effect applied to the legacies and devises of a will where the testatrix granted specific legacies and devises to certain family members without stating what was to occur should any family member predecease her, then, in a subsequent Article, provided that her residuary estate was to include all lapsed legacies and devises. The inclusion of this language indicates that the testatrix contemplated that the legacies and devises granted in previous Articles could lapse and clearly indicates her intention that lapsed legacies were to become part of her residuary estate. N.C.G.S. § 31-42(a).

Appeal by defendants Hazel S. Branch, Howell W. Branch, Betsy Branch Lewis and Wesley Stevenson Branch from judgment entered 12 March 2001 by Judge Clifton W. Everett, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 13 March 2002.

Alexander Ralston, Speckhard & Speckhard, L.L.P., by Donald K. Speckhard for defendants-appellants Hazel S. Branch, Howell W. Branch, Betsy Branch Lewis and Wesley Stevenson Branch.

Gaylord, McNally, Strickland, Snyder & Holscher, L.L.P., by Danny D. McNally and Emma Stallings Holscher, for defendants-appellees George M. Stevenson, III and Susan Stevenson.

WALKER, Judge.

Defendants Hazel S. Branch, Howell W. Branch, Betsy Branch Lewis and Wesley Stevenson Branch (appellants) appeal from a judgment ordering that the legacies and devises granted to George M. Stevenson, Jr. (George Jr.) under the Will of Hazel Piland Stevenson (testatrix) pass to George M. Stevenson, III (George III). The testatrix died on 24 January 2000 and was predeceased by her only son, George Jr., who died on 29 November 1999. The sole issue with this appeal is

whether the trial court erred in determining that N.C. Gen. Stat. § 31-42 (anti-lapse statute) applied to the legacies and devises granted to George Jr. under the Will, thereby allowing George Jr.'s issue, George III, to take in his place.

The pertinent provisions of the Will are as follows:

ARTICLE III

I bequeath all my personal effects, household furnishings and other tangible personal property not otherwise disposed of too [sic] my son, GEORGE M. STEVENSON, JR., to be distributed as he, in his sole discretion, shall determine.

ARTICLE IV

I devise and bequeath the following described items of property to the following named beneficiaries:

A. To my daughter, HAZEL S. BRANCH, and my son-in-law, HOWELL W. BRANCH, the sum of $10,000.00 as a token of my appreciation and love for them.

B. To my son, GEORGE M. STEVENSON, JR., all of the cash I have remaining after the above specific requests and all death taxes and expenses are paid.

C. To my son, GEORGE M. STEVENSON, JR., and my grandson, GEORGE M. STEVENSON, III, in equal shares, all of the stocks and bonds and other securities which I own at the time of my death. This bequest is made to my son and grandson in consideration of their expenditures of time and money for my well-being and comfort.

D. To my son, GEORGE M. STEVENSON, JR., all of my farm equipment and machinery.

E. To my son, GEORGE M. STEVENSON, JR., all of my interest in the Dickerson-Baker farm in Martin County, North Carolina, in fee simple.

F. To my daughter, HAZEL S. BRANCH, for her lifetime only, all of my interest in the Johnson Farm in Martin County, North Carolina, and remainder to my granddaughter, BETSY BRANCH LEWIS, in fee simple.

G. To my daughter, HAZEL S. BRANCH, for her lifetime only, all my interest in the Adams Farm in Halifax County, North Carolina,

and remainder to my grandson, WESLEY STEVENSON BRANCH, in fee simple. For a period of one (1) year following the date of my death, I direct that my son, GEORGE M. STEVENSON, JR., shall have the right to keep and maintain any livestock, electric fences and farming equipment in the same manner as existing at the time of my death . . . .

ARTICLE V

All of the residue of the property which I may own at the time of my death, real or personal, tangible and intangible, of whatsoever nature and wheresoever situated, including all property which I may acquire or become entitled to after the execution of this will, including all lapsed legacies and devises, or other gifts made by this will which fail for any reason, I bequeath and devise in fee to my son, GEORGE M. STEVENSON, JR., and to my daughter, HAZEL S. BRANCH, in equal shares.

Appellants maintain that the language used in Article V of the Will clearly indicates the testatrix's intention that any legacy or devise which lapsed was to become a part of her residuary estate; therefore, the trial court erred in concluding the anti-lapse statute applied to the legacies and devises granted to George Jr. Our State's anti-lapse statute provides as follows:

> Unless the will indicates a contrary intent, if a devisee predeceases the testator, whether before or after the execution of the will, and if the devisee is a grandparent of or a descendant of a grandparent of the testator, then the issue of the predeceased devisee shall take in place of the deceased devisee.

N.C. Gen. Stat. § 31-42(a) (1999).[1]

Our courts have consistently recognized a duty "to render a will operative and to give effect to [a] testator's intent if reasonable interpretation can be given which is not in contravention of some established rule of law." *NCNB v. Apple*, 95 N.C. App. 606, 608, 383 S.E.2d 438, 440 (1989); *see also Stephenson v. Rowe*, 315 N.C. 330, 335, 338 S.E.2d 301, 304 (1986) (where a testator's intent is clearly expressed in plain and unambiguous language "the will is to be given effect according to its obvious intent"). *Watson v. Smoker*, 138 N.C. App. 158, 160, 530 S.E.2d 344, 346, *disc. rev. denied*, 352 N.C. 363, 544

1. We are cognizant of the fact that N.C. Gen. Stat. § 31-42(a) was amended effective 17 May 2001. However, since the testatrix died on 24 January 2000, the version in effect on that date applies to the disposition of her estate.

S.E.2d 560 (2000) (*quoting Price v. Price*, 11 N.C. App. 657, 660, 182 S.E.2d 217, 219 (1971)).

Based on these principles, this Court has held "[a] testator who desires to prevent lapse must express such intent or provide for substitution of another devisee in language sufficiently clear to indicate what person or persons testator intended to substitute for the legatee dying in his lifetime; otherwise, the anti-lapse statute applies." *Early v. Bowen*, 116 N.C. App. 206, 210, 447 S.E.2d 167, 170 (1994); *disc. rev. denied*, 339 N.C. 611, 454 S.E.2d 249 (1995) (*citing In re Will of Hubner*, 106 N.C. App. 204, 416 S.E.2d 401, *disc. rev. denied*, 332 N.C. 148, 419 S.E.2d 572 (1992)). Here, the parties agree with the trial court's finding that "[t]he provisions of testatrix's will pertinent to this action are not ambiguous." Under Article V, the testatrix specifically stated the residue of her property was to include "all lapsed legacies and devises, or other gifts made by this will which fail for any reason." Generally, words used in a will which have a well-defined legal significance are "presumed to have been used in that sense, in the absence of evidence of a contrary intent." *Clark v. Connor*, 253 N.C. 515, 521, 117 S.E.2d 465, 468-69 (1960). A "lapsed" legacy or devise has historically been defined by our courts as one where the legatee or devisee dies before the testator. *See Smith v. Wiseman*, 41 N.C. 540 (1850); *Mebane v. Womack*, 55 N.C. 293 (1855); *Betts v. Parrish*, 312 N.C. 47, 320 S.E.2d 662 (1984).

Nevertheless, appellees contend the testatrix's inclusion of the phrase "including all lapsed legacies and devises" was merely "boilerplate language" and should not be interpreted as an expression of her intent to prevent an application of the anti-lapse statute. In support of their contention, appellees cite *Blevins v. Moran*, 12 S.W.3d 698 (Ky. Ct. App. 2000), in which the Kentucky Court of Appeals held that a will's residuary clause which included the phrase "[a]ll the rest, residue and remainder of my estate . . . including legacies and devises, if any, which may fail for any reason" did not, by itself, establish a testator's intent to avoid operation of its anti-lapse statute. However, the Court reached its conclusion based on its finding that the language used by the testator was ambiguous and its determination that the Kentucky Anti-Lapse Statute carried with it a "*strong* presumption against lapse." *Id.* at 703 (emphasis added).

With the exception of Kentucky, other jurisdictions which have addressed this issue have held that a testator's use of such similar language demonstrates an intention that a lapsed bequest was to become

part of the residuary estate and was not to be saved by their states' anti-lapse statutes. *See Estate of Salisbury*, 143 Cal. Rptr. 81 (Cal. App. 1978) (finding language stating that "the residue of my estate, real and personal, wheresoever situate, including all failed and lapsed gifts" was a sufficiently clear expression of testatrix's intent to render that state's anti-lapse statute inapplicable); *In re Neydorff*, 184 N.Y.S. 551 (N.Y. 1920) (holding that where testator granted the residue to specified person, "including lapsed legacies," the legacies to testator's predeceased brother and sister did not fall within the state's anti-lapse statute); *In re Phelps' Estate*, 126 N.W. 328 (Iowa 1910) (holding a residuary clause which provided "I give, devise and bequeath all the rest, residue and remainder of my estate, real, personal and mixed, wheresoever situated together with any of my estate that may fail, for any reason to pass . . . to the following named persons . . ." demonstrated testator's intention that the State's anti-lapse statute was not to be applied).

A careful review of Articles III and IV of the Will reveals the testatrix granted specific legacies and devises to certain family members without stating what was to occur should any family member predecease her. Thereafter, in Article V, the testatrix provided that her residuary estate was to include "all lapsed legacies and devises, or other gifts made by this will which fail for any reason. . . ." The inclusion of this language indicates that the testatrix contemplated that the legacies and devises granted in Articles III and IV could lapse and clearly demonstrates her intention that should a lapse occur, then the lapsed legacies or devises were to become part of her residuary estate. To apply the anti-lapse statute would require us to presume the testatrix intended that should George Jr. predecease her, the bequests to him in Articles III and IV were to go to George III. We decline to make this presumption in light of (1) the specific language the testatrix used in Article V and (2) the lack of evidence indicating such a contingency in Articles III and IV. *See Clark*, 253 N.C. at 521, 117 S.E.2d at 468-69 (in the interpretation of a testator's intent "nothing is to be added to or taken from the language used, and every clause and every word must be given effect if possible"); *see also Central Carolina Bank v. Wright*, 124 N.C. App. 477, 483, 478 S.E.2d 33, 37 (1996), *disc. rev. denied*, 345 N.C. 340, 483 S.E.2d 162 (1997).

Accordingly, we conclude that, in Article V of her Will, the testatrix used sufficiently clear language to express her intent that the anti-lapse statute not apply to the legacies and devises which lapsed

or failed for any reason. The judgment of the trial court is reversed and the case is remanded for proceedings consistent with this opinion.

Reversed and remanded.

Judges HUNTER and BRYANT concur.

CONSECO FINANCE SERVICING CORPORATION v. DEPENDABLE HOUSING, INC. D/B/A WESTWOOD HOMES AND D/B/A OAKCREEK VILLAGE, RELIABLE HOUSING, INC. AND RICHARD M. PEARMAN, JR.

No. COA01-870

(Filed 7 May 2002)

1. **Appeal and Error— appealability—motion for change of venue**

An appeal from a ruling on a motion for change of venue as a matter of right was not premature.

2. **Venue— sale of collateral—no deficiency at time of sale**

The trial court did not err in an action arising from the sale of collateral by denying defendants' motion for a change of venue from Wake County to Guilford County where defendant Dependable Housing (DHI) was located in Person County, defendant Reliable Housing (RHI) was located in Vance County, defendant Pearman was located in Guilford County and signed all the paperwork in his Guilford County office, and plaintiff maintained an office in Wake County. Although N.C.G.S. § 1-76.1 requires that an action on a deficiency must be brought in the county in which the debtor resides, the inventory had not been sold when this complaint was filed and there was no deficiency claim.

3. **Contracts— site of negotiation—evidence**

The trial court did not err in an action arising from a guaranty and the sale of collateral by finding that the contracts were negotiated in part in Wake County where defendants supplied affidavits stating that no negotiations had been made in Wake County and plaintiff did not directly contradict that statement, but there

was evidence that some of the contracts were approved in Raleigh. The trial court did not have to accept defendants' affidavits as true and could have considered the approval process as an integral part of the negotiation.

4. Judgments— out of session—objection—not specific

There was no valid objection to entry of an order denying a change of venue out of session where defendants objected to the contents of the order, but not to its entry.

Appeal by defendants from judgment entered 10 April 2001 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 28 March 2002.

Smith, Debnam, Narron, Wyche, Story & Myers, LLP, by Byron L. Saintsing and Connie E. Carrigan for plaintiff-appellee.

Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Jessica M. Marlies for defendants-appellants.

THOMAS, Judge.

Defendants appeal from an order denying their motion to transfer venue. Among the four assignments of error put forth, defendants argue the trial court was required to transfer venue because plaintiff's complaint, based on breach of contract, was in reality a request for a deficiency judgment. We affirm the trial court for the reasons discussed herein.

The facts are as follows: Defendant Richard Pearman, Jr. (Pearman) entered into an agreement with plaintiff, Conseco Finance Servicing Corporation (Conseco), on behalf of defendant Dependable Housing, Inc. (DHI). The agreement was a guaranty for DHI's debt. Defendant Reliable Housing, Inc. (RHI) also executed a similar guaranty agreement for DHI. Both DHI and RHI were owned and operated by Pearman and were in the business of selling mobile homes. All three agreements were executed at Pearman's Guilford County office. Conseco is incorporated in Delaware, has a main office address of Alpharetta, Georgia, and maintains an office in Wake County, North Carolina. Conseco, formerly Green Tree Financial Servicing Corporation, is in the business of providing inventory financing and other housing-related loans.

In 1998, DHI experienced serious financial problems. It defaulted on the agreement with Conseco, ceased doing business, and closed its

manufactured home lot in Person County, North Carolina. On 19 April 1999, DHI offered to surrender the collateral (manufactured homes) securing the debt to Conseco, but there was continuing disagreement as to a release form which delayed the retrieval.

Claiming the collateral still had not been properly returned, Conseco filed a complaint on 22 February 2000 for breach of contract, personal guaranty, and possession of inventory. In the complaint, Conseco demanded an order of claim and delivery and that it recover from defendants possession of the collateral inventory, $208,699.41 plus interest in outstanding payments, $31,304.91 in attorney fees, applicable finance and late charges, and costs.

The complaint was filed in Wake County. While Conseco maintains an office in Wake County, defendants do not. Their answer and counterclaims included a motion for change of venue, alleging that plaintiff: (1) asserted false allegations in its complaint, with knowledge of their falsity; (2) deliberately allowed the collateral, after default, to remain on unguarded lots thus reducing its value; (3) after electing performance rather than guaranty, seized monies belonging to RHI because of DHI's breach, resulting in RHI's being put out of business; (4) engaged in unfair and deceptive trade practices; (5) has so dissipated the collateral as to render the guaranties unenforceable; and (6) acted in bad faith.

Defendants' motion for change of venue pursuant to N.C. Gen. Stat. §§ 1-76.1 and 1-83 was denied by the trial court. They appeal.

[1] Before we consider defendants' arguments, we note the trial court's order would not normally be immediately appealable because it would be considered interlocutory. *State ex rel. Employment Security Commission v. IATSE Local 574*, 114 N.C. App. 662, 663, 442 S.E.2d 339, 340 (1994). A ruling is interlocutory if it does not determine the issues but directs some further proceeding preliminary to a final decree. *Blackwelder v. Dept. of Human Resources*, 60 N.C. App. 331, 299 S.E.2d 777 (1983). However, an appeal from a ruling on a motion for change of venue as a matter of right is not premature. *See Klass v. Hayes*, 29 N.C. App. 658, 660, 225 S.E.2d 612, 614 (1976).

[2] By defendants' first and second assignments of error, they argue the trial court erred in denying their motion for change of venue from Wake County to Guilford County, pursuant to N.C. Gen. Stat. §§ 1-76.1 and 1-83(1). We disagree.

Venue is governed by sections 1-76 to 1-87 of the North Carolina General Statutes. Section 1-76.1 provides:

> Subject to the power of the court to change the place of trial as provided by law, actions to recover a deficiency, which remains owing on a debt after secured personal property has been sold to partially satisfy the debt, must be brought in the county in which the debtor or debtor's agent resides or in the county where the loan was negotiated.

N.C. Gen. Stat. § 1-76.1 (1999).

In the instant case, DHI and RHI are located in Person County and Vance County, respectively. Pearman resides in Guilford County and signed all of the paperwork in his Guilford County office.

Conseco argues section 1-76.1 is inapplicable because its claim is not for a deficiency balance, but rather for recovery of a debt. Defendants contend section 1-76.1 is applicable because by the time of the *hearing*, Conseco had both retrieved and sold the collateral.

This Court has held that the trial court may consider only the plaintiff's pleadings, holding that "[f]or purposes of determining venue . . . consideration is limited to the allegations in plaintiff's complaint" regarding the form of the action alleged. *McCrary Stone Service, Inc. v. Lyalls*, 77 N.C. App. 796, 799, 336 S.E.2d 103, 105 (1985), *rev. denied*, 315 N.C. 588, 341 S.E.2d 26 (1986). The *McCrary* court stated that the focus should be on the "principal object" sought by the plaintiff. *Id.* (Citing *Rose's Stores v. Tarrytown Center*, 270 N.C. 201, 154 S.E.2d 320 (1967)). In the instant case, plaintiff brought actions for breach of contract, personal guaranty, and possession of inventory.

Section 1-76.1 frames the action brought as an action "to recover a *deficiency*, which remains owing on a debt *after* secured personal property has been sold to partially satisfy the debt[.]" N.C. Gen. Stat. § 1-76.1 (emphasis added). This Court has strictly construed section 1-76.1, emphasizing the framing of the action. *See M & J Leasing Corp. v. Habegger*, 77 N.C. App. 235, 334 S.E.2d 804 (1985). In *M & J*, a venue change was denied under section 1-76.1 because a sale of personal property had not yet been held. The *M & J* court held that "[Section 1-76.1] has no application to this case because the personal property involved has not yet been sold and the action is not 'to recover a deficiency which remains owing on a debt.' " *Id.* at 237, 334 S.E.2d at 805.

Here, at the time of the filing of the complaint, the inventory had not yet been sold and there was no claim for the recovery of a deficiency balance. Conseco's action is to recover collateral and monies owed on a debt. Therefore, under section 1-76.1, venue in Wake County is not improper.

The only argument put forward by defendants to support their change of venue motion under section 1-83(1) is that venue is improper because of section 1-76.1. Consequently, because we have already held venue not to be improper because of section 1-76.1, we must also reject this contention by defendants. Section 1-83(1), provides: "The court may change the place of trial in the following cases: (1) When the county designated for that purpose is not the proper one." N.C. Gen. Stat. § 1-83(1) (1999). *See also Miller v. Miller*, 38 N.C. App. 95, 247 S.E.2d 278 (1978) (where this Court construed the "may change" language in section 1-83(1) to mean "must change."). Additionally, there was evidence that retail contracts were negotiated in Wake County (*see* assignment of error three, *infra*), with plaintiff maintaining an office in Wake County.

The issue before us is not one where the trial court found that a party fraudulently framed the question in its pleading in order to avoid a change of venue.

[3] By defendants' third assignment of error, they argue the trial court erred in finding that the contracts were negotiated, in part, in Wake County. We disagree.

"The trial court in ruling upon a motion for change of venue is entirely free to either believe or disbelieve affidavits . . . without regard to whether they have been controverted by evidence introduced by the opposing party." *Godley Constr. Co., Inc. v. McDaniel*, 40 N.C. App. 605, 608, 253 S.E.2d 359, 361 (1979). Here, defendants supplied affidavits to the trial court stating that no negotiations had been made in Wake County at any time. Conseco did not directly contradict that statement, although there was evidence that some of defendants' retail contracts were sent to Conseco's Raleigh office for approval. However, the trial court did not have to accept defendants' affidavits as true and reasonably could have considered the approval process an integral part of any negotiation. The trial court did not err and we reject defendants' argument.

[4] By defendants' fourth assignment of error, they argue the trial court improperly denied their motion to change venue because the

order contains findings that were not made by the court while in session. We disagree.

The North Carolina Rules of Civil Procedure provide, in pertinent part:

> [A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court. . . . Consent for the signing and entry of a judgment out of term, session, county, and district shall be deemed to have been given unless an express objection to such action was made on the record prior to the end of the term or session at which the matter was heard.

N.C. Gen. Stat. § 1A-1, Rule 58 (1999). Defendants contend they objected in a letter addressed to Judge David Q. LaBarre, the presiding judge, where they stated: "We are writing to object to the proposed Order denying Defendant Richard M. Pearman, Jr.'s Motion to Transfer Venue which counsel for Conseco intends to submit to you." In the letter, defendants asked that the proposed order not include the language:

> And it appearing to the Court that the contracts at issue in this proceeding were negotiated, in part, in Wake County and that the Plaintiff maintains an office and place of business in Wake County and that the Defendants' motion should therefore be denied, and that this Order may be entered out of term[.]

The trial court rejected defendants' objection and included the section.

We find the objection lodged in defendants' letter not specific enough to comply with Rule 58, which provides that the objection must be to the action of signing the judgment out of session. Here, defendants appear to be objecting to the *contents* of the order, not its entry out of session. Therefore, since no valid objection to the out of session entry of judgment was expressly given, we reject defendants' argument.

AFFIRMED.

Judges MARTIN and TYSON concur.

TOWN OF CAMERON, PLAINTIFF-APPELLEE v. PAUL W. WOODELL AND BRENDA H. WOODELL, DEFENDANTS-APPELLANTS

No. COA00-1546

(Filed 7 May 2002)

Zoning— laches—town's assurances

The doctrine of laches precluded the Town of Cameron from enforcing its zoning ordinance against defendants with respect to their use of property for selling automobiles as well as operating a flea market where the uncontroverted evidence was that defendants informed the town of their proposed uses of the property prior to purchasing the property, defendants relied on the town's assurances that the property was not within its zoning jurisdiction, defendants obtained the necessary permits for such uses of the property in reliance on these assurances, and the town waited nearly four years before it attempted to enforce its zoning ordinance.

Appeal by defendants from judgment entered 12 July 2000 by Judge William M. Neely in Moore County District Court. Heard in the Court of Appeals 7 November 2001.

The Brough Law Firm, by Michael B. Brough and G. Nicholas Herman, for plaintiff-appellee.

Van Camp, Meacham & Newman, P.L.L.C., by Thomas M. Van Camp, for defendants-appellants.

TIMMONS-GOODSON, Judge.

On 17 September 1993, Paul W. Woodell and Brenda H. Woodell (collectively, "the defendants") signed a contract to purchase property in the town of Cameron. Prior to consummating the purchase, defendants informed the town clerk and mayor that they intended to sell used merchandise and automobiles on the property. The town clerk advised defendants that the property was not within the town's zoning jurisdiction. Defendants subsequently obtained the necessary permits from Moore County.

On 6 October 1993, the town of Cameron adopted an ordinance that zoned as "residential agricultural" the area where defendants' property was located. The ordinance provided that those selling used merchandise or automobiles must first obtain a conditional use permit.

Defendants acquired title to the property on 18 November 1993, more than a month after the enactment of the 6 October 1993 zoning ordinance. In November of 1993, defendants obtained a license to operate a flea market from the North Carolina Department of Revenue and in June of 1994, defendants acquired a license from the North Carolina Department of Motor Vehicles to sell automobiles on the property.

In 1997, the town of Cameron discovered that defendants' property was, in fact, located within the town's jurisdiction. Thereafter, the town issued a violation notice to defendants. In October 1997, defendants applied for a conditional use permit for the continued operation of their business. The application was denied by the Town of Cameron Board of Commissioners. On 11 May 1998, the town instituted an action to enjoin defendants from selling merchandise and automobiles in violation of the town's zoning ordinance.

On 12 July 2000, the trial court entered an order containing the following pertinent findings of fact:

> 15. Shortly after the defendants bid on the Woodell property the[y] contacted the mayor and clerk of the Town of Cameron as to the necessary licenses and to the status of zoning on the property. The clerk of the Town of Cameron informed them, that the property was not within the zoning area of the Town of Cameron.
>
> 16. When the defendants obtained the record title on November 18, 1993[,] they applied for and were given a license from Moore County to operate a business for the sale of goods.
>
> 17. At the time of the issuance of the business license the Woodell[s] mistakenly believed that the Woodell property was not within any zoning district and they were not aware of the zoning ordinance enacted on October 6, 1993.
>
> . . . .
>
> 20. The defendants have not proven to the court that they ever made inquiry of the Town of Cameron as to whether automobile sales were permitted on the Woodell property under zoning ordinance of the Town of Cameron or that they did not rely upon any assurances of any official of the Town of Cameron as to the non-applicability of zoning the Woodell property in regard to the sale of automobiles.

21. The defendants acted in reasonable reliance upon the statements by officials of the Town of Cameron as to the lack of applicability of zoning ordinances to the Woodell property in the creation of their business for the sale of merchandise on the property in question.

. . . .

28. The defendants are entitled to protection from enforcement of the zoning ordinance of the Town of Cameron as to the operation of their business for sale of merchandise as a flea market to the extent they operated the business as such in the fall of 1997 when they were informed of the violation in the ordinance.

29. The defendants have not established that they are entitled to protection from the enforcement of the zoning ordinance of the Town of Cameron as to the defendants' use of the property in question for the sale of automobiles.

The court concluded as a matter of law that the Town of Cameron was barred by the doctrine of laches from enforcing its zoning ordinance against the defendants as it related to the use of the Woodell property for the sale of merchandise as a flea market. The court granted injunctive relief against defendants' operation of the sale of automobiles. Defendants appeal.

The dispositive issue on appeal is whether the doctrine of laches prohibits the town of Cameron from enforcing its zoning ordinance with respect to defendants' use of the property for the sale of automobiles. For the reasons stated herein, we affirm in part and reverse in part the judgment of the trial court.

"It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992). Findings of fact are binding on appeal if there is competent evidence to support them, "even where 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).

Laches is an affirmative defense that bars a claim where the " 'lapse of time has resulted in some change in the condition of the

property or in the relations of the parties which would make it unjust to permit the prosecution of the claim[.]' " *Taylor v. N.C. Dept. of Transportation*, 86 N.C. App. 299, 304, 357 S.E.2d 439, 441-42 (1987) (quoting *Taylor v. City of Raleigh*, 290 N.C. 608, 622, 227 S.E.2d 576, 584 (1976)). To prevail on the affirmative defense of laches, the party asserting the defense bears the burden of proving that (1) the claimant knew of the existence of the grounds for the claim; (2) the delay was unreasonable and must have worked to the disadvantage, injury or prejudice of the party asserting the defense; (3) the delay of time has resulted in some change in the condition of the property or in the relations of the parties; however, the mere passage of time is insufficient to support a finding of laches. *See Abernethy v. Town of Boone Bd. of Adjustment*, 109 N.C. App. 459, 464, 427 S.E.2d 875, 878 (1993). The amount of delay required to establish laches depends on the facts and circumstances of each case. *See Taylor*, 290 N.C. at 622, 227 S.E.2d at 584.

In *Abernethy*, a landowner was granted a permit by the Town of Boone for a freestanding sign. *Abernethy*, 109 N.C. App. at 460, 427 S.E.2d at 876. Thereafter, plaintiff, a lessee of landowner's building, was informed that the landowner wanted to sell the premises to a third party. *Id.* The landowner and the third party agreed to sell plaintiff the property located in Southgate II, an adjacent shopping center. Plaintiff conditioned the entire transaction on being allowed to retain possession of its existing freestanding sign. *Id.* at 461, 427 S.E.2d at 876. Before agreeing to the transaction, plaintiff contacted the zoning enforcement officer for the Town of Boone who informed plaintiff that the sign was in compliance and the permit was valid. *Id.* Relying on the representations of the town officials, plaintiff vacated the premises. Four years later, the Town of Boone, ordered the sign removed, because the sign violated the town's zoning ordinance. This Court held that as a general rule, "laches cannot be asserted against a municipality to prevent it from enforcing its own ordinances when the delay is reasonable and defendant has suffered no disadvantage due to the delay." *Id.* at 465, 427 S.E.2d at 878. However, this Court held that "on the facts of this case," the doctrine of laches applied and thus prohibited the Town of Boone from enforcing its own ordinances. *Id.* In applying the elements of laches to the facts, the Court held that (1) the Town was aware of the potential violation for almost four years before it attempted to enforce the ordinance; (2) the Town's representations and delay in attempting to enforce the ordinance was unreasonable and (3) the plaintiff was prejudiced by the Town's representations and delay. *Id.* The Court further concluded

that "if the two years and twenty-two days in *Taylor* was unreasonable, then four years is clearly unreasonable as well." *Id.*; *see also Taylor*, 290 N.C. at 626, 427 S.E.2d at 586 (holding that the delay was unreasonable where two years and twenty-two days had elapsed since the city's adoption of a rezoning ordinance).

Similarly, in the present case, we hold that the doctrine of laches is applicable on these facts as it relates to the defendants' use of the property for the sale of automobiles as well as to the flea market. In drawing a distinction between defendants' use of the property, the trial court concluded that the doctrine of laches was applicable as it related to the use of the property for the sale of used merchandise in a flea market, but not for the sale of automobiles. However, clearly, all the requisite elements for laches are present in both situations. As in *Abernethy*, the town of Cameron was aware of defendants' proposed use of the property in September of 1993 when they informed the town of their plans to use the property for selling used merchandise and for selling automobiles. The town of Cameron, knowing of defendants' intended use of the property, delayed nearly four years before it attempted to enforce its zoning ordinance. There is no competent evidence in the record to support the trial court's finding that defendants did not rely upon any assurances from the town of Cameron in regards to the sale of automobiles. Instead, the evidence in the record reveals that after defendants informed the town on 17 September 1993 of their plans, the town told them it did not have zoning jurisdiction over the property. Plaintiff attempts to rely on the fact that, while the record discloses that defendants contracted to purchase the property in September of 1993, defendants did not obtain a permit to operate the flea market until November of 1993 and a permit to operate the flea market until June of 1994. However, the uncontroverted evidence remains that: (1) defendants informed the town of their proposed uses of the property for both businesses prior to their purchase; (2) defendants relied on the town's assurances that the property was not within the town of Cameron's zoning jurisdiction; (3) in reliance on these assurances, defendants obtained the necessary permits from Moore County to purchase the property. Clearly, if the evidence supports a finding that the town knew about defendants' use of the property as a flea market, it would logically support the same finding as to the sale of automobiles on the property.

Further, the unreasonable delay on the part of the Town of Cameron has prejudiced defendants. Only after the town of Cameron informed defendants that their property was not within the town's

jurisdiction did defendants obtain permits from Moore County and begin their development of the property. We therefore conclude that the doctrine of laches precluded the town of Cameron from enforcing its zoning ordinance against defendants with respect to their use of the property for selling automobiles, as well as operating a flea market.

Plaintiff brings forth one cross-assignment of error arguing that the trial court erred in concluding that the doctrine of laches barred the town from enforcing its zoning ordinance against defendants as it relates to the use of the property as a flea market. However, in light of the above holding, we affirm the trial court's decision with respect to the defendants' use of the property as a flea market.

Affirmed in part; reversed in part.

Judges HUDSON and TYSON concur.

CHARLES MARTIN, PLAINTIFF v. PATRICE PARKER, DEFENDANT

No. COA01-821

(Filed 7 May 2002)

1. **Malicious Prosecution— disorderly conduct against a teacher—summary judgment—probable cause a question of law**

The trial court did not err by granting summary judgment in favor of defendant teacher on the issue of malicious prosecution where defendant initiated a prosecution against plaintiff parent for disorderly conduct stemming from the parties' meeting at school about plaintiff's son, because: (1) there is no genuine issue of fact that plaintiff's conduct was disorderly when defendant and others felt threatened and intimidated by plaintiff's words and actions; and (2) the facts underlying the issuance of the citation are undisputed, and the determination of probable cause is a question of law for the courts.

2. Abuse of Process— disorderly conduct against a teacher—summary judgment

The trial court did not err by granting summary judgment in favor of defendant on the issue of abuse of process where defendant teacher initiated a prosecution against plaintiff parent for disorderly conduct stemming from the parties' meeting at school about plaintiff's son even though plaintiff contends defendant used the threat of and procured criminal process in order to coerce plaintiff to further apologize to defendant, because: (1) plaintiff was not required to further apologize to defendant as a condition of dismissal of the citation; and (2) plaintiff failed to forecast any other evidence that defendant acted improperly or engaged in conduct that misused the legal process after the citation was issued.

Appeal by plaintiff from judgment entered 25 April 2001 by Judge Kimberly S. Taylor in Union County Superior Court. Heard in the Court of Appeals 28 March 2002.

Sellers, Hinshaw, Ayers, Dortch and Lyons, P.A., by Robert C. Dortch, Jr. and Robert A. Whitlow, for plaintiff-appellant.

Dean & Gibson, L.L.P., by I. Timothy Zarsadias, for defendant-appellee.

TYSON, Judge.

Charles Martin ("plaintiff") appeals from the trial court's grant of Patrice Parker's ("defendant") motion for summary judgment. We affirm the judgment of the trial court.

I. Facts

Plaintiff is the father of two sons ("Martin boys") who attended Parkwood Middle School ("school"). Defendant is a computer lab instructor at the school where she taught the Martin boys. On their first day back after a one week absence due to the recent and unexpected death of the Martin boys' sister, defendant punished one of plaintiff's sons for forgetting his computer password by requiring that he write his password 100 times. Defendant testified that she was unaware of the sister's death at the time of the punishment, even though both her students had been absent from school the previous week.

Plaintiff met with defendant on 14 October 1999 to discuss whether defendant could reduce his sons' workload. Defendant complained that plaintiff used profane language during the meeting, and that plaintiff threatened and intimidated her by throwing a paper note containing the password and punishment toward defendant. Plaintiff denied threatening, intimidating, or using profanity during the meeting. Plaintiff wrote and delivered a letter to defendant that contained an apology for any misunderstanding stemming from the meeting.

At a subsequent meeting on 2 November 1999 between plaintiff, defendant, Principal Larry B. Stinson ("Principal Stinson"), and the school's Resource Officer, William A. Thompson ("Officer Thompson"), defendant demanded a verbal apology from plaintiff. At that meeting plaintiff read the earlier letter he had written to defendant. Defendant again refused to accept plaintiff's apology and instructed Officer Thompson to issue a disorderly conduct citation ("citation") to plaintiff. During the issuance of the citation, Officer Thompson informed plaintiff that if plaintiff would apologize to defendant the charges would be dropped. Plaintiff refused and stated that he did not believe he did anything wrong. Plaintiff also stated that he had apologized to defendant numerous times before. The citation required plaintiff to appear in district criminal court on 16 November 1999.

Sometime thereafter, defendant called Officer Thompson and asked him to drop the charges against plaintiff. The charges were eventually dismissed on 5 November 1999.

Plaintiff filed a complaint for malicious prosecution and abuse of process against defendant on 20 December 1999. Defendant filed her answer denying plaintiff's allegations on 14 March 2000. Defendant moved for summary judgment, and the trial court granted defendant's motion on 25 April 2001. Plaintiff appeals.

II. Issues

Plaintiff contends the trial court erred by granting defendant's motion for summary judgment. Plaintiff argues that genuine and material issues of fact exist regarding: (1) whether defendant initiated criminal proceedings against plaintiff without probable cause, and (2) whether defendant's conduct constituted an abuse of process.

III. Malicious Prosecution

[1] Plaintiff claims that disputed issues of material fact exist as to whether defendant initiated the prosecution, and argues that there are "two distinct accounts about the core issue of who initiated criminal charges against [plaintiff]."

In order to support a malicious prosecution claim, plaintiff must establish the following four elements: "(1) defendant initiated the earlier proceeding; (2) malice on the part of defendant in doing so; (3) lack of probable cause for the initiation of the earlier proceeding; and (4) termination of the earlier proceeding in favor of the plaintiff." *Best v. Duke University*, 337 N.C. 742, 749, 448 S.E.2d 506, 510 (1994) (citation omitted); *see also Hill v Hill*, 142 N.C. App. 524, 537, 545 S.E.2d 442, 451 (dissenting opinion), *rev'd. on other grounds*, 354 N.C. 348, 553 S.E.2d 679 (2001).

Presuming that plaintiff is correct that disputed issues of fact exist regarding who initiated the prosecution, the presence of probable cause necessarily defeats plaintiff's claim. Plaintiff contends that whether probable cause exists to issue the citation is a matter for the jury, and that summary judgment is therefore inappropriate. We disagree.

Probable cause is defined as the existence of facts and circumstances known to the decision maker which would induce a reasonable person to commence a prosecution. *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978) (citing *Morgan v. Stewart*, 144 N.C. 424, 430, 57 S.E. 149, 151 (1907)). "[W]hen the facts are in dispute the question of probable cause is one of fact for the jury." *Id.* If the facts underlying the issuance are not in dispute, the determination of probable cause is for the courts. *Id.*

Plaintiff was issued a citation for disorderly conduct pursuant to G.S. § 14-288.4. The term "disorderly conduct" is defined by our legislature in G.S. § 14-288.4, which provides in pertinent part:

> any person who: . . . . (6) Disrupts, disturbs or interferes with the teaching of students at any public or private educational institution or engages in conduct which disturbs the peace, order or discipline at any public or private educational institution or on the grounds adjacent thereto.

N.C. Gen. Stat. § 14-288.4 (1994).

While plaintiff admits in his affidavit that he "did speak to Mrs. Parker in a firm manner," plaintiff denies that he used profanity, threatened, or intimidated defendant. Plaintiff wrote a letter to defendant apologizing for any "misunderstandings" that resulted from their meeting.

In a letter to plaintiff banning him from the school campus, Principal Stinson stated that "many people overheard the anger that you registered in the office last week." Ms. Cathy NeSmith, a school secretary, was present during the 14 October 1999 meeting between plaintiff and defendant and provided a statement to Officer Thompson that plaintiff "had an angry tone, was screaming, and [that she] feared Mr. Martin might hit Ms. Parker." Plaintiff did not deny that he screamed during the meeting. Officer Thompson testified that he conducted an investigation and relayed its findings to the magistrate. The magistrate agreed that probable cause existed to issue the citation.

Viewing the evidence in the light most favorable to plaintiff and giving him the benefit of all reasonable inferences, we conclude that there is no genuine issue of fact that plaintiff's conduct was disorderly. There is substantial evidence in the record that defendant and others felt *threatened* and *intimidated* by plaintiff's words and actions. The facts underlying the issuance of the citation are undisputed, and the determination of probable cause is a question of law for the courts. *Pitts*, 296 N.C. at 87, 249 S.E.2d at 379. We hold that the facts and circumstances known to Officer Thompson would induce a reasonable person to commence a prosecution against plaintiff for disorderly conduct. This assignment of error is overruled.

IV. Abuse of Process

[2] Plaintiff contends that defendant used the threat of and procured criminal process in order to coerce plaintiff to further apologize to defendant. Plaintiff argues that a disputed issue of fact exists as to "whether Officer Thompson's actions, as influenced by Ms. Parker's directions, should support an award of damages."

The North Carolina Supreme Court has defined "abuse of process" as "the misuse of legal process for an ulterior purpose. It consists in the malicious misuse or misapplication of that process *after issuance* to accomplish some purpose not warranted or commanded by the writ." *Fowle v. Fowle*, 263 N.C. 724, 728, 140 S.E.2d 398, 401 (1965) (citation omitted) (emphasis in original); *see also*

Hill, 142 N.C. App. at 541, 545 S.E.2d at 453 (dissenting opinion). "The distinction between an action for malicious prosecution and one for abuse of process is that malicious prosecution is based upon malice in causing the process to issue, while abuse of process lies for its improper use *after* it has been issued." *Barnette v. Woody*, 242 N.C. 424, 431, 88 S.E.2d 223, 227 (1955) (emphasis supplied). The cause of action requires an act in the use of the process that is not proper in the regular prosecution of the legal process. *Id.* at 431, 88 S.E.2d at 227-28.

Plaintiff contends that defendant acted improperly after the citation was issued. Plaintiff argues that Officer Thompson's conduct of calling plaintiff on the telephone to ask whether he "was going to apologize to Ms. Parker so that the criminal trial could be dismissed" after the citation was issued was improper. We disagree.

Although Officer Thompson testified that defendant called him and asked whether she could dismiss the charges, defendant's act was not improper. The acts of Officer Thompson were not the acts of defendant. Nor is there any evidence of a *quid pro quo*. Plaintiff was not required to further apologize to defendant as a condition of dismissal of the citation. Plaintiff failed to forecast any other evidence that defendant acted improperly or engaged in conduct that misused the legal process *after* the citation was issued. This assignment of error is overruled.

V. Summary

Since we hold that probable cause existed to issue the citation, and that defendant did not engage in any improper act *after* the citation was issued, we affirm the trial court's grant of summary judgment for defendant.

Affirmed.

Judges MARTIN and THOMAS concur.

DANA E. SHOOK, PLAINTIFF v. LYNCH & HOWARD, P.A., THOMAS M. MILLER, MAYLON E. LITTLE, AND HOMER G. DUNCAN, JR., DEFENDANTS

No. COA01-321

(Filed 7 May 2002)

Accountants and Accounting— summary judgment—accountants' valuations

The trial court did not err in a negligence case by granting summary judgment in favor of defendant accountants and accounting firm arising out of defendants' business valuations of the companies of plaintiff's husband for plaintiff's equitable distribution proceedings, because: (1) plaintiff failed to offer evidence of the proper standard of care by introducing affidavits of individuals experienced in accounting and familiar with the standard of care owed by an accountant; and (2) plaintiff failed to allege or forecast the value of her injury or how defendants' breach of their duty to her proximately caused her injury.

Appeal by plaintiff from order entered 13 December 2000 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 23 January 2002.

Burford & Lewis, PLLC, by Robert J. Burford, for plaintiff-appellant.

Boyce & Isley, PLLC, by Eugene Boyce, for defendant-appellee Homer G. Duncan.

Schiller Law Firm, by Marvin Schiller, for defendant-appellees Lynch & Howard and Maylon E. Little.

Shanahan Law Group, by Kiernan Shanahan, for defendant-appellee Thomas Miller.

HUDSON, Judge.

Plaintiff appeals an order granting defendants' motion for summary judgment. Initially, plaintiff assigned as error multiple orders, including: (1) the denial of plaintiff's motion for findings of fact, (2) the granting of defendants' motions to amend, and (3) the granting of defendants' motions for summary judgment and judgment on the pleadings. Plaintiff's sole argument on appeal concerns the granting of defendants' motion for summary judgment; thus, pursuant to Rule

10 of the North Carolina Rules of Appellate Procedure (1999), all other assignments of error are deemed abandoned. We affirm.

In her complaint, Dana E. Shook ("plaintiff") alleged that she hired Lynch & Howard and their employees ("L & H") in May 1996 to prepare "business valuations" on her husband's companies. At the time, plaintiff was in the process of obtaining a divorce from her husband, Michael G. Shook, and needed assistance valuing his financial holdings for equitable distribution proceedings. Defendants Thomas M. Miller, Maylon E. Little, and Homer G. Duncan, Jr. are accountants who worked at L & H and participated in preparing reports on the businesses. According to plaintiff, she rejected an equitable distribution settlement offer from her husband, because she relied on defendants' evaluations, which she contends were incorrect. Plaintiff and her husband settled "all matters in controversy" and entered a consent judgment resolving all equitable distribution issues on 27 May 1998.

After the entry of the Judgment of Equitable Distribution, plaintiff initiated this lawsuit against defendants. In her Amended Complaint, plaintiff alleged that:

> 22. As a direct and proximate result of the defendants' supplying the plaintiff with erroneous information and advice, the plaintiff was caused to suffer substantial compensatory injury and damage, including but not limited to the following: substantial handicap and detriment in the plaintiff's efforts to negotiate a settlement of the equitable distribution property dispute between the plaintiff and Mr. Shook; headache, nervous stomach, bodily illness, embarrassment, humiliation; severe mental and emotional distress; and loss of the economic benefit of a more favorable settlement offer because the defendants' erroneous accounting information and advice misled her to consider Mr. Shook's initial settlement proposal to be unreasonable when [] she would have evaluated said settlement proposal differently had she received the accurate and competent accounting advice to which she was entitled and for which she paid.
>
> As a direct and proximate result of the defendants' wanton, multiple and gross negligent acts and omissions (and the defendants' wanton failure to timely recognize and correct such), the plaintiff has suffered compensatory damages in an amount substantially in excess of TEN THOUSAND DOLLARS ($10,000) . . . .

Defendants each answered and asserted multiple affirmative defenses including judicial immunity or witness immunity, and *res judicata* or collateral estoppel. Defendants also filed motions to dismiss, motions for summary judgment, and motions for judgment on the pleadings. Plaintiff filed a "Motion for Findings of Fact" requesting "that the Court make findings of fact and conclusions of law in his rulings on the defendants [sic] motion for judgment on the pleadings, motions for summary judgment, and motion regarding the defense of collateral estoppel." The trial court denied plaintiff's motion, and granted defendants' motions concluding "that there is no genuine issue of material fact and that Defendants are entitled to judgment as a matter of law. Defendants' motions for summary judgment should be and hereby are ALLOWED on the basis of Defendants' affirmative defenses of testimonial immunity and collateral estoppel." Plaintiff appeals the granting of defendants' motion for summary judgment.

"It is well established that the standard of review of the grant of a motion for summary judgment requires a two-part analysis of whether, '(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.' " *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000) (citations omitted), *aff'd*, 353 N.C. 445, 545 S.E.2d 210 (2001); *see also* N.C. R. Civ. Proc. 56 (1999). After conducting a review commensurate with the test described above, we conclude that summary judgment was appropriate.

In essence, plaintiff alleged that defendants were negligent. "In order to make out a claim for negligence, the party asserting negligence must show that defendant owed a duty to the plaintiff, breached that duty, and that such breach was an actual and proximate cause of plaintiff's injuries." *Jones v. GMRI, Inc.*, 144 N.C. App. 558, 566, 551 S.E.2d 867, 873 (2001), *cert. improv. allowed*, 355 N.C. 275, 559 S.E.2d 787 (2002). "[S]ummary judgment may be granted in a negligence action where there are no genuine issues of material fact and the plaintiff fails to show one of the elements of negligence." *Lavelle v. Schultz*, 120 N.C. App. 857, 859, 463 S.E.2d 567, 569 (1995), *disc. rev. denied*, 342 N.C. 656, 467 S.E.2d 715 (1996).

After reviewing the limited documentation provided in the record on appeal, we find that plaintiff failed to sufficiently allege or forecast all elements of a claim for negligence against defendants. "It is gen-

erally recognized that an accountant may be held liable for damages naturally and proximately resulting from his failure to use that degree of knowledge, skill and judgment usually possessed by members of the profession in a particular locality." *Snipes v. Jackson*, 69 N.C. App. 64, 73, 316 S.E.2d 657, 662, *disc. rev. denied*, 312 N.C. 85, 321 S.E.2d 899 (1984). Here the complaint alleges numerous breaches of the standard of care owed by the defendants-accountants to plaintiff. *See, e.g., Bartlett v. Jacobs*, 124 N.C. App. 521, 525, 477 S.E.2d 693, 696 (1996), *disc. rev. denied*, 345 N.C. 340, 483 S.E.2d 161 (1997). This Court noted in *Bartlett* that in a successful negligence claim against accountants, plaintiff offered evidence of the proper standard of care by introducing affidavits of individuals "experienced in accounting and familiar with the standard of care owed by an accountant." *Id.* No such affidavits appear in the record here and the allegations of the complaint alone do not withstand defendants' summary judgment motion and affidavits. *See id; see also* N.C. R. Civ. Proc. 56(e) (1999) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.").

Plaintiff also failed to allege or forecast the value of her injury or how defendants' breach of their duty to her proximately caused injury to plaintiff. In her affidavit, plaintiff states that "[m]y rejection of the $550,000 settlement offer made to me by my former husband, Michael G. Shook, was based on the erroneous information contained in the Lynch & Howard, P.A. valuation reports furnished to me prior to the court proceedings." Plaintiff does not indicate what she actually received in equitable distribution proceedings, nor does she forecast how she was harmed by rejecting the settlement offer in reliance on "erroneous information" from defendants. Thus, because plaintiff has failed to forecast essential elements of negligence, we conclude that the trial court properly ruled that there is no genuine issue of material fact as to plaintiff's allegations of negligence. Summary judgment was appropriate on this basis. *See Campbell v. City of High Point*, 144 N.C. App. 493, 495-97, 551 S.E.2d 443, 445-47, *aff'd*, 354 N.C. 566, 557 S.E.2d 529 (2001). Therefore, we do not reach defendants' arguments regarding judicial immunity or collateral estoppel, and regard the mention thereof in the trial court's order as "sur-

plusage." *See, e.g., United Virginia Bank v. Air-Lift Associates*, 79 N.C. App. 315, 323, 339 S.E.2d 90, 95 (1986) (noting that findings and conclusions in the trial court's order for summary judgment are surplusage and unnecessary to the appellate court's later determinations).

Affirmed.

Judges THOMAS and JOHN concur.

STATE OF NORTH CAROLINA v. HENRY BERNARD SPIVEY, JR.

No. COA01-458

(Filed 7 May 2002)

Constitutional Law— right to a speedy trial—delay caused by backlog of cases

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder for an alleged lack of a speedy trial based on a four and one-half year delay in taking defendant to trial, because: (1) the State made a showing that the dockets were clogged with murder cases and this fact caused an unavoidable backlog of cases; and (2) there is no indication that the court's resources were either negligently or purposefully underutilized.

Judge TIMMONS-GOODSON dissenting.

Appeal by defendant from order entered 26 April 1999 by Judge Jack A. Thompson in Superior Court, Robeson County. Heard in the Court of Appeals 13 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Robert C. Montgomery, for the State.

William L. Davis and Chad Hammonds, for the defendant-appellant.

WYNN, Judge.

The record reveals defendant, Henry Bernard Spivey, Jr., on 3 May 1999, pled guilty to the charge of second-degree murder. He

seeks to appeal from the trial court's denial of his motion to dismiss for lack of a speedy trial based on a four and one-half year delay in taking him to trial. We grant certiorari to review his appeal. N.C. Gen. Stat. § 15A-1444(e) (1999).[1]

Upon review, we find *State v. Hammonds*, controlling. 141 N.C. App. 152, 541 S.E.2d 166 (2000), *affirmed*, 354 N.C. 353, 554 S.E.2d 645 (2001). In *Hammonds*, the defendant argued that the trial court erred by denying his motion to dismiss where there was a pre-trial delay of four and one half years. In *Hammonds*, this Court stated that:

> Defendant argues that the delay between his arrest and trial was caused in part by the State's "laggard performance." The record, however, reveals that the local docket was congested with capital cases. The trial court described it as "chopped the block [sic] with capital cases. They're trying two at a time and just one right after the other, and there are only so many that can be tried." "Our courts have consistently recognized congestion of criminal court dockets as a valid justification for delay." *State v. Hughes*, 54 N.C. App. 117, 119, 282 S.E.2d 504, 506 (1981) (citations omitted) (finding defendant failed to meet his burden where delay was result of backlog of cases). Indeed, "[b]oth crowded dockets and lack of judges or lawyers, and other factors, make some delays inevitable." *State v. Brown*, 282 N.C. 117, 124, 191 S.E.2d 659, 664 (1972) (citation omitted). Accordingly, in assessing defendant's speedy trial claim, we see no indication that court resources were either negligently or purposefully underutilized.

State v. Hammonds, 141 N.C. App. at 160-61, 541 S.E.2d at 173. This Court held in *Hammonds* that the delay of over four and one half years between defendant's arrest and trial did not constitute denial of his constitutional right to a speedy trial.

In the present case, defendant was arrested on 10 October 1994 and charged with first-degree murder; he pled guilty on 3 May 1999. Defendant argues the State was not diligent in bringing him to trial in

1. Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari. If an indigent defendant petitions the appellate division for a writ of certiorari, the presiding superior court judge may in his discretion order the preparation of the record and transcript of the proceedings at the expense of the State.

a speedy and prompt manner since his arrest. Like *Hammonds*, this case originated in Robeson County. The State in this case made a showing as it did in *Hammonds*, that the dockets were clogged with murder cases and this caused an unavoidable backlog of cases. We are bound by *Hammonds* holding of "no indication that court resources were either negligently or purposefully underutilized."

Affirmed.

Judge TYSON concurs.

Judge TIMMONS-GOODSON dissenting with separate opinion.

TIMMONS-GOODSON, Judge, dissenting.

The right to a speedy trial is a fundamental right guaranteed to an accused by the Sixth Amendment to the United States Constitution and the laws of this State. The right to a speedy trial protects the accused from " 'oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the [accused's] defense will be impaired' by dimming memories and the loss of exculpatory evidence." *Doggett v. United States*, 505 U.S. 647, 654, 120 L. Ed. 2d 520, 529-30 (1992) (quoting *Barker v. Wingo*, 407 U.S. 514, 532, 33 L. Ed. 2d 101, 118 (1972)). The Sixth Amendment right to a speedy trial is a "slippery" right "generically different from any of the other rights enshrined in the Constitution for the protection of the accused," of which a violation results in the "unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived." *Barker*, 407 U.S. at 519-22, 33 L. Ed. 2d at 110-12. Because I believe that the trial court did abuse its discretion in denying defendant's motion to dismiss for lack of a speedy trial, I respectfully dissent from the majority opinion.

In *Barker*, the United States Supreme Court established a balancing test of four factors to be considered in determining whether a defendant was denied the constitutional right to a speedy trial. Those four factors include: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant. *See Barker*, 407 U.S. at 533, 33 L. Ed. 2d at 117; *see also State v. Chaplin*, 122 N.C. App. 659, 662, 471 S.E.2d 653, 655 (1996). The burden is on the defendant to show that his "constitutional rights have been violated[,]" and that the unreasonable delay in his trial was caused by " 'neglect or wilful-

ness of the prosecution[.]' " *Chaplin*, 122 N.C. App. at 663, 471 S.E.2d at 655 (quoting *State v. McKoy*, 294 N.C. 134, 141, 240 S.E.2d 383, 388 (1978)).

In *Doggett*, the Supreme Court further clarified how the four factors are to be weighed and the burden each factor carries. The Court held that the threshold inquiry is whether the delay was long enough to trigger a "speedy trial analysis." *Doggett*, 505 U.S. at 651-52, 120 L. Ed. 2d at 528. Generally, a post-accusation delay approaching one year is "presumptively prejudicial." *Id.*

In the instant case, a period of approximately four and a half years elapsed between defendant's date of arrest and the date on which defendant was ultimately convicted. Defendant was arrested on 18 October 1994 and remained in the Robeson County jail without the benefit of bond until his trial on 3 May 1999. Under the first factor of *Barker*, "[t]his delay is not only unreasonable, but excessive and thus presumptively compromised the reliability and fairness of defendant's trial." *State v. Hammonds*, 141 N.C. App. 152, 176, 541 S.E.2d 166, 182-83 (2000) (Greene, J., dissenting), *affirmed*, 354 N.C. 353, 554 S.E.2d 645 (2001). As Judge Greene noted in his dissent, "although there is no showing the prosecutor intentionally delayed the trial for the purpose of obtaining an advantage over defendant, the record clearly shows [that] the prosecutor did not make a reasonable effort to avoid the excessive delay of defendant's trial and thus was negligent." *Id.* at 176-77, 541 S.E.2d at 183. The record in the present case clearly indicates that the criminal docket in Robeson County is overflowing and heavily congested. As stated in the dissent in *Hammonds*, there is no evidence in the record that the prosecutor made any reasonable effort to "avoid the excessive delay" of defendant's trial and was therefore negligent. This Court cannot continue to overlook such substantial delays because of congested dockets. Under our unified court system and the constitutional right to a speedy trial, the court's resources must not be viewed from the perspective of a single judicial district, but system-wide. A lack of personnel or court sessions in a single judicial district is not a sufficient reason to maintain a defendant who is presumed innocent, confined in jail for four and a half years awaiting his or her day in court.

In summary the defendant has been denied his right to a speedy trial and the trial court erred in refusing to grant defendant's motion to dismiss.

JOYCE ANN ROARY v. PAUL MAURICE BOLTON AND VALERIE ALIESA HOOD

No. COA01-842

(Filed 7 May 2002)

1. Trials— motion for new trial—negligence

The trial court did not abuse its discretion by granting plaintiff a new trial under N.C.G.S. § 1A-1, Rule 59 in a negligence action after the jury had returned a verdict in favor of defendants in light of plaintiff's uncontroverted evidence of negligence by defendants.

2. Trials— motion for new trial—motion for relief from order—negligence

The trial court did not abuse its discretion by denying defendants' motion for relief from the trial court's order granting a new trial on plaintiff's negligence claim, because the Court of Appeals already concluded the trial court did not abuse its discretion in ordering the new trial.

3. Negligence— contributory—request for jury instruction

Although defendants contend the trial court erred in a negligence case by refusing to allow defendants' request for a jury instruction on contributory negligence, it is unnecessary to address this assignment of error since the trial court ordered a new trial.

Appeal by defendants from judgment entered 20 October 2000 by Judge Hollis M. Owens, Jr. in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 March 2002.

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

Hedrick, Eatman, Gardner & Kincheloe, LLP, by Allen C. Smith for defendants-appellants.

THOMAS, Judge.

Defendants, Paul M. Bolton and Valerie A. Hood, appeal the trial court's order for a new trial on plaintiff's negligence claim after the jury had returned a verdict in their favor. For the reasons discussed herein, we find no error.

The facts are as follows: Plaintiff, Joyce Ann Roary, was a passenger on a motorcycle operated by Bolton and owned by Hood. During the ride, Bolton failed to negotiate a curve and crashed the motorcycle. Plaintiff sustained injuries to her neck, back, and legs.

Roary filed a complaint for damages against defendants based on negligence. Defendants answered and alleged assumption of risk and contributory negligence. The jury returned a verdict for defendants but then the trial court, stating that "the Jury's verdict in the trial of this matter was contrary to the overwhelming evidence of negligence presented by Plaintiff in the trial of this case," granted Roary's motion for a new trial.

Defendants moved for relief from the order allowing the new trial. Their motion was denied.

[1] By defendants' first assignment of error, they argue the trial court abused its discretion in allowing Roary's motion for a new trial after the jury returned a verdict in their favor. We disagree.

"An abuse of discretion occurs when the trial court's ruling 'is so arbitrary that it could not have been the result of a reasoned decision.' " *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998) (*quoting White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)).

Pursuant to Rule 59 of the North Carolina Rules of Civil Procedure, trial judges may grant a motion for a new trial under certain circumstances. In the instant case, the trial court based awarding the new trial on two grounds: (1) manifest disregard by the jury of the instructions of the court; and (2) the verdict was contrary to law. *See* N.C. Gen. Stat. § 1A-1, Rules 59(a)(5) and (7) (1999). Granting a motion for a new trial under Rule 59 is directed to the discretion of the trial court. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985). The trial court's ruling will thus not be disturbed upon appeal without a finding of abuse of discretion. *State ex rel. Gilchrist v. Cogdill*, 74 N.C. App. 133, 327 S.E.2d 647 (1985). We turn now to a consideration of the record to determine if it affirmatively demonstrates a manifest abuse of discretion. *See Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982).

Roary presented evidence that Officer W.J. Wiktorek of the Charlotte-Mecklenburg Police Department estimated Bolton to be

operating the motorcycle at 80 m.p.h. in a 45 m.p.h. speed zone when he first saw him. Wiktorek followed the motorcycle, although he was not "in pursuit." He estimated that Bolton's speed eventually reached 120 m.p.h. After losing sight of the motorcycle, Wiktorek continued down the street and spotted Roary, bleeding, in the middle of the road, fifty feet from the wrecked motorcycle. Bolton was found in a ditch approximately fifteen feet from Roary.

Wiktorek asked Bolton what had happened. Bolton's reply was simply that "the weight shifted." Wiktorek estimated the motorcycle was doing 90 m.p.h. when it crashed, but he did not issue any citations.

Roary testified that while she was riding with Bolton, he began to speed up and she asked him why he was speeding. When he replied, "Don't worry about it, don't worry about it," Roary became afraid and held on tightly. Bolton continued to speed and ran a red light. With a curve then looming ahead, Bolton slowed down, but the motorcycle tipped over and both Roary and Bolton were dragged with it.

Roary also testified at length about her injuries, which included scarring and back pain. The jury watched a videotaped deposition of Dr. James Sherrer, a plastic surgeon, and heard the testimony of Dr. William Carlyle, a chiropractor, as to Roary's injuries and treatment. She also presented evidence of actual and prospective medical bills totaling $8,545 and lost wages of approximately $3,400.

At the close of Roary's evidence, defendants, who did not put on evidence, moved for a directed verdict. The trial court denied the motion. Defendants then requested a jury instruction on contributory negligence. The trial judge stated the "evidence [did] not warrant the submission of an issue of contributory negligence[.]" The trial judge instructed the jury on negligence, proximate cause, and damages. In the face of the uncontroverted evidence of negligence, though, the jury returned a verdict in favor of defendants.

The issues, as they were presented to the jury, and the jury's responses were:

> 1. Was the Plaintiff injured by the negligence of the Defendant?
>
> ANSWER: No

2. What amount of damages is the Plaintiff entitled to recover for her personal injuries?

ANSWER: ___ [Not Answered]

In reviewing this record, we find no manifest abuse of discretion. The trial court had ample grounds on which to base its ruling. *See Garrison v. Garrison*, 87 N.C. App. 591, 361 S.E.2d 921 (1987) (where the trial court's grant of new trial in negligence case was upheld when jury found for defendant, who presented no evidence, in face of plaintiff's evidence as to her injuries). Consequently, the decision of the trial court will not be disturbed and we reject defendants' argument.

[2] By defendants' second assignment of error, they argue the trial court abused its discretion in denying their motion for relief from the order allowing the new trial. Because we have held the trial court did not abuse its discretion in ordering the new trial, we reject this assignment of error as well.

[3] By defendants' third assignment of error, they contend: (1) the trial court committed reversible error in refusing to allow their request for a jury instruction on contributory negligence; and (2) that this Court should direct the trial court to instruct the jury on contributory negligence on remand. We disagree.

Here, we affirm the trial court's order for a new trial. Therefore, it is not necessary or appropriate for us to address the first part of this assignment of error. Additionally, in *Burchette v. Lynch*, 139 N.C. App. 756, 535 S.E.2d 77 (2000), this Court held that:

> When a trial court orders a new trial, "the case remain[s] on the civil issue docket for trial *de novo*, unaffected by rulings made therein during the [original] trial[.]" . . . [O]n retrial, [a] defendant would not be "bound by the evidence presented at the former trial. Whether [his] evidence at the new trial will support [a motion for directed verdict] cannot now be decided."

Id. at 760-61, 535 S.E.2d at 80 (citations omitted). We therefore reject defendants' argument.

NO ERROR.

Judges MARTIN and TYSON concur.

MARK RATCHFORD, EMPLOYEE, PLAINTIFF-APPELLANT v. C.C. MANGUM INC., EMPLOYER; ST. PAUL FIRE & MARINE INSURANCE COMPANY, CARRIER, DEFENDANT-APPELLEES

No. COA01-848

(Filed 7 May 2002)

1. Appeal and Error— petition to Supreme Court—jurisdiction of Industrial Commission

The Industrial Commission had jurisdiction to enter an opinion and award in an action on remand from the Court of Appeals in which a petition for discretionary review was pending before the Supreme Court. There was no temporary stay or writ of supersedeas from the Supreme Court.

2. Appeal and Error— workers' compensation order—amount of compensation not determined—premature appeal

An appeal from a workers' compensation order was dismissed as premature where the order determined that a clincher agreement was void but did not determine the extent and amount of compensation and plaintiff did not show a substantial right which might be lost if the opinion and award was not reviewed before a final decision.

Appeal by plaintiff from opinion and award entered 15 February 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 March 2002.

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

Teague, Campbell, Dennis & Gorham, L.L.P., by Linda Stephens and Tracey L. Jones, for defendant-appellees.

MARTIN, Judge.

Plaintiff was injured in his employment with defendant-employer on 20 October 1995. On 1 November 1995, defendants executed an IC Form 60, recognizing plaintiff's right to temporary total disability compensation. Pursuant thereto, plaintiff received compensation from 21 October 1995 until 10 August 1996.

On 29 July 1996, defendants filed an IC Form 24 application to terminate plaintiff's benefits for his refusal to return to work. The Form

24 was withdrawn by defendants on 12 August 1996 after the parties entered into a clincher agreement in which defendants agreed to pay plaintiff $30,000 in addition to the compensation which he had already been paid in full settlement of his claim "for compensation due or to become due." The clincher agreement was submitted to the Industrial Commission for approval and was approved.

On 26 December 1996, plaintiff filed an IC Form 33, seeking to set aside the clincher agreement on the grounds that it had been improvidently approved by the Commission. A deputy commissioner denied plaintiff's motion and the Full Commission affirmed the deputy's decision. Plaintiff appealed to this Court. In an unpublished opinion filed 19 December 2000, this Court held that the agreement had been approved in violation of G.S. § 97-82 and Industrial Commission Rule 502 and was voidable pursuant to G.S. § 97-82. The Commission's decision was reversed and the case was remanded to the Commission. *Ratchford v. C.C. Mangum, Inc.*, 141 N.C. App. 150, 541 S.E.2d 523 (unpublished, COA99-1611, 19 December 2000). The decision was certified to the Commission on 8 January 2001.

On 23 January 2001, defendants petitioned the North Carolina Supreme Court for discretionary review. While the petition was pending, on 15 February 2001, the Industrial Commission entered an opinion and award concluding "the agreement is voidable by plaintiff" and remanding the case to a deputy commissioner for a further hearing to determine what benefits, if any, are owed to plaintiff. On 1 March 2001, the Supreme Court denied defendant's petition for discretionary review. On 12 March 2001, plaintiff gave notice of appeal from the Commission's 15 February 2001 opinion and award.

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[1] Plaintiff initially contends the Commission had no jurisdiction to enter its opinion and award because defendants' petition for discretionary review of this Court's opinion was pending before the North Carolina Supreme Court. We disagree. Where a case is remanded to the Industrial Commission from an appellate court, the appellate court surrenders jurisdiction and the Industrial Commission acquires jurisdiction for all purposes. *Butts v. Montague Bros.*, 208 N.C. 186, 179 S.E. 799 (1935). Thus, the Commission acquired jurisdiction of this case after appeal on 8 January 2001 when this Court certified its opinion reversing the prior opinion and award and remanding the case to the Commission. The petition for discretionary review, filed in the Supreme Court on 23 January 2001, did not divest the Commission of jurisdiction. In the absence of the grant of a temporary stay or a

writ of supersedeas by the Supreme Court, the enforcement of the determination mandated by the Court of Appeals is not stayed pending the Supreme Court's determination of the application for discretionary review. N.C.R. App. P. 23. The record in this case does not contain any order of the Supreme Court staying, pending that Court's determination of defendant's petition for discretionary review of the decision of this Court, the effect of the mandate issued by this Court to the Commission. Therefore, we hold the Commission had jurisdiction to enter the opinion and award from which plaintiff seeks to appeal.

[2] Having determined that the Commission had jurisdiction to enter the opinion and award, we must now consider whether the opinion and award is properly before us for review. We conclude that it is not and dismiss the appeal.

An appeal from an opinion and award of the Industrial Commission is subject to the "same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." N.C. Gen. Stat. § 97-86 (1999). Parties have a right to appeal any final judgment of a superior court. N.C. Gen. Stat. § 7A-27 (1999). Thus, an appeal of right arises only from a final order or decision of the Industrial Commission. *Ledford v. Asheville Housing Authority*, 125 N.C. App. 597, 598-99, 482 S.E.2d 544, 545, *disc. review denied*, 346 N.C. 280, 487 S.E.2d 550 (1997).

A final judgment is one that determines the entire controversy between the parties, leaving nothing to be decided in the trial court. *Ledford*, 125 N.C. App. at 599, 482 S.E.2d at 545; *Atkins v. Beasley*, 53 N.C. App. 33, 36, 279 S.E.2d 866, 869 (1981). An opinion and award of the Industrial Commission is interlocutory if it determines one but not all of the issues in a workers' compensation case. *Fisher v. E.I. Du Pont De Nemours*, 54 N.C. App. 176, 177-78, 282 S.E.2d 543, 544 (1981) (order not final where amount of compensation not determined).

In the present case, the Commission's opinion and award determines that the clincher agreement is void; the extent and amount of compensation to which plaintiff is entitled upon the voiding of the agreement, however, has not been determined. Thus, the order does not determine the entire controversy and, to the extent it remands the matter to a deputy commissioner for hearing, it is clearly interlocutory. *See Fisher*, *supra*.

Nevertheless, an appeal from an interlocutory order may be proper when the order from which appeal is taken affects a substantial right of the appellant. N.C. Gen. Stat. §§ 7A-27(d) (1999); 1-277 (1999). This exception requires that the interlocutory order being appealed affect a right of the appellant which is a substantial one, the deprivation of which will potentially result in injury to the appellant if the order is not reviewed before final judgment. *Travco Hotels v. Piedmont Natural Gas Co.*, 332 N.C. 288, 420 S.E.2d 426 (1992); *see Plummer v. Kearney*, 108 N.C. App. 310, 423 S.E.2d 526 (1992) (applying substantial right analysis to workers' compensation case). Whether an order affects a substantial right is a case-by-case determination made by weighing the specific facts and procedural context. *Id.* "The party desiring an immediate appeal of an interlocutory order bears the burden of showing that such appeal is necessary to prevent loss of a substantial right." *Mills Pointe Homeowner's Association, Inc. v. Whitmire*, 146 N.C. App. 297, 299, 551 S.E.2d 924, 926 (2001) (citing *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)). In *Jeffreys*, this Court stated that "[i]t is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order." 115 N.C. App. at 380, 444 S.E.2d at 254. Plaintiff has shown, in his brief, no substantial right which may be lost if the Commission's opinion and award is not reviewed before a final decision.

Appeal dismissed.

Judges TYSON and THOMAS concur.

SHERRY A. BLANTON v. KENNON W. FITCH

No. COA01-370

(Filed 7 May 2002)

Child Support, Custody, and Visitation— support—counselor not licensed in North Carolina

The trial court abused its discretion by requiring a noncustodial parent to make reimbursement for counseling under a child support order where the services were rendered in North Carolina by a pastoral counselor and social worker residing but not licensed in North Carolina. None of the statutory exceptions

to unlicensed counseling apply and the protection of the public interest mandated by the statutes prohibits court ordered reimbursement for services performed in violation of the statutes.

Appeal by defendant from judgment entered 31 August 1999 by Judge Anna F. Foster in Cleveland County District Court. Heard in the Court of Appeals 23 January 2002.

No brief filed for plaintiff-appellee.

Colin P. McWhirter, attorney for defendant-appellant.

THOMAS, Judge.

The primary issue here is whether a non-custodial parent may be required to make reimbursement under a child support order for counseling bills where the services were rendered in North Carolina by a pastoral counselor and social worker residing, but not certified or licensed, in this State.

The specific provision in the consent order is as follows:

> That [Kennon W. Fitch] agrees to carry medical insurance on the minor children and to be responsible for any deductibles. That each other parties shall be responsible for one-half of uninsured medical bills, this including dental, or orthodontist, doctor, psychological, hospital and prescribed medications.

The trial court found that defendant, Kennon W. Fitch, is liable for one-half of the $1,440.00 counseling bill. He appeals, and based on the reasoning herein, we reverse the trial court.

The facts are as follows: Plaintiff, Sherry A. Blanton, and defendant entered into the consent order on 19 February 1997. It established child support as well as custody of their two minor children.

From approximately August of 1997 to June of 1998, both children received counseling from Crystal Champion. One child had a learning disability and received counseling for problems with self-esteem, and the other received counseling for difficulties she experienced regarding the transition from private to public school.

Champion has a Master's Degree in Divinity, is an ordained minister, and is endorsed by her denomination affiliation, the Alliance of Baptist, as a pastoral counselor. She is also licensed in South Carolina as a social worker. Champion is employed at Spartanburg Regional

Medical Facility in Spartanburg, South Carolina, as a social worker, but agreed to counsel the children from her home in Shelby, North Carolina, because it was more convenient for plaintiff and the children. She possesses no certificates or licenses from the State of North Carolina authorizing her to counsel here, however.

The counseling fee was at the rate of $40.00 per hour and totaled $1440.00. Plaintiff paid the bills and mailed a copy of them to defendant at approximately the time the services were rendered. Defendant did not reimburse her.

In September 1997, one child was also treated by the Child & Family Development Center for a developmental reading disorder. The fee for these services totaled $832.50. Plaintiff submitted copies of the bills to defendant but, as with Champion's bills, defendant did not file them with his insurance carrier or reimburse her for one-half.

On 15 July 1999, plaintiff filed her motion for reimbursement on a form titled "Motion and Notice of Hearing for Child Support Order." The trial court treated it as a motion for reimbursement of medical and psychological expenses. An order to show cause for contempt was apparently also issued, but was not included in the record. After finding that defendant was not in civil contempt, the trial court determined that the bills for both sets of counseling services totaled $2,272.50, and ordered defendant to reimburse plaintiff in the amount of $1,136.25. Defendant's assignments of error concern only the bills from Champion, with $770.00 being his portion.

Among his assignments of error, defendant contends the trial court abused its discretion by requiring him to reimburse plaintiff for the services of Champion, who rendered such services in violation of North Carolina licensing laws and public policy. We agree with this contention.

Section 90-331 of the North Carolina General Statutes is a general provision making it unlawful for anyone, not licensed under the Professional Counselors Act, to "engage in the practice of counseling." N.C. Gen. Stat. § 90-331 (1999). The evidence supports the conclusion that Champion "engaged in the practice of counseling." First, she billed plaintiff on business-styled stationery captioned "Crystal Champion, M.Div.," with "Pastoral Counselor" typed immediately below it. Inscribed at the bottom of the stationery is Champion's North Carolina address and phone number. Second, Champion pro-

vided services to the children thirty-six times over a two-year period, all in Shelby.

There are exceptions to the general prohibition against unlicensed counseling, however, set forth in section 90-332.1. Among these exceptions are:

> (1) [A]ny . . . person *registered, certified, or licensed by the State* to practice any other occupation or profession while rendering counseling services in the performance of the occupation or profession for which the person is registered, licensed, or certified.
>
> (5) Any ordained minister or other member of the clergy while acting in a ministerial capacity *who does not charge a fee* for the service, or any person invited by a religious organization to conduct, lead, or provide counseling to its members when the service is not performed for more than 30 days a year.
>
> (6) Any *nonresident* temporarily employed in this State to render counseling services for not more than 30 days in a year, if the person holds a license or certificate required for counselors in another state.

N.C. Gen. Stat. § 90-332.1 (1999) (emphasis added).

Champion is a fee-based pastoral counselor, but is not certified in North Carolina under N.C. Gen. Stat. § 90-380 *et seq.*, which set forth the procedures for certification of such counselors. Although she is licensed in South Carolina as a social worker, she is not licensed in North Carolina under Chapter 90B, which regulates social work certification and licensure. Therefore, the exception under section 90-332.1(1) does not apply.

Champion is an ordained minister, but she charged a fee in this case and was not invited to perform services by a religious organization. Section 90-332.1(5) is therefore not applicable.

Finally, the trial court found Champion to be a resident of North Carolina even though her primary employment is out of state. Thus, the exception in 90-332.1(6) does not apply.

Chapter 90B, which regulates social workers, also provides an exception to its licensing requirement:

> Nothing in this Chapter shall be construed as prohibiting a *nonresident* clinical social worker certified, registered, or licensed in

> another state from rendering professional clinical social work services in this State for a period of not more than five days in any calendar year.

N.C. Gen. Stat. 90B-8(b) (1999) (emphasis added). However, Champion does not qualify for this exception because she is a resident of Shelby, North Carolina.

We can find no basis upon which Champion's services were statutorily permitted in North Carolina. The stated purpose of the Licensed Professional Counselors Act, N.C. Gen. Stat. § 90-329 (1999), the Fee-Based Practicing Counselor Certification Act, N.C. Gen. Stat. § 90-381 (1999), and the Social Worker Certification and Licensure Act, N.C. Gen. Stat. § 90B-2 (1999), is to protect the public by regulating the services provided by these health-care providers. The protection of the public interest mandated by these statutes prohibits a court from ordering reimbursement for services performed in violation of them. *Cf. Hawkins v. Holland*, 97 N.C. App. 291, 388 S.E.2d 221 (1990) (prohibiting unlicensed contractors from enforcing construction contracts where, by statute, licensure was mandated before entering into contracts). Moreover, a non-custodial parent liable for the cost of psychological services for his children is clearly a person the legislature seeks to protect by regulating counselors and social workers. *See Furr v. Fonville Morisey Realty, Inc.*, 130 N.C. App. 541, 545, 503 S.E.2d 401, 405 (1998) ("[I]llegality is a defense to the enforcement of an otherwise binding, voluntary contract in violation of a statute only where the party seeking to void the contract is a victim of the substantive evil the legislature sought to prevent."), *disc. review allowed*, 350 N.C. 94, 532 S.E.2d 529, *disc. review dismissed as improvidently allowed*, 351 N.C. 41, 519 S.E.2d 314 (1999).

Based on our holding, we need not address defendant's other assignments of error. Accordingly, we reverse that part of the trial court's order requiring reimbursement for one-half of the cost of Champion's counseling services.

REVERSED.

JUDGES HUDSON and JOHN concur.

STATE OF NORTH CAROLINA v. RICKY LEE DAVIS

No. COA01-312

(Filed 7 May 2002)

Criminal Law— guilty plea—motion to withdraw denied

The trial court did not err in a prosecution for second-degree murder, driving while impaired, and felony hit and run by denying defendant's motion to withdraw his plea of guilty pursuant to a plea bargain. Although defendant contends that he entered the plea hastily and did not understand that he was pleading guilty to second-degree murder, the record shows otherwise. Furthermore, the State's proffer of evidence was significant.

Appeal by defendant from judgment entered 13 December 2000 by Judge William H. Freeman in Superior Court, Surry County. Heard in the Court of Appeals 23 January 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Charles R. Briggs for defendant-appellant.

McGEE, Judge.

Ricky Lee Davis (defendant) was indicted on 5 September 2000 for second degree murder, driving while impaired, and felony hit and run. These charges resulted from an automobile collision on 18 February 2000, in which defendant lost control of the car he was driving and crashed. A young passenger in defendant's car was killed. Defendant left the scene of the accident. Defendant pled guilty to all charges on 5 December 2000, pursuant to a plea agreement whereby judgment was arrested on the driving while impaired charge, and the remaining charges were consolidated for sentencing with the second degree murder charge.

A sentencing hearing was scheduled for 13 December 2000. Defendant filed a motion to withdraw his plea on 12 December 2000. A hearing was held on defendant's motion on 13 December 2000. The trial court denied defendant's motion to withdraw the plea and sentenced defendant to 170 to 213 months in prison. Defendant appeals from the denial of his motion to withdraw his guilty plea.

Defendant first argues the trial court erred in failing to grant defendant's motion to withdraw his guilty plea prior to sentencing

because fair and just reasons existed for his withdrawal request. Defendant contends he hastily entered into the plea agreement and did not understand exactly to which charge he was pleading guilty. We disagree.

In reviewing a motion to withdraw a guilty plea, "the appellate court does not apply an abuse of discretion standard, but instead makes an 'independent review of the record.' " *State v Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993) (quoting *State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990)). Our Court "must itself determine, considering the reasons given by the defendant and any prejudice to the State, if it would be fair and just to allow [a] motion to withdraw." *Marshburn*, 109 N.C. App. at 108, 425 S.E.2d at 718. In general, a "presentence motion to withdraw a plea of guilty should be allowed for any fair and just reason." *Handy*, 326 N.C. at 539, 391 S.E.2d at 162.

In reviewing such a motion, this Court may consider

> whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

Id., 326 N.C. at 539, 391 S.E.2d at 163 (citations omitted). In the case before us defendant filed a motion to withdraw his guilty plea seven days after he entered the plea. Defendant testified he was confused and wanted to withdraw his plea because he thought he was pleading guilty to driving while impaired and not to second degree murder. There was not a showing of any considerable prejudice to the State.

However, while defendant testified to confusion and misunderstanding, the record shows otherwise. Defendant met with his attorney and the prosecutor prior to defendant entering his plea and all three discussed consequences of pleading guilty to the charges and the consequences of pleading not guilty to the charges. Defendant then watched his attorney fill out the plea transcript and listened to and answered his attorney's questions concerning the transcript. The transcript reveals defendant understood his right to plead not guilty, understood he was pleading guilty to all charges, and understood as

a condition of the plea all charges would be consolidated for sentencing into the second degree murder charge. In front of the trial court, defendant answered questions concerning the plea transcript.

> THE COURT: Mr. Davis, you went over all these questions on the plea transcript with your lawyer, didn't you?
>
> MR. DAVIS: Yes, sir.
>
> THE COURT: Did you understand all the questions and give truthful and honest answers?
>
> MR. DAVIS: Yes, sir.
>
> THE COURT: You understand you're pleading guilty to second degree murder, driving while impaired, and driving while your license revoked, and hit and run?
>
> MR. DAVIS: Um-hum.
>
> . . .
>
> THE COURT: The plea bargain in your case is that all these charges are consolidated into the second degree murder charge; sentencing will occur on Wednesday, December 13th, year 2000. Is that correct and you accept that arrangement?
>
> MR. DAVIS: Yeah.

We note defendant's attorney was present with defendant when defendant discussed his options with the prosecutor and when defendant appeared before the trial court. The record reveals no evidence of haste or coercion in entering defendant's plea. Defendant's only assertion of legal innocence was an answer to his attorney's direct question, "Do you feel like you're guilty of second degree murder?" Defendant answered, "No, sir." In *State v. Graham*, 122 N.C. App. 635, 637, 471 S.E.2d 100, 102 (1996), the defendant made a similar statement when he stated he " 'always felt that he was not guilty[.]' " This Court held the statement by the defendant was not a "concrete assertion of innocence[.]" *Id.*

Furthermore, the State's proffer of evidence was significant. Our review of the record reveals the State was prepared to offer several eyewitnesses who would have testified to defendant's drunken condition at the time the accident occurred and his erratic driving. The State was also prepared to enter evidence of defendant's blood alco-

hol content being .23 at the time of the accident, along with defendant's two prior convictions for drunk driving.

Having considered all the *Handy* factors, we conclude defendant has failed to present a fair and just reason for withdrawal of his plea, and the trial court properly denied defendant's motion to withdraw his plea. We overrule this assignment of error.

We have carefully reviewed the record in this matter in accord with *Anders v. California*, 386 U.S. 738, 18 L. Ed. 2d 493 (1967), as requested by defendant's attorney, and have found no error in the hearing and determination of the charges against defendant.

We affirm the trial court's denial of defendant's motion to withdraw his plea of guilty.

Affirmed.

Judges WALKER and BIGGS concur.

OLIVER DEVONE, EULA DEVONE ARMSTRONG, FREDERICK DEVONE, FLORA DEVONE GRAHAM, ETHEL D. DEVONE, TIFFANY MACK, WHITAKER MACK, JR., CHRISTINE DEVONE JONES AND JEANETTE DEVONE SMITH, PLAINTIFF-APPELLANTS V. JOSEPH L. PICKETT AND WIFE, PATSY D. PICKETT, DEFENDANT-APPELLEES

No. COA01-322

(Filed 7 May 2002)

Adverse Possession— evidence of title—not raised as affirmative defense

The trial court did not err in an adverse possession action by allowing defendants to present evidence of defendants' title to the property when defendants did not raise title as an affirmative defense or counterclaim. Any evidence of defendant's ownership would help to prove a fact which would defeat plaintiff's cause of action and is properly admitted under a general denial of plaintiff's ownership.

Appeal by plaintiffs from judgment entered 21 September 2000 by Judge James E. Ragan, III in Superior Court, Pender County. Heard in the Court of Appeals 9 January 2002.

Moore & Kenan, by Robert C. Kenan, Jr., for plaintiff-appellants.

R. Kent Harrell for defendant-appellees.

McGEE, Judge.

Plaintiffs filed a complaint on 3 November 1998 alleging ownership of 2.885 acres of property located in Grady Township, Pender County, North Carolina. Plaintiffs presented evidence at trial of their ownership of the property through adverse possession. They testified their family, primarily their father, Willie Devone, farmed the property until the mid-1960s. From that time until 1991, Harrison Williams, a cousin of plaintiffs, farmed the property through permission from the Devone family. From 1991 until the time of the trial, the Devone family hired Marvin Pridgen to plow the field on the property a couple of times a year.

Defendants presented evidence of their title to the property through a deed recorded on 29 April 1997. Defendants also testified they have paid taxes on the property.

The case was heard by a jury on 21 August 2000. The jury found in favor of defendants and judgment was entered 21 September 2000. Plaintiffs appeal from the judgment denying their ownership of the property by adverse possession.

In plaintiffs' sole assignment of error, plaintiffs argue the trial court erred in allowing defendants to present evidence at trial of defendants' title to the property when defendants did not raise title as an affirmative defense or as a counterclaim. We disagree.

Our Supreme Court held in *Fleming v. Sexton*, 172 N.C. 250, 90 S.E. 247 (1916), that the defendants could present evidence of their ownership of a life estate even though the defendants did not assert this issue in the pleadings. Our Supreme Court reasoned the evidence was properly admitted because

> the pleadings are general in actions to try title to land. The plaintiff alleges ownership and under this allegation is permitted to establish his title in any legitimate way, by a connected chain of title or by adverse possession with or without color, by proof of tenancy, etc.; and the same latitude is allowed the defendant in making his defense. . . . "So in those States which have adopted the code system it is usually held that the defendant may under

> the general denial prove any fact which will defeat the plaintiff's cause of action."

Id., 172 N.C. at 253-54, 90 S.E. at 249 (citation omitted). "The plaintiff carries the burden of proving his legal right to possession, and the defendant is permitted to prove facts which show that his possession is lawful." *Id.*, 172 N.C. at 254, 90 S.E. at 249. *See also Farrior v. Houston*, 95 N.C. 578 (1886) (holding the trial court erred in refusing to allow the defendants to present evidence of adverse possession following a general denial of the plaintiff's ownership).

In the case before us, any evidence defendants presented as to their ownership of the property would certainly help to " 'prove any fact which will defeat the plaintiff's cause of action.' " *Fleming*, 172 N.C. at 254, 90 S.E. at 249 (citation omitted). Thus, such evidence is properly admitted under a general denial of plaintiffs' claim of ownership. We overrule plaintiffs' sole assignment of error and affirm the judgment of the trial court.

No error.

Judges WALKER and BIGGS concur.

STATE OF NORTH CAROLINA v. RICHARD ALLEN STOKES

No. COA00-1526

(Filed 21 May 2002)

1. Confessions and Incriminating Statements— motion to suppress—Sixth Amendment right to counsel

The trial court did not violate defendant's Sixth Amendment right to counsel in a first-degree felony murder and felonious child abuse case by denying defendant's motion to suppress a purported confession made by defendant to an officer who was walking by the cell block where defendant was being held and who initiated the conversation with defendant even though a first-degree murder warrant had been secured and served on defendant, and defendant had been arrested and had appeared before a magistrate, because: (1) an arrest warrant for first-degree murder in North Carolina is not a formal charge such that the Sixth Amendment right to counsel is invoked; (2) a defendant's Sixth Amendment right to counsel does not attach either at the issuance of the warrant or at the time of his arrest upon the warrant; and (3) a defendant's appearance before a magistrate does not trigger his Sixth Amendment right to counsel since no adversary judicial proceedings have commenced at that point.

2. Confessions and Incriminating Statements— motion to suppress—Fifth Amendment right to be free from self-incrimination

The trial court violated defendant's Fifth Amendment right to be free from self-incrimination in a first-degree felony murder and felonious child abuse case by denying defendant's motion to suppress a purported confession made by defendant to an officer who was walking by the cell block where defendant was being held and who initiated the conversation with defendant, and defendant is entitled to a new trial because: (1) defendant was in custody at the time the statement to the officer was made; (2) defendant was being interrogated by the officer since the officer's question of "how?" is the type of question that necessarily invites a response, and the officer's question was designed for the purpose of eliciting a response he knew or should have known was reasonably likely to be incriminating; (3) defendant's meeting with his counsel, as well as his arrest and the passage of nineteen hours, diluted the first and only Miranda warning given to defend-

ant; and (4) the State failed to meet its burden to show admission of defendant's statement to the officer was harmless beyond a reasonable doubt.

3. Criminal Law— jury instruction—defendant's hands as a deadly weapon

The trial court did not abuse its discretion in a first-degree felony murder and felonious child abuse case by its jury instruction on the use of defendant's hands as a deadly weapon, because the trial court made it clear to the jury that the jury was not compelled to infer anything and that it was free to decide from all the evidence whether defendant's hands had been used as a deadly weapon.

4. Evidence— minor child's prior injuries—opinion testimony about battered child syndrome

The trial court did not err in a first-degree felony murder and felonious child abuse case by permitting the State to offer evidence of the minor child's prior injuries to his ear and head, as well as the opinion testimony of a doctor that the minor child suffered from battered child syndrome, because: (1) evidence of the prior injuries was relevant to the doctor's diagnosis of battered child syndrome; and (2) the basis of the doctor's expert opinion was his experience and education, as well as his review of the minor child's medical records and the autopsy report.

Judge HUNTER concurring in part and dissenting in part.

Appeal by defendant from judgment dated 29 February 2000 by Judge Michael E. Beale in Superior Court, Davidson County. Heard in the Court of Appeals 29 November 2001. An opinion in this case was originally filed 16 April 2002. The opinion was withdrawn by order entered 26 April 2002. This opinion replaces the prior opinion of this Court.

Attorney General Roy Cooper, by Robert J. Blum, Special Deputy Attorney General, for the State.

Danny T. Ferguson, for defendant-appellant.

McGEE, Judge.

Richard Allen Stokes (defendant) was indicted on 11 May 1998 for first degree murder of two-year-old Alexander Ray Asbury (Alex) and on 8 June 1998 for felonious child abuse of Alex. Both crimes

were alleged to have been committed on 1 April 1998 and were consolidated for trial.

Evidence at trial for the State tended to show that Alex died in the early morning hours of 1 April 1998. Alex lived in a mobile home with his mother, Tricia Burnette, formerly Tricia Asbury (Tricia), and defendant. Defendant was Tricia's boyfriend and had lived with Tricia and Alex since August of 1997. Defendant was not Alex's biological father.

Tricia put Alex to bed at approximately 9:30 p.m. on 31 March 1998. Tricia went to bed at 10:00 p.m. and defendant followed shortly thereafter. Before going to bed, defendant smoked marijuana, as he did most nights. Tricia testified she was awakened shortly before 4:00 a.m. by defendant screaming that Alex was not breathing. Tricia called 911 and she and defendant administered CPR to Alex. Flynt Hill, an EMT/Paramedic who responded to Tricia's call, found that Alex was not breathing and had no pulse or heart activity. Alex was transported to Wake Forest University Medical Center (Baptist Hospital) in Winston-Salem by ambulance. Defendant and Tricia followed the ambulance to the hospital where Alex was pronounced dead at 4:52 a.m.

The day before his death, Alex attended Sunshine Day Care. Crystal Wilkes, the owner and director of the day care, and Angela Reece, a teacher there, testified that they noticed nothing unusual about the way Alex was acting at day care on 31 March 1998. Tricia testified she picked Alex up from day care shortly after 5:00 p.m. on 31 March 1998 and took him to get his hair cut. She did not notice anything unusual about Alex after she picked him up from day care. Gerri Brown cut Alex's hair and testified that she did not notice anything out of the ordinary about Alex that evening.

Tricia and Alex then visited defendant for about an hour at defendant's place of employment, playing football in the parking lot. Tricia and Alex next visited Tricia's mother, Donna Burnette (Mrs. Burnette). Mrs. Burnette testified that Alex was very excited because he had just gotten his hair cut and was acting "very energetic." Mrs. Burnette stated that she saw Alex four to five times a week and on that evening did not notice anything unusual about his head. Tricia went to the basement of her mother's home to use a tanning bed for about twenty minutes while her mother watched Alex.

Mrs. Burnette testified that while Tricia was downstairs, Alex ran into a buffet, hit the left side of his head, fell down and began to cry. Shortly thereafter, Alex again ran into the buffet and hit the right side of his head, but did not fall down. She stated that "[t]he skin [on Alex's head] wasn't broken, it was red, but it wasn't bruised." Mrs. Burnette said she did not feel Alex needed emergency medical treatment at that time. Mrs. Burnette said to Tricia that "Alex broke his record, he had fallen twice in less than 20 minutes."

Tricia and Alex then picked up a pizza, which they and defendant ate for dinner. Tricia washed Alex and put him to bed. Tricia testified that she did not see any bruising on Alex.

The State presented evidence at trial of prior injuries Alex had sustained. Tricia testified that on or about the morning of 9 February 1998, she saw purple and black bruising on Alex's right ear. She testified that Alex's ears were not bruised before he went to bed the previous night. She said that she and defendant decided it was caused by Alex's bed. Tricia called Dr. Nifong, Alex's pediatrician, that afternoon about Alex's ear and he told her to bring Alex in if the ear was swelling. Crystal Wilkes testified that around 9 February 1998 she noticed that Alex's ear was covered with bruises and was swollen. She discussed the injury with Tricia who told her that Alex had gotten his head caught in the railing of the bed. Mrs. Burnette also testified that on or about the morning of 9 February 1998, Tricia called and told her that Alex had gotten his ear "hung in the slats of his bunk bed."

Tricia also testified at trial that she noticed a soft spot on Alex's head when she was bathing him on 22 February 1998 and sought medical treatment from Dr. Nifong. Dr. Nifong examined Alex and referred Tricia to Dr. Bell, a neurosurgeon. Alex was seen by Dr. Bell twice. Dr. Bell took a CT scan of Alex's head and told Tricia to continue to observe the soft spot on his head. Crystal Wilkes testified that she, too, noticed a soft spot on the back of Alex's head around 22 February 1998 and discussed this with Tricia. Tricia told Crystal Wilkes that she was concerned about the soft spot and was having Alex treated by a doctor.

Tricia testified that Alex suffered from asthma which frequently caused him to have breathing problems. Alex took medicine through a nebulizer if he had a cold or an asthma attack. She testified that Alex was often treated by Dr. Nifong for asthma problems.

Dr. Patrick Lantz (Dr. Lantz), a forensic pathologist at Baptist Hospital, testified that he performed an autopsy on Alex on 1 April 1998. Upon an external exam, Dr. Lantz saw signs of injury and testified that Alex

> had a small bruise between his right eyebrow and the hairline, which was about a quarter of an inch in size, then he had a smaller one than that, a small little bruise right at the corner of his eyebrow on the right side. He also had a small little bruise on the left side. Looking through the hair, I could actually see that there was some bruising of the scalp on the right and the left side in the hair, farther back on the forehead, both on the right and the left side.

Dr. Lantz also noted three bruises on Alex's back, as well as bruises on Alex's legs typical of those found on a young child. Dr. Lantz concluded that Alex's death was not caused by abnormalities in Alex's cardiovascular system or respiratory system, nor did he find abnormalities in Alex's liver, gallbladder, pancreas or the first part of his small bowel. He did note that "there was a little bit of fat in the liver cells" but nothing in Alex's records suggested that this caused Alex's death or that Alex suffered from Reyes Syndrome. Dr. Lantz concluded that Alex's death was caused by "cerebral edema or swelling of the brain due to an acute intracranial injury from blunt force trauma of the head."

When asked if the injuries he discovered were consistent with the type of injuries Alex could have received from hitting his head on the buffet, Dr. Lantz stated that

> [b]ased on the pattern of the injuries on the left side and the severity with the amount of hemorrhage under the parallel bruises, I would say it would be inconsistent with any two year or two-and-a-half-year-old running into that and being knocked down just by the force of, you know, falling into it. . . .
>
> The smaller bruise between the eyebrow and the hairline may have been caused by some type of minor bump like that, but the larger two by two inch bruise back in the hairline sort of had a repeating nodular pattern with a hemorrhage underneath it, which was over four inches in size, would not be consistent within any reasonable medical probability of that type of injury.

Upon questioning by the State, Dr. Lantz agreed that Alex's head injury could "be consistent with a mature adult taking his right hand, folding it . . . and striking th[e] child."

Dr. Lantz was tendered as an expert on battered child syndrome based on his education, training, and experience. Dr. Lantz testified that he had performed about 2,000 autopsies over his career and had, in other cases, been qualified as an expert on battered child syndrome. He described battered child syndrome as "repeated nonaccidental injuries to an infant or a child either at one setting or over a period of time." After reviewing the records discussing the soft spot on Alex's head that Tricia noticed on 22 February 1998, Dr. Lantz testified that "[b]ased on the location and the hemorrhage [on the head], it would be highly unlikely to be due to an accidental injury." Dr. Lantz concluded that this type of injury "usually [would] be attributed to some type of direct trauma or [if] someone grabs a child's hair and pulls on it very sharply." Additionally, after reviewing the records reporting the bruise on Alex's ear that Tricia noticed around 9 February 1998, Dr. Lantz testified that "[a] bruise or an injury to an ear on a child, that's not a typical occasion or an accidental injury in a child from [a] usual day-to-day running around, falling and playing. That type of injury is more likely than not to be non-accidental." Dr. Lantz testified that after reviewing Alex's records kept by Dr. Nifong, Dr. Bell, Dr. Orr, the radiologist who performed Alex's CT scan, Dr. Griffith, Alex's primary care provider, the records from Baptist Hospital, the ambulance call report, and the autopsy report, it was his opinion that Alex "did suffer from Battered Child Syndrome."

Defendant presented evidence at trial, including the testimony of Dr. Edward Robert Friedlander (Dr. Friedlander), chairman of the pathology department at the University of Health Sciences in Kansas City, Missouri and teacher at the University of Missouri School of Medicine. Dr. Friedlander was tendered as an expert in clinical and anatomical pathology and it was his opinion that Alex's head injury could have been caused by something other than a fist. He stated that the injury could have been caused by running into the buffet. According to Dr. Friedlander, the fat cells found in Alex's liver, as noted by Dr. Lantz in his autopsy report, although "not fully developed Reyes," could be Reyes related and "one of the Reyes mimics." Dr. Friedlander agreed that Alex's "death was caused by the cerebral edema following the head trauma [but was] concerned that there was something else going on that would be more viable to the effects of a household accident." He stated that "one punch to a two-year-old's

head . . . can cause cerebral edema." When questioned about battered child syndrome, Dr. Friedlander stated that was "not something that [he] would want to say that's present or not present."

Defendant testified at trial that he loved Alex, he never disciplined him, and that Tricia took the responsibility of caring for Alex. He said he noticed the bruise on Alex's ear in early February 1998 and looked at it with Tricia. The evening of 31 March 1998 he helped Tricia put Alex to bed and did not notice anything unusual about Alex at that time. He admitted that he smoked marijuana that night and "[e]very night if I had it," but did not drink alcohol or smoke cigarettes and never smoked marijuana around Alex. He testified that he often got up two to three times a night and on 31 March 1998, he awoke around 12:00 a.m. or 12:30 a.m. and went to the bathroom. Before returning to bed, he checked on Alex "[l]ike [he] always d[id]," and stated that Alex was breathing regularly. At approximately 3:55 a.m., defendant again awoke and went to the bathroom. He again checked on Alex and noticed that Alex's fingertips were blue. Defendant stated that he then "stuck [his] finger in [Alex's] mouth to see if there was any kind of objects in his mouth or down his . . . throat," but there was nothing there so he "picked him up immediately and ran." He called for Tricia to call 911 as he ran through the kitchen and then defendant began performing CPR on Alex. Defendant testified that he thought Alex was not breathing because of his asthma. Defendant testified that he never hit, squeezed or pinched Alex, or laid a hand on him, nor did he ever physically discipline him.

A jury found defendant guilty of first degree felony murder and felonious child abuse. The jury recommended that defendant be sentenced to life imprisonment without parole. Defendant appeals.

I.

Defendant argues that the trial court erred in denying his motion to suppress a purported confession made to Officer Varner, thus depriving defendant of his state and federal constitutional rights to representation by counsel and right to be free from self-incrimination.

Prior to trial, defendant moved to suppress statements he made to law enforcement on 1 April 1998 and 2 April 1998. At issue on appeal is the statement defendant made to Officer Varner on 2 April 1998. When a defendant objects to the admissibility of certain evidence at trial, "the trial court must conduct a *voir dire* hearing to determine [the] admissibility" of that evidence. *State v. Porter*, 303

N.C. 680, 691, 281 S.E.2d 377, 385 (1981). "The trial court's findings of fact following a *voir dire* hearing are binding on this [C]ourt when supported by competent evidence." *State v. Lane*, 334 N.C. 148, 154, 431 S.E.2d 7, 10 (1993). However, "the trial court's conclusions of law based upon those findings are fully reviewable on appeal." *Id.*

In the case before us, a *voir dire* hearing was held to determine the admissibility of defendant's statement to Officer Varner as well as statements made to other law enforcement officers. Evidence at the hearing relevant to this issue tended to show that Officer McDade testified that on 1 April 1998, defendant voluntarily went with him to the Davidson County Sheriff's Department, where he read defendant his *Miranda* rights at 4:57 p.m. Defendant was not under arrest at that time. Defendant acknowledged that he understood his rights and that he was "willing to talk to [Officer McDade] now and willing to talk to [Officer McDade] without a lawyer." Defendant remained at the Sheriff's Department for about five hours and during that time he made several statements to various law enforcement officials. Defendant first made a written, signed statement at approximately 6:00 p.m., stating that he did not have anything to do with Alex's death but instead found Alex in his bed shortly before 4:00 a.m. with blue fingers and not breathing. Defendant made an oral statement at 8:21 p.m., which Officer McDade wrote down. The statement said that "if I did it, I didn't remember it, just give me the death penalty or I will do it in jail." At 8:30 p.m. defendant made a written, signed statement to the same effect. Defendant was then arrested on a warrant charging him with first degree murder.

Defendant made another oral statement around 9:25 p.m., which was transcribed by Officer McDade and signed by defendant at 9:57 p.m., admitting that defendant struck the child.

Larry Stokes and Angela Stokes, defendant's father and sister, testified at the suppression hearing that they hired an attorney for defendant at approximately 8:30 a.m. on 2 April 1998. Defendant met with his attorney at approximately 10:00 a.m. on 2 April 1998 for about an hour.

Officer Varner testified at the suppression hearing that around noon on 2 April 1998, he went to the jail to see who had been "charged with the killing of the child." He stated that he was not directed by any other law enforcement officer to go to the cell block. Officer Varner testified that he went to the cell block to see defendant and defendant said, "What do you want?" Officer Varner then asked

defendant, "How?" Officer Varner testified that defendant said that "[h]e just kept crying and I lost it, ain't nothing I can do but the time now." Officer Varner described defendant at the time as "[c]alm, relaxed, just sitting on the bunk." Officer Varner made no record of this exchange and thereafter left the jail. At no point did Officer Varner read defendant his *Miranda* rights. He testified that he did not know that defendant had met with counsel earlier that morning and he did not go to the jail with any investigative purpose. When asked if "How?" was a question, Officer Varner responded, "That type of response I wasn't expecting, I just answered what he said to me." Defendant did not testify at the suppression hearing.

Following the hearing, the trial court entered an order on 4 February 2000 stating in relevant part:

> That on the 2nd day of April[] 1998, Officer Varner walked to the cell block where the defendant was being held, somewhere around noon, that the defendant's relatives had hired an attorney, . . . prior to that noon hour. That this was unknown to Officer Varner at the time. That when he walked by the cell he looked in, having never seen the defendant previously, to see who had been arrested and charged with murder, at which time the defendant spontaneously said to Officer Varner, "What do you want"? To which Officer Varner responded "How?" The defendant then spontaneously to Officer Varner said in essence, he kept crying, and I lost it and there ain't nothing I can do but the time now. That he appeared to be calm at that time. Officer Varner then turned and walked away.

The trial court concluded that the statement of defendant to Officer Varner on 2 April 1998, as well as other statements made to law enforcement officials on 1 April 1998,

> were made freely, voluntarily and understandingly. That the defendant fully understood his constitutional right to remain silent and his constitutional right for counsel and all other rights. That the defendant did freely, knowingly, intelligently and voluntarily waive each of those rights and thereupon made statements to the officers of the Davidson County Sheriff's Department.

A. Sixth Amendment

[1] Defendant contends that his statement to Officer Varner was unlawfully obtained in violation of his Sixth Amendment right to counsel.

The Sixth Amendment to the U.S. Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." U.S. Const. amend. VI. This "right to counsel attaches only at such time as adversary judicial proceedings have been instituted 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " *State v. Franklin*, 308 N.C. 682, 688, 304 S.E.2d 579, 583 (1983), *overruled on other grounds by State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 32 L. Ed. 2d 411, 417 (1972)). Therefore, " 'only when the defendant finds himself confronted with the prosecutorial resources of the state arrayed against him and [is] immersed in the complexities of a formal criminal prosecution [is] the sixth amendment right to counsel [] triggered as a guarantee.' " *State v. Taylor*, 354 N.C. 28, 35, 550 S.E.2d 141, 147 (2001), *cert. denied*, — U.S. —, 152 L. Ed. 2d 221 (2002) (quoting *State v. McDowell*, 301 N.C. 279, 289, 271 S.E.2d 286, 293 (1980), *cert. denied*, 450 U.S. 1025, 68 L. Ed. 2d 220 (1981)).

Defendant contends his Sixth Amendment right to counsel had attached when he made the statement to Officer Varner on 2 April 1998 because a warrant charging him with murder had been secured and served on him, he had been arrested and had appeared before the magistrate, and he was thereafter incarcerated in the county jail. Our Supreme Court, however, has stated that "an arrest warrant for first-degree murder in this state is not a formal charge" such that the Sixth Amendment right to counsel is invoked. *Taylor*, 354 N.C. at 36, 550 S.E.2d at 147. Further, a defendant's Sixth Amendment right to counsel does "not attach either at the issuance of the warrant or at the time of his arrest upon the warrant." *Id. See also United States v. Gouveia*, 467 U.S. 180, 190, 81 L. Ed. 2d 146, 155 (1984). Finally, a defendant's appearance before a magistrate does not trigger his Sixth Amendment right to counsel because no adversary judicial proceedings have commenced at that point. *Franklin*, 308 N.C. at 689, 304 S.E.2d at 584 (citing *Tarpley v. Estelle*, 703 F.2d 157 (5th Cir. 1983)).

Therefore, in the case before us, defendant's Sixth Amendment right to counsel had not attached when Officer Varner initiated the conversation with defendant. Admission of the statement made by defendant to Officer Varner was not in violation of defendant's Sixth Amendment right to counsel.

B. Fifth Amendment

[2] Defendant also contends that admitting his statement to Officer Varner violates defendant's Fifth Amendment right to be free from self-incrimination under *Miranda v. Arizona*, 384 U.S. 436, 479, 16 L. Ed. 2d 694, 726 (1966), which provides that the Fifth Amendment requires that no evidence obtained from a defendant through custodial interrogation may be used against the defendant, unless the interrogation was preceded by the appropriate warnings of defendant's right to remain silent and to have an attorney present, and a voluntary and intelligent waiver of those rights.

Defendant argues that his Fifth Amendment right applies in this case because he was in custody when he made a statement to Officer Varner, and he was subjected to interrogation by Officer Varner without first being advised of his *Miranda* rights.

The State argues that Officer Varner did not interrogate defendant; rather, defendant's statement was spontaneous and therefore admissible even if Officer Varner did not read defendant his *Miranda* rights. According to the State, Officer Varner was not at the jail for the purpose of conducting an interrogation. Further, the State claims that no interrogation occurred.

The Fifth Amendment to the U.S. Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself[.]" U.S. Const. amend. V. The North Carolina Supreme Court has also ruled that the Fifth Amendment provides that "no evidence obtained from a defendant through *custodial interrogation* may be used against that defendant at trial, unless the interrogation was preceded by (1) the appropriate warnings of the rights to remain silent and to have an attorney present and (2) a voluntary and intelligent wavier of those rights." *State v. Locklear*, 138 N.C. App. 549, 551 n.2, 531 S.E.2d 853, 855 n.2, *disc. review denied*, 352 N.C. 359, 544 S.E.2d 553 (2000) (citing *Miranda*, 384 U.S. at 479, 16 L. Ed. 2d at 726).

Custodial interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *State v. Clay*, 297 N.C. 555, 559, 256 S.E.2d 176, 180 (1979), *overruled on other grounds, State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982) (quoting *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706). In this case, defendant was clearly in custody at the time the statement to Officer Varner was

made. Also, Officer Varner initiated the questioning of defendant. Officer Varner went to the jail to see who had been arrested for Alex's death and there is no evidence in the record that defendant invited Officer Varner to the jail or asked to see him. Upon Officer Varner's unexpected arrival at his cell, defendant asked, "What do you want?" Defendant did not just voluntarily blurt out a confession when Officer Varner came to his cell. Instead, Officer Varner initiated questioning of defendant when he asked defendant "How?" and defendant then responded to the officer's question.

Our inquiry then becomes whether defendant was being "interrogated" by Officer Varner at the time he made the statement. "Interrogation," as that term is used in Fifth Amendment cases, is defined as " 'any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.' " *State v. Golphin*, 352 N.C. 364, 406, 533 S.E.2d 168, 199 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 302, 64 L. Ed. 2d 297, 308 (1980)). We find that Officer Varner interrogated defendant because the question "How?" is the type of question that necessarily invites a response. The officer's question was designed for the purpose of eliciting a response he knew or should have known was reasonably likely to be incriminating. *State v. Banks*, 322 N.C. 753, 760, 370 S.E.2d 398, 403 (1988). Although Officer Varner testified that he did not expect the response he got from defendant, his question improperly elicited clearly incriminating information from defendant and therefore defendant's statement was not spontaneous.

Because we have determined that defendant was in fact interrogated by Officer Varner, defendant's Fifth Amendment rights were violated unless the appropriate warnings were given to defendant before the interrogation, and defendant knowingly and intelligently waived those rights.

In this case, defendant was read his *Miranda* rights on 1 April 1998 at 4:59 p.m. After his arrest, he was not given a new set of warnings, nor did Officer Varner give defendant any warnings. *Miranda* warnings retain efficacy, so long as "no inordinate time elapses between the interrogations, the subject matter of the questioning remains the same, and there is no evidence that in the interval between the two interrogations anything occurred to dilute the first warning[.]" *State v. McZorn*, 288 N.C. 417, 433, 219 S.E.2d 201, 212 (1975), *vacated in part*, 428 U.S. 904, 49 L. Ed. 2d 1210 (1976). The

"need for a second warning is to be determined by the 'totality of the circumstances' in each case." *McZorn*, 288 N.C. at 434, 219 S.E.2d at 212 (citing *Commonwealth v. Ferguson*, 444 Pa. 478, 282 A.2d 378 (1971)). In this case, defendant's meeting with his counsel, as well as his arrest and the passage of nineteen hours, diluted the first and only warning given to defendant. Defendant's waiver on 1 April 1998 was invalid as to Officer Varner's custodial interrogation of defendant on 2 April 1998 and the statements arising from that interrogation.

We find that Officer Varner's question to defendant was designed to elicit an incriminating response and constituted interrogation by the police in violation of defendant's Fifth Amendment right to counsel; therefore, the trial court erred in not suppressing defendant's response to Officer Varner's question.

C. Prejudicial error

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (1999). As defendant argues

> [d]efendant's veracity and truthfulness of the more detailed alleged confession given by Defendant the night before was challenged by the evidence that it was merely parroting back what Detective Shusky told him they wanted to hear when they refused to accept his original, truthful statement. The jury was instructed that they were required to consider the circumstances surrounding that alleged confession before deciding what, if any, weight to put on it. . . . The statement allegedly made to [Officer] Varner the following day served to strengthen the State's argument that the confession of the night before should be taken as truthful.

The State does not argue in its brief that admission of defendant's statement to Officer Varner was harmless beyond a reasonable doubt and has thus failed to meet its burden. We find that defendant's Fifth Amendment right to counsel was violated and we cannot determine beyond a reasonable doubt that the admission of Officer Varner's testimony was harmless. Defendant must therefore be granted a new trial.

II.

[3] Because the alleged error argued in defendant's first assignment of error may occur at retrial of defendant's case, we next address defendant's contention that the trial court's instructions to the jury deprived defendant of his state and federal rights to due process of law.

First degree felony murder is "[a] murder which shall be . . . committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]" N.C. Gen. Stat. § 14-17 (1999). In order to prove felony murder on the basis of felony child abuse, the State must "prove that the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon." *State v. Pierce*, 346 N.C. 471, 493, 488 S.E.2d 576, 589 (1997). "When a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons." *Id.*

The trial court instructed the jury that it is their "duty to decide from [all the] evidence what the facts are." The trial court also instructed the jury in part that to sustain the charge of first degree felony murder, the State must prove beyond a reasonable doubt that: (1) defendant committed felonious child abuse, (2) "that while committ[ing] felonious child abuse . . . defendant killed the victim with a deadly weapon," (3) defendant's actions were "a proximate cause of the victim's death," and (4) "that the felonious child abuse was committed or attempted with the use of a deadly weapon." The trial court explained that

> [a] deadly weapon is a weapon which is likely to cause death or serious bodily injury. . . . Hands or fists used against an infant of tender years *may* be considered deadly weapons. In determining whether one's hands or fists are deadly weapons, you should consider the nature, the manner in which they were used, and the size and strength of the defendant as compared to the victim. When a strong or mature person makes an attack by hands alone u[p]on a small child, the jury *may* infer that the hands were used as deadly weapons and you may infer that the act was unlawful and done with malice, *but you are not compelled to do so.*

(emphasis added). Upon review, "[a]s to the issue of jury instructions, we note that choice of instructions is a matter within the trial court's

discretion and will not be overturned absent a showing of abuse of discretion." *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152 (2002).

Defendant argues that the above jury instruction "impermissibly reduce[d] the State's burden of convincing the jury beyond a reasonable doubt that Defendant's hands were used as a deadly weapon." Defendant argues that the inference the jury was instructed it could draw was "overbroad" because it

> permitted the jury to find an element of the offense, hands used as a deadly weapon, without considering all of the evidence presented at the trial, particularly the evidence [that] Alex's liver condition created a condition where death would result from a blow which was not likely to cause death or great bodily harm to a small child.

We find that the trial court did not abuse its discretion in its jury instruction. As noted by the State in its brief, the trial court made it clear to the jury that the jury was not "compelled to infer anything, and that it was free to decide from all the evidence whether defendant's hands had been used as a deadly weapon." The instructions given were based upon our Supreme Court's decision in *Pierce* and did not improperly reduce the State's burden of proving its case beyond a reasonable doubt. This assignment of error is overruled.

III.

[4] Because the alleged error argued in defendant's third assignment of error might occur on retrial, we elect to address defendant's contention that the trial court improperly permitted the State to offer evidence of prior injuries to Alex's ear and head, as well as the opinion testimony of Dr. Lantz that Alex suffered from battered child syndrome.

Expert testimony that is helpful to the jury in carrying out its role in determining the truth is admissible if based on a proper foundation. N.C. Gen. Stat. § 8C-1, Rule 702 (1999). "Expert medical opinion has been allowed on a wide range of facts, the existence or non-existence of which is ultimately to be determined by the trier of fact." *State v. Wilkerson*, 295 N.C. 559, 568, 247 S.E.2nd 905, 910 (1978) (citations omitted). The trial court has the duty to act as gatekeeper and to insure that expert opinion is properly founded on scientifically reliable methodology. *Daubert v. Merrell Dow*, 509 U.S. 579, 125 L. Ed. 2d

469 (1993); *see also State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995).

"A child who has been diagnosed with 'battered child syndrome' has suffered severe and numerous injuries such that it is logical to presume that the injuries were not caused by accidental means or by an isolated contact with a stranger, but instead were caused intentionally by the child's caretaker." *State v. Noffsinger*, 137 N.C. App. 418, 424, 528 S.E.2d 605, 609-10 (2000) (citing *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978)). Upon a diagnosis that a child suffers from battered child syndrome, "a permissible inference arises that the child's caretakers intentionally inflicted his injuries." *Noffsinger* at 424, 528 S.E.2d at 610.

Dr. Lantz was tendered as an expert in battered child syndrome based upon his education, training and experience. The jury was instructed that when listening to Dr. Lantz's testimony, they must "consider each expert opinion in evidence and give it the weight you think it deserves. You may reject it entirely if you find that the alleged facts upon which it has been based is untrue or the support of the opinions are not sound." Dr. Lantz testified that based upon a review of Alex's medical records and the autopsy report, it was his opinion that Alex "did suffer from Battered Child Syndrome."

Defendant argues that an opinion that Alex suffered from battered child syndrome, based on the soft spot on Alex's head and the ear injury, is error because "[i]t is unlikely that any child will not have suffered at least two significant injuries at some point and that his parents will not be able to discover the actual source of at least one of them." Further, defendant argues that Dr. Lantz's testimony is "far removed" from what our courts have found admissible as evidence of battered child syndrome.

The State argues that evidence regarding Alex's prior injuries is relevant and admissible even if it cannot be directly linked to the crimes charged. The State also argues that the jury was correctly instructed to give the expert testimony whatever weight it thought was deserved. Further, the State contends that Dr. Lantz possessed an expertise, such that a lay person would not have, to testify about battered child syndrome.

We find that the opinion expressed by Dr. Lantz in this case, although partially based on minimal evidence of prior injuries, fell within the bounds of permissible medical testimony. The basis for Dr. Lantz's expert opinion was his experience and education, as well as

his review of Alex's medical records and the autopsy report. Evidence of the prior injuries was relevant to Dr. Lantz's diagnosis of battered child syndrome. 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 that it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1999). Defendant presented evidence regarding Alex's prior injuries through Dr. Friedlander. The jury was permitted to weigh the opinions of both Dr. Friedlander and Dr. Lantz, and was not compelled to find facts one way or another. We find that the level of evidence relied upon by Dr. Lantz, although minimal, was sufficient for his diagnosis.

New trial.

Judge SMITH concurs.

Judge HUNTER concurs in part and dissents in part with a separate opinion.

HUNTER, Judge, concurring in part, dissenting in part.

I concur with the majority with respect to Parts II and III of the opinion. However, because I would hold that the trial court did not err in denying defendant's motion to suppress his statement to Officer Varner, I dissent as to Part I. The majority holds that the trial court erred in failing to suppress the statement as being in violation of the Fifth Amendment because Officer Varner initiated an interrogation of defendant without re-informing him of his *Miranda* rights and without an express waiver of those rights. I disagree, and would uphold the trial court's extensive findings and conclusions that defendant's statement was a spontaneous statement not the result of any police-initiated interrogation or inducement, and that defendant made the statement freely, voluntarily and with knowledge of his constitutional rights to remain silent and to have an attorney present.

"A trial court's ruling on a motion to suppress is conclusive on appeal 'if [it is] supported by competent evidence.' " *State v. Buchanan*, 355 N.C. 264, 265, 559 S.E.2d 784, 785 (2002) (citation omitted). Such a ruling is conclusive notwithstanding evidence to the contrary. *State v. Young*, 148 N.C. App. 462, 465, 559 S.E.2d 814, 817, *appeal dismissed and disc. review denied*, 355 N.C. 500, 564 S.E.2d 233 (2002). " 'This deference is afforded the trial judge because he is in the best position to weigh the evidence, given that he has heard all

of the testimony and observed the demeanor of the witnesses.' " *Id.* (quoting *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000)).

Here, the trial court found, and I believe the evidence supports, that Officer Varner was looking into defendant's cell as he walked by; that "defendant spontaneously said to Officer Varner, 'What do you want?' "; that Officer Varner simply responded " 'How?' "; that defendant then "spontaneously" told Officer Varner something to the effect that "he kept crying, and I lost it and there ain't nothing I can do but the time now"; that defendant appeared calm during the exchange; and that Officer Varner thereafter simply walked away. Based on these findings, the trial court concluded that the statement was not made as a result of any inducement or persuasion, that defendant made the statement freely, voluntarily, and with full knowledge and understanding of his constitutional rights, and therefore, that defendant's constitutional rights had not been abridged.

The trial court's finding that defendant spontaneously and without persuasion or inducement initiated a conversation with Officer Varner which led to the inculpatory statement was clearly supported by competent evidence in the form of Officer Varner's testimony, and is therefore conclusive. This finding supports the trial court's conclusion of law that there was no violation of defendant's constitutional rights. It is well-established that " ' "*Miranda* warnings and waiver of counsel are required only when an individual is being subjected to custodial interrogation." ' " *State v. Parks*, 148 N.C. App. 600, 606, 560 S.E.2d 179, 184 (2002) (citations omitted). Custodial interrogation is defined as " ' "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." ' " *Id.* (citations omitted).

In *Parks*, we recently held that the defendant's inculpatory statements were not made in the context of a police-initiated interrogation where the evidence clearly showed that the defendant initiated the conversation that led to the inculpatory statements. *Id.* at 607, 560 S.E.2d at 184. The evidence showed that the defendant initiated contact with the officer by asking him whether he was in trouble. Defendant thereafter made several incriminating statements during the conversation which ensued as a result of defendant's initial question to the officer. We held that the officer's testimony "clearly establishes that defendant initiated the conversation which led to his inculpatory statements," and therefore, "[d]efendant did not make the

inculpatory statements in the context of a police-initiated interrogation, and thus was not required to have been informed of his *Miranda* rights." *Id.* at 607, 560 S.E.2d at 184; *see also State v. Taylor*, 332 N.C. 372, 384, 420 S.E.2d 414, 421 (1992) (defendant's Fifth Amendment rights were not implicated where defendant initiated conversations which lead to his incriminating statements).

In a similar case, our Supreme Court reiterated that an interrogation does not ensue where the defendant initiates the contact. *See State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985). In that case, the evidence established that the officer happened to be standing nearby the defendant's jail cell when the defendant indicated that he wanted to speak to the officer, and a conversation ensued wherein defendant made incriminating statements. *Id.* at 115, 326 S.E.2d at 252. The Supreme Court rejected the defendant's argument that he had been subjected to a custodial interrogation, stating that although all the parties conceded the statement was made while the defendant was in custody, "we agree with the State and the trial judge that the statement was not made as a result of interrogation. Both the circumstances surrounding the statement and the substance of the statement are clear indications that it was volunteered." *Id.* at 116, 326 S.E.2d at 253; *see also, e.g., State v. Coffey*, 345 N.C. 389, 401, 480 S.E.2d 664, 671 (1997) (even assuming the defendant was being interrogated at the time he made incriminating statements, no constitutional violation occurred where "the trial court correctly concluded that defendant initiated the communication with the law enforcement officers").

I would hold that we are bound by the trial court's finding that defendant spontaneously initiated the conversation with Officer Varner, who happened to walk by his cell, by asking Officer Varner what he wanted, and that this finding supports a conclusion that defendant did not make the subsequent statement in the context of a police-initiated custodial interrogation.

Moreover, I would uphold the trial court's conclusion that defendant's statement was made after he freely, knowingly, and voluntarily waived his right to remain silent, his right to have an attorney present, and all other applicable rights. In *State v. Morganherring*, 350 N.C. 701, 722, 517 S.E.2d 622, 634-35 (1999), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d 322 (2000), our Supreme Court rejected the defendant's argument that he did not knowingly waive his Fifth and Sixth Amendment rights because there was no evidence in the record that the defendant's confession was anything but voluntary. The record in

this case likewise fails to show that defendant's incriminating statement or waiver of his rights was anything but voluntary and knowing. "A trial court's finding of voluntariness, when supported by competent evidence, is conclusive on appeal." *State v. Samuels*, 25 N.C. App. 77, 78-79, 212 S.E.2d 393, 394 (1975) (holding no violation of defendant's constitutional rights where trial court found that defendant's statements were made " 'suddenly, spontaneously and voluntarily,' " and not in response to interrogation, and such findings were supported by competent evidence).

We stated in *State v. Morrell*, 108 N.C. App. 465, 424 S.E.2d 147, *appeal dismissed, disc. review denied and cert. denied*, 333 N.C. 465, 427 S.E.2d 626 (1993), that the voluntariness of a confession must be determined in light of the totality of the circumstances. *Id.* at 474, 424 S.E.2d at 153. We stated that some factors to consider in assessing whether a confession was voluntary are " 'whether the defendant was in custody when he made the statement; the mental capacity of the defendant; and the presence of psychological coercion, physical torture, threats, or promises.' " *Id.* at 474-75, 424 S.E.2d at 153 (citation omitted). In applying those factors, we noted that although the defendant was in custody, that factor alone is not determinative. *Id.* at 475, 424 S.E.2d at 153. The trial court found that the statements were freely given as they were not the product of any threat, promise, or duress, and that the defendant was not suffering from any mental or emotional disorder, nor was she impaired or disabled. *Id.* Based on those findings, the trial court concluded the statements were voluntary. *Id.* We upheld the conclusion, noting that we are bound by the trial court's findings, which were supported by competent evidence. *Id.*

In the present case, the trial court's findings establish that there was no persuasion or inducement, that defendant was calm, and that both his initiation of the conversation and subsequent incriminating statement were made "spontaneously." Indeed, the evidence shows that in response to defendant's question, Officer Varner simply said one word. There is no evidence, and defendant does not argue, that he was otherwise impaired by any mental or emotional disorder or disability that would have prevented him from understanding the nature of his statement and the waiver of his constitutional rights.

In summary, the evidence supports the trial court's findings of fact that defendant initiated the conversation with Officer Varner, that Officer Varner responded with one word, and that defendant, with a calm and collected demeanor, subsequently made a sponta-

neous incriminating statement. These findings support a conclusion that there was no police-initiated custodial interrogation, and that defendant spontaneously volunteered the statement without persuasion and after a voluntary and knowing waiver of his rights. The record fails to show any violation of defendant's Fifth Amendment rights. Accordingly, I would affirm the trial court's denial of defendant's motion to suppress, and thus find no error in defendant's trial.

THE COUNTRY CLUB OF JOHNSTON COUNTY, INC., PLAINTIFF v. UNITED STATES FIDELITY & GUARANTY COMPANY, DEFENDANT

No. COA01-726

(Filed 21 May 2002)

1. Collateral Estoppel and Res Judicata— claim-splitting— compulsory counterclaims

The trial court did not err in an unfair and deceptive trade practices case by denying defendant insurance company's motions to dismiss, for directed verdict, and for judgment notwithstanding the verdict or new trial even though defendant contends plaintiff insured's claims should have been barred by the rule against claim-splitting and plaintiff's claims were required to be brought as compulsory counterclaims in defendant's declaratory judgment action, because: (1) the instant case involves different claims than those involved in the declaratory judgment action; and (2) defendant failed to establish that the claims presented are compulsory counterclaims under N.C.G.S. § 1A-1, Rule 13(a) since it has failed to established that plaintiff knew or reasonably should have known of all material facts necessary to assert all claims.

2. Unfair Trade Practices— insurance policy—contractual right to coverage

The trial court did not err in an unfair and deceptive trade practices case by denying defendant insurance company's motions to dismiss, for directed verdict, and for judgment notwithstanding the verdict or new trial even though defendant contends plaintiff insured cannot maintain a claim under N.C.G.S. § 75-1.1 where there is no contractual right to coverage under the

insurance policy, because: (1) defendant's argument is based on the faulty premise that plaintiff's policy did not provide coverage for the accident at issue; and (2) it has already been established that the policy at issue provided coverage to plaintiff.

3. Unfair Trade Practices— insurance policy—unfair claims settlement practices in insurance industry

Although defendant insurance company contends plaintiff insured cannot maintain a claim under N.C.G.S. § 75-1.1 where it failed to plead and prove a claim under N.C.G.S. § 58-63-15(11) which sets forth various acts which constitute unfair claims settlement practices in the insurance industry, an insurer may violate N.C.G.S. § 75-1.1 separate and apart from a violation of Chapter 58 and a plaintiff need not prove a violation of Chapter 58 in order to recover for unfair and deceptive trade practices.

4. Unfair Trade Practices— misconduct—aggravating circumstance

The trial court did not err by concluding that plaintiff insured established misconduct on the part of defendant insurance company or an aggravating circumstance necessary to support an unfair and deceptive trade practices claim under N.C.G.S. § 75-1.1, because: (1) courts may look to types of conduct prohibited by N.C.G.S. § 58-63-15(11) for examples of conduct constituting unfair and deceptive acts under N.C.G.S. § 75-1.1, and defendant's actions violated at least one of the acts prohibited by N.C.G.S. § 58-63-15(11); and (2) the jury's verdict that defendant improperly determined it would deny coverage, misrepresented the nature of its investigation to plaintiff, and unfairly and improperly cited an exclusion as its basis to send a reservation of rights letter supports a conclusion that the insurer's acts were unethical and involved an unfair assertion of its power.

5. Costs— attorney fees—reasonableness—unfair and deceptive trade practices

The trial court did not abuse its discretion in an unfair and deceptive trade practices case by awarding costs and attorney fees under N.C.G.S. § 75-16.1 to plaintiff, because: (1) the trial court made extensive findings, including the required findings regarding the willful nature of defendant's acts and its unwillingness to facilitate a resolution of the matter; and (2) the trial court made appropriate findings concerning the reasonableness of attorney fees, including those addressed to the time and labor

expended by the attorney, the skill required to perform the services rendered, the experience and ability of the attorney, and the customary fee for like work.

Appeal by defendant from judgment and orders entered 27 November 2000 by Judge Jack A. Thompson in Johnston County Superior Court. Heard in the Court of Appeals 13 March 2002.

W. Brian Howell, P.A., by W. Brian Howell and T. Cooper Howell; Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for plaintiff-appellee.

Wilson & Iseman, by G. Gray Wilson and Kevin B. Cartledge, for defendant-appellant.

HUNTER, Judge.

Defendant-appellant Unites States Fidelity and Guaranty Company ("USF&G") appeals the entry of judgment based upon a jury verdict concluding that USF&G committed an unfair and deceptive act or practice in violation of N.C. Gen. Stat. § 75-1.1 (1999), and awarding treble damages, and orders denying its motions and awarding costs and attorney's fees. For reasons stated herein, we hold the trial court did not err in denying USF&G's motions and in concluding that USF&G's actions as found by the jury amounted to a violation of N.C. Gen. Stat. § 75-1.1.

This is the fourth appeal to this Court involving these parties and stemming from an incident which occurred 18 October 1991. On that date, a member of plaintiff-appellee The Country Club of Johnston County, Inc. ("the Club") consumed several alcoholic beverages at the Club following a golf tournament. While driving home, the member struck another vehicle, killing its driver and seriously injuring a passenger. On the date of the accident, the Club was insured by USF&G under a master insurance policy including commercial general liability coverage ("the policy"). In May 1993, the family of the decedent instituted an action against the member and the Club in Wake County Superior Court. *See Sanders, et al. v. Upton*, 93 CVS 4415 ("*Sanders*"). USF&G defended the Club in *Sanders* under a reservation of rights regarding coverage, and the case was ultimately settled.

In July 1993, USF&G filed a declaratory judgment action seeking a determination that the policy afforded no coverage to the Club for

the damages alleged in *Sanders* because of a liquor liability exclusion in the policy (hereinafter "Exclusion C").[1] The Club filed an answer and a counterclaim alleging USF&G negligently failed to provide an extension of its coverage despite knowledge of the Club's alcohol practices. While an appeal to this Court was pending, the Club voluntarily dismissed its counterclaim without prejudice and instituted the present action on 23 January 1995. The amended complaint alleged, among other things, claims against USF&G for bad faith and unfair and deceptive practices in violation of N.C. Gen. Stat. § 75-1.1.

In July 1995, this Court rendered an opinion in USF&G's declaratory judgment action. *See U.S. Fidelity & Guaranty Co. v. Country Club of Johnston County*, 119 N.C. App. 365, 458 S.E.2d 734, *disc. review denied*, 341 N.C. 656, 462 S.E.2d 527 (1995) ("*USF&G I*"). In *USF&G I*, we reversed the trial court's entry of summary judgment in favor of USF&G, holding that although the policy contained a liquor liability coverage exclusion, there remained genuine issues of material fact as to whether USF&G was precluded from denying coverage under the doctrines of estoppel and waiver. *Id.* at 374-75, 458 S.E.2d at 740-41. On remand, the trial court granted summary judgment in favor of the Club, finding that USF&G waived its right to enforce Exclusion C as a matter of law. In June 1997, this Court affirmed that judgment, and the Supreme Court denied review, thereby establishing that the Club was entitled to coverage. *See U.S. Fidelity and Guaranty Co. v. Country Club of Johnston Co.*, 126 N.C. App. 633, 491 S.E.2d 569 (unpublished opinion), *disc. review denied*, 347 N.C. 141, 492 S.E.2d 38 (1997) ("*USF&G II*").

Following our decision in *USF&G II*, in November 1997, USF&G filed a motion to dismiss the Club's complaint in the present case under N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and (6) (1999). The motion was denied, and USF&G filed an appeal with this Court, which we dismissed as interlocutory. *See Country Club of Johnston County, Inc. v. U.S. Fidelity and Guar. Co.*, 135 N.C. App. 159, 519 S.E.2d 540 (1999), *disc. review denied*, 351 N.C. 352, 542 S.E.2d 207 (2000) ("*Country Club I*"). The Club's claims proceeded to trial.

The evidence presented at trial tended to show that in April 1991, USF&G directed its underwriters to attach to the policies of insureds who serve alcohol an amendment further restricting coverage for liquor liability. The amendment, called CG-2150, amended

1. Although Exclusion C is entitled "Amendment of Liquor Liability Exclusion," we note that the exclusions applied to all "alcoholic beverages."

Exclusion C, the policy's general liquor liability coverage exclusion, which excluded coverage for insureds "in the business of" selling or furnishing alcohol. The CG-2150 amendment was intended to clarify that, as to insureds who regularly serve alcohol, the general liability coverage under their policy would not be enough to provide coverage for their alcohol practices, and that they would be required to pay an additional premium if they wished to have coverage for such practices. Under the CG-2150 amendment, the exclusion would also apply to insureds who "[s]erve or furnish alcoholic beverages without a charge, if a license is required for such activity."

In August 1991, shortly before the accident, senior USF&G underwriter Catherine Davis reviewed the Club's underwriting report which contained details regarding its alcohol practices, including that the Club had a brown-bagging alcohol license. Davis made handwritten notes on the report indicating that because the Club had an alcohol license, the CG-2150 endorsement must be applied to its policy to inform the Club that it would be required to procure additional insurance if it desired coverage for its alcohol practices. Despite Davis' notation that CG-2150 should attach to the Club's policy due to its liquor license, the Club maintained that it was not informed by USF&G that its general policy did not provide coverage for its alcohol activities or that it would be required to purchase additional coverage. The Club produced Davis' notes from a September 1991 telephone conversation with USF&G agent David Grady, also a member of the Club, wherein Grady informed Davis that Club members only "brown bag" approximately six times per year. Thus, Davis concluded that the Club did not "appear to be a large exposure," and that she was "going to delete CG-2150." Davis later maintained that Grady had failed to inform her, and that she was unaware, that Club members could also purchase beer at the Club. Following the accident, Davis sent a letter to the Club informing it that USF&G would now be attaching the CG-2150 amendment to its policy.

The Club also presented evidence establishing that when the claim was made, the matter was examined by claims supervisor Douglas Funk, who determined that Exclusion C, the original liquor liability coverage exclusion, did not bar coverage. Funk testified that according to his notes dated 19 November 1991, he recommended that USF&G not send a reservation of rights letter on the basis that Exclusion C applied, and noted that the Club did not appear to be in the business of serving or furnishing alcohol. On 20 November 1991, USF&G did send a reservation of rights letter stating that USF&G

believed Exclusion C might apply to bar coverage, and that the matter would be further investigated. The following day, 21 November 1991, a USF&G home office claims examiner concluded that "we are going to take the position of no coverage."

Don Roinestad, who testified as an insurance expert in the fields of underwriting and claims handling, concluded that USF&G had failed to follow "acceptable claims practices" throughout the handling of the Club's claim. He testified that by failing to attach the CG-2150 amendment further restricting liquor liability coverage, Davis, and as a result USF&G, automatically accepted that there was coverage under the policy as it existed. He further testified that the sending of a reservation of rights letter in part based upon the applicability of Exclusion C was "totally inappropriate" because "the claims people . . . already knew at th[at] time that Cathy Davis and the agent [David Grady] agreed to provide this coverage for the insured." Roinestad also testified that USF&G failed to properly document its claims process, observing that key conversations regarding the Club's claim were never documented and placed in its file.

On 15 August 2000, the jury returned a verdict in favor of the Club as to damages and proximate cause, answering the following four special interrogatories in the affirmative:

a. Did USF&G prematurely and improperly determine that it was going to deny coverage prior to conducting a meaningful investigation?

b. Did USF&G misrepresent that it was investigating the application of Exclusion C when USF&G had determined that it was going to deny coverage?

c. Did USF&G solicit an opinion letter from counsel after having already made a decision to deny coverage?

d. Did USF&G unfairly or improperly send a "reservation of rights" letter on 11/20/91 citing Exclusion C, without having an adequate or documented basis to reverse Mr. Funk's position to not reserve rights as to Exclusion C documented on 11/19/91?

The jury answered the remaining two interrogatories in favor of USF&G, declining to find the insurer responsible for its attorney's conduct of removing Davis' handwritten notes regarding the CG-2150

amendment from the copy of USF&G's underwriting report provided to the Club during discovery in the declaratory judgment action:

e. Did USF&G participate in an unfair or deceptive alteration of Cathy Davis' handwritten notes on page two of the underwriting report?

f. Did USF&G participate in an unfair or deceptive use of the underwriting report that had been altered by the deletion of Cathy Davis' handwritten notes?

The jury awarded the Club $90,000.00 in damages. With the Club's consent, the trial court entered a remittitur on 27 November 2000 which reduced the damage award to $43,312.53, the amount which both parties agreed was what the Club had expended in attorney's fees defending USF&G's declaratory judgment action. By this order, the trial court also denied USF&G's post-trial motions for judgment notwithstanding the verdict, or in the alternative, a new trial. By judgment entered 27 November 2000, the trial court concluded as a matter of law, based on the jury's interrogatories and the court's independent review of the evidence, that USF&G committed an unfair and deceptive act or practice in violation of N.C. Gen. Stat. § 75-1.1. The trial court trebled the damages to $129,937.59 pursuant to N.C. Gen. Stat. § 75-16 (1999). In a separate order, the trial court made extensive findings of fact with respect to costs and attorney's fees and taxed $12,530.52 in costs and $154,078.75 in attorney's fees to USF&G. USF&G appeals from the verdict and judgment, from the denial of its post-trial motions, and from the order taxing costs and attorney's fees.

USF&G brings forth several assignments of error on appeal, which we address within the following five issues: whether the trial court erred in failing to grant USF&G's motions to dismiss, for directed verdict, and for judgment notwithstanding the verdict or new trial because (1) the Club's complaint was barred by the rule against claim-splitting and because its claims were compulsory counterclaims in USF&G's declaratory judgment action; (2) a claim under N.C. Gen. Stat. § 75-1.1 cannot be maintained in the absence of a contractual right to coverage under the policy; (3) the Club's claim under N.C. Gen. Stat. § 75-1.1 cannot stand where the Club failed to plead and prove a claim under N.C. Gen. Stat. § 58-63-15(11) (1999); (4) the Club failed to show any misconduct or aggravated circumstances sufficient to support a claim under N.C. Gen. Stat. § 75-1.1; and (5) attorney's fees and costs were unwarranted under N.C. Gen. Stat. § 75-16.1

(1999), and were unreasonable in amount. We conclude the trial court did not err in denying any of USF&G's motions and in determining, as a matter of law, that USF&G's actions as found by the jury constituted an unfair and deceptive act or practice in violation of N.C. Gen. Stat. § 75-1.1, thereby warranting treble damages, attorney's fees, and costs.

Preliminarily, we note that the standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is *de novo*. *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001). For a motion based on Rule 12(b)(6), the standard is whether, construing the complaint liberally, " 'the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory.' " *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (citation omitted). Our standard of review for a ruling on motions for directed verdict and judgment notwithstanding the verdict are the same: "whether, 'upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury.' " *Stamm v. Salomon*, 144 N.C. App. 672, 679, 551 S.E.2d 152, 157 (2001) (citation omitted), *appeal dismissed and disc. review denied*, 355 N.C. 216, 560 S.E.2d 139 (2002). Moreover, " '[t]he trial court's determination on the grant or denial of an alternative new trial is reversible only for an abuse of discretion.' " *In re Buck*, 350 N.C. 621, 627, 516 S.E.2d 858, 862 (1999) (citation omitted).

I.

[1] USF&G first argues that the trial court erred in denying its motions both because the Club's complaint should have been barred by the rule against claim-splitting and because the Club's claims were required to be brought as compulsory counterclaims in USF&G's declaratory judgment action. We disagree with both arguments.

First, USF&G argues that the Club's claims in this case should be barred by *res judicata*, and specifically, the rule against claim-splitting because the Club knew of the claims which it brings forth here at the time USF&G filed its declaratory judgment action. Thus, USF&G argues, the Club was required to have brought forth its claims in the declaratory judgment action because they arose out of the same factual background and transactions addressed in that action, and the claims are now barred from being litigated in this case.

"[T]he common law rule against claim-splitting is based on the principle that all damages incurred as the result of a single wrong must be recovered in one lawsuit." *Bockweg v. Anderson*, 333 N.C. 486, 492, 428 S.E.2d 157, 161 (1993). "Where the second action between two parties is upon the same claim, the prior judgment serves as a bar to the relitigation of all matters that were or should have been adjudicated in the prior action." *Id.* However, if the second action involves a different claim, "the prior judgment serves as a bar only as to issues actually litigated and determined in the original action." *Id.* "While it is true that a 'judgment is conclusive as to all issues raised by the pleadings,' the judgment is not conclusive as to issues not raised by the pleadings which serve as the basis for the judgment." *Id.* at 492, 428 S.E.2d at 161-62 (citation omitted).

Thus, in *Bockweg*, our Supreme Court determined that where the negligence claims at issue were previously dismissed voluntarily from a prior federal court action and were not the basis of the prior judgment, the prior judgment could not operate to bar subsequent prosecution of the claims in state court. *Id.* at 493, 428 S.E.2d at 162. The defendants in *Bockweg* advocated application of the "transactional approach" to claim-splitting wherein "all issues arising out of 'a transaction or series of transactions' must be tried together as one claim." *Id.* The Supreme Court declined to adopt this approach and concluded that the subsequent action, which involved a claim arising out of a separate instance of negligence, could not be barred by the prior federal court judgment "since the pleadings upon which the judgment in the prior action was based did not raise the claim now presented." *Id.* at 496, 428 S.E.2d at 164.

We have previously observed that the courts of this State have not adopted the transactional approach to claim-splitting. *See Northwestern Financial Group v. County of Gaston*, 110 N.C. App. 531, 537, 430 S.E.2d 689, 693, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 337 (1993). The defendants in *Northwestern* attempted to distinguish *Bockweg* (which involved two separate instances of negligence) from their case, which involved two claims based upon the same wrongful act of denying a permit. *Id.* at 538, 430 S.E.2d at 694. The defendants argued that the second action did not raise anything new, but instead simply changed the legal argument and the remedy sought. *Id.* Nevertheless, this Court held that the second action was permissible, stating:

> Though it is true that both Northwestern's suits arise out of the same set of facts and circumstances, Northwestern alleges that

> its claims for damages could not have been known until after it was granted the mandatory injunction. We believe that this is a pivotal distinction. It is well established that all of a party's damages resulting from a single wrong must be recovered in a single action. . . . However, for this rule to apply, logic and common sense require that both remedies must have been available at the time the first action was commenced.

Id. at 538-39, 430 S.E.2d at 694.

In the present case, aside from the fact that the Club voluntarily dismissed its sole counterclaim prior to its being litigated, we agree with the Club's position that the instant action involves different claims than those involved in the declaratory judgment action. The declaratory judgment action involved issues of coverage such as waiver and estoppel, and not the issues presented in this suit, namely, bad faith and unfair and deceptive practices. To the extent the Club's counterclaim in the declaratory judgment action, which simply alleged USF&G's negligence in failing to provide adequate coverage for the Club's alcohol practices, addressed USF&G's actions, it did not assert a claim for unfair and deceptive practices, and it did not address USF&G's handling of the claim after the accident, which was the basis for the judgment in the instant case. Indeed, the amended complaint in the present case contains factual allegations far exceeding those in the declaratory judgment action, including several allegations regarding USF&G's handling of the Club's claim, which were neither pled nor at issue in the declaratory judgment action.

Moreover, the Club maintains that it did not assert its claims for bad faith and unfair and deceptive practices in the declaratory judgment action because at that time it was not and could not have been fully aware of the facts which now form the basis of its claims, nor the extent of its damages. The record supports the Club's assertion that it began to discover the facts surrounding USF&G's handling of its policy and its claim as discovery proceeded in the declaratory judgment action. Thus, as we observed in *Northwestern*, logic and common sense require the conclusion that the Club cannot be required to have brought a claim of which it could not have reasonably known at the time of the first action. Even USF&G acknowledges in its brief that a party is required to try his whole cause of action at one time only when the party has "full knowledge of his damages as well as the facts giving rise to his cause of action." Although USF&G argues that the Club knew at the time it filed its answer and counterclaim of all facts necessary to bring its entire cause of action against

USF&G, including its claim for unfair and deceptive practices, USF&G has failed to persuasively establish that such was the case. Contrary to USF&G's assertion, the Club did not plead claims relating to USF&G's failure to investigate in its answer to the declaratory judgment action.

We conclude that the Club's complaint in the present case was not barred by *res judicata* because it did not bring forth claims which had already been litigated. Rather, it brought forth entirely different claims, based in part upon USF&G's actions in handling the Club's claim, which were not at issue in the declaratory judgment action and which were not fully known to the Club at that time. For the same reasons, we overrule USF&G's related argument that the present claims were required to have been brought as compulsory counterclaims in the declaratory judgment action.

Under N C. Gen. Stat. § 1A-1, Rule 13(a) (1999), a party is required to plead as a counterclaim

> any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Under this rule, a counterclaim is compulsory only "when it is in existence at the time of the serving of the pleading." *U.S. Fire Ins. Co. v. Southeast Airmotive Corp.*, 102 N.C. App. 470, 472, 402 S.E.2d 466, 468, *disc. review denied*, 329 N.C. 505, 407 S.E.2d 553 (1991).

Thus, where a claim is not mature at the time of the filing of the action, failure to bring it as a counterclaim does not serve as a bar to subsequent litigation on that claim. *Stines v. Satterwhite*, 58 N.C. App. 608, 614, 294 S.E.2d 324, 328 (1982). Moreover, even where the claim matures after the pleadings have been filed but during the pendency of the action, the pleader is not required to supplement the pleadings with a compulsory counterclaim. *Id.* Therefore, in *Stines*, we held that where the complaint in the subsequent action averred that material facts were not known at the time of the preceding action, the claims based thereon could not have been compulsory counterclaims, and the plaintiffs were not barred from bringing the subsequent action. *Id.* We observed that the plaintiffs "cannot be expected to plead that which they did not know." *Id.* Likewise, in

Driggers v. Commercial Credit Corp., 31 N.C. App. 561, 230 S.E.2d 201 (1976), we held that:

> Since there is no showing that [plaintiff] knew or by the exercise of reasonable diligence should have known of his alleged claim for fraud at the time he served answer in the prior action, his claim falls within the exception to Rule 13(a) and constitutes a permissive, not compulsory, counterclaim. His failure to assert his claim in the prior action is therefore not a bar to his present action.

Id. at 565, 230 S.E.2d at 203.

In this case, USF&G has failed to establish that the claims presented here are compulsory counterclaims because, as previously discussed, it has failed to establish that the Club knew or reasonably should have known of all material facts necessary to assert all claims. To the contrary, the Club asserts, and the record supports, that the true extent of USF&G's actions and the facts which constitute the basis of the Club's claims in this case were not fully known to the Club at the time the declaratory judgment action was filed, but rather, became clear to the Club throughout the pendency of that action. None of the allegations in the Club's answer or counterclaim in the prior action reveals that the Club had any knowledge regarding the manner in which USF&G handled the investigation of its claim. Moreover, the amended complaint in this case avers that it was not until 1996 that the Club discovered that Catherine Davis originally determined the CG-2150 amendment should apply to the Club's policy due to its liquor license, and that USF&G had deleted Davis' notes from the copy of the underwriting report previously provided to the Club during discovery (which fact helped form the basis for the Club's bad faith claim). The trial court did not err in denying USF&G's motions on these grounds. These assignments of error are overruled.

II.

[2] USF&G next argues that the trial court erred in denying its motions because the Club cannot maintain a claim under N.C. Gen. Stat. § 75-1.1 where there is no contractual right to coverage under the policy. Specifically, USF&G argues that such claims "are grounded in and arise from the contractual relationship between insurer and insured," and because the Club's policy did not provide coverage, it cannot maintain an "extracontractual claim."

We need not engage in a discussion of whether a claim under N.C. Gen. Stat. § 75-1.1 in this context must be grounded in contract, as USF&G's argument is based on the faulty premise that the Club's policy did not provide coverage for the accident at issue. In fact, in *Country Club I*, this Court rejected this same argument and squarely established that the policy provided coverage to the Club. *See Country Club of Johnston County, Inc.*, 135 N.C. App. at 165, 519 S.E.2d at 545. In that case, we noted that "USF&G has continued to insist the policy afforded no coverage and that the Club therefore may not assert a bad faith claim," despite the fact that such argument was already addressed and rejected in *USF&G II*. *Id.* at 165, 519 S.E.2d at 544. We went on to clarify:

> USF&G also overlooks the estoppel effect of conduct comprising waiver. It is not that the conduct of USF&G and that of its agents has operated to write into the policy coverage previously excluded; rather, conduct comprising waiver has created a disability on the part of USF&G thereby precluding it from thereafter *denying* that such coverage is included within the policy.
>
> . . .
>
> In short, the issue in the instant case is no longer one of coverage . . . .

Id. at 165, 519 S.E.2d at 545. We have therefore previously established that the policy at issue provided coverage to the Club, and have already rejected the argument which USF&G has brought forth again here. This argument is overruled.

III.

[3] USF&G further contends that the Club cannot maintain a claim under N.C. Gen. Stat. § 75-1.1 where it failed to plead and prove a claim under N.C. Gen. Stat. § 58-63-15(11), which sets forth various acts which constitute unfair claims settlement practices in the insurance industry. USF&G argues that in order to maintain a claim under Chapter 75, the Club was required to have established an unfair claims settlement practice under N.C. Gen. Stat. § 58-63-15(11), which also requires a showing that the act was committed "with such frequency as to indicate a general business practice." N.C. Gen. Stat. § 58-63-15(11). We likewise reject this argument.

This Court has noted "that unfair and deceptive acts in the insurance area are not regulated exclusively by Article 63 of Chapter 58,

but are also actionable under N.C. Gen. Stat. § 75-1.1 (1988)." *Golden Rule Insurance Co. v. Long*, 113 N.C. App. 187, 196, 439 S.E.2d 599, 604, *appeal dismissed and disc. review denied*, 335 N.C. 555, 439 S.E.2d 145 (1993). In *Gray v. N.C. Ins. Underwriting Ass'n*, 352 N.C. 61, 529 S.E.2d 676, *reh'g denied*, 352 N.C. 599, 544 S.E.2d 771 (2000), our Supreme Court observed that "[a]lthough N.C.G.S. § 58-63-15(11) does regulate settlement claims in the insurance industry, insurance companies are not immune to the general principles and provisions of N.C.G.S. § 75-1.1." *Id.* at 71, 529 S.E.2d at 683. In *Gray*, the Supreme Court held that an insurer's act of failing to attempt in good faith to effectuate prompt and fair claims settlements is a violation of N.C. Gen. Stat. § 75-1.1 "separate and apart from any violation of N.C.G.S. § 58-63-15(11)." *Id.* at 73, 529 S.E.2d at 684. The Court noted that having determined the insurer could violate N.C. Gen. Stat. § 75-1.1 separate and apart from N.C. Gen. Stat. § 58-63-15(11), it was unnecessary to determine whether the plaintiffs had established that the acts occurred with such frequency as to constitute a general business practice, as is required to show a violation of N.C. Gen. Stat. § 58-63-15(11). *Id.* at 74, 529 S.E.2d at 684.

This Court has also summarized the relationship between the two statutes:

> An unfair or deceptive trade practice claim against an insurance company can be based on violations of either section 75-1.1 or section 58-63-15. A violation of section 58-63-15, however, constitutes a violation of section 75-1.1. Furthermore, *the* remedy for a violation of section 58-63-15 is the filing of a section 75-1.1 claim. *There is no requirement, however, that a party bringing a claim for unfair or deceptive trade practices against an insurance company allege a violation of section 58-63-15 in order to bring a claim pursuant to section 75-1.1.*

Lee v. Mut. Community Sav. Bank, 136 N.C. App. 808, 811 n.2, 525 S.E.2d 854, 857 n.2 (2000) (citations omitted) (emphasis added).

Moreover, federal courts interpreting North Carolina law have also recognized that a party may bring an independent claim under N.C. Gen. Stat. § 75-1.1 against an insurer. In *High Country Arts and Craft v. Hartford Fire Ins.*, 126 F.3d 629 (4th Cir. 1997), the United States Court of Appeals for the Fourth Circuit observed that

> [w]hile proof of unfair claims practices does constitute per se proof of an unfair or deceptive trade practice under N.C. Gen.

> Stat. § 75-1.1, failure to prove unfair claims practices [under N.C. Gen. Stat. § 58-63-15(11)] does not independently necessitate judgment as a matter of law against a related claim for unfair trade practices.

Id. at 635 (citations omitted).

In *U.S. Fire Ins. Co. v. Nationwide Mut. Ins. Co.*, 735 F. Supp. 1320 (E.D.N.C. 1990), the Unites States District Court for the Eastern District of North Carolina observed that our courts have held that Chapter 58 "is not the exclusive state remedy for unfair trade practices in the insurance industry." *Id.* at 1327. In that case, the insurer argued, as does USF&G in this case, that the plaintiffs were required to allege a violation of Chapter 58 in order to show a violation of Chapter 75. The Court rejected the argument, stating that "[a]bsent an explicit holding by the North Carolina courts that a plaintiff must prove a Chapter 58 violation to prove a Chapter 75 violation, this court will not impose such a requirement." *Id.*

In this case, USF&G has failed to cite any persuasive authority from this jurisdiction which would lead us to the conclusion that the Club had to establish a claim under N.C. Gen. Stat. § 58-63-15(11) in order to succeed on its claim under N.C. Gen. Stat. § 75-1.1. To the contrary, the case law cited herein establishes that an insurer may violate N.C. Gen. Stat. § 75-1.1 separate and apart from any violation of Chapter 58, and that a plaintiff need not prove a violation of Chapter 58 in order to recover for unfair and deceptive practices. Accordingly, this argument is overruled.

IV.

[4] We next address USF&G's claim that the Club failed to establish any misconduct on the part of USF&G or any aggravated circumstances necessary to support a claim under N.C. Gen. Stat. § 75-1.1. "In order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs." *Gray*, 352 N.C. at 68, 529 S.E.2d at 681. " '[A] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.' " *Id.* (citation omitted). "When 'an insurance company engages in conduct manifesting an inequitable assertion of power or position,' including conduct which can be characterized as 'unethical,' that 'conduct constitutes an unfair trade practice.' " *Johnson v. First Union Corp.*, 128 N.C. App. 450, 458, 496 S.E.2d 1, 6

(1998) (citation omitted) (holding insurer's act of altering an agreement and misrepresenting the plaintiff's work duties sufficient to support claim under N.C. Gen. Stat. § 75-1.1).

As we have held, a plaintiff is not required to prove a violation of N.C. Gen. Stat. § 58-63-15(11) in order to succeed on an independent claim under N.C. Gen. Stat. § 75-1.1. Nevertheless, we may look to the types of conduct prohibited by N.C. Gen. Stat. § 58-63-15(11) for examples of conduct which would constitute an unfair and deceptive act or practice. *Gray*, 352 N.C. at 71, 529 S.E.2d at 683. In *Gray*, the Supreme Court determined that when an insurer is guilty of failing to attempt in good faith to effectuate prompt and fair claims settlements where liability is reasonably clear, an act prohibited by N.C. Gen. Stat. § 58-63-15(11)(f), the insurer "also engages in conduct that embodies the broader standards of N.C.G.S. § 75-1.1 because such conduct is inherently unfair, unscrupulous, immoral, and injurious to consumers." *Id.* Thus, such an act constitutes a violation of N.C. Gen. Stat. § 75-1.1 "without the necessity of an additional showing of frequency indicating a 'general business practice,' " as is required under N.C. Gen. Stat. § 58-63-15(11)(f). *Id.* It follows that the other prohibited acts listed in N.C. Gen. Stat. § 58-63-15(11) are also acts which are unfair, unscrupulous, and injurious to consumers, and that such acts therefore fall within the "broader standards" of N.C. Gen. Stat. § 75-1.1.

In the present case, the trial court determined, as a matter of law, that USF&G's acts constituted a violation of N.C. Gen. Stat. § 75-1.1. *See Gray*, 352 N.C. at 68, 529 S.E.2d at 681 (the determination of whether an act or practice is an unfair or deceptive practice that violates N.C. Gen. Stat. § 75-1.1 is a question of law for the court, and may be based on the facts as determined by the jury). The trial court noted that it based its determination upon the jury's verdict with respect to the interrogatories, and "the Court's independent review of the evidence presented." As set forth in the interrogatories, the jury determined that USF&G "prematurely and improperly" determined it would deny the Club's claim prior to conducting a "meaningful investigation"; that USF&G "misrepresent[ed]" to the Club that it would investigate the claim and specifically, the application of Exclusion C when it had already concluded it would deny the claim; that USF&G "unfairly" and "improperly" sent a reservation of rights letter based on Exclusion C without having "an adequate or documented basis to reverse Mr. Funk's position to not reserve rights as to Exclusion C documented on 11/19/91"; and that USF&G solicited

an opinion letter from counsel only after having made its decision regarding coverage.

In addition, in its order taxing attorney's fees and costs, the trial court made the following relevant findings of fact which are supported by the evidence: that "USF&G willfully engaged in the acts or practices at issue because, in its acts found by the jury, USF&G intended to deceive [the Club]"; "USF&G decided to deny coverage, documented this decision internally, and then misrepresented to [the Club] that USF&G was investigating coverage"; "USF&G knew that it prematurely and improperly denied [the Club] coverage without conducting a meaningful investigation and prior to obtaining an opinion letter from counsel"; that "[a]t the same time, USF&G misrepresented to [the Club] that USF&G was investigating the application of Exclusion C"; and that despite knowledge that the Club's claim had merit and that the Club simply sought restitution, USF&G engaged in an unwarranted refusal to fully resolve the claims constituting the basis for this suit.

We hold that the evidence presented and the jury's verdict warrants a conclusion that USF&G's actions constituted a violation of N.C. Gen. Stat. § 75-1.1. We find support for this conclusion particularly in looking to N.C. Gen. Stat. § 58-63-15(11) for guidance as to what types of acts are inherently unfair, unscrupulous, and injurious to consumers. *See Gray*, 352 N.C. at 71, 529 S.E.2d at 683 (courts may look to types of conduct prohibited by N.C. Gen. Stat. § 58-63-15(11) for examples of conduct constituting unfair and deceptive acts under N.C. Gen. Stat. § 75-1.1). USF&G's conduct arguably violates at least one of the following acts prohibited by N.C. Gen. Stat. § 58-63-15(11): (1) "[r]efusing to pay claims without conducting a reasonable investigation based upon all available information," N.C. Gen. Stat. § 58-63-15(11)(d); (2) "[f]ailing to promptly provide a *reasonable* explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim," N.C. Gen. Stat. § 58-63-15(11)(n) (emphasis added); (3) "[n]ot attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear," N.C. Gen. Stat. § 58-63-15(11)(f); and (4) "[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue," N.C. Gen. Stat. § 58-63-15(11)(a).

Moreover, the jury's verdict that USF&G "improperly" determined it would deny coverage, "misrepresent[ed]" the nature of its investigation to the Club, and "unfairly" and "improperly" cited Exclusion C

as its basis to send a reservation of rights letter supports a conclusion that the insurer's acts were unethical and involved an unfair assertion of its power. Such acts also support the conclusion that a violation of N.C. Gen. Stat. § 75-1.1 has occurred. *See Johnson*, 128 N.C. App. at 458, 496 S.E.2d at 6; *see also Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 435 S.E.2d 537 (1993) (insurer's act in uniformly denying certain claims without first establishing a proper basis for refusal to pay sufficient to support claim under N.C. Gen. Stat. § 75-1.1), *disc. review denied*, 335 N.C. 770, 442 S.E.2d 519 (1994).

In summary, we uphold the trial court's conclusion of law that the evidence and the jury's verdict support a determination that USF&G violated N.C. Gen. Stat. § 75-1.1, notwithstanding that the jury returned two of six interrogatories in favor of USF&G. The trial court therefore did not err in denying USF&G's motions to dismiss, for directed verdict, and for judgment notwithstanding the verdict or new trial on this ground.

V.

[5] Finally, USF&G maintains the trial court erred in taxing attorney's fees and costs under N.C. Gen. Stat. § 75-16.1 and asserts that the amount of fees and costs was unreasonable. Under N.C. Gen. Stat. § 75-16.1, a trial court has discretion in actions based upon a violation of N.C. Gen. Stat. § 75-1.1 to award attorney's fees where the trial court determines that "[t]he party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit." N.C. Gen. Stat. § 75-16.1(1). An award or denial of attorney's fees under this section is within the sound discretion of the trial court. *Southern Bldg. Maintenance v. Osborne*, 127 N.C. App. 327, 335, 489 S.E.2d 892, 897 (1997).

In this case, the trial court made extensive findings, including the required findings regarding the willful nature of USF&G's acts and its unwillingness to facilitate a resolution of the matter. Based on its extensive findings, the trial court concluded that USF&G had both willfully engaged in the acts at issue and engaged in an unwarranted refusal to fully resolve the Club's claims. Given our review of the evidence, we cannot conclude that the trial court's findings and conclusion are wholly unsupported or that the decision to award fees was either " 'manifestly unsupported by reason' " or " 'so arbitrary that it could not have been the result of a reasoned decision.' " *See Williams*

v. McCoy, 145 N.C. App. 111, 117, 550 S.E.2d 796, 801 (2001) (citation omitted) (defining abuse of discretion standard).

In addition, the trial court must make findings as to whether the amount of attorney's fees is reasonable. *Barbee v. Atlantic Marine Sales & Service*, 115 N.C. App. 641, 648, 446 S.E.2d 117, 122, *disc. review denied*, 337 N.C. 689, 448 S.E.2d 516 (1994). To that end, appropriate findings would include those addressed to the time and labor expended by the attorney, the skill required to perform the services rendered, the experience and ability of the attorney, and the customary fee for like work. *Id.*

The trial court in this case made all required findings, including (1) that the case involved difficult issues which warranted the involvement of more than one attorney for the Club; (2) that USF&G had at least two and sometimes three attorneys assisting with its case; (3) that it was reasonable for the Club to seek the legal assistance of the counsel involved in the trial, as both attorneys had prior involvement in the case and possessed significant knowledge of the facts and legal issues that were crucial to successful prosecution of the Club's claims; (4) that the Club's attorneys have extensive experience and provided high quality legal services that enabled the Club to obtain a favorable judgment in a very difficult case; (5) that the attorneys' rates were reasonable and consistent with those charged by attorneys with equivalent expertise and experience; (6) that the Club's attorneys divided duties in a reasonable manner so as to avoid duplication of services; (7) that the affidavits provided by both attorneys accurately reflect the services provided; and (8) that these services were reasonable and necessary for prosecution of the Club's claims. The trial court also made findings regarding the exact time expended by each attorney.

The trial court's extensive findings are sufficiently supported by evidence in the record. USF&G has failed to persuade us that the trial court's award of attorney's fees is manifestly unsupported by reason or wholly arbitrary. Accordingly, and for all reasons stated herein, we uphold the decisions of the trial court with respect to the denials of USF&G's motions, and we conclude that the trial was free of error.

No error.

Judges WALKER and BRYANT concur.

DANIEL FABRICIO ROSERO, PLAINTIFF-APPELLEE v. LISA BLAKE, DEFENDANT-APPELLANT

No. COA01-350
No. COA01-483

(Filed 21 May 2002)

1. Appeal and Error— appeal of child custody order—subsequent motion in trial court for injunction

The trial court in a child custody action properly determined that it was without jurisdiction to grant defendant's motion for an injunction which was directly related to and would have affected a custody order that was on appeal. While the trial court's duty to protect the child's welfare continues pending the outcome of the appeal, N.C.G.S. § 1-294 provides that appeal of a judgment stays all further proceedings in the trial court upon the matter embraced therein.

2. Child Support, Custody, and Visitation— custody of child never legitimated—common law presumption

The trial court incorrectly applied the best interest of the child analysis in a child custody action where the parents never married, plaintiff-father acknowledged paternity and maintained contact with the child, defendant remained a single mother with family support, and plaintiff sought custody after marrying and moving to North Carolina. There are significant differences between the statutory procedures governing the legitimation of a child and those for acknowledging paternity and agreeing to provide child support.

Judge Walker concurring in part and dissenting in part.

Appeal by defendant from order entered 2 January 2001 by Judge Anne Salisbury and from order entered 26 January 2001 by Judge Paul Gessner in District Court, Wake County. Heard in the Court of Appeals 23 January 2002.

Kathleen Murphy for plaintiff-appellee.

Sally H. Scherer for defendant-appellant.

McGEE, Judge.

Defendant appeals an order filed 2 January 2001 granting primary legal custody of the parties' minor child to plaintiff. Defendant further

appeals an order filed 26 January 2001 dismissing her motion for a protective order for lack of subject matter jurisdiction.

Plaintiff and defendant are the natural parents of Kayla Alexandria Rosero (Kayla), who was born on 20 March 1996. The parties had a brief relationship in 1995, while plaintiff was living in North Carolina. In December of that year, plaintiff moved to Oklahoma. After Kayla's birth, plaintiff agreed to submit to a paternity test which confirmed that he was Kayla's biological father. Plaintiff acknowledged paternity by signing a "Father's Acknowledgment of Paternity" form prepared in accordance with N.C. Gen. Stat. § 110-132 on 3 March 1997. The parties agreed that Kayla would remain in defendant's care, where she had lived all her life, and that plaintiff would provide child support.

During the next three years, Kayla visited with plaintiff and his wife on several occasions, including visits to Oklahoma for a long weekend, or for a period of two or three weeks. Plaintiff maintained contact with Kayla through letters, telephone calls, and visits when he traveled to North Carolina.

Defendant is also the mother of two minor sons. The boys' father, Clea Johnson, continues to have contact with his sons and has developed a relationship with Kayla. Kayla often refers to him as "daddy Clea." Defendant's mother and grandmother assist her in caring for the three children. Defendant's mother is employed at the daycare center where Kayla is enrolled and cares for Kayla when defendant is at work or away.

Plaintiff filed this action seeking custody of Kayla on 22 March 2000, while he was still living in Oklahoma. Defendant responded and filed a counterclaim for custody, alleging that although plaintiff was a fit and proper person to have visitation with Kayla, it was in Kayla's best interest for the child to remain in defendant's custody. Prior to the hearing, plaintiff and his wife moved back to North Carolina. The trial court heard evidence from both parties, found both parties to be fit parents, and awarded "primary legal custody" of Kayla to plaintiff and "secondary physical custody" to defendant.

I.

[1] Defendant first appeals the trial court's denial of her motion for a protective order, which she filed approximately two weeks after the entry of the custody order.

The record shows that on 11 January 2001, defendant gave notice of appeal from the custody order and petitioned this Court for a writ of supersedeas and a temporary stay. On that date, our Court issued a temporary stay but reserved ruling on the writ of supersedeas pending a response by plaintiff. During this time, Kayla continued to live with defendant. However, on 15 January 2001, plaintiff took physical custody of Kayla by removal of the child from the home of her maternal grandmother.

Defendant moved the trial court for a protective order on 17 January 2001, alleging plaintiff had caused Kayla to be "abducted." Defendant further alleged that plaintiff had refused to allow her to have any contact with Kayla. Defendant requested the trial court to (1) "issue an injunction protecting the child by prohibiting the plaintiff from taking her from the defendant's physical custody at any time unless agreed upon by the parties in advance or ordered by" the trial court; and (2) that "plaintiff be ordered to return the child to the defendant's home immediately[.]"

The trial court dismissed defendant's motion on 26 January 2001 on the grounds that because its custody order was on appeal to this Court, the trial court lacked jurisdiction to grant the relief defendant requested. On the same date, this Court denied defendant's petition for a writ of supersedeas and dissolved the temporary stay. However, this Court's order noted that the trial court retained jurisdiction to entertain motions based on defendant's allegations so that it might "enter any interlocutory orders needed to enforce the custody order or to protect the interests of the parties and the welfare of the child pending the outcome of the appeal."

Pursuant to N.C. Gen. Stat. § 1-294, a perfected appeal

> stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.

N.C. Gen. Stat. § 1-294 (1999). Additionally, our Supreme Court has held that an appeal of a custody order leaves the trial court "*functus officio*" with regard to all custody matters until the cause is remanded. *Joyner v. Joyner*, 256 N.C. 588, 592, 124 S.E.2d 724, 727 (1962). The law of this State mandates that once a custody order is appealed, the trial court is divested of jurisdiction over all matters

specifically affecting custody. *Accord Hackworth v. Hackworth*, 87 N.C. App. 284, 360 S.E.2d 472 (1987).

Nevertheless, defendant contends that since the trial court has a continuing duty to protect Kayla's welfare, it retained jurisdiction to grant the relief she requested. N.C. Gen. Stat. § 50-13.3(a) (1999) states that:

> Notwithstanding the provisions of G.S. 1-294, an order pertaining to child custody which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal.

Defendant correctly asserts that the trial court's duty to protect Kayla's welfare continues pending the outcome of the appeal. *See Joyner*, 256 N.C. at 591, 124 S.E.2d at 727. Indeed, this Court's order dissolving the temporary stay acknowledges that the trial court retained jurisdiction "to entertain any motions . . . to protect the interests of the parties and the welfare of the child pending the outcome of the appeal."

As our Court noted in *Upton v. Upton*, 14 N.C. App. 107, 187 S.E.2d 387 (1972), filing an appeal did not authorize a violation of the order of the trial court and that " '[o]ne who wilfully violates an order does so at his peril. If the order is upheld by the appellate court, the violation may be inquired into when the case is remanded' " to the trial court. *Id.* at 109, 187 S.E.2d at 389 (quoting *Joyner*, 256 N.C. at 591, 124 S.E.2d at 727).

While in no manner condoning alleged actions of plaintiff in obtaining physical custody of Kayla, the relief sought by defendant appears to be directed toward staying the custody order pending appeal. If the trial court had granted the relief requested by defendant, it would have effectively kept Kayla in defendant's primary custody while the case was on appeal. *See Carpenter v. Carpenter*, 25 N.C. App. 307, 308, 212 S.E.2d 915, 916 (1975) (the purpose of N.C. Gen. Stat. § 1-294 is to prevent the trial court from undertaking the very matters which were embraced in a previous order).

Our Court has stated that upon appeal from the trial court's judgment, " 'all further proceedings in the cause' are suspended in the trial court during the pendency of the appeal, and the trial court 'is without power to hear and determine questions involved in [the pending] appeal[.]' " *Cox v. Dine-A-Mate, Inc.*, 131 N.C. App. 542, 544, 508 S.E.2d 6, 7 (1998) (quoting *Lowder v. Mills, Inc.*, 301 N.C. 561, 580,

273 S.E.2d 247, 258 (1981)). As stated above, N.C.G.S. § 1-294 provides that "appeal of [a] judgment stays all further proceedings in the trial court '*upon the matter embraced therein*[,]' " which in the case before us is the custody of Kayla. *Cox*, 131 N.C. App. at 544, 508 S.E.2d at 7 (emphasis added). The trial court is only empowered to " 'proceed upon any other matter included in the action and *not affected by the judgment appealed from*' . . . so long as they do not concern the subject matter of the suit." *Id.* at 544, 508 S.E.2d at 7-8 (quoting *Woodward v. Local Governmental Employees' Retirement Sys.*, 110 N.C. App. 83, 85-86, 428 S.E.2d 849, 850 (1993)). Both statutory and case law direct that the trial court lost jurisdiction over all matters dealing specifically with custody in this case when defendant appealed the custody order of the trial court. Accordingly, we conclude the trial court properly determined that it was without jurisdiction to grant defendant's motion, which was directly related to and would have affected the custody order that was on appeal.

II.

[2] Defendant argues the trial court applied an improper standard in determining who is entitled to custody of Kayla. She contends that since plaintiff has failed to legitimate Kayla, the trial court must first find that defendant is unfit or otherwise unable to care for Kayla before it can apply a "best interest of the child" analysis to determine who should have primary custody. In response, plaintiff asserts the trial court did apply the proper legal standard.

In support of her contention that the trial court applied an improper legal standard, defendant relies on our Supreme Court's decision in *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965). In *Jolly*, the mother of an illegitimate child petitioned for custody of her seven-year-old son. The evidence showed that the child had lived intermittently with his father and mother but was currently living with his father. Although the father had acknowledged the child as his son, he had failed to "legitimate" the child. The trial court found both the mother and father were fit and suitable persons to have custody but concluded that it was in the child's best interest that primary custody be awarded to the father. Our Supreme Court reversed, holding the trial court applied an improper legal standard. Relying on the common law, the Court stated that the mother of an illegitimate child is presumed to have a superior right to custody of her child as against all others, including the child's putative father.

Our Supreme Court held in *Jolly* that: " 'It is well settled law in this State . . . that the mother of an illegitimate child . . . has the legal right to [the] custody, care and control, if a suitable person, even though others may offer more material advantages in life for the child[.]' " *Jolly*, 264 N.C. at 713-14, 142 S.E.2d at 595 (quoting *Browning v. Humphrey*, 241 N.C. 285, 287, 84 S.E.2d 917, 918 (1954)). The Supreme Court stated that " '[a]s between the putative father and the mother of illegitimate children, it is well established that the mother's right of custody is superior . . . .' " *Jolly*, 264 N.C. at 714, 142 S.E.2d at 595 (quoting 98 A.L.R.2d 417, 431). The Court further held that "[a]s against the right of the mother of an illegitimate child to its custody, the putative father may defend only on the ground that the mother, by reason of character or special circumstances, is unfit or unable to have the care of her child[.]" *Jolly*, 264 N.C. at 714, 142 S.E.2d at 595.

The common law presumption in favor of the mother of an illegitimate child stems in part from an issue peculiar to the illegitimate child's situation: uncertainty as to the identity of the father of the child. When a child is born to a married woman, her husband is legally presumed to be the child's father. *Jones v. Patience*, 121 N.C. App. 434, 466 S.E.2d 720, *disc. review denied*, 343 N.C. 307, 471 S.E.2d 72 (1996). However, no legal presumption arises as to the identity of the father of a child born to an unmarried woman since, "the female is present at the birth of the child and [is] identifiable as the mother," *Stanley v. Illinois*, 405 U.S. 645, 661-62, 31 L. Ed. 2d 551, 564-65 (1972), while the identity of the father may be uncertain. Thus, the putative father of a child is defined as the "alleged or reputed father of a child born *out of wedlock.*" Black's Law Dictionary, 1237 (6th ed. 1990) (emphasis added).

The power to abrogate the common law presumption rests only with the General Assembly or our Supreme Court. The General Assembly has specifically established procedures whereby a putative father is given the opportunity to establish his factual or legal identity as a child's father, and thus shift his status from putative father to that of a natural or legal parent. These statutes abrogate, in part, the common law presumption of *Jolly*. *See State v. Green*, 124 N.C. App. 269, 477 S.E.2d 182 (1996), *aff'd*, 348 N.C. 588, 502 S.E.2d 819 (1998), *cert. denied*, 525 U.S. 1111, 142 L. Ed. 2d 783 (1999) (when General Assembly enacts legislation addressing a subject, the statute supplants common law in regard to that matter). Summarized, these statutes are:

1. N.C.G.S. § 49-10 establishes procedures for the putative father to legitimate his illegitimate child. The mother and child are "necessary parties to the proceeding," which allows legitimation when "it appears to the court that the petitioner is the father of the child[.]" N.C. Gen. Stat. § 49-10 (1999).

2. N.C.G.S. § 49-12 provides for automatic legitimation of a child upon the marriage of the putative father to the illegitimate child's mother. N.C. Gen. Stat. § 49-12 (1999).

3. N.C.G.S. § 49-12.1 sets out the procedure for legitimation of a child whose mother is married to someone other than the putative father. The putative father may overcome the presumption of legitimacy arising from the mother's marriage by "clear and convincing evidence." N.C. Gen. Stat. § 49-12.1 (1999).

4. N.C.G.S. § 49-14 provides for a civil action to establish the paternity of an illegitimate child upon "clear, cogent, and convincing evidence." N.C. Gen. Stat. § 49-14 (1999).

Upon compliance with provisions of any of the above statutes, the putative father of an illegitimate child achieves a legal status equal to that of the child's mother:

1. N.C.G.S. § 49-11 states that upon legitimation, the father has "all of the lawful parental privileges and rights, . . . to the same extent as if said child had been born in wedlock[.]" N.C. Gen. Stat. § 49-11 (1999).

2. N.C.G.S. § 49-15 provides that, "*after* [a judicial] *establishment of paternity* of an illegitimate child pursuant to G.S. 49-14, the rights, duties, and obligations of the mother and the father so established, with regard to support and custody of the child, shall be the same[.]" N.C. Gen. Stat. § 49-15 (1999) (emphasis added).

Therefore, after the putative father legitimates his child according to statutory provision, or submits to a judicial determination of paternity, the child's parents stand on an equal footing as regards to custody. *See Conley v. Johnson*, 24 N.C. App. 122, 210 S.E.2d 88 (1974) (upholding award of visitation rights to the father of an illegitimate child, following judicial determination that he was the child's father; Court notes abrogation of common law by compliance with N.C.G.S. § 49-14).

As to whether plaintiff has taken the necessary steps to legitimate Kayla, this Court has identified several procedures by which a bio-

logical father may legitimate his child: (1) through a verified petition filed with the superior court seeking to have the child declared legitimate, (2) by subsequent marriage to the mother, or (3) through a civil action to establish paternity filed pursuant to N.C. Gen. Stat. § 49-14. *Helms v. Young-Woodard*, 104 N.C. App. 746, 749-50, 411 S.E.2d 184, 756 (1991), *disc. review denied*, 331 N.C. 117, 414 S.E.2d 756, *cert. denied*, 506 U.S. 829, 121 L. Ed. 2d 53 (1992); *see also* N.C. Gen. Stat. §§ 49-10 through 49-17 (1999).

In this case, the record shows that plaintiff filed a "Father's Acknowledgment of Paternity" under N.C. Gen. Stat. § 110-132, by which he acknowledged his paternity of Kayla. In addition, plaintiff agreed to provide support, and an order of paternity was approved which states that it "shall have the same force and effect as a judgment of paternity entered by this Court pursuant to Chapter 110[.]" However, plaintiff has not taken any of the steps outlined in *Helms* to legitimate Kayla. The parties concede that plaintiff neither legitimated Kayla as provided by statute, nor did he seek a judicial determination of paternity under N.C.G.S. § 49-14.

We are aware of recent statutory and case law dealing with the constitutionally protected right of a biological parent to the care and custody of his or her child. For example, since *Jolly*, the United States Supreme Court has acknowledged on several occasions that due process and equal protection mandate that a biological parent may not be denied the companionship, custody and control of a child absent a showing of unfitness. *See Stanley*, 405 U.S. 645, 31 L. Ed. 2d 551 (holding that in a dependency proceeding following the death of an illegitimate child's natural mother, due process requires that the unwed father be given a hearing on his fitness as a parent before the child can be taken from him); *Lehr v. Robertson*, 463 U.S. 248, 77 L. Ed. 2d 614 (1983) (holding that where an unwed father has failed to developed a significant custodial, personal or financial relationship with his child, due process does not entitle him to notice of the child's adoption proceedings).

Similarly, our Supreme Court has held that unless a trial court finds that a parent is unfit, has neglected the welfare of the child, or has exhibited other conduct inconsistent with the parent's constitutionally protected status, the parent's paramount right to custody, care, and control of the child must prevail. *Petersen v. Rogers*, 337 N.C. 397, 445 S.E.2d 901 (1994). *See also*, *Price v. Howard*, 346 N.C. 68, 484 S.E.2d 528 (1997).

In addition, since *Jolly*, our General Assembly has enacted statutory safeguards for biological parents and illegitimate children. Indeed, the *Jolly* court specifically noted that under the laws then existing, a child would not have been entitled to inherit from his father or his father's relatives and that the father's consent would not have been required for adoption. *Jolly*, 264 N.C. at 715, 142 S.E.2d at 595-96. However, under current intestacy laws, Kayla would be entitled to inherit from and through plaintiff, and plaintiff would be entitled to inherit from and through her, in that plaintiff acknowledged himself to be Kayla's father pursuant to N.C. Gen. Stat. § 29-19(b)(2) (1999). Plaintiff's consent would also now be required for her adoption. *See* N.C. Gen. Stat. § 48-3-601 (1999).

Likewise, other statutes acknowledge the constitutionally protected rights afforded to a biological father who has acknowledged paternity but may not have legitimated his child. *See e.g.*, N.C. Gen. Stat. § 7B-1111 (1999) (grounds for termination of parental rights); N.C. Gen. Stat. § 101-2 (1999) (consent required for change in name). Further, North Carolina law now provides illegitimate children, upon an acknowledgment of paternity, with benefits which had previously been unavailable. *See e.g.*, N.C. Gen. Stat. § 31-5.5 (1999) (requiring after-identified illegitimate children to be treated the same as afterborn and after-adopted children in testamentary disposition under a will); N.C. Gen. Stat. § 97-2 (12) (1999) (including "acknowledged illegitimate child" within the definition of "child" under the Workers' Compensation Act); N.C. Gen. Stat. §§ 143-166.1 through .7 (recognizing acknowledged illegitimate child's right to death benefits provided to state law enforcement officers, firemen and rescue squad workers).

In this case, the record shows that plaintiff has acknowledged paternity pursuant to N.C.G.S. § 110-132 and has held Kayla out as his child. Upon confirmation of his acknowledgment, plaintiff began providing Kayla with financial support and has had overnight visits in Oklahoma and North Carolina where he and his wife have developed a "close bond" with her. However, these actions did not dissolve the presumption in favor of defendant.

There are significant differences between the procedures outlined in N.C.G.S. § 110-132 for acknowledgment of paternity in an agreement to provide child support and those governing the legitimation of a child. N.C.G.S. § 110-132 specifically governs child support, rather than child welfare and custody generally. One of the "express purposes of Article 9 of Chapter 110 of the General Statutes is 'to pro-

vide for . . . support[.]' " *Dept. of Social Services v. Williams*, 52 N.C. App. 112, 115, 277 S.E.2d 865, 867 (1981) (quoting N.C. Gen. Stat. § 110-128 (1999)). However, " '[t]he entire thrust of a civil action under G.S. 49-14 is the determination of whether or not the defendant is the natural father of the illegitimate child in question.' " *King v. King*, 144 N.C. App. 391, 395, 547 S.E.2d 846, 849 (2001) (quoting *Carrington v. Townes*, 306 N.C. 333, 336, 293 S.E.2d 95, 98 (1982)). Therefore, as to custody, N.C.G.S. §§ 49-14 and 49-15, which explicitly address the determination of paternity and its effect on custody issues, should prevail over general provisions of Chapter 110 acknowledging paternity for child support purposes.

Secondly, N.C.G.S. § 49-14 requires paternity to be established by "clear, cogent, and convincing evidence[,]" necessarily requiring judicial evaluation of the record evidence. N.C.G.S. § 49-14(b); *Brown v. Smith*, 137 N.C. App. 160, 526 S.E.2d 686 (2000) (mother's testimony that putative father was her only sexual partner, coupled with child's resemblance to putative father, held sufficient to allow court to determine paternity); *Nash County Dept. of Social Services v. Beamon*, 126 N.C. App. 536, 485 S.E.2d 851, *disc. review denied*, 347 N.C. 268, 493 S.E.2d 655 (1997) (court's determination that defendant was *not* the child's father upheld where supported by defendant's testimony denying paternity, notwithstanding introduction of blood test evidence showing a 99.96 percent probability that defendant was the father). In contrast, an order of paternity may be issued pursuant to N.C.G.S. § 110-132 upon the execution of affidavits, with no requirement of judicial evaluation of the evidence, or standard for the court to apply.

Thirdly, N.C.G.S. § 110-132 explicitly provides for possibility of recision, and the statutory language limits the *res judicata* effect of an acknowledgment of paternity under N.C.G.S. § 110-132 to child support actions. N.C.G.S. § 110-132(a) (1999) (acknowledgment of paternity "shall have the same legal effect as a judgment of paternity *for the purpose of . . . child support*[.]") (emphasis added). However, the putative father may bring a later challenge to the underlying question of paternity. *Leach v. Alford*, 63 N.C. App. 118, 124, 304 S.E.2d 265, 269 (1983) (*res judicata* language in N.C.G.S. § 110-132 "applies to child support proceedings," and does not bar relief "from the underlying acknowledgment (judgment) of paternity").

There is no statutory authority for legitimation, or for equal status regarding child custody, under Chapter 110. Nor is there statutory

support for any change in a putative father's status based upon his general indication of interest in or affection for the child. We apply to this issue the canon of statutory construction "embodied in the maxim, *expressio unius est exclusio alterius*, meaning the expression of one thing is the exclusion of another[.]" *Dickens v. Puryear*, 302 N.C. 437, 444 n.8, 276 S.E.2d 325, 330 n.8 (1981) (where subject tort not included in statutory list of actions governed by one-year statute of limitations, the exclusion is considered intentional). We therefore conclude that the General Assembly, by specifying certain procedures to confer parental status upon the putative father of an illegitimate child, necessarily excluded other procedures. For this reason, we conclude that plaintiff's execution of documents pursuant to the child support provisions of Chapter 110 of the N.C. General Statutes did not erase the common law presumption in favor of defendant.

In North Carolina, "[a]ll such parts of the common law . . . which [have] not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are . . . in full force within this State." N.C. Gen. Stat. § 4-1 (1999). Morever, while the North Carolina Supreme Court "possesses the authority to alter judicially created common law when it deems it necessary in light of experience and reason[,]" *State v. Freeman*, 302 N.C. 591, 594, 276 S.E.2d 450, 452 (1981) (citations omitted), this Court does not possess such authority. We are mindful of the actions taken by plaintiff in this case in regard to his parental role. However, as stated above, the limits of this Court's authority require that a plaintiff's "equitable challenge must yield to our judicial stricture to follow the statutory law, not make it." *In re Adoption of Byrd*, 137 N.C. App. 623, 628, 529 S.E.2d 465, 469 (2000), *aff'd*, 354 N.C. 188, 552 S.E.2d 142 (2001).

The common law rule remains in effect until altered by enactment of the General Assembly or ruling of the North Carolina Supreme Court. Based upon the facts of this case, the trial court incorrectly applied the "best interest of the child" analysis and should have applied the common law presumption set forth in *Jolly*, 264 N.C. 711, 142 S.E.2d 592. The decision of the trial court is reversed and the matter is remanded for a new hearing applying the common law presumption in favor of defendant.

Reversed and remanded.

Judge BIGGS concurs.

Judge WALKER concurs in part and dissents in part with a separate opinion.

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

I concur with the majority's conclusion that the trial court properly determined that it was without jurisdiction to grant defendant's motion for a protective order. However, for the following reasons, I respectfully dissent from that portion of the majority's opinion which holds the trial court applied an improper legal standard in determining who should have custody of Kayla.

I.

As the majority correctly points out, N.C. Gen. Stat. § 4-1 mandates that "[a]ll such parts of the common law . . . which [have] not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete are . . . in full force within this State." N.C. Gen. Stat. § 4-1 (2001). However, in my opinion, the cumulative impact of the decisions handed down by the United States Supreme Court and our own Supreme Court, along with the laws enacted by our legislature since *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965), has been the abrogation of the common law principle that as between the mother and the father of an illegitimate child, the mother is presumed to have a superior right to custody.

In addition to the extensive case and statutory law cited in the majority opinion, I feel that our legislature has acknowledged such an abrogation in N.C. Gen. Stat. § 50-13.2. In a custody proceeding arising pursuant to N.C. Gen. Stat. §§ 50-13.1 *et seq.* as "[b]etween the mother and father, whether natural or adoptive, *no presumption shall apply* as to who will better promote the interest and welfare of the child." N.C. Gen. Stat. § 50-13.2(a) (2001) (emphasis added). This Court has consistently observed that §§ 50-13.1 *et seq.* were enacted in 1967 to "eliminate the conflicting and inconsistent statutes, which have caused pitfalls for litigants, and to bring all of the statutes relating to child custody and support together into one act." *In re Holt*, 1 N.C. App. 108, 111, 160 S.E.2d 90, 93 (1968); *see also In re King*, 3 N.C. App. 466, 165 S.E.2d 60 (1969); *and Johnson v. Johnson*, 14 N.C. App. 378, 188 S.E.2d 711 (1972). "Had the Legislature intended G.S. 50-13.1 to apply to only those custody disputes involved in a divorce or separation, it would have expressly so provided, as it did in the prior statutes G.S. 50-13 and G.S. 50-16. The mere fact that G.S. 50-13.1 is found in the Chapter of the General Statutes governing

Divorce and Alimony is not sufficient to cause its application to be restricted to custody disputes involved in separation or divorce." *Oxendine v. Catawba County Dept. of Social Services*, 303 N.C. 699, 706, 281 S.E.2d 370, 374 (1981). Furthermore, this Court, in *Conley v. Johnson*, 24 N.C. App. 122, 210 S.E.2d 88 (1974), specifically recognized the abrogation of the common law principle that the father of an illegitimate child is not entitled to visitation privileges absent consent of the mother. *Conley*, 24 N.C. App. at 123, 210 S.E.2d at 89.

Therefore, my review of the statutory and case law since *Jolly* leads me to conclude that any presumption of a superior right to custody afforded to the mother of an illegitimate child can only arise today upon a showing that the father has failed to accept the responsibilities associated with parenthood such that he is no longer entitled to the constitutional and statutory safeguards provided to a parent. Absent this showing, the trial court must confine itself to a determination of what is in the best interest of the child. *See Adams v. Tessener*, 354 N.C. 57, 61, 550 S.E.2d 499, 502 (2001) (observing that in custody proceedings between biological or adoptive parents, or between two parties who are not natural parents, the trial court must determine custody based on the "best interest of the child" test).

The fact that plaintiff has failed to file the documents necessary to "legitimate" Kayla should be only one factor to consider in whether he has assumed the responsibilities of parenthood. To establish such a prerequisite for the enjoyment of constitutional protections simply raises form over substance and relegates plaintiff to the status of a third party despite the absence of any dispute concerning his paternity of Kayla. Indeed, on remand plaintiff would be well advised to seek leave of the trial court so that he might file a legitimation petition pursuant to N.C. Gen. Stat. § 49-10. Presumably, defendant would not contest paternity and the parties, as the majority's opinion suggests, would then be on equal footing with respect to Kayla's custody.

The record clearly shows plaintiff has not relinquished his parental rights and the obligations required thereunder. Accordingly, I conclude the trial court correctly applied the "best interest of the child" test.

II.

Defendant also maintained that the trial court abused its discretion in awarding "primary legal custody" of Kayla to plaintiff. Our

appellate courts have consistently held that where competent evidence exists to support a trial court's findings, a custody order supported by such findings will not be disturbed on appeal absent an abuse of discretion. *Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998); *Swicegood v. Swicegood*, 270 N.C. 278, 154 S.E.2d 324 (1967); *Church v. Church*, 119 N.C. App. 436, 458 S.E.2d 732 (1995); *Green v. Green*, 54 N.C. App. 571, 284 S.E.2d 171 (1981). This is so because by seeing and hearing the parties first hand, the trial court is better positioned to "detect tenors, tones, and flavors" which are absent in a cold, impersonal record. *Newsome v. Newsome*, 42 N.C. App. 416, 426, 256 S.E.2d 849, 855 (1979). Nonetheless, "when the [trial] court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby v. Crosby*, 272 N.C. 235, 238-39, 158 S.E.2d 77, 80 (1967); *see also Green*, 54 N.C. App. at 573, 284 S.E.2d at 173.

This Court has vacated custody orders where the findings consisted of merely conclusory statements, ignored critical issues or were otherwise deficient such that we were unable to determine whether the custody award was in the best interest of the child. *See e.g. Cantrell v. Wishon*, 141 N.C. App. 340, 540 S.E.2d 804 (2000); *Hunt v. Hunt*, 112 N.C. App. 722, 436 S.E.2d 856 (1993); *Dixon v. Dixon*, 67 N.C. App. 73, 312 S.E.2d 669 (1984); *Montgomery v. Montgomery*, 32 N.C. App. 154, 231 S.E.2d 26 (1977); and *Austin v. Austin*, 12 N.C. App. 286, 183 S.E.2d 420 (1971). As this Court has aptly stated, the "[e]vidence must bolster the trial court's findings, the findings must support the conclusions, and the conclusions must support the judgment." *Green*, 54 N.C. App. at 575, 284 S.E.2d at 174.

In conducting my review of the custody order, I elect to review the following findings:

> 6. That in December, 1995, the Plaintiff moved to Oklahoma. When the child was born, the Plaintiff requested a paternity test and he voluntarily supported the child upon receiving a confirmation that he was the biological father of the child.

There is no competent evidence to support a finding that when Kayla was born, plaintiff requested a paternity test. Rather, the evidence clearly points to plaintiff as having agreed to submit to a paternity test at the behest of the Wake County Child Support Agency. It was only after the test that plaintiff acknowledged paternity.

The trial court also found:

> 8. That the Defendant's ex-boyfriend, Clea Johnson, who is father to the two (2) other minor children, has a relationship with the minor child, Kayla. The child has called him "daddy Clea" and that relationship has led to the confusion of the child.
>
> 9. That the defendant is presently involved with Moheeb Oona and this relationship has led to the confusion of the minor child.

These findings conclude that defendant's relationships with other men have led to "the confusion" of Kayla. However, neither finding explains how Kayla is "confused" or details the impact these relationships have had on Kayla's welfare.

With respect to Kayla's care, the trial court found:

> 14. That the Defendant's mother and grandmother get the child ready for school in the mornings, pick her [up] from daycare, feed her dinner, bathe her and put her to bed on a regular basis.
>
> . . .
>
> 19. That the minor child is enrolled at Ernest Myatt daycare center and has been so enrolled since she was two (2) years old. From her birth until age two (2), the minor child was cared for by the Defendant's grandmother.

While there is competent evidence to support a finding that defendant's mother and grandmother have played a role in Kayla's care, the evidence does not indicate, as these findings suggest, that defendant's mother and grandmother have played such a dominant role to the exclusion of defendant. The findings also fail to consider defendant's status as a single mother and the impact of her having received support payments from plaintiff in amounts less than what would have been required under our State's child support guidelines. Rather, the findings only state:

> 22. That the Plaintiff paid voluntary child support to the Defendant upon the determination of paternity and there was no Order for Child Support entered. The parties agreed upon an amount of support and it was paid regularly and consistently by the Plaintiff.

The trial court next addressed defendant's being away from Kayla and found:

30. That the Defendant is not with the minor child a lot but rather she is at work or out with friends. The Defendant does go out 2-3 times per month on the weekends and the minor child is with the Defendant's mother.

This statement is merely a conclusion concerning defendant's lifestyle without relating how, if at all, Kayla's best interest or welfare has been adversely affected.

The trial court does make specific reference to Kayla's behavioral development in the following findings:

27. That the minor child, Kayla, is a happy, lively child but she does have some problems. While at the daycare, the child was hitting, biting, scratching other children. These behaviors are not unusual in and of themselves, however, what is unusual is that the daycare contacted Project Enlightenment to monitor the child's progress.

28. That after the evaluation was conducted by Project Enlightenment, the Defendant did not follow through with informing herself about the results and she believed that the child was just going through a phase. The needs of the child were underestimated by the Defendant.

However, the evidence in the record shows that after further consultations with Kayla's teachers, the Project Enlightenment consultant noted that her behavior had improved and closed the case. Moreover, the findings fail to identify the "needs" of Kayla, which were "underestimated" by defendant.

In some instances, the trial court alludes to defendant having failed to meet Kayla's "needs." For example, the trial court found:

29. That the minor child needs more attention than she is getting from the Defendant. The minor child needs more structure than she is getting from the Defendant. The Defendant does not offer the minor child a stable and consistent environment.

. . .

32. That the Defendant's social life and work schedule has led to a hectic household which does not meet the needs of the child for stability and consistency.

Yet, these findings likewise do not detail what Kayla's "needs" are or how they have not specifically been met by defendant.

Thus, I conclude that these specific findings demonstrate that the trial court has failed to find facts so that this Court may satisfactorily determine whether its order awarding primary custody to plaintiff is adequately supported by competent evidence. Therefore, although I conclude the trial court applied the proper legal standard, I would vacate the custody order and remand the case to the trial court for more detailed findings.

RICHARD ARP, EMPLOYEE, PLAINTIFF v. PARKDALE MILLS, INCORPORATED, EMPLOYER, DEFENDANT; CAMERON M. HARRIS & COMPANY, THIRD PARTY ADMINISTRATOR

No. COA01-701

(Filed 21 May 2002)

1. **Workers' Compensation— employee injured while leaving work—climbing gate**

The Industrial Commission did not err by concluding that an employee's injury arose out of and in the course of his employment where plaintiff was injured when he fell while attempting to climb a gate through which he could not squeeze when he left work. An injury occurring while an employee travels to and from work is not one that arises in the course of employment, with an exception when the employee is injured on the employer's premises. It is undisputed that the gate and parking lot were owned, controlled, or maintained by defendant; there is competent evidence to support findings that plaintiff did not leave work early; the fact that plaintiff was not actually engaged in the performance of his duties does not automatically defeat his claim; and his attempt to climb the gate does not defeat the premises exception because short cuts are attractive and sometimes dangerous. The appellate court may review the record to determine whether the findings and conclusions of the Commission are supported by sufficient evidence, but may not weigh the evidence and decide the issue on the basis of weight.

2. **Workers' Compensation— credibility—deputy commissioner's determination—reversed by full Commission**

The Industrial Commission did not err in a workers' compensation action by reversing a deputy commissioner's credibility

determination without making specific findings of fact about why it was reversing the determination. The full Commission is the sole judge of the weight and credibility of the evidence; appellate courts are limited to reviewing whether any competent evidence supports the Commission's findings and whether the findings support the conclusions.

Judge TYSON dissenting.

Appeal by defendant from Opinion and Award filed 7 March 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 13 March 2002.

Grandy & Martin, by Charles William Grandy, for plaintiff-appellee.

Alala Mullen Holland & Cooper, P.A. by H. Randolph Sumner and Jesse V. Bone for defendant-appellants.

WYNN, Judge.

In this workers compensation appeal, the employer—Parkdale Mills—appeals from a North Carolina Industrial Commission decision holding that its employee—Richard Arp—was injured by accident that arose out of and in the course of his employment. We uphold the decision.

Arp worked for Parkdale Mills as a yarn-service packer during the hours of 7:00 a.m. to 7:00 p.m. on alternating weeks of four and three days. This appeal concerns the manner in which Arp chose to exit from the property on 16 September 1998—the date of his injury.

Parkdale Mills has main exits at the front and back of the plant. Employees like Arp who work 12-hour day shifts, generally park their cars in a lot outside of the front door or in the back parking lot. The back parking lot is fenced by a chainlinked gate, approximately six feet in height, with an additional one to one and one-half feet of barbed wire extending above the gate. Arp worked at the rear of the plant and used the back parking lot which he reached from the rear exit.

Although some evidence showed that the gate was usually locked before 7:00 p.m., Arp testified that before the date of his injury, he had encountered a locked gate only once in the rear parking lot when leaving work. At the end of his workday on 16 September 1998, Arp

saw his mother waiting to pick him up in her car parked outside of the locked-rear gate. Arp was unable to squeeze through the gate, and when he attempted to climb the gate, he slipped; fell; and broke his left leg.

In her Opinion and Award, Deputy Commissioner Margaret Morgan Holmes, found that on the date of his injury, Arp left work approximately fifteen minutes early without authorization when he reached the locked-back gate. She also found that instead of waiting for it to be unlocked or walking back through the plant and out of the front door, Arp attempted to climb the gate. She further found that he sustained an injury by accident arising out of and in the course of his employment.

On appeal, the full Commission modified in part and affirmed in part the deputy commissioner's Opinion and Award. The full Commission concluded that:

> 2. . . . In the present case, plaintiff's injury occurred in the parking lot adjacent to the plant where he worked and the parking lot was a part of Parkdale Mills's premises. *See Maurer v. Salem Co.*, 266 N.C. 381, 146 S.E.2d 432 (1966). Therefore, the incident occurring on 16 September 1998 constituted an injury by accident arising out of and in the course of plaintiff's employment with Parkdale Mills. G.S. § 97-2(6).
>
> 3. Contributory negligence or bad judgment on the part of plaintiff in attempting to leave by climbing the gate is not a bar to recovery under Act. Hartley v. Prison Dept. 258 N.C. 287, 128 S.E.2d 598 (1962).
>
> 4. Because Parkdale Mills general intent or purpose for having a gate or fence around the plant is irrelevant and plaintiff was not disobeying a direct or specific order from a then present supervisor when he climbed the gate and fell sustaining his injuries on 16 September 1998, he may recover compensation for his claim. Hoyle v. Isenhour Brick & Tile Company, 306 N.C. 248, 293 S.E.2d 196 (1982).
>
> 5. Because plaintiff was on his employer's premises and not thrill seeking when he climbed the gate, fell and injured himself on 16 September 1998, he may recover compensation for his claim. Id.
>
> 6. As a result of his 16 September 1998 injury by accident, plaintiff is entitled to have Parkdale Mills pay ongoing total disability

compensation at the rate of $258.52 per week for the period of 17 September 1998 through the present and continuing until such time as he returns to work or until further order of the Commission. G.S. § 97-29.

7. As a result of his 16 September 1998 injury by accident, plaintiff is entitled to have Parkdale Mills pay for all medical expenses incurred. G.S. § 97-25.

From that Opinion and Award, Parkdale Mills appealed to this Court.

The issues on appeal are whether the full Commission erred in: (1) concluding that Arp's injury arose out of and in the course of his employment; and (2) rejecting the deputy commissioner's credibility determination without making specific findings of fact.

"[O]ur Workmen's Compensation Act should be liberally construed to effectuate its purpose to provide compensation for injured employees or their dependents, and its benefits should not be denied by a technical, narrow, and strict construction." *Hollman v. City of Raleigh, Public Utilities Dept.*, 273 N.C. 240, 252, 159 S.E.2d 874, 882 (1968). "In reviewing the findings found by a deputy commissioner or by an individual member of the Commission when acting as a hearing commissioner, the Commission may review, modify, adopt, or reject the findings of fact found by the hearing commissioner. 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). "The evidence tending to support plaintiff's claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998).

[1] First, Parkdale Mills contends that Arp's attempt to scale the gate, placed him outside of the course and scope of his employment. Parkdale Mills also argues that the "premises exception" to the "coming and going rule" does not apply to the present case because Arp was not authorized to climb the gate. We disagree.

The issue of whether an accident arises out of and in the course of employment is a mixed question of law and fact, and the appellate court may review the record to determine if the findings and conclusions of the Industrial Commission are supported by sufficient evidence. *See Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982). "The findings of fact by the Industrial

Commission are conclusive on appeal if supported by any competent evidence." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977). Thus, our Court does not have the right to weigh the evidence and decide the issue on the basis of its weight. "The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965).

"The general rule in this state is that an injury by accident occurring while an employee travels to and from work is not one that arises out of or in the course of employment." *Royster v. Culp, Inc.* 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996). "A limited exception to the 'coming and going' rule applies when an employee is injured when going to or coming from work but is on the employer's premises." *Id.*, *see also Jennings v. Backyard Burgers of Asheville*, 123 N.C. App. 129, 131, 472 S.E.2d 205, 207 (1996). "[T]he great weight of authority holds that injuries sustained by an employee while going to and from his place of work upon premises owned or controlled by his employer are generally deemed to have arisen out of and in the course of the employment within the Workmen's Compensation Act and are compensable provided that the employee's act involves no unreasonable delay." *Maurer v. Salem Co.*, 266 N.C. 381, 382, 146 S.E.2d 432, 433-34 (1966). "There must be some causal relation between the employment and the injury; but if the injury is one which, after the event, may be seen to have had its origin in the employment, it need not be shown that it is one which ought to have been foreseen or expected." *Watkins v. City of Wilmington*, 290 N.C. 276, 280, 225 S.E.2d 577, 580 (1976) (quoting *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 726, 153 S.E. 266, 269 (1930)).

Although Parkdale Mills cites *Jennings v. Backyard Burgers of Asheville*, 123 N.C. App. 129, 472 S.E.2d 205 (1996), and *Royster v. Culp, Inc.*, 343 N.C. 279, 470 S.E.2d 30 (1996), to support its contention that Arp's injury was not compensable; in both of those cases, the employees were not injured on premises owned, controlled or maintained by their employers. In *Jennings*, the employee was injured when he fell down stairs at an employee parking lot that was not under his employer's control. In *Royster*, the plaintiff was injured by a car on a public highway that was between a parking lot owned by the employer and the place of employment.

However, in this case, the evidence is undisputed that Arp's injury occurred at the employer's gate and parking lot—premises owned,

controlled or maintained by Parkdale Mills. This finding of fact sufficiently supports the Commission's conclusion that those areas constituted a part of the employer's premises.

Parkdale Mills also argues that the "premises exception" to the "coming and going rule" cannot apply in this case because Arp was not at a place he was authorized to be, and he was not furthering the business of his employer.

Our Courts "have not viewed minor deviations from the confines of a narrow job description as an absolute bar to the recovery of benefits, even when such acts were contrary to stated rules or to specific instructions of the employer where such acts were reasonably related to the accomplishment of the task for which the employee was hired." *Hoyle v. Isenhour Brick & Tile Co.* 306 N.C. at 254, 293 S.E.2d at 200. "[T]he terms of the Act should be liberally construed in favor of compensation, deficiencies in one factor are sometimes allowed to be made up by strength in the other." *Hoyle*, 306 N.C. at 252, 293 S.E.2d at 199.

In the present case there is competent evidence to support the Commission's findings that on 16 September 1998: Arp did not leave work early; the gate to the rear parking lot of his employer's premises was locked at 7:00 p.m.; and his fractured leg was a result of injury by accident. The record contains evidence showing that on the date of his injury, Arp was present at 6:45 p.m. when his supervisor checked Arp's workstation; at 6:55 p.m., Arp went to the bathroom to clean up; and at 7:00 p.m., Arp arrived at the gate to the rear parking lot on his employer's premises. Indeed, Arp's mother testified that she arrived at the gate at approximately 6:55 p.m. and that she had to wait for him to show up. In addition, there is no evidence in the record showing that Arp disobeyed a specific order from his supervisor or a written company policy when he climbed the gate. Thus, while the record also indicates that two of Arp's co-employees presented evidence that Arp left work before 7:00 p.m., our "duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Lincoln Constr. Co.*, 265 N.C. at 434, 144 S.E.2d at 274. Since there is competent evidence to support the full Commission's findings, we are powerless to overturn those findings.

Moreover, our "courts have upheld awards of compensation where the activities resulting in the injuries were not strictly in furtherance of a duty of the employment, but were considered a reason-

able activity under the circumstances or a minor deviation only." *Williams v. Hydro Print, Inc.*, 65 N.C. App. 1, 12, 308 S.E.2d 478, 485 (1983), *review denied*, 310 N.C. 156, 311 S.E.2d 297 (1984). Accordingly, the fact that Arp was not actually engaged in the performance of his duties as a packer at the time of the injury does not automatically defeat his claim for compensation. *See Williams v. Hydro Print, Inc.*, 65 N.C. App. at 15, 308 S.E.2d at 481 (Upholding the award of compensation to an employee who injured his knee during a scheduled rest break on his employer's premises while racing with fellow employees.).

Furthermore, negligence by Arp in attempting to climb the gate does not defeat the applicability of the "premises exception" to the "coming and going rule."

> Negligence is not a defense to a compensation claim. The negligence of the employee, however, does not debar . . . compensation for an injury by accident arising out of and in the course of his employment. The only ground set out in the statute upon which compensation may be denied on account of the fault of the employee is when the injury is occasioned by his intoxication or willful intention to injure himself or another.

Hartley v. North Carolina Prison Dept., 258 N.C. 287, 290, 128 S.E.2d 598, 600 (1962) (citations omitted); *see also Hensley v. Caswell Action Committee*, 296 N.C. 527, 251 S.E.2d 399 (1979). As in *Hartley*, "[t]he essence of the story in this case may be told in few words: Usually the idea of a short cut is attractive. Sometimes it is dangerous. To follow the appellant's contention would require us to hold that contributory negligence in this case is a complete defense." *Hartley*, 258 N.C. at 291, 128 S.E.2d at 601. Thus, we reject this assignment of error.

[2] Second, Parkdale Mills argues that the Commission erred in reversing the deputy commissioner's credibility determination without making specific findings of fact of why it was reversing the deputy's determination. We disagree.

> Whether the full Commission conducts a hearing or reviews a cold record, N.C.G.S. § 97-85 places the ultimate fact-finding function with the Commission—not the hearing officer. It is the Commission that ultimately determines credibility, whether from a cold record or from live testimony. Consequently, in reversing the deputy commissioner's credibility findings, the full

> Commission is not required to demonstrate . . . that sufficient consideration was paid to the fact that credibility may be best judged by a first-hand observer of the witness when that observation was the only one.

Adams v. AVX Corp. 349 N.C. at 681, 509 S.E.2d at 413-14 (citation omitted). Thus, "(1) the full Commission is the sole judge of the weight and credibility of the evidence, and (2) appellate courts reviewing Commission decisions are limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000).

In the present case, the full Commission found that "Plaintiff and his mother testified that he did not leave work early on 16 September 1998." On appeal, since we do not have the right to weigh the evidence and decide the issue on the basis of its weight; our duty goes no further than to determine whether the record contains any evidence tending to support the finding, and whether those findings support the conclusions of law. *See Anderson v. Lincoln Constr. Co.*, 265 N.C. at 434, 144 S.E.2d at 274. Thus, we must reject this assignment of error.

Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

Plaintiff climbed a seven and one-half foot chain link and barb wire gate to leave work when another safe route was provided by defendant. This act was an unreasonable activity. Plaintiff's injuries did not "arise out of" and "in the course of" his employment. No compensable injury exists. I would reverse the decision of the Commission. I respectfully dissent.

I. "Arise Out Of And In The Course Of Employment"

"In order to be compensable under our Workers' Compensation Act, an injury must arise out of and in the course of employment. *Barham v. Food World, Inc.*, 300 N.C. 329, 332, 266 S.E.2d 676, 678

(1980) (citing N.C. Gen. Stat. § 97-2(6)). "If claimant's injury did not arise out of and in the course of his employment, it is not compensable." *Poteete v. North State Pyrophyllite Co.*, 240 N.C. 561, 564, 82 S.E.2d 693, 694 (1954) (citations omitted). "The phrases 'arising out of' and 'in the course of' employment are not synonymous, but involve two distinct ideas and impose a double condition, both of which must be satisfied in order to render an injury compensable." *Williams v. Hydro Print, Inc.*, 65 N.C. App. 1, 5, 308 S.E.2d 478, 481 (1983) (citing *Poteete*, 240 N.C. 561, 82 S.E.2d 693). This Court and our Supreme Court have stated that " 'course of employment' and 'arising out of employment' are both parts of a single test of work-connection and therefore, 'deficiencies in the strength of one factor are sometimes allowed to be made up by strength in the other.' " *Id.* at 9, 308 S.E.2d at 483 (quoting *Watkins v. City of Wilmington*, 290 N.C. 276, 281, 225 S.E.2d 577, 581 (1976)). "Together, the two phrases are used in an attempt to separate work-related injuries from nonwork-related injuries." *Id.* at 5, 308 S.E.2d at 481 (citing *Watkins*, 290 N.C. at 280, 308 S.E.2d at 580).

"In general, the term 'in the course of' refers to the time, place and circumstances under which an accident occurs, while the term 'arising out of' refers to the origin or causal connection of the accidental injury to the employment." *Gallimore v. Marilyn's Shoes*, 292 N.C. 399, 402, 233 S.E.2d 529, 531-32 (1977) (citations omitted). " 'There must be some causal relation between the employment and the injury.' " *Bass v. Mecklenburg County*, 258 N.C. 226, 231, 128 S.E.2d 570, 574 (1962) (quoting *Conrad v. Cook-Lewis Foundry Co.*, 198 N.C. 723, 153 S.E. 266. (1930)). Unless a causal connection between employment and injury is proved, the injury is not compensable. The burden of proving the causal relationship or connection rests with the claimant. *McGill v. Town of Lumberton*, 218 N.C. 586, 587, 11 S.E.2d 873, 874 (1940).

"The rule of causal relation is 'the very sheet anchor of the Workmen's Compensation Act,' and has been adhered to in our decisions, and prevents our Act from being a general health and insurance benefit act." *Bryan v. First Free Will Baptist Church*, 267 N.C. 111, 115, 147 S.E.2d 633, 635 (1966) (citations omitted).

A. In The Course Of

An accident arising "in the course of" the employment is one which occurs while "the employee is doing what a man so employed may reasonably do within a time during which he is

> employed and at a place where he may reasonably be during that time to do that thing;" or one which "occurs in the course of the employment and as the result of a risk involved in the employment, or incident to it, or to conditions under which it is required to be performed."

Hildebrand v. McDowell Furniture Co., 212 N.C. 100, 109, 193 S.E. 294, 301 (1937) (quotations omitted). "[I]t is the conjunction of all three of these factors—time, place and circumstances—that brings a particular accident within the concept of *course of* employment. If, in addition to this, the accident arose *out of* employment, then any injury resulting therefrom is compensable under the Act." *Harless v. Flynn*, 1 N.C. App. 448, 457, 162 S.E.2d 47, 53 (1968) (emphasis in original).

B. Arise Out Of

"A compensable injury must arise not only within the time and space limits of the employment, but also in the course of an activity related to the employment." 2 Arthur Larson, *The Law of Workmen's Compensation* § 20.00 (2001). " 'An injury arises out of the employment when it comes from the work the employee is to do, or out of the service he is to perform, or as a natural result of one of the risks of the employment; the injury must spring from the employment or have its origin therein.' " *Williams*, 65 N.C. App. at 7, 308 S.E.2d at 482 (quoting *Harless*, 1 N.C. App. 455, 162 S.E.2d at 52). Our Supreme Court has stated that "[w]here any reasonable relationship to the employment exists, or employment is a contributory cause, the court is justified in upholding the award as 'arising out of employment.' " *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (citation omitted).

> When an injury cannot fairly be traced to the employment as a contributing proximate cause, or if it comes from a hazard to which the employee would have been equally exposed apart from the employment, or from the hazard common to others, it does not arise out of the employment.

Williams, 65 N.C. App. at 7-8, 308 S.E.2d at 482 (quoting *Harless*, 1 N.C. App. 455, 162 S.E.2d at 52).

Whether an accident arose out of the employment is a mixed question of law and fact. *Sandy v. Stackhouse, Inc.*, 258 N.C. 194, 128 S.E.2d 218 (1962). Whether the facts, as found by the majority of the Commission, compel the conclusion that plaintiff's injuries "arise out

of" his employment is a question of law for this Court. *Stallcup v. Carolina Wood Turning Co.*, 217 N.C. 302, 7 S.E.2d 550 (1940). Our review is *de novo*.

II. The Premises Rule

The majority opinion is correct in stating that an injury by accident occurring while traveling to and from work is generally not compensable. There is also a *limited* exception to the "coming and going" rule. If one is injured on the employer's property while going to and from his employment, the injury is "generally deemed to have arisen out of and in the course of the employment," provided the injury is causally related to the employment. *Maurer v. Salem Co.*, 266 N.C. 381, 382, 146 S.E.2d 432, 433-34 (1966) (citing *Bass*, 258 N.C. 226, 128 S.E.2d 570 (summarizing and citing numerous cases from other jurisdictions which recognize the premises rule)).

It is undisputed that plaintiff was leaving, and injured on, defendant's property. Mere presence on the employer's premises at the time of the employee's injury, however, is insufficient to make the injury compensable. Our Supreme Court has stated that:

> "there is no magic in being on the [employer's] premises, if the employee is injured by getting into places where he has no right to go." Neither a minor nor an adult claimant can recover under the Workmen's Compensation Act when he "does acts different in kind from what he is expected or required to do, which are forbidden and outside the range of his service."

Martin v. Bonclarken Assembly, 296 N.C. 540, 546, 251 S.E.2d 403, 406 (1979) (quoting 1A Larson, § 21.21(d) (1978) (other citation omitted)).

III. Employment Related Activities

The majority opinion quotes *Hoyle v. Isenhour Brick & Tile Co.*, 306 N.C. 248, 254, 293 S.E.2d 196, 200 (1982), to show that North Carolina courts "have not viewed minor deviations from the confines of a narrow job description as an absolute bar to the recovery of benefits, even when such acts were contrary to stated rules or to specific instructions of the employer where such acts were reasonably related to the accomplishment of the task for which the employee was hired." Plaintiff was not engaged in any activity, reasonable or otherwise, to accomplish a task for which he was hired at the time of the injury.

Many jurisdictions divide employment related activities into two types: (1) actual performance of the direct duties of the job activities, and (2) incidental activities. 2 Larson, § 21.08(1), p. 21-43. The former are almost always within the course of employment, regardless of the method chosen to perform them. *Id.* Incidental activities are afforded much less protection. If they are: (1) too remote from customary usage and reasonable practice or (2) are extraordinary deviations, neither are incidents of employment and are not compensable. *Id.*

Our courts follow this distinction. In *Hartley v. North Carolina Prison Dept.*, 258 N.C. 287, 128 S.E.2d 598 (1962), a plaintiff was injured during the actual performance of direct duties of his specific job activity. Our Supreme Court held that claimant's injuries were compensable and resulted from the performance of his job-related duties despite the fact that he sustained injuries by falling from a fence that he decided to climb for his own personal convenience. The mere fact that claimant selected a more hazardous route *in the performance of his duties* did not defeat his recovery. Evidence existed that others had climbed the same fence in furtherance of their job-related activities. The majority opinion's reliance on *Hartley* is misplaced.

If plaintiff was engaged in "incidental activities such as seeking personal comfort, going and coming, engaging in recreation, and the like," 2 Larson § 21.08(1) p. 21-42, these "acts necessary to the life, comfort and convenience of the employee are incidental to employment." *Williams*, 65 N.C. App. at 8, 308 S.E.2d at 483.

The majority opinion recognizes that plaintiff was not actually engaged in the performance of his work duties at the time of his injury. The majority opinion fails to analyze why plaintiff's activity of climbing a seven and one-half foot high locked chain link and barb wire gate was a reasonable incidental activity or only a minor deviation from one.

Scaling a seven and one-half foot tall locked chain link and barb wire gate is an unreasonable activity for plaintiff to exit defendant's property when a safer method was provided to and known by plaintiff. There was no evidence that any other employees, including plaintiff, ever exited defendant's premises in this manner. Plaintiff's activity was not in actual performance of a direct job duty. Plaintiff's activity was so remote from customary or reasonable practice that it was not causally related to his employment and is not compensable as a matter of law.

A. Unreasonable Incidental Activity

Our courts have consistently denied compensation where the incidental activity was unreasonable. *See Mathews v. Carolina Standard Corp.*, 232 N.C. 229, 234, 60 S.E.2d 93, 96 (1950) (held that plaintiff's injury and death "did not result from a hazard incident to his employment" when he jumped onto the back of a truck moving across employer's property following the sounding of the lunch whistle); *Moore v. Stone Company*, 242 N.C. 647, 89 S.E.2d 253 (1955) (held that when employee for unknown reasons or for curiosity, while eating lunch, attempted to set off a single dynamite cap, which accidentally detonated other dynamite caps, resulting injuries did not arise out of employment); *Teague v. Atlantic Co.*, 213 N.C. 546, 196 S.E. 875 (1938) (held that plaintiff's injury did not follow as a natural incident of his work and that denial of compensation was proper when an employee chose the more dangerous route of leaving the basement by riding a conveyor belt instead of taking the employer provided steps).

At least four other jurisdictions have specifically held that when an employer has provided a safe route and an employee chooses, solely for his own convenience, a hazardous route for ingress and egress from the place of employment, the injury sustained does not "arise out of and in the course of employment." In *Lane v. Gleaves Volkwagen*, 594 P.2d 1249 (Or. App. 1979), a plaintiff's injuries resulting from a fall after his decision to climb over a seven-foot-tall chain link fence that was locked when there was a safe alternative route to the employee parking lot was held to be an unreasonable activity. Injuries therefrom did not arise out of and in the course of employment. In *Corcoran v. Fitzgerald Bros.*, 58 N.W.2d 744 (Minn. 1953), that court held that where employer furnishes safe means of ingress and egress to employee, and employee climbs a ten foot fence for his own convenience, not customarily used by the other employees, his injuries did not arise out of employment within the meaning of the Compensation Act. The employee stepped outside the scope of his employment. In *Associated Indem. Corp. v. Industrial Acc. Com'n of California*, 112 P.2d 615 (Cal. 1941), and *Langon v. Industrial Comm.*, 173 N.E. 49 (Ill. 1930), the courts held that where employee has a choice of leaving work and voluntarily selects a dangerous route, such action or activity is not incident to employment.

B. Reasonable Incidental Activity

In contrast, cases that allow compensation for injuries occurring from reasonable incidental activities, or minor deviations, are distinguishable from the facts here. *See e.g. Bellamy v. Manufacturing Co.*, 200 N.C. 676, 158 S.E. 246 (1931) (accident while riding in an elevator on a personal errand was held not a deviation or departure because he was required by his employer to stay in the plant); *Brown v. Aluminum Co.*, 224 N.C. 766, 32 S.E.2d 320 (1944) (accident arose out of and in the course of employment even though on watchman's personal time); *Rewis v. Insurance Co.*, 226 N.C. 325, 38 S.E.2d 97 (1946), (incidental act found to have arisen out of employment and compensable when an employee, feeling faint slipped and fell out of the window to his death); *Watkins*, 290 N.C. 276, 225 S.E.2d 577 (the repairing of a fellow employee's car during lunch period was a reasonable activity because the employees made, and were allowed to make, repairs during lunch hour that benefitted employer); *Harless*, 1 N.C. App. 448, 162 S.E.2d 47 (the leaving of employer's parking lot with permission of employer to eat lunch off the site was not an unreasonable activity or substantial deviation not in the course of employment); *Williams*, 65 N.C. App. 1, 308 S.E.2d 478 (Plaintiff's own conduct in spontaneously running along with his fellow employees toward a shiny, glittering object on the track was not unreasonable when employees were free to engage in recreational activities of running during their rest breaks. This activity was held not "a departure or deviation from the course of employment because plaintiff's assigned duties at that time were to take a break inside the locked yard of the plant along with a large group of his fellow employees" and running was customary.). Unlike the facts at bar, all of these cases involved "incidental activities" that were reasonable and compensable.

IV. Summary

Scaling a seven and one-half foot tall locked chain link and barb wire gate is an unreasonable activity for egress from defendant's property when defendant provided a safe and secured exit. Undisputed evidence shows that plaintiff had never previously climbed the back gate to exit defendant's property, nor that any other employee utilized this method of exiting defendant's property that would have put defendant on notice of this activity. Plaintiff testified that if he had utilized the front gate instead of climbing over the chain link and barb wire gate, it would have taken him five to eight minutes longer to exit. Other employees testified that the time to take the safe

route was between two to four minutes. Plaintiff could have also waited for the gate to be unlocked and have exited with his fellow employees at the end of their shift. It is undisputed that plaintiff chose a hazardous route solely for his own convenience, not for any benefit, direct or indirect, to defendant.

V. Conclusion

Plaintiff's injuries are not causally related to his employment, and did not "arise out of and in the course of employment." Plaintiff's activity was so removed from customary or reasonable practice that it cannot, as a matter of law, be an incidental activity of employment. Plaintiff's unreasonable actions, *not* the grossly negligent manner in which he performed them, produced his injuries. Plaintiff's unreasonable activity is more analogous to precedent cases where courts have denied compensation. I would reverse the decision of the Industrial Commission, and remand for dismissal of plaintiff's claim.

STATE OF NORTH CAROLINA v. JUNIOUS LEE RHUE, JR.

No. COA01-718

(Filed 21 May 2002)

1. **Evidence— prior crimes or bad acts—assault with a deadly weapon**

The trial court did not abuse its discretion in a second-degree murder case by permitting the State to cross-examine defendant's character witnesses under N.C.G.S. § 8C-1, Rule 405(a) regarding defendant's 1980 conviction for assault with a deadly weapon, because: (1) the State in rebuttal can introduce evidence of defendant's bad character after defendant introduces evidence of his good character; (2) Rule 405(a) does not contain any time limit or rule regarding remoteness, and our Supreme Court has explicitly refused to impose one; and (3) the witnesses' testimony that they knew defendant in 1980 as a peaceful person made that time-frame relevant.

2. **Discovery— witness interview—timely disclosure to defendant—due process**

A detective's interview with a witness was timely disclosed to defendant so that the detective was properly allowed to read

from the interview transcript, although the State did not disclose the interview promptly after it was conducted, because (1) under N.C.G.S. § 15A-903(f)(1) the State was not required to disclose a witness's statement in advance of trial, and (2) the due process requirements of *Brady v. Maryland*, 373 U.S. 83, were satisfied where defense counsel had possession of the interview before the trial commenced, he made effective use of the transcript at trial by extensively cross-examining the witness with the interview transcript, and the State did not introduce the detective's testimony regarding the interview until after defense counsel had already vigorously cross-examined the witness about the content of the interview.

3. Evidence— hearsay—corroboration—prior consistent statements

The trial court did not commit plain error in a second-degree murder case by permitting the investigating detective to read from a witness's interview even though defendant contends it constituted inadmissible hearsay, because: (1) although the witness's prior statements differed slightly from his testimony and provided some new pieces of information, such variation is permissible; (2) despite some minor variations, the witness's prior statements tended to confirm and corroborate his trial testimony, and any variations were to be considered by the jury in assessing the weight to afford the evidence presented; and (3) defendant has failed to point to a rule that limits testimony on prior consistent statements to the declarant only.

4. Criminal Law— pro se motion for appropriate relief—failure to show entitlement to hearing

The trial court did not err in a second-degree murder case by denying, without a hearing, defendant's pro se motion for appropriate relief, because: (1) defendant's alleged newly discovered evidence, even if true, would not have the necessary bearing on his trial to warrant the grant of a new trial; and (2) defendant failed to file any affidavits or other evidence to support his assertions that his counsel was ineffective.

Appeal by defendant from judgment entered 22 September 2000 by Judge Jack Thompson in Johnston County Superior Court. Heard in the Court of Appeals 16 April 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Daniel D. Addison, for the State.

Martin A. Tetreault for defendant-appellant.

HUNTER, Judge.

Junious Lee Rhue, Jr. ("defendant") appeals his conviction of second degree murder and resulting sentence. Defendant assigns error to the admission of various testimony and to the denial of his motion for appropriate relief. For reasons stated herein, we conclude there was no error.

The State's evidence tended to show that on 12 July 1999, Thomas Holiday and his brother Charles Nichols encountered defendant on a street in Smithfield, North Carolina at approximately 8:00 p.m. Holiday and Nichols knew defendant from living in the same neighborhood for several years. Defendant began walking with Holiday and Nichols. Holiday testified that defendant seemed "agitated" and was making comments about the "young kids" in the neighborhood who "don't care about nothing." Defendant then removed a pistol from the front of his pants and began waving it in the air. At Holiday's and Nichols' request, defendant replaced the pistol in his pants and continued walking with them until Holiday and Nichols arrived at their mother's house.

Holiday testified that he left his mother's house to walk home around 11:00 p.m. that evening. Holiday observed defendant talking to a lady who was in her car, stopped at a stop sign. Holiday overheard the two talking about Kevin Shumpert, whom Holiday knew from the neighborhood. Holiday heard the lady in the car tell defendant that Shumpert had "done her wrong." Defendant appeared to be angry, and Holiday heard him state that he was "fed up with these young people" and that he "needs to teach somebody a lesson." Holiday then observed Shumpert walking nearby, whereupon the lady in the car said to defendant, "[t]here he goes right now." Defendant said "I'll go straighten this out," and began walking towards Shumpert. Holiday called to defendant, asking if he "still [had] what [he] had earlier today," meaning the pistol. Defendant responded that he did, and told Holiday he was going to "teach [Shumpert] a lesson."

Defendant began calling to Shumpert, who then turned to walk towards defendant. Holiday observed defendant remove the pistol

from his pants and tell Shumpert to "[h]old it." Defendant held the gun on Shumpert and demanded that he "go into [his] pockets" and give defendant "what [he] owe[d] [him]." Shumpert then placed his hands in his pockets, whereupon defendant "froze up" and instructed Shumpert not to remove his hands. Shumpert told defendant that he would give him whatever he wanted, and begged defendant not to shoot him. Defendant told Shumpert that he could remove his hands from his pockets on the count of three. Defendant counted to two, then shot and killed Shumpert, whose hands were still in his pockets. Defendant then squatted beside Shumpert, looked in his pockets, and ran away.

Defendant testified on his own behalf. He stated that someone had stolen a bicycle from him a few days prior. On the evening of the shooting, defendant testified that he was on his way to his cousin's house, and that he took his pistol because it was dark and he was alone. According to defendant, Shumpert approached defendant on the street and told him that he was the one who took his bicycle, and began to taunt him, saying he was going to "smoke" him. Defendant told Shumpert that he had "no animosity" and asked to be left alone. Defendant turned from Shumpert, and as he looked back at him over his shoulder, he saw Shumpert's hand go "back to the right," whereupon defendant pulled the pistol, fired, and ran. Defendant testified that he was fearful for his life when he saw Shumpert move his hand, and he believed Shumpert would follow through with his threats.

A jury convicted defendant on 22 September 2000 of second degree murder. The trial court entered judgment on that date, sentencing defendant to 151-191 months in prison. On 24 October 2000, defendant filed a handwritten, *pro se* document which the trial court treated as a motion for appropriate relief. On 27 October 2000, a trial judge other than the one who presided over the trial entered an order denying the motion without a hearing. Defendant appeals his judgment and commitment.

[1] Defendant first argues the trial court erred in permitting the State to cross-examine defendant's character witnesses regarding defendant's 1980 conviction for assault with a deadly weapon. Prior to trial, defendant moved to suppress evidence of the conviction. The trial court granted defendant's motion to suppress, thereby prohibiting the State from questioning defendant on the conviction, but left open the possibility that the evidence might be admissible through other witnesses if defendant were to put his character into issue. Defendant presented two character witnesses, both of whom testified that they

had known defendant since childhood, and that they had always known him to be a peaceful person. On cross-examination, the State questioned each witness as to whether they remembered "hearing a report in 1980 that [defendant] assaulted a person with a deadly weapon, inflicting serious injury[.]" Defendant argues that this was error because the incident was too remote to the crime at issue and therefore, its prejudice outweighed its probative value.

"A criminal defendant is entitled to introduce evidence of his good character, thereby placing his character at issue. The State in rebuttal can then introduce evidence of defendant's bad character." *State v. Roseboro*, 351 N.C. 536, 553, 528 S.E.2d 1, 12, *cert. denied*, 531 U.S. 1019, 148 L. Ed. 2d 498 (2000). Under N.C. Gen. Stat. § 8C-1, Rule 405(a) (1999), the State may do so by cross-examining a defendant's character witnesses as to "relevant specific instances of conduct." Thus, where the defendant in *Roseboro* introduced testimony from family members regarding his reputation for peacefulness, the State was entitled to cross-examine the witnesses as to whether they knew of any accusations that the defendant acted violently towards his wife. *Roseboro*, 351 N.C. at 553, 528 S.E.2d at 12.

Moreover, unlike evidence of prior bad acts being offered under N.C. Gen. Stat. § 8C-1, Rule 404(b) (1999), Rule 405(a) does not contain any time limit or rule regarding remoteness, and our Supreme Court has explicitly refused to impose one. *See State v. Cummings*, 332 N.C. 487, 507, 422 S.E.2d 692, 703 (1992). Rather, "[a] 'relevant' specific instance of conduct under Rule 405(a) would be any conduct that rebuts the earlier reputation or opinion testimony offered by the defendant." *Id.* (holding State's cross-examination of character witnesses as to 1963 assault permissible after witnesses had testified they had never known defendant to be violent). Nevertheless, the trial court possesses the sound discretion to exclude evidence otherwise admissible under Rule 405(a) where the probative value of the rebuttal evidence is substantially outweighed by its prejudice. *Id.*; N.C. Gen. Stat. § 8C-1, Rule 403 (1999).

In this case, defendant was approximately twenty-two years old at the time of the prior conviction. Both character witnesses testified that they knew defendant in 1980 at the time of the conviction. Thus, their testimony that they had always known defendant to be a peaceful person applied to their knowledge of him in 1980. Their testimony that they knew defendant in 1980 as a peaceful person made that time-frame relevant, and the State was therefore entitled under Rule 405(a) to rebut their character evidence by asking the witnesses if

they were aware of a report of a prior assault by defendant. We discern no abuse of discretion in the trial court's determination that this Rule 405(a) evidence was also admissible under Rule 403.

[2] Defendant argues next that the trial court erred in allowing the investigating detective, Steve Knox, to read from interviews that he conducted with defendant and Holiday following the shooting because the interviews contained exculpatory evidence which was not timely disclosed to defendant by the State. Detective Knox interviewed both defendant and Holiday separately the day after the shooting, 13 July 1999. Detective Knox did not transcribe the interviews. According to the prosecutor, the State did not become aware of the existence of the interviews until 3 August 2000, whereupon the State made a motion to have the interviews transcribed, and informed defense counsel of their existence. The trial court entered an order allowing the motion for transcription on 9 August 2000, and directed the State to provide a copy of the transcript of defendant's interview to defense counsel in accordance with N.C. Gen. Stat. § 15A-903 (1999). Under N.C. Gen. Stat. § 15A-903(a)(1), upon a defendant's motion, the State must be ordered to allow the defendant "to inspect and copy or photograph any relevant written or recorded statements made by the defendant . . . within the possession, custody, or control of the State the existence of which is known or by the exercise of due diligence may become known to the prosecutor." N.C. Gen. Stat. § 15A-903(a)(1).

We first note that under N.C. Gen. Stat. § 15A-903(f)(1), the State was not required to disclose Holiday's statements in advance of trial. Under that rule, "no statement or report in the possession of the State that was made by a State witness or prospective State witness, other than the defendant, shall be the subject of subpoena, discovery, or inspection until that witness has testified on direct examination in the trial of the case." N.C. Gen. Stat. § 15A-903(f)(1). Defendant argues that this statute aside, *Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963) and due process required that the State disclose the interview promptly after it was conducted, regardless of the prosecutor's knowledge of the interview.

In fact, "[o]ur Supreme Court has held 'that due process and *Brady* are satisfied by the disclosure of the evidence at trial, so long as disclosure is made in time for the defendants to make effective use of the evidence.' " *State v. Small*, 131 N.C. App. 488, 490, 508 S.E.2d 799, 801 (1998) (citation omitted). Defendant argues that he was unable to make effective use of the Holiday interview because the

delay in disclosure deprived him of the opportunity to use the interview to investigate and possibly locate more witnesses. However, similar arguments based on the loss of the defense's ability to use the evidence as an investigatory tool due to the State's failure to disclose in advance of trial have been rejected by this Court as being both speculative, *see id.*, and not required by law, *see State v. Taylor*, 344 N.C. 31, 50, 473 S.E.2d 596, 607 (1996) (no due process or *Brady* violation where State provided officer's notes to defense four days prior to State resting its case; defense counsel had "ample opportunity" to make use of the evidence, including contacting witnesses if defendants so desired).

The record in the present case reveals that defense counsel had possession of the Holiday interview before the trial even commenced, and that he made effective use of the transcript at trial by extensively cross-examining Holiday with the interview transcript. Indeed, we observe that the State did not introduce Detective Knox's testimony regarding Holiday's interview until after defense counsel had already vigorously cross-examined Holiday regarding the content of the interview. It is well-established that the benefit of any objection to the introduction of evidence is lost where the evidence is previously admitted without objection, and particularly, where defendant is responsible for first introducing the evidence. *See State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989); *State v. Moses*, 316 N.C. 356, 362, 341 S.E.2d 551, 554-55 (1986) (defendant cannot object to introduction of portions of a letter written by defendant when defendant later read letter into evidence on direct examination).

With respect to Detective Knox's reading of defendant's interview, we likewise observe that defendant failed to object to the introduction of this testimony, and then proceeded to use the interview transcript to extensively cross-examine Detective Knox. Although defendant's assignment of error contained in the record alleges that the introduction of this testimony was plain error, defendant has not argued in his brief on appeal that the alleged error amounted to plain error. Our Supreme Court has held that when a defendant who fails to object at trial also fails to "specifically and distinctly argue in his brief that the trial court's [actions] amounted to plain error, this Court will not conduct plain error review." *State v. Parks*, 147 N.C. App. 485, 490, 556 S.E.2d 20, 24 (2001); *see also* N.C.R. App. P. 10(c)(4) (defendant must "specifically and distinctly" contend judicial action amounts to plain error). These arguments are therefore rejected.

[3] In a related argument, defendant maintains that Detective Knox should not have been permitted to read from Holiday's interview because it constituted inadmissible hearsay, and that the trial court's admission of this evidence constituted plain error. Defendant concedes that our courts allow the admission of prior statements made by a witness for the purpose of corroborating that witness' testimony at trial, despite the statements' hearsay nature. *See State v. Gell*, 351 N.C. 192, 204, 524 S.E.2d 332, 340, *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000).

"Corroborative evidence by definition tends to 'strengthen, confirm, or make more certain the testimony of another witness.' " *State v. McGraw*, 137 N.C. App. 726, 730, 529 S.E.2d 493, 497 (citation omitted), *disc. review denied*, 352 N.C. 360, 544 S.E.2d 554 (2000). "Corroborative evidence need not mirror the testimony it seeks to corroborate, and may include new or additional information as long as the new information tends to strengthen or add credibility to the testimony it corroborates." *Id.* "In other words, '[w]here testimony which is offered to corroborate the testimony of another witness does so substantially, it is not rendered incompetent by the fact that there is some variation.' " *State v. Lloyd*, 354 N.C. 76, 104, 552 S.E.2d 596, 617 (2001) (citation omitted). Such variations only affect the weight of the evidence, not its admissibility. *Id.*

Here, defendant argues that Holiday's prior statements were not sufficiently consistent with Holiday's trial testimony to be considered admissible prior consistent statements. Again, we disagree. Although Holiday's prior statements differed slightly from Holiday's testimony and provided some new pieces of information, such variation is permissible. *See id.* Our review of the transcript leads us to conclude that despite some minor variations, Holiday's prior statements tended to confirm and corroborate Holiday's trial testimony. To the extent there were variations between the two, the jury was to consider this fact in assessing the weight to afford the evidence presented. *See id.* The trial court did not commit plain error in allowing Detective Knox's testimony.

Moreover, defendant suggests that the State impermissibly used Detective Knox to present Holiday's prior statements to the jury, as opposed to Holiday himself. However, defendant has failed to point to any rule, nor are we aware of one, that limits testimony on prior consistent statements to the declarant only. *See, e.g., Taylor*, 344 N.C. at 46, 473 S.E.2d at 605 (police officer's testimony regarding witness' prior statement admissible to corroborate witness' trial testimony);

State v. Beane, 146 N.C. App. 220, 232, 552 S.E.2d 193, 201 (2001) (victim's prior statements, as testified to by both family members and detective, admissible for purposes of corroborating victim's trial testimony). This assignment of error is overruled.

[4] In his final argument, defendant contends the trial court erred in denying, without a hearing, his *pro-se* motion for appropriate relief, which raised various issues. On appeal, defendant argues that the trial court was required to have conducted a hearing on his motion for two reasons: (1) because the motion established that defendant possessed newly discovered evidence which "would drastically change the defense of the case"; and (2) because defendant sufficiently established a claim for ineffective assistance of counsel.

Under N.C. Gen. Stat. § 15A-1420(c)(1) (1999), a defendant "is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit." Thus, a defendant is not entitled to a hearing on a motion for appropriate relief if it can be determined from the motion itself that the defendant is not entitled to relief. *See State v. McHone*, 348 N.C. 254, 257, 499 S.E.2d 761, 763 (1998).

In this case, we agree with the trial court that defendant's motion failed to show that he was entitled to any relief, and thus, defendant was not entitled to a hearing on his motion.[1] Defendant first argues that he is entitled to relief on the basis of newly discovered evidence consisting of a witness who would be willing to testify that Holiday and Nichols took a gun from Shumpert on the night of the shooting. Defendant maintains that this new evidence "would drastically change the defense of the case, given that Defendant's claim of self-defense and the fact that, at trial, the prosecutor elicited testimony from Holiday that Shumpert had no weapon."

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1. We acknowledge that under N.C. Gen. Stat. § 15A-1420(c)(7), the trial court is required to make conclusions of law and state its reasoning before denying the motion where the defendant asserts with specificity in his motion that the judgment was obtained in violation of his constitutional rights. Defendant in this case did assert a violation of his constitutional rights in his motion, but the trial court did not make conclusions of law. However, defendant has not assigned error to this omission, and we therefore do not address it here. Nevertheless, for clarity, we note that our Supreme Court has held that N.C. Gen. Stat. § 15A-1420(c)(7), as well as the fact that a defendant raises constitutional issues, does not operate as an "expansion either of defendant's right to be heard or his right to present evidence." *McHone*, 348 N.C. at 257, 499 S.E.2d at 762. Thus, any error in the trial court's omission does not affect the pertinent question of whether defendant was entitled to an evidentiary hearing.

Among the factors a defendant must prove to obtain a new trial on the basis of newly discovered evidence are: (1) "the evidence is material, competent and relevant"; (2) "the newly discovered evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness"; and (3) "the evidence is of such a nature that a different result will probably be reached at a new trial." *State v. Garner*, 136 N.C. App. 1, 13, 523 S.E.2d 689, 698 (1999), *appeal dismissed and cert. denied*, 351 N.C. 477, 543 S.E.2d 500 (2000).

Applying these principles here, defendant's motion does not entitle him to relief on this ground because defendant cannot establish that, even if true, the newly discovered evidence would have changed the result at trial. Regardless of whether Shumpert was armed at the time of the shooting, defendant testified that he never saw a gun or other weapon on Shumpert. Thus, the reality of whether Shumpert was actually armed is irrelevant to the issue of self-defense, which is examined from the point of view of the defendant. *See State v. Williams*, 342 N.C. 869, 873, 467 S.E.2d 392, 394 (1996) (essential question in self-defense is reasonableness of defendant's belief that deadly force is necessary). Moreover, to the extent defendant sought to discredit Holiday's testimony that Shumpert was unarmed, this is not a proper basis for granting a motion on the grounds of newly discovered evidence. *See Garner*, 136 N.C. App. at 13, 523 S.E.2d at 698. We therefore disagree with defendant that this newly discovered evidence, even if true, would have had the necessary bearing on his trial to warrant the grant of a new trial.

We likewise disagree with defendant that his claim for ineffective assistance of counsel mandated an evidentiary hearing. Defendant maintained in his motion that his counsel was deficient in two respects: (1) in failing to call a particular witness; and (2) in failing to strike a juror who allegedly knew defendant from school and disliked him. In order to successfully assert an ineffective assistance of counsel claim, a defendant must establish the following: (1) that his counsel's performance fell below an objective standard of reasonableness; and (2) that his counsel's performance deficiency was so serious that a reasonable probability exists that the result of the trial would have been different. *State v. Gainey*, 355 N.C. 73, 112, 558 S.E.2d 463, 488 (2002). "There is a presumption that trial counsel acted in the exercise of reasonable professional judgment." *Id.*

In *State v. Aiken*, 73 N.C. App. 487, 326 S.E.2d 919, *appeal dismissed and disc. review denied*, 313 N.C. 604, 332 S.E.2d 180 (1985),

we held that the trial court properly denied, without a hearing, the defendant's motion for appropriate relief based on ineffective assistance of counsel where the defendant failed to produce any supporting affidavits or other evidence beyond the bare assertions of the motion. *Id.* at 500-01, 326 S.E.2d at 927. The defendant based his claim on the fact that his attorney failed to move to suppress the defendant's statement to police and to contact various defense witnesses. *Id.* We observed that N.C. Gen. Stat. § 15A-1420(c)(6) requires that a defendant seeking relief by a motion for appropriate relief " 'must show the existence of the asserted ground for relief.' " *Id.* at 501, 326 S.E.2d at 927 (quoting N.C. Gen. Stat. § 15A-1420(c)(6)). Thus, where the defendant did not comply with N.C. Gen. Stat. § 15A-1420(c)(6) by failing to file anything but bare assertions that his counsel was ineffective, "the trial court's summary denial of the motion for appropriate relief was not error." *Id.*

Our Supreme Court has also stated that the rules which govern "the procedure for filing a motion for appropriate relief clearly require[] supporting affidavits to accompany the motion." *State v. Payne*, 312 N.C. 647, 668, 325 S.E.2d 205, 219 (1985). The Court observed that aside from subsection (c)(6), N.C. Gen. Stat. § 15A-1420(b)(1) provides that motions for appropriate relief made after the entry of judgment " 'must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records and any transcript of the case or which are not within the knowledge of the judge who hears the motion.' " *Id.* at 669, 325 S.E.2d at 219 (quoting N.C. Gen. Stat. § 15A-1420(b)(1)).

The record in this case reveals that defendant failed to file any affidavits or other evidence to support his assertions that counsel was ineffective. According to *Aiken*, such failure supports the trial court's summary denial of defendant's motion. In any event, as we noted in *Aiken*, decisions such as which witnesses to call, whether and how to conduct examinations, which jurors to accept or strike, and what trial motions should be made are strategic and tactical decisions that are within the " 'exclusive province' " of the attorney. *Aiken*, 73 N.C. App. at 496, 326 S.E.2d at 924 (citation omitted). " 'Trial counsel are necessarily given wide latitude in these matters. Ineffective assistance of counsel claims are not intended to promote judicial second-guessing on questions of strategy as basic as the handling of a witness.' " *Id.* (citation omitted). Defendant's bare assertions in his motion are insufficient to show that his attorney's

decisions with respect to which jurors to strike and which witnesses to call were anything but proper tactical decisions within the range of professionally reasonable judgment. *See State v. Campbell*, 142 N.C. App. 145, 152, 541 S.E.2d 803, 807 (2001) ("[w]here the strategy of trial counsel is 'well within the range of professionally reasonable judgments,' the action of counsel is not constitutionally ineffective" (*citation omitted*)).

No error.

Judges GREENE and TIMMONS-GOODSON concur.

MARCUS SMITH, PETITIONER v. RICHMOND COUNTY BOARD OF EDUCATION, RESPONDENT

No. COA01-637

(Filed 21 May 2002)

1. Appeal and Error— administrative board—proper standard of review

The Court of Appeals employs the proper standard of review regardless of that employed by the trial court; thus, the Court of Appeals applied the de novo standard of review where appropriate in an appeal from a school board decision to dismiss a principal even though the trial court applied the whole record test.

2. Schools and Education— principal dismissal—continuance denied

The Richmond County Board of Education did not err by denying a motion to continue a hearing on whether a principal would be dismissed where petitioner had over two months to obtain evidence; he was represented by at least four attorneys during this time; he chose to request a hearing before the Board; his first continuance was granted; his next motion for a continuance did not identify particular evidence he was unable to obtain or provide any explanation for not being able to obtain the evidence; petitioner's acknowledgement that a particular affidavit could have been obtained quickly undermines his argument; and petitioner submitted other affidavits to the same effect.

3. Schools and Education— principal dismissal—evidence submitted before hearing

A principal dismissed by the Richmond County School Board failed to show how the Board was biased by exposure to the superintendent's documentary evidence prior to the hearing where the superintendent sent the evidence to each member of the Board 14 days before the hearing; the same evidence was ultimately presented to the Board; the Board admitted and considered all of petitioner's documentary evidence even though it had not been provided to the superintendent three days before the hearing, as required by statute; there was no indication that the individual members of the Board entered the hearing with a commitment to decide the case against petitioner; and there was no reason to presume that the members of the Board would be unable to refrain from reaching a conclusion merely because of lapse of time between exposure to the superintendent's evidence and petitioner's evidence.

4. Schools and Education— principal dismissal—request for Board hearing—case manager waived

A school board did not err by denying a principal's motion to have his case heard by a case manager where the principal had requested a hearing before the Board, as he was permitted to do by N.C.G.S. § 115C-325(h). By the same statute, a request for a hearing before the board forfeits the right to a hearing by a case manager.

5. Schools and Education— principal dismissal—superintendent's opinion—admission not improper

The submission of a school superintendent's personal beliefs about whether a principal should be dismissed did not amount to the admission or consideration of improper evidence where the superintendent's beliefs were implied in his recommendation of dismissal.

6. Schools and Education— principal dismissal—admission of affidavits—consideration of hearsay

The Richmond County Board of Education did not err by admitting certain affidavits in a hearing to determine whether to dismiss a principal for sexual harassment where all but one provided direct testimony from individuals with first-hand knowledge, and the remaining affidavit, while hearsay, was not prejudicial because the Board received other affidavits to the same

effect and because a board may consider hearsay which provides background information helpful to understanding the matter before the Board.

7. Schools and Education— principal dismissal—evidence sufficient

There was substantial evidence in the whole record to support a school board dismissal of a principal for sexual harassment.

Appeal by petitioner from an order entered 26 January 2001 by Judge C. Preston Cornelius in Richmond County Superior Court. Heard in the Court of Appeals 20 February 2002.

Andresen & Associates, by Kenneth P. Andresen and Christopher M. Vann, for petitioner-appellant.

Schwartz & Shaw, P.L.L.C., by Richard Schwartz and Brian C. Shaw; George E. Crump, III, for respondent-appellee.

HUNTER, Judge.

Marcus Smith ("petitioner") appeals the superior court's order affirming the dismissal of petitioner by the Richmond County Board of Education ("the Board"). We affirm.

The pertinent facts and procedural history are as follows. As of June 2000, petitioner was the principal of the Leak Street School. By letter dated 20 June 2000, the Superintendent for Richmond County Schools, Dr. Larry K. Weatherly, notified petitioner that he was being suspended with pay as a result of allegations of sexual harassment and inappropriate conduct. Petitioner initially retained attorney Thomas M. Stern to represent him, and subsequently retained Donald E. Lewis, an attorney licensed to practice law in Pennsylvania but not in North Carolina. By letter dated 25 July 2000, and pursuant to the provisions of N.C. Gen. Stat. § 115C-325 (1999), Dr. Weatherly notified petitioner that he was being suspended without pay, and that Dr. Weatherly intended to recommend that petitioner be dismissed.

By letter dated 7 August 2000, petitioner requested a hearing before the Board. The hearing was scheduled for 18 August 2000. By letter dated 10 August 2000, Dr. Weatherly formally recommended to the Board that petitioner be dismissed. A copy of this letter was sent to attorney Lewis. Also by letter dated 10 August 2000, Dr. Weatherly, through his attorney Richard A. Schwartz, delivered to petitioner and

the Board all of the documentary evidence that Dr. Weatherly intended to present at the hearing before the Board.

By letter dated 15 August 2000, petitioner requested a continuance of the hearing until late September or early October. By order dated 16 August 2000, the Board denied the request for a continuance. Also in that order, the Board stated that it would not rule on any further motions by attorney Lewis until he complied with the requirements of N.C. Gen. Stat. § 84-4.1 (1999) regarding out-of-state attorneys practicing in North Carolina. By letter dated 18 August 2000, petitioner, through a third attorney, Derek G. Crawford, again requested a continuance, this time on the grounds that his brother was in intensive care, and that petitioner has "severe heart trouble" and had been directed by his doctor not to attend a hearing while his brother remained in intensive care. By order dated 18 August 2000, the Board agreed to continue the hearing until 24 August 2000.

On 21 August 2000, petitioner retained a fourth attorney, Kenneth P. Andresen. By letter dated 22 August 2000, petitioner requested an additional continuance for a period of thirty days in order to allow attorney Andresen to prepare for the hearing. By letter dated 24 August 2000, petitioner further requested that his case be referred to a case manager on the grounds that the Board would be unable to conduct a fair and impartial hearing because the Board had received and reviewed Dr. Weatherly's documentary material prior to the hearing, and also because one of the members of the Board had allegedly made a predetermination on the merits of the case prior to the hearing. By orders dated 24 August 2000, the Board denied the motion for an additional continuance, and denied the request that the case be referred to a case manager.

Following a hearing on 24 August 2000, the Board ordered that petitioner be immediately dismissed. On 22 September 2001, pursuant to subdivision (n) of N.C. Gen. Stat. § 115C-325, petitioner petitioned the Richmond County Superior Court for judicial review of the Board's dismissal. By order entered 26 January 2001, the superior court affirmed the Board's dismissal. Petitioner appeals.

On appeal, petitioner presents five arguments: (1) the Board erred in denying petitioner's 22 August 2000 motion to continue; (2) the Board's exposure to Dr. Weatherly's evidence against petitioner prior to the hearing constituted a violation of the applicable statute and a violation of his due process rights; (3) the Board erred by denying petitioner's request to have his case reviewed by a case manager;

(4) the Board erred by considering improper evidence; and (5) the Board's decision to dismiss petitioner was not supported by substantial evidence.

I. Standard of Review

[1] Judicial review of an appeal taken pursuant to N.C. Gen. Stat. § 115C-325(n) is governed by the standards set forth in N.C. Gen. Stat. § 150B-51 (1999) (formerly § 150A-51). *Faulkner v. New Bern-Craven Bd. of Educ.*, 311 N.C. 42, 49, 316 S.E.2d 281, 286 (1984). Pursuant to N.C. Gen. Stat. § 150B-51(b), the court, in reviewing a final agency 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 . . . in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b); *Air-A-Plane Corp. v. N.C. Dept. of E.H.N.R.*, 118 N.C. App. 118, 124, 454 S.E.2d 297, 301, *disc. review denied*, 340 N.C. 358, 458 S.E.2d 184 (1995). Where a petitioner alleges that an agency's decision is based upon an error of law, is in excess of the agency's statutory authority, was made upon unlawful procedure, or is in violation of constitutional provisions, the court must undertake a *de novo* review. *Air-A-Plane Corp.*, 118 N.C. App. at 124, 454 S.E.2d at 301. *De novo* review requires a court to consider a question anew, as if not considered or decided by the agency previously, and, in conducting a *de novo* review, the reviewing court "must make its own findings of fact and conclusions of law and cannot defer to the agency its duty to do so." *Jordan v. Civil Serv. Bd. of Charlotte*, 137 N.C. App. 575, 577, 528 S.E.2d 927, 929 (2000). Where, however, a petitioner alleges that an agency's decision is not sup-

ported by substantial evidence or is arbitrary and capricious, the court must review the "whole record" to determine if the agency's decision is supported by substantial evidence. *Id.*

> [O]nce the trial court has entered its order, should one of the parties appeal to this Court,
>
> "[o]ur task, in reviewing a superior court order entered after a review of a board decision is two-fold: (1) to determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review."

Id. (citation omitted). Here, the superior court stated in its order that it reviewed all of petitioner's assignments of error under the "whole record" test. However, some of petitioner's assignments of error should have been reviewed under a *de novo* standard of review. "We will employ the proper standard of review regardless of that employed by the reviewing trial court." *Souther v. New River Area Mental Health*, 142 N.C. App. 1, 4, 541 S.E.2d 750, 753, *affirmed*, 354 N.C. 209, 552 S.E.2d 162 (2001). Thus, in those instances in which the superior court improperly applied the "whole record" test rather than the *de novo* standard of review, we will employ the *de novo* standard of review.

II.

[2] Petitioner first challenges the Board's denial of his 22 August 2000 motion to continue. The superior court concluded that the Board did not err in denying the motion to continue. However, the superior court incorrectly applied the "whole record" test. This issue involves an allegedly unlawful procedure by the Board, and is therefore subject to a *de novo* review.

Petitioner was first formally notified of the allegations against him on 20 June 2000. On 25 July 2000, over a month later, petitioner was notified that Dr. Weatherly intended to recommend that he be dismissed. Petitioner elected to request "a hearing within 10 days before the board on the superintendent's recommendation." N.C. Gen. Stat. § 115C-325(h)(3). The hearing was scheduled for 18 August 2000, but, upon petitioner's request, the Board agreed to continue the hearing until 24 August 2000. By letter dated 22 August 2000, petitioner requested a second continuance for a period of thirty days in order to allow attorney Andresen to gather additional evidence which petitioner alleged was "critical to a fair and proper presentation" of his

case. However, petitioner did not identify any particular evidence which might be critical to his case, nor did he provide any explanation for why such evidence had not already been gathered during the period of more than two months since petitioner had first been notified about the allegations against him.

In his brief to this Court, petitioner argues that the denial of the motion to continue prevented him from obtaining "an affidavit from his physician" stating that petitioner "was impotent" during the relevant period of time and that the alleged sexual conduct by petitioner "was impossible or extremely unlikely." Petitioner further contends that "[a]n affidavit from Petitioner's doctor could have been obtained quickly with no prejudice to the Superintendent."

Petitioner had over two months to obtain any evidence that he believed would be crucial to his case, and he was represented by at least four different attorneys during this time. Petitioner voluntarily elected to request a hearing before the Board within ten days, and his first request for a continuance was granted by the Board, allowing petitioner an additional six days to prepare for the hearing. Petitioner's subsequent 22 August 2000 motion for a continuance did not identify any particular evidence which he had been unable to obtain, or provide any explanation for why he had been unable to obtain certain evidence. Petitioner now alleges he could have obtained an affidavit from his physician regarding his impotence if given more time; however, petitioner's acknowledgment that such an affidavit could have been "obtained quickly" undermines his argument by emphasizing his failure to do so prior to the 22 August 2000 motion. We also note that petitioner did submit to the Board for its consideration his own affidavit and an affidavit from his wife alleging facts related to his impotence and, therefore, was not prevented from arguing the facts of his impotence to the Board as a defense to the sexual harassment allegations against him. For these reasons, we affirm the superior court's conclusion that the Board did not err in denying petitioner's 22 August 2000 motion to continue.

III.

[3] Petitioner next argues that the Board's exposure to Dr. Weatherly's evidence against petitioner prior to the hearing constituted a violation of the applicable statute and a violation of his due process rights. The superior court rejected this argument but incorrectly applied the "whole record" test. This issue is subject to a *de novo* review.

The hearing was originally scheduled for 18 August 2000. On 10 August 2000, Dr. Weatherly, through attorney Schwartz, delivered to petitioner and to the Board all of the documentary evidence that Dr. Weatherly intended to present at the hearing. The hearing was ultimately held on 24 August 2000. Petitioner argues that the fact that the Board was exposed to Dr. Weatherly's evidence fourteen days prior to the hearing constitutes a violation of the applicable statute and a violation of petitioner's due process rights. The superior court found that the procedure was not in violation of the statute and concluded that petitioner's due process rights were not violated.

N.C. Gen. Stat. § 115C-325(j2) governs the procedures of a "hearing conducted by the board," and provides that, in cases where there has been no prior review by a case manager,

> the board shall receive the following:
>
> a. Any documentary evidence the superintendent intends to use to support the recommendation. The superintendent shall provide the documentary evidence to the career employee seven days before the hearing.
>
> b. Any documentary evidence the career employee intends to use to rebut the superintendent's recommendation. The career employee shall provide the superintendent with the documentary evidence three days before the hearing.
>
> c. The superintendent's recommendation and the grounds for the recommendation.

N.C. Gen. Stat. § 115C-325(j2)(3). Petitioner interprets the statute as prohibiting a board from receiving evidence from either party at any time prior to the hearing itself. The Board argues that other portions of the statute indicate a clear legislative intent that a board is to receive evidence from both parties prior to the hearing. For example, the Board quotes only the first part of N.C. Gen. Stat. § 115C-325(j2)(6) ("[n]o new evidence may be presented at the hearing . . .") and argues that, if no new evidence may be presented at the hearing, then the intention is that the evidence is to be presented to a board prior to the hearing. However, (j2)(6) in its entirety states:

> No new evidence may be presented at the hearing except upon a finding by the board that the new evidence is critical to the matter at issue *and the party making the request could not,*

with reasonable diligence, have discovered and produced the evidence at the hearing before the case manager.

N.C. Gen. Stat. § 115C-325(j2)(6) (emphasis added). This section clearly applies only where a case has already been heard by a case manager prior to the hearing before the Board, and, in this context, "new evidence" clearly refers to any evidence that was not previously considered by the case manager.

Unlike petitioner and the Board, our reading of the entire statute leads us to the conclusion that the statute is, in fact, silent on whether the Board should receive evidence from either party at any time prior to the hearing. Therefore, we are not persuaded by petitioner's argument that the Board's exposure to Dr. Weatherly's evidence prior to the hearing constitutes a violation of the statute.

Petitioner further argues that his due process rights were violated because the Board received Dr. Weatherly's documentary evidence fourteen days prior to the hearing and did not receive petitioner's documentary evidence until the day of the hearing. Again, we disagree. This Court has previously addressed in detail the due process implications in cases where members of a board are exposed to facts about a case prior to the hearing.

> Our Supreme Court has noted that "[a]n unbiased, impartial decision-maker is essential to due process." Bias has been defined as "a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction." "Bias can refer to preconceptions about facts, policy or law; a person, group or object; or a personal interest in the outcome of some determination." However, in order to prove bias, it must be shown that the decision-maker has made some sort of commitment, due to bias, to decide the case in a particular way.
>
> . . .
>
> Our Supreme Court has recognized that prior knowledge and discussion of the facts relating to a given adjudicatory hearing are inevitable aspects of the multi-faceted roles which Board members play. As long as Board members are able to set aside their prior knowledge and preconceptions concerning the matters at issue, and to base their considerations solely upon the evidence presented during the hearing, constitutionally impermissible bias does not exist.

Evers v. Pender County Bd. of Education, 104 N.C. App. 1, 15-16, 407 S.E.2d 879, 887 (1991) (citations omitted), *affirmed*, 331 N.C. 380, 416 S.E.2d 3 (1992). In *Evers*, the plaintiff contended that "both rumors and prehearing communications between the superintendent and the Board infected the Board and caused it to develop a preconceived notion of plaintiff's guilt of the actions alleged." *Id.* at 15, 407 S.E.2d at 887. Relying upon *Crump v. Bd. of Education*, 326 N.C. 603, 392 S.E.2d 579 (1990), this Court reiterated that "mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of Board members at a later adversary hearing," and concluded that the plaintiff had failed to show how the Board may have been biased by either the "rumors" or the prehearing communications between the superintendent and the Board. *Evers*, 104 N.C. App. at 18, 407 S.E.2d at 888. Moreover, "because of their multi-faceted roles as administrators, investigators and adjudicators, school boards are vested with a presumption that their actions are correct, and the burden is on a contestant to prove otherwise." *Crump*, 326 N.C. at 617, 392 S.E.2d at 586 (citing N.C. Gen. Stat. § 115C-44 (1987)).

In the present case, fourteen days prior to the hearing, Dr. Weatherly sent all of the documentary evidence he intended to use against petitioner to each individual member of the Board. This very same evidence was ultimately presented to the Board at the hearing. Although petitioner failed to "provide the superintendent with [petitioner's] documentary evidence three days before the hearing," as required by N.C. Gen. Stat. § 115C-325(j2)(3)(b), the Board nevertheless admitted and considered all of petitioner's documentary evidence at the hearing. There is no indication in the record that, as a result of receiving Dr. Weatherly's documentary evidence prior to the hearing, individual members of the Board entered the hearing with a commitment to decide the case against petitioner. Moreover, we find no reason to presume that members of the Board, presented with the superintendent's documentary evidence (which would later be admitted at the hearing) would be unable to refrain from reaching a conclusion as to petitioner's guilt merely because of a lapse of time (fourteen days) between exposure to the superintendent's evidence and exposure to petitioner's evidence. We hold that petitioner has failed to show how the Board may have been biased by exposure to Dr. Weatherly's documentary evidence prior to the hearing, and therefore affirm the superior court's conclusion that petitioner's due process rights were not violated.

IV.

[4] Petitioner next argues that the Board erred in denying his request to have his case heard by a case manager. The superior court rejected this argument but incorrectly applied the "whole record" test. This issue involves an allegedly unlawful procedure by the Board, and is therefore subject to a *de novo* review.

N.C. Gen. Stat. § 115C-325(h) provides that a superintendent must give written notice to an employee of his intention to recommend dismissal of the employee, and that within fourteen days after receipt of the notice, the employee may file with the superintendent a written request for either (1) a hearing by a case manager, or (2) a hearing (within 10 days) before the Board. N.C. Gen. Stat. § 115C-325(h)(2) and (3). The statute further states that "[i]f the career employee requests an immediate hearing before the board, he forfeits his right to a hearing by a case manager." N.C. Gen. Stat. § 115C-325(h)(3).

Here, by letter dated 25 July 2000, Dr. Weatherly notified petitioner that he intended to recommend that petitioner be dismissed, and, by letter dated 7 August 2000, petitioner requested a hearing before the Board. Thus, petitioner forfeited his right to a hearing by a case manager. We affirm the trial court's conclusion that the Board did not commit error by denying petitioner's motion to remand the case to a case manager.

V.

Petitioner next argues that the Board erred by admitting and considering certain evidence. We disagree.

The procedures prescribed by statute " 'for the dismissal of a career teacher are essentially administrative rather than judicial' " in nature, and the Board " 'is not bound by the formal rules of evidence which would ordinarily obtain in a proceeding in a trial court.' " *Crump*, 326 N.C. at 621, 392 S.E.2d at 589 (citation omitted). In considering the dismissal of an employee, it is proper for a board to consider and rely upon any evidence "that is of a kind commonly relied on by reasonably prudent persons in the conduct of serious affairs." N.C. Gen. Stat. § 115C-325(j3)(4); *Evers*, 104 N.C. App. at 18, 407 S.E.2d at 889. Moreover, even the introduction of incompetent evidence is not prejudicial in an administrative proceeding so long as there is other sufficiently competent evidence to support the material findings of the administrative agency. *See Campbell v. Board of Alcoholic Control*, 263 N.C. 224, 225, 139 S.E.2d 197, 199 (1964).

Petitioner first contends that it was improper for the Board to admit and consider: (1) the affidavit testimony of Dr. Weatherly that, in his opinion, petitioner was guilty of the sexual harassment allegations against him; and (2) the affidavit testimony of Dr. Weatherly and Dr. Jimmie Smith, the Assistant Superintendent of Human Resources for the Richmond County School System, that, in their opinions, two victims of the alleged sexual harassment, Ms. Kirkcaldy and Ms. Peek, were telling the truth in their allegations regarding petitioner.

[5] In order for a superintendent to initially recommend the dismissal of an employee, the statutory scheme implicitly requires that the superintendent must first conclude that the allegations and evidence of the employee's misconduct are credible, and that the employee likely engaged in the alleged misconduct. *See* N.C. Gen. Stat. § 115C-325(h)(2) (requiring the superintendent to "set forth as part of his recommendation the grounds upon which he believes such dismissal or demotion is justified"). The superintendent's personal beliefs on these issues are, therefore, necessarily implied in the fact that the superintendent has recommended the employee's dismissal. We are not persuaded that the express declaration of such beliefs appearing in the documentary evidence submitted to the Board amounts to the admission and consideration of improper evidence.

[6] Petitioner also contends that it was improper for the Board to admit and consider four particular affidavits. Linwood Huffman is currently the principal of Rockingham Junior High School, where petitioner was previously employed as an assistant principal. In his affidavit, Mr. Huffman provided only hearsay testimony that several female teachers at the school had told him that petitioner had made inappropriate comments to them, and that petitioner "aggressively approaches women in a sexual manner and makes them feel extremely uncomfortable." Robbie James, who was a teacher at Rockingham Junior High School while petitioner was the assistant principal, averred that petitioner had sexually harassed her, that he had asked her to hug him several times, that he constantly watched her, and that petitioner's presence made her "extremely uncomfortable." Amy Kesler, also a teacher at petitioner's former school, averred that petitioner had asked her to "get a beer or go out to a club" with him at least five or six times, and that these requests made her "very uncomfortable." Chasity Bledsoe, who worked as petitioner's secretary in July of 1999, averred that petitioner's persistent comments about her attractiveness made her so "extremely uncomfortable" that she resigned after only six days.

We do not believe the Board erred in admitting and considering the affidavits from James, Kesler, or Bledsoe, as these affidavits provided direct testimony from individuals who had first-hand knowledge of incidents bearing upon the various grounds alleged by the superintendent to support his recommendation that petitioner be dismissed. Furthermore, although Huffman's affidavit provided what would be considered hearsay evidence, we do not believe admission of this affidavit was prejudicial. In the first place, a board may properly consider hearsay evidence where such evidence provides background information that assists the board in understanding the matter before it. *See Baxter v. Poe*, 42 N.C. App. 404, 410, 257 S.E.2d 71, 75, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 298 (1979). Furthermore, "[t]he admission of incompetent testimony will not be held prejudicial when its import is abundantly established by other competent testimony, or the testimony is merely cumulative or corroborative." *Board of Education v. Lamm*, 276 N.C. 487, 493, 173 S.E.2d 281, 285 (1970). Here, in addition to the affidavits of James, Kesler, and Bledsoe, alleging various incidents of sexual harassment and inappropriate behavior by petitioner, the Board received affidavits from Sharon Peek, Bonnie Lisenby, and Elizabeth Kirkcaldy, all alleging various incidents of sexual harassment by petitioner. We conclude that the Board did not commit prejudicial error in admitting and considering this evidence.

VI.

[7] Finally, petitioner contends that the Board's decision is not supported by substantial evidence. The superior court correctly applied the "whole record" test, *see Jordan*, 137 N.C. App. at 577, 528 S.E.2d at 929, and determined that the Board's decision was supported by substantial evidence. We believe the superior court correctly applied this scope of review.

> The "whole record" test does not allow the reviewing court to replace the Board'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*. On the other hand, the "whole record" rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result, without taking

into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Thompson v. Board of Education, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citations omitted). We have carefully reviewed the "whole record" and hold that the Board's decision is supported by substantial evidence. The superintendent presented affidavits from three individuals who were employed at the Leak Street School while petitioner was the principal. Bonnie Lisenby averred that petitioner sexually harassed her by asking her to leave school to meet him, by saying to her, "[y]ou know you want it," and by rubbing himself against her. Sharon Peek averred that petitioner sexually harassed her by propositioning her for sex on numerous occasions, by asking her, "[d]o you want me?", by pressing his body against her, by unzipping his pants in front of her, and by touching her buttocks. Elizabeth Kirkcaldy averred that petitioner made sexual advances toward her, touched her, made sexually explicit comments to her, tried to kiss her, pressed his aroused penis against her, and propositioned her for sex.

The affidavits offered by petitioner provided testimony primarily seeking to impugn these three individuals by attacking their competency at work, by castigating their character (describing them as "flirty," "conniving," and "nasty"), by alleging that they dressed "inappropriately" and wore short skirts and "skimpy" tops, and by alleging they were "man-hater[s]" and "did not like men." The individuals providing affidavits for petitioner sought to portray petitioner as an honest and professional man, and alleged that they had not ever personally witnessed any inappropriate behavior by petitioner. We hold that there was substantial evidence to support the Board's decision to dismiss petitioner.

For the reasons stated herein, we affirm the superior court's conclusions on the various issues raised by petitioner, and we thereby affirm the Board's dismissal of petitioner.

Affirmed.

Judges WALKER and BRYANT concur.

BENJAMIN S. HORACK, JR., PLAINTIFF v. SOUTHERN REAL ESTATE COMPANY OF CHARLOTTE, INC., LOUIS L. ROSE, JR., AND STEPHEN M. PATTERSON, DEFENDANTS

No. COA01-79

(Filed 21 May 2002)

1. **Brokers— wage and hour claim—commercial real estate broker—no evidence of employment after resignation**

The trial court properly granted defendant Southern Real Estate Company's (SRE's) motion for directed verdict on a Wage and Hour Act claim arising from a dispute over the commission for a commercial real estate transaction completed after plaintiff-realtor left defendant's employment where there was a reasonable inference of an agreement concerning the transaction, but no evidence that plaintiff was an employee of defendant after he resigned.

2. **Unfair Trade Practices— payment of commercial real estate commission—evidence of contract, not unfair practice**

Defendants' motion for a directed verdict was properly granted on an unfair and deceptive trade practices claim which arose from a dispute over payment of a commercial real estate commission for a transaction which closed after plaintiff left defendant's employment. The actions of defendants, if true, amount to a breach of contract instead of an unfair or deceptive trade practice.

3. **Quantum Meruit— commercial real estate commission—broker not procuring cause of sale**

The trial court properly granted a directed verdict for defendant real estate agency on a quantum meruit claim arising from a commercial real estate commission for a transaction which closed after plaintiff left defendant's employ where plaintiff presented no evidence of anything other than an express contract and plaintiff's participation in the transaction did not amount to evidence that he was the procuring cause of the sale.

4. **Brokers— commercial real estate brokers—dispute over commission—no representations reasonably relied upon**

The trial court did not err by granting motions for directed verdicts on fraud claims against other commercial real estate brokers arising from a disputed commission for a transaction which

closed after plaintiff broker had left the agency. There were no misrepresentations by defendant Rose because plaintiff testified that he did not communicate with Rose between the parties' last meeting about plaintiff's pending deals and the time the transaction closed, and, if the other broker made any misrepresentations, plaintiff could not have reasonably relied upon them because plaintiff was a former manager and 22 year employee of the agency and this defendant was a new broker with no authority to determine commission payments.

Judge GREENE dissenting.

Appeal by plaintiff from orders entered that ultimately resulted in a judgment filed 19 September 2000 by Judge James E. Lanning in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 November 2001.

Weaver, Bennett & Bland, P.A., by Michael D. Bland and Joseph T. Copeland, for plaintiff-appellant.

Moore & Van Allen, PLLC, by Gregory J. Murphy and Scott M. Tyler, for defendant-appellees.

CAMPBELL, Judge.

Plaintiff appeals from orders entered in Mecklenburg County Superior Court by Judge James E. Lanning ("Judge Lanning") granting defendants' motions for directed verdict against plaintiff's claims: (I) under the North Carolina Wage and Hour Act; (II) under the North Carolina Unfair and Deceptive Trades Practices Act; (III) for *quantum meruit*; and (IV) for fraud against defendant Louis L. Rose, Jr. ("Rose") and defendant Stephen M. Patterson ("Patterson") individually. We affirm.

Plaintiff was employed by defendant Southern Real Estate Company of Charlotte, Inc. ("SRE") between 1973 and 1995 as a commercial real estate broker. From 1986 to 1991, plaintiff acted as sales manager of SRE. Patterson was also employed as a commercial real estate broker with SRE from 1995 to 1999. Rose was president of SRE during plaintiff's and Patterson's employment with the company.

In 1985, SRE instituted a company policy manual ("manual"). On 23 August 1990, a new page ("Page 8B") was added to this manual. Page 8B provided, in part, that:

> [T]he broker when leaving [SRE] will register with the Sales Manager the potential sales he feels that are active and where he should be a participant in the commission. This registration will be in writing and signed by both the leasing broker and Sales Manager. After they have agreed on those potential sales, this listing will be binding on both for 90 days from the date of the listing by both the leasing broker and the Sales Manager.

Plaintiff was aware of Page 8B and even referred to it in a memorandum he wrote while acting as SRE's sales manager. However, plaintiff did not believe Page 8B applied to him because he was never given a copy of it as part of his policy manual. (At trial, defendants presented a 13 February 1985 memorandum that stated each employee is "required to keep [his or her copy of the manual] updated as corrections, additions or deletions are distributed.")

On 3 November 1994, SRE obtained a commercial real estate listing from Dixie Yarn, Inc. ("Dixie"), which gave SRE the exclusive right to list and market Dixie's 144 acre tract ("the Dixie property") in Mount Holly, North Carolina for nine months. Rose assigned plaintiff to be the listing agent for the Dixie property. In June of 1995, Squires Enterprises, Inc. ("Squires") was brought forward as a potential buyer for the Dixie property by Patterson, the buyer's agent for Squires. Plaintiff and Patterson began working together to try to close the deal between Dixie and Squires.

The nine-month listing agreement between Dixie and SRE expired on 3 August 1995. Squires did not make an offer to purchase the Dixie property prior to the expiration of the listing. Therefore, plaintiff sought to obtain an extension of the listing from Dixie, but Dixie chose not to re-list the property until it had determined whether Squires was actually going to make the purchase.

On 30 August 1995, plaintiff submitted his letter of resignation from SRE to Rose. As required by Page 8B, this letter listed the Dixie/Squires transaction as one plaintiff expected to participate in after he left SRE. On 6 September 1995, plaintiff met with Rose and Patterson to discuss the pending deals he had been working on for SRE, including the Dixie/Squires transaction. There is a dispute as to what transpired at this meeting. According to plaintiff, he made a separate agreement with SRE whereby he would continue to represent Dixie in its negotiations with Squires after his resignation, but Patterson would represent Dixie as to any other potential buyers. Rose and Patterson denied that a separate agreement was made.

Nevertheless, all parties agreed that during the meeting plaintiff was never told that Page 8B's ninety-day rule did not apply to him.

After plaintiff resigned from SRE, Patterson obtained a written renewal of the Dixie listing on 12 September 1995; thus, making him both the listing agent and the buyer's agent in the Dixie/Squires transaction. The Dixie listing was again renewed by Patterson on 19 June 1996. Although plaintiff was no longer labeled as Dixie's listing agent, he continued to be copied on several documents about the transaction at least up until the conclusion of the ninety-day period following his resignation. When the contract of sale between Dixie and Squires was signed in March of 1996 (more than six months after plaintiff's resignation), Patterson honored plaintiff's request to send him a copy of the contract. Plaintiff had no contact with Rose between the date of his resignation and the signing of the contract of sale.

The Dixie/Squires transaction closed on 18 December 1996, more than fifteen months after plaintiff resigned from SRE. SRE's commission on the transaction was $160,606.98. Upon learning of the closing, plaintiff informed SRE that he was entitled to the twenty-five percent commission allocated to the listing agent. SRE informed plaintiff that Patterson had already received the listing agent's portion of the commission because his renewal of the Dixie listing had made him both the listing agent and the buyer's agent. SRE also stated that Page 8B's ninety-day rule barred plaintiff's entitlement to a commission. However, as a good faith gesture, Patterson offered plaintiff $10,000.00 from his share of the commission. Plaintiff refused this amount.

Thereafter, plaintiff filed a complaint against defendants asserting claims against defendant SRE under the Wage and Hour Act and for *quantum meruit*, and claims against all three defendants under the Unfair and Deceptive Trades Practices Act and for fraud. Plaintiff's complaint did not include a claim for breach of contract. At the close of plaintiff's evidence on 29 August 2000, the trial court granted directed verdict on plaintiff's Wage and Hour Act claim against SRE, his fraud claims against both Rose and Patterson, and plaintiff's Unfair and Deceptive Trade Practices Act claim against all three defendants. At the close of all the evidence, the court granted directed verdict on plaintiff's *quantum meruit* claim against SRE. Plaintiff's fraud claim against SRE was allowed to go to the jury. On 31 August 2000, the jury unanimously found that SRE was not liable

to plaintiff for fraud. The court's judgment reflecting the jury verdict was filed on 19 September 2000. Plaintiff appeals the orders granting defendants' motions for directed verdict.

Plaintiff argues the trial court erred in granting defendants' motions for directed verdict. We disagree.

"A motion for directed verdict tests the sufficiency of the evidence to take [a] case to the jury." *Abels v. Renfro Corp.*, 335 N.C. 209, 214, 436 S.E.2d 822, 825 (1993). It is appropriately granted only when by looking at the evidence in the light most favorable to the non-movant, and giving the non-movant the benefit of every reasonable inference arising from the evidence, the evidence is insufficient for submission to the jury. *Streeter v. Cotton*, 133 N.C. App. 80, 514 S.E.2d 539 (1999). A trial court's decision to grant or deny a motion for directed verdict should not be disturbed absent an abuse of discretion. *G.P. Publications, Inc. v. Quebecor Printing-St. Paul, Inc.*, 125 N.C. App. 424, 481 S.E.2d 674 (1997).

Plaintiff brings forth four assignments of error in the case *sub judice*. For the following reasons, we affirm the trial court's orders granting defendants' motions for directed verdict.

I: Wage and Hour Act

[1] In plaintiff's first assignment of error, he argues the trial court erred in granting defendant SRE's motion for directed verdict on his Wage and Hour Act claim. We disagree.

The Wage and Hour Act was enacted to safeguard the hours worked by and the wages paid to "the people of the State without jeopardizing the competitive position of North Carolina business and industry." N.C. Gen. Stat. § 95-25.1(b) (2001). An employee or the Commissioner of Labor may bring suit against an employer for violations of this act. *Laborers' Int'l Union of North America, AFL-CIO v. Case Farms, Inc.*, 127 N.C. App. 312, 315, 488 S.E.2d 632, 634 (1997). Under the Wage and Hour Act, an "employee" is defined as "any individual employed by an employer." § 95-25.2(4). Additionally, in determining whether an individual is an "employee," our state considers factors such as: (1) the degree of control the alleged employer exerted over the person; and (2) the permanency of the relationship between the person and the alleged employer. *See Laborers'*, 127 N.C. App. at 314, 488 S.E.2d at 634; *Thomas v. Brock*, 617 F. Supp. 526, 534 (W.D.N.C. 1985), *aff'd in part, modified in part and remanded*, 810 F.2d 448 (4th Cir. 1987).

When looking at the evidence in the light most favorable to plaintiff, there is a reasonable inference that a separate agreement between the parties was made as a result of their 6 September meeting. However, there is no evidence to support plaintiff's contention that he was an employee of SRE after he resigned from the company. The separate agreement between plaintiff and SRE was entered into after plaintiff resigned. Following his resignation, plaintiff was to participate only in the Dixie/Squires transaction, providing services directly to Dixie and not SRE. This is further evinced by plaintiff having no contact with Rose during the fifteen-month negotiation period between Dixie and Squires. Plaintiff's limited and virtually non-existent relationship with Rose (and Dixie) during this period fails to prove SRE exerted control over any aspect of plaintiff's employment after 6 September 1995, especially considering plaintiff started his own real estate company following his resignation. Thus, the trial court properly granted defendant SRE's motion because plaintiff was not an "employee" of SRE. At most, plaintiff's role in the Dixie/Squires transaction was that of an independent contractor.

II: Unfair and Deceptive Trades Practices Act

[2] In plaintiff's second assignment of error, he argues the trial court erred in granting defendants' motions for directed verdict on his Unfair and Deceptive Trades Practices Act claim. We disagree.

Chapter 75 of our statutes establishes an action for unfair or deceptive practices or acts in or affecting commerce. *See Strickland v. A & C Mobile Homes*, 70 N.C. App. 768, 321 S.E.2d 16 (1984); N.C. Gen. Stat. § 75-1.1 (2001). Our case law has held that "[a] practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers . . . . [A] practice is deceptive if it has the capacity or tendency to deceive; proof of actual deception is not required." *Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981) (citations omitted).

It is also well recognized by our state that actions for unfair or deceptive trade practices are distinct from actions for breach of contract. *Lapierre v. Samco Development Corp.*, 103 N.C. App. 551, 559, 406 S.E.2d 646, 650 (1991). Thus, "[a] mere breach of contract does not constitute an unfair or deceptive trade practice." *Mosley v. Mosley Builders v. Landin Ltd.*, 97 N.C. App. 511, 518, 389 S.E.2d 576, 580 (1990) (citation omitted). "[A] plaintiff must show substantial aggravating circumstances attending the breach to recover under the

Act, which allows for treble damages." *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989) (citation omitted). *See also Branch Banking and Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992).

By inferring that there was a separate agreement between the parties in the case *sub judice*, the actions of defendants, if found to be true, amount to a breach of contract instead of an unfair or deceptive trade practice. Essentially, plaintiff attempted to establish an unfair or deceptive trade practice by offering evidence of a note in Patterson's file stating: "Also, per [Rose], low profile with Dixie and [Dixie's counsel] regarding [plaintiff]. [SRE] is the agent, any obligation is through us." However, this note and the other purported "aggravating circumstances" offered into evidence, none of which were substantial, lack the sufficiency needed to allow submission of an unfair or deceptive trade practice claim to a jury. The trial court may have found there was sufficient evidence to allow a claim for breach of contract to go to the jury, assuming plaintiff had made a breach of contract claim, but plaintiff failed to plead such a claim in his complaint. Therefore, defendants' motion for directed verdict was properly granted.

III: *Quantum Meruit*

[3] In plaintiff's third assignment of error, he argues the trial court erred in granting defendant SRE's motion for directed verdict on his *quantum meruit* claim. We disagree.

In order to prevent unjust enrichment, a plaintiff may recover in *quantum meruit* on an implied contract theory for the reasonable value of services rendered to and accepted by a defendant. *See Ellis Jones, Inc. v. Western Waterproofing Co.*, 66 N.C. App. 641, 647, 312 S.E.2d 215, 218 (1984). However, "[i]t is a well established principle that an express contract precludes an implied contract with reference to the same matter." *Concrete Co. v. Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962). Therefore, *quantum meruit* "is not an appropriate remedy when there is an actual agreement between the parties." *Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 414 (1998).

In the instant case, plaintiff presented no evidence of anything other than that he and defendants had entered into an express contract with regard to the Dixie/Squires transaction. Although he pled no claim specifically alleging breach of this express contract, all of

his claims alluded to this contract, including his fraud claim which went to the jury based on alleged fraudulent breach of the express contract. Having presented evidence only of an express contract, plaintiff may not now successfully contend that the trial court erred in granting defendant SRE's motion for a directed verdict on the *quantum meruit* claim.

Even if we were to find that there was sufficient evidence to show that any express contract (assuming one in fact existed) was abandoned or relinquished, plaintiff still did not produce evidence which would enable him to go to the jury on *quantum meruit*. Plaintiff's work while employed at SRE is not to be confused with his being the procuring cause of the sale of the property. A real estate broker is entitled to a commission as the procuring cause if the sale of the property "is the direct and proximate result of his efforts or services[.]" *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 251, 162 S.E.2d 486, 491 (1968). Here, despite plaintiff's active role in the transaction during the three months prior to his resignation, plaintiff's participation did not amount to evidence that he was the procuring cause of the sale. The evidence clearly showed that plaintiff did not (1) obtain the Dixie listing, (2) bring Squires forward as a potential buyer, or (3) participate in the Dixie/Squires negotiations that took place throughout the entire year following his resignation from SRE. Even making the above assumptions and taking the evidence in a light most favorable to plaintiff, his "efforts" nevertheless fall short of being the procuring cause of the sale.

Accordingly, defendant SRE's motion for directed verdict on plaintiff's *quantum meruit* claim was properly granted.

IV: Fraud

[4] In plaintiff's fourth assignment of error, he argues the trial court erred in granting defendants' motions for directed verdict on his fraud claims against both Rose and Patterson. In particular, plaintiff argues that since Rose and Patterson were acting as agents of SRE, the trial court committed reversible error when it dismissed the fraud claims against them, but allowed the fraud claim against SRE to go to the jury. Defendants Rose and Patterson agree that it is logically impossible to allow only the SRE fraud claim to go to the jury. *See Baker v. Rushing*, 104 N.C. App. 240, 247, 409 S.E.2d 108, 112 (1991) (holding "[i]t is well settled in North Carolina that a person is personally liable for all torts committed by him, notwithstanding that he may have acted as an agent for another or as an officer for a corpo-

ration."). However, defendants argue the trial court's error was harmless because there is no evidence to support fraud claims against Rose and Patterson. We agree.

The essential elements of the tort of fraud are as follows:

> (1) material misrepresentation of a past or existing fact; (2) the representation must be definite and specific; (3) made with knowledge of its falsity or in culpable ignorance of its truth; (4) that the misrepresentation was made with intention that it should be acted upon; (5) that the recipient of the misrepresentation reasonably relied upon it and acted upon it; and (6) that [thereby] resulted in damage to the injured party.

Rosenthal v. Perkins, 42 N.C. App. 449, 451-52, 257 S.E.2d 63, 65 (1979). Concealment of a material fact may also constitute a misrepresentation for the purposes of a fraud claim. *See Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974).

In the present case, there were obviously no misrepresentations made by Rose to plaintiff because plaintiff testified he did not communicate with Rose following their 6 September meeting until a month after the Dixie/Squires transaction closed. Additionally, if Patterson made any misrepresentations, plaintiff, a former manager and twenty-two year employee of SRE, could not have reasonably relied upon them because Patterson had no authority to determine commission payments as a new broker with SRE. Having failed to support this first element of fraud, plaintiff's fraud claims against Rose and Patterson were properly dismissed.

However, even if there had been any misrepresentation or concealment by Rose and Patterson, the evidence offered by plaintiff failed to establish that it was definite and specific. There was no evidence detailing the terms of plaintiff's commission on the Dixie/Squires transaction under the alleged separate agreement, especially those terms concerning the amount of that commission. At best, defendants Rose and Patterson promised that plaintiff would receive a commission; a promise that Patterson kept by offering plaintiff $10,000.00. Thus, there was no abuse of discretion by the trial court with respect to the fraud claims.

For the aforementioned reasons, we find that the trial court properly granted defendants' motions to dismiss plaintiff's claims.

Affirmed.

Judge McCULLOUGH concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting in part.

As I believe the evidence, viewed in the light most favorable to plaintiff, establishes substantial evidence to support his *quantum meruit* claim, I dissent. I otherwise fully concur in the remainder of the majority opinion.

Standard of Review

On appeal from a directed verdict, this Court must determine whether there is substantial evidence of each essential element of a plaintiff's claim. *Cobb v. Reitter*, 105 N.C. App. 218, 220, 412 S.E.2d 110, 111 (1992). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). In deciding a defendant's motion for a directed verdict, the trial court must consider the evidence "in the light most favorable to the plaintiff, including evidence elicited from the defendant favorable to the plaintiff," *Environmental Landscape Design Specialist v. Shields*, 75 N.C. App. 304, 305, 330 S.E.2d 627, 628 (1985), and resolve "all inconsistences, contradictions and conflicts for [the plaintiff], giving [the plaintiff] the benefit of all reasonable inferences drawn from the evidence," *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 177 (1990).

Elements

In order to prevent unjust enrichment, "[q]*uantum meruit* operates as an equitable remedy based upon a quasi contract or a contract implied in law, such that a party may recover for the reasonable value of materials and services rendered." *Data Gen. Corp. v. County of Durham*, 143 N.C. App. 97, 103, 545 S.E.2d 243, 248 (2001). To recover in *quantum meruit*, a plaintiff must show: "(1) services were rendered to [the] defendants; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously." *Shields*, 75 N.C. App. at 306, 330 S.E.2d at 628. In addition, there can be no recovery for *quantum meruit* if there is an express contract governing the same subject matter. *Barrett Kays & Assoc., P.A. v. Colonial Bldg. Co., Inc. of Raleigh*, 129 N.C. App. 525, 529, 500 S.E.2d 108, 111 (1998). When applying *quantum meruit* to real estate trans-

actions, a plaintiff is entitled to recover a commission if he procures a party who actually contracts to purchase the property. *See Sessler v. Marsh*, 144 N.C. App. 623, 629-30, 551 S.E.2d 160, 164, *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001).

Express Contract

Defendants allege plaintiff's *quantum meruit* claim is barred by the existence of an express contract.

I agree with the majority that if an express contract exists, *quantum meruit* is not appropriate. This proposition, however, is conditioned on the existence of an express contract. *See Barrett Kays*, 129 N.C. App. at 529, 500 S.E.2d at 111. Even assuming an express contract exists, it "may be abandoned or relinquished: (1) by agreement between the parties; (2) by conduct clearly indicating such purpose; [or] (3) by the substitution of a new contract inconsistent with the existing contract." *Bixler v. Britton*, 192 N.C. 199, 201, 134 S.E. 488, 489 (1926).

In this case, viewing all the evidence in the light most favorable to plaintiff on his *quantum meruit* claim, there is substantial evidence an express contract covering the Dixie/Squires transaction did not exist. While there is a conflict in the evidence as to the existence of an express contract, this conflict must be resolved in favor of plaintiff. Even if there were no substantial evidence that an express contract existed, there is substantial evidence that any contract that did exist either was abandoned or relinquished. The parties' conduct, including Rose and Patterson having already decided prior to the closing of the Dixie/Squires transaction that plaintiff would not be paid a 25% listing commission, leads to an inference that the contract was abandoned or relinquished by the parties' conduct. *See id.*

Procuring Cause

Because I believe there is substantial evidence no express contract exists covering the Dixie/Squires transaction, I address whether there was substantial evidence plaintiff was the "procuring cause" of the transaction.

"The general rule is that a broker is entitled to a commission 'whenever he procures a party who actually contracts for the purchase of the property at a price acceptable to the owner.' " *Sessler*, 144 N.C. App. at 629-30, 551 S.E.2d at 164 (quoting *Realty Agency, Inc. v. Duckworth & Shelton, Inc.*, 274 N.C. 243, 250-51, 162 S.E.2d

486, 491 (1968)). A "broker is the procuring cause if the sale is the direct and proximate result of his efforts or services," *Duckworth*, 274 N.C. at 251, 162 S.E.2d at 491, and he sets " 'in motion a series of events which, *without break in their continuity*' lead to the procurement of a purchaser who is ready, willing and able to purchase the property," *Sessler*, 144 N.C. App. at 633, 551 S.E.2d at 166 (citation omitted). Thus, it is the broker's "procurement of 'a party who actually contracts for the purchase of the property,' which determines entitlement to a realtor's commission." *Collins v. Ogburn Realty Co., Inc.*, 49 N.C. App. 316, 320, 271 S.E.2d 512, 515 (1980) (citation omitted).

In this case, viewing the evidence in the light most favorable to plaintiff, there is substantial evidence plaintiff was the procuring cause of the Dixie/Squires transaction. Initially, plaintiff evaluated the property to determine if SRE's listing of the Dixie property would be a profitable transaction. In addition, plaintiff was primarily responsible for marketing the property and cooperating with potential buyers. In June 1995, plaintiff provided a marketing packet, which included various information about the property, to Patterson for him to forward to Squires. Plaintiff worked with Patterson to promote the property, showed the property to Squires, and even drove Squires' representatives and Patterson on his boat to view the Dixie property. Prior to plaintiff's resignation, he received a proposed contract on the Dixie property from Squires and Patterson. Even after plaintiff resigned from SRE, from September 1995-December 1995, he continued to communicate with Dixie and worked with the lawyers of both Squires and Dixie to obtain a formal contract on the Dixie property, assisting in negotiation of those details. The evidence shows the Dixie/Squires transaction was a direct result of plaintiff's efforts and services; specifically, through plaintiff's marketing and advertisement of the Dixie property, he set in motion a series of events which led to the procurement of Squires, a ready, willing, and able purchaser.

Conclusion

Accordingly, as there is substantial evidence of each essential element of *quantum meruit*, specifically that there was no express contract and that plaintiff was the procuring cause of the Dixie/Squires transaction, plaintiff's *quantum meruit* claim should have been submitted to the jury.

STATE OF NORTH CAROLINA v. CORNELIUS KEITH SMITH

No. COA01-836

(Filed 21 May 2002)

Evidence— motion to suppress—cocaine

The trial court did not err in an intent to sell and deliver cocaine case under N.C.G.S. § 90-95 by denying defendant's motion to suppress evidence of cocaine seized in a non-consensual search that went beyond a pat-down of defendant's clothing after the stop of a vehicle in which defendant was a passenger, because the officer's action in lifting defendant's shirt under the specific circumstances of this case was reasonably related to the events that took place when: (1) the officer recognized defendant from multiple court proceedings, including a shooting; (2) the officer recognized defendant from photographs in police safety bulletins; (3) defendant consistently covered his pants pocket with his hand as if attempting to hide something; (4) defendant appeared uneasy and became more nervous when the officer asked for permission to search the car; (5) once defendant's hand was moved, the officer saw a bulge in defendant's pants that was slightly smaller than a tennis ball; (6) once the officer moved defendant's hand and saw the bulge, defendant appeared anxious and moved his feet and shifted as if he were sizing up the situation; and (7) the officer was concerned that defendant might have a weapon in his pocket.

Judge TIMMONS-GOODSON dissenting.

Appeal by defendant from judgment entered 6 March 2001 by Judge D. Jack Hooks, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 23 April 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Marvin R. Waters, for the State.

A. Michelle FormyDuval for defendant-appellant.

HUNTER, Judge.

Cornelius Keith Smith ("defendant") appeals the trial court's denial of his motion to suppress. We affirm.

The following is a summary of the pertinent facts and procedural history. On 4 August 2000, Officer Loren Lewis, a sergeant with the

Oak Island Police Department, participated in the stop of a motor vehicle pursuant to a road block to check drivers for intoxication. Officer Lewis immediately recognized both the driver of the vehicle, Bria Bishop, and defendant, who was sitting in the front passenger seat. Officer Lewis testified that he had been "dealing with Ms. Bishop . . . since she was a juvenile" and that she had not been cooperative in his prior experiences with her. He also testified that he recognized defendant:

> I had seen the Defendant previously in court, in District Court and Superior Court for—if I recall correctly, one incident was a shooting and also his face has been on photographs that have come across my desk as officer—kind of an officer safety bulletin or such.

According to Officer Lewis, upon stopping the vehicle, defendant

> seemed to be uneasy. He—he had his hand in between the seat and the door. He was looking straight ahead and trying not to turn, you know, away or towards us. He had his other hand on his leg just kind of looking left to right[,] kind of nervous acting.

Bishop voluntarily consented to a search of the car, at which point, according to Officer Lewis, defendant's demeanor changed:

> He just seemed to get more nervous whenever I talked to him. He darted toward—or turned his face toward her. You know, I said, "What are you doing?" He just turned directly. She turned back and there was a couple of gazes back and forth but no words spoken, just kind of shaky.

Because defendant had his hand by his leg, and based on what Officer Lewis knew about defendant and his history, Officer Lewis became concerned that there might be a weapon in the car. He then asked Bishop and defendant to exit the car.

A deputy sheriff took control of Bishop while Officer Lewis watched over defendant. According to Officer Lewis, defendant "had his right hand pushed against his front right pocket as if he was concealing or covering something." Officer Lewis then took hold of defendant's right hand and pulled it away from defendant's body. Officer Lewis observed a bulge in defendant's right front pocket, which was slightly smaller than a tennis ball. However, defendant was wearing a long, "heavy canvas type shirt" which covered defendant's

pants pocket, preventing Officer Lewis from directly viewing the outside of the pants pocket.

Officer Lewis asked Detective Vining, who was assisting him, to take defendant's left hand. Officer Lewis testified that his primary concern at this point was that defendant might have a weapon in his pocket. According to Officer Lewis, during this time defendant

> was kind of moving his feet shifting, not really pulling away from us but kind of moving into a position that he could take flight, in my opinion. He would turn and kind of—just moving different directions trying to see which way—he was looking around to see who was behind him, looking to see who was holding on to him, more or less sizing up the situation.

Officer Lewis then lifted up defendant's shirt and, without entering defendant's pants pocket, was immediately able to observe a large plastic bag containing cocaine. Officer Lewis took possession of the cocaine and placed defendant in handcuffs. He then conducted a full pat-down of defendant because he was "still concerned that he may have a weapon on him based on what I knew about him."

Defendant was indicted and charged with one count of possession with intent to sell and deliver five grams of cocaine, pursuant to N.C. Gen. Stat. § 90-95 (1999). Defendant moved to suppress the cocaine as evidence on the grounds that the search and seizure which produced the evidence constituted a violation of his constitutional rights. A hearing was conducted on 3 January 2001 consisting only of the testimony of Officer Lewis. Following Officer Lewis' testimony, defendant argued that Officer Lewis' conduct extended beyond the permissible scope of a *Terry* frisk for weapons. *See Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968). The State conceded that by lifting up defendant's shirt, Officer Lewis did commit a "slight violation of the *Terry* frisk." However, the State contended that Officer Lewis' conduct was permissible given: that Officer Lewis was familiar with Bishop, who had been uncooperative in the past; that Officer Lewis was familiar with defendant's "previous violent behavior" because Officer Lewis had "seen flyers come across [his] desk warning officers about this Defendant"; and that defendant appeared nervous.

At the close of the hearing, the trial court made the following pertinent findings of fact in open court:

> And that while the officer was talking with the driver, [defendant] kept making movements with his hands around a pants pocket.
>
> Upon being removed from the vehicle, the Defendant acted nervous, looked around, and continued to hold his hand in front of the pocket as if to conceal something.
>
> That the officer was familiar with the Defendant, both as a prior defendant and as a person who could be dangerous to police officers.
>
> The officer became concerned for his safety and conducted a search of the area of the pocket by simply raising the shirt to determine whether something was in the pocket or not. At which point, he found in plain view the cocaine.

The trial court concluded as a matter of law that the search did not violate defendant's constitutional rights, and therefore denied defendant's motion to suppress. Following the denial of his motion to suppress, defendant pled guilty and judgment was entered against him. Pursuant to N.C. Gen. Stat. § 15A-979(b) (1999), defendant preserved his right to appeal the judgment against him based upon the denial of the motion to suppress.

On appeal, defendant contends that the trial court erred in denying the motion to suppress. Our review of a motion to suppress is limited to a determination of whether the trial court's findings of fact are supported by competent evidence, and whether those findings in turn support the trial court's conclusions of law. *State v. Willis*, 125 N.C. App. 537, 540, 481 S.E.2d 407, 410 (1997).

Defendant does not challenge the stop of the vehicle in which defendant was a passenger. Nor does defendant argue that Officer Lewis would have been prohibited from conducting a pat-down of defendant's outer clothing. Rather, defendant challenges the manner of the search of defendant which produced the cocaine that formed the basis for the charge against him.

> [S]earches and seizures " 'conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.' " One such exception was recognized in Terry v. Ohio, which held that "where a police officer observes unusual conduct which leads

> him reasonably to conclude in light of his experience that criminal activity may be afoot . . . [,]" the officer may briefly stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions.
>
> Terry further held that "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a patdown search "to determine whether the person is in fact carrying a weapon." "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence . . . ." Rather, a protective search—permitted without a warrant and on the basis of reasonable suspicion less than probable cause—must be strictly "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under Terry and its fruits will be suppressed.

Minnesota v. Dickerson, 508 U.S. 366, 372-73, 124 L. Ed. 2d 334, 343-44 (1993) (citations omitted). Similarly, this Court has held:

> In the context of most "investigatory stops," police officers may perform only a limited frisk, or pat-down, of a suspect to discover any weapons which might be present. This limited frisk may take place, "[i]f, after the detention, [the investigating officer's] personal observations confirm his apprehension that criminal activity may be afoot and [] that the person may be armed . . . ." In such a situation, the limited frisk is a function of "self-protection."

Willis, 125 N.C. App. at 542, 481 S.E.2d at 411 (citations omitted).

A *Terry* frisk generally contemplates a limited pat-down of the outer clothing of an individual. *See, e.g., State v. Beveridge*, 112 N.C. App. 688, 693-95, 436 S.E.2d 912, 915-16 (1993), *affirmed*, 336 N.C. 601, 444 S.E.2d 223 (1994). Defendant contends, and the State appears to concede, that Officer Lewis' conduct in lifting defendant's shirt to expose the pocket of his pants without defendant's consent extended beyond the scope permissible pursuant to a *Terry* frisk. Thus, the question here is whether the circumstances were sufficient to warrant a search beyond that allowed pursuant to a *Terry* frisk.

Whether a non-consensual search that goes beyond a pat-down of the outer clothing is improper requires a court to determine "whether

the degree of intrusion [was] reasonably related to the events that took place." *State v. Watson*, 119 N.C. App. 395, 398, 458 S.E.2d 519, 522 (1995).

> "In determining whether or not conduct is unreasonable, '[t]here is no slide-rule formula,' and '[e]ach case must turn on its own relevant facts and circumstances.' In determining reasonableness, courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."

Id. at 399, 458 S.E.2d at 522 (citations omitted).

Here, the record indicates that Officer Lewis was presented with the following circumstances: (1) he recognized defendant from multiple court proceedings, one of which involved "a shooting"; (2) he also recognized defendant from photographs in police safety bulletins; (3) defendant consistently covered his pants pocket with his hand as if attempting to hide something; (4) defendant appeared "uneasy" and became more nervous when Officer Lewis asked for permission to search the car; (5) once defendant's hand was moved, Officer Lewis saw a bulge in defendant's pants that was slightly smaller than a tennis ball; (6) once Officer Lewis moved defendant's hand and saw the bulge, defendant appeared anxious and moved his feet and shifted as if he were "sizing up the situation"; and (7) Officer Lewis was concerned that defendant might have a weapon in his pocket. It was at this point that Officer Lewis lifted defendant's long, "heavy canvas type shirt" to expose the outside of defendant's pants pocket. Officer Lewis did not have to reach inside of defendant's pocket in order to discover the cocaine. Moreover, Officer Lewis still conducted a pat-down search of defendant, even after lifting his shirt and removing the cocaine, which fact indicates that Officer Lewis was not impermissibly seeking to discover evidence in lifting defendant's shirt, but rather was seeking to determine whether defendant was in possession of a weapon. The trial court entered findings consistent with these facts, which findings were supported by the evidence presented at the hearing. Based upon these findings, the trial court concluded that defendant's constitutional rights had not been violated and denied the motion to suppress.

We hold that the trial court did not err in concluding that Officer Lewis' action in lifting defendant's shirt, under the specific circumstances here, was "reasonably related to the events that took place." *Watson*, 119 N.C. App. at 398, 458 S.E.2d at 522; *see U.S. v. Edmonds*,

948 F. Supp. 562, 565-66 (E.D. Va. 1996) (where defendant, seen standing next to a parked car with lights and engine off in tow-away zone in high-crime area at 10:30 p.m., acted nervous in response to police officer's request that he lift his shirt, officer did not exceed permissible scope of weapons search under *Terry* in drawing his weapon and lifting defendant's shirt), *affirmed*, 149 F.3d 1171 (4th Cir.), *cert. denied*, 525 U.S. 912, 142 L. Ed. 2d 212 (1998). Thus, we affirm the trial court's order denying the motion to suppress.

Affirmed.

Judge GREENE concurs.

Judge TIMMONS-GOODSON dissents in a separate opinion.

TIMMONS-GOODSON, Judge, dissenting.

Because I conclude that Officer Lewis' actions in exceeding the permissible scope of a *Terry* search are not justified under the circumstances presented by the instant case, I respectfully dissent from the majority opinion. I would hold that, because Officer Lewis' act of lifting defendant's shirt without first performing a pat-down to ascertain the presence of a weapon constituted an unreasonable search, the trial court erred in denying his motion to suppress.

The majority opinion agrees with both parties that Officer Lewis' conduct extended beyond the scope of a permissible search pursuant to *Terry*. *Terry* authorized only a "carefully limited search of the outer clothing" for weapons. *Terry*, 392 U.S. at 30, 20 L. Ed. 2d at 911. Nothing in *Terry* or its progeny permits a law enforcement officer conducting a *Terry* frisk to routinely remove or lift an outer layer of clothing, or a clothing accessory, in order to search beneath such clothing or accessory. This is because the purpose of permitting a limited pat-down search is not to discover evidence, but rather to allow a law enforcement officer to determine whether a defendant is in possession of a weapon. *See id.* at 29, 20 L. Ed. 2d at 910-11. A search for weapons must be narrow in scope and limited to that which is necessary for the discovery of weapons that are readily accessible. *See id.* at 26, 29, 20 L. Ed. 2d at 909-11. It is well established that " 'investigative methods employed [during an investigative search] should be the least intrusive means reasonably available to verify or *dispel the officer's suspicion* in a short period of time.' " *State v. Allison*, 148 N.C. App. 702, 706, 559 S.E.2d 828, 831 (2002)

(quoting *Florida v. Royer*, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 238 (1983)) (alteration in original).

Although the majority opinion sets forth the circumstances surrounding Officer Lewis' search of defendant in great detail, it offers no explanation as to why Officer Lewis could not have first conducted a *Terry* frisk of defendant to determine whether the bulge in defendant's pocket was a weapon or other dangerous object. As such, the majority opinion presents no valid justification for Officer Lewis' actions in lifting defendant's shirt without first performing a limited pat-down search of defendant's outer clothing. Had Officer Lewis conducted such a pat-down, he would have likely concluded, from feeling the soft bulge in defendant's pocket, that defendant was not concealing a weapon. At that point, one of two avenues was open to Officer Lewis. First, had Officer Lewis been able to conclude with certainty, from his experience, that the bulge he felt in defendant's pocket was illegal contraband, he would have been entitled to seize it. *See, e.g., State v. Beveridge*, 112 N.C. App. 688, 694-95, 436 S.E.2d 912, 915-16 (1993), *affirmed*, 336 N.C. 601, 444 S.E.2d 223 (1994). Alternatively, had Officer Lewis been unable to conclude that the bulge was contraband, he would not have been entitled to engage in any further intrusion upon defendant, and he would not have been justified in lifting defendant's shirt in order to view the outside of defendant's pants pocket as he did here. *See State v. Smith*, 345 Md. 460, 469, 693 A.2d 749, 753 (1997) (warning that, "[i]f a pat-down reveals no weapon-like objects . . . the risk of harm to the officer is no longer of sufficient magnitude to outweigh the individual's competing interest in personal security, and the police officer may not further intrude upon the suspect").

Courts in other jurisdictions addressing the issue of searches conducted without the benefit of an initial pat-down have generally concluded that such searches violate the Fourth Amendment. *See, e.g., State v. Isidore*, 789 So.2d 79, 86 (La.App. 4 Cir. 2001) (concluding that a deputy's action in removing a baseball cap from the defendant's head and shaking it out exceeded the scope of a permissible *Terry* pat-down search); *Jamison v. State*, 455 So.2d 1112, 1114 (Fla.App. 4 Dist. 1984) (determining that a search beneath clothing is unauthorized unless a pat-down of outer clothing is first conducted that indicates the presence of a concealed weapon, because a pat-down might reveal that the suspicious bulge is soft and could not be a weapon), *cert. denied*, 469 U.S. 1127, 83 L. Ed. 2d 804 (1985); *United States v. Hairston*, 439 F. Supp. 515, 519 (N.D. Ill. 1977) (holding that,

where the officer stopped the defendant for a traffic violation, recognized him as being recently released from prison, and noticed a bulge in the defendant's trousers, the officer's act of reaching into the defendant's pants and pulling out a pistol without first conducting a pat-down was an unreasonable search and beyond that minimally necessary to insure safety); *Smith*, 345 Md. at 470, 693 A.2d at 754 (holding that the officer exceeded the scope of a permissible *Terry* search where, after an initial pat-down disclosed no weapons, the officer pulled the defendant's shirt up and discovered cocaine concealed in the waistband of the defendant's pants); *People v. Aviles*, 21 C.A.3d 230, 234, 98 Cal.Rptr. 316, 318-19 (1971) (concluding that an officer's conduct in reaching inside the defendant's coat and seizing a bag of marijuana was an impermissible intrusion where the officer failed to first conduct a *Terry* pat-down).

In contrast, cases in which courts have permitted intrusion by a law enforcement officer without requiring an initial pat-down tend to involve additional exigent circumstances creating an increased risk to the officer. *See, e.g., U.S. v. Baker*, 78 F.3d 135, 138 (4th Cir. 1996) (holding that the officer's act of directing the defendant to raise his shirt, which revealed a handgun, was reasonable under the circumstances where the defendant first gave chase to the officer, then lied to the officer, and where the officer observed a triangular-shaped bulge beneath the defendant's shirt), *cert. denied*, 522 U.S. 1051, 139 L. Ed. 2d 643 (1998); *United States v. Thompson*, 597 F.2d 187, 191 (9th Cir. 1979) (concluding that an officer's act of reaching into the defendant's coat pocket for a weapon was a permissible limited intrusion based upon the defendant's repeated efforts to reach into his pocket despite the officers' warnings not to, coupled with the officer's inability to determine from the pat-down whether the pocket of a bulky coat contained a weapon); *United States v. Hill*, 545 F.2d 1191, 1193 (9th Cir. 1976) (holding that the lifting of the defendant's shirt was not overly intrusive under *Terry* where the defendant was stopped shortly after and within five hundred feet of an armed bank robbery and where the bulge in the defendant's clothing was consistent with the shape and size of a weapon); *U.S. v. Edmonds*, 948 F. Supp. 562, 566 (E.D.Va. 1996) (holding that, where the officer found the defendant sitting in a parked car with the lights and engine off in a tow-away zone located in a high-crime area at 10:30 p.m., and where the defendant acted nervously in response to the officer's request that he lift his shirt, the officer did not exceed the permissible scope of a weapons search under *Terry* in drawing his weapon and lifting

defendant's shirt), *affirmed*, 149 F.3d 1171 (4th Cir. 1998), *cert. denied*, 525 U.S. 912, 142 L. Ed. 2d 212 (1998).

In the instant case, defendant was stopped in connection with a road block check for intoxicated drivers. At no point did defendant indicate that he might reach for a weapon on his person or pose any threat of harm to Officer Lewis. Moreover, according to Officer Lewis, the bulge in defendant's pants was "slightly smaller than a tennis ball" and was therefore inconsistent with the presence of a weapon such as a gun or a knife. Such circumstances do not warrant an overly intrusive search beneath defendant's outer clothing, especially where a pat-down of defendant's outer clothing might have quickly and easily dispelled Officer Lewis' suspicions that defendant was in possession of a weapon.

For the reasons stated herein, I would hold that Officer Lewis' actions violated defendant's Fourth Amendment right to be free from unreasonable searches, and I would therefore vacate the judgment against defendant, reverse the trial court's order denying the motion to suppress, and remand to the trial court with instructions to grant the motion to suppress and for further proceedings.

PAUL W. POTTER AND MIRROR TECH, INC. v. HILEMN LABORATORIES, INC., NOW KNOWN AS HILEMN SILVERING SOLUTIONS, VALSPAR MIRROR COATINGS DIVISION OF THE VALSPAR CORPORATION v. SALEM DISTRIBUTING CO., INC., ROBERT A. LONG, AND ARTHUR J. LOCKHART

No. COA01-399

(Filed 21 May 2002)

1. Trade Secrets— silvering solution—consent agreement—patent expired

The trial court did not err by determining that plaintiffs' use of a certain silvering solution in making mirrors was a trade secrets case even though the patent for the substance already expired, because regardless of whether the substance is technically a trade secret, plaintiffs are bound by their agreement that they would treat it as one.

2. Trade Secrets— silvering solution—reversal of oral ruling in written order

The trial court did not commit prejudicial error by reversing in a written order its earlier oral ruling that a certain silvering solution used to make mirrors was not a trade secret, because: (1) plaintiffs were not prevented from introducing evidence as a result of the order; and (2) the primary focus of plaintiffs' case at trial was to show that the use of the substance in silvering solutions was not a trade secret.

3. Trade Secrets— silvering solution—violation of consent judgment—willfulness

The trial court did not err by finding plaintiffs willfully violated a consent judgment based on plaintiffs' conduct of using a certain silvering solution to make mirrors, because: (1) a mistaken belief that the use of the chemical came under an exception does not negate the purposefulness or deliberateness of plaintiff individual's acts; and (2) plaintiffs may not be relieved of their duty to comply with a consent judgment's provisions based on their mistaken interpretation or finding the judgment difficult to interpret.

4. Trade Secrets— silvering solution—appropriate relief under consent judgment

The trial court did not err by determining that defendant's relief under a consent judgment, stating that a certain silvering solution used to make mirrors was a trade secret between the parties, included remedies provided for trade secret violations under the Trade Secrets Act or for breach of contract because: (1) by the plain language of the consent judgment, the parties entered into an agreement allowing the court and the undersigned judge to choose an appropriate remedy for a violation of the agreement; and (2) the trial court correctly determined that it had a choice of legal remedies not limited to contempt.

5. Judgments— consent—jointly and severally liable

The trial court did not err by holding plaintiffs to be jointly and severally liable under N.C.G.S. § 1B-1(a) in a trade secrets case because plaintiff president and majority shareholder, as well as plaintiff corporation, both agreed to be bound by the consent order.

6. Unfair Trade Practices— consideration of claim—no harm

Although plaintiffs contend the trial court erred by considering defendant's claim of unfair and deceptive trade practices, plaintiffs suffered no harm and the argument will not be addressed because the trial court found the elements for this claim did not exist.

7. Costs— attorney fees—Trade Secrets Protection Act

The trial court erred by awarding attorney fees in a trade secrets case, because: (1) the Trade Secrets Protection Act does not allow for attorney fees as a remedy; and (2) even if the Act were utilized as a basis, plaintiff's misappropriation of the pertinent substance was not malicious.

Appeal by plaintiffs from judgment entered 14 August 2000 by Judge Melzer A. Morgan, Jr. in Rockingham County Superior Court. Heard in the Court of Appeals 23 January 2002.

Bell, Davis & Pitt, P.A., by William K. Davis and Alan M. Ruley, for plaintiffs-appellants.

Adams & Osteen, by William L. Osteen, Jr., for plaintiffs-appellants.

Smith Helms Mulliss & Moore, L.L.P, by Bynum M. Hunter, Gregory G. Holland, and Allison Van Laningham, for defendant-appellee.

THOMAS, Judge.

Plaintiffs, Paul W. Potter and Mirror Tech., Inc., appeal the trial court's judgment finding that they violated a consent decree by using a certain silvering solution (Substance X) in making mirrors. Plaintiffs contend the trial court erred in four ways: (1) in concluding that, as between the parties, this is a trade secrets case; (2) in reversing by written order its prior oral ruling that Substance X is not a trade secret; (3) in holding that plaintiffs knowingly and willfully violated the consent judgment; and (4) in determining the type of relief available to defendants.

For reasons discussed herein, we reverse in part and affirm in part.

The facts are as follows: From 1979 until 1990, Potter was employed by defendant, Hilemn Laboratories, Inc., now known as the

Hilemn Silvering Coatings Division of the Valspar Corporation (Hilemn). In 1991, Potter left Hilemn and became president of Mirror Tech., which also manufactures and sells silvering solutions used in making mirrors. It directly competes with Hilemn.

Potter and Mirror Tech filed a complaint in 1991 for declaratory relief against Hilemn, primarily seeking two declarations: (1) that a non-competition agreement executed between Potter and Hilemn in 1979 was invalid; and (2) that Hilemn possessed no trade secrets which plaintiffs could be enjoined from using under the North Carolina Trade Secrets Protection Act or other relevant law. Hilemn counterclaimed. It sought to restrain plaintiffs from using or divulging Hilemn's trade secrets and from manufacturing or selling any mirroring solutions similar to Hilemn's solutions, particularly its silvering solutions. Hilemn's pleadings were based in part on the Trade Secrets Protection Act, N.C. Gen. Stat. §§ 66-152 to 66-157 (1999), and alleged breach of fiduciary duty, breach of implied contract, and unfair and deceptive trade practices. Hilemn then filed motions for a temporary restraining order, accelerated discovery, and a preliminary injunction, all of which the trial court granted.

Hilemn also brought a third-party complaint against Salem Distributing Company, Inc., and its president and vice-president Robert A. Long and Arthur J. Lockhart, respectively. Hilemn contended they contacted Potter in an effort to appropriate Hilemn's trade secrets and confidential information.

The terms of the preliminary injunction were lengthy. The trial court found that Hilemn, through its research, had developed silvering solutions, and that two basic high efficiency concentrated solutions were made from Hilemn's own secret chemical formulations and processes: (1) Hilemn's three-part silvering solution; and (2) Hilemn's two-part silvering solution. The trial court further determined that "even though some of the elements used in Hilemn's trade secrets are known to chemists and to the industry . . . it is the combination of the various elements and their processing which make[s] them a trade secret." Potter, the court found, breached his duty to his former employer not to use such secret information.

The trial court made an effort to protect the interests of Hilemn while still allowing Potter to work in the mirror silvering industry. It first listed the substances and processes that plaintiffs were forbidden to use or divulge. Among the prohibitions was one banning the use of Substance X in making silvering solutions until 28 September

1993. Provided plaintiffs did not violate this or any other prohibition, however, they were permitted to manufacture, use, or sell silvering solutions which did not contain Substance X. Those included some solutions developed by London Labs, Inc., Hilemn's only significant competitor, solutions not substantially similar to Hilemn's, and some solutions developed independently of Hilemn prior to 1 November 1990.

Approximately a year later, on 17 March 1992, the parties entered into a consent judgment. Significantly, it amended and strengthened the preliminary injunction's provision forbidding plaintiffs from divulging or using Substance X in making silvering solutions by deleting any time limit on the prohibition.

In 1999, Hilemn became aware of possible violations of the consent judgment by plaintiffs. Based on affidavits submitted by Hilemn, the trial court determined that plaintiffs may have been violating the judgment and permitted defendant to test Mirror Tech's formulas. The tests revealed that plaintiffs were using Substance X in its two-part silvering system. Hilemn requested that the court, as the language provides in the consent judgment, "determine the appropriate remedy for said violation."

At the hearing, Potter testified that following the entry of the injunction, he had begun to search for other mirroring solutions. On 15 April 1991, he purchased a two-part and a three-part mirroring solution formula from Mirror Labs. Mirror Lab's two-part formula called for the use of Substance X. Believing the use of Substance X in the Mirror Labs formula violated a London Labs patent, Potter used a different chemical until July of 1998, when the London Labs patent expired. He then started using Substance X. Potter said he believed he was allowed to use Substance X after the expiration of the patent since others in the industry could.

The trial court determined, however, that Substance X is a trade secret *as between plaintiffs and defendant* because of their agreement. It further found that, beginning in July of 1998, plaintiffs knowingly and willfully, but not maliciously, violated the consent order by using Substance X in its two-part silvering solutions.

The trial court concluded that: (1) Hilemn is entitled to recover from plaintiffs $233,499.17, the amount of plaintiffs' profits derived from using Substance X; (2) Hilemn is entitled to attorneys' fees for plaintiffs' bad faith misappropriation of a trade secret in the amount

of $43,594.25, but is not entitled to punitive damages; and (3) Hilemn is not entitled to nominal damages for unfair and deceptive trade practices because it suffered indirect, not actual, injury. Plaintiffs appeal.

Where the plain language of a consent judgment is clear, the original intention of the parties is inferred from its words. *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 552-53, 478 S.E.2d 518, 521 (1996), *disc. review denied*, 346 N.C. 275, 487 S.E.2d 538 (1997). The trial court's determination of original intent is a question of fact. *Id.* On appeal, a trial court's findings of fact have the force of a jury verdict and are conclusive if supported by competent evidence. *Foster v. Foster Farms, Inc.*, 112 N.C. App. 700, 706, 436 S.E.2d 843, 847 (1993). The trial court's determination of whether the language in a consent judgment is ambiguous, however, is a question of law and therefore our review of that determination is *de novo*. *Bicket*, 124 N.C. App. at 553, 478 S.E.2d at 521. "An ambiguity exists where the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993).

[1] By plaintiffs' first assignment of error, they argue the trial court erred in determining this to be a trade secrets case. Looking to the consent judgment for guidance, the court found: "Substance X is a trade secret under the unique circumstances of this case." While recognizing that the chemical has not been a trade secret since the "Peacock Lab patent expired in 1993 and the London Lab[s] patent expired in 1998," the court held that, "as between the plaintiffs . . . and the defendant Hilemn, the use of Substance X as a reducer in two-part silvering solutions was a trade secret." We agree with the trial court's conclusion that, regardless of whether Substance X is technically a trade secret, plaintiffs are bound by their agreement that they would treat it as one. *See Lampley v. Bell*, 250 N.C. 713, 716, 110 S.E.2d 316, 318 (1959) (a consent judgment is binding on the parties thereto).

[2] We also reject plaintiffs' second assignment of error, by which they contend the trial court erred in reversing by written order its earlier oral ruling that Substance X is not a trade secret. Although the trial court did find that, due to "the unique circumstances of this case" it "explicitly reverses its earlier ruling that Substance X is not a trade secret," plaintiffs failed to show that they suffered prejudice.

See, e.g., Reed v. Abrahamson, 108 N.C. App. 301, 309, 423 S.E.2d 491, 495 (1992) (an erroneous ruling requires reversal only when the objecting party demonstrates it has suffered resulting prejudice), *cert. denied*, 333 N.C. 463, 427 S.E.2d 624 (1993). They were not prevented from introducing evidence as a result of the order. In fact, the primary focus of their case at trial was to show that the use of Substance X in silvering solutions was not a trade secret.

[3] By plaintiffs' third assignment of error, they contend the trial court erred in finding a violation of the consent judgment in that the conduct constituting the alleged violation was not willful and fell within listed exceptions. The consent judgment provides in pertinent part:

> 8. *[Plaintiffs] shall not divulge or use [Substance X] in making silvering solutions.*
>
> . . . .
>
> 12. *Except as provided in Paragraphs 1-11 above:*
>
> a. The plaintiffs . . . are not prohibited from manufacturing, using, or selling mirror solutions so long as such mirror solutions are
>
> (2) not solutions which, through misappropriation as defined in G.S. 66-152(1), utilize any trade secrets of Hilemn, or
>
> . . . .
>
> (4) not three-part or two-part silvering solutions substantially similar to Hilemn's three-part and two-part silvering solutions (for the purposes of this Order, London Labs solutions are not considered substantially similar to defendant's three-part or two-part silvering solutions), or
>
> (5) substantially similar to defendant's three-part and two-part silvering solutions, but the formulations of such solutions were developed and in existence before November 1, 1990 independently of the defendant's research and development.
>
> b. This Order does not prohibit plaintiffs or third-party defendants from
>
> (1) purchasing or licensing a formula for mirroring solutions which formula is presently legitimately owned by some non-party entity and was so owned before November 1, 1990 although

substantially similar to the defendant's three-part or two-part silvering solutions; or

(2) purchasing or licensing a process for mirroring solutions which process is presently legitimately owned by some non-party entity, and was so owned before November 1, 1990 although substantially similar to the defendant's three-part or two-part silvering solutions; or

(3) manufacturing or selling any mirroring solutions if plaintiffs . . . obtain the formula or process used for making mirroring solutions from some non-party source which presently legitimately owns such formula or process and was so owned before November 1, 1990 (for example, by obtaining another mirror solutions company, or by merging with another mirror solutions company, or by obtaining mirroring solutions from some non-party company)[.]

(Emphasis added).

Citing this Court in *Hancock v. Hancock*, 122 N.C. App. 518, 523, 471 S.E.2d 415, 418 (1996), plaintiffs contend that "evidence which does not show a person to be guilty of 'purposeful and deliberate acts' or guilty of 'knowledge and stubborn resistance' is insufficient to support a finding of willfulness." Plaintiffs do not argue their conduct was not purposeful or deliberate. Rather, they maintain the evidence fails to establish that they knowingly violated the consent judgment because Potter purchased formulas in which the use of Substance X was not substantially similar to defendant's solutions. Thus, his conduct fell within the exceptions listed in the consent judgment. Moreover, plaintiffs argue, Potter acted in good faith by using Substance X only after the London Labs patent expired, and therefore did not willfully violate the consent judgment. We disagree.

Paragraph (8) mandates that plaintiffs "shall not divulge or use [Substance X] in making silvering solutions." Paragraph (12) then lists conduct that is not prohibited. It begins: "Except as provided in paragraphs 1-11 above . . . ." Therefore, by the plain language of the consent order, there is no exception to paragraph (8)'s prohibition against the use of Substance X. A mistaken belief that the use of the chemical came under an exception does not negate the purposefulness or deliberateness of Potter's acts. Accordingly, the evidence supports the trial court's finding that Potter willfully violated the consent judgment.

Plaintiffs further argue that, because of the exceptions, the consent judgment was too ambiguous to provide notice of the forbidden conduct.

"A consent judgment is a court-approved contract subject to the rules of contract interpretation. If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (citations omitted). By the plain language of paragraph (8) of the consent judgment, use of Substance X is forbidden. The consent judgment contains no exceptions to this prohibition. Plaintiffs may not be relieved of their duty to comply with its provisions because they are mistaken in their interpretation or find interpreting it to be difficult. Accordingly, we reject this assignment of error.

[4] By plaintiffs' fourth assignment of error, they argue that the trial court erred in determining defendant's relief under the consent judgment. Plaintiffs contend the award was not supported by the evidence or permitted by applicable law.

A consent judgment is the contract of the parties entered upon the record with the sanction of the court. *Crane v. Green*, 114 N.C. App. 105, 106, 441 S.E.2d 144, 144-45 (1994). Thus, it is both an order of the court and a contract between the parties. *See id.* If a consent judgment is merely a recital of the parties' agreement and not an adjudication of rights, it is not enforceable through the contempt powers of the court, but only through a breach of contract action. *Nohejl v. First Homes of Craven County, Inc.*, 120 N.C. App. 188, 190, 461 S.E.2d 10, 12 (1995).

Here, the consent judgment is not a mere recital of the parties' agreement. It contains findings of fact and an order based on those findings. It provides:

> This Final Judgment By Consent is a full resolution of all claims asserted or that could have been asserted in this action, including damages, with the following provision: *This Court and the Undersigned Judge shall retain jurisdiction to enforce the terms of this Final Judgment by Consent.* Should the Court find that there has been a violation of this Final Judgment By Consent including a violation of the Permanent Injunction found in Exhibit A, *the Court shall determine the appropriate remedy for said violation.*

Defendant argues that the foregoing language authorizes the trial court to award damages, costs, and fees in its discretion. Plaintiffs, however, contend that "*appropriate* remedy" limits the remedies to those allowed in a contempt proceeding. Therefore, plaintiffs argue, the trial court may not award damages based on remedies provided for trade secret violations under the Trade Secret Act or on breach of contract principles. We disagree.

By the plain language of the consent judgment, the parties entered into an agreement allowing "[t]his Court and the Undersigned Judge" to choose an appropriate remedy for a violation of the agreement. *See State ex rel. Envir. Mgmt. Comm. v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 444, 400 S.E.2d 107, 114 (plain language of a consent judgment is controlling), *writ of supersedeas and disc. review denied,* 328 N.C. 576, 403 S.E.2d 521 (1991). In fact, the trial judge who signed the original consent judgment also presided over the present case. However, as evident by the interpretations advanced by each party, the phrase "appropriate remedy" is susceptible to different meanings and therefore is ambiguous. The trial court, acting in the instant case as the trier of fact, resolves this ambiguity by considering "a range of factors including the expressions used, the subject matter, the end in view, the purpose and the situation of the parties." *Glover*, 109 N.C. App. at 458, 428 S.E.2d at 210.

Here, the trial court correctly determined that it had a choice of legal remedies not limited to contempt. To interpret "appropriate remedy" as plaintiffs argue would render superfluous the entire provision authorizing the court to determine a remedy and award damages. The language in the remedy provision is broad. Read in context with the entire judgment, it clearly shows an intent on the part of the parties to consolidate their potential claims based on a violation into one case. Therefore, the court did not err in looking to the North Carolina Trade Secrets Protection Act for guidance in fashioning an appropriate remedy because the wording of the consent judgment makes it appear that, as between the parties, Substance X is considered a trade secret. Nor did it err in finding that Hilemn may be entitled to relief under the law of restitution. Restitution measures the remedy by the wrongdoer's unjust enrichment, and seeks to force disgorgement of that gain. *See* 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 4.1(1), at 555 (2d ed. 1993); *see also id.* § 10.5(3), at 691 (listing restitution as a remedy for misappropriation of confidential information or trade secrets).

The trial court stated that the appropriate relief is the measure of plaintiffs' unjust enrichment, which the Trade Secrets Protection Act expressly permits as a measure of damages. *See* N.C. Gen. Stat. § 66-154(b) (1999). Accordingly, the court took the total amount of sales of the product that included Substance X, $953,388.20, and subtracted direct costs incurred by plaintiffs, $719,939.03, to determine the award amount of $233,449.17. The trial court did not subtract indirect costs such as health insurance, utilities, and uniforms, which would have been incurred with or without the offending sales.

In support of their contention that all costs, including indirect ones, should be deducted, plaintiffs cite cases involving lost profit damages due to a party's breach of contract. Lost profit damages means the non-breaching party is entitled to the contract price less cost of performance. *Bowles Distributing Co. v. Pabst Brewing Co.*, 80 N.C. App. 588, 597, 343 S.E.2d 543, 548 (1986). The non-breaching party may not recover the expenses saved from the result of being excused from performance by the other party's breach. *Hassett v. Dixie Furniture Co.*, 333 N.C. 307, 312-13, 425 S.E.2d 683, 685 (1993). Here, one party profited from violating the parties' consent judgment and the trial court sought to remedy the violation by, in effect, transferring those profits. The trial court's findings were that the additional expenses sought to be included by plaintiffs were fixed and not affected by the products at issue. We find no error in the trial court's calculation.

[5] The trial court also did not err in holding plaintiffs to be jointly and severally liable. Joint tort-feasors are two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. N.C. Gen. Stat. § 1B-1(a) (1999). Potter, who is the president and majority shareholder of Mirror Tech, and Mirror Tech agreed to be bound by the consent order.

[6] Plaintiffs further argue the trial court erred in considering defendant's claim of unfair and deceptive trade practices. The trial court, however, found the elements for this claim did not exist. Plaintiffs suffered no harm and we do not address their argument.

[7] We agree with plaintiffs' contention that, absent statutory authority, attorneys' fees are generally not available. This principle is applicable here despite the broad remedy language in the parties' agreement. " 'As a general rule[,] contractual provisions for attorney's fees

are invalid in the absence of statutory authority. This is a principle that has long been settled in North Carolina and fully reviewed by our Supreme Court . . . .' " *Delta Env. Consultants of N.C. v. Wysong & Miles Co.*, 132 N.C. App. 160, 167, 510 S.E.2d 690, 695, *disc. review denied and dismissed*, 350 N.C. 379, 536 S.E.2d 70-71 (1999) (quoting *Forsyth Municipal ABC Board v. Folds*, 117 N.C. App. 232, 238, 450 S.E.2d 498, 502 (1994)); *see also Harborgate Prop. Owners Ass'n v. Mountain Lake Shores Dev. Corp.*, 145 N.C. App. 290, 297-98, 551 S.E.2d 207, 212 (2001) (reversing the trial court's award of attorneys' fees due to lack of statutory authority despite an express provision in the parties' consent judgment allowing such fees); *Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 11-12, 545 S.E.2d 745, 751-52 (reversing the award of attorneys' fees due to lack of statutory authority despite an express contractual provision), *appeal dismissed and cert. allowed*, 354 N.C. 218, 553 S.E.2d 402, *aff'd*, 354 N.C. 565, 556 S.E.2d 293 (2001); *but see Bromhal v. Stott*, 341 N.C. 702, 703-05, 462 S.E.2d 219, 220-21 (permitting as an exception to the general rule the enforcement of attorneys' fees provisions contained in separation agreements based on public policy interests), *reh'g denied*, 342 N.C. 418, 465 S.E.2d 536 (1995).

The Trade Secrets Protection Act does allow for attorneys' fees as a remedy, provided "willful and malicious misappropriation exists." N.C. Gen. Stat. § 66-154(d) (1999). However, even utilizing the Act as a basis, Hilemn would not be entitled to attorneys' fees. The trial court specifically found that Potter's misappropriation of Substance X was not malicious. As a result, we hold that the trial court was without authority to award attorneys' fees.

Accordingly, the judgment of the trial court is reversed as to the award of attorneys' fees and is otherwise affirmed.

REVERSED IN PART; AFFIRMED IN PART.

JUDGES HUDSON and JOHN concur.

FRANCINE DELANY NEW SCHOOL FOR CHILDREN, INC., PLAINTIFF-APPELLEE v. ASHEVILLE CITY BOARD OF EDUCATION, DEFENDANT-APPELLANT

No. COA01-420

(Filed 21 May 2002)

Schools and Education— charter school funding—supplemental school tax, penal fines and forfeitures

The trial court did not err by granting summary judgment for a charter school which sought additional funding from a school board where the charter school received an equal per pupil share from the board's local current expense fund but received no share of revenues collected from the supplemental school tax or penal fines and forfeitures. The Legislature clearly intended that charter schools be treated as public schools subject to the uniform budget format and that the operating expenses of the public school systems be included in a single local expense fund which expressly includes penal fines and forfeitures, and supplemental taxes.

Appeal by defendant from amended judgment entered 5 January 2001 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 10 January 2002.

Goldsmith, Goldsmith & Dews, P.A., by C. Frank Goldsmith, Jr., for plaintiff-appellee.

Schwartz & Shaw, P.L.L.C., by Richard A. Schwartz and Brian C. Shaw, for defendant-appellant.

Haywood, Denny & Miller, L.L.P., by Robert E. Levin, for Financial Reform for Excellence in Education, amicus curiae.

BRYANT, Judge.

This appeal arises out of the interpretation of statutes that provide public and charter schools with local funding.

I. Background

Plaintiff, Francine Delany New School for Children, Inc. [Delany School], is a charter school operating within the Asheville City Schools Administrative Unit. Defendant, Asheville City Board of Education [Board], operates public schools also within the Asheville City Schools Administrative Unit.

Charter schools are public schools. N.C.G.S. § 115C-238.29E(a) (2001). As such, they are eligible for state and local funding. Section 115C-238.29H(b) provides that "[i]f a student attends a charter school, the local school administrative unit in which the child resides shall transfer to the charter school an amount equal to the per pupil local current expense appropriation to the local school administrative unit for the fiscal year." N.C.G.S. § 115C-238.29H(b) (2001).

By statute, all North Carolina public schools must adhere to a uniform budget format. *See* N.C.G.S. § 115C-426(a) (2001). Under this format, funding for public schools comes from three sources: 1) the State Public School Fund; 2) the local current expense fund; and 3) the capital outlay fund. N.C.G.S. § 115C-426(c) (2001). At issue in this appeal are revenues from fines and forfeitures and from supplemental school taxes accruing to the local current expense fund.

The local current expense fund contains revenues from several sources accruing to the local school administrative unit [LSAU] for the public school system's current operating expenses. N.C.G.S. § 115C-426(e) (2001). The local current expense fund includes:

> revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution, moneys made available to the local school administrative unit by the board of county commissioners, supplemental taxes levied by or on behalf of the local school administrative unit pursuant to a local act or G.S. 115C-501 to 115C-511, State money disbursed directly to the local school administrative unit, and other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system.

N.C.G.S. § 115C-426(e); *see* N.C. Const. art. IX, § 7.

The parties stipulated that these revenues include Buncombe County's annual appropriation to the local current expense fund of the Asheville City Schools. Delany School received an equal per pupil share of Buncombe County's annual appropriation to the Board's local current expense fund, but received no share of the revenues collected from the supplemental school tax or penal fines and forfeitures. Delany School requested that the Board include revenues from supplemental school taxes and penal fines and forfeitures as part of the funds transferred on a per pupil basis. The Board refused, despite the fact that revenues from supplemental taxes and from penal fines and forfeitures are included in the per pupil funding to non-charter public schools. Delany School received an average of $1075.38 per

pupil from the Board during its first three years of operation. Had Delany School received revenues from supplemental taxes and penal fines and forfeitures, the per pupil allocation would have been an additional $1100.

Delany School requested an Advisory Opinion from the North Carolina Attorney General's Office regarding whether local school boards authorized to levy supplemental school taxes must transfer a share of the levied tax to charter schools. The Attorney General's Office issued an Advisory Opinion on 23 September 1998, stating that in its opinion, the local school boards were required to transfer a share of the levied tax because the tax is part of the local current expense fund, which is indistinguishable from the local current expense appropriation to the local school administrative unit. Advisory Opinion by Special Deputy Attorney General Thomas J. Ziko and Assistant Attorney General Laura E. Crumpler, *Charter School's Entitlement to Supplemental Tax Funds*, to C. Frank Goldsmith, Jr., Goldsmith, Goldsmith & Dews, P.A. 2-3 (Sept. 23, 1998), http://www.jus.state.nc.us/opinion/advisory/advs98.htm#[381] (last modified Feb. 4, 1999). In response, attorneys for the North Carolina School Boards Association, the North Carolina Association of School Administrators and four other school law attorneys sent to the Attorney General's Office a letter disputing the Advisory Opinion.

Delany School filed a complaint in the Superior Court of Buncombe County on 7 September 1999, seeking: 1) a judgment declaring as unlawful the Board's refusal to share funds received from the supplemental school tax; 2) a judgment declaring as unlawful the Board's refusal to share the funds received from the collection of penal fines and forfeitures; 3) an order enjoining the Board from refusing to include the above-mentioned funds in the Board's calculation of the per pupil local current expense appropriation; and 4) an order requiring the Board to remit to Delany School the difference between the per pupil local current expense appropriation actually transferred by the Board from the 1997 to the 1999 school years, and the amount which should have been transferred, i.e., the per pupil local current expense appropriation for those years calculated to include funds from the supplemental school tax and penal fines and forfeitures, plus interest. The Board answered, and both parties moved for summary judgment.

The trial court granted summary judgment in favor of Delany School and entered an Amended Judgment on 5 January 2001. In

reaching summary judgment, the trial court stated that the terms "fund" and "appropriation" are used interchangeably in Chapter 115C. The trial court enjoined the Board from withholding the funds received from the supplemental school tax and from penal fines and forfeitures in the calculation of the per pupil local current expense appropriation. The trial court also ordered the Board to pay Delany School the difference between the per pupil local current expense appropriation actually transferred by the Board for the school years in question and the per pupil local current expense appropriation for those years calculated to include funds received by the Board from the supplemental school tax and penal fines and forfeitures, plus interest. The Board appealed.

The Board raises two assignments of error. First, that the trial court erred in concluding that the phrase "local current expense appropriation" in the Current Operations Appropriations and Capital Improvement Appropriations Act of 1998 [Charter School Funding Statute], N.C.G.S. § 115C-238.29H(b), is synonymous with the phrase "local current expense fund" in the School Budget and Fiscal Control Act, N.C.G.S. § 115C-426(e). Second, that the trial court erred in concluding that Delany School is entitled to a share of supplemental school taxes and penal fines and forfeitures received by the Board. We disagree with the Board and affirm the trial court.

II. Scope of Review

Upon motion, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2001). An issue is material if "the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). An issue is genuine if it is supported by substantial evidence. *Id.* Our task is to determine, after reviewing the entire record: 1) whether a genuine issue of material fact exists; and 2) whether Delany School was entitled to judgment as a matter of law. The parties have stipulated to the material facts; therefore, this Court need only determine whether Delany School is entitled to judgment as a matter of law.

III. "Appropriation" and "Fund"

The Board argues that the trial court erred in concluding that there is no material difference between "local current expense appropriation" and "local current expense fund." The trial court stated, "The fact that the School Budget and Fiscal Control Act refers to local operating expenses as the 'local current expense *fund*' whereas the Charter School Funding Statute refers to such expenses as the 'local current expense *appropriation*' is not a material distinction." In its order the court noted that the terms "fund" and "appropriation" are used interchangeably in Chapter 115C. The trial court concluded that "local current expense *appropriation*" includes supplemental school taxes because "the definition of local current expense *fund* in N.C. Gen. Stat. § 115C-426(e) expressly refers to the monies generated by the supplemental tax and by penal fines and forfeitures as becoming a part of county appropriations." (Emphases added.). We agree with the trial court's interpretation of the definition of "local current expense fund."

The specific issue is whether N.C.G.S. § 115C-238.29H(b) of the Charter School Funding Statute, which refers to the "local current expense appropriation" to the LSAU, when construed with N.C.G.S. § 115C-426(e), which refers to the local current expense fund, requires the Board to transfer to Delany School money other than the county's annual budget appropriation to the LSAU under N.C.G.S. § 115C-429. The Board argues that Delany School is not entitled to an apportionment of the county's fines and forfeitures or supplemental school taxes because N.C.G.S. § 115C-238.29H(b) requires the LSAU to transfer funds amounting to the per pupil local current expense *appropriation to* the LSAU. The Board contends that an appropriation is "the authorization by a governmental body to spend up to a certain amount of money for a specified purpose." A "fund," the Board argues, is "defined by statute as an 'independent fiscal and accounting entity,' consisting of cash and other resources, together with related liabilities and equities, for the purpose of carrying on specific activities or obtaining certain objectives." (citing N.C.G.S. §§ 115C-423(5), 159-7(b)(8)). Therefore, "appropriation" and "fund" have different meanings.[1] Furthermore, the Board argues that the language of N.C.G.S.§ 115C-238.29H(b) is critical because "[a]n

1. We note that Webster's Dictionary defines "appropriation" as "money set aside for a specific use," Webster's New World College Dictionary 70 (4th ed. 1999), and defines "fund" as "a sum of money set aside for some particular purpose." *Id.* at 573. We do not, however, base our decision on the common definitions of these words.

appropriation by a governmental body is akin to an expenditure, because it authorizes future expenditures. An appropriation to a governmental body is a revenue source to that governmental body (and is an expenditure by the other governmental body which made the appropriation)."

Delany School, on the other hand, argues that the distinction between "appropriation" and "fund" is one without a difference. Delany School argues that the definition of "local current expense fund" in N.C.G.S. § 115C-426(e)

> expressly includes "appropriations" in a way that clearly refers to the local supplemental tax and fines and forfeitures: "These *appropriations* shall be funded by revenues accruing to the local school administrative unit by virtue of Article IX, Sec. 7 of the Constitution . . . , supplemental taxes . . . , and other moneys made available or accruing to the local school administrative unit for the current operating expenses of the public school system."

(alterations in original) (quoting N.C.G.S. § 115C-426(e)). Delany School also argues that because the North Carolina Constitution uses "appropriate" to refer to the transfer of fines and forfeitures, then, according to the Board's argument, "the drafters of the Constitution erred in using the wrong verb to describe the disposition of these funds." Finally, Delany School argues that to use the Board's construction of the statutes would fly in the face of the Legislature's intent that charter schools be treated as public schools. We agree. We begin with a discussion of the language of the statutes and the mechanics of school funding.

A. Local Current Expense Fund

1. Board of County Commissioners

The county budget approval by the board of county commissioners is governed by N.C.G.S. § 115C-429. The county superintendent of schools submits the budget to the board of education. N.C.G.S. § 115C-429(a) (2001). The board of education approves the budget, then submits it to the board of county commissioners. *Id.* The board of county commissioners determines the amount of county revenues to appropriate to the LSAU for the budget year. N.C.G.S. § 115C-429(b) (2001). The board of county commissioners then appropriates the revenues to the LSAU school finance officer. N.C.G.S. § 115C-437 (2001). These revenues are included in the local

current expense fund for the LSAU's operating expenses. N.C.G.S. § 115C-426 (2001).

2. Penal Fines and Forfeitures

Article IX, Section 7 of the North Carolina Constitution provides that "the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State . . . shall be faithfully appropriated and used exclusively for maintaining free public schools." N.C. Const. art. IX, § 7. The appropriation of fines and forfeitures is governed by N.C.G.S. § 115C-452, entitled 'Fines and forfeitures,' and N.C.G.S. § 115C-430, entitled 'Apportionment of county appropriations among local school administrative units.' Fines and forfeitures are collected in the General Court of Justice in each county. N.C.G.S. § 115C-452 (2001). The proceeds are remitted by the clerk of superior court to the county finance officer, who determines the amount to apportion to each LSAU if there is more than one LSAU in the county. *Id.* If there are multiple LSAUs, "all *appropriations* by the county to the local current expense funds of the units, except appropriations funded by supplemental taxes levied less than countywide . . . must be apportioned according to the membership of each unit." N.C.G.S. § 115C-430 (2001) (emphasis added).

Fines and forfeitures are apportioned according to the projected average daily membership of each LSAU. *Id.* County appropriations are properly apportioned when the dollar amount obtained by dividing the amount appropriated to each unit by the total membership of the unit is the same for each unit. N.C.G.S. § 115C-430 (2001). The county finance officer then remits the proper portion to the LSAU finance officer. N.C.G.S. § 115C-452 (2001). These revenues are included in the local current expense fund for the LSAU's operating expenses. N.C.G.S. § 115C-426 (2001).

3. Supplemental School Taxes

Supplemental school taxes may be levied to supplement state and county funds and operate schools of a higher standard. N.C.G.S. §§ 115C-501 to -511 (2001).

> Elections may be called by the local tax-levying authority to ascertain the will of the voters as to whether there shall be levied and collected a special tax in the several local school administrative units, districts, and other school areas, including districts formed from contiguous counties, to supplement the funds from

> State and county allotments and thereby operate schools of a higher standard by supplementing any item of expenditure in the school budget.

N.C.G.S. § 115C-501. Residents of the Asheville City School District approved a supplemental school tax in a school tax election on 27 August 1935.[2] Based on such an election, the board of county commissioners is thereafter authorized to levy a tax on property within the LSAU to supplement the local current expense fund. N.C.G.S. § 115C-511(a) (2001). The county collects the tax and remits it to the LSAU. N.C.G.S. § 115C-511(b). The tax revenues are included in the local current expense fund for the LSAU's operating expenses. N.C.G.S. § 115C-426 (2001). Residents of the Asheville City School District have paid annual supplemental school taxes since 1935 to operate schools in the Asheville City Schools Administrative Unit on a higher standard than that provided for by the State.

B. Legislative Intent

We first address our rules of statutory construction. The meaning of a statute is controlled by legislative intent. *Brown v. Flowe*, 349 N.C. 520, 507 S.E.2d 894 (1998). "To determine legislative intent, a court must analyze the statute as a whole, considering the chosen words themselves, the spirit of the act, and the objectives the statute seeks to accomplish." *Brown*, 349 N.C. at 522, 507 S.E.2d at 895. If the language of a statute is unambiguous on its face, then we must construe the statute according to its plain meaning. *Lutz v. Gaston County Bd. of Educ.*, 282 N.C. 208, 192 S.E.2d 463 (1972); *Davis v. Granite Corp.*, 259 N.C. 672, 131 S.E.2d 335 (1963); *Hedrick v. Graham*, 245 N.C. 249, 96 S.E.2d 129 (1956). However, where the language of the statute is ambiguous and its meaning is unclear, legislative intent controls. *Whittington v. N.C. Dep't of Human Resources*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990). Statutes on the same subject matter must be construed together and harmonized to give effect to each. *Lutz*, 282 N.C. at 219, 192 S.E.2d at 471.

N.C.G.S. § 115C-238.29E(a) states, "A charter school that is approved by the State shall be a public school within the local school administrative unit in which it is located." N.C.G.S. § 115C-426(a) states, "The State Board of Education, in cooperation with the Local Government Commission, shall cause to be prepared and promul-

2. Prior to the vote, the Citizens Committee for the School Supplement told voters, "Every penny provided by the Supplement will be spent under the supervision of the Asheville School Board and for the improvement of the Asheville City Schools."

gated a standard budget format for use by local school administrative units throughout the State." After reviewing the language of the education statutes, we hold that the trial court did not err in concluding that there is no material distinction between 'local current expense fund' in the Fiscal Control Act and 'local current expense appropriation' in the Charter School Funding Statute. Legislative history gives us insight into the intent of the Legislature in providing funding for charter schools.

The Legislature clearly intended for charter schools to be treated as public schools subject to the uniform budget format. *See* N.C.G.S. § 115C-239E(a) ("A charter school . . . shall be a public school . . . .") and N.C.G.S. § 115C-424 ("It is the intent of the General Assembly . . . to prescribe for the public schools a uniform system of budgeting and fiscal control."). The Legislature also clearly intended that the operating expenses of the public school systems be included in a single local expense fund which expressly includes penal fines and forfeitures and "supplemental taxes levied by or on behalf of the local school administrative unit." N.C.G.S. § 115C-426(e). Construing the Charter School Funding Statute with other public funding statutes in Chapter 115C, it is clear that the Legislature intended that supplemental taxes as well as penal fines and forfeitures be included in the operating budget of the school—the local expense fund.

Fines and forfeitures are apportioned according to N.C.G.S. § 115C-430. N.C.G.S. § 115C-452 and N.C.G.S. § 115C-430 state that, if there are multiple LSAUs in a county, "*all appropriations* by the county to the local current expense funds of the [LSAUs], except appropriations funded by supplemental taxes levied less than countywide . . . , must be apportioned according to the membership of each unit." N.C.G.S. § 115C-430. Reading § 115C-452 and § 115C-430 in pari materia, as we must, it is clear that fines and forfeitures are appropriated to the local current expense fund. The local current expense fund is used for the LSAU's current operating expenses. N.C.G.S. § 115C-426. Therefore, the appropriations included in the local current expense fund—fines and forfeitures, supplemental school taxes and county budgetary appropriations—are local current expense appropriations to the LSAU. "A [statutory] construction which operates to defeat or impair the object of the statute must be avoided if that can reasonably be done without violence to the legislative language." *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 295 (1975) (citing *Ballard v. Charlotte*, 235 N.C. 484, 70 S.E.2d 575 (1952)). The Legislature has clearly expressed its intent that charter schools

approved by the State be treated as public schools within the LSAU. We will not interpret the statutes at issue in this appeal in such a way as to defeat that intent.

V. Conclusion

Based on the foregoing, we hold that the trial court did not err in concluding that the phrase "local current expense appropriation" in the Charter School Funding Statute, N.C.G.S. § 115C-238.29H(b), is synonymous with the phrase "local current expense fund" in the School Budget and Fiscal Control Act, N.C.G.S. § 115C-426(e). We further hold that the trial court did not err in concluding that Delany School is entitled to a share of supplemental school taxes and penal fines and forfeitures received by the Board. Therefore, Delany School is entitled to judgment as a matter of law. Accordingly, we affirm.

AFFIRMED.

Judges MARTIN and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. AARON STUART VANCAMP

No. COA01-860

(Filed 21 May 2002)

1. Evidence— cocaine—seizure from vehicle where defendant was passenger

The trial court did not err in a trafficking in cocaine case by admitting evidence of 30.7 grams of cocaine seized at a license checkpoint from the console of a vehicle in which defendant was a passenger, because: (1) defendant has no standing to challenge the search of the vehicle since he had no ownership or possessory interest therein; and (2) even if defendant did have standing, his constitutional rights were not violated when all vehicles going through the checkpoint were stopped and the checkpoint was thus constitutional; an officer conducted a lawful frisk of defendant for weapons, discovered brass knuckles in defendant's pants pocket, and arrested defendant for carrying a concealed weapon; and the officer was justified in conducting a search incident to that arrest of the interior of the vehicle, including the console compartment.

2. Criminal Law— motion for mistrial—juror saw defendant in custody

The trial court did not err in a trafficking in cocaine case by concluding that defendant was not entitled to a mistrial after a juror saw defendant in the custody of a sheriff's deputy, because: (1) defendant failed to show an abuse of discretion by the trial court; (2) defendant failed to show any evidence of serious improprieties that would have made it impossible for defendant to receive a fair and impartial verdict; and (3) the trial court sua sponte substituted an alternative juror after denying defendant's motion for a mistrial.

3. Criminal Law— private unrecorded conference with juror—juror saw defendant in custody

The trial court did not err in a trafficking in cocaine case by conducting a private unrecorded conference with a juror who saw defendant in custody of a deputy sheriff, because: (1) defendant's failure to timely object to alleged procedural irregularities or improprieties constituted a waiver; and (2) even if there was no waiver, defendant failed to show prejudice when the trial court disclosed the substance of the conversation and both parties were given an opportunity to inquire further concerning the juror.

Appeal by defendant from judgment entered 11 January 2001 by Judge Forrest D. Bridges in Superior Court, Lincoln County. Heard in the Court of Appeals 24 April 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General John J. Aldridge, III, for the State.

Lewis & Shuford, P.A., by Meredith A. Shuford, for the defendant-appellant.

WYNN, Judge.

Aaron Stuart VanCamp presents the following issues on appeal of his conviction for trafficking cocaine: (I) Did the trial court err in admitting evidence of 30.7 grams of cocaine seized from a vehicle in which defendant was a passenger? (II) Was defendant entitled to a mistrial after a juror saw him in the custody of a sheriff's deputy? and (III) Did the trial judge err in conducting a private unrecorded conference with the juror who saw defendant in custody? For the

reasons stated below, we conclude that defendant received a fair trial, free from prejudicial error.

The evidence at trial tended to show that on 4 August 1999, Lincoln County Deputy Sheriff Brian Huffstickler assisted in conducting a systematic license check of all vehicles at a checkpoint intersection in Lincoln County. This case concerns his nighttime checking of an automobile driven by David Cook and containing defendant as a passenger. Apparently, on approaching the checkpoint, Cook ignored the officer's admonition to stop the vehicle; instead, he continued to drive through the checkpoint while he and defendant nervously talked and looked at each other. After the officer yelled six times for the vehicle to stop, Cook slowed and eventually stopped the vehicle approximately 60 feet past the checkpoint. As the vehicle slowed, the officer looked inside the vehicle with his flashlight and saw the corner of a plastic bag sticking out from the passenger seat occupied by defendant. The officer testified that he knew that plastic baggies, such as the one he observed, were often used as a method for transporting illegal drugs.

When defendant rolled down the window at Officer Huffstickler's request, the officer smelled a strong odor of alcohol coming from the vehicle. Thereafter, the officer asked defendant to step from the vehicle; patted down defendant for weapons; felt what he recognized to be a pair of brass knuckles in defendant's front pants pocket; and arrested defendant for carrying a concealed weapon. The officer then conducted a search of the center console, dash compartment, and passenger seat of the vehicle. His search of the baggie that he had seen earlier, revealed nothing; however, he found a yellow envelope that contained two plastic baggies in the center console which later testing revealed to contain 30.7 grams of crack cocaine.

Cook testified at the trial, without a limiting agreement with the State, implicating defendant as the owner of the crack cocaine. He stated that he agreed to drive defendant to a house in Denver, North Carolina in exchange for $50 and a gram of cocaine. Cook saw defendant put the crack cocaine in his car. He stated that on nearing the checkpoint, he told defendant to throw the drugs out of the vehicle but defendant refused. Cook admitted using cocaine daily and having prior convictions for numerous criminal offenses including possession of cocaine.

At the close of the evidence and before the jury charge, a juror privately revealed to the trial judge that he had inadvertently seen

defendant in an orange jumpsuit. Ultimately, the trial judge informed defendant and his counsel as well as the district attorney, and allowed them an opportunity to question the juror further; but, they all declined to do so. Thereafter, without objection, the trial court *sua sponte* substituted the juror with an alternative juror.

Following defendant's conviction of trafficking in cocaine by possessing 28 grams or more, the trial judge sentenced him to a minimum term of 35 months and a maximum term of 42 months imprisonment and to pay a $50,000 fine. Defendant appealed.

(I) Did the trial court err in admitting evidence of 30.7 grams of cocaine seized from the vehicle in which defendant was a passenger?

[1] We answer: No, because defendant had no standing to challenge the search of the vehicle, and even if he did, his constitutional rights were not violated.

The "[r]ights assured by the Fourth Amendment are personal rights, [which] . . . may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure." *Simmons v. United States*, 390 U.S. 377, 389, 19 L. Ed. 2d 1247, 1256 (1968). Standing to claim the protection of the Fourth Amendment guaranty of freedom from unreasonable governmental searches and seizures is based upon the legitimate expectations of privacy of the individual asserting that right in the place which has allegedly been unreasonably invaded. *See Rakas v. Illinois*, 439 U.S. 128, 138, 58 L. Ed. 2d 387, 398 (1978); *Katz v. U.S.*, 389 U.S. 347, 19 L. Ed. 2d 576 (1967).

In this case, defendant who claims an infringement of his rights, asserts neither an ownership nor a possessory interest in the automobile which was searched. The evidence presented at the pretrial hearing established that defendant did not own the car in which he rode nor was he driving the car. In its order denying defendant's motion to suppress, the trial court correctly concluded as a matter of law that defendant "as a mere passenger in the 1989 Acura, claiming no ownership or possessory interest therein, had no legitimate expectation of privacy in the center console of the vehicle, and therefore, has no standing to assert any alleged illegality of the search thereof."

Even assuming *arguendo*, that defendant possessed a justiciable expectation of privacy in the vehicle, the trial court's decision to deny

defendant's motion to suppress is based on findings of fact that are supported by competent evidence. "The scope of review on appeal of the denial of a defendant's motion to suppress is strictly limited to determining whether the trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law." *State v. Corpening*, 109 N.C. App. 586, 587-88, 427 S.E.2d 892, 893 (1993).

Defendant argues that whether the standard is reasonable suspicion or probable cause, the factual circumstances did not justify his seizure by removal from the vehicle, which led to a search of the vehicle that was not consented to by the driver. "[A]n investigative stop and detention leading to a pat down search must be based on an officer's reasonable suspicion of criminal activity. . . . However, an investigative stop at a traffic check point is constitutional, without regard to any such suspicion, if law enforcement officers systematically stop all oncoming traffic." *State v. Briggs*, 140 N.C. App. 484, 487, 536 S.E.2d 858, 860 (2000) (citations omitted); *see also Delaware v. Prouse*, 440 U.S. 648, 59 L. Ed. 2d 660 (1979). In the present case, the officers were conducting a systematic stop of vehicles to check licenses and registrations. All vehicles going through this checkpoint were stopped; thus, the checkpoint was constitutional. *Id.*

Defendant also challenges his frisk by Officer Huckstickler.

> "[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him."

State v. Streeter, 283 N.C. 203, 209-10, 195 S.E.2d 502, 506-07, *affirmed*, 283 N.C. 203, 195 S.E.2d 502 (1973) (quoting *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). "Although a routine traffic stop does not justify a protective search for weapons in every instance, once the defendant is outside the automobile, an officer is

permitted to conduct a limited pat down search for weapons if he has a reasonable suspicion based on articulable facts under the circumstances that defendant may be armed and dangerous." *State v. Briggs*, 140 N.C. App. at 488, 536 S.E.2d at 860. When a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such person in an attempt to discover weapons which might be used to assault him. *State v. Sanders*, 112 N.C. App. 477, 481, 435 S.E.2d 842, 845 (1993).

In determining whether the findings of fact sustain the trial court's conclusions of law, we must provide "due weight to inferences drawn from those facts by resident judges and law enforcement officers." *Ornelas v. U.S*, 517 U.S. 690, 699, 134 L. Ed. 2d 911, 920 (1996). A court must consider "the totality of the circumstances—the whole picture" in determining whether a reasonable suspicion to make an investigatory stop exists. *U.S. v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 629 (1981).

In the present case, the evidence shows that: 1) The vehicle slowed and eventually stopped only after the officer repeatedly yelled for the driver to do so; 2) the vehicle stopped approximately 60 feet beyond the checkpoint and before doing so, the officer observed defendant and the driver nervously talking and making eye contact with each other; 3) at the stopped vehicle, the officer saw, with a flashlight, a plastic baggie which he believed to be the kind typically used to transport illegal drugs; and, when defendant rolled down his window, the officer smelled a strong odor of alcohol. Moreover, the record shows that after exiting from the vehicle, the officer conducted a limited pat down of defendant and discovered brass knuckles in his pants pocket resulting in defendant's arrest for carrying a concealed weapon in violation of N.C. Gen. Stat. § 14-269.

Since the stop and frisk was lawful, the officer was justified in conducting a search incident to that arrest of the interior of the vehicle. Our appellate courts recognize the authority of an officer to search, incident to an arrest, the entire interior of the vehicle, including the glove compartment, console, or other interior compartments. *See New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768 (1981) (holding that when an officer makes a lawful custodial arrest of the occupants

of an automobile he may, as incident of that arrest, search the passenger compartment of the vehicle and may also examine the contents of any container found within the passenger compartment. Container here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment.); *see also U.S. v. Ross*, 456 U.S. 798, 72 L. Ed. 2d 572 (1982) (holding that where police officers have probable cause to search a vehicle, they may conduct a warrantless search of every part of the vehicle, including all containers and packages within it, that may conceal the object of the search); *State v. Massenburg*, 66 N.C. App. 127, 310 S.E.2d 619 (1984) (holding that warrantless search of defendant's locked glove compartment pursuant to lawful arrest was proper). Accordingly, we hold that the trial court properly admitted the cocaine seized from the console compartment.

(II) Was defendant entitled to a mistrial after a juror saw him in the custody of a sheriff's deputy?

[2] We answer: No, because defendant has shown no abuse of discretion by the trial judge, and no evidence of serious improprieties that would have made it impossible for defendant to receive a fair and impartial verdict.

"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." N.C. Gen. Stat. § 15A-1061 (2001). However, the decision to order a mistrial lies within the discretion of the trial judge, reviewable only for gross abuse of discretion. *See State v. Pakulski*, 319 N.C. 562, 568, 356 S.E.2d 319, 323 (1987), *decision reversed on other grounds*, 326 N.C. 434, 390 S.E.2d 129 (1990); *State v. Darden*, 48 N.C. App. 128, 268 S.E.2d 225 (1980). A mistrial is generally granted where there have been improprieties in the trial of such a serious nature, that defendant cannot receive a fair and impartial verdict. *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 140 (1998); *State v. Cagle*, 346 N.C. 497, 516, 488 S.E.2d 535, 548 (1997).

The evidence in this case shows that during a lunch break, juror number five informed the trial judge that he had inadvertently seen defendant in the custody of a deputy. The trial judge immediately inquired of the juror whether he had in any way discussed his observations with other jurors. The juror answered that he did not. The

trial judge, outside the presence of the jury, informed defendant, defendant's counsel and the assistant district attorney of what juror number five told him. Defendant's counsel asked the trial judge if she could question the remaining jurors to see if they had any contact with defendant. On questioning by the trial judge, the remaining jurors denied having observed defendant or having any discussions with juror number five. No objections were raised by defendant's counsel as to the nature or extent of the questioning by the trial court. After the trial court denied defendant's motion for a mistrial, the trial court *sua sponte* substituted an alternative juror for juror number five.

In a similar case, *State v. Boykin*, our Court upheld the trial court's denial of a motion for mistrial based on evidence that one juror saw the defendant removed from the courtroom in handcuffs. 78 N.C. App. 572, 337 S.E.2d 678 (1985). In *Boykin*, the trial court polled the jurors as to what they had seen, as in the present case, the trial judge asked counsel if they had any questions and they indicated that they did not have any. Likewise, the trial judge excused the single juror. As in *Boykin*, because defendant has shown no abuse of discretion by the trial judge and no serious improprieties that would make it impossible for him to receive a fair and impartial verdict, we reject this assignment of error. *See State v. Blackstock*, 314 N.C. 232, 243, 333 S.E.2d 245, 252 (1985).

(III) Did the trial judge err in conducting a private unrecorded conference with the juror who saw defendant in custody?

[3] We answer: No, because defendant's failure to object in apt time to alleged procedural irregularities or improprieties constituted a waiver, and even if there was no waiver, defendant has failed to show prejudice.

On the issue of waiver, our Supreme Court reached the same result in *State v. Tate*, 294 N.C. 189, 198, 239 S.E.2d 821, 827 (1978):

> We are of the opinion that the trial court's private conversations with jurors were ill-advised. The practice is disapproved. At least, the questions and the court's response should be made in the presence of counsel. The record indicates, however, that defendant did not object to the procedure or request disclosure of the substance of the conversation. Failure to object in apt time to alleged procedural irregularities or improprieties constitutes a waiver.

Likewise, in this case, we disapprove of the trial judge's private conversation with juror number five; but, defendant did not object to the procedure, and in this case, the trial judge did disclose the substance of the conversation. In fact, after immediately conveying the substance of his conversation with juror number five to defendant's attorney and the assistant district attorney, the trial judge gave both parties an opportunity to inquire further of juror number five. Defendant's attorney requested further questioning of the other jurors but did not object to the trial judge's conversation with juror number five nor request further questioning of that particular juror. Thus, as in *Tate*, defendant's failure to object in apt time to alleged procedural irregularities or improprieties constituted a waiver.

Furthermore, the record shows that the trial judge questioned the other jurors to find out if they knew about juror number five's inadvertent observation; and subsequently, dismissed juror number five and replaced him with an alternative juror. Thus, even assuming *arguendo*, that such conversation between the trial judge and juror number five constituted error, it was harmless error because the proceedings could not in any manner affected the jury's verdict. *See State v. Hudson*, 331 N.C. 122, 415 S.E.2d 732 (1992) (a trial judge's chance encounter in a corridor with a juror during a recess in a defendant's trial was not a "proceeding" within the meaning of N.C. Gen. Stat. § 15A-1241, and therefore need not be recorded); *State v. Huff*, 325 N.C. 1, 29, 381 S.E.2d 651 (1989) (Our Supreme Court held that it was harmless error to permit the defendant to be absent during a portion of the evidence because defendant was not prejudiced by his absence.).

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

No prejudicial error.

Judges McCULLOUGH and BIGGS concur.

OFFISS, INC., PLAINTIFF-APPELLANT v. FIRST UNION NATIONAL BANK, DEFENDANT-APPELLEE

FIRST UNION NATIONAL BANK, THIRD-PARTY PLAINTIFF v. TAX-FREE INCOME TRUST S/H/A TAX-FREE HIGH YIELD PORTFOLIO, THIRD-PARTY DEFENDANT

No. COA01-620

(Filed 21 May 2002)

1. **Mortgages and Deeds of Trust— public bonds for golf course—reserve fund—foreclosure—entitlement to fund**

The discharge of an Indenture did not result in plaintiff being entitled to a Reserve Fund where revenue bonds were issued by plaintiff to build a public golf course; an Indenture was issued to facilitate issuance of the bonds, with First Union serving as trustee; financial difficulties and a restructuring ensued, with First Union now holding a security interest in revenues including a Reserve Fund; default and foreclosure followed, with the entire amount of the secured obligation being satisfied; the purchaser of the golf course (the Bondholder) eventually sold the property and directed First Union to disburse to it all remaining funds; and plaintiff demanded payment of the Reserve Fund. Plaintiff could acquire an ownership interest in the Reserve Fund only if it satisfied the conditions set forth in the Indenture and therefore had only a contingent interest in the Reserve Fund.

2. **Mortgages and Deeds of Trust— public bonds for golf course—reserve fund—foreclosure—payment of obligation by bondholder**

The trial court properly determined that plaintiff was not entitled to a Reserve Fund under an Indenture where the Fund was created as a part of revenue bond financing for a public golf course, the entire amount of the secured obligation was satisfied by a credit bid at foreclosure and plaintiff contended that it was entitled to the Reserve Fund because the obligations had been satisfied. The Indenture agreement was that plaintiff would be entitled to the Reserve Fund only if it "paid" or "caused to be paid" the principal and interest; a scenario in which plaintiff could default on its obligations, have the bondholder make a credit bid at foreclosure, and yet remain entitled to the balance in the Reserve Fund would contradict the purpose for which the Reserve Fund was created.

OFFISS, INC. v. FIRST UNION NAT'L BANK

[150 N.C. App. 356 (2002)]

Appeal by plaintiff from judgment entered 26 January 2001 by Judge Robert P. Johnston in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 February 2002.

Rayburn Cooper & Durham, P.A., by G. Kirkland Hardymon, for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by David M. Schilli, for defendant-appellee/third-party plaintiff-appellee.

Moore & Van Allen, PLLC, by Jeffrey J. Davis; and Dorsey & Whitney, LLP, by Patrick J. McLaughlin, for third-party defendant-appellee.

WALKER, Judge.

Plaintiff OFFISS, Inc. (OFFISS) initiated this action on 1 October 1999 against defendant First Union National Bank (First Union) asserting claims for conversion, breach of fiduciary duty, negligence, breach of contract, and unfair and deceptive trade practices.[1] First Union answered denying liability and asserting affirmative defenses of waiver, estoppel, and laches. First Union also filed a third-party complaint against Tax-Free High Yield Portfolio (the Bondholder) seeking indemnification for any judgments entered in favor of OFFISS against First Union. Thereafter, the parties agreed to a trial upon a stipulated statement of facts and exhibits. On 26 January 2001, after hearing arguments and reviewing the record, the trial court entered judgment in favor of First Union and dismissed OFFISS' complaint with prejudice.

This case involves a revenue bond financing transaction. OFFISS is a non-profit corporation with its stated purpose being to oversee the development and funding of programs designed to "improve, develop, and integrate human services, economic development, education and leadership" in Swain County. On 17 March 1994, OFFISS issued what were designated "Recreational Facilities Gross Revenue Bonds (Smoky Mountain Golf Course)" to finance the acquisition, development and construction of a public golf course facility near Bryson City (the Project). The bonds had a principal amount of $5,695,000.00 and were purchased by the Bondholder. To facilitate the issuing of the bonds, OFFISS executed an Indenture of Trust with

1. OFFISS also asserted claims for an accounting and the imposition of a constructive trust but subsequently waived these claims.

First Union under which First Union served as trustee of various "property, franchises and income" related to the bonds and the Project for the benefit of the Bondholder.

Over the next two years, the Project experienced financial difficulty such that OFFISS was unable to service its bond obligations. To avoid a default and to provide additional funds to complete the Project, the parties agreed to restructure the bonds. In February 1996, OFFISS re-issued the bonds at a principal amount of $5,484,738.25 and issued additional bonds in the principal amount of $2,066,449.10 for an aggregate total of $7,551,187.35 (the Bonds). The Bonds carried an interest of 8.4 percent per annum and the Bondholder purchased them for $7,633,863.43.

The Bonds were issued pursuant to an Amended And Restated Indenture of Trust (Indenture) executed by OFFISS and First Union. The Indenture again named First Union as trustee of various "property, franchises and income" related to the Bonds and the Project for the benefit of the Bondholder.

To provide security for the repayment of the Bonds, OFFISS granted to First Union within the Indenture a security interest in the "Revenues" as defined by the Indenture. OFFISS also executed a "Deed of Trust and Security Agreement" (Deed of Trust). Pursuant to the Deed of Trust, OFFISS conveyed the property on which the golf course was being built (Mortgaged Property) to a Deed of Trust Trustee for the benefit of First Union as the trustee under the Indenture. The Deed of Trust authorized the Deed of Trust Trustee to foreclose on the Mortgaged Property through a power of sale if: (a) an "event of default" occurred under the Bonds, (b) the maturities on the Bonds were accelerated pursuant to the terms of the Indenture, and (c) First Union, as beneficiary, so directed the trustee. Finally, the Deed of Trust also granted to First Union a security interest in certain "collateral" associated with the Project (Deed of Trust Collateral).

In accordance with the Indenture, certain funds were created and maintained by First Union. One of these funds was designated as "The Smoky Mountain Golf Course Reserve Fund" (Reserve Fund). Money deposited into this fund was to be withdrawn and used by First Union pursuant to the terms of the Indenture. The Indenture required that $829,500.00 of the Bond proceeds be deposited into the Reserve Fund.

In 1997, OFFISS defaulted on its obligations under the Indenture when it failed to make payments of principal and interest on the Bonds. Consequently, First Union was unable to make its payments to the Bondholder when the Bonds came due. On 14 May 1998, pursuant to the Bondholder's instructions, First Union gave OFFISS notice of default, accelerated the maturities on the Bonds, and directed the Substitute Trustee[2] under the Deed of Trust to begin foreclosure proceedings. After the Substitute Trustee commenced foreclosure proceedings on the Mortgaged Property and Deed of Trust Collateral, a foreclosure sale was held on 8 July 1998. As of that date, the outstanding principal and accrued unpaid interest under the Bonds was $8,891,134.00. Prior to the foreclosure sale, the Bondholder instructed First Union to enter a credit bid of $8,900,000.00 on its behalf. First Union submitted this bid and the Bondholder became the successful bidder. Subsequently, on 31 July 1998, the Substitute Trustee conveyed to the Bondholder through a "Deed by Trustee under Foreclosure" the Mortgaged Property and the Deed of Trust Collateral. A Final Report and Account of Foreclosure Sale was filed which reported that the entire amount of the secured obligation between OFFISS and First Union had been satisfied. The cost and expenses incurred by First Union and the Substitute Trustee amounted to $76,478.31.

Meanwhile, although the golf course had been completed, it failed to generate sufficient income to pay its operating expenses. Throughout 1998, First Union, in accordance with the Indenture, disbursed funds out of the Reserve Fund to keep it operating. As a result, only $616,156.26 remained in the Reserve Fund on 31 July 1998. After that date, First Union continued to disburse funds from the Reserve Fund pursuant to instructions it received from the Bondholder.

In December 1998, the Bondholder sold the Mortgaged Property and received $464,791.47 in net proceeds. Shortly thereafter, the Bondholder directed First Union to disburse to it all remaining funds held in relation to the Bonds. Upon receipt of these funds, the Bondholder tendered the Bonds to First Union for cancellation. However, on 13 September 1999, OFFISS demanded payment from First Union, as Trustee under the Indenture, of the $616,165.26 which had been in the Reserve Fund as of 31 July 1998.

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2. Subsequent to the execution of the Deed of Trust the parties named a Substitute Trustee to replace the Trustee.

With this appeal, OFFISS contends the trial court erred in rendering judgment in favor of First Union and dismissed its complaint. In reaching this decision, the trial court concluded in part:

> 5. First Union had a duty as trustee under the Indenture to use the Reserve Fund solely in repayment of the Bonds, and First Union satisfied its duty by disbursing the money in the Reserve Fund pursuant to the terms of Article V of the Indenture and the instructions received from the Bondholder.
>
> 6. The Indenture contains conditions precedent that [OFFISS] was required to satisfy before [OFFISS] acquired any right to the Reserve Fund, and [OFFISS] did not satisfy those conditions precedent and, thus, has no right to the Reserve Fund.

OFFISS argues the trial court erred in that: (1) the Indenture had been discharged as a result of the foreclosure proceedings and its terms no longer controlled who was entitled to the Reserve Fund, and (2) even if the Indenture's terms controlled, OFFISS satisfied the conditions specified in the Indenture and thus had acquired the right to the Reserve Fund.

I.

[1] OFFISS' first argument rests on its interpretation of the terms of the Indenture and the Deed of Trust. OFFISS maintains the Deed of Trust incorporated the terms of the Indenture and thereby served to secure OFFISS' repayment of the Bonds and the performance of its other obligations under the Indenture. Thus, according to OFFISS, when the Deed of Trust was foreclosed upon and the Substitute Trustee reported that the obligations secured by it had been satisfied, any remaining obligations of OFFISS under the Deed of Trust and the Indenture were discharged. As a result, the conditions specified in the Indenture were no longer applicable and First Union became obligated to disburse to OFFISS the proceeds which remained in the Reserve Fund. We disagree.

The basis of OFFISS' argument centers on its assumption that, at the time OFFISS executed the Indenture with First Union, OFFISS acquired an ownership interest in the Reserve Fund. Under this assumption, once the encumbrances on OFFISS' ownership interest were satisfied as a result of foreclosure, OFFISS became entitled to the Reserve Fund regardless of the conditions set forth in the Indenture. In support of its position, OFFISS cites *Liberty Mfg. Co. v.*

Malloy, 217 N.C. 666, 9 S.E.2d 403 (1940) which holds: "[t]he essential effect and consequence of the discharge of the mortgage debt is the discharge of the mortgage itself. The mortgage was incident to the debt, rested upon it, and when the purpose for which it was created was accomplished, it ceased to have effect." *Id.* at 668, 9 S.E.2d at 404. However, the case here is distinguishable in light of the fact that OFFISS never acquired an ownership interest in the Reserve Fund.

Under the Indenture's provisions, OFFISS pledged to First Union as trustee under the Indenture, the "Trust Estate,"[3] for the benefit of the Bondholder. The Trust Estate remained as pledged security under the Indenture which recited:

> PROVIDED, HOWEVER, that if [OFFISS] pays or causes to be paid all of the principal of, premium, if any, and interest due and payable on all Outstanding Bonds, pays or causes to be paid all other sums payable by [OFFISS], including all fees, expenses and other amounts payable to [First Union], . . ., then, and in that case, the right, title and interest of [First Union] in and to the Trust Estate will then cease, terminate and become void and this Indenture and the rights hereby granted shall cease, determine and be void; otherwise this Indenture to be and remain in full force and effect.

The parties agree that the Reserve Fund was included in the Trust Estate and that First Union as trustee was required to create and maintain the fund using $829,500.00 of the proceeds provided by the Bondholder. They also agree the Indenture sets forth two independent conditions, each of which needed to be fulfilled by OFFISS before it was entitled to the Reserve Fund: (1) payment of all of the principal and interest due on the Bonds, and (2) payment of all other sums payable by OFFISS including all fees, expenses and other amounts payable to First Union. *See Farmers Bank v. Brown Distributors*, 307 N.C. 342, 350, 298 S.E.2d 357, 362 (1983) (a condition precedent is an event which must occur before a contractual right arises). Section 5.05 of the Indenture provides:

> Trust Moneys deposited in the Reserve Fund shall be used and withdrawn by the Trustee for the purpose of paying the last maturing principal of and the interest on the Bonds, whether at the stated payment date or by redemption of the Bonds; provided, however, that whenever and to the extent that moneys in the

3. The Indenture defined the "Trust Estate" as "all property and rights conveyed by [OFFISS] under the Granting Clauses of [the] Indenture."

> Bond Fund[4] are insufficient for the purpose of paying principal of and interest on the Bonds, whether or not at the redemption date therefor, moneys on deposit in the Reserve Fund shall be withdrawn by the Trustee and used for such purposes. . . .

Thus, the parties created the Reserve Fund and the Indenture required that it be held by First Union in trust for the general purpose of securing the payment of the principal and interest on the Bonds. OFFISS could only acquire an ownership interest in the Reserve Fund if it satisfied the conditions set forth in the Indenture. Therefore, by the terms of the Indenture, OFFISS only had a contingent interest in the Reserve Fund. *See e.g. In re Central Medical Center, Inc.*, 122 B.R. 568, 573 (Bankr. E.D. Mo. 1990) (recognizing that a reserve fund created under an indenture was not considered property of the debtor's bankruptcy estate as the debtor only had a reversionary interest in the fund). Accordingly, since OFFISS never acquired an ownership interest in the Reserve Fund, we find no merit to OFFISS' contention that the discharge of the Indenture resulted in its entitlement to the Reserve Fund.

II.

[2] OFFISS also argues that regardless of whether the terms of the Indenture controlled, it nonetheless satisfied the Indenture's two conditions and is thereby entitled to the Reserve Fund. Specifically, OFFISS maintains the conditions were met by virtue of the $8,900,000.00 credit bid the Bondholder made at foreclosure.

Regarding the first condition, OFFISS contends that since the Bondholder's credit bid of $8,900,000.00 "fully satisfied" the obligations secured by the Deed of Trust, it in effect "paid" the principal and interest due on the Bonds as required by the Indenture. In support of this position, OFFISS cites authority which it asserts concludes that a credit bid made by a secured creditor at foreclosure is the equivalent of making a cash payment. *See* 59A C.J.S. Mortgages § 634(c) (1998); *Bennett v. Morrison*, 242 P. 636, 637 (Colo. 1925); *Witter v. Bank of Milpitas*, 269 P. 614, 619 (Cal. 1928); *Pennington v. Purcell*, 125 So. 79, 82 (Miss. 1929); *Thomason v. Pacific Mut. Life Ins. Co. of California*, 74 S.W.2d 162, 164 (Tex. Civ. App.-El Paso 1934); *Somers v. Godwin*, 27 S.E.2d 909, 912 (Va. 1943); *and Semmes Nurseries, Inc. v. McDade*, 263 So.2d 127, 131 (Ala. 1972).

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4. The Indenture required the creation of a Bond Fund to ensure principal and interest payments as they came due.

Notwithstanding the principle set forth in these cases, OFFISS fails to reconcile the expressed language set forth throughout the Indenture. In addition to the previously quoted provisions, Section 9.10 states in relevant part:

> Whenever the principal of, premium, if any, and interest on all of the Bonds have been paid under the provisions of this Section 9.10 and all expenses and charges of [First Union] have been paid, any balance remaining in the Funds created hereunder shall be paid to [OFFISS].

Furthermore, under Article XII:

> Any Bond will be deemed to be paid. . .for all purposes of this Indenture when. . .payment of the principal of such Bond plus interest thereon . . . has been provided for by irrevocably depositing with [First Union]. . . moneys sufficient to make such payment. . . .

Our courts have consistently held that the terms of a contract are to be interpreted according to the expressed intent of the parties unless such intent is contrary to law. *See Lane v. Scarborough*, 284 N.C. 407, 200 S.E.2d 622 (1973); *Duke Power Co. v. Blue Ridge Elec. Membership Corp.*, 253 N.C. 596, 117 S.E.2d 812 (1961); *Lake Mary Ltd. Part. v. Johnston*, 145 N.C. App. 525, 551 S.E.2d 546, *disc. rev. denied*, 354 N.C. 363, 557 S.E.2d 539 (2001); *and Bueltel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 518 S.E.2d 205, *disc. rev. denied*, 351 N.C. 186, 514 S.E.2d 709 (1999). "If the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996).

Here, Section 5.05, Section 9.10, and Article XII of the Indenture each use the word "paid" in the context which would require OFFISS to make a payment or cause a payment to be made. Nonetheless, OFFISS seeks to have the word "paid" interpreted to include the satisfaction of its obligations by a credit bid in foreclosure. The interpretation OFFISS puts forth would require us to conclude the parties contemplated that OFFISS could default on its obligations, have the Bondholder make a credit bid at foreclosure, and yet remain entitled to the balance in the Reserve Fund. Such a scenario contradicts the very purpose for which the Reserve Fund was created, namely, to ensure that the Bondholder received payment of the principal and

interest on the Bonds from OFFISS. Additionally, a careful reading of the Indenture reveals that, in other sections, the parties clarified when the term "pay" was to include the satisfaction or discharge of an obligation. For example, pursuant to Section 7.13(g), OFFISS agreed to "pay or otherwise satisfy and discharge" the various obligations it made in connection with the Project. The parties stipulated that "[OFFISS] defaulted on its obligations under the Indenture by *failing to make payments* of principal and interest on the Bonds to First Union." (emphasis added).

We conclude the Indenture clearly sets forth the parties' agreement that OFFISS would only be entitled to the Reserve Fund if it "paid" or "caused to be paid" the principal and interest due under the Bonds. Since OFFISS has not fulfilled this condition, the trial court properly determined it was not entitled to the Reserve Fund. We note that our holding today does not suggest that, under similar circumstances, a credit bid at a foreclosure sale, which equals or exceeds the total outstanding principal and accrued unpaid interest under the bonds, could never constitute payment of the obligations secured by a Deed of Trust.

The judgment of the trial court dismissing OFFISS' complaint with prejudice is hereby

Affirmed.

Judges HUNTER and BRYANT concur.

STATE OF NORTH CAROLINA v. MARIO MARTINEZ

No. COA01-876

(Filed 21 May 2002)

1. Search and Seizure— trafficking in marijuana—possession with intent to sell and deliver marijuana—motion to suppress-warrantless search

The trial court did not err in a trafficking in marijuana and possession with intent to sell and deliver marijuana case by denying defendant's motion to suppress even though defendant con-

tends he was subjected to a warrantless search in violation of his Fourth Amendment rights, because the officers had probable cause to believe that defendant and his accomplice were committing a felony in their presence based on an informant's information and the officers' independent verification of that information.

2. Evidence— accomplice testimony—uncorroborated

The trial court did not err in a trafficking in marijuana and possession with intent to sell and deliver marijuana case by admitting the uncorroborated testimony of defendant's accomplice, because: (1) the uncorroborated testimony of an accomplice will sustain a conviction so long as the testimony tends to establish every element of the offense charged; and (2) defendant had ample opportunity to cross-examine his accomplice and challenge his credibility before the jury.

3. Drugs— trafficking in marijuana—possession with intent to sell and deliver marijuana—motion to dismiss—constructive possession

The trial court did not err in a trafficking in marijuana and possession with intent to sell and deliver marijuana case by failing to dismiss the case at the close of the State's evidence based on alleged insufficient evidence of constructive possession because there was sufficient evidence of other incriminating circumstances for the jury to reasonably infer that defendant had the power and intent to control the twenty-five pounds of marijuana found in the trunk of the car in which he was riding as a passenger, including the facts that: (1) this was a planned drug transaction; (2) an informant testified that he had pre-arranged to have twenty-five pounds of marijuana delivered to his house; (3) defendant's accomplice testified that he had been paid by defendant to be his courier to and from the informant's house; (4) the informant had purchased drugs from the accomplice and defendant on five or six previous occasions; (5) defendant had delivered drugs to the informant's house previously; (6) the officers independently corroborated and verified everything that the informant had reported to them about the drug transaction; and (7) defendant was found with $1,780 in cash on his person at the scene.

4. Drugs— jury instruction—knowingly possessing marijuana

The trial court did not commit plain error in a trafficking in marijuana and possession with intent to sell and deliver marijuana case by instructing the jury about the law of knowingly possessing marijuana even though defendant contends there is no evidence of defendant's knowledge of the marijuana in the automobile, because the State presented sufficient evidence to show that defendant had the intent and capability to exercise control and dominion over the marijuana based on constructive possession.

5. Drugs— requested instruction—mere presence not acting in concert

Although the trial court refused to give defendant's requested instruction that defendant's mere presence in the automobile was insufficient to show defendant acted in concert in a trafficking in marijuana and possession with intent to sell and deliver marijuana case, the substance of defendant's requested instruction was contained in the trial court's instruction on the law of constructive possession.

6. Appeal and Error— preservation of issues—failure to cite authority

Although defendant contends the trial court erred in a trafficking in marijuana and possession with intent to sell and deliver marijuana case by giving multiple verdict sheets to the jury, this assignment of error is abandoned because defendant has failed to cite any authority in support of his argument as required by N.C. R. App. P. 28(b)(5).

Appeal by defendant from judgments entered 15 February 2001 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 25 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Amy L. Yonowitz, for the State.

William H. Dowdy, for defendant-appellant.

TYSON, Judge.

Mario Martinez ("defendant") appeals from the trial court's entry of judgment after a jury returned a verdict finding defendant guilty of trafficking in marijuana by transportation of more than ten pounds

but less than fifty pounds, trafficking in marijuana by possession of more than ten pounds but less than fifty pounds, and possession with intent to sell and deliver marijuana. We find no error.

I. Facts

The evidence at trial tended to show that officers of the New Hanover County Sheriff's Department ("officers") served a valid search warrant based upon a known informant's tip on Daniel Goff ("Goff") at his residence on 21 August 2000 at approximately 8:00 p.m. The search revealed illegal drugs, contraband, and large quantities of cash. Goff, a college student in his early twenties, communicated a statement to Officer Sidney Causey ("Officer Causey") that normally he purchased his marijuana from two Hispanic males. Officer Causey testified that Goff was "crying and I'm sure he was scared and he provided us with this information, which I believed was true." Goff stated that the two Mexican males were currently en route to deliver a twenty-five pound shipment of marijuana to his house. Goff informed Officer Causey that he had spoken to them about an hour earlier, and that they would be arriving in a small white four-door automobile, which would "come right to my door."

The officers established surveillance in the immediate area. While the officers were waiting in Goff's house, Goff received a cellular telephone call from two men who were driving to his house. Officer Causey overheard the conversation and verified that two Hispanic men would be arriving at Goff's residence in approximately twenty minutes.

Approximately twenty minutes later, a white four-door Neon automobile, occupied by two Hispanic males, turned into Goff's driveway, and parked next to Goff's front door. The "take down" signal was given, and both men were seized and removed from the vehicle. The officers searched the trunk and found large plastic bags that smelled like marijuana. Both men were arrested.

Mario Martinez ("defendant") was searched and $1,780.00 cash was found in his pocket. The driver, Carlos Zavala ("Zavala"), was also searched and $30.00 cash was found on his person.

On 11 February 2001, defendant filed a motion to suppress evidence. A hearing was conducted, and the trial court denied the motion. Defendant was tried on 13 February 2001 and did not offer any evidence. Defendant moved to dismiss at the close of the State's evidence. The trial court denied his motion. The jury returned a ver-

dict of guilty against defendant for trafficking in marijuana by transportation of more than ten pounds but less than fifty pounds, trafficking in marijuana by possession of more than ten pounds but less than fifty pounds, and possession with intent to sell and deliver marijuana.

Defendant was sentenced to twenty-five months minimum and forty months maximum for trafficking in marijuana by transportation, twenty-five months minimum and thirty months maximum for trafficking in marijuana by possession, and six months minimum and eight months maximum for possession with the intent to sell and deliver marijuana, all in the presumptive range and all to run consecutively. Defendant appeals.

II. Issues

Defendant assigns as error the trial court's (1) denying defendant's motion to suppress, (2) admitting accomplice testimony into evidence, (3) denying defendant's motion to dismiss for insufficiency of the evidence, (4) jury instructions, and (5) giving multiple verdict sheets to the jury.

III. Motion to Suppress

[1] Defendant argues that he was subjected to a warrantless search that violated the Fourth Amendment prohibition against unreasonable searches and seizures. This argument is without merit. Our review of a motion to dismiss is *de novo*. *State v. Brooks*, 337 N.C. 132, 140-41, 446 S.E.2d 579, 585 (1994).

"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 *State v. Wooten*, 34 N.C. App. 85, 88, 237 S.E.2d 301, 304 (1977)). "A search of a motor vehicle which is on a public roadway or in a public vehicular area is not in violation of the fourth amendment [sic] if it is based on probable cause, even though a warrant has not been obtained." *State v. Isleib*, 319 N.C. 634, 638, 356 S.E.2d 573, 576 (1987) (citing *United States v. Ross*, 456 U.S. 798, 809, 72 L. Ed. 2d 572, 584 (1982)).

" '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)). "Once [officers] corroborated the description of the defendant and his presence at the named location, [they] 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.

Transporting twenty-five pounds of marijuana is a felony. *See* N.C. Gen. Stat. § 90-95(h)(1) (2001). Although Goff was not a known informant, the officers independently verified the information that he provided to them. Based on Goff's information and the officers' independent verification of that information, the officers had probable cause to believe that defendant and Zavala were committing a felony in their presence.

Goff informed the officers that his suppliers, two Hispanic males, were currently driving to his house in a small white four-door automobile to deliver approximately twenty-five pounds of marijuana. Goff also told Officer Causey that the two Hispanics would park their car right in front of his front door.

The officers independently verified and corroborated Goff's information. Officer Causey overheard a cellular telephone conversation between Goff and the two Hispanic men. Officer Causey verified that they would be arriving at Goff's house in approximately twenty minutes when he overheard Goff's telephone conversation with Zavala and defendant, which corroborated the time frame Goff originally communicated to Officer Causey. Approximately twenty minutes later, the officers observed a small white four-door automobile, containing two Hispanic males, turn into Goff's drive-way and park next to his front door. At that moment, the officers had corroborated the (1) description of the transporting automobile, (2) a description of the two occupants, (3) the proximity of the automobile's position to the front door, and (4) the arrival time of the automobile. All of Goff's information was proven reliable up to that point. The officers had probable cause to believe that a felony was being committed in their presence.

The trial court properly denied defendant's motion to dismiss. This assignment of error is overruled.

IV. Accomplice Testimony

[2] Defendant contends that the trial court erred by admitting the testimony of defendant's accomplice Zavala. Defendant argues that this testimony constituted the "uncorroborated testimony of an accomplice," and that Zavala's testimony violated hearsay rules. Defendant in his brief has failed to show this Court what hearsay rule the trial court violated. That portion of this assignment of error is dismissed.

In defendant's brief he cites *State v. Keller*, 297 N.C. 674, 256 S.E.2d 710 (1979), for the proposition that "uncorroborated testimony of an accomplice is to be received with caution, and can be accepted *only if* it establishes every element of the offense charged." (Emphasis supplied). This assertion misstates the law.

"It is well-established that the uncorroborated testimony of an accomplice will sustain a conviction so long as the testimony *tends to establish* every element of the offense charged." *Keller*, 297 N.C. at 679, 256 S.E.2d at 714 (emphasis supplied) (citations omitted).

Keller further states that the fact that an accomplice "may have lied earlier bears only on the credibility, not the sufficiency, of his testimony. The credibility of witnesses is a matter for the jury rather than the court. Contradictions and discrepancies in the state's [sic] evidence do not warrant dismissal of the case." *Id.* (citations omitted).

"It is well settled in this jurisdiction that although the jury should receive and act upon such testimony with caution, the unsupported testimony of an accomplice is sufficient to sustain a conviction if it satisfies the jury beyond a reasonable doubt of the guilt of the accused." *State v. Tilley*, 239 N.C. 245, 249, 79 S.E.2d 473, 476, (1954) (citations omitted). Defendant had ample opportunity to cross-examine Zavala and challenge his credibility before the jury. The trial court properly admitted the testimony of Zavala. This assignment of error is overruled.

V. Sufficiency of the Evidence

[3] Defendant contends that there was insufficient evidence to support a guilty verdict, and the trial court should have dismissed the

case at the close of the State's evidence. Defendant argues that the State's evidence only shows defendant's mere presence as a passenger in an automobile where twenty-five pounds of marijuana was discovered in the trunk. We disagree.

" 'An accused's possession of narcotics may be actual or constructive. He has possession of the contraband material within the meaning of the law when he has both the power and intent to control its disposition or use.' " *State v. Weems*, 31 N.C. App. 569, 570, 230 S.E.2d 193, 194 (1976) (quoting *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)).

"Proving constructive possession where defendant had nonexclusive possession of the place in which the drugs were found requires a showing by the State of other incriminating circumstances which would permit an inference of constructive possession." *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 73 (1996) (citations omitted); *State v. Matias*, 143 N.C. App. 445, 550 S.E.2d 1, *aff'd*, 354 N.C. 549, 556 S.E.2d 269 (2001). "Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the controlled substance." *Matias*, 143 N.C. App. at 448, 550 S.E.2d at 3 (citing *State v. Peek*, 89 N.C. App. 123, 365 S.E.2d 320 (1988)).

Defendant did not have exclusive control of the automobile. The drugs were discovered in the trunk, not the passenger area of the automobile where defendant sat. After thoroughly reviewing the entire record, we conclude that there were sufficient "other incriminating circumstances" for the jury to reasonably infer that defendant had the power and intent to control the twenty-five pounds of marijuana found in the trunk of the car in which he was riding. Those "other incriminating circumstances" include: (1) this was a planned drug transaction, (2) Goff testified that he had pre-arranged to have twenty-five pounds of marijuana delivered to his house, (3) Zavala testified that he had been paid by defendant to be his courier to and from Goff's house, (4) Goff had purchased drugs from Zavala and defendant on five or six previous occasions, (5) defendant had delivered drugs to Goff's house previously, (6) the officers independently corroborated and verified everything that Goff had reported to them about the drug transaction in process, and (7) defendant was found with $1,780.00 in cash on his person at the scene. We hold that these are sufficient other incriminating circumstances to support a convic-

tion based on constructive possession when defendant was not in exclusive control of the vehicle where the drugs were found. This assignment of error is overruled.

VI. Jury Instructions

A. Trial Court's Instruction

[4] Defendant contends that the trial court committed plain error instructing the jury about the law of knowingly possessing marijuana. Defendant argues that no evidence existed to show that he had knowledge of the marijuana seized in the automobile, and that "[t]he instruction invited the jury to speculate as to [defendant's] guilt and to return an erroneous verdict."

Defendant did not object to the trial court's instruction during trial. Defendant must show not only that the instruction was error, but that the instruction probably impacted the jury's finding defendant guilty. *See e.g., State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983).

Defendant's sole contention is that no evidence of defendant's knowledge of the marijuana in the automobile existed at trial. We have held that the State presented sufficient evidence to show that defendant had the intent and capability to exercise control and dominion over the marijuana based on constructive possession. Defendant has failed to show that the instruction was erroneous. This assignment of error is overruled.

B. Requested Instruction

[5] Defendant contends that there was no basis to convict defendant of knowingly possessing marijuana, "using either actual or constructive possession . . . because the evidence only shows the [defendant's] mere presence [in the automobile]." Defendant concludes therefore that "the only other basis to uphold [defendant's] convictions is that [defendant] was acting in concert." Defendant requested the trial court to instruct the jury that the defendant's mere presence in the automobile was insufficient to show defendant acted in concert. The trial court refused, but gave the following instruction on the law of constructive possession:

> the defendant's physical proximity, if any, to the substance does not by itself permit an inference that the defendant was aware of its presence or had the power or intent to control its disposition or use . . . such an inference may be drawn only from this and

other circumstances which you find from the evidence beyond a reasonable doubt.

The substance of defendant's requested instruction was contained in this instruction. Since we have held that there was evidence to support the conviction based on constructive possession, this assignment of error is overruled.

VII. Multiple Verdict Sheets

[6] Defendant assigns error to the trial court's giving multiple verdict sheets to the jury. Defendant has failed to cite any authority in support of his argument. Rule 28(b)(5) of the N.C. Rules of Appellate Procedure states that "the body of the argument shall contain citations of authority upon which the appellant relies. . . . Assignments of error . . . in support of which no . . . authority is cited, will be taken as abandoned." N.C.R. App. P. 28(b)(5) (2001). This assignment of error is abandoned. N.C.R. App. P. 28(b)(3) (2001). *See also Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987).

After carefully reviewing the entire record, we hold that defendant received a trial by a jury of his peers before an able judge free from errors he assigned.

No error.

Judges MARTIN and THOMAS concur.

JUDY ANN SIDDEN, PLAINTIFF v. RICHARD BERNARD MAILMAN, DEFENDANT

No. COA01-63

(Filed 21 May 2002)

Divorce— separation agreement—waiver of any fiduciary duty

The trial court correctly upheld a separation agreement where plaintiff argued that the agreement should be set aside and an equitable distribution hearing allowed because defendant had breached a fiduciary duty by failing to disclose the value of his state retirement account. Any fiduciary duty was waived because plaintiff's actions establish that plaintiff's decision to sign the agreement was based on her desire to finalize the separation and

that the value of defendant's state retirement account was not material to her decision.

Judge GREENE dissenting.

Appeal by plaintiff from a supplemental order entered 9 October 2000 by Judge Alonzo B. Coleman, Jr. in Orange County District Court. Heard in the Court of Appeals 4 December 2001.

Sheridan & Steffan, P.C., by Mark T. Sheridan, for plaintiff-appellant.

The Brough Law Firm, by G. Nicholas Herman, for defendant-appellee.

CAMPBELL, Judge.

Plaintiff appeals a supplemental order affirming a separation and property settlement agreement between plaintiff and defendant based on plaintiff's failure to present facts supporting her entitlement to relief under the theory of breach of fiduciary duty. We affirm.

A full statement of the facts is set forth in this Court's earlier opinion of *Sidden v. Mailman*, 137 N.C. App. 669, 529 S.E.2d 266 (2000) ("*Sidden I*"). Therefore, we summarize the facts to present only those facts needed for an understanding of this opinion: Plaintiff and defendant were married on 21 April 1979. On 15 August 1996, the parties separated and defendant moved out of the marital home. Thereafter, defendant prepared a listing of the parties' assets and liabilities, which did not include defendant's North Carolina State Employees' Retirement Account ("state retirement account") that was worth $158,100.00. Later, at trial, defendant testified that this had been an inadvertent omission.

After discussing the listing of assets and liabilities prepared by defendant, the parties signed a one-page informal agreement on 1 September 1996 that outlined the terms of their separation. This separation agreement ("Agreement") was formalized on 9 September 1996 by Wayne Hadler ("Attorney Hadler"), an attorney retained by defendant. The Agreement stated, in part, that: "All retirement benefits, pension accounts, IRA or annuity benefits associated with [defendant's] employment . . . shall be deemed [defendant's] sole, exclusive and separate property. [Plaintiff] releases any and all interest she may have in the same." The Agreement did not specify the values of the accounts or specifically list defendant's different retire-

ment accounts. Before signing the Agreement, plaintiff was informed by Attorney Hadler that he could not give her advice because he represented defendant. However, Attorney Hadler did encourage plaintiff to have the Agreement reviewed by separate counsel. Despite this encouragement, the Agreement was executed by both parties and acknowledged before a notary on 10 September 1996 without plaintiff consulting separate counsel.

On 29 July 1997, plaintiff filed a complaint alleging the Agreement should be set aside because she entered into the Agreement at a time when she was suffering from psychosis and hypo-mania, as well as alcohol abuse due to marital and professional problems.[1] After hearing evidence from both parties, the trial court entered an order on 29 January 1999 holding that "[a]t the time the Plaintiff signed the Agreement she was not under the influence of any psychiatric disorder nor under the influence of any drug-induced mania or abuse of alcohol, and was instead in all respects emotionally and legally competent to enter into the Agreement." The court also noted that plaintiff entered into the Agreement after voluntarily electing not to seek the advice of counsel. Finally, the trial court held that plaintiff:

> [O]ffered no evidence that she was unaware of the Defendant's retirement benefits and she did not plead mistake or breach of fiduciary duty in her Complaint nor did she offer any evidence of same; the Plaintiff voluntarily and knowingly signed the Separation Agreement in which she waived her rights to the Defendant's retirement benefits.

Plaintiff appealed this order.

The appeal was heard by this Court on 25 January 2000. In our opinion filed on 2 May 2000 we held that the trial court correctly determined that plaintiff was mentally competent when she entered into the Agreement. *See Sidden I.* However, we found that plaintiff did present some evidence of a breach of fiduciary duty by defendant because defendant's admission that he had inadvertently omitted the existence of his state retirement account from the listing he prepared was "tantamount to an amendment to the complaint that Defendant failed to disclose a material asset." *Id.* at 678, 529 S.E.2d at 272. Thus, the case was remanded to the trial court to enter findings and con-

1. Plaintiff also alleged five other causes of action, but discussion of those actions are not relevant to the present case. The current cause of action at issue was severed from the other issues and ruled on separately by the trial court.

clusions on the breach of fiduciary duty issue based on the evidence in the record. *Id.* at 679, 529 S.E.2d at 273.

On remand, the trial court decided the breach of fiduciary duty issue by considering the transcript, the record and the decision of this Court, as well as additional case law. In a supplemental order entered on 9 October 2000, the trial court concluded that the facts surrounding the parties' marriage, including the time between their separation and the signing of the Agreement, were insufficient to establish a confidential relationship giving rise to a fiduciary duty. The court also concluded that:

> 4. [Even if it was required to find that such a relationship existed simply because the parties were married,] Plaintiff waived any duty the [Defendant] may have had to disclose the value of the State Retirement to her and as a result of this waiver, Defendant had no further duty to make disclosure to her. . . .
>
> 5. Even if Defendant had made the disclosure of the value of the State Retirement account to Plaintiff, she would not have acted any differently, as she would have not been aware of such value because she refused to read the disclosure documents which were given to her by the Defendant. Thus, even if such documents had included the value of the State Retirement account, Plaintiff would have acted as she did. . . .

Therefore, the trial court's original order was affirmed. Plaintiff appeals this supplemental order.

By plaintiff's two assignments of error she essentially argues the parties' Agreement should be set aside and an equitable distribution hearing on the merits be allowed because defendant breached his fiduciary duty to her when he failed to disclose the value of his state retirement account. We disagree.

A duty to disclose arises "where a fiduciary relationship exists between the parties to [a] transaction." *See Harton v. Harton*, 81 N.C. App. 295, 297, 344 S.E.2d 117, 119 (1986). "The relationship of husband and wife creates such a duty." *Id.* This marital relationship is the "most confidential of all relationships, and transactions between [spouses], to be valid, must be fair and reasonable." *Eubanks v. Eubanks*, 273 N.C. 189, 195-96, 159 S.E.2d 562, 567 (1968) (citation omitted). "However, that duty ends when the parties separate and become adversaries negotiating over the terms of their separation. [Also, t]ermination of the fiduciary relationship is firmly established

when one or both of the parties is represented by counsel." *Harton*, 81 N.C. App. at 297, 344 S.E.2d at 119 (citations omitted).

Plaintiff contends that her separation from defendant was not adversarial and Attorney Hadler's role was only to reduce their Agreement to a formal separation document; therefore, defendant owed her a fiduciary duty to disclose the value of his state retirement account because the parties were still married at the time they entered into the Agreement. However, defendant contends that he did not owe a fiduciary duty to plaintiff because there was no confidential relationship between them when the Agreement was entered into. Defendant further contends that this Court should not be compelled to conclude that a confidential relationship existed simply because he and plaintiff were married.

Based on the facts in this case, we find it unnecessary to address whether a confidential relationship existed between the parties giving rise to a fiduciary duty because plaintiff effectively waived any duty of disclosure defendant may have owed to her.

"A waiver is sometimes defined to be an intentional relinquishment of a known right. The act must be voluntary and must indicate an intention or election to dispense with something of value or to forego some advantage which the party waiving it might at his option have insisted upon." *Guerry v. Trust Co.*, 234 N.C. 644, 648, 68 S.E.2d 272, 275 (1951). "A person *sui juris* may waive practically any right he has unless forbidden by law or public policy. The term, therefore, covers every conceivable right-those relating to procedure and remedy as well as those connected with the substantial subject of contracts." *Clement v. Clement*, 230 N.C. 636, 639, 55 S.E.2d 459, 461 (1949).

In the case *sub judice,* plaintiff's actions resulted in a waiver of any duty defendant may have had to her to disclose the value of his state retirement account. During the trial, Attorney Hadler testified that he told plaintiff to take her time reviewing the Agreement and even encouraged her to seek outside counsel before signing it. Although the state retirement account was not disclosed in the original listing by defendant or in the parties' discussions prior to their execution of the Agreement on 10 September 1996, the Agreement specifically stated that "all retirement benefits" were defendant's sole, exclusive and separate property. Plaintiff reviewed this Agreement alone for ten to fifteen minutes. Thereafter, she signed the Agreement without inquiring as to the value of any retirement bene-

fits or obtaining legal advice (despite having attorneys available with whom she regularly consulted as to business issues). After we remanded this case, the trial court found that "[e]ven if Defendant had made the disclosure of the value of the State Retirement account to Plaintiff, she would not have been aware of such value because she refused to participate in the process of disclosure and refused to look at what Defendant attempted to disclose to her." These actions establish that the value of defendant's state retirement account was not material to plaintiff's decision to sign the Agreement; rather, plaintiff's decision was based on her desire to finalize her separation from defendant. Also, plaintiff's failure to inquire about the value of any of the retirement accounts after reviewing the Agreement further supports our conclusion that she waived her rights to additional disclosures from defendant regarding those accounts.

As stated earlier, a waiver must be given voluntarily. *See Guerry*, 234 N.C. at 648, 68 S.E.2d at 275. This Court determined in *Sidden I* that plaintiff's mental condition did not impair her judgment at the time she signed the Agreement. Our determination was supported by Attorney Hadler, "who holds a Master's degree in Social Work and previously worked for twelve years as a social worker . . . testif[ying] that he did not see anything about Plaintiff's appearance, demeanor, or behavior that would indicate she was confused or lacked the capacity to enter into the Agreement." *Sidden I*, 137 N.C. App. 669, 671, 529 S.E.2d 226, 268 (2000). Thus, we also conclude that plaintiff's mental condition did not impair her ability to voluntarily waive any duty defendant may have had to disclose the value of his state retirement account.

We are cognizant of the fact that defendant never pled waiver as an affirmative defense as required by N.C. Gen. Stat. § 1A-1, Rule 8(c) (2001). However, defendant would have had to have been prescient to have pled waiver in his answer since plaintiff had never made an allegation of breach of fiduciary duty in her complaint. This allegation appears only by judicial amendment to the complaint in *Sidden I* where this Court held that defendant's failure to disclose the extent of his state retirement account was "tantamount to an amendment to the complaint that Defendant failed to disclose a material asset." *Sidden I*, 137 N.C. App. at 678, 529 S.E.2d at 272.[2] Additionally, the record contains no assignment of error by plaintiff nor does plaintiff's

2. This Court first points out in *Sidden I* that "[t]he trial court found Plaintiff 'did not plead . . . breach of fiduciary duty in her Complaint nor did she offer any evidence of same.' " *Id.* at 677, 529 S.E.2d at 272. Then we went on to say:

brief argue that defendant did not plead waiver as an affirmative defense. Thus such an argument would appropriately be deemed abandoned. *See* N.C.R. App. P. 28(b)(5) (2001).

For the reasons stated, we hold that the trial court was correct in upholding the Agreement between the parties, because plaintiff cannot support her claim for relief under a theory of breach of fiduciary duty.

Affirmed.

Judge McCULLOUGH concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

The trial court determined there existed a "confidential relationship . . . between [plaintiff and defendant] as of the signing of the [A]greement" and defendant's "failure to disclose the amount of his State Retirement account was a breach of [his] fiduciary duty [to plaintiff]." Defendant does not assign error to these determinations, and they are thus presumed to be supported by competent evidence, based on a proper construction of the law, and binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

The trial court further determined, however, that plaintiff was precluded from recovering for defendant's breach because she had "waived this breach." According to the trial court, this waiver was supported by plaintiff's failure to "take some action to learn the value of the State Retirement account," and this failure "establishes that there was no reasonable or justifiable reliance upon [d]efendant's failure to disclose."

Waiver is an affirmative defense, N.C.G.S. § 1A-1, Rule 8(c) (1999), and because it was not pled by defendant and the record does not reveal the issue was tried by the express or implied consent of the

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[A]t trial, however, Defendant admitted he did not disclose to Plaintiff the existence of his State Retirement Account, and the admission of this evidence is tantamount to an amendment to the complaint that Defendant failed to disclose a material asset. N.C.G.S. § 1A-1, Rule 15(b) (1999). With this amendment, the complaint sufficiently alleges Defendant breached his fiduciary duty to Plaintiff when he failed to disclose the existence of his State Retirement Account.

Id. at 678, 529 S.E.2d at 272.

parties, it cannot be a basis for resolving this case, *see Sloan v. Miller Bldg. Corp.*, 128 N.C. App. 37, 43, 493 S.E.2d 460, 464 (1997). In any event, the general rule in fraud cases that the representee has a duty to exercise due diligence "does not apply if a relation of trust or confidence exists between the parties, so that one of them places peculiar reliance in the trustworthiness of the other." 37 C.J.S. *Fraud* § 45, at 233 (1997). Thus, plaintiff's failure to take some action to discover the value of defendant's State Retirement account is not fatal to her claim.

Accordingly, I would reverse the order of the trial court and remand for entry of an order rescinding the Agreement. I, therefore, dissent.

IN RE: DEANDREA MONIQUE HARDESTY, SHAKEENA LAKESE HUDSON, LADARRIUS LAQUAN HARDESTY

No. COA01-825

(Filed 21 May 2002)

1. Termination of Parental Rights— mere use of words similar to statute for grounds of termination—sufficiency of notice

The trial court erred by denying respondent mother's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) the petition to terminate respondent's parental rights to her son, because petitioner Department of Social Services's mere use of words similar to those in N.C.G.S. § 7A-289.32 setting out the grounds for termination, alleging illegitimacy and that the minor child spent his entire life in foster care, are insufficient to give respondent notice as to what acts, omissions, or conditions are at issue.

2. Termination of Parental Rights— clear, cogent, and convincing evidence

The trial court did not err by terminating respondent mother's parental rights to her two daughters based on clear, cogent, and convincing evidence including: (1) the minor children's multiple placements in foster homes; (2) respondent's severe mental problems and frequent admissions to psychiatric hospitals; (3) respondent's criminal record; (4) failure to legitimate the two

children; (5) the children's previous adjudication of being neglected and dependent juveniles; (6) respondent's inability to provide a stable residence; (7) respondent ignoring the recommendations of her therapists; (8) respondent's inability to maintain stable employment; and (9) respondent's failure to manage her own finances.

3. Termination of Parental Rights— best interests of child

The trial court did not abuse its discretion by concluding that it was in the best interests of respondent mother's two daughters that respondent's parental rights be terminated.

4. Appeal and Error— preservation of issues—failure to cite authority

Although respondent mother contends the trial court erred by denying her motion for temporary visitation of her children pending appeal from the termination of her parental rights, this assignment of error is abandoned because no legal authority was cited in respondent's brief as required by N.C. R. App. P. 28(b)(5).

Appeal by respondent from judgments entered 29 December 2000 and 15 March 2001 by Judge Jerry F. Waddell in Craven County District Court. Heard in the Court of Appeals 28 March 2002.

McCotter, McAfee & Ashton, PLLC, by Rudolph A. Ashton, III and Terri W. Sharp for respondent-appellant.

Bernard Bush for petitioner-appellee Craven County Department of Social Services.

Daniel Potter for petitioner-appellee Guardian ad litem.

THOMAS, Judge.

Latasha Hardesty, respondent, appeals from orders which terminated her parental rights and denied visitation. For the reasons discussed herein, we reverse the trial court's termination order as to her son, Ladarrius Laquan Hardesty, but affirm as to DeAndrea Monique Hardesty and Shakeena Lakese Hudson.

Among the assignments of error, Hardesty argues the petition to terminate her parental rights to Ladarrius, born 20 April 1999, insufficiently alleged facts upon which the trial court could base a determination. We agree.

Petitioner, the Craven County Department of Social Services (DSS), became involved with Hardesty in 1991 when there were several reports that she was neglecting her daughter, DeAndrea, born 5 April 1991. The allegations included inappropriate discipline and failure to provide proper care and supervision. However, no petition was filed.

On 26 February 1997, DeAndrea and her sister, Shakeena, born 14 April 1993, were adjudicated neglected when the trial court found, *inter alia*, that Hardesty beat Shakeena with a switch, leaving linear marks, and slapped DeAndrea on the side of her head. The children were subsequently placed in foster care by DSS.

In March 1997, Hardesty was involuntarily committed to Cherry Psychiatric Hospital and diagnosed with bipolar I disorder. Later in 1997 and into 1998, there was evidence that: (1) Hardesty exposed the children to sexual materials during visitations; (2) she missed visitations with the children; (3) she moved from place to place; (4) she advised the children to "act out" so the family could get back together; (5) Hardesty had other admissions to mental hospitals; and (6) she communicated threats or otherwise acted unlawfully. During this time, the children remained in foster care and in the custody of DSS.

A new juvenile petition based on dependency was filed after Hardesty delivered a third child, Ladarrius. He was only allowed to be in her custody for one day. The day after his birth, Ladarrius was placed in DSS's custody.

On 25 June 1999, DSS filed petitions to terminate the parental rights of Hardesty to DeAndrea and Shakeena. The allegations included that Hardesty had: (1) willfully left DeAndrea and Shakeena in foster care or placement outside the home for more than twelve months without showing reasonable progress under the circumstances to correct the conditions that led to the removal of the children; (2) for the past year, willfully failed and refused to provide and pay for the care, support, and maintenance of the children while they were in DSS's care; (3) willfully abandoned the children for at least six months immediately preceding the filing of the petition; (4) failed to establish or maintain concern or responsibility for the children; (5) neglected the children; (6) failed to legitimate the children; and (7) failed to provide consistent care and financial support. Similar allegations were made against Gene Chapman, DeAndrea's father, and

Jerome Hudson, Shakeena's father, in petitions to terminate their parental rights.

DSS filed a shortened petition to terminate Hardesty's parental rights to Ladarrius, alleging: (a) Ladarrius was dependent and that there was a reasonable probability that Hardesty's incapability of properly caring for him would continue for the foreseeable future; (b) Ladarrius has not been legitimated; and (c) Ladarrius has spent his entire life in foster care.

On 29 December 2000, the trial court terminated the parental rights of Hardesty to all three children, Chapman's rights to DeAndrea, Hudson's rights to Shakeena, and any unknown father's rights to Ladarrius. Among its findings were that: (1) the children had not been legitimated; (2) the respective fathers had not provided financial support or consistent care and had not visited the children in at least one year; (3) Hardesty, who was diagnosed with bipolar disorder, does not have the ability to manage her own financial funds or properly parent her children; (4) Hardesty's mental condition will last for the foreseeable future; (5) Hardesty lived in various residences without securing a stable home; and (6) Hardesty's situation is no more stable than it was when the children were removed from her care.

We note at the outset that the trial court's ruling refers to Chapter 7B. However, since the petition for termination was filed prior to 1 July 1999, the applicable reference is to Chapter 7A.

[1] By Hardesty's first assignment of error, she argues the trial court erred in denying her motion to dismiss as to Ladarrius because the petition did not state facts sufficient to warrant a determination that one or more grounds for terminating parenting rights existed. We agree.

A motion to dismiss based on Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is a challenge to a pleading, claiming it fails to state a claim upon which relief can be granted. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1999). The question on a motion to dismiss is whether, as a matter of law, and taking the allegations in the complaint as true, the allegations are sufficient to state a claim upon which relief may be granted under any legal theory. *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 355 S.E.2d 838 (1987).

In the instant case, the petition for the termination of parental rights to Ladarrius alleged, *inter alia*, that Hardesty and any

unknown father were incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is dependent and there is a reasonable probability that such incapability will continue for the foreseeable future. The petition, however, did not allege any facts to delineate the incapacity. Section 7A-289.25 (now codified as section 7B-1104) of the North Carolina General Statutes requires that the petition state facts sufficient to warrant a determination that grounds for terminating parental rights exist. N.C. Gen. Stat. § 7A-289.25 (1998). It provides in pertinent part that:

> The petition . . . shall set forth such of the following facts as are known; and with respect to the facts which are unknown the petitioner or movant shall so state:
>
> . . . .
>
> (6) Facts that are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.

N.C. Gen. Stat. § 7A-289.25 (1989). In *In re Quevedo*, 106 N.C. App. 574, 419 S.E.2d 158, *appeal dismissed*, 332 N.C. 483, 424 S.E.2d 397 (1992), this Court held that a "petitioners' bare recitation . . . of the alleged statutory *grounds* for termination does not comply with the requirement in N.C. Gen. Stat. § 7A-289.25(6) that the petition state '*facts* which are sufficient to warrant a determination that grounds exist to warrant termination.' " *Id.* at 579, 419 S.E.2d at 160. (Emphasis in original). Unlike *Quevedo*, there was no earlier order containing the requisite facts incorporated into the petition.

Here, petitioner merely used words similar to those in the statute setting out grounds for termination, alleged illegitimacy, and alleged that Ladarrius had spent his entire life in foster care. *See* N.C. Gen. Stat. § 7A-289.32 (1989). That is not sufficient. While there is no requirement that the factual allegations be exhaustive or extensive, they must put a party on notice as to what acts, omissions or conditions are at issue. The motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure should have been granted and we therefore reverse the trial court's termination of Hardesty's parental rights to Ladarrius.

We proceed now only with that part of Hardesty's assignments of error which concern DeAndrea and Shakeena.

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 establish that at least one ground for the termination of parental rights listed in N.C. Gen. Stat. § 7A-289.32 (now codified as section 7B-1111) exists. N.C. Gen. Stat. § 7A-289.30 (1998) (now codified as N.C. Gen. Stat. § 7B-1109). In this stage, the court's decision must be supported by clear, cogent and convincing evidence with the burden of proof on the petitioner. *In re Swisher*, 74 N.C. App. 239, 240, 328 S.E.2d 33, 35 (1985). 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. § 7A-289.31(a) (1998) (now codified as section 7B-1110(a)). *See also In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001); *In re Carr*, 116 N.C. App. 403, 448 S.E.2d 299 (1994).

[2] By Hardesty's second and third assignments of error, she argues the trial court erred in concluding that grounds for the termination of her parental rights were proven by clear, cogent, and convincing evidence. We disagree.

Petitioner presented evidence of: (a) DeAndrea's and Shakeena's multiple placements in foster homes; (b) Hardesty's severe mental problems, including diagnoses of bipolar disorder and histrionic personality disorder and history of "breakdowns"; (c) Chapman's failure to legitimate DeAndrea; (d) Hardesty's frequent admissions to psychiatric hospitals; (e) Hardesty's criminal record; (f) Hudson's failure to legitimate Shakeena; (g) the children's previous adjudication of being neglected and dependent juveniles; (h) Hardesty's inability to provide a stable residence; (i) Hardesty ignoring the recommendations of her therapists; (j) Hardesty's inability to maintain stable employment; and (k) Hardesty's failure to manage her own finances.

A clear, cogent and convincing evidentiary standard is a higher standard than preponderance of the evidence, but not as stringent as the requirement of proof beyond a reasonable doubt. *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984). Here, we hold that grounds for the termination of Hardesty's parental rights were established by clear, cogent and convincing evidence. Hardesty's argument is rejected.

[3] By Hardesty's fourth and fifth assignments of error, she argues the trial court erred in concluding that it was in the best interests of the children that her parental rights be terminated. We disagree.

After one or more of the grounds for termination are established, the trial court must consider the best interests of the child. *In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001). The trial 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. § 7A-289.31(a) (1998) (now codified as section 7B-1110(a)). *See also In re Blackburn*, 142 N.C. App. 607, 543 S.E.2d 906 (2001); *In re Parker*, 90 N.C. App. 423, 368 S.E.2d 879 (1988).

The children's best interests are paramount, not the rights of the parent. *In re Smith*, 56 N.C. App. 142, 287 S.E.2d 440, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982). Here, the trial court had ample evidence upon which to base the decision of best interests and did not abuse its discretion in deciding that the best interests of DeAndrea and Shakeena required the termination of Hardesty's parental rights. We thus reject Hardesty's argument.

[4] By Hardesty's final assignment of error, she argues the trial court erred in denying her motion for temporary visitation pending appeal. However, this assignment is taken as abandoned since no legal authority was cited in the body of Hardesty's argument. N.C.R. App. P. 28(b)(5).

We therefore affirm the trial court's terminations of Hardesty's parental rights to DeAndrea and Shakeena. We reverse the trial court's termination of Hardesty's parental rights to Ladarrius.

AFFIRMED IN PART; REVERSED IN PART.

Judges MARTIN and TYSON concur.

COMPOSITE TECHNOLOGY, INC., PLAINTIFF v. ADVANCED COMPOSITE STRUCTURES (USA), INC., DEFENDANT

No. COA01-465

(Filed 21 May 2002)

Jurisdiction— subject matter—personal liability of a non-party

The trial court lacked subject matter jurisdiction to enter an order assessing personal liability against an officer of defendant corporation who was not a party to the underlying dispute for

debts owed by defendant to plaintiff corporation for alleged trade secret violations and unfair trade practices based on the corporate officer's failure to properly respond to plaintiff's interrogatories, and the order of the trial court is vacated, because: (1) the appropriate remedy for the corporate officer's alleged failure to answer plaintiff's interrogatories would have been for plaintiff to file a separate civil action in order to obtain a judgment for personal liability since the corporate officer was not a party to the original suit against defendant, N.C.G.S. § 1-324.3; (2) although plaintiff could properly serve the interrogatories on the corporate officer as an ancillary action to the underlying judgment, whether plaintiff could properly seek to establish personal liability on the corporate officer's part for his failure to adequately respond to such interrogatories by filing a motion in the cause is another matter; (3) if plaintiff was unsatisfied with the answers it received in response to the interrogatories it sent, it could have petitioned the court for entry of an order requiring defendant to appear and properly respond to questions regarding defendant's assets, N.C.G.S. § 1-352.1; and (4) plaintiff could have filed a separate action against the corporate officer under N.C.G.S. § 1-324.4 for his failure to comply with N.C.G.S. § 1-324.2.

Appeal by defendant and Bruce Anning from order entered 1 December 2000 by Judge Michael E. Helms in Guilford County Superior Court. Heard in the Court of Appeals 20 February 2002.

Fisher Clinard & Craig, P.L.L.C., by John O. Craig, III, and Alyce E. Hill, for plaintiff appellee.

Kennedy Covington Lobdell & Hickman, L.L.P., by Amy Pritchard Williams, for defendant appellant.

TIMMONS-GOODSON, Judge.

Advanced Composite Structures (USA), Inc. ("defendant") and Bruce Anning ("Anning"), an officer of defendant corporation, appeal from an order by the trial court assessing personal liability against Anning for debt owed by defendant to Composite Technology, Inc. ("plaintiff"). For the reasons set forth herein, we vacate the order of the trial court.

On 27 December 1996, plaintiff filed a complaint against defendant in Guilford County Superior Court, alleging that one of plaintiff's former employees had disclosed certain trade secrets to defendant.

The complaint sought relief based on claims of misappropriation of trade secrets, breach of contract, unfair competition, tortious interference with contract, and unfair and deceptive trade practices. Plaintiff moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, and the trial court heard the matter on 13 September 1999. Defendant did not appear to defend plaintiff's motion or to prosecute its counterclaims. Finding that no genuine issues of material fact existed, the trial court granted plaintiff's motion for summary judgment and awarded plaintiff actual damages in accordance with the North Carolina Trade Secrets Protection Act. The trial court further determined that defendant had committed unfair and deceptive trade practices and trebled plaintiff's damages pursuant to section 75-1.1 of the General Statutes. Plaintiff was also awarded attorneys' fees, with total damages awarded in the sum of $264,000,00.

On 31 May 2000, a writ of execution was filed against defendant in the amount of $264,000.00. The writ of execution was eventually returned unserved by the Guilford County Sheriff's Office, as the sheriff was unable to locate any property on which to levy. In order to discover defendant's potential assets, plaintiff filed a "Notice for Execution Information" and a demand for "Execution Information" pursuant to sections 1-324.2, *et seq.* of the North Carolina General Statutes. The notice was addressed to "JIM ANNING as President, Agent, Officer or other person having charge or control of any property of ADVANCED COMPOSITE STRUCTURES (USA), INC." The Execution Information set forth a written set of interrogatories concerning the nature and location of defendant's assets. On 5 July 2000, Bruce Anning, a Canadian citizen and brother to Jim Anning, was served with the "Notice for Execution Information." Anning accepted service as president of defendant corporation.

On 14 July 2000, Anning responded to plaintiff's interrogatories by sending the following letter to the Guilford County Sheriff's Department:

> I, Bruce Anning, am no longer an officer of Advanced Composite Structures (USA), Inc. As far as I know, Advanced Composite Structures (USA) Inc. has been administratively dissolved as a result of the company ceasing operations in May of 1999. To the best of my recollection, I am not aware of any assets belonging to, or debts owed to, Advanced Composite Structures (USA) Inc.

Plaintiff thereafter filed a "Motion in the Cause for Personal Liability" pursuant to section 1-324.3 of the General Statutes, requesting that the court assess personal liability against Anning for the debt owed by defendant to plaintiff.

On 30 October 2000, plaintiff's motion came before the trial court, which found that Anning had failed to properly respond to plaintiff's interrogatories. The trial court concluded that "Bruce Anning's failure to respond to the interrogatories propounded in the manner required by law hereby cause him to be liable to the Plaintiff/Judgment Creditor herein for the amount due on the execution." The trial court therefore entered an order assessing personal liability against Anning for the amount of $264,000.00, along with expenses and attorneys' fees in the amount of $48,393.57, from which defendant and Anning appeal.

Defendant contends that the trial court improperly imposed personal liability upon Anning for the debt owed by defendant to plaintiff because it lacked subject matter jurisdiction over the action. We agree with defendant, and we therefore vacate the order of the trial court.

Although defendant made no arguments concerning subject matter jurisdiction before the trial court, a party may raise the issue at any stage of a proceeding. *See Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 421, 248 S.E.2d 567, 571 (1978), *disc. review denied*, 296 N.C. 583, 254 S.E.2d 32 (1979). This Court may also raise the issue even if neither party has addressed the matter. *See id.* Defendant asserts that, since Anning was not a party to the original suit against defendant, the appropriate remedy for his alleged failure to answer plaintiff's interrogatories would have been for plaintiff to file a separate civil action in order to obtain a judgment for personal liability. Because plaintiff failed to file a separate action, defendant argues the trial court lacked subject matter jurisdiction over the matter. Under the facts of the instant case, we agree with defendant.

"Common experience has taught that vital information regarding assets which ought to be subjected to the lien of or discharge of a judgment are often in the hands of third persons and, as well, information concerning such assets . . . ." *Ex Parte Burchinal*, 571 So. 2d 281, 283 (Miss. 1990). In order to assist legitimate creditors in the execution of unsatisfied judgments, the North Carolina General Statutes provide several methods to assist judgment creditors in locating

assets belonging to a judgment debtor. One such method is set forth under section 1-324.2 of our General Statutes, which provides that

> [e]very agent or person having charge or control of any property of the corporation, on request of a public officer having for service a writ of execution against it, shall furnish to him the names of the directors and officers thereof, and a schedule of all its property, including debts due or to become due, so far as he has knowledge of the same.

N.C. Gen. Stat. § 1-324.2 (2001). In the event the agent "neglects or refuses to comply with the provisions of [section 1-324.2,]" he becomes "liable to pay to the execution creditor the amount due on the execution, with costs." N.C. Gen. Stat. § 1-324.4 (2001). Further, a judgment creditor may discover information regarding corporate shares through section 1-324.3, which states that:

> Any share or interest in any bank, insurance company, or other joint stock company, that is or may be incorporated under the authority of this State, or incorporated or established under the authority of the United States, belonging to the defendant in execution, may be taken and sold by virtue of such execution in the same manner as goods and chattels. The clerk, cashier, or other officer of such company who has at the time the custody of the books of the company shall, upon being shown the writ of execution, give to the officer having it a certificate of the number of shares or amount of the interest held by the defendant in the company; and if he neglects or refuses to do so, or if he willfully gives a false certificate, he shall be liable to the plaintiff for the amount due on the execution, with costs.

N.C. Gen. Stat. § 1-324.3 (2001). Violation of sections 1-324.2-4 is a Class 1 misdemeanor. *See* N.C. Gen. Stat. § 1-324.5 (2001).

Section 1-352.1 of the General Statutes establishes further means of locating potential assets belonging to a judgment debtor, providing in pertinent part that

> [a]s an additional method of discovering assets of a judgment debtor, the judgment creditor may prepare and serve on the judgment debtor written interrogatories concerning his property, at any time the judgment remains unsatisfied, and within three years from the time of issuing an execution. Such written interrogatories shall be fully answered under oath by the judgment debtor within 30 days of service on the judgment debtor . . . .

> Interrogatories may relate to any matters which can be inquired into under G.S. 1-352 . . . .
>
> Upon failure of the judgment debtor to answer fully the written interrogatories, the judgment creditor may petition the court for an order requiring the judgment debtor to answer fully, which order shall be served upon the judgment debtor in the same manner as a summons is served pursuant to the Rules of Civil Procedure, fixing the time within which the judgment debtor can answer the interrogatives . . . .
>
> Any person who disobeys an order of the court may be punished by the judge as for a contempt under the provisions of G.S. 1-368.

N.C. Gen. Stat. § 1-352.1 (2001).

In the instant case, plaintiff attempted to utilize section 1-324.2 in order to locate potential assets belonging to defendant by sending the Notice for Execution Information ("Notice") to Anning, who accepted as president of the company. The Notice, however, was not limited to a request for the names of defendant's directors and officers and a schedule of its property as provided for in section 1-324.2. Instead, the Notice demanded within fifteen days after service notarized responses to twenty-nine detailed questions, some of which requested personal information of Anning. As such, the Notice sent by plaintiff more closely resembled a proceeding under section 1-352.1. During argument before this Court, plaintiff contended that it proceeded simultaneously under both sections 1-324.2 and 1-352.1 when it sent its Notice to Anning.

Interrogatories propounded under section 1-352.1 take place as a supplementary proceeding to the execution of a judgment. *See* N.C. Gen. Stat. §§ 1-352, *et seq.* Section 1-352.1 thereby allows a judgment creditor to discover the assets of a judgment debtor without the burden of initiating a separate action. *See Rand v. Rand*, 78 N.C. 12, 15 (1878) (stating that, "[p]roceedings supplementary to execution are but a prolongation of the action necessary to the final discharge of the judgment, the purpose . . . being that all matters affecting the complete satisfaction and determination of the action shall be settled in the same action, instead of by a multiplicity of suits"). Thus, plaintiff could properly serve the interrogatories on Anning in his role as president of the judgment debtor as an ancillary matter to the original action.

Although plaintiff could properly serve the interrogatories on Anning as an ancillary action to the underlying judgment, whether or not plaintiff could properly seek to establish personal liability on Anning's part for his failure to adequately respond to such interrogatories by filing a motion in the cause is another matter. Plaintiff's motion in the cause for personal liability against Anning was filed pursuant to section 1-324.3. Unlike section 1-352.1, which details the appropriate procedure for a judgment creditor to follow if a judgment debtor fails to appropriately respond to propounded interrogatories, section 1-324.3 states simply that the "clerk, cashier, or other officer of such company who has at the time the custody of the books of the company . . . shall be liable to the plaintiff for the amount due on the execution, with costs" if such a person neglects or refuses to give to the officer serving the writ of execution the appropriate information. N.C. Gen. Stat. § 1-324.3. Thus, section 1-324.3 establishes a penalty for violation of this section, but it does not specify a method for proceeding against a person who has potentially violated its mandates.

In such instance, we conclude that a plaintiff who seeks to enforce section 1-324.3 by establishing personal liability against a person for the debt owed by the judgment creditor must do so by filing a separate proceeding against that person. In the case at bar, plaintiff's cause of action against Anning—namely, personal liability for his alleged failure to comply with section 1-324.3—was an entirely distinct and separate matter than the original cause of action filed by plaintiff against defendant—that of liability for alleged violations of the North Carolina Trade Secrets Protection Act and section 75-1.1 of the General Statutes. Anning was not a party to the original action. We do not read section 1-324.3 to authorize a judgment creditor to pursue personal liability against a non-party for substantial monies owed by a judgment debtor by merely filing a motion in the prior action. Unlike section 1-352.1, a proceeding under section 1-324.3 is not a supplemental proceeding to the original action. *Compare* N.C. Gen. Stat. § 1-352.1 (appearing in Article 31, entitled "Supplemental Proceedings") and N.C. Gen. Stat. § 1-324.3 (set forth in Article 28, entitled "Execution"); *see also Bronson v. Insurance Company*, 85 N.C. 411, 413 (1881) (holding that where a judgment creditor of a corporation caused an execution to issue, which was returned unsatisfied, and then brought a suit for himself and all other creditors against the corporation and its stockholders, demanding an accounting to ascertain the amount due upon unpaid stock in order to pay the debt of the corporation, such

suit was a new and independent action and not a proceeding supplementary to execution).

If plaintiff here was unsatisfied with the answers it received in response to the interrogatories it sent, it could have petitioned the court for entry of an order requiring defendant to appear and properly respond to questions regarding defendant's assets. *See* N.C. Gen. Stat. § 1-352.1. Plaintiff could have also filed a separate action against Anning under section 1-324.4 for his failure to comply with section 1-324.2.[1] As plaintiff failed to file an action against Anning, who was not a party to the underlying dispute, no legitimate action existed over which the trial court could properly exercise jurisdiction. *See* N.C. Gen. Stat. § 1A-1, Rules 2, 3 (2001) (requiring the filing of a complaint with the court in order to commence a civil action); *In re Transportation of Juveniles*, 102 N.C. App. 806, 808, 403 S.E.2d 557, 558 (1991) (noting that, "before a court may act there must be some appropriate application invoking the judicial power of the court with respect to the matter in question"). The trial court therefore lacked subject matter jurisdiction to enter the order assessing personal liability against Anning for debts owed by defendant to plaintiff. We therefore vacate the order of the trial court.

Vacated.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. WILLIAM NOLAN PATTERSON

No. COA01-448

(Filed 21 May 2002)

1. Evidence— prior crimes or bad acts—modus operandi

The trial court did not err in a prosecution for first-degree statutory rape, incest, and other crimes by admitting evidence of defendant's prior abuse of the victim's sister as bearing on modus

1. We note incidentally that as there was no evidence whatsoever that Anning was a "clerk, cashier, or other officer . . . ha[ving] at the time the custody of the books of the company" as required under section 1-324.3, sections 1-324.2 and 1-324.4 would have been the more appropriate sections under which to proceed against Anning. N.C. Gen. Stat. § 1-324.3.

operandi. The similarities between the abuse charged and the prior abuse of the victim's sister supported the inference that the same person committed the crimes, and the risk of undue prejudice did not outweigh its probative value.

2. Sentencing— social services documents—not provided to defendant—no abuse of discretion

The trial court did not abuse its discretion when sentencing defendant for first-degree statutory rape, incest, and other crimes by considering DSS records which were not provided to the defense where defendant had filed a motion for production of confidential records that required that the court review confidential DSS documents in camera, the court disclosed any arguably exculpatory evidence to both parties, and defendant requested at sentencing a mitigating factor which was rebutted by the records. Defendant was given ample opportunity to present his evidence, including any that showed error in the records; his failure to do so was not due to any restriction imposed by the trial court.

Judge GREENE dissenting in part.

Appeal by defendant from judgment entered 18 August 2000 by Judge Gregory A. Weeks in Cumberland County Superior Court. Heard in the Court of Appeals 12 February 2002.

Roy Cooper, Attorney General, by Thomas O. Lawton, III, Assistant Attorney General, for the State.

John T. Hall for defendant-appellant.

THOMAS, Judge.

Defendant, William Nolan Patterson, was convicted in a jury trial of first-degree statutory rape, two counts of first-degree statutory sexual offense, two counts of taking indecent liberties with a child, felonious incest between near relatives, crime against nature, and two counts of felonious child abuse.

He sets forth two assignments of error in his appeal: (1) the trial court erred by allowing testimony of his previous bad acts into evidence; and (2) the trial court sentenced him in a manner not authorized by law. For the reasons discussed herein, we find no error.

The State's evidence tended to show the following: On 15 January 1998, Officer Susan Scearce with the Cumberland County Sheriff's

Department presented a drug-abuse program at an elementary school. As she was preparing to leave, a student, "L," asked to speak with her in the hallway. L told Scearce that: (1) she was hungry; (2) she and her siblings were not being fed because her father, defendant, sold their groceries to buy drugs; (3) the family regularly did not have water or power; (4) defendant had threatened her to not talk to social workers; (5) defendant beat her and her siblings; and (6) defendant used crack cocaine and abused alcohol.

Subsequently, L was taken to the sheriff's department, where she disclosed that defendant sexually abused her. She said defendant had sexual relations with her in a number of ways, in both her bed and his.

During the course of the investigation, defendant's wife, Shirley Patterson (Mrs. Patterson), stated that defendant's actions with their daughters had concerned her. L's sister, "I," stated that defendant also sexually abused her until she was twelve or thirteen and began "running away from home and not coming home certain nights." Defendant is the natural father of both girls.

Dr. Sharon Cooper, a forensic pediatrician, examined L and determined that she had symptoms of post-traumatic stress disorder and physical characteristics of having been sexually abused.

The charges in this case relate only to the abuse of L.

Defendant testified during the trial and denied the claims of his daughters. Nevertheless, he was convicted and sentenced as follows: (a) 300 to 369 months for first-degree statutory rape and first-degree statutory sexual offense in 98 CRS 13337; (b) 16 to 20 months for indecent liberties with a child and felonious incest between near relatives in 98 CRS 13338; (c) 300 to 369 months for first-degree statutory sexual offense in 98 CRS 13339; (d) 25 to 39 months for felonious child abuse in 98 CRS 13340; (e) 25 to 39 months for felonious child abuse and indecent liberties with a child in 98 CRS 13341. All sentences were to run consecutively. The trial court dismissed the charge of crime against nature in 98 CRS 13340. Defendant appeals.

[1] By his first assignment of error, defendant argues the trial court erred by admitting, over his objection, evidence of his prior bad acts of abusing I. We disagree.

Rule 404 of the North Carolina Evidence Code provides, in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

N.C.R. Evid. 404(b). In the instant case, the trial judge gave a limiting instruction to the jury concerning I's allegations that included the following statements:

> THE COURT: I specifically instruct you that you may not consider this evidence as evidence of the fact that the defendant is a bad person and therefore, he is more likely to have committed the offenses which are now before us. But I instruct you that you may consider the evidence only to the extent that you find it bears on the issues or questions of the defendant's intent or modus operandi, mode of operation, as it relates to the allegations in this case involving [L] Patterson.
>
> Do each of you understand that [i]nstruction? If you do understand that instruction, please indicate that by raising your hands.
>
> (All hands raised.)
>
> THE COURT: Let the record reflect that all twelve members responded affirmatively.
>
> And members of the Jury, I again instruct you that if you believe the evidence, you may consider it only for the limited purpose for which it has been received in this case, and for no other purpose.

In *State v. Green*, 321 N.C. 594, 604, 365 S.E.2d 587, 593, *cert. denied*, 488 U.S. 900, 102 L. Ed. 2d 235 (1988), our Supreme Court held: "It is not necessary that the modus operandi of the crime the state seeks to have admitted rise to the level of unique or bizarre." The similarities between the past crimes and the crimes the state seeks to prove must simply support the reasonable inference that the same person committed both the earlier and later crimes. *Id.* Here, there was ample evidence presented in the testimony of L and I of the types of abuse, including fellatio, sexual intercourse, and digital manipulation of the vaginal and anal areas, to conclude that defendant committed similar sexual crimes against them. In overruling

defendant's objection to the introduction of the evidence, the trial court found that defendant abused I from age six to fourteen and that he abused L when she was eleven; that both girls were his biological children; that the abuse occurred in the victims' bedrooms and in other places in their home; that the pattern of abuse with both children was similar; and that defendant threatened both victims not to reveal the acts he forced them to commit. Clearly, the similarities support the inference that the same person committed the offenses.

For evidence to be admissible pursuant to Rule 404(b), however, the trial court must also determine whether the risk of undue prejudice outweighs the probative value of the evidence. *State v. Schultz*, 88 N.C. App. 197, 202, 362 S.E.2d 853, 857 (1987), *aff'd*, 322 N.C. 467, 368 S.E.2d 386 (1988). "North Carolina courts have been consistently liberal in admitting evidence of similar sex offenses in trials on sexual crime charges." *State v. Jacob*, 113 N.C. App. 605, 608, 439 S.E.2d 812, 813 (1994) (allowing evidence that the defendant had sexually abused not only the victim, but also her stepsister) (citing *State v. McCarty*, 326 N.C. 782, 785, 392 S.E.2d 359, 361 (1990)). Although the evidence was harmful to defendant's case, the risk of undue prejudice did not outweigh its probative value. We therefore reject defendant's argument.

[2] By defendant's second assignment of error, he argues he was sentenced in a manner not authorized by law in that the trial court read and considered Department of Social Services (DSS) documents from Harnett and Cumberland counties, and from the State of Pennsylvania, that were not provided to the defense. We disagree.

This Court will not disturb a judgment because of the sentencing procedures utilized unless an abuse of discretion prejudicial to the defendant or conduct offending the public sense of fair play can be shown. *State v. Stone*, 104 N.C. App. 448, 453, 409 S.E.2d 719, 722 (1991), *disc. review denied*, 330 N.C. 617, 412 S.E.2d 94 (1992). In sentencing, the trial court may rely on circumstances brought out at trial. *State v. Flowe*, 107 N.C. App. 468, 472-73, 420 S.E.2d 475, 478, *disc. review denied*, 332 N.C. 669, 424 S.E.2d 412 (1992).

Before trial, defendant filed a Motion for Production of Confidential Records that required the trial court to review *in camera* several confidential DSS documents regarding L and I for exculpatory evidence. The trial court did so, and disclosed any arguably exculpatory evidence to both parties. Then, at the sentencing phase of the trial, defendant requested that the trial court

consider the mitigating factor that he had been gainfully employed. The only evidence of defendant's employment was his own testimony. The trial court, however, found that DSS's records rebutted defendant's evidence.

According to DSS documents, defendant was receiving assistance for his children from either Pennsylvania or North Carolina from at least 1982 to the present. In fact, they indicated that all monies received by the family came from DSS in one form or another. There was also ample testimony that the Patterson family frequently went hungry and that defendant would sell their groceries in order to purchase drugs.

Defendant has failed to establish that the trial court abused its discretion or that the public sense of fair play was offended. Defendant himself had asked the trial court to review the DSS documents. He was given ample opportunity to present his evidence, including any that showed error in the DSS records. His failure to present copies of employment records, pay stubs, income tax returns, or other evidence of prior employment was not due to any restriction imposed by the trial court. Accordingly, we reject this argument and find no error.

NO ERROR.

Judge McGEE concurs.

Judge GREENE dissenting in part.

GREENE, Judge, dissenting in part.

I dissent because I believe the trial court erred in considering for sentencing purposes information contained in records that had not been presented into evidence either at trial or at the sentencing hearing. As to the remainder of the majority opinion, however, I fully concur.

Although the formal rules of evidence do not apply in a sentencing hearing, such a hearing "must be fair and just" and provide the defendant with an "effective way of contradicting [any] damaging and prejudicial information." *State v. Locklear*, 34 N.C. App. 37, 39-40, 237 S.E.2d 289, 291 (1977), *rev'd on other grounds*, 294 N.C. 210, 241

S.E.2d 65 (1978); N.C.G.S. § 15A-1334(b) (2001). As a general proposition, the sentencing judge is permitted to consider any "circumstances brought out at trial." *State v. Flowe*, 107 N.C. App. 468, 472-73, 420 S.E.2d 475, 478, *disc. review denied*, 332 N.C. 669, 424 S.E.2d 412 (1992).

In this case, the sentencing judge considered, in evaluating the credibility of defendant's request for a mitigating factor,[1] certain Department of Social Services (DSS) records that had been presented to the trial court during the trial for *in camera* review but which had not been presented into evidence or otherwise been made available to defendant. The sentencing judge, after reviewing these records *in camera*, noted that defendant's trial testimony relating to his employment history was "clearly rebutted by the [DSS] records." Defendant questioned the trial court's procedure in reviewing the records on the ground that his "credibility ha[d] been challenged by records" he had not seen. After advising defendant he could "take it up on appeal," the sentencing judge sentenced defendant without granting him the benefit of the requested mitigating factor.

As the information in the DSS records was not evidence in defendant's trial, it was not within the scope of *Flowe*. Furthermore, it was not "fair and just" to allow the sentencing judge to consider this information, which was damaging and prejudicial, as defendant had no effective method or opportunity to contradict it. *See State v. Midyette*, 87 N.C. App. 199, 204-05, 360 S.E.2d 507, 510 (1987), *aff'd*, 322 N.C. 108, 366 S.E.2d 440 (1988) (new sentencing hearing required where trial court conducted an *in camera* victim input session and pronounced judgment without ensuring that all information received by the trial court had been known to the defendant and without the defendant having had an opportunity to explain or refute the information).

Therefore, I would vacate the sentence and remand for a new sentencing hearing.

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1. Defendant testified at trial he had a positive employment history and during the sentencing hearing requested a finding in mitigation pursuant to N.C. Gen. Stat. § 15A-1340.16(e)(19) (2001).

LINDA JUNE VITTITOE, PLAINTIFF v. JAMES E. VITTITOE, JR., DEFENDANT

No. COA01-629

(Filed 21 May 2002)

Divorce— postseparation support—not terminated by divorce judgment

The trial court properly denied defendant's motions to set aside and modify a postseparation support order where the order stated that postseparation support would continue "until final determination of the alimony claim" even though no claim for alimony had been asserted, a judgment for divorce was subsequently entered which did not reserve a claim for alimony, and there is no evidence that either party died, that plaintiff remarried, or that plaintiff has engaged in cohabitation. A judgment of divorce does not terminate an existing postseparation support order. N.C.G.S. § 50-16.1A(4).

Appeal by defendant from order entered 30 November 2000 by Judge Donald L. Boone in Guilford County District Court. Heard in the Court of Appeals 21 February 2002.

Hamrick & Associates, by Diane Q. Hamrick, and Bell, Davis & Pitt, P.A., by Robin J. Stinson, for plaintiff-appellee.

Douglas, Ravenel, Hardy, Crihfield & Hoyle, L.L.P., by G.S. Crihfield and Eric A. Halus, for defendant-appellant.

CAMPBELL, Judge.

This is the second appeal to come before this Court in the instant action and the third appeal to come before this Court involving issues arising out of the separation and divorce of the parties. In this opinion, we only set forth the factual and procedural history that is relevant to the instant appeal.

On 11 March 1998, Judge Boone entered an order granting plaintiff $800.00 per month in postseparation support beginning 1 February 1998 and continuing "until the final determination of the alimony claim." At the time, no claim for alimony had been asserted by either party. Defendant appealed Judge Boone's postseparation support order and several other orders and judgments arising out of the instant action, including an order holding defendant in civil con-

tempt for failure to pay support pursuant to Judge Boone's order. This Court, *inter alia*, dismissed defendant's appeal from Judge Boone's postseparation support order on the grounds that it was interlocutory and did not affect a substantial right. *Vittitoe v. Vittitoe*, 136 N.C. App. 234, 529 S.E.2d 523 (1999) (unpublished) ("*Vittitoe I*").

During the course of this action, plaintiff filed a separate action seeking an absolute divorce. On 22 June 1998, judgment for absolute divorce was entered on behalf of plaintiff. The judgment of divorce did not reserve a claim for alimony, nor was an alimony claim pending at the time. After entry of the judgment of absolute divorce, plaintiff filed a motion to amend her complaint to add a claim for alimony, and a motion to set aside the judgment of absolute divorce pursuant to N.C. R. Civ. P. 60. On 2 June 1999, the trial court entered an order denying plaintiff's motions. Plaintiff appealed and this Court affirmed. *Vittitoe v. Vittitoe*, 140 N.C. App. 791, 541 S.E.2d 238 (2000) (unpublished) ("*Vittitoe II*").

Following this Court's decision in *Vittitoe I*, defendant failed to pay plaintiff any support until plaintiff filed a calendar request on 26 January 2000 for a hearing regarding defendant's continued failure to pay support. As a result, on 4 February 2000, defendant sent plaintiff's counsel a check dated 1 February 2000 in the amount of $11,334.00. The check was labeled "Paid In Full," with an attached letter stating that the check "satisfies in full the amount due under the order for post separation support and attorney ['s] fees of 11 March 1998 and the order of 6 July 1998." Plaintiff's attorney acknowledged receipt of the check by letter dated 14 February 2000, which stated, "this will also serve as a denial, on behalf of Ms. Vittitoe, that the check fully satisfies Mr. Vittitoe's obligation pursuant to the post separation support order." The check, subsequently cashed by plaintiff, covered five months of postseparation support at $800.00 per month pursuant to Judge Boone's order, $3,823.20 in back postseparation support awarded by Judge Boone, and $3,500.00 in attorney's fees awarded by Judge Boone. This payment is the only support plaintiff has received from defendant since the parties separated on 5 June 1996.

On 20 March 2000, plaintiff filed her second motion for contempt for defendant's failure to pay support pursuant to Judge Boone's postseparation support order. On 7 April 2000, defendant answered and moved to dismiss plaintiff's motion for contempt on the grounds that (1) plaintiff's acceptance and negotiation of defendant's check

dated 1 February 2000 constituted an accord and satisfaction, and (2) plaintiff's obtaining a judgment of divorce terminated her right to postseparation support.

On 1 May 2000, Judge Enochs entered an order denying defendant's motion to dismiss, concluding that "[t]he Plaintiff's acceptance of the check dated February 1, 2000 was not accord and satisfaction." Plaintiff's motion for contempt was heard on 8 May 2000 by Judge Foster. On 10 May 2000, Judge Foster entered an order finding defendant in civil contempt for a second time for his failure to pay postseparation support pursuant to Judge Boone's 11 March 1998 order. Judge Foster made the following finding of fact:

> 6. The March 11, 1998 postseparation support Order of Judge Boone has not been modified, has been upheld by the Court of Appeals, and is still in full force and effect. Under current North Carolina case law, the divorce on June 22, 1998, does not terminate Plaintiff's right to continue to receive postseparation support.

Based on his findings of fact, Judge Foster concluded, as a matter of law, that defendant's failure to comply with the terms of Judge Boone's 11 March 1998 order had been wilful and without lawful excuse. Defendant was ordered to be incarcerated, but was allowed to purge himself of the contempt by making timely postseparation support payments of $800.00 per month beginning 1 June 2000. Thus, Judge Foster ordered that defendant's incarceration be stayed until defendant failed to make a timely payment of postseparation support "without sufficient excuse." Defendant was also ordered to pay plaintiff $4,984.50 in attorney's fees. Judge Foster further found that defendant was $18,400.00 in arrears for postseparation support from July 1998 through May 2000, but ordered that the arrearages be held in abeyance until further order of the court.

On 12 May 2000, defendant filed a Rule 60 motion seeking to set aside Judge Boone's postseparation support order on the grounds that the order was entered by mistake and inadvertence, and was contrary to the intention of the court. Defendant argued that Judge Boone did not realize there was no alimony claim pending when he entered the postseparation support order, and, thus, the language that postseparation support "should continue until the final determination of the alimony claim" was unrepresentative of the posture of the case and of Judge Boone's intention. Defendant further argued that Judge Boone did not intend for defendant to pay postseparation support fol-

lowing the entry of a judgment of divorce. Defendant also sought reconsideration of Judge Foster's contempt order.

On 27 July 2000, defendant filed a motion requesting modification of Judge Boone's postseparation support order so as to terminate support as of the date of the parties' divorce. By order entered 30 November 2000, Judge Boone denied both of defendant's motions seeking to terminate his postseparation support obligation. Defendant appeals.

The dispositive issue on appeal is whether plaintiff's right to postseparation support terminated upon the entry of the judgment of absolute divorce.

N.C. Gen. Stat. § 50-16.1A(4) (2001) defines postseparation support as "spousal support to be paid until the earlier of either the date specified in the order of postseparation support, or an order awarding or denying alimony." "Under the plain language of G.S. 50-16.1A(4) . . . postseparation support may continue despite a judgment of divorce if the postseparation support order does not specify a termination date and there is no court order awarding or denying alimony." *Marsh v. Marsh*, 136 N.C. App. 663, 665, 525 S.E.2d 476, 477 (2000). This is in sharp contrast to the old alimony *pendente lite* (APL) statute, which provided that APL terminated upon a judgment of divorce. N.C. Gen. Stat. § 50-16.1(2) (repealed 1995).

In addition to terminating by definition on the date specified in the order, if one is so specified, or upon entry of an order awarding or denying alimony, postseparation support also terminates upon the death of either the supporting or dependent spouse, upon the remarriage of the dependent spouse, or when the dependent spouse engages in cohabitation. N.C. Gen. Stat. § 50-16.9(b) (2001).

In *Marsh*, this Court addressed the question of whether postseparation support may continue after a judgment of divorce. The parties in *Marsh* entered into a separation agreement that the trial court later incorporated into its judgment of divorce. The separation agreement provided, in pertinent part:

> The Husband shall pay to the Wife, as postseparation support/alimony without divorce, one-half (½) of his military retirement . . . The Husband's obligation for the payment of postseparation support/alimony without divorce shall terminate upon the death of the Husband, the death or remarriage of the Wife.

The separation agreement contained no other language concerning termination of postseparation support/alimony without divorce, and the agreement contained no language concerning permanent alimony.

The defendant-husband filed a motion seeking to terminate his obligations for postseparation support/alimony without divorce. After hearing testimony, the trial court issued an order terminating the defendant-husband's obligations for postseparation support, concluding that "the terms of the Separation Agreement only provided for postseparation support until the granting of a divorce."

On appeal, this Court began by acknowledging, that unlike the old APL statute, the current postseparation support statute "create[s] a window that may allow postseparation support to continue indefinitely." *Marsh*, 136 N.C. App. at 664, 525 S.E.2d at 477; *see also Wells v. Wells*, 132 N.C. App. 401, 414, 512 S.E.2d 468, 476 (1999). We noted that the parties' separation agreement provided for only three possible instances in which the defendant-husband's obligation to pay postseparation support would terminate; (1) the death of the defendant-husband, (2) the death of the plaintiff-wife, or (3) the remarriage of the plaintiff-wife. There was no evidence in the record that any of these events had occurred, and there was no other provision in the separation agreement dealing with termination of postseparation support. In addition, the record contained no evidence that the trial court had awarded or denied alimony. In fact, as in the instant case, it appeared from the record that the plaintiff-wife had never even sued for alimony.[1] Based on these facts, we concluded that the defendant-husband's obligation to pay postseparation support did not automatically terminate upon the judgment of divorce. *Marsh*, 136 N.C. App. at 665, 525 S.E.2d at 477.

Defendant argues that the facts in the instant case are distinguishable from those in *Marsh*, while plaintiff contends that the principles set forth in *Marsh* are controlling and compel the conclusion that defendant's obligation to pay postseparation support did not terminate upon entry of the judgment of divorce. We agree with plaintiff.

Defendant contends that the postseparation support order in the instant case specifically provided that postseparation support would

1. The Court in *Marsh* did not address whether the record contained any evidence that the dependent spouse, the plaintiff-wife, had engaged in cohabitation. Thus, we assume there was no such evidence.

terminate on the date of the final determination of the alimony claim. According to defendant, the final determination of the alimony claim was made when a judgment granting plaintiff an absolute divorce was entered without a claim for alimony pending, and without reserving a claim for alimony. *See* N.C. Gen. Stat. § 50-11(a) (2001) ("After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine . . . .") However, defendant's contention ignores the express language of N. C. Gen. Stat. § 50-11(c), which states, in pertinent part:

> Furthermore, a judgment of absolute divorce *shall not* impair or destroy the right of a spouse to receive alimony or postseparation support or affect any other rights provided for such spouse under any judgment or decree of a court rendered *before* or at the time of the judgment of absolute divorce.

N.C.G.S. § 50-11(c) (2001) (emphasis added). Interpreting N.C.G.S. §§ 50-16.1A(4) and 50-11(c) *in pari materia*, we conclude that a judgment of absolute divorce does not terminate an existing postseparation support order.

In reaching this decision, we reiterate the words of Chief Judge Eagles in writing for the Court in *Marsh:*

> [I]t is important to note that we understand that the General Assembly may have intended postseparation support to be a temporary measure. However, we are bound to interpret statutes as they are written. If the General Assembly feels that the policy of this State should be that postseparation support ends upon a judgment of divorce then it is within its power to amend the statute.

Marsh, 136 N.C. App. at 665-66, 525 S.E.2d at 477-78 (internal citation omitted).

Based on the foregoing, we conclude that defendant's obligation to pay postseparation support has not terminated. The record shows that the trial court has not entered an order awarding or denying alimony. In fact, neither party has asserted a claim for alimony. The only provision in the original postseparation support order dealing with termination states that the award "should continue until the final determination of the alimony claim." Having concluded that N.C.G.S. 50-11(c) prevents a judgment of absolute divorce from terminating an existing postseparation support order, this provision does not have the effect of terminating defendant's postseparation support obliga-

tions. Further, there is no evidence that either party has died, that plaintiff has remarried, or that plaintiff has engaged in cohabitation. Therefore, we affirm the trial court's order denying defendant's motions to set aside and modify the original postseparation support order.

Affirmed.

Judges MARTIN and HUDSON concur.

CLYDE BENJAMIN BAKER, JR. AND WIFE, BRENDA L. BAKER, CECIL L. BERRY, JR. AND WIFE, DIANA PRICE BERRY, ROBERT LEE BROWN, DONALD R. CAMPBELL AND WIFE, TOMMIE JO CAMPBELL, MELVIN EDWARD CARTER AND WIFE, WANDA J. CARTER, HERBERT E. HALL AND WIFE, KATHLEEN B. HALL, JAMES M. HOLT, SR. AND WIFE, DOROTHY HOLT, FLOYD ISOM, SR. AND WIFE, BEULA LAWSON ISOM, WALTER LEE JONES AND WIFE, BETTY B. JONES, ALBERT W. LAWS AND WIFE, BRENDA C. LAWS, MILDRED E. LAWS AND HUSBAND, DAVID LAWS, KENDALL R. LINKER, CLYDE CARL MARSH, JOHN G. MILLER, JAMES D. PARKS AND WIFE, LORETTA PARTS, AND MARY FRANCIS PRICE, PLAINTIFFS V. ARTHUR LEE IVESTER, DEFENDANT

No. COA01-258

(Filed 21 May 2002)

Workers' Compensation— asbestos abatement—negligence action by one employee against another—no willful, reckless or wanton conduct

The trial court did not err by entering summary judgment for defendant in an action seeking damages for injuries caused by workplace exposure to asbestos where plaintiffs and defendants were co-employees of Fieldcrest; defendant was employed as a supervisor in Fieldcrest's industrial hygiene department with asbestos responsibilities; there was nothing in the record to suggest that defendant had personal contact with any of the plaintiffs; and plaintiffs do not contend that defendant had an actual intent to injure the individual plaintiffs. The record clearly establishes that defendant did not engage in the type of willful, reckless and wanton conduct contemplated by the exception to Workers' Compensation ban on common law actions between employees.

Appeal by plaintiffs from summary judgment entered 1 September 2000 by Judge Robert M. Burroughs in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 February 2002.

Wallace and Graham, P.A., by Michael B. Pross, Edward L. Pauley and Mona Lisa Wallace, for plaintiff-appellants.

Anderson, Korzen & Associates, P.C., by John J. Korzen for plaintiff-appellant.

Harry C. Martin, for plaintiff-appellant.

Smith Helms Mulliss & Moore, L.L.P., by Jeri L. Whitfield, Manning A. Connors and Stephanie E. Stark, for defendant-appellee.

North Carolina Academy of Trial Lawyers, by Stella A. Boswell, for amicus curiae.

BIGGS, Judge.

Plaintiffs are former employees, and spouses of former employees, of Fieldcrest Cannon, Inc. (Fieldcrest). Defendant was employed by Fieldcrest as an industrial hygienist, from 1976 to 1997. In 1997, plaintiffs filed suit against defendant, four other Fieldcrest employees, and Fieldcrest, seeking damages for illness and injury caused by workplace exposure to asbestos. On 28 May 1998, the trial court divided the plaintiffs into four classes, designated A, B, C, and D. The present appeal involves only the Class C group: plaintiffs and spouses who (a) worked for Fieldcrest within ten years of filing the complaint, and (b) had claims only against the individual defendants, but not against Fieldcrest. On 1 July 1998, after the case was severed into four plaintiff classes, defendant, with the others who had been sued, moved for summary judgment. Prior to argument on the summary judgment motion, the plaintiffs entered a voluntary dismissal against all parties sued except Ivester, the defendant in the present appeal. The motion was heard on 7 April 2000, and on 1 September 2000, the trial court granted summary judgment in favor of defendant. Plaintiffs appeal from this order.

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, 56(c) (2001). "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). "Once the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000). However, "the 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).

On appeal, this Court's standard of review involves a two-step inquiry, to determine if (1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and (2) either party is entitled to judgment as a matter of law. *Von Viczay v. Thoms*, 140 N.C. App. 737, 738, 538 S.E.2d 629, 630 (2000), *aff'd*, 353 N.C. 445, 545 S.E.2d 210 (2001) (citations omitted). Furthermore, "the evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

In the instant case, plaintiffs have filed suit against defendant, who is their co-employee, for damages associated with exposure to asbestos while working at Fieldcrest. Plaintiffs do not contend that there is any issue of material fact, and acknowledge that "[t]he facts are not in dispute." However, plaintiffs contend that the trial court erred by finding defendant entitled to judgment as a matter of law. Consequently, we first review the law governing claims by an employee against a co-employee.

"The Workmen's Compensation Act . . . [bars] an employee subject to the Act whose injuries arise out of and in the course of his employment [from maintaining] a common law action against a negligent co-employee." *Strickland v. King and Sellers v. King*, 293 N.C. 731, 733, 239 S.E.2d 243, 244 (1977). However, the North Carolina Supreme Court has recognized that the Workers' Compensation Act does not prevent an employee from bringing a suit against a co-employee for intentional torts, "willful, wanton and reckless negligence," or behavior that is "manifestly indifferent to the consequences." *Pleasant v. Johnson*, 312 N.C. 710, 714, 715, 325

S.E.2d 244, 248 (1985). The Court defined the relevant terms as follows:

> '[W]anton' conduct [is] an act manifesting a reckless disregard for the rights and safety of others. The term 'reckless', as used in this context, appears to be merely a synonym for 'wanton[.]'. . . . The term 'willful negligence' has been defined as the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed. A breach of duty may be willful while the resulting injury is still negligent. . . . Even in cases involving 'willful injury,' however, the intent to inflict injury need not be actual. Constructive intent to injure . . . exists where conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequences that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified.

Id. at 714-15, 325 S.E.2d at 248. The issue, therefore, is whether defendant's conduct, viewed in the light most favorable to the plaintiff, was willful, wanton, or reckless, so as to fall within the *Pleasant* exception. A review of the case law since *Pleasant* suggests that, on the facts of this case, the exclusivity provision of the Workman's Compensation Act precludes plaintiffs from maintaining a common law action against defendant.

In *Echols v. Zarn, Inc.*, 116 N.C. App. 364, 448 S.E.2d 289 (1994), *aff'd* 342 N.C. 184, 463 S.E.2d 228 (1995), plaintiff was injured when she performed a machine operation in violation of company rules, on instructions from defendant, who was plaintiff's supervisor, and in charge of enforcing safety rules. On these facts, the Court found the evidence insufficient to support "an inference that [defendant] intended that plaintiff be injured or that she was manifestly indifferent to the consequences of [plaintiff's actions.]" *Id.* at 376, 448 S.E.2d at 296. *See also Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993) ("[defendants] may have known certain dangerous parts of the machine were unguarded when they instructed [plaintiff] to work at the machine, [but] we do not believe this supports an inference that they intended that [plaintiff] be injured or that they were manifestly indifferent to the consequences of his doing so.")

This Court recently addressed a situation similar to that of *Pendergrass* and *Echols*, in which the plaintiff, while under the influence of prescribed medication, was injured when she operated a machine at the direction of her supervisor, who (1) was in charge of

employee safety; (2) knew of the machine's danger; and (3) also knew about plaintiff's medication. This Court held that "[i]n light of the holdings in *Echols* and *Pendergrass*, we do not believe [defendant's] actions support an inference that he intended that plaintiff be injured or was manifestly indifferent to the consequences of her operating the picker machine." *Bruno v. Concept Fabrics, Inc.*, 140 N.C. App. 81, 87, 535 S.E.2d 408, 412-13, (2000).

In the case *sub judice*, it is not disputed that plaintiffs and defendant were co-employees of Fieldcrest. Defendant was employed as a supervisor in Fieldcrest's industrial hygiene department. His role at Fieldcrest was to make the company's management aware of health problems, such as exposure to cotton dust, excessive noise, and asbestos, and to assist in developing recommendations and policies for responding to these industrial health risks. Defendant was also the company's senior industrial hygienist in the area of asbestos abatement. As such, defendant chaired Fieldcrest's asbestos subcommittee, within the company's Environmental Compliance committee, and made recommendations to Fieldcrest management regarding environmental and statutory guidelines for asbestos abatement. He was also responsible for keeping Fieldcrest's management apprised of relevant OSHA regulations; developing a corporate plan for management of asbestos; and assisting the company president with monitoring and reviewing Fieldcrest's compliance with asbestos safety regulations.

Nothing in the record suggests that defendant had personal contact with any of the plaintiffs; nor do plaintiffs contend that defendant had an actual intent to injure individual plaintiffs. Rather, plaintiffs apparently contend that defendant's job performance was so deficient that as a matter of law it constituted willful, wanton, and reckless negligence. We do not agree.

Fieldcrest, as plaintiffs' employer, had the duty to provide its employees with "a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees[.]" N.C.G.S. § 95-129(1) (1999). Indeed, "[i]t is well established in our jurisprudence that an employer must exercise the due care of a prudent person . . . to provide a safe place for employees to work." *Macklin v. Dowler*, 53 N.C. App. 488, 490, 281 S.E.2d 164, 165-66 (1981).

Plaintiffs appear to argue that, by assigning defendant tasks pertaining to asbestos abatement, Fieldcrest shifted their respon-

sibility for workplace safety to defendant. However, as previously discussed, defendant owed his co-employees only the duty to exercise reasonable care and to avoid willful, wanton and recklessly negligent conduct. *Pleasant*, 312 N.C. 710, 325 S.E.2d 244. Plaintiffs have presented no evidence that Fieldcrest's obligations were transferred to defendant. *See Brooks v. BCF Piping*, 109 N.C. App. 26, 426 S.E.2d 282 (1993) (employer's duty to provide safe workplace generally is nondelegable). Thus, plaintiffs' evidence tending to suggest that Fieldcrest may have breached its duty of care towards its employees does not establish a cause of action against defendant.

Plaintiffs failed to present evidence that defendant breached any duty owed to individual plaintiffs, or that he acted with actual or constructive intent to injure any individual plaintiffs. Further, plaintiffs have not cited any basis upon which to hold defendant individually liable for an industrial disease. There is nothing in the record indicating that defendant concealed from Fieldcrest, which had the legal responsibility for workplace safety, the fact that asbestos was an issue requiring Fieldcrest's attention. The record establishes that Fieldcrest was informed of its responsibility to ensure the safety of its employees in regard to exposure to asbestos, and that defendant participated in the company's efforts to address asbestos-related problems.

We conclude that the record evidence clearly establishes as a matter of law that defendant did not engage in the type of 'willful, reckless and wanton' conduct contemplated by the holding of *Pleasant*. We further conclude that, on the record before the trial court, the entry of summary judgment for defendant was not error. Accordingly, we affirm the trial court.

Affirmed.

Chief Judge EAGLES and Judge McCULLOUGH concur.

PRISCILLA OWENBY, PLAINTIFF v. FRED JOHNSON YOUNG, DEFENDANT

No. COA01-711

(Filed 21 May 2002)

Child Support, Custody, and Visitation— custody—action by grandparent—deceased mother—alcohol abuse by father

The trial court erred by not finding a father unfit to have custody of his two children where he and the mother had divorced, with the mother having primary custody; the mother died in a plane crash; the maternal grandmother brought this action seeking custody; and defendant's behavior, including consuming alcohol while transporting the children and allowing others to do the same, is inconsistent with his constitutionally protected status and constituted a substantial risk of harm to the children. The matter was remanded for application of the best interest of the child standard in determination of custody.

Appeal by plaintiff from order filed 3 January 2001 by Judge Robert S. Cilley in McDowell County District Court. Heard in the Court of Appeals 16 April 2002.

Lynch & Taylor, P.A., by Anthony Lynch, for plaintiff-appellant.

C. Gary Triggs, for defendant-appellee.

GREENE, Judge.

Priscilla Owenby (Plaintiff) appeals a judgment filed 3 January 2001 dismissing her action against Fred Johnson Young (Defendant) for lack of standing.

In summary form, the undisputed evidence shows Defendant and Priscilla Price Young (Young), Plaintiff's daughter, were married on 13 July 1985. During their marriage, Defendant and Young had two children: Frederick Johnson Young, III (Trey), born on 12 May 1989, and Taylor Patrick Young (Taylor), born on 11 December 1990. On 25 August 1993, Defendant and Young divorced and custody issues were settled in a separation agreement, which was later incorporated into a court order. Defendant and Young had joint custody of the children, with Young having primary custody and Defendant having secondary custody, structured as visitation. After Defendant and Young separated, Young and the children often lived with Plaintiff. In December

1995 and again on 13 April 2000, Defendant was convicted of driving while impaired. As a result of Defendant's second driving while impaired conviction, his driver's license was revoked.

Subsequently, on 28 April 2000, Young died in a plane crash and shortly thereafter, on 26 May 2000, Plaintiff filed a complaint seeking custody of Trey and Taylor. In her complaint, Plaintiff alleged Defendant was unfit to have care, custody, and control of Trey and Taylor due to his: lifelong problem with alcohol abuse; DWI convictions; and employment and economic instability. On the day Plaintiff filed her complaint, she moved the trial court to enter an order granting her temporary care, custody, and control of Trey and Taylor. The trial court entered an *ex parte* order on 26 May 2000 granting Plaintiff immediate temporary custody of Trey and Taylor. After Defendant moved the trial court for dissolution of the 26 May 2000 order, the trial court entered a temporary order on 21 July 2000 incorporating an agreement reached by Plaintiff and Defendant. The 21 July 2000 order maintained primary custody with Plaintiff, awarded Defendant visitation of the children, and further ordered that:

> ii. Neither party shall consume alcohol around the children or permit alcohol to be consumed by others at their residence while the children are present.
>
> iii. Neither party shall drive the children unless they are properly licensed by the state of North Carolina; neither party will permit another to drive the minor children except those licensed, insured and driving a properly registered vehicle.

A two-day hearing was held on 7 and 18 December 2000 to determine if Plaintiff had standing to seek custody of Trey and Taylor. The trial court stated Plaintiff's burden was "to show [Defendant] to be unfit or in some other way to have acted . . . in a [manner] inconsistent with the parental relationships." At the hearing, Defendant testified he has driven while impaired and has also driven without a license. At times, Defendant has "operated a vehicle[] and consumed alcohol at the same time." Defendant also testified that while he knew it was wrong, he has allowed others to drive his children in the recent past while the individuals were consuming alcohol. According to Defendant, the children have spent a significant part of their lives in McDowell County, living either with or in proximity to Plaintiff.

Both Trey and Taylor testified they often smelled alcohol on Defendant's breath. Trey stated that on several instances in the past,

he has ridden in a vehicle with Defendant while Defendant drank beer. In addition, Trey's paternal uncle, while drinking, has driven Trey, Taylor, and Defendant to Charlotte.

Taylor testified that on more than one occasion, he has ridden in a car with Defendant while Defendant and others consumed alcohol while driving. On one occasion, when the children's paternal uncle was drinking alcohol and driving, the children were involved in an automobile accident but were not severely injured. Taylor stated that he did not feel good about riding with his father because he was "afraid [Defendant] might . . . [drink] and [they] would get in a wreck again." Both children testified that when Defendant drinks alcohol, he becomes upset and agitated with Trey and Taylor. The two minor children were aware Defendant's driver's license was suspended, he often operated a vehicle while drinking alcohol or being under its influence, and Defendant operated a vehicle on several occasions while his license had been revoked.

After the hearing, the trial court concluded:

> 2. The burden of proof is on the non-parent to show the existence of the factual basis for a conclusion of unfitness or neglect.
>
> . . . .
>
> 4. The facts found on the threshold issue do not make out a prima facie case that as a matter of law [D]efendant is unfit to act as a parent, or that he has so neglected his responsibilities as a parent as to constitute a waiver of his rights to raise his own children.
>
> 5. Plaintiff, having failed to make out a prima facie case that [D]efendant is unfit or neglectful or that he has otherwise acted inconsistent with the parental relationship, has no standing to maintain an action against [D]efendant for custody of his minor children.

Consistent with its findings of fact and conclusions of law, the trial court dismissed Plaintiff's action for "lack of standing" and dissolved the temporary custody order.

The dispositive issue is whether the trial court erred in concluding Defendant is fit "to act as a parent[] or that he has [not] neglected his responsibilities as a parent as to constitute a waiver of his rights to raise his own children."

In a custody dispute between natural parents and a third person, including a grandparent, a natural parent has a "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). Thus, in order to have standing to seek custody from a parent, a third party must show she has an established relationship with the child, such that she is not a stranger to the child, *Ellison v. Ramos*, 130 N.C. App. 389, 394, 502 S.E.2d 891, 894, *appeal dismissed and disc. review denied*, 349 N.C. 356, 517 S.E.2d 891 (1998), and "the parent is unfit to have custody or . . . [his] conduct is inconsistent with his . . . constitutionally protected status," *Adams*, 354 N.C. at 62, 550 S.E.2d at 503 (citations omitted). Only after a nonparent has shown she has an established relationship with the child and that the parent has acted in a manner inconsistent with his constitutionally protected status, will the "best interest of the child" standard be applied to determine custody. *Id.* at 62, 550 S.E.2d at 502.

Conduct rising to the level of that inconsistent with a parent's constitutionally protected status "includes, but is not limited to: neglect of the children; abandonment of the children; and, in some circumstances, the voluntary surrender of custody of the children." *Speagle v. Seitz*, 141 N.C. App. 534, 536, 541 S.E.2d 188, 190 (2000), *overruled on other grounds*, 354 N.C. 525, 557 S.E.2d 83 (2001). Whether a parent is unfit or his conduct constitutes "conduct inconsistent" with his constitutionally protected status "presents a question of law and, thus, is reviewable *de novo*," and the conduct " 'need not rise' to that conduct necessary to terminate parental rights." *Id.* (citations omitted). In order to give rise to a best interest inquiry, the parental conduct must be inconsistent with the constitutionally protected status and "have some negative impact on the child or constitute a substantial risk of such impact." *Id.* at 536-37, 541 S.E.2d at 190; *see Speagle v. Seitz*, 354 N.C. 525, 531, 557 S.E.2d 83, 87 (2001) (any past circumstance that could "impact either the present or the future of a child is relevant"); *see also Wisconsin v. Yoder*, 406 U.S. 205, 233-34, 32 L. Ed. 2d 15, 35 (1972) (parents' constitutional rights will be suspended only "if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens").

In this case, the evidence at trial shows Defendant drank beer while driving Trey and Taylor and allowed his brother to do the same. Furthermore, even though Defendant testified at trial that he knew it was wrong to drink and drive, he still permitted his brother to drive

the children after and while the brother had consumed alcohol. Defendant's behavior, including consuming alcohol while transporting the children and allowing others to do the same, is inconsistent with his constitutionally protected status and constituted a substantial risk of harm to the children. Accordingly, the trial court erred in failing to find Defendant unfit to have custody of Trey and Taylor. This case, therefore, must be remanded for the trial court to apply the "best interest of the child" standard and to determine in whose custody the interests of Trey and Taylor would be best served.

Reversed and remanded.

Judges TIMMONS-GOODSON and THOMAS concur.

STATE OF NORTH CAROLINA v. WILLIAM THOMAS FRAZIER

No. COA01-849

(Filed 21 May 2002)

Robbery— dangerous weapon—failure to submit lesser included offense of common law robbery

The trial court erred in a robbery with a dangerous weapon case by failing to submit the lesser included offense of common law robbery to the jury and the case is remanded for a new trial, because: (1) where a defendant presents evidence that the weapon used during a robbery was unloaded or otherwise incapable of firing, such evidence tends to prove the absence of an element of the offense of armed robbery and requires the submission of the case to the jury on the lesser included offense of common law robbery as well as the greater offense; and (2) there was some evidence tending to show that the firearm used by defendant was not loaded.

Appeal by defendant from judgment entered 21 March 2001 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 23 April 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Gayl M. Manthei, for the State.

Randolph and Fischer, by Rebekah L. Randolph, for defendant appellant.

TIMMONS-GOODSON, Judge.

On 21 March 2001, a jury found William Thomas Frazier ("defendant") guilty of robbery with a dangerous weapon. At trial, the State presented evidence tending to show the following: In the late afternoon of 28 March 1999, defendant and his friend, Darrick McLean ("McLean") purchased several items from a convenience store located in Kernersville, North Carolina. Later that evening, the two men discussed robbing the store. At approximately 11:20 p.m., defendant returned to the convenience store. Defendant selected some candy and approached the counter, where the store clerk was occupied adjusting the tape in the cash register. When the clerk looked up from the register, he saw that defendant was holding a gun. Holding the weapon to the clerk's midsection, defendant demanded that he open the safe, but the clerk informed him that he did not have a key. Defendant threatened to kill him, but upon discovering a small bag containing approximately $153.00 in cash, defendant took the bag and left the store. He then drove away with McLean and McLean's girlfriend, who were waiting for defendant outside in their automobile.

Defendant testified on his own behalf. Defendant stated that he and McLean discussed robbing the store, but that he "didn't really want it to happen[.]" McLean insisted, however, that defendant commit the robbery and handed him a gun. Defendant asserted that he unloaded the weapon and tucked it into the front of his pants before entering the store. According to defendant, when he approached the store counter with his candy, the clerk requested his assistance in loading the register tape, whereupon defendant walked behind the counter and attempted to load the tape. Defendant explained that, "at the time I was helping [the clerk] put the paper in, my gun had moved; and I didn't make a sudden gesture, but I tried to slide my hands to where I can adjust it to where it wouldn't, you know, it wouldn't fall or anything." When defendant put his hand on the register, the clerk "grabbed" him "and at this point in time my gun is falling out of my pants leg, so I grabbed it and I pulled it out and held it towards the ground." The clerk then retrieved a small envelope containing cash from under the counter

and told defendant to "take this don't hurt me." Defendant took the envelope and left the store.

Upon receiving the jury's guilty verdict, the trial court sentenced defendant to a minimum term of 99 months and a maximum term of 128 months of imprisonment. Defendant appeals from his conviction and resulting sentence.

The sole issue on appeal is whether the trial court erred in refusing to instruct the jury on the lesser included offense of common law robbery. Because there was evidence from which a reasonable jury could conclude that defendant committed the lesser included offense, the trial court erred in failing to instruct the jury on common law robbery. We therefore remand defendant's case for a new trial.

Defendant argues that the trial court erred in failing to instruct the jury on the lesser included offense of common law robbery. "If a request is made for a jury instruction which is correct in itself and supported by the evidence, the trial court must give the instruction at least in substance." *State v. Harvell*, 334 N.C. 356, 364, 432 S.E.2d 125, 129 (1993). Where there is positive and unequivocal evidence as to each and every element of armed robbery, and there is *no* evidence supporting the defendant's guilt of a lesser included offense, the trial court may properly decline to instruct the jury on the lesser included offense of common law robbery. *See State v. Cummings*, 346 N.C. 291, 325, 488 S.E.2d 550, 570 (1997), *cert. denied*, 522 U.S. 1092, 139 L. Ed. 2d 873 (1998). "The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981).

The offense of robbery with a firearm or other dangerous weapon is set forth in section 14-87 of the North Carolina General Statutes, which reads:

> (a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who

> aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87(a) (2001). The primary distinction between armed robbery and common law robbery is that "the former is accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened." *State v. Peacock*, 313 N.C. 554, 562, 330 S.E.2d 190, 195 (1985). The use or threatened use of a dangerous weapon, however, is not an essential element of common law robbery. *See Cummings*, 346 N.C. at 325-26, 488 S.E.2d at 570.

An object incapable of endangering or threatening life cannot be considered a dangerous weapon. *See State v. Allen*, 317 N.C. 119, 122, 343 S.E.2d 893, 895 (1986). In deciding whether a particular instrument is a dangerous weapon under section 14-87, "the determinative question is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened." *State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982).

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

State v. Thompson, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979). Where there is evidence, however, that the instrument is "an inoperative firearm incapable of threatening or endangering the life of the victim[,]" it is "for the jury to determine the nature of the weapon." *Allen*, 317 N.C. at 125-26, 343 S.E.2d at 897. Thus, where a defendant presents evidence that the weapon used during a robbery was unloaded or otherwise incapable of firing, such evidence "tend[s] to prove the absence of an element of the offense [of armed robbery] and require[s] the submission of the case to the jury on the lesser included offense of common law robbery as well as the greater offense of robbery with firearms or other dangerous implements." *State v. Joyner*, 67 N.C. App. 134, 136, 312 S.E.2d 681, 682 (1984), *affirmed*, 312 N.C. 779, 324 S.E.2d 841 (1985); *see also Allen*, 317 N.C. at 126, 343 S.E.2d at 898 (noting that evidence that a firearm is inoperative forms the basis for instruction on common law robbery).

In the instant case, there was some evidence tending to show that the instrument used by defendant was not loaded during the commis-

sion of the robbery and was therefore incapable of endangering the life of a person. Defendant testified in detail that before he entered the store, he "[t]ook the bullets out of [the gun] and placed [them] in a hat, which was in the back seat [of McLean's automobile], and just covered them up." Defendant also described the mechanical process of unloading the weapon. Moreover, the weapon was not loaded when seized by law enforcement officers several days after the commission of the robbery. The State argues that this evidence is neither probative nor credible, and that the trial court was therefore not required to instruct the jury on common law robbery. We disagree. Credibility of evidence is the proper province of the jury, and we do not conclude that the evidence in question was "so lacking in credibility that the jury should not have been permitted to consider it." *Allen*, 317 N.C. at 126, 343 S.E.2d at 898. Thus, because there was evidence from which the jury could find that the firearm was inoperable and thus incapable of threatening or endangering the life of the victim, the jury should have been instructed on the offense of common law robbery. The trial court erred in failing to submit the lesser included offense of common law robbery to the jury. We therefore vacate defendant's conviction for armed robbery and remand his case to the trial court for a new trial.

New trial.

Judges GREENE and HUNTER concur.

BENNY HALL SHARPE, WALTER LEE SHARPE, RONALD EDWARD SHARPE, LINDA SHARPE GOODIN AND MARTHA SHARPE GOODIN, PLAINTIFFS V. CAROLYN GREGORY SHARPE, AS EXECUTRIX OF THE ESTATE OF EDITH C. SHARPE, LARRY W. SHARPE, ELIZABETH SHARPE, BENNY HALL (BUTCH) SHARPE, JR., WESLEY SHARPE, JOHN MILTON SHARPE, DAVID EDWARD GOODIN, (NAMED AS DAVID SHARPE IN WILL), HENRY DANIEL GOODIN (NAMED AS HENRY MELTON SHARPE IN WILL), JASON SCOTT GOODIN (NAMED AS JASON EDWARD GOODIN IN WILL), CONNIE IRENE SHARPE, DEANNA SHARPE BODENHEIMER (NAMED AS DEANNA SHARPE IN WILL), KRISTA NICOLE SHARPE, TERRELL LARRY SHARPE, BRENT ALEXANDER SHARPE, AND TRINA RAYE SHARPE, ALL AS RESIDUAL BENEFICIARIES UNDER THE LAST WILL AND TESTAMENT OF EDITH C. SHARPE, DEFENDANTS

No. COA01-783

(Filed 21 May 2002)

Real Property— option to purchase—timely exercise of option—timely tender of purchase price

The trial court properly granted summary judgment for defendants in a declaratory judgment action in which plaintiffs claimed that defendant Larry Sharpe failed to exercise an option in a will to purchase land and that the land passed to the residual beneficiaries. The option merely required that Mr. Sharpe give notice that he had elected to purchase the land within six months and did not require that he tender the purchase price during that period. Mr. Sharpe timely exercised his option by a letter to the executrix and tendered the purchase price within a reasonable time under the circumstances, which included a delay of 33 months for plaintiffs' legal proceedings.

Appeal by plaintiffs from judgment filed 2 May 2001 by Judge Larry G. Ford in Iredell County Superior Court. Heard in the Court of Appeals 27 March 2002.

McElwee Firm, PLLC, by William H. McElwee, III and Elizabeth K. Mahan, for plaintiffs-appellants.

Eisele, Ashburn, Greene & Chapman, P.A., by John D. Greene, for defendants-appellees.

WALKER, Judge.

The decedent died on 20 March 1997. Her Last Will and Testament (the Will) named Carolyn G. Sharpe (the Executrix) as the Executrix of her estate. The Will devised the following in part:

> ITEM III. I hereby direct my hereafter named Executor to sell to my nephew, Larry W. Sharpe, at his option, either or both of the following described tracts of land for a total price of Eight Hundred ($800.00) Dollars per acre: The thirty-eight (38) acre tract of land in Concord Township, Iredell County, North Carolina, which adjoins the above mentioned homeplace, and the forty (40) acre tract, more or less, located in Concord Township, Iredell County, North Carolina, known as the "Stone place." In the event my said nephew elects to purchase either of said tracts of land, the purchase price shall be Eight Hundred ($800.00) Dollars per acre, and my hereafter named Executor is directed and authorized to execute and deliver a good and sufficient deed of conveyance for said property upon payment of said purchase price. The option of my said nephew to make the above mentioned purchase or purchases shall remain open for six (6) months from the date of qualification of my hereafter named Executor.

Ms. Sharpe qualified as Executrix on 7 April 1997. On 15 May 1997, Larry W. Sharpe (Mr. Sharpe) sent a letter to the Executrix exercising his option to purchase the two tracts of property.

On 29 September 1997, plaintiffs filed a caveat proceeding challenging the Will and an order was entered suspending proceedings in relation to the estate. On 26 October 1998, the parties entered into a settlement agreement with regard to the caveat proceeding.

On 12 November 1997, while the caveat proceeding was pending, plaintiffs filed an action seeking to remove the Executrix. On 19 January 2000, the trial court entered summary judgment in favor of defendant allowing the Executrix to remain. On 5 April 2000, plaintiffs filed a complaint against the Executrix alleging breach of fiduciary duty. On 27 April 2000, plaintiffs entered into a settlement agreement with the Executrix which joined the other beneficiaries of the Will. Pursuant to the settlement agreement, plaintiffs voluntarily dismissed with prejudice both the complaint seeking to remove the Executrix and the breach of fiduciary duty action on 10 August 2000.

On 31 July 2000, Mr. Sharpe delivered a letter to the Executrix in which he stated that he was "reaffirming my intention of exercising my option to purchase the land as described in Edith Sharpe['s] will." He requested a survey of the tracts of land. Therefore, the Executrix transferred the tracts of land to Mr. Sharpe by deed dated 14 September 2000 and recorded on 18 October 2000.

On 24 October 2000, plaintiffs filed the present declaratory judgment action claiming that Mr. Sharpe failed to tender the purchase price for the land by 5 December 1998, thereby losing the right to purchase the land. Thus, plaintiffs claimed the land passed to the residual beneficiaries under the Will. Both parties filed motions for summary judgment. On 2 May 2001, the trial court filed an order granting summary judgment in favor of defendants and dismissing the 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. Gen. Stat. § 1A-1, Rule 56(c) (2001). By both parties filing motions for summary judgment, the parties agree there are no genuine issues of fact.

Plaintiffs contend the trial court erred in denying summary judgment in their favor and in granting summary judgment in favor of the defendants. They first claim that Mr. Sharpe should not have been allowed to purchase the land because he did not timely exercise his option; thus, the property belonged to the residual beneficiaries.

In an option to purchase property, "[t]he acceptance must be according to the terms of the contract." *Winders v. Kenan*, 161 N.C. 628, 633, 77 S.E. 687, 689 (1913). " 'The "exercise" of an option is merely the election of the optionee to purchase the property.' " *Kottler v. Martin*, 241 N.C. 369, 372, 85 S.E.2d 314, 317 (1955) (*quoting* 66 C.J., Vendor and Purchaser, Sec. 21 (1954)). Our Supreme Court held in *Kidd v. Early*, 289 N.C. 343, 222 S.E.2d 392 (1976):

> Whether tender of the purchase price is necessary to exercise an option depends upon the agreement of the parties as expressed in the particular instrument. The acceptance must be in accordance with the terms of the contract. Where the option requires the payment of the purchase money or a part thereof to accompany the optionee's election to exercise the option, tender of the payment specified is a condition precedent to a formation of a contract to sell unless it is waived by the optionor. On the other hand, the option may merely require that notice be given of the exercise thereof during the term of the option.

Kidd, 289 N.C. at 361, 222 S.E.2d at 405.

Here, the Will granted an option to Mr. Sharpe to purchase the land at an established price but specified that "[t]he option . . . shall

remain open for six (6) months. . . ." There was no requirement that he must tender the purchase price during the time period. The option merely required that within six months there must be notice by Mr. Sharpe that he had elected to purchase the land. Thus, Mr. Sharpe timely exercised his option under the Will when he forwarded a letter to the Executrix, in which he expressed his election to purchase the tracts of land, thirty-eight days after the Executrix had been qualified.

Plaintiffs also claim that even if Mr. Sharpe timely exercised his option, he did not tender the purchase price within a reasonable time since he waited until after 31 July 2000. "Where an option or contract to purchase does not specify the time within which the right to buy may be exercised, the right must be exercised within a reasonable time." *Furr v. Carmichael*, 82 N.C. App. 634, 638, 347 S.E.2d 481, 484 (1986) (*citing Lewis v. Allred*, 249 N.C. 486, 106 S.E.2d 689 (1959)).

Here, thirty-eight days after the Will was presented for probate, Mr. Sharpe gave written notice of his exercise of the option. Plaintiffs delayed for thirty-three months the transfer of the land by filing a caveat action on 29 September 1997, an action to remove the Executrix on 12 November 1997, and a lawsuit for a breach of fiduciary duty on 5 April 2000. After all of the parties entered into a settlement agreement on 27 April 2000, all pending actions were dismissed with prejudice on 1 August 2000. On 31 July 2000, Mr. Sharpe reaffirmed his exercise of the option to purchase the land by notifying the Executrix and requesting a survey. We find that Mr. Sharpe acted within a reasonable time under the circumstances in the tendering of the purchase price for the tracts of land. Thus, the trial court did not err in granting summary judgment in favor of defendants.

As summary judgment was properly granted in favor of defendants, the trial court properly denied plaintiffs' motion for summary judgment. The order of the trial court granting summary judgment in favor of defendants is

Affirmed.

Judges McGEE and CAMPBELL concur.

GAYLA B. JOHNSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR RACHEL E. JOHNSON, MINOR, PLAINTIFFS v. IRVIN WAYNE BREWINGTON, DEFENDANT

No. COA01-865

(Filed 21 May 2002)

Arbitration and Mediation— nonbinding arbitration—trial de novo—defendant's insurance carrier not a proper party defendant

The trial court erred in a negligence case arising out of an automobile accident by denying defendant's motion for a trial de novo after the parties participated in nonbinding arbitration under N.C.G.S. § 7A-37.1 based on the trial court's erroneous conclusion that defendant's insurance carrier was required by Rule 3(p) of the Rules of Court-Ordered Arbitration in North Carolina to have a representative present at the arbitration hearing, and the case is remanded with instructions for the trial court to grant defendant's demand for trial de novo and to address any pending motions by either party, because: (1) the Rules of Court-Ordered Arbitration in North Carolina do not require that a representative of a defendant's insurance carrier be present at a court-ordered, nonbinding arbitration hearing when the insurance carrier is not a party named in the action; and (2) our Supreme Court has specifically held that in an action ex delicto for damages proximately caused by the alleged negligence of defendant, his liability insurance carrier is not a proper party defendant.

Appeal by defendant from orders entered 24 January 2001 and 25 January 2001 by Judge Kimbrell Kelly Tucker in Cumberland County District Court. Heard in the Court of Appeals 23 April 2002.

Murray, Craven & Inman, L.L.P., by Richard T. Craven and Thomas W. Pleasant, for plaintiff-appellees.

Walker, Clark, Allen, Herrin & Morano, L.L.P., by Jerry A. Allen, Jr. And Gay P. Stanley, for defendant-appellant.

HUNTER, Judge.

Irvin Wayne Brewington ("defendant") appeals the trial court's order striking his demand for trial *de novo* following entry of an "Arbitration Award and Judgment" awarding $5,426.19 in favor of

Gayla B. Johnson and Rachel E. Johnson ("plaintiffs"). We reverse and remand.

Plaintiffs and defendant were involved in an automobile accident. Plaintiffs filed this action alleging negligence by defendant and seeking damages. The trial court ordered the parties to participate in non-binding arbitration pursuant to N.C. Gen. Stat. § 7A-37.1 (1999). Plaintiffs, plaintiffs' attorney, defendant, and defendant's attorney attended the arbitration hearing. The arbitrator entered a total award of $5,426.19 in favor of plaintiffs, and defendant filed a demand for trial *de novo* pursuant to Rule 5 of the Rules for Court-Ordered Arbitration. Plaintiffs then filed a "Motion to Enforce Arbitration Award and Deny Defendant's Request for Trial De Novo" contending that defendant's insurance carrier, Allstate Insurance Company ("Allstate"), was the "real party in interest," that a representative of Allstate was required to appear at the arbitration hearing, and that Allstate's failure to have a representative appear at the arbitration hearing constituted a failure to "participate in good faith and in a meaningful manner." On this basis, plaintiffs requested that the trial court sanction defendant by striking defendant's request for trial *de novo* and enforcing the arbitration award in favor of plaintiffs. The trial court granted plaintiffs' motion, and defendant appeals.

The sole issue in this case is whether the Rules for Court-Ordered Arbitration in North Carolina require that a representative of a defendant's insurance carrier be present at a court-ordered, non-binding arbitration hearing, despite the fact that the insurance carrier is not a party named in the action. We answer the question in the negative.

Rule 3(p) requires all "parties" to be present at arbitration hearings. *See* R. Ct.-Ordered Arbitration in N.C. 3(p), 2002 N.C. R. Ct. 233. This requirement may be satisfied in one of two ways: (1) the party himself may appear "in person," or (2) the party may appear "through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator." *See id.* The trial court here determined that although defendant appeared at the arbitration hearing, Allstate was "the real party in interest in the defense of this lawsuit," and that Allstate violated Rule 3(p) by not having a representative present at the arbitration hearing. The trial court further concluded that Allstate's violation of Rule 3(p) warranted sanctions pursuant to Rule 3(l), which provides that the court may impose certain types of sanctions against "[a]ny party failing or refusing to

participate in an arbitration proceeding in a good faith and meaningful manner." *See* R. Ct.-Ordered Arbitration in N.C. 3(l), 2002 N.C. R. Ct. 233.

"In 1989, the North Carolina General Assembly authorized statewide, court-ordered arbitration and further authorized the North Carolina Supreme Court to adopt certain rules governing this procedure. Subsequently, the Supreme Court implemented the Rules for Court-Ordered Arbitration . . . ." *Taylor v. Cadle*, 130 N.C. App. 449, 452, 502 S.E.2d 692, 694 (1998). Had our Supreme Court determined that the objectives of court-ordered arbitration would best be served by requiring representatives of defendants' insurance carriers to be present for, and participate in, arbitration hearings, we believe the Court would have so specified in the rules. For example, Rule 4(A)(1)(b) of the Rules of Mediated Settlement Conferences expressly requires the attendance at a mediated settlement conference of "[a] representative of each liability insurance carrier, uninsured motorist insurance carrier, and underinsured motorist insurance carrier which may be obligated to pay all or part of any claim presented in the action." R. Implementing Statewide Mediated Settlement Confs. in Superior Ct. Civil Actions 4(A)(1)(b), 2002 N.C. R. Ct. 82. The Rules for Court-Ordered Arbitration contain no such requirement. Instead, Rule 3(p) requires only that "parties" be present at arbitration hearings, and we have found nothing to support the view that this term was intended to include a defendant's insurance carrier not named in the action.

Moreover, our Supreme Court has specifically held that "in an action *ex delicto* for damages proximately caused by the alleged negligence of the defendant, his liability insurance carrier is not a proper party defendant." *Taylor v. Green*, 242 N.C. 156, 158, 87 S.E.2d 11, 13 (1955). Thus, the trial court's determination that Allstate is "the real party in interest" in this case was error.

We hold that the trial court erred in determining that Allstate was required by Rule 3(p) to have a representative present at the arbitration hearing. We further hold that the trial court erred in finding that defendant violated Rule 3(l), and in imposing sanctions against defendant by striking defendant's demand for trial *de novo* and enforcing the arbitration award. We reverse the trial court's order and remand this case with instructions for the trial court to grant defendant's demand for trial *de novo*, and to address any pending motions by either party.

Reversed and remanded.

Judges GREENE and TIMMONS-GOODSON concur.

VIRGINIA BOLICK, PLAINTIFF v. BON WORTH, INC., DEFENDANT

No. COA01-968

(Filed 21 May 2002)

Premises Liability— slip and fall—bathroom steps—plaintiff's knowledge of hazard

The trial court did not err by granting summary judgment for defendant in a negligence action arising from a fall on steps leading from a bathroom to defendant's store where plaintiff admitted that she was able to see the floor and the steps leading to the bathroom, the bathroom door was open and the bathroom light was on, and plaintiff had had no trouble getting to the bathroom using the steps. Even if the steps created a hazardous condition, plaintiff had knowledge of that condition and defendant had no duty to warn of an open and obvious danger of which plaintiff had at least equal knowledge.

Appeal by plaintiff from order entered 27 February 2001 by Judge Loto G. Caviness in Lincoln County Superior Court. Heard in the Court of Appeals 25 April 2002.

Charles R. Hassell, Jr., for plaintiff-appellant.

Stiles, Byrum & Horne, L.L.P., by Lane Matthews, for defendant-appellee.

MARTIN, Judge.

Plaintiff brought this action for personal injuries sustained when she fell at defendant's store in Lincolnton, North Carolina. Defendant denied negligence and asserted plaintiff's contributory negligence as an affirmative defense. Defendant moved for summary judgment.

The evidentiary materials before the trial court tended to show that plaintiff was a customer at defendant's store on 25 June 1996. Plaintiff asked to use the restroom, and was directed by an employee

to an area in the back of the store. Although plaintiff testified at her deposition that she could not recall whether the hallway outside the bathroom was lit, she stated that she did not have any trouble seeing because the bathroom light was on and the bathroom door was open; light was also coming from the door leading to the main area of the store. She also stated she could see the floor, and saw several wooden steps leading up to the bathroom. Plaintiff testified that she had no trouble getting into the bathroom; however, as she attempted to exit the bathroom, she fell down the steps, striking the wall and suffering injuries to her head and shoulder. Plaintiff claimed that when she opened the door, there was "no landing there, no nothing. It was step downs (sic), but when the door flew open I just went sailing." Plaintiff stated that she had not forgotten about the steps outside the bathroom, and that she did not trip going out of the bathroom. Materials before the court also included photographs of the hallway and a report from plaintiff's expert, Norman A. Cope, who concluded that the step-down from the bathroom created a hazardous condition.

The trial court granted defendant's motion for summary judgment on grounds that there were no issues of material fact as to (1) the breach of any duty owed plaintiff by defendant, and (2) plaintiff's contributory negligence as a matter of law. Plaintiff appeals.

Plaintiff assigns error to the trial court's grant of summary judgment dismissing her complaint. We affirm.

Summary judgment is appropriate when all the evidentiary materials before the court "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 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. *First Federal Savings & Loan Ass'n v. Branch Banking & Trust Co.*, 282 N.C. 44, 191 S.E.2d 683 (1972).

> The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Roumillat v. Simplistic Enterprises, Inc., 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992) (citation omitted). In ruling on the motion, the court is not authorized to resolve issues of fact, only to determine whether

there exists 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).

In a negligence action, to survive a motion for summary judgment, plaintiff must establish a *prima facie* case by showing: "(1) that defendant failed to exercise proper care in the performance of a duty owed plaintiff; (2) the negligent breach of that duty was a proximate cause of plaintiff's injury; and (3) a person of ordinary prudence should have foreseen that plaintiff's injury was probable under the circumstances." *Lavelle v. Schultz*, 120 N.C. App. 857, 859-60, 463 S.E.2d 567, 569 (1995) (citation omitted), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996).

Owners and occupiers of land have a duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors. *Barber v. Presbyterian Hosp.*, 147 N.C. App. 86, 89, 555 S.E.2d 303, 306 (2001) (citing *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892, *reh'g denied*, 350 N.C. 108, 533 S.E.2d 467 (1999)). "Reasonable care" requires that the landowner not unnecessarily expose a lawful visitor to danger and give warning of hidden hazards of which the landowner has express or implied knowledge. *Id.* (citing *Norwood v. Sherwin-Williams Co.*, 303 N.C. 462, 467, 279 S.E.2d 559, 562 (1981)). There is no duty to protect or warn, however, "against dangers either known or so obvious and apparent that they reasonably may be expected to be discovered." *Von Viczay v. Thoms*, 140 N.C. App. 737, 739, 538 S.E.2d 629, 631 (2000), *affirmed*, 353 N.C. 445, 545 S.E.2d 210 (2001) (citing *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 162, 516 S.E.2d 643, 646 (1999)). Moreover, a landowner is not required to warn of hazards of which the lawful visitor has "equal or superior knowledge." *Id.* (citation omitted).

In *Von Viczay*, the plaintiff arrived at the home of the defendant for a party on a wintry evening with ice and snow on the ground. The defendant had shoveled and salted all her walkways prior to the party. Nevertheless, the plaintiff observed some snow and ice along the walkway as she entered the house. When the plaintiff left the party, she fell walking along the same walkway from which she had entered the defendant's home. This Court held that the defendant had no duty to warn the plaintiff or to protect her from the hazard when the facts indicated the plaintiff had equal knowledge of the hazardous condition. *Id.*

In the present case, plaintiff admitted that she was able to see the floor and the steps leading to the bathroom. She stated that she did

not have any trouble seeing because the bathroom light was on and the bathroom door was open. She testified that she had no trouble getting into the bathroom using the steps. Important to the disposition of this case, plaintiff had full knowledge of the condition of the doorway to the bathroom by virtue of having safely negotiated her way inside the bathroom moments before she fell. On this record, even if the steps leading up to and out of the bathroom created a hazardous condition, plaintiff had knowledge of the alleged hazardous condition. *See Von Viczay*, 140 N.C. App. at 739, 538 S.E.2d at 631.

Because we determine that defendant had no duty to warn of an open and obvious danger of which plaintiff had at least equal knowledge prior to the injury, we do not reach plaintiff's remaining argument regarding whether she was contributorily negligent as a matter of law.

Affirmed.

Judges TYSON and THOMAS concur.

STATE OF NORTH CAROLINA v. HORACE SUMPTER

No. COA01-1101

(Filed 21 May 2002)

Search and Seizure— entry into residence—simultaneous announcement of identity and purpose

The trial court did not err in a narcotics prosecution by denying defendant's motion to suppress evidence seized in a search of his residence where an officer announced his identity and purpose as he entered an unlocked door. The officer violated the literal requirements of N.C.G.S. § 15A-249 by not announcing his identity and purpose prior to opening the door and entering the residence, but the violation was not substantial.

Appeal by defendant from judgments entered 11 January 2001 by Judge Carl L. Tilghman in Beaufort County Superior Court. Heard in the Court of Appeals 13 May 2002.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General W. Dale Talbert, for the State.

Edwin M. Hardy, for defendant-appellant.

HUNTER, Judge.

Horace Sumpter ("defendant") was found guilty of possession of cocaine, possession of drug paraphernalia, and possession of marijuana. He was sentenced to an active term of forty-five days for possession of drug paraphernalia. The remaining convictions were consolidated and defendant was sentenced to a suspended term of six to eight months.

The sole issue on appeal is whether the court erred in denying defendant's motion to suppress because the officers executing a search warrant did not knock and announce their presence prior to entering defendant's residence. We find no error.

An officer executing a search warrant is statutorily required, prior to entering the premises, to

> give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is unclear whether anyone is present at the premises to be searched, he must give the notice in a manner likely to be heard by anyone who is present.

N.C. Gen. Stat. § 15A-249 (1999). Following a *voir dire* hearing, the court made findings of fact that show the following. Detective J. W. Davis of the Washington Police Department obtained a warrant on 7 June 2000 to search the premises at 601 East Fourth Street for the presence of controlled substances. In executing the search warrant, Detective Davis opened an unlocked exterior door to enter the residence. As he pushed the door open, he announced, in a voice sufficiently loud to be heard by all occupants of the residence, his identity and purpose "to wit[:] 'police officer, search warrant.' " Other officers following Detective Davis into the residence uttered the same words. Prior to entering the residence, Detective Davis had received information from informants and other officers that controlled substances were being bought and sold within the residence, sometimes in exchange for sexual acts. Detective Davis also had observed approximately ten persons, some he knew as drug dealers or users, come and go through the same unlocked door without knocking or being invited inside by an occupant.

The court concluded that the simultaneous announcement of identity and purpose upon the officers' entry into the residence sufficiently satisfied the requirement of N.C. Gen. Stat. § 15A-249 that officers executing a search warrant give notice of their identity and purpose prior to entering the premises. The court further concluded that even if proper notice prior to entry was not given, the violation did not constitute a substantial violation of statutory provisions. The court noted that the deviation was slight, that the entry was not the result of any deviousness or ruse on the part of the officers, and that no evidence was seized which would not have been discovered had the entry not been as described.

Defendant does not assign error to any of the findings of fact; therefore, the scope of our review is limited to determining whether the 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). Evidence must be suppressed if it is obtained as a result of a substantial violation of the Criminal Procedure Act. N.C. Gen. Stat. § 15A-974(2) (1999). Whether a violation is substantial is dependent upon the particular circumstances, including the importance of the interest violated, the extent of the violation from lawful conduct, the extent to which the violation was willful, and the extent to which exclusion of the evidence will deter future misconduct. *Id.*

By not announcing his identity and purpose prior to opening the door and entering the residence, Detective Davis violated the literal requirements of N.C. Gen. Stat. § 15A-249. We thus must examine the circumstances to determine whether this violation was substantial. " 'The knock and announce rule has three purposes: (1) to protect law enforcement officers and household occupants from potential violence; (2) to prevent the unnecessary destruction of private property; and (3) to protect people from unnecessary intrusion into their private activities.' " *State v. Harris*, 145 N.C. App. 570, 582, 551 S.E.2d 499, 506 (2001) (quoting *Adcock v. Commonwealth*, 967 S.W.2d 6, 8 (Ky. 1998)), *appeal dismissed and disc. review denied*, 355 N.C. 218, 560 S.E.2d 146 (2002). Detective Davis testified that, based on his training and experience, persons who use and sell crack cocaine usually carry weapons and that firearms and ammunition are often found during searches for drugs pursuant to search warrants. Detective Davis observed a number of persons enter through the door without knocking or receiving an invitation from an occupant to enter. The door was unlocked at the time the officers entered.

The amount of time required between the giving of notice and entering the premises is dependent upon the circumstances of each case. *State v. Gaines*, 33 N.C. App. 66, 69, 234 S.E.2d 42, 44 (1977). In *Gaines* we upheld entry onto premises immediately after the officer announced his presence and identity, noting that no one objected to the officer's entry, which was through an unlocked and open door. *Id.* Here, Detective Davis announced his presence and purpose simultaneously with the opening of the door and entry into the dwelling. As in *Gaines*, no occupant in the present case objected to the officers' entry through the unlocked door.

We also have not found a substantial violation when the immediate entry is effected to prevent destruction of the contraband sought when the contraband is easily destructible. *See, e.g., State v. Edwards*, 70 N.C. App. 317, 320, 319 S.E.2d 613, 615 (1984), *rev'd on other grounds*, 315 N.C. 304, 337 S.E.2d 508 (1985); *State v. Willis*, 58 N.C. App. 617, 623, 294 S.E.2d 330, 333 (1982), *aff'd per curiam*, 307 N.C. 461, 298 S.E.2d 388 (1983). Detective Davis testified that drugs such as crack cocaine, the object of the search, may be destroyed within a matter of seconds by flushing them down the toilet.

For these reasons, we hold the trial court properly concluded that the violation was not substantial and that the court properly denied the motion to suppress.

No error.

Judges MARTIN and BRYANT concur.

IN THE MATTER OF: ANTHONY BRAITHWAITE

No. COA01-832

(Filed 21 May 2002)

Juveniles— county's right to appeal in juvenile proceedings— writ of certiorari

The county's appeal from a juvenile order filed 16 March 2001 and an amended juvenile order dated 26 March 2001 ordering it to pay the costs of a juvenile delinquent's residential treatment for mental illness and substance abuse is dismissed, because: (1) the

county does not have a right to appeal in a juvenile proceeding in North Carolina; and (2) the Court of Appeals is without authority to issue remedial writs or grant a writ of certiorari under the circumstances of this case when the county has not failed to take timely action, the county is not attempting to appeal from an interlocutory order, and the county is not seeking review under N.C.G.S. § 15A-1422(c)(3).

Appeal by respondent-appellant from order filed 16 March 2001 and from amended order dated 26 March 2001 by Judge Marcia H. Morey in Durham County District Court. Heard in the Court of Appeals 16 April 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Mabel Y. Bullock, for the State.

County Attorney S.C. Kitchen, by Deputy Durham County Attorney Lowell L. Siler and Assistant Durham County Attorneys Curtis O. Massey, II, and Lucy Chavis, for respondent-appellant, Durham County.

Phillip W. Evans, for respondent-appellee, juvenile.

GREENE, Judge.

Durham County (the County) appeals a juvenile order filed 16 March 2001 and an amended juvenile order dated 26 March 2001 ordering it to pay the costs of Anthony Braithwaite's (Braithwaite) residential treatment.

Braithwaite was first adjudicated delinquent on 28 March 2000 for felony breaking and entering and felony larceny and again on 9 February 2001 for assault. Subsequently, on 16 March 2001, the trial court determined Braithwaite was in need of residential treatment for a mental illness and substance abuse. After finding Braithwaite's mother unable to afford the cost of her son's treatment, the trial court ordered the County to "pay the costs of [Braithwaite's] residential treatment and that the . . . mother . . . contribute $100 monthly to the [C]ounty for her son's treatment."

On 2 April 2001, the County filed its notice of appeal and on 29 June 2001, filed a petition for writ of certiorari.

The dispositive issue is whether this Court has the right to grant a writ of certiorari and review the trial court's orders in this case.

A trial court may order a county "to arrange for evaluation or treatment of [a] juvenile and to pay for the cost of the evaluation or treatment." N.C.G.S. § 7B-2502(b) (1999). While a county must be given notice and an opportunity to be heard before an order to pay costs can be issued, *id.*, a county does not have a "statutory right to appeal in a juvenile proceeding in this state," *In re Voight*, 138 N.C. App. 542, 545, 530 S.E.2d 76, 78, *disc. review denied, cert. denied, and remedial writ denied*, 352 N.C. 674, 545 S.E.2d 728 (2000); *In re Wharton*, 305 N.C. 565, 569, 290 S.E.2d 688, 690 (1982); *In re Brownlee*, 301 N.C. 532, 547, 272 S.E.2d 861, 870 (1981). Although *Brownlee* and *Wharton* held that a county does not have a right to appeal in a juvenile delinquency action, our Supreme Court exercised its power under the N.C. Constitution, Article IV, Section 12(1) and issued a remedial writ to hear the appeals. *Voight*, 138 N.C. App. at 545, 530 S.E.2d at 78. This Court, however, "does not have the power to issue a remedial writ under our Constitution" but does "have the power to issue certain prerogative writs under N.C. Gen. Stat. § 7A-32 (1999)." *Id.* One of these prerogative writs is certiorari. N.C.G.S. § 7A-32(c) (1999). This Court has authority to issue a writ of certiorari only

> in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to G.S. 15A-1422(c)(3) of an order of the trial court denying a motion for appropriate relief.

N.C.R. App. P. 21(a)(1).

In this case, the County has not failed to take timely action, is not attempting to appeal from an interlocutory order, and is not seeking review pursuant to N.C. Gen. Stat. § 15A-1422(c)(3). Thus, this Court does not have the authority to issue a writ of certiorari pursuant to Rule 21(a)(1). Accordingly, because the County does not have a right to appeal and this Court is without authority to issue remedial writs or grant a writ of certiorari under the circumstances of this case, the County's appeal is dismissed.

Dismissed.

Judges TIMMONS-GOODSON and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 21 MAY 2002

BAXLEY v. BAXLEY No. 01-494	Davidson (96CVD471)	Reversed and remanded
BROOKS v. BROOKS No. 01-584	Mecklenburg (99CVD4389)(ELL)	Affirmed
CURRENCE v. SARA LEE INTIMATES/BALI No. 01-1222	Ind. Comm. (I.C. 648616)	Affirmed
FINOVA CAPITAL CORP. v. VITALE No. 01-897	Wake (99CVD6511)	Affirmed
FRALIN v. ALLSTATE INS. CO. No. 01-918	Wake (00CVD1888)	Affirmed
GUILFORD CTY. ex rel. ARMWOOD v. COUNCIL No. 01-1237	Guilford (00CVD4255)	Affirmed
HARRIS v. LAMAR CO., L.L.C. No. 01-774	Pasquotank (00CVS449)	Vacated and remanded
HART v. HART No. 01-679	Mecklenburg (99CVD17597-RMM)	Appeal dismissed
IN RE ALLEN No. 01-624	Union (99J145)	Affirmed
IN RE GURLEY No. 01-833	Durham (98J117)	Dismissed
IN RE KITCHEN No. 01-1134	Henderson (00J9)	Reversed and remanded
IN RE WILLIAM S. No. 01-1147	Pender (01J7)	Reversed
MILEY v. H.C. BARRETT & ASSOCS. No. 01-720	Iredell (99CVS2316)	Affirmed
NATURALLY KNITS, INC. v. GREAT NORTHERN INS. CO. No. 01-777	Gaston (00CVS1085)	Affirmed
SKINNER v. SKINNER No. 01-1118	Durham (96CVD4139)	Remanded
SOLZSMON v. SOLZSMON No. 01-440	Guilford (99CVD6743)	Reversed and remanded

SOLZSMON v. SOLZSMON No. 01-441	Guilford (99CVD6743)	Vacated
SQUIRES v. JIM WALTER HOMES, INC. No. 01-750	Jones (00CVS172)	Affirmed
STATE v. ARTHUR No. 01-666	Beaufort (00CRS2074)	No error
STATE v. BARRON No. 01-1264	Forsyth (99CRS42396)	Affirmed
STATE v. BELL No. 01-1170	Gaston (98CRS26491)	No error
STATE v. BELTRAN No. 01-911	Guilford (00CRS77520) (00CRS77522) (00CRS77526) (00CRS77527) (00CRS77530) (00CRS77532) (00CRS77534) (00CRS77535)	No error
STATE v. BEY No. 01-1209	Wake (98CRS11366) (98CRS11367)	No error
STATE v. CARAVAJAL No. 01-772	Wake (99CRS26956) (99CRS26957) (99CRS26958) (99CRS26960) (99CRS73408) (99CRS73409) (99CRS73410) (99CRS73411) (99CRS73412) (99CRS73414) (99CRS73415) (99CRS73416) (99CRS103647) (99CRS103650) (99CRS103651)	Affirmed
STATE v. CARAVAJAL No. 01-830	Wake (99CRS26956) (99CRS26957) (99CRS26958) (99CRS26960) (99CRS73408) (99CRS73409)	No error

	(99CRS73410) (99CRS73411) (99CRS73412) (99CRS73414) (99CRS73415) (99CRS73416) (99CRS103647) (99CRS103650) (99CRS103651)	
STATE v. CHESSON No. 01-1245	Wayne (97CRS14659)	No error
STATE v. COOPER No. 01-1337	Wake (98CRS10808)	No error
STATE v. DAVENPORT No. 01-163	Cleveland (99CRS2858) (99CRS2859)	No error
STATE v. ELLER No. 01-789	Hoke (96CRS822)	No error
STATE v. FOUST No. 01-984	Cabarrus (98CRS13646) (98CRS15645)	No error
STATE v. GUY No. 01-1366	Cumberland (98CRS70708)	No error
STATE v. HAGWOOD No. 01-1149	Guilford (97CRS65568) (97CRS65569) (97CRS65570) (97CRS65571)	No error
STATE v. HARRIS No. 01-1194	Wakex (00CRS75861)	Affirmed; remanded with instructions
STATE v. HEADEN No. 01-676	Randolph (98CRS11370) (98CRS11373)	No error
STATE v. HOGAN No. 01-1161	Wayne (00CRS54213)	Remanded for resentencing as to count thirteen
STATE v. JOHNSON No. 01-320	Granville (99CRS3316)	No error
STATE v. KING No. 01-730	Halifax (00CRS2197) (00CRS2198) (00CRS2199)	No error in part; vacate in part, and remand for new sentencing

STATE v. LENOIR No. 01-765	Buncombe (91CRS3669) (91CRS14539) (91CRS14540)	Affirmed
STATE v. McELVINE No. 01-677	Cumberland (99CRS54797)	No error
STATE v. McNAIR No. 01-706	Guilford (99CRS109266) (99CRS109267) (99CRS109268) (99CRS109269)	No error
STATE v. McQUAIG No. 01-993	Durham (99CRS70775)	No error
STATE v. MOORE No. 01-1213	Rockingham (99CRS13609) (00CRS11249) (01CRS296)	No error
STATE v. MORAITIS No. 01-930	Watauga (98CRS4437)	Affirmed
STATE v. MORROW No. 01-446	Cherokee (94CRS152) (94CRS983)	Affirmed
STATE v. MULDROW No. 01-1082	Wake (00CRS16146) (00CRS59989)	No error
STATE v. NIXON No. 01-1238	Craven (00CRS51951)	Affirmed
STATE v. ORAMAS No. 01-915	Guilford (92CRS67848)	No error
STATE v. PARKS No. 01-967	Wake (98CRS72375) (98CRS72378)	No error
STATE v. PENNY No. 01-1119	Wake (00CRS89454) (00CRS94488)	No error
STATE v. ROBERTS No. 01-709	Cumberland (99CRS58689)	No error
STATE v. ROUNDTREE No. 01-844	Chatham (99CRS51393)	No error
STATE v. ROUSH No. 01-415	Randolph (99CRS15491) (99CRS15492)	No error

	(99CRS15493) (99CRS15494) (99CRS15495) (99CRS15496) (99CRS16486) (00CRS35) (00CRS36) (00CRS37) (00CRS38) (00CRS39) (00CRS40) (00CRS41)	
STATE v. SHARPER No. 01-1208	Warren (99CRS2669) (00CRS1214) (00CRS1215)	Affirmed
STATE v. SILVER No. 01-1103	Nash (00CRS6820)	Reversed and remanded
STATE v. SIMPSON No. 01-1013	Forsyth (01CRS51836)	Appeal dismissed
STATE v. SIRACUSA No. 01-1148	Lincoln (99CRS5647) (99CRS6052) (00CRS690)	Affirmed
STATE v. TOOMER No. 01-1298	Wake (00CRS89432) (00CRS94489)	No error
STATE v. TURNER No. 01-785	Caswell (89CRS73) (89CRS74)	No error
UNIVERSAL UNDERWRITERS INS. CO. v. KINGS No. 01-983	Mecklenburg (00CVS4991)	Dismissed

STATE OF NORTH CAROLINA v. WAYNE SCOTT

No. COA01-96

(Filed 4 June 2002)

1. Jury— selection—private unrecorded bench discussions

Defendant's nonwaivable constitutional right to be present at every stage of his capital trial was violated by the trial judge's unrecorded private bench discussions with prospective jurors during jury selection on their requests to defer their jury service, and defendant's right under N.C.G.S. § 15A-1241 to have complete recordation of jury selection in capital cases was also violated by these unrecorded discussions. However, these errors were harmless beyond a reasonable doubt where the record does not reveal that any prospective juror was deferred as a result of a private discussion with the judge, and the record shows that the judge resumed the jury voir dire after each of the private discussions with prospective jurors. N.C. Const. art. I, § 23.

2. Criminal Law— motion for mistrial—Post Office's failure to deliver juror summonses to rural box number addresses

The trial court did not abuse its discretion in a first-degree murder, first-degree burglary, first-degree rape, and arson case by denying defendant's motion for a mistrial based on an alleged refusal of the United States Postal Service to deliver juror summonses to Robeson County residents with rural box number addresses, because: (1) defendant has failed to show that the trial court's denial was so arbitrary that it could not have been the result of a reasoned decision since the change in the mail delivery policy complained of by defendant did not affect the venire from which defendant's jury was drawn; and (2) the change in mail delivery policy complained of by defendant began the day before the start of jury selection in defendant's case, and N.C.G.S. § 9-10 requires a person to be served at least 15 days before the session of court for which the juror is summoned.

3. Arson— error to find first-degree when elements of second-degree charged

The trial court erred by entering judgment against defendant for first-degree arson and on remand the trial court is instructed to enter judgment against defendant for second-degree arson and to sentence defendant accordingly, because: (1) the indictment was not sufficient to put defendant on notice that he may be tried

for first-degree arson and did not allow defendant to prepare accordingly; (2) although the indictment charged defendant with violating N.C.G.S. § 14-58 by burning the dwelling house inhabited by the two victims, the indictment did not allege that the house was in fact occupied at the time of the burning; and (3) the trial court lacks subject matter jurisdiction to try or enter judgment on an offense based on an indictment that only charges a lesser-included offense.

4. Burglary and Unlawful Breaking or Entering— first-degree—variance between indictment and instructions— no effect on felony murder convictions—harmless error

Any error by the trial court's instruction on first-degree burglary allowing defendant to be convicted if the evidence proved he intended to commit murder or rape when he broke into the victims' home when the indictment alleged only the intent to commit murder was harmless because (1) the trial court properly arrested judgment on the first-degree burglary conviction since burglary was the underlying felony for two convictions of defendant for felony murder, and (2) any variance between the burglary indictment and the trial court's instructions had no effect on defendant's felony murder convictions since the State was not required to secure a separate indictment for the underlying felony in a felony murder prosecution, and the short-form indictment was sufficient to charge felony murder.

Appeal by defendant from judgments entered 1 February 1999 by Judge James R. Vosburgh in Robeson County Superior Court. Heard in the Court of Appeals 4 December 2001.

Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Benjamin Dowling-Sendor, for defendant-appellant.

CAMPBELL, Judge.

On 4 December 1995, defendant Wayne Scott was indicted for the murders of Docia Chavis and Melinda Chavis, arson, first-degree burglary, and first-degree rape. The case was tried capitally on the basis of both premeditated and deliberate murder and felony murder. On 27 January 1999, defendant was found guilty of first-degree arson, first-degree rape, first-degree burglary, and two counts of first-degree mur-

der under the felony murder rule. Following a capital sentencing proceeding, the jury was unable to reach a unanimous sentencing recommendation on the two first-degree felony murder convictions. Accordingly, the trial court sentenced defendant to two consecutive terms of life imprisonment. Defendant also received consecutive sentences of 101 to 132 months for the first-degree arson conviction, and 384 to 470 months for the first-degree rape conviction. The trial court arrested judgment on the first-degree burglary conviction because burglary was the underlying felony supporting the two first-degree felony murder convictions.[1]

The State's evidence tended to show that defendant attended a party at the home of Leo Edwards on the evening of 3 July 1995. While at the party, defendant smoked crack cocaine and drank liquor. Defendant left the party between midnight and 1:00 a.m. on 4 July 1999, and went to the home of eighty-three-year-old Docia Chavis and her seventeen-year-old granddaughter, Melinda Chavis. Defendant entered the Chavis home through an unlocked door, strangled Docia Chavis, strangled and raped Melinda Chavis, and, after both victims were dead, set fire to the house.

Additional facts will be presented as needed to discuss specific issues raised by defendant.

Jury Selection Issues

[1] In his first argument defendant contends that the trial court committed reversible error under the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution by having unrecorded private bench discussions with prospective jurors. Defendant argues that these private bench discussions violated his nonwaivable right to be present at every stage of his capital trial.

A review of the jury selection process reveals the following: After defendant's case was called for trial on 4 January 1999, the first set of prospective jurors entered the courtroom. After this group of prospective jurors was told that defendant's case had been called for trial, the following exchange transpired:

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1. When a defendant is convicted of first-degree murder pursuant to the felony murder rule, and a verdict of guilty is also returned on the underlying felony, this latter conviction merges into the murder conviction, and any judgment imposed on the underlying felony must be arrested. *State v. Moore*, 339 N.C. 456, 468, 451 S.E.2d 232, 238 (1994).

BY THE COURT:

. . . It is my understanding that no jury excuses have been heard from this group of jurors today. Is that correct?

(PROSPECTIVE MEMBERS OF THE JURY NOD IN THE AFFIRMATIVE)

BY THE COURT:

Are those—are there any of you who have not had an opportunity to speak to a District Court judge with regard to serving as a juror this week? And I will tell you that this could be a protracted trial and extend for anywhere from three weeks to as much as five weeks. And I tell you that because it could have some effect on your lives with regard to business commitments and things of that nature. I cannot excuse you from jury duty, but I can have you deferred so that you can serve some other time. Are there any of you among the jurors who are out there now who would like to speak to me privately at the bench with regard to having your jury service deferred to some subsequent time? If there are, let me ask you to raise your hands. I see three hands, four, five. All right. Sheriff, if you would, stand there and have them line up right there at the bench. And I'll speak to you privately up here at the bench.

(BENCH CONFERENCES WITH INDIVIDUAL PROSPECTIVE MEMBERS OF THE JURY OFF THE RECORD)

BY THE COURT:

Are there any others who would like to meet with me with regard to the possibility of deferring your jury service?

Defendant and defense counsel were present in the courtroom throughout this exchange, but were not present at the bench when the private discussions with prospective jurors took place, nor were the discussions recorded by the court reporter. After this exchange, the judge proceeded with jury *voir dire*. The record does not indicate that any action was taken by the judge as a result of these unrecorded private discussions with prospective jurors.

The record further reveals three additional occasions on which the judge had unrecorded private discussions with prospective jurors. On each occasion, after the prospective jury panel entered the courtroom, the judge asked if any member of the panel wished to be

heard concerning a request that their jury service be deferred. On two of these occasions, the judge informed the prospective jurors that the trial could take several weeks and could create personal hardships which might make it impossible for some of the jurors to serve. On one occasion, the judge simply asked if any of the prospective jurors wished to be heard concerning deferral of their jury service. The judge then questioned the prospective jurors individually at the bench about their requests to be deferred. It is uncontradicted that these private bench discussions with prospective jurors occurred outside the hearing of defendant and his attorneys. However, as with the first round of private bench discussions with prospective jurors, the record does not disclose that any prospective juror was actually excused or deferred as a result of these private communications. In fact, defendant has failed to identify any prospective juror that was actually excused or deferred as a result of the trial court's unrecorded private discussions with prospective jurors.

The Confrontation Clause of the North Carolina Constitution guarantees the right of every accused to be present at every stage of his trial. N.C. Const. art. I, § 23; *State v. Cummings*, 353 N.C. 281, 289, 543 S.E.2d 849, 854, *cert. denied*, —— U.S. ——, 151 L. Ed. 2d 286 (2001); *State v. Nobles*, 350 N.C. 483, 491, 515 S.E.2d 885, 891 (1999). In *Cummings*, our Supreme Court recently stated:

> In a capital case, there is a heightened need for strict adherence to the constitutional mandate that the defendant be personally present at all critical stages of the prosecution. This right, as it pertains to communications of substance between the trial court and a prospective juror, is based on the principle that a defendant should be permitted an opportunity to evaluate and be heard as to whether the proposed judicial action is appropriate under the circumstances.

Id. at 289, 543 S.E.2d at 854. "Furthermore, defendant's right to be present at every stage of his capital trial is nonwaivable." *Nobles*, 350 N.C. at 491, 515 S.E.2d at 891.

It is well settled that jury selection is a stage of a capital trial at which the defendant has the constitutional right to be present, and that it is error for the trial court to exclude the defendant, counsel, and the court reporter from its private communications with prospective jurors prior to excusing them. *Cummings*, 353 N.C. at 289, 543 S.E.2d at 854; *State v. Williams*, 339 N.C. 1, 28-29, 452

S.E.2d 245, 262 (1994); *State v. Smith*, 326 N.C. 792, 794, 392 S.E.2d 362, 363 (1990).

The defendant bears the burden of demonstrating this kind of error from the record on appeal. *Nobles*, 350 N.C. at 494, 515 S.E.2d at 892. However, this kind of error "is subject to harmless error analysis, the burden being upon the State to demonstrate the harmlessness beyond a reasonable doubt." *Williams*, 339 N.C. at 29, 452 S.E.2d at 262. Our Supreme Court has found such error harmless beyond a reasonable doubt where " 'the transcript reveals the substance of the conversations, or the substance is adequately reconstructed by the trial judge at trial,' " *State v. Adams*, 335 N.C. 401, 409, 439 S.E.2d 760, 763 (1994) (quoting *State v. Boyd*, 332 N.C. 101, 106, 418 S.E.2d 471, 474 (1992)), and "it is manifest from the transcript that defendant was not harmed because his presence would have made no difference in the outcome of the conversation . . . ." *Williams*, 339 N.C. at 29, 452 S.E.2d at 262. Further, in *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582 (1991), the Supreme Court stated:

> Whether this kind of error is harmless depends, we conclude, on whether the questioning of prospective jurors in defendant's absence might have resulted in a jury composed differently from one which defendant might have obtained had he been present and participated in the process. We are satisfied here beyond a reasonable doubt that defendant's absence during the preliminary questioning of prospective jurors did not result in the rejection of any juror whom defendant was entitled to have on the panel or the seating of any juror whom defendant was entitled to reject either for cause or peremptorily.

Id. at 389, 402 S.E.2d at 589; *accord Cummings*, 353 N.C. at 289-90, 543 S.E.2d at 854.

In the instant case, we conclude that the trial court violated defendant's constitutional right to be present by having unrecorded private discussions with prospective jurors on each of the four occasions recited above. The question is whether the State has demonstrated the error to be harmless beyond a reasonable doubt.

We conclude that it has under the reasoning of the Supreme Court in *Williams*. In *Williams*, the defendant assigned error to seven alleged unrecorded private bench conferences, each with a different prospective juror. One of the alleged private bench conferences was referenced in the trial transcript only by the following:

"DISCUSSION AT THE BENCH with a juror." This incident occurred immediately after court opened on the ninth day of jury selection. The record did not reveal that any action was taken as a result of this communication, and, immediately after it occurred, the trial court greeted those in attendance and resumed the *voir dire* examination of the prospective jurors. Based on these facts, the Court held:

> We can safely assume that this juror was thereafter subject to questioning by both the State and defendant, and was either seated or excused on the basis of this examination and not the discussion at the bench. The discussion, therefore, did not deprive defendant of a juror to whom he would otherwise have been entitled, nor did it result in the seating of a juror whom he might otherwise have rejected. It was, therefore, harmless under the rationale of *State v. Payne*, 328 N.C. 377, 402 S.E.2d 582.

Williams, 339 N.C. at 31, 452 S.E.2d at 263.

In defendant's case, the record references all four occasions of private discussions between the judge and prospective jurors as follows: "(BENCH CONFERENCES WITH INDIVIDUAL PROSPECTIVE MEMBERS OF THE JURY OFF THE RECORD)." The record further reveals that each discussion was preceded by the judge asking the prospective jurors if any of them wished to be heard concerning possible deferral of their jury service. The record does not reveal that any action was taken as a result of any of the private discussions. There is no showing that a prospective juror was deferred as a result of a private discussion with the judge. Finally, after each of the private discussions between the judge and prospective jurors, the record shows that the judge resumed the jury *voir dire*. We find these facts sufficiently similar to those in *Williams* to make the Supreme Court's reasoning in *Williams* controlling. Therefore, we conclude that the State has met its burden of establishing that the trial court's violation of defendant's right to be present was harmless beyond a reasonable doubt.

Defendant further points out that N.C. Gen. Stat. § 15A-1241 requires complete recordation of jury selection in capital proceedings, and that the trial court granted defendant's motion for complete recordation prior to trial. Thus, the trial court also erred under N.C.G.S. § 15A-1241 in failing to record its private discussions with prospective jurors. However, we conclude that this error was likewise harmless beyond a reasonable doubt for the reasons stated above. Accordingly, defendant's first assignment of error is overruled.

Defendant next contends that the trial court erred in denying his motion for a mistrial on the grounds that the refusal of the United States Postal Service to deliver juror summonses to Robeson County residents with rural box number addresses (1) deprived defendant of a jury of his peers chosen from a fair cross-section of the community in violation of the Sixth Amendment to the United States Constitution and (2) violated the requirements of N.C. Gen. Stat. § 9-10.

[2] The record reveals that on 4 January 1999, the first day of jury selection, the trial court observed that many fewer prospective jurors than expected had appeared for jury service. On 11 January 1999, the trial court again expressed concern over the failure of a number of prospective jurors to appear for jury duty. Finally, on 13 January 1999, defense counsel and the trial court had the following exchange:

> BY MR. JACOBSON:
>
> We have had problems with jurors from the very beginning. And I think I have figured out what is going on. And that's going to be part of a motion. The post office has recently said that they will not deliver mail to—pieces of mail that are addressed to a rural route.
>
> BY THE COURT:
>
> Or a rural box number.
>
> BY MR. JACOBSON:
>
> Or a rural box.
>
> BY THE COURT:
>
> They've done that since last Sunday.
>
> BY MR. JACOBSON:
>
> Yes, they have. And that includes jury summonses because they go out of this county by mail. And that accounts for at least why we didn't have any responses on this panel that came in Monday. And so it's my opinion that the defendant is being denied a jury of his peers since it's only town folks that are being called as jurors and not people from the rural routes. In order to preserve it, Your Honor, I make a motion for a mistrial on that basis.

The trial court denied defendant's motion for a mistrial, and defendant assigns error to this denial.

The standard of review for the denial of a motion for a mistrial has been stated by the Supreme Court as follows:

> It is well settled that the decision of whether to grant a mistrial rests in the sound discretion of the trial judge and will not be disturbed on appeal absent a showing of an abuse of discretion. . . . [A] trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.

State v. Barts, 316 N.C. 666, 682, 343 S.E.2d 828, 839 (1986) (citations omitted).

In the instant case, defendant has failed to show that the trial court's denial of his motion for a mistrial was so arbitrary that it could not have been the result of a reasoned decision since the change in the mail delivery policy complained of by defendant did not affect the *venire* from which defendant's jury was drawn.

N.C.G.S. § 9-10 (1999) requires that summonses to jurors "shall be served personally, or by leaving a copy thereof at the place of residence of the juror, or by telephone or first-class mail, at least 15 days before the session of court for which the juror is summoned." N.C.G.S. § 9-10 further provides that service by first-class mail is valid and binding on the person served "if mailed to the correct current address of the juror." N.C.G.S. § 9-10(a).

Here, defendant's case was called for trial at the 4 January 1999 Session of Robeson County Superior Court. The jury selection process continued into the 11 January 1999 Session of Robeson County Superior Court. Under N.C.G.S. § 9-10(a), the juror summonses for the 4 January 1999 session of court were required to be served no later than 20 December 1998, while the juror summonses for the 11 January 1999 session were required to be served no later than 27 December 1998. The record shows that the change in mail delivery policy complained of by defendant began on 3 January 1999, the day before the start of jury selection in defendant's case. In addition, defendant asserts in his brief that the addresses on the juror summonses for defendant's jury *venire* became incorrect the day before jury selection began. Based on these facts, we find that the change in mail delivery policy complained of by defendant could not have adversely affected defendant's jury *venire* since the prospective jurors for defendant's case were required to be summoned at least seven days prior to institution of the new policy. Defendant has failed

to show, and the record does not otherwise indicate, that defendant's jury *venire* was in any way affected by the Postal Service's change in mail delivery policy in Robeson County. Thus, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Guilt-Innocence Issues

[3] Defendant next contends that the trial court erred in entering judgment against him for first-degree arson because the arson indictment only alleged the elements of second-degree arson.

The indictment under which defendant was charged with arson provided:

> 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 maliciously burn the dwelling house *inhabited* by Docia Chavis and Melinda Chavis, located at Route 3 Box 62, Lumberton, North Carolina, all against the form of the statute in such case made and provided and against the peace and dignity of the State.

(Emphasis added). The caption of the indictment does not identify the alleged offense by name, but merely states that the alleged offense is a violation of N.C. Gen. Stat. § 14-58. The record shows that both the arrest warrant and the certificate of arraignment identify the alleged offense as second-degree arson. In addition, the record indicates that when defendant's case was called for trial the prosecutor identified the charge as second-degree arson.

During the jury charge conference, the trial court indicated that it planned to instruct the jury on first-degree arson. Defense counsel objected, arguing, *inter alia*, that the indictment only charged defendant with second-degree arson. The trial court overruled defendant's objection and instructed the jury on first-degree arson, and the lesser-included offenses of second-degree arson and burning an uninhabited house. After the trial court instructed the jury, defendant renewed all of his earlier objections to the instructions. The jury subsequently found defendant guilty of first-degree arson. Defendant now argues that he could not be found guilty of first-degree arson since the indictment only alleged second-degree arson.

N.C. Gen. Stat. § 15A-924(a)(5) (1999) provides that an indictment or other criminal pleading 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.

A bill of indictment is sufficient to charge a particular criminal offense when:

> "(1) The offense is charged in a plain, intelligible, and explicit manner; (2) The offense is charged properly so as to avoid the possibility of double jeopardy; and (3) There is such certainty in the statement of the accusation as to enable the accused to prepare for trial and to enable the court, on conviction or plea of *nolo contendre* [sic] or guilty to pronounce sentence according to the rights of the case."

State v. Jones, 110 N.C. App. 289, 291, 429 S.E.2d 410, 411-12 (1993) (quoting *State v. Reavis*, 19 N.C. App. 497, 498, 199 S.E.2d 139, 140 (1973)). We conclude that the arson indictment in the instant case was not sufficient to put defendant on notice that he may be tried for first-degree arson and to allow him to prepare accordingly.

The common law definition of arson is still in force in North Carolina, *State v. Barnes*, 333 N.C. 666, 677, 430 S.E.2d 223, 229 (1993), and has been stated as "the willful and malicious burning of the dwelling house of another person." *State v. Allen*, 322 N.C. 176, 196, 367 S.E.2d 626, 637 (1988). "Further, since arson is an offense against the security of the habitation and not the property, an essential element of the crime is that the property be inhabited by some person." *State v. Vickers*, 306 N.C. 90, 100, 291 S.E.2d 599, 606 (1982). Thus, the Supreme Court has held "that 'dwelling house' as contemplated in the definition of arson means an *inhabited* house." *Id.* (emphasis in original). Further, in *Vickers*, the Supreme Court expressly rejected the "defendant's attempt to equate *inhabit* with *occupy*." *Id.* (emphasis in original). Accordingly, "common law arson results from the burning of a dwelling even though its occupants are temporarily absent at the time of the burning." *Id.*

In 1979, "[i]n order to give more protection when a dwelling house is occupied by a person at the time of the burning," *Barnes*, 333 N.C. at 677, 430 S.E.2d at 229 (1993), the General Assembly amended N.C.G.S. § 14-58 to create two degrees of arson:

> There shall be two degrees of arson as defined at the common law. If the dwelling burned was *occupied* at the time of the burning, the offense is arson in the first degree and is punishable as a Class D felony. If the dwelling burned was *unoccupied* at the time of the burning, the offense is arson in the second degree and is punishable as a Class G felony.

N.C.G.S. § 14-58 (1999) (emphasis added).

Combining the common law definition of arson with the provisions of N.C.G.S. § 14-58, we find the elements of first-degree arson to be: (1) the willful and malicious burning (2) of the dwelling (i.e., inhabited) house of another; (3) which is occupied at the time of the burning. The elements of second-degree arson are: (1) the willful and malicious burning (2) of the dwelling (i.e., inhabited) house of another; (3) which is unoccupied at the time of the burning. *Jones*, 110 N.C. App. at 291, 429 S.E.2d at 412.

The indictment in the instant case charged defendant with violating N.C.G.S. § 14-58 by burning the dwelling house *inhabited* by Docia Chavis and Melinda Chavis. The indictment did not allege that the house was in fact *occupied* at the time of the burning. "All the facts and circumstances which constitute the statutory definition of the offense, or which are distinctive of the particular degree for which punishment is to be inflicted, must be alleged in the indictment or information." 5 Am. Jur. 2d *Arson and Related Offenses* § 32, at 802 (1995). Accordingly, we conclude that the indictment in the instant case did not allege every element of first-degree arson and was not sufficient to put defendant on notice that he may be tried for first-degree arson. Thus, it was error for the trial court to enter judgment against defendant for first-degree arson based on the indictment in the instant case.

The State argues that this error is harmless beyond a reasonable doubt because the transcript indicates that defendant was on notice that the State intended to attempt to convict him of first-degree arson, and, in fact, presented a full defense to the charge of first-degree arson. Thus, the State contends that any variance between the indictment and the jury instructions and judgment was not fatal and did not in any way prejudice defendant.

However, the State's argument ignores the fact that the trial court lacks subject matter jurisdiction to try, or enter judgment on, an offense based on an indictment that only charges a lesser-included

offense. While it is permissible to convict a defendant of a lesser degree of the crime charged in the indictment, *see* N.C. Gen. Stat. § 15-170 (1999), "[a]n indictment will not support a conviction for an offense more serious than that charged." *State v. Hare*, 243 N.C. 262, 264, 90 S.E.2d 550, 552 (1955) (quoting 42 C.J.S. *Indictments and Informations* § 300, at 1330). Therefore, we reject the State's contention that the variance between the indictment and defendant's conviction is harmless, and we vacate defendant's first-degree arson conviction.

While the indictment here is not sufficient to support a conviction for first-degree arson, it does allege all of the elements of second-degree arson: (1) the willful and malicious burning (2) of the dwelling (i.e., inhabited) house of another (3) which is unoccupied at the time of the burning. In addition, the evidence in the record is sufficient to support all of the elements of second-degree arson. Therefore, upon remand the trial court is instructed to enter judgment against defendant for second-degree arson and to sentence defendant accordingly.

[4] Defendant next contends that the trial court erred in entering judgment against him for first-degree burglary because the jury was instructed on a theory not alleged in the burglary indictment. In addition, since first-degree burglary was the underlying felony for both of defendant's felony murder convictions, defendant contends that the variance between the indictment and the jury instructions on burglary also tainted his first-degree murder convictions. Thus, defendant contends that not only is he entitled to a new trial on the burglary indictment, but he is also entitled to a new trial on the two murder indictments. Based on the following analysis, we disagree.

A murder is a felony murder when it is "committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon." N.C. Gen. Stat. § 14-17 (1999); *State v. Barlowe*, 337 N.C. 371, 380, 446 S.E.2d 352, 358 (1994). When the State prosecutes a defendant for first-degree murder under the felony murder rule, the State is not required to secure a separate indictment for the underlying felony. *State v. Williams*, 305 N.C. 656, 660 n. 1, 292 S.E.2d 243, 247 (1982); *State v. Carey*, 288 N.C. 254, 274, 218 S.E.2d 387, 400 (1975). If the State does secure a separate indictment for the underlying felony, and there is a conviction of both felony murder and the underlying felony, the defendant will be sentenced for the murder and the judgment must be arrested

for the underlying felony under the merger rule. *Barlowe*, 337 N.C. at 380, 446 S.E.2d at 358; *Carey*, 288 N.C. at 274, 218 S.E.2d at 400. If the indictment for the underlying felony is treated as surplusage, and only the felony murder charge submitted to the jury, the defendant cannot thereafter be charged for the underlying felony. *Carey*, 288 N.C. at 274-75, 218 S.E.2d at 400.

In the instant case, defendant was charged with first-degree burglary in an indictment that specified that defendant broke into the home of Docia and Melinda Chavis with the intent to commit murder.[2] Defendant was also charged with two counts of murder in short-form indictments authorized by N.C. Gen. Stat. § 15-144. "The short-form indictment has been held sufficient to charge murder in the first degree on the basis of either felony murder or premeditation and deliberation." *State v. Brown*, 320 N.C. 179, 191, 358 S.E.2d 1, 11 (1987).

Following the presentation of evidence, the jury was instructed that it could find defendant guilty of first-degree burglary if the State proved beyond a reasonable doubt that he broke into the house in question with the intent to commit murder *or* rape. In addition, the jury was instructed on first-degree murder on the theory of premeditation and deliberation and felony murder. The trial court defined felony murder as the killing of a human being in the perpetration of a burglary, and instructed the jury that it could find defendant guilty of first-degree felony murder if the State proved beyond a reasonable doubt that defendant broke into the house with the intent to commit murder *or* rape, and during the commission of the burglary, defendant killed the victims. In its verdict, the jury specifically found defendant not guilty of first-degree murder on the basis of malice, premeditation, and deliberation but guilty of first-degree murder under the felony murder rule. The jury also found defendant guilty of first-degree burglary. However, since the underlying felony for the felony murder convictions was burglary, the trial court properly arrested judgment on the first-degree burglary conviction.

Defendant maintains that the trial court improperly instructed the jury on first-degree burglary by allowing defendant to be convicted if the evidence proved that he intended to commit murder *or* rape when he broke into the home, while the indictment only alleged

2. The essential elements of first-degree burglary are: (1) breaking or entering, (2) the occupied dwelling house of another, (3) in the nighttime, (4) with the intent to commit a felony therein. N.C. Gen. Stat. § 14-51 (1999); *State v. Montgomery*, 341 N.C. 553, 566, 461 S.E.2d 732, 739 (1995).

the intent to commit murder. Since burglary was the underlying felony for the felony murder convictions, defendant further argues that the variance between the first-degree burglary indictment and the instructions to the jury on burglary tainted the felony-murder convictions. We disagree.

Any alleged error arising from the variance between the burglary indictment and the trial court's instructions on burglary has no effect on defendant's felony murder convictions because the State is not required to secure a separate indictment for the underlying felony in a felony murder prosecution. *Carey*, 288 N.C. at 274, 218 S.E.2d at 400. Further, the trial court arrested judgment on defendant's first-degree burglary charge. Thus, any error in the charge of burglary was harmless.

Nonetheless, the State was not precluded from using burglary as the underlying felony in the prosecution of defendant for first-degree felony murder. *Id.* at 275, 218 S.E.2d at 400. In order to do so, the State was required to present substantial evidence that defendant murdered the victims during the perpetration of a breaking or entering which defendant committed with the intent to commit murder or rape. On appeal, defendant has not argued that the evidence was insufficient to support felony murder based on burglary as it was presented to the jury. Therefore, we need not address such argument.

In sum, the State was not required to return an indictment for burglary in order to use burglary as the underlying felony in the prosecution of defendant for felony murder. Therefore, any variance between the burglary indictment and the charge to the jury on burglary did not prevent the State from using burglary as the underlying felony for felony murder. Defendant's assignment of error is overruled.

For preservation purposes, defendant next argues that the short-form indictments for murder and rape authorized by N.C. Gen. Stat. §§ 15-144 and 15-144.1 and utilized in this case are unconstitutional. However, defendant concedes that our Supreme Court has consistently held that the short-form indictments for murder and rape comport with both the North Carolina Constitution and the United States Constitution. *See State v. Wallace*, 351 N.C. 481, 504-05, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000); *State v. Kilpatrick*, 343 N.C. 466, 472, 471 S.E.2d 624, 628 (1996). Defendant has neither advanced new arguments nor cited any new authority to

persuade this Court to depart from these holdings. Therefore, this assignment of error is overruled.

Defendant's remaining assignments of error are deemed abandoned pursuant to Rule 28(a) of the Rules of Appellate Procedure for defendant's failure to present argument in support thereof in his brief.

Conclusion

In conclusion, we hold that judgment against defendant for first-degree arson is hereby vacated and the case remanded with instructions that judgment be entered against defendant for second-degree arson and that defendant be sentenced accordingly. Defendant's remaining convictions stand undisturbed.

In 95 CRS 12779, judgment vacated and case remanded for entry of judgment for second-degree arson and appropriate sentencing.

In 95 CRS 12780-12782, no error.

In 95 CRS 12818, no error.

Judges GREENE and McCULLOUGH concur.

STATE OF NORTH CAROLINA v. ROBERT LAWRENCE HOLLAND

No. COA01-721

(Filed 4 June 2002)

1. Evidence— expert testimony—Highway Patrol trooper—accident investigation

The trial court did not abuse its discretion in an involuntary manslaughter prosecution by allowing a Highway Patrol trooper to testify as an expert in accident reconstruction where the witness had been a trooper for 16 years and had both formal training and experience in accident investigation and reconstruction. N.C.G.S. § 8C-1, Rule 702.

2. Evidence— expert testimony—accident reconstruction—sufficiently reliable

A Highway Patrol trooper's testimony in reconstructing an accident in an involuntary manslaughter prosecution established a sufficient level of reliability to support the trial court's discretionary admission of his expert testimony.

3. Evidence— guilt of another—involuntary manslaughter—drunken driving

There was no prejudicial error in a prosecution for involuntary manslaughter arising from a highway collision in the exclusion of evidence which purportedly tended to show that another driver (Greene) was the party who should have been charged where the excluded testimony would have been cumulative.

4. Criminal Law— automobile accident—drinking—involuntary manslaughter—excluded blood test—questions and comments

There was no prejudicial error in an involuntary manslaughter prosecution in comments in the prosecutor's cross-examination of defendant and in closing arguments about a hospital blood test after the hospital record was ruled inadmissible. Defendant's blood alcohol level was relevant, the prosecutor asked about defendant's awareness of the test rather than the hospital records, and the jury acknowledged an instruction not to consider the evidence which followed the statements in the argument. Moreover, there was overwhelming evidence that defendant was impaired.

Appeal by defendant from judgment entered 24 January 2001 by Judge Marvin K. Gray in Union County Superior Court. Heard in the Court of Appeals 16 April 2002.

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

Mann, VonKallist and Young, P.A., by Joseph VonKallist, for defendant-appellant.

HUNTER, Judge.

Robert Lawrence Holland ("defendant") appeals his conviction of involuntary manslaughter resulting from a fatal automobile accident.

Defendant assigns error to the admission of certain evidence, to the trial court's failure to allow defendant to introduce certain evidence, and to statements made by the prosecutor during cross-examination and closing arguments. For the following reasons, we conclude defendant's trial was free of prejudicial error, and we therefore uphold his conviction and sentence.

The State's evidence tended to show that on 9 October 1999, Phillip Honeycutt and his son Russell were traveling in a Chevrolet pickup truck in the southbound lane of New Salem Road, a two-lane highway in Union County. Russell was driving, and it was shortly before noon when the Honeycutts' truck passed New Hope Baptist Church. At the same time, Corbett Greene was driving a tractor in the northbound lane of New Salem Road. Greene was driving as close to the side of the road as possible, with his right wheels on the white median line. The tractor was equipped with four red-flashing rear lights, two on the rear fender, and two on the rear canopy. Greene testified that these rear flashing lights were on at that time.

As Greene approached New Hope Baptist Church, he observed in his rear-view mirror a gray Jeep Cherokee "coming fast" behind him in his lane of travel. Defendant was driving the jeep. Greene testified that he immediately "jerked" his wheels to the right to get out of the way of the jeep, but he was only able to get one wheel off of the pavement by the time the front right of defendant's jeep hit his left rear tractor tire. Greene testified that the impact raised the tractor entirely off of the ground before it hit the pavement and tipped over onto its side. He further testified that he never heard any tires squeal prior to defendant's jeep hitting the tractor from behind. After defendant's jeep struck the tractor, it veered into the southbound lane of the highway and collided head-on with the Honeycutts' truck. Phillip Honeycutt was killed as a result of head and neck fractures sustained in the collision, and Russell was seriously injured.

Various witnesses converged on the scene of the accident. James Holmes testified that he approached the driver's side of defendant's jeep and observed defendant in the driver's seat behind a partially inflated airbag. Holmes testified that he observed a strong smell about defendant of what he believed to be liquor, and that in his opinion, defendant was "drunk." Holmes attempted to reassure defendant, telling him that help had been called. Defendant then extended his hand out of his window to shake hands with Holmes. When Holmes declined to shake defendant's hand because it was "real bloody," defendant stated, "[y]ou sure are ugly." Holmes noticed that defend-

ant had some dogs in the jeep, some of which appeared to be injured. Holmes wanted to open one of the jeep doors to get the dogs outside, and he asked defendant whether the dogs would bite. Defendant began to tell Holmes the dogs' names. Holmes testified that in the process of trying to keep the dogs calm, he called one of them by the wrong name, whereupon defendant became "upset" and corrected him as to the dog's name "like it really mattered."

Trooper Barry Hiatt of the North Carolina State Highway Patrol testified that he inspected defendant's jeep at the scene of the accident. He observed that there was green paint on the right front of defendant's vehicle which appeared to match the green paint on Greene's tractor, and that there was damage to the left rear of Greene's tractor. Trooper Hiatt also observed gray paint which appeared to match defendant's jeep in the front radiator of the Honeycutt's truck. He further testified that he inspected the interior of defendant's jeep and did not see any alcoholic beverage containers.

Trooper Hiatt then located defendant at the hospital where he observed defendant struggling with and "talking back to" the medical staff. Trooper Hiatt smelled alcohol in defendant's room, and upon speaking with defendant, he noticed that his speech was slurred, his face was flushed, and his eyes were red and glassy. Trooper Hiatt testified that it was his opinion that defendant was under the influence of alcohol, and that his "appreciable impairment" caused him to lose control over his mental and physical faculties. Trooper Hiatt read defendant his rights and then asked if he would consent to a blood test. Defendant did so, and a test administered shortly after 3:00 p.m., at least three hours after the accident, revealed defendant's blood alcohol level to be .222. Defendant was charged with driving while impaired, which charge was upgraded to involuntary manslaughter on 29 November 1999 upon the death of Phillip Honeycutt.

Defendant testified on his own behalf, stating that Greene's tractor had pulled out in front of him from a dirt logging road. Defendant maintained that this caused him to strike the tractor and veer to the left. He testified on direct examination that he had no memory of what had occurred after he struck the tractor, remembering only that his jeep came to a rest at the side of the road and that he was in pain. However, defendant maintained on cross-examination that he "didn't hit the damn pickup truck," but rather, Russell Honeycutt was driving on the wrong side of the road and ran into the front of Greene's trac-

tor. When asked why there was no noticeable damage to the front of Greene's tractor, defendant simply responded that the front of the tractor "weighs a thousand pounds" and that "[y]ou could drive that [tractor] into the church and there wouldn't be any damage on it." Defendant further testified that he had not been drinking prior to the accident, but once his jeep came to a rest following the collision, he picked up one of two liquor bottles from the floor of his jeep and began to drink vodka to "self medicate."

On 24 January 2001, a jury convicted defendant of involuntary manslaughter. The trial court entered judgment thereon, sentencing defendant to eighteen to twenty-two months' imprisonment. The trial court also ordered defendant to pay restitution to the Honeycutt family. He appeals.

[1] Defendant first argues on appeal that Trooper Hiatt's testimony was inadmissible because he should not have been qualified as an expert in the field of accident reconstruction, and because he failed to establish that his testimony was reliable. We disagree.

The trial court accepted Trooper Hiatt as an expert in accident investigation and reconstruction, and then permitted him to testify to details about the accident scene, including the extent and location of damage to the vehicles, the presence of scrape, gouge and scuff marks in the pavement, and the location of debris. Based on his analysis, Trooper Hiatt gave an opinion as to the sequence of events which occurred, opining that both Greene's tractor and defendant's jeep were traveling north on New Salem Road; that the jeep collided with the rear of the tractor; that thereafter, the jeep crossed the center line of the highway; that the jeep collided with the Honeycutt's pickup truck, which was traveling south; and that both vehicles then came to a rest on the left side of the road. Defense counsel vigorously cross-examined Trooper Hiatt before the jury both on his qualifications and his opinions.

Under N.C. Gen. Stat. § 8C-1, Rule 702 (2001), in order for expert testimony to be admitted, the expert must be qualified by "knowledge, skill, experience, training, or education." "North Carolina case law requires only that the expert be better qualified than the jury as to the subject at hand, with the testimony being 'helpful' to the jury." *State v. Jones*, 147 N.C. App. 527, 544, 556 S.E.2d 644, 654 (2001) (citation omitted), *appeal dismissed and disc. review denied*, 355 N.C. 351, 562 S.E.2d 427 (2002). The trial court's decision with respect to whether a witness possesses the necessary qualifications and is in

a better position than the jury to form an opinion on the matter to assist the jury in understanding the evidence "is within the sound discretion of the trial court and will not be reversed by the appellate court unless there is a complete lack of evidence to support it." *Pelzer v. United Parcel Service*, 126 N.C. App. 305, 309, 484 S.E.2d 849, 851-52, *disc. review denied*, 346 N.C. 549, 488 S.E.2d 808 (1997); *see also State v. Miller*, 142 N.C. App. 435, 444, 543 S.E.2d 201, 207 (2001) (abuse of discretion occurs where " 'ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision' " (citation omitted)).

In this case, we cannot hold that there is a "complete lack of evidence" to support the trial court's acceptance of Trooper Hiatt as an expert in accident investigation and reconstruction. Trooper Hiatt's testimony established that he possesses both formal training and a fair amount of experience in investigating accidents, specifically with regard to accident reconstructions. Trooper Hiatt testified that he had been a State Trooper for sixteen years; that in 1992 he completed a six-week course in accident investigation and reconstruction for which he received a certificate entitled "Traffic Accident Reconstruction"; and that he has attended various other training programs in the area of accident investigation, including both a basic and advanced program on the inspection and investigation of commercial vehicle accidents, and a training course in the use of a device used to take measurements at accident scenes. In addition, Trooper Hiatt testified that he has investigated somewhere between 2,000 and 2,500 automobile accidents, and he has conducted approximately thirty to forty accident reconstructions. We hold that the trial court did not abuse its discretion in ruling that Trooper Hiatt was more qualified than the jury on the subject at hand, and that his testimony would assist the jury in understanding the evidence.

[2] We also disagree with defendant that Trooper Hiatt's testimony should have been excluded because it failed to meet the reliability requirements of *Daubert v. Merrell Dow*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), as interpreted by our Supreme Court in *State v. Goode*, 341 N.C. 513, 461 S.E.2d 631 (1995). As with the decision on who qualifies as an expert, the decision on what expert testimony to admit is within the wide discretion of the trial court. *See State v. Washington*, 141 N.C. App. 354, 362, 540 S.E.2d 388, 395 (2000), *disc. review denied*, 353 N.C. 396, 547 S.E.2d 427 (2001).

In *Taylor v. Abernethy*, 149 N.C. App. 263, 560 S.E.2d 233 (2002), this Court very recently analyzed the requirements of the admission

of expert testimony set forth in *Daubert*, and particularly *Goode*. We noted that "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." *Id.* at 274, 560 S.E.2d at 240. Thus, in *Taylor*, where the principles underlying expert testimony on handwriting analysis had been repeatedly recognized as reliable and admissible, the trial court was not required to launch into a full analysis of the reliability of its underlying principles. *Id.*; *see also State v. Parks*, 147 N.C. App. 485, 490, 556 S.E.2d 20, 24 (2001) (no abuse of discretion in admitting officer's expert testimony in fingerprint analysis where Supreme Court has already "recognized that fingerprinting is an established and scientifically reliable method of identification").

We observe that expert testimony in the field of accident reconstruction has been widely accepted as reliable by the courts of this State. *See, e.g.*, *Griffith v. McCall*, 114 N.C. App. 190, 194, 441 S.E.2d 570, 573 (1994) (upholding admission of accident reconstruction expert testimony to assist jury in understanding central issues and noting that it is the function of cross-examination to expose any weaknesses in the expert testimony); *State v. Purdie*, 93 N.C. App. 269, 276, 377 S.E.2d 789, 793 (1989) (expert testimony on accident reconstruction admissible where based on expert's review of accident report, an interview with the investigating officer, photographs of the accident scene, and review of witness' testimony, because such information is that which is reasonably relied upon by experts in the field; where dispute existed over sequence of events, expert's testimony would clearly assist jury in interpreting physical evidence). Under our decision in *Taylor*, this alone sufficiently supports the admission of Trooper Hiatt's testimony, as defendant failed to set forth any new evidence calling the reliability of the methods of accident reconstruction into question.

In any event, we observe that Trooper Hiatt's testimony regarding his reconstruction methods and his analysis established a sufficient level of reliability to support the trial court's discretionary admission of his expert testimony. "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." *Taylor*, 149 N.C. App. at 272, 560 S.E.2d at 239 (citing N.C. Gen. Stat. § 8C-1, Rule 702(a) (1999)). As we further stated in *Taylor*:

> 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." 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." 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 273, 560 S.E.2d at 239 (citations omitted). Here, Trooper Hiatt's testimony revealed that the techniques he employs in performing reconstructions are established techniques; he possesses extensive background in accident investigation and reconstruction; and he employed the use of several photographic exhibits to assist in illustrating his testimony for the jury. Defense counsel vigorously cross-examined Trooper Hiatt on his findings and conclusions. Although Trooper Hiatt did not testify as to any independent research that he has conducted in the area, there was evidence to support the trial court's ruling, and as such, we hold that it was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. *See Miller*, 142 N.C. App. at 444, 543 S.E.2d at 207. These arguments are therefore rejected.

[3] By his next argument, defendant maintains the trial court erred in prohibiting him from introducing evidence that Greene was the party who should have been charged with the crime. Specifically, defendant sought to introduce evidence from one of Greene's treating physicians, Dr. Alexander Snyder, to establish that Greene had been suffering from a myriad of health problems in the time leading up to the accident, and that Greene also had alcohol problems, both of which could have affected his judgment and capabilities at the time of the accident.

The trial court permitted Dr. Snyder to testify to Greene's health as he observed it during August 1999 and October 1999 office visits. However, when defendant sought to introduce Dr. Snyder's testimony as to Greene's office visits dating from April 1999, approxi-

mately six months prior to the accident, and prior, the State objected on grounds of relevance. On *voir dire*, defendant established that Dr. Snyder would have testified that during April 1999 office visits, Greene stated he was experiencing shortness of breath, frequent falls, and that Greene smelled of alcohol; that during a January 1999 office visit, Dr. Snyder was of the opinion that Greene had been drinking; that during a December 1998 visit, Greene complained of difficulty in raising his arms and also smelled of alcohol; that in July 1996, Greene experienced loss of appetite and difficulty sleeping; and that in August 1996 Greene sustained a skin tear as a result of a fall and also smelled of alcohol. When the trial court asked Dr. Snyder if Greene's office visits dating back to April 1999 and prior would be in any way connected to the accident, Dr. Snyder responded he was unaware of any connection.

Even if it were error for the trial court to have excluded Dr. Snyder's testimony on the grounds of relevance, any error could not have been prejudicial where other testimony from Dr. Snyder, and testimony from Greene's cardiologist, Dr. James Roberts, and Greene himself clearly established what defendant sought to prove: that Greene had a history of health and alcohol problems that could have affected his capabilities at the time of the accident. Extensive testimony pertaining to Greene's health problems in the months leading up to the accident was admitted, and Greene himself testified that he had been drinking on the morning of the accident and had been charged with driving while impaired following the accident.

Dr. Snyder testified to office visits wherein Greene complained of being tense and having problems sleeping. Dr. Snyder also testified that Greene was on blood-thinning medication, showed a loss of muscle, and had decreased range of motion in his shoulders which caused him difficulty with such basic tasks as buttoning a shirt and lifting a utensil to his mouth. Dr. Roberts, whom the defense tendered as an expert in cardiology, testified to a July 1999 office visit wherein Greene complained of chest pain and gastric problems. Dr. Roberts noted that Greene had trouble walking properly, that he was prone to frequent falling, that he did not have normal feeling in his right leg, that he had experienced a slow heart rate, and that he might suffer from angina and weakness of the heart muscle. Dr. Roberts testified his notes revealed Greene had a severely decreased appetite, had experienced weight loss, and that Greene admitted to regularly consuming twelve or more beers a day. On cross-examination, in addition to testifying that he consumed alcohol on the morning of

the accident, Greene admitted to suffering from various health problems.

Thus, defendant was permitted to elicit ample testimony regarding Greene's health and drinking habits. Dr. Snyder's *voir dire* testimony, if admitted, would simply have been cumulative, and therefore, defendant could not have been prejudiced by its exclusion. *See* N.C. Gen. Stat. § 15A-1443(a) (2001) (defendant carries burden of establishing that but for alleged error, the result of the trial would have been different). This assignment of error is overruled.

[4] In his final argument, defendant contends he was denied a fair trial because of comments the prosecutor made during cross-examination and closing arguments regarding the results of a hospital-administered blood test. The results of the test appeared on a hospital record entitled "Laboratory Cumulative Summary," which indicated that a blood sample drawn from defendant by hospital personnel at 1:12 p.m. on the afternoon of the accident showed a blood alcohol concentration of .307. The State attempted to introduce the hospital record under N.C. Gen. Stat. § 8C-1, Rule 803(6) (2001), the business records exception to the rule against hearsay, and expressed to the trial court that it was prepared to have the hospital's records custodian testify to authenticate the record. The trial court ruled the record inadmissible.

On cross-examination of defendant, the State was permitted to ask, over defendant's objection, whether defendant was aware that the test had been performed, and that it had registered a .307 blood alcohol content. Defendant stated he was not aware of the test. The record also reveals that at some point during closing arguments, the prosecutor made mention of the test and its results, whereupon the jury was excused from the courtroom and a discussion ensued. When the jury was brought back for the remainder of arguments, the trial court instructed that the test and its results were not in evidence and that the jury was not to consider it. The jury responded that they understood they were not to consider evidence of the test and its results.

We first note that it was not entirely impermissible for the prosecutor to ask defendant on cross-examination whether he was aware of the results of the other blood test, as defendant's blood alcohol content approximately one hour following the accident was highly relevant to the case. As our Supreme Court has held:

> "[I]t remains true that the North Carolina practice is quite liberal and, under it, cross-examination may ordinarily be made to serve three purposes: (1) to elicit further details of the story related on direct, in the hope of presenting a complete picture less unfavorable to the cross-examiner's case; (2) to bring out new and different facts relevant to the whole case; and (3) to impeach the witness, or cast doubt upon her credibility."

State v. Scott, 343 N.C. 313, 338, 471 S.E.2d 605, 620 (1996) (citation omitted) (emphasis omitted). Here, the prosecutor did not attempt to admit the hospital records on cross-examination of defendant, but simply asked defendant about his own awareness of the records, which subject matter was relevant to the case. " 'A witness may be cross-examined on any matter relevant to any issue in the case.' " *State v. Yearwood*, 147 N.C. App. 662, 665, 556 S.E.2d 672, 675 (2001) (quoting N.C. Gen. Stat. § 8C-1, Rule 611(b) (1999)). We discern no abuse of discretion in the trial court's allowing the prosecutor's questions. *See id.* (trial court " 'has broad discretion over the scope of cross-examination' " (citation omitted)).

Moreover, to the extent the prosecutor should not have stated the test results during closing arguments because the trial court had ruled them inadmissible, the trial court thereafter instructed the jury that this information was not in evidence and that they were not permitted to consider it. The jury acknowledged their understanding of the trial court's instruction. It is very well-established that " '[w]hen defense counsel objects, and the objection is sustained, and curative instructions are given to the jury, defendant has no grounds for exception on appeal. "Jurors are presumed to follow a trial judge's instructions." ' " *State v. Lewis*, 147 N.C. App. 274, 280, 555 S.E.2d 348, 352 (2001) (citations omitted) (no basis for objection on appeal where record shows that defense objected to statement made by prosecutor during closing arguments and trial court thereafter sustained objection and provided curative instruction); *see also, e.g.*, *State v. Taylor*, 340 N.C. 52, 64, 455 S.E.2d 859, 866 (1995) (no prejudice to defendant where trial court gave curative instruction requiring that jurors disregard testimony from their consideration where jurors indicated they understood the court's instructions; jurors are presumed to follow court's instructions, and "trial judge properly cured any potential error").

In any event, we hold that any error was harmless beyond a reasonable doubt. The overwhelming evidence presented at trial established that defendant was impaired to an "appreciable" extent

following the accident. Witnesses at the scene testified to defendant's demeanor and stated that defendant appeared to be "drunk" immediately following the accident. Defendant's emergency room doctor testified there was a "strong presence" of a smell about defendant which he recognized to be the smell of liquor; that defendant's speech was slurred to a "very noticeable" extent; that defendant engaged in "multiple incidences of inappropriate or obnoxious comments towards staff in the hospital," including the use of profanity; and that in his opinion, not only were defendant's mental and physical capacities impaired by alcohol, but they were "appreciably impaired."

In addition, Trooper Hiatt, who observed defendant in the hospital, testified that defendant's hospital room smelled of alcohol, defendant was acting belligerently to the medical staff, and that defendant's speech was slurred, his face was flushed, and his eyes were red and glassy. Trooper Hiatt testified that defendant's impairment was so "appreciable" that he had lost the capacity to control his mental and physical faculties. Defendant himself testified that following the accident, he attempted to "self medicate" by taking several "strong swigs" of vodka. Moreover, another blood test, the results of which were properly presented to the jury, revealed that defendant's blood alcohol concentration several hours after the accident was .222. Thus, the evidence of defendant's impairment following the accident was overwhelming, and evidence of an additional blood test confirming that defendant was intoxicated would have had little, if any, impact.

For these reasons, we hold that the prosecutor's comments, if erroneous, were harmless beyond a reasonable doubt. Accordingly, we need not address the State's cross-assignment of error that the trial court erred in excluding the hospital records from evidence. Defendant received a fair trial.

No error.

Judges GREENE and TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. BENJAMIN FRANKLIN CHINA

No. COA01-667

(Filed 4 June 2002)

1. Constitutional Law— right to a speedy trial—delay in processing appeal

A defendant's right to a speedy trial was not violated in a second-degree burglary case even though there was almost a seven-year delay in processing review of his conviction, because: (1) there is no constitutional right to an appeal under the United States Constitution for a convicted criminal, and the right is purely statutory; (2) the record fails to indicate that defendant asserted his right to a speedy appeal prior to 14 June 2000, and defendant contributed to the delay by failing to assert earlier his right to a speedy appeal; (3) although defendant contends he suffered a greater degree of anxiety over the outcome of his appeal compared to a typical appellant, defendant failed to support his claim; and (4) although defendant contends he was prejudiced since the passage of time has prevented him from obtaining a certified transcript of his trial, defendant has failed to show that the unsigned transcript provided in the record is inaccurate.

2. Evidence— photographs—jewelry

The trial court did not commit plain error in a second-degree burglary case by allowing the State to introduce into evidence photographs of the victim's stolen jewelry that she wore into court during the trial on the grounds that the State failed to disclose to defendant its intention to enter the items into evidence at trial and failed to properly preserve the tangible evidence seized and released to the victim at the crime scene because: (1) even assuming there was error in admitting the photographs into evidence, defendant has failed to show any prejudice when the victims and an officer could have testified about the jewelry regardless of whether the photographs were admitted into evidence; (2) defendant was provided a full opportunity to examine the jewelry prior to its admission into evidence, to object to the trial court's recommended procedure, or to cross-examine any witness about the jewelry; and (3) defendant has failed to show that but for the admission of these photographs, a different result probably would have occurred or that he was denied a fair trial by the admission of the evidence.

3. Evidence— cross-examination—statement defendant was a thief

The trial court did not commit plain error in a second-degree burglary case by failing to intervene ex mero motu during defendant's cross-examination of one of the victims who stated that defendant was a thief and that the victim knew defendant had to be involved, because: (1) an officer identified defendant as the perpetrator, the victim's jewelry was found in defendant's apartment, defendant's arm was bleeding profusely immediately after the burglary, and blood was found on the broken glass at the victims' house; and (2) even if improper character evidence was admitted, defendant has not shown that a different result was probable if the trial court had stricken the testimony.

4. Constitutional Law— effective assistance of counsel—failure to move to suppress evidence

A defendant did not receive ineffective assistance of counsel in a second-degree burglary case based on defense counsel's failure to move to suppress evidence obtained during a warrantless search of defendant's apartment, because: (1) the warrantless entry into defendant's residence did not violate defendant's Fourth Amendment rights since the officer could have reasonably believed that someone in the house was in need of immediate assistance based on the violent screaming emanating from inside the apartment as he approached the front door along with the two victims; and (2) once inside the apartment, the officer's seizure of the victim's jewelry in plain view was lawful.

Appeal by defendant from judgment entered 28 April 1994 by Judge Anthony M. Brannon in Durham County Superior Court. Heard in the Court of Appeals 28 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General John P. Scherer, II, for the State.

Daniel Shatz for defendant-appellant.

TYSON, Judge.

Benjamin Franklin China ("defendant") appeals from judgment entered after a jury verdict found him guilty of second-degree burglary. We find no prejudicial error.

I. Facts

The evidence at trial tended to show that on the evening of 15 January 1994 at approximately 10:00 p.m. Jonetta Dixon ("Jonetta") and her husband Lacy Billings ("Lacy") were visited by Lacy's daughter Diane China ("Diane") in their home. Diane is married to defendant. Diane borrowed $20.00 in cash from Lacy during their visit. Diane testified that she did not have a good relationship with Lacy.

Jonetta and Lacy informed Diane that they were going to spend the night at Jonetta's sister's house and that they would not return that evening. Jonetta and Lacy left their house at approximately 11:30 p.m. shortly after Diane left to go to her home. Jonetta and Lacy locked all of the doors and windows.

Officer M.D. Barenson ("Officer Barenson") was working in the vicinity of Jonetta's and Lacy's home when he received a call advising a burglary was in progress. Officer Barenson drove to Jonetta's and Lacy's house and parked in front. Officer Barenson exited his vehicle, approached the front door, determined that it was locked, and proceeded toward the side of the building. He discovered broken glass and a water cooler propped up against the wall directly under a shattered window. Officer Barenson radioed his sergeant to confirm the burglary, and his sergeant dispatched assistance. The sergeant and other officers were located nearby conducting a murder investigation.

Officer Barenson cautiously proceeded to the back of the building. He observed a black male, five-foot-six to five-foot-eight inches tall and approximately 145 pounds, later identified as defendant, descending the back stairs carrying numerous items in his arms. Defendant and Officer Barenson locked eyes momentarily. Defendant sprinted around the other side of the building, and dropped the items he was carrying. Defendant unknowingly ran past the murder scene where Officer Barenson's sergeant and other officers were conducting the unrelated murder investigation. Barenson's sergeant saw defendant running. Officer Barenson radioed his sergeant, who tried to secure the area with the other officers. The officers unsuccessfully conducted a search for defendant.

After the search, Officer Barenson and another officer returned to the burglarized house. While examining the residence, Jonetta and Lacy returned home at approximately 12:30 a.m. Officer Barenson

informed them of the burglary. Lacy responded that he suspected his son-in-law might be involved. Jonetta and Lacy escorted Officer Barenson to Diane's house. As they approached, they heard a violent argument emanating from inside the apartment. Officer Barenson knocked on the door, it opened, and they walked inside. Diane was sitting in the living room with a knife in her hand, and defendant walked out of the kitchen bleeding profusely from his forearm.

Officer Barenson immediately recognized defendant as the person he had seen descending the back stairs an hour earlier. Jonetta testified that Officer Barenson stated "this is the one . . . that is him." Officer Barenson testified that "I looked right at him and I said that is him. That is the man." Defendant was wearing pants that looked identical to the pants that Officer Barenson saw the burglar wearing. Defendant was placed under arrest.

Jonetta stood by Officer Barenson's side and observed the arrest. She also noticed and immediately recognized her jewelry scattered on top of the kitchen table and on top of the coffee table in the living room. Jonetta remembered seeing her jewelry on top of her bedroom dresser earlier that evening prior to leaving her house. The jewelry included necklaces, rings, bracelets, and watches. Unprompted, Diane fervently denied breaking into her father's house.

After a complete identification of the jewelry by Jonetta, Officer Barenson returned Jonetta's jewelry to her pursuant to his sergeant's orders. Defendant was transported downtown to jail. Jonetta and Lacy returned home and noticed that her jewelry had, in fact, been stolen. One window was entirely shattered. Jonetta discovered blood stains on the curtains that surrounded the broken window. Lacy observed blood on the broken window glass.

Defendant was tried on 24 April 1994. Defendant did not testify, but offered the testimony of his wife at trial. The jury found defendant guilty of second-degree burglary. The trial court sentenced defendant to twenty years. Defendant appealed in open court. The trial court appointed defendant's trial counsel to represent him on appeal. Defendant's appointed counsel did not perfect the appeal.

Approximately six years later on 9 June 2000, defendant petitioned our Court for a writ of certiorari. Our Court granted defendant's petition and remanded the case to Durham County Superior Court for the appointment of substitute appellate counsel. New counsel was appointed on 11 December 2000. Defendant obtained the nec-

essary extensions for filing the record and the briefs. The case is properly before us.

II. Issues

Defendant assigns the following errors: (1) the delay in affording defendant an appeal violated his statutory and constitutional rights to a "speedy appeal," (2) the trial court erred by overruling defendant's objection and admitting photographic evidence at trial, (3) the trial court erred by failing to stop a State's witness from improperly attacking defendant's character, and (4) defendant had ineffective assistance of counsel.

III. Appeal Delay

[1] Defendant contends that his due process rights and law of the land rights to a speedy trial were violated. He argues that the almost seven year delay in processing review of his conviction was unconscionable.

There is no constitutional right to an appeal under the United States Constitution for a convicted criminal. *Goeke v. Branch*, 514 U.S. 115, 119, 131 L. Ed. 2d 152, 158 (1995) (citing *Ortega-Rodriguez v. United States*, 507 U.S. 234, 253, 122 L. Ed. 2d 581, 600 (1993) (Rehnquist, C.J., dissenting)). The right to appeal in a criminal proceeding is purely statutory. *State v. Shoff*, 118 N.C. App. 724, 725, 456 S.E.2d 875, 876 (1996); N.C. Gen. Stat. § 15A-1444 (2001) ("A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.)

In *State v. Hammonds*, 141 N.C. App. 152, 164, 541 S.E.2d 166, 175 (2000) this Court stated that " 'undue delay in processing an appeal *may* rise to the level of a due process violation.' " (quoting *United States v. Johnson*, 732 F.2d 379, 381 (4th Cir. 1984) (emphasis in original)). We must analyze the factors set forth in *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972), to determine if there was a due process violation caused by a delay in processing an appeal. *See Hammonds*, 141 N.C. App. at 164, 541 S.E.2d at 175. The four factors are: (1) the length of the delay; (2) the reason for the delay; (3) defendant's assertion of his right to a speedy appeal; and (4) any prejudice to defendant. *Id.* at 158, 541 S.E.2d at 172 (citing *Barker*, 407 U.S. at 530, 33 L. Ed. 2d at 116-17). No one factor is dispositive; the four "are related factors and must be considered together with such other circumstances as may be relevant." *Id.*

A. Length and Reason for the Delay.

An approximately seven year delay in processing defendant's appeal is lengthy and sufficient to examine the remaining factors. We are troubled by the reason for the delay in this case. Defendant argues that "[t]he reason for most of the delay in this case is the failure of the defendant's court-appointed attorney to perfect the appeal." In the State's response to defendant's petition for writ of *certiorari*, it posits that defendant's appointed trial counsel did not know that he was appointed as defendant's appellate counsel. Defendant claims that the colloquy at the end of the trial between the judge and defendant's trial counsel clearly shows that defendant's trial counsel knew and understood that he was appointed as defendant's appellate counsel. The trial transcript supports defendant's position.

None of the delay was attributable to any affirmative act by defendant. "[W]e are equally unable to find that the delay is attributable to the prosecution." *Id.* at 164, 541 S.E.2d at 176. From the record before us, we cannot and do not determine why defendant's appeal was not perfected.

B. Defendant's Assertion of His Right to a Speedy Appeal

The record fails to indicate that defendant asserted his right to a speedy appeal prior to 14 June 2000. On that date defendant petitioned this Court *pro se* for a writ of *certiorari* and requested that we order the Durham County Superior Court to review defendant's judgment. Defendant contributed to the delay by failing to assert earlier his right to a speedy appeal.

Defendant could have contacted his attorney, the trial court, or the Clerk of this Court to determine the status of his appeal at any time between the time he gave notice of appeal and filed a petition for a writ of *certiorari* with our Court. In the speedy trial context, our Supreme Court has stated: "[d]efendant's failure to assert his right to a speedy trial sooner in the process does not foreclose his speedy trial claim, *but does weigh against his contention that he has been denied his constitutional right to a speedy trial.*" *State v. Flowers*, 347 N.C. 1, 28, 489 S.E.2d 391, 407 (1997) (citing *State v. Webster*, 337 N.C. 674, 680, 447 S.E.2d 349, 352 (1994) (emphasis supplied)).

Here, defendant's silence is deafening. Defendant's failure to stay informed concerning the status of his appeal of right and to assert his

rights weighs heavily against his contention that his due process rights were violated.

C. Prejudice

In the trial context, our Supreme Court and the United States Supreme Court have recognized three interests protected by a speedy trial: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." *Flowers*, 347 N.C. at 28, 489 S.E.2d at 407 (citing *Webster*, 337 N.C. at 681, 447 S.E.2d at 352) (quoting *Barker*, 407 U.S. at 532, 33 L. Ed. 2d at 118)).

Concerning the first two interests, defendant contends that he suffered a greater degree of anxiety over the outcome of his appeal than the typical appellant. Defendant argues that he was abandoned by his attorney, and that he did not have anyone zealously representing his interests. If defendant was unaware that appellate counsel was, in fact, not representing him, then he logically could not have suffered any more anxiety than the average appellant. If he was aware that he did not have appellant counsel, any anxiety he purportedly suffered could have been alleviated by acting on his concerns at any time. Once defendant acted, this Court granted his requested relief. Defendant has failed to show that he suffered any more anxiety than any other appellant.

Concerning the third interest, defendant claims that "the passage of time has prevented [him] from obtaining a certified transcript of his trial, since the Court Reporter has moved to Nicaragua." Defendant also contends that it is impossible for his counsel to determine if any error occurred during those periods because the trial transcript does not contain the selection of the jury or trial counsel's closing arguments. The record contains an unsigned copy of the trial transcript. Defendant presented no evidence to suggest that the unsigned transcript is inaccurate. After balancing the four factors set out above, defendant's failure to assert his right to a speedy appeal combined with the lack of prejudice suffered by defendant shows that although his delay in processing his appeal was approximately seven years, defendant suffered no depravation of due process. We hold that defendant's delay in asserting his statutory right of appeal did not violate his due process rights.

IV. Evidence at Trial

[2] Defendant contends the trial court erred by allowing the State to introduce into evidence photographs of Jonetta's jewelry that she wore into court during the trial. Defendant claims the State failed to disclose to defendant its intention to enter the items into evidence during the trial, and that the State failed to properly preserve the tangible evidence seized and then released at the crime scene. Defendant contends that the trial court's failure to sanction the State for these violations was an abuse of discretion. We disagree.

A. Discovery Disclosure

N.C.G.S § 15A-903(d) controls the disclosure of documentary and tangible evidence by the State to the defendant, and requires the prosecutor, upon request by defendant, to disclose all tangible evidence to be used against defendant at trial. N.C. Gen. Stat. § 15A-903(d) (2001). The record shows that the State did not intend to introduce the jewelry or photographs into evidence at trial.

The trial transcript also shows that defendant failed to object to the admission into evidence of Jonetta's jewelry. Defendant has alleged plain error. "This Court has recognized that '[t]he plain error rule applies only in truly exceptional cases.' " *State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002) (quoting *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986)). "[A] defendant relying on the rule bears the heavy 'burden of showing . . . (i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.' " *Id.* (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)).

The admission of the evidence occurred when the State was questioning Jonetta on direct examination. Defendant's counsel peremptorily objected that the State was about to broach the subject of the jewelry Jonetta was wearing. The trial court removed the jury and considered defendant's objections. The trial court discovered that Jonetta was wearing some of the jewelry that was stolen and returned to her the night of the burglary. The trial court suggested that the items be examined thoroughly by both sides and be photographed. Defendant (1) did not object to the suggested procedure, (2) indicated his complete satisfaction with the procedure, and (3) was allotted time to completely examine all of the jewelry. Hearing no

objections or complaints from defendant or his counsel, the trial court resumed the trial. The State continued its examination of Jonetta. The State admitted the photographs of the jewelry into evidence. Defendant never cross-examined Jonetta's or any other witness' recollection of the jewelry.

Assuming error in admitting the photographs into evidence, defendant has failed to show, and we are unable to find, any prejudice to defendant. Jonetta, Lacy, and Officer Barenson could have testified about the jewelry regardless of whether the photographs were admitted into evidence. This assignment of error is overruled.

B. Preservation

Defendant contends that the officer's failure to keep records of the jewelry seized from and returned to Jonetta constituted a statutory violation and substantially impeded defendant's ability to defend against the charges. Defendant argues that "[b]y releasing the property without any documentation of ownership, the offer created a situation where the prosecuting witness might have manufactured the strongest evidence against [defendant], in furtherance of a preexisting grudge." Defendant also argues that "[b]y placing [Jonetta] in a position where she was able to wear the evidence into court and spring it upon the defendant without warning, the State substantially impeded the defendant's ability to challenge the most critical evidence against him."

Defendant failed to object when the photographs were admitted as evidence and asserts plain error. We disagree. For the same reasons stated above, defendant was provided a full opportunity to examine the jewelry prior to its admission into evidence, object to the trial court's recommended procedure, or cross-examine any witness about the jewelry. Defendant has not shown that but for the admission of these photographs a different result probably would have occurred or that he was denied a fair trial by the admission of the evidence. Defendant has failed to show prejudice. This assignment of error is overruled.

V. Trial Court's Failure to Intervene

[3] On cross-examination by defense counsel, Lacy testified that "I know [defendant] is a thief and I feel like there was some connection between those two [defendant and Diane] with what happened to the house . . . . I said it had to be one or the other but after [Officer Barenson] described who it was I was definite that he was the one

because I know his past life." Immediately after Lacy's comments, defense counsel attempted to impeach Lacy's credibility.

Defendant argues that it was plain error for the trial court not to intervene *ex mero motu*. Defendant's counsel elicited the testimony during cross-examination. Defendant's counsel continued to question Lacy about the comment and about defendant's description. Defense counsel did not object to Lacy's response, nor move to strike Lacy's comments as not responsive.

Officer Barenson identified defendant as the perpetrator, Jonetta's jewelry was found in defendant's apartment, defendant's arm was bleeding profusely immediately after the burglary, and blood was found on the broken glass at Jonetta's and Lacy's house. Even if improper character evidence was admitted, defendant has not shown that a different result was probable if the trial court had stricken the testimony. This assignment of error is overruled.

VI. Ineffective Assistance of Counsel

[4] In his final assignment of error, defendant contends that when Officer Barenson entered defendant's house without a search or arrest warrant his Fourth Amendment rights were violated. Defendant argues that his counsel did not move to suppress the evidence obtained at defendant's apartment. Defendant claims that this failure constituted ineffective assistance of counsel. We disagree.

"To successfully assert an ineffective assistance of counsel claim, defendant must satisfy a two-prong test." *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). "First, he must show that counsel's performance fell below an objective standard of reasonableness." *State v. Gainey*, 355 N.C. 73, 112, 558 S.E.2d 463, 488 (2002) (citation omitted). "Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different." *Id.*

There is a presumption that trial counsel acted in the exercise of reasonable professional judgment. *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694. "In analyzing the reasonableness under the performance prong, the material inquiry is whether the actions were reasonable considering the totality of the circumstances at the time of performance." *Gainey*, 355 N.C. at 112, 558 S.E.2d at 488 (citation

omitted). "Reviewing courts should avoid the temptation to second-guess the actions of trial counsel, and judicial review of counsel's performance must be highly deferential." *Id.*

Officer Barenson's warrantless entry into defendant's residence did not violate defendant's Fourth Amendment rights. The evidence shows that Officer Barenson, Lacy and Jonetta arrived at the front door, heard a violent argument in the apartment, knocked on the door which opened, and walked inside. Officers may enter a house for emergency purposes without a warrant when they believe a person in the house is in need of immediate aid or assistance in order to avoid serous injury. *State v. Woods*, 136 N.C. App. 386, 391-92, 524 S.E.2d 363, 366 (2000); *see also Mincey v. Arizona*, 437 U.S. 385, 57 L. Ed. 2d 290 (1978).

Officer Barenson could have reasonably believed that someone in the house was in need of immediate assistance based on the violent screaming emanating from inside of the apartment as he, Lacy and Jonetta approached the front door. Once inside, Officer Barenson's beliefs were justified. Diane was holding a knife, and defendant was bleeding excessively from his arm. Defendant and Diane did not protest Officer Barenson's, Lacy's, or Jonetta's entry. Counsel's actions in not moving to suppress the evidence were reasonable.

Once inside, Officer Barenson's seizure of the jewelry in plain view was lawful. *State v. Worsley*, 336 N.C. 268, 282, 443 S.E.2d 68, 75 (1994) (bloody bed-sheet was admissible since it was within the plain view of the officers while they were lawfully on the premises); *State v. Allison*, 298 N.C. 135, 140, 257 S.E.2d 417, 420 (1979) ("The seizure of suspicious items in plain view inside a dwelling is lawful if the officer possesses legal authority to be on the premises.") (citations omitted).

Defendant has failed to meet the first prong of the ineffective assistance of counsel test. Because defendant has failed to satisfy the first prong, we need not address the second prong. *See Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. This assignment of error is overruled.

VII. Summary

We have carefully examined all of defendant's argued assignments of error. Those assignments of error not argued are deemed

abandoned. N.C.R. App. P. 28(b)(5) (2001). We hold that defendant received a trial free from prejudicial errors that he assigned.

No error.

Judges MARTIN and THOMAS concur.

BEVERLY A. RUFFIN, EMPLOYEE-PLAINTIFF v. COMPASS GROUP USA, EMPLOYER, CNA INSURANCE CO., INSURER, DEFENDANTS

No. COA01-18

(Filed 4 June 2002)

1. **Workers' Compensation— specific traumatic incident—vending machine route—back injury**

The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff had suffered a compensable back injury resulting from a specific traumatic incident when she aggravated a pre-existing condition by lifting a forty-pound box of syrup while servicing a vending machine.

2. **Workers' Compensation— back injury—new vending machine route—same duties, greater work load**

It was noted that the Industrial Commission in a workers' compensation action could have concluded that plaintiff suffered an injury by accident which arose out of and in the course of employment where she injured her back on a new vending machine route that did not alter her duties but included longer hours and increased lifting and straining. Even though the new requirements may have been part of plaintiff's normal job description, plaintiff was not merely carrying out her duties in the usual way.

3. **Workers' Compensation— back injury—symptoms in neck and shoulder**

There was competent evidence in a workers' compensation action to support the Industrial Commission's findings that plaintiff suffered a compensable back injury where the symptoms were apparent in the neck and shoulder but the injury was to spinal discs, which are indisputably the "back."

4. Workers' Compensation— disability—causal connection with injury

The Industrial Commission did not err by finding a causal connection between plaintiff's back injury and her disability where medical testimony was presented to establish causation.

Judge TYSON dissenting.

Appeal by defendants from an opinion and award entered 10 October 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 7 November 2001.

Law Offices of Roberta L. Edwards, P.A., by Kenneth R. Massey, for plaintiff-appellee.

Teague, Campbell, Dennis & Gorham, L.L.P., by Dayle A. Flammia and Tara L. Davidson, for defendants-appellants.

TIMMONS-GOODSON, Judge.

Compass Group USA ("employer") and CNA Risk Management Co. ("carrier") (collectively "defendants") appeal from an opinion and award entered by the North Carolina Industrial Commission ("Full Commission") awarding Beverly Ruffin ("plaintiff") workers' compensation benefits. We affirm.

Pertinent facts and procedural history include the following: Plaintiff worked as a vendor, servicing vending machines in Rocky Mount, North Carolina. Her duties consisted of loading and unloading food supplies and soft drinks from her truck and stocking vending machines. Additionally, plaintiff was responsible for re-supplying cola machines with syrup. When a handcart was inaccessible, plaintiff was also responsible for manually carrying eight to ten cases of soda and lifting forty-pound boxes of syrup. Plaintiff operated the same vending route for a year; however, in April 1998, her route changed. Although plaintiff's normal job duties were not altered by her new route, there was a significant change in the amount of her work load including longer hours and more lifting and straining than her job normally required.

On 9 May 1998, plaintiff pulled a forty-pound box of syrup from the truck. As she lifted the box, plaintiff felt a cramp in her left shoulder blade. The next morning, plaintiff experienced pain in her left shoulder and numbness in her left arm and fingers. Plaintiff reported to the emergency room with complaints of "pain in her left side of her

upper back" and was referred to Carolina Regional Orthopaedics. On 21 May 1999, plaintiff was examined by Dr. David C. Miller ("Dr. Miller"), a spine specialist. Dr. Miller reviewed plaintiff's MRI which revealed pre-existing problems including an unusual curvature of the spine and disc herniations and concluded that the 9 May 1999 injury aggravated these pre-existing conditions. Dr. Miller further stated that the aggravation of plaintiff's herniated disc resulted in nerve impingement which caused plaintiff's neck and left shoulder pain. After surgery, plaintiff returned to work with restrictions against repeated lifting of more than forty pounds.

Plaintiff filed a claim for workers' compensation benefits. On 22 January 1999, a hearing was held before Deputy Commissioner Amy L. Pfeiffer. In an opinion filed 17 November 1999, Deputy Commissioner Pfeiffer denied plaintiff's claim, concluding that plaintiff did not sustain an injury by accident arising out of and in the course of her employment. Plaintiff appealed to the Full Commission and with one member dissenting, the Full Commission reversed the opinion and award of the Deputy Commissioner and made the following pertinent finding of fact:

> 12. On 9 May 1998, plaintiff suffered an injury resulting from a specific traumatic incident which arose out of and in the course of her employment with defendant-employer, and which aggravated a pre-existing condition of her cervical spine.

The Commission concluded that plaintiff suffered a "compensable injury in the form of the aggravation of a pre-existing condition as a direct result of a specific traumatic incident arising out of and in the course of her employment" with defendants. From this opinion and resulting award, defendants appeal.

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[1] In the first assignment of error, defendants contend that the Full Commission erred when it found as a fact and concluded as a matter of law that plaintiff suffered a compensable back injury resulting from a "specific traumatic injury" arising out of and during the course of employment. For the reasons discussed below, we disagree.

First we note that in reviewing an opinion and award entered by the Full Commission, our inquiry is limited to two questions: (1) whether there is any competent evidence in the record to support the Commission's findings of fact, and (2) whether the Commission's findings of fact, likewise, support its conclusions of law. *See Simmons v. N.C. Dept. of Transp.*, 128 N.C. App. 402, 405-06, 496

S.E.2d 790, 793 (1998). "The findings of fact by the Industrial Commission are conclusive on appeal, if there is any competent evidence to support them, and even if there is evidence that would support contrary findings." *Fish v. Steelcase, Inc.*, 116 N.C. App. 703, 708, 449 S.E.2d 233, 237 (1994), *cert. denied*, 339 N.C. 737, 454 S.E.2d 650 (1995). However, the Commission's conclusions of law are fully reviewable on appeal. *Id.* This Court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). *See also Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116-17, 530 S.E.2d 549, 553 (2000) (holding that "[r]equiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness" or one piece of evidence over another).

N.C. Gen. Stat. § 97-2(6) (2001) defines a back injury as one arising "out of and in the course of the employment, and is the direct result of a specific traumatic incident of the work assigned." Prior to the amendment in 1983, "this statute required that there be some type of unusual circumstance" for a compensable back injury. *Fish*, 116 N.C. App. at 707, 449 S.E.2d at 237. N.C. Gen. Stat. § 97-2(6) now provides two theories upon which a back injury can be compensated: "(1) if the claimant was injured by accident; or (2) if the injury arose from a specific traumatic incident." *Glynn v. Pepcom Industries*, 122 N.C. App. 348, 354, 469 S.E.2d 588, 591 (1996). "If the injury arises out of and in the course of employment and is the result of a 'specific traumatic incident,' then the statute as amended mandates that the injury be construed to be 'injury by accident.' " *Caskie v. R.M. Butler & Co.*, 85 N.C. App. 266, 268, 354 S.E.2d 242, 244 (1987) (citation omitted). However, if there is no 'specific traumatic incident' the claimant may still be entitled to workers' compensation benefits if she meets the definition of 'injury by accident.' *Id.* (citation omitted).

Under our current case law, the specific traumatic incident provision of N.C. Gen. Stat. § 97-2(6) requires the plaintiff to prove an injury at a judicially cognizable point in time. *See Fish*, 116 N.C. App. at 708, 449 S.E.2d at 237. In determining whether an injury occurred at a cognizable time, it is not necessary to "allege the specific hour or day of the injury." *Id.* Moreover, "*[j]udicially cognizable* does not

mean 'ascertainable on an exact date.' " *Id.* at 709, 449 S.E.2d at 238 (alteration in original) (citation omitted). Instead,

> the term should be read to describe a showing by plaintiff which enables the Industrial Commission to determine when, within a reasonable period, the specific injury occurred. The evidence must show that there was some event that caused the injury, not a gradual deterioration. If the window during which the injury occurred can be narrowed to a judicially cognizable period, then the statute is satisfied.

Id. Thus, "events which occur contemporaneously, during a cognizable time period, and which cause a back injury, do fit the definition intended by the legislature." *Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 119 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989).

In the instant case, the evidence establishes that plaintiff sustained an injury as a result of a specific traumatic incident. The Commission found, and the evidence fully supports that plaintiff suffered a specific traumatic incident on 9 May 1998, when she lifted a forty-pound box of syrup out of her truck. This incident resulted in injury to her pre-existing back conditions including herniating discs and an unusual curvature of the spine. "Clearly, aggravation of a pre-existing condition which results in loss of wage earning capacity is compensable under the workers' compensation laws in our state." *Smith v. Champion, Int'l.*, 134 N.C. App. 180, 182, 517 S.E.2d 164, 166 (2000). We therefore hold that the competent evidence clearly supports the finding and resulting conclusion that "plaintiff suffered a compensable injury in the form of the aggravation of a pre-existing condition as a direct result of a specific traumatic incident arising out of and in the course of her employment[.]"[1]

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[2] 1. We note that under our existing case law, even without deciding the issue of specific traumatic incident, the Commission could have concluded that plaintiff's back injury was an "injury by accident" arising out of and in the course of employment, therefore qualifying as a compensable injury under N.C. Gen. Stat. § 97-2(6). Clearly, the evidence establishes that plaintiff's new job duties required more lifting and more physical work exertion. Even though the new requirements may have been part of plaintiff's normal job description, plaintiff was not merely carrying on her duties in the usual way. "It is well settled in this State that an extra or unusual degree of exertion by an employee while performing a job may constitute the unforeseen or unusual event or condition necessary to make any resulting injury an 'injury by accident.' " *Jackson v. Fayetteville Area Sys. of Transp.*, 88 N.C. App. 123, 126, 362 S.E.2d 569, 571 (1987); *see also Caskie v. R.M. Butler & Co.*, 85 N.C. App. 266, 269, 354 S.E.2d 242, 244 (1987) (holding that without deciding the issue of specific traumatic incident, the Commission should have concluded that plaintiff suffered an injury by accident arising out of and

[3] Defendants argue that the evidence only establishes that plaintiff suffered a shoulder injury, not a back injury. However, contrary to defendants' assertion, there is competent evidence in the record to support the Full Commission's findings that plaintiff suffered a compensable injury in the form of an aggravated back injury. Plaintiff testified that on 9 May 1998, she sustained an injury while lifting a forty-pound box of syrup out of her truck. Plaintiff stated that she felt a "pull or cramp" in the area of her left shoulder blade, towards the center of her back. Subsequent tests revealed herniating discs to the left side of plaintiff's back. Medical evidence tended to show that plaintiff suffered from a "disk protrusion or a herniation at the C5 and C6 level" and "kyphosis which is an unusual curvature of the spine." Dr. Miller opined that although plaintiff's herniating discs probably pre-existed the 9 May 1998 injury, the incident aggravated plaintiff's pre-existing condition and resulted in nerve impingement, causing neck and left shoulder pain. Even though the symptoms may have been manifest in the neck and shoulder area, the injury was to the spinal discs, which are indisputably, the "back." Further, while there may have existed conflicting evidence as to the "degree of plaintiff's impairment, it was for the Commission to weigh the credibility of the witnesses and to decide the issues." *Smith*, 130 N.C. App. at 182, 517 S.E.2d at 166. We therefore overrule this assignment of error.

[4] In their second assignment of error, defendants further contend that the Full Commission erred by finding a causal connection between plaintiff's injury and her disability. We disagree.

"In order for there to be a compensable claim for workers' compensation, there must be proof of a causal relationship between the injury and the employment." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 597, 532 S.E.2d 207, 210 (2000). "In evaluating the causation issue, 'this Court can do no more than examine the record to determine whether any competent evidence exists to support the Commission's findings as to causation[.]' " *Id.* at 598, 532 S.E.2d at 210 (quoting *Young v. Hickory Business Furniture*, 137 N.C. App. 51, 55, 527 S.E.2d 344, 348 (2000)). An opinion by an expert to a reasonable degree of medical certainty that a particular cause could or might have produced the result is sufficient to support an award of workers' compensation benefits. *See Buck v. Proctor & Gamble, Co.*, 52 N.C. App. 88, 96, 278 S.E.2d 268, 273 (1981) (holding that in "viewing the totality of the expert testimony in the light most favorable to

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in the course of employment, where the evidence showed that plaintiff "was not merely carrying on her usual and customary duties in the usual way").

plaintiff," there was some evidence that the incident could have "produced the particular disability in question," and therefore, with respect to the sufficiency of the medical expert's opinion on causation, it is conclusive on appeal).

In the instant case, medical testimony was presented to establish causation. Dr. Miller opined that plaintiff's work-related accident aggravated pre-existing conditions existing prior to the date of the injury. Dr. Miller testified, to a reasonable degree of medical certainty, that the lifting of the four-gallon box by plaintiff could have aggravated a pre-existing condition and that, "in light of those underlying findings, it is possible or likely that [plaintiff's] lifting episode could have exacerbated those underlying, preexisting conditions, to give[] her the pain that she complained about." Dr. Miller further testified that the aggravation of plaintiff's herniated discs resulted in nerve impingement causing plaintiff's neck and left shoulder pain. In light of this testimony, we hold that the Full Commission did not err in determining that plaintiff's pre-existing condition contributed to some reasonable degree to her current disability.

For the foregoing reasons, we hold that there was competent evidence to support the Full Commission's findings and we affirm the opinion and award of the Full Commission.

Affirmed.

Judge HUDSON concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

I do not find competent evidence in the record to support the Commission's finding and conclusion that plaintiff suffered a compensable back injury. I disagree with the majority's application of a "specific traumatic incident" under N.C.G.S. § 97-2(6) to the facts of this case. Therefore, I respectfully dissent.

In order to be compensable under the Workers' Compensation Act ("Act"), an injury must result from an "accident arising out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6) (2001). An accident is an "unlooked for and untoward event which is not expected or designed by the injured employee." *Edwards v. Piedmont Publ'g Co.*, 227 N.C. 184, 186, 41 S.E.2d 592, 593 (1947)

(citations omitted). In 1983, the General Assembly amended N.C.G.S. § 97-2(6) to provide that the term "injury" as applied to back injuries, means an injury resulting from a "specific traumatic incident of the work assigned." *See Richards v. Town of Valdese*, 92 N.C. App. 222, 224, 374 S.E.2d 116, 118 (1988) (citing N.C. Gen. Stat. § 97-2(6)). An employee may show a back injury by proving either (1) injury by accident or (2) injury arising from a specific traumatic incident. *Id.* This amendment eliminated the requirement that a back injury be the result of an "accident." However, "injury by accident" still applies to injuries to parts of the body other than the back. *Id.*

Here, plaintiff repeatedly testified that she felt a "cramp," "catch," or "pull" in her left "shoulder" or "shoulder blade." Plaintiff never testified to an injury to her neck. The majority opinion relies on the testimony of Dr. Miller. Dr. Miller was asked:

> if [plaintiff] previously testified that while working on or about May 8th, [sic] 1998, she felt a catch in her neck while lifting a box which contained approximately four gallons of syrup, do you have an opinion satisfactory to yourself and to a reasonable degree of medical certainty that this incident could or might have caused her injuries, which included disk [sic] herniations at the C4-5—C4-C5, C5-C6, and C6-C7 levels?

(Emphasis supplied.) Dr. Miller's testimony was based on facts not in evidence. His opinion was not competent testimony of a back injury. *See Hubbard v. Quality Oil Co. of Statesville, Inc.*, 268 N.C. 489, 494, 151 S.E.2d 71, 76 (1966) ("Expert testimony on a state of facts not supported by the evidence is inadmissible.").

"[T]here must be some unforeseen or unusual event other than the bodily injury itself" for an incident to constitute an accident within the meaning of the Act. *Rhinehart v. Roberts Super Mkt., Inc.*, 271 N.C. 586, 588, 157 S.E.2d 1, 3 (1967). "If an employee is injured while carrying on his usual tasks in the usual way the injury does not arise by accident." *Gunter v. Dayco Corp.*, 317 N.C. 670, 673, 346 S.E.2d 395, 397 (1986). If an interruption of the work routine occurs introducing unusual conditions likely to result in unexpected consequences, an accidental cause will be inferred. *Id.* Here, plaintiff failed to show a compensable injury by accident.

Plaintiff informed her treating chiropractor that she was injured from repetitive motion. Plaintiff testified on cross-examination that her injury occurred from "constantly do[ing] a job every day, ten to

twelve hours a day." Plaintiff further testified that on 9 May 1998, the date of the incident, she had only one vendor to service and that she lifted forty-pound boxes of syrup everyday as a part of her normal work routine.

The majority opinion, in a footnote, correctly cites that "an extra or unusual degree of exertion by an employee while performing a job may constitute the unforeseen or unusual event or condition necessary to make any resulting injury an injury 'by accident.' " *Jackson v. Fayetteville Area Sys. of Transp.*, 88 N.C. App. 123, 126, 362 S.E.2d 569, 571 (1987) (citing *Jackson v. North Carolina State Highway Commission*, 272 N.C. 697, 158 S.E.2d 865 (1968); *Gabriel v. Town of Newton*, 227 N.C. 314, 42 S.E.2d 96 (1947); *Gladson v. Piedmont Stores*, 57 N.C. App. 579, 292 S.E.2d 18, *disc. rev. denied*, 306 N.C. 556, 294 S.E.2d 370 (1982); *Bingham v. Smith's Transfer Corp.*, 55 N.C. App. 538, 286 S.E.2d 570 (1982); *Porter v. Shelby Knit, Inc.*, 46 N.C. App. 22, 264 S.E.2d 360 (1980)). The facts of the present case are distinguishable.

In *Jackson*, the plaintiff had unusual difficulty in opening a money collection box. *Jackson*, 88 N.C. App. at 124, 362 S.E.2d at 570. Jackson testified that she had no problem with any box until this particular one, that she could not recall ever having a money box that tough to open or that heavy, and that she had not previously had to exert as much pressure to get one to open. *Id.* at 125, 362 S.E.2d at 570. Similarly in *Porter*, the plaintiff suffered an injury by accident when he experienced pain while straining to withdraw a rod from a roll of cloth which was "extra tight" and "unusually hard" to pull out. *Porter*, 46 N.C. App. at 25, 264 S.E.2d at 362. There was no evidence of such unusual exertion here.

Plaintiff did not testify to any unusual exertion in sliding and lifting the syrup box onto the handcart. The majority opines that the addition of stops on plaintiff's vendor route amounted to "an extra or unusual degree of exertion." The evidence does not support this conclusion. Plaintiff testified that she had been servicing the additional stops for three weeks prior to the day of the incident and that she was servicing only one vendor on that day. *See Bowles v. CTS of Asheville, Inc.*, 77 N.C. App. 547, 550, 335 S.E.2d 502, 504 (1985) ("once an activity, even a strenuous or otherwise unusual activity, becomes a part of the employee's normal work routine, an injury caused by such activity is not the result of an interruption of the work routine or otherwise an 'injury by accident' ") (citations omitted).

The evidence fails to establish that there was an interruption of plaintiff's regular work routine nor an unusual degree of exertion to qualify the incident as an injury by accident. *See Swindell v. Davis Boat Works, Inc.*, 78 N.C. App. 393, 397, 337 S.E.2d 592, 594 (1985) (no matter how great the injury, if it occurred under normal working conditions and the employee was injured while performing his regular duties in the usual and customary manner, no accident has occurred). The Commission's findings and conclusions are not supported by the evidence. I would reverse the Opinion and Award of the Commission. Accordingly, I respectfully dissent.

BARRY E. ALFORD, ET AL., PLAINTIFFS v. CATALYTICA PHARMACEUTICALS, INC. AND EASTERN OMNI CONSTRUCTORS, DEFENDANTS

No. COA01-959

(Filed 4 June 2002)

1. Appeal and Error— appealability—interlocutory order—certification for immediate appeal

Although plaintiffs' appeal from the trial court's grant of defendant's motion to dismiss plaintiffs' Woodson claim is an appeal from an interlocutory order since there were further issues remaining for final determination, the appeal will be heard because the trial court certified the order as a final judgment and stated there was no just reason for delay with respect to the claim dismissed.

2. Employer and Employee— *Woodson* claim—motion to dismiss—one-year statute of limitations

The trial court did not err by granting defendant employer's motion to dismiss plaintiff employees' *Woodson* claim based on the trial court's conclusion that plaintiffs' claim was barred by the one-year statute of limitations under N.C.G.S. § 1-54(3), because plaintiffs' *Woodson* claim is equivalent to an intentional tort.

Judge THOMAS dissenting.

Appeal by plaintiffs from order entered 22 February 2001 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 25 April 2002.

Resnick & Abraham, LLC, by Perry J. Pelaez, and Laura S. Jenkins, P.C., by Laura S. Jenkins, for plaintiffs-appellants.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Mark A. Ash and J. Mitchell Armbruster, for defendants-appellees.

TYSON, Judge.

I. Facts

Plaintiffs were employees of Catalytica Pharmaceuticals, Inc. ("defendant"). Defendant contracted with Eastern Omni Constructors ("Eastern Omni") to construct and install a new bulk bromine storage/handling system and components for bromine transfer.

On 15 August 1999, there was a rupture of a component part to the storage tank which caused the release of liquid bromine and bromine gas. Human exposure to bromine can cause death if ingested or inhaled and serious injury if it comes in contact with the skin. Plaintiffs were injured after coming into contact with the bromine liquid or bromine gas.

Plaintiffs filed a complaint against defendant and Eastern Omni on 5 September 2000, alleging: (1) inherently dangerous activity, (2) intentional infliction of emotional distress, (3) assault, (4) battery, and (5) negligence. Defendant filed a motion to dismiss the complaint pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Eastern Omni also moved to dismiss the claim for intentional infliction of emotional distress only, pursuant to Rule 12(b)(6).

On 18 January 2001, plaintiffs filed an amended complaint alleging three causes of action: (1) a *Woodson* claim, (2) intentional infliction of emotional distress, and (3) negligence. A hearing on all the parties' motions was held on 8 February 2001. The trial court: (1) granted plaintiffs' motion to amend their complaint, withdrawing the claims for assault, battery, and inherently dangerous activity; (2) granted defendant's motion to dismiss plaintiffs' *Woodson* claim as barred by the one-year statute of limitations in N.C.G.S. § 1-54; and (3) denied both defendant's and Eastern Omni's motions to dismiss as to plaintiffs' claim for intentional infliction of emotional distress. The trial court certified that portion of the order dismissing plaintiffs' *Woodson* claim for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Plaintiffs appeal. We affirm.

II. Issues

The sole issue presented is whether plaintiffs' claim pursuant to *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), is barred by the one-year statute of limitations in N.C.G.S. § 1-54(3).

[1] This appeal is interlocutory in nature. An order is interlocutory if entered during the pendency of an action and does not dispose of the case but requires further action by the trial court 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) (2001); *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. However, a party may appeal an interlocutory order 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 pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. *See Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993).

In this case, the trial court granted defendant's motion to dismiss plaintiffs' *Woodson* claim, and denied defendant's motion and Eastern Omni's motion to dismiss plaintiffs' claim for intentional infliction of emotional distress. The trial court stated that "there is no just reason for delay with respect to the claim dismissed" and certified the order "as a final judgment." The trial court's order dismissing plaintiffs' *Woodson* claim is a final judgment as to that claim. We may review this issue on appeal, notwithstanding that further issues remain at the trial court for final determination.

[2] The essential question on a motion under Rule 12(b)(6) "is whether the complaint, when liberally construed, states a claim upon which relief can be granted on *any* theory." *Barnaby v. Boardman*, 70 N.C. App. 299, 302, 318 S.E.2d 907, 909 (1984), *rev'd on other grounds*, 313 N.C. 565, 330 S.E.2d 600 (1985) (emphasis in original). When the complaint fails to allege the substantive elements of some legally cognizable claim, or where it alleges facts which defeat any claim, the complaint must be dismissed. *See Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 345-46, 511 S.E.2d 309, 312 (1999). We decide whether plaintiffs' *Woodson* claim was properly dismissed as barred by the statute of limitations.

If a *Woodson* claim is considered to be an intentional tort, it is governed by the one-year statute of limitations pursuant to N.C.G.S.

§ 1-54(3) (1999) and dismissal was appropriate. On the other hand, if a *Woodson* claim is not an intentional tort, it is governed by the three-year statute of limitations pursuant to N.C.G.S. § 1-52(5) (1999) and dismissal was improperly granted. We hold that a claim pursuant to *Woodson* is governed by the one-year statute of limitations in N.C.G.S. § 1-54(3).

Our Supreme Court in *Woodson* held that "when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the [Workers' Compensation] Act." *Woodson*, 329 N.C. at 340-41, 407 S.E.2d at 228. The Court acknowledged that the Workers' Compensation Act ("Act") seeks to balance the competing interests between employers and their employees and implements trade-offs by: (1) providing an injured employee certain and sure recovery without having to prove negligence or face affirmative defenses, and also (2) limiting the recovery available for compensable injuries and removing the employee's right to pursue potentially larger damages awards in civil actions against the employer. *Id.* at 338, 407 S.E.2d at 227 (citing *Pleasant v. Johnson*, 312 N.C. 710, 712, 325 S.E.2d 244, 246-47 (1985)).

Our Supreme Court distinctly noted that in *Pleasant* the doctrine of "constructive intent" has been applied to willful and wanton conduct. *Id.* at 342, 407 S.E.2d at 229. "Constructive intent to injure may provide the mental state necessary for an intentional tort." *Pleasant*, 312 N.C. at 715, 325 S.E.2d at 248. While willful and wanton misconduct is sufficient for holding a co-employee civilly liable, civil actions against employers require more aggravated conduct than willful and wanton in "keeping with the statutory workers' compensation trade-offs." *Woodson*, 329 N.C. at 342, 407 S.E.2d at 229. Substantial certainty is a higher threshold which "serv[es] as a deterrent to intentional wrongdoing and promoting safety in the workplace." *Id.*

In adopting the substantial certainty standard, our Supreme Court cited cases from Louisiana, Michigan, Ohio, and South Dakota. *Id.* at 342-43, 407 S.E.2d at 229-30. We turn to these jurisdictions for their treatment of such claims.

The workers' compensation statutes in Ohio provides that an action for an employment intentional tort shall be brought within one year of the date on which the employee knew or through exercise of reasonable diligence should have known of the injury, condition or disease. *See Christian v. The Scotts Co.*, 710 N.E.2d 1182, 1184 (Ohio App. 1998) (citing R.C. 2305.112(A)). South Dakota has held that "[w]orker's [sic] compensation is the exclusive remedy for all on-the-job injuries to workers except those injuries intentionally inflicted by the employer. Under the intentional tort exception, workers may bring suit against their employers at common law only 'when an ordinary, reasonable, prudent person would believe an injury was *substantially certain* to result from [the employer's] conduct.' " *Jensen v. Sport Bowl, Inc.*, 469 N.W.2d 370, 371 (S.D. 1991) (citing *VerBouwens v. Hamm Wood Products*, 334 N.W.2d 874, 876 (S.D. 1983) (emphasis in original)).

The legislature in Michigan has by statute rejected the "substantially certain" test announced in *Beauchamp v. Dow Chemical Co.*, 398 N.W.2d 882 (1986), and adopted a more rigorous "true intentional tort" standard as the proper test for determining the presence of an intentional tort to overcome the exclusivity of their workers' compensation provisions. *See Gray v. Morley*, 596 N.W.2d 922, 924 (Mich. 1999). The Louisiana Supreme Court has held that "intentional act" as used in their statute means the same as intentional tort, stating that "intent" means that the person either: " '(1) consciously desires the physical result of his act, whatever the likelihood of that result happening from his conduct; or (2) knows that that result is substantially certain to follow from his conduct, whatever his desire may be as to that result.' " *McCool v. Beauregard Memorial Hosp.*, — So.2d —, — (La. App. Apr. 3, 2002) (No. 01-1679) (quoting *Bazley v. Tortorich*, 397 So.2d 475, 481 (La. 1981)).

The courts and legislatures of those jurisdictions followed by our Supreme Court in *Woodson*, consider such claims to be equivalent to an intentional tort and within the intentional tort exception to the exclusivity of the Workers' Compensation Act.

Plaintiffs argue that our Supreme Court "clarified that a claim under *Woodson* was not an intentional tort" in *Owens v. W.K. Deal Printing, Inc.*, 339 N.C. 603, 453 S.E.2d 160 (1995). In *Owens*, our Supreme Court reversed *per curiam* the decision of this Court for the reasons stated in the dissenting opinion. The Court added that "[t]o the extent that it may be read as implying that actions authorized

under [*Woodson*], seek recovery for 'intentional torts' *in the true sense of that term*, we do not accept the reasoning of [the] dissent. We reemphasize that plaintiffs in *Woodson* actions need only establish that the employer intentionally engaged in misconduct and that the employer knew that such misconduct was 'substantially certain' to cause serious injury or death, and thus, the conduct was 'so egregious as to be tantamount to an intentional tort.' " *Id.* at 604, 453 S.E.2d at 161 (emphasis supplied). We find this statement to be qualified by the language "in the true sense of that term."

Plaintiffs argue, and the dissent asserts, that "substantial certainty" originates in negligence. Our courts have acknowledged that certain behavior grounded in negligence is tantamount to an intentional tort, and have implicitly treated such conduct as intentional torts. *E.g., Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956) (malicious conduct, wanton conduct, or a degree of negligence which indicates a reckless indifference to consequences will support punitive damages); *see also State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984) (wanton and reckless conduct will supply malice for second-degree murder).

An intentional tort requires an actual or constructive intent to harm. *Lynn v. Burnette*, 138 N.C. App. 435, 440, 531 S.E.2d 275, 279 (2000) (citing 65 C.J.S. Negligence § 3 (1966)). The intentional tort of battery occurs "when the plaintiff is offensively touched against the plaintiff's will." *Id.* at 439, 531 S.E.2d at 279 (citing *Ormond v. Crampton*, 16 N.C. App. 88, 94, 191 S.E.2d 405, 410, *cert. denied*, 282 N.C. 304, 192 S.E.2d 194 (1972)). Battery does not require malice, willfulness or wantonness. *Id.* at 439-40, 531 S.E.2d at 279 (citing *Myrick v. Cooley*, 91 N.C. App. 209, 215, 371 S.E.2d 492, 496, *disc. review denied*, 323 N.C. 477, 373 S.E.2d 865 (1988)). The intent required for battery may be established by grossly or culpably negligent conduct, *see Jenkins v. Averett*, 424 F.2d 1228, 1231 (1970), wanton and reckless negligence, *see Pleasant*, 312 N.C. at 715, 325 S.E.2d at 248, as well as one's *belief that certain consequences are substantially certain to follow from an action*, *see Jones v. Willamette Industries*, 120 N.C. App. 591, 594, 463 S.E.2d 294, 297 (1995) (emphasis supplied).

Our Supreme Court has repeatedly held that a successful *Woodson* claim does not require actual certainty but substantial certainty. *See Rose v. Isenhour Brick & Tile Co., Inc.*, 344 N.C. 153, 159, 472 S.E.2d 774, 778 (1996); *Mickles v. Duke Power Co.*, 342 N.C. 103,

110, 463 S.E.2d 206, 211 (1995); *see also Regan v. Amerimark Bldg. Products, Inc.*, 127 N.C. App. 225, 227, 489 S.E.2d 421, 423 (1997). We conclude that the additional language in *Owens* was to qualify the dissent's use of "intentional tort" and does not classify a *Woodson* claim as an additional cause of action separate and apart from an intentional tort.

Both parties point out that the North Carolina General Assembly has extended the statute of limitations for intentional torts. *See* N.C. Session Laws 2001-175. However, the statute in effect at the time plaintiffs' alleged *Woodson* claim arose subjects the claim to the one-year statute of limitations.

We reject plaintiffs' argument that "the expression of one thing is the exclusion of another," and conclude that section 1-54(3) applies to all actions substantially similar to those enumerated constituting intentional torts. We hold that plaintiffs' *Woodson* claim is equivalent to an intentional tort and we affirm the trial court's dismissal of this claim as time-barred by N.C.G.S. § 1-54(3).

Affirmed.

Judge MARTIN concurs.

Judge THOMAS dissents.

THOMAS, Judge, dissenting.

Because our courts have not consistently held that an action forming the basis of a *Woodson* claim is an intentional tort "in the true sense of that term," I respectfully dissent.

The one-year statute of limitations as prescribed in N.C. Gen. Stat. § 1-54(3) (1999) is inapplicable even if a *Woodson* claim is 99.9% an intentional tort. The standard is not flexible under any circumstances—it must be an intentional tort in every sense of the word, absolutely, or there is no room in that section for *Woodson*.

Statutes of limitation are inflexible and unyielding and the trial court has no discretion when considering whether a claim is barred by the applicable statute of limitations. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

In *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), our Supreme Court held there is an exception to the exclusivity clause of

the North Carolina Workers' Compensation Act where an employer had knowledge that an injury was substantially certain to occur under the circumstances. The *Woodson* court allowed a separate civil action, stating:

> the legislature did not intend to relieve employers of civil liability for intentional torts which result in injury or death to employees. In such cases the injury or death is considered to be both by accident, for which the employee or personal representative may pursue a compensation claim under the Act, and the result of an intentional tort, for which a civil action against the employer may be maintained.

Id. at 338-39, 407 S.E.2d at 227. The *Woodson* court held that

> when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is seriously injured or killed by that misconduct, . . . [s]uch misconduct is *tantamount* to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act.

Id. at 340-41, 407 S.E.2d at 228. (Emphasis added). *See also* Daye & Morris, *North Carolina Law of Torts* § 2.31, at 6 & n.10 (2d ed. 1999).

However, in *Owens v. W.K. Deal Printing, Inc.*, 339 N.C. 603, 453 S.E.2d 160 (1995), our Supreme Court explained that a *Woodson* claim is not an intentional tort "in the true sense of that term." *Id.* at 604, 453 S.E.2d at 161. In *Pendergrass v. Card Care, Inc.*, 333 N.C. 233, 424 S.E.2d 391 (1993), our Supreme Court stated that a *Woodson* claim involved a "higher degree of reckless *negligence* than willful, wanton and reckless negligence[,]" but did not say the claim involved an intentional tort. *Id.* at 240, 424 S.E.2d at 395. (Emphasis added).

This evolving characterization ranging from an "intentional tort," to "tantamount to an intentional tort," to an extremely high level of "negligence," to not an intentional tort "in the true sense of that term," clearly removes *Woodson* from the necessarily seamless definition needed for inclusion in section 1-54(3). The "substantial certainty" test set forth in *Woodson* is one of the tests utilized in establishing intent for an intentional tort, yet its description appears to originate in negligence theory.

There is in fact a continuum of tortious conduct, with actual intent on one end and mere recklessness and negligence on the other.

See Woodson, 329 N.C. at 341, 407 S.E.2d at 228-29; Logan & Logan, *North Carolina Torts* § 17.20 (1996). It is generally clear where substantial certainty is on that continuum. However, it is unclear precisely where a *Woodson* claim is on the continuum and how it should be procedurally treated.

In *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981), our Supreme Court held that because no statute of limitations addressed the tort of intentional infliction of emotional distress, the general three-year statute of limitations pursuant to section 1-52(5) must govern. There is no specific limitation set forth in our General Statutes for a *Woodson* claim. Unlike Michigan, as cited in the majority opinion, our General Assembly has not acted to establish the statute of limitations at one year and has not adopted what the majority refers to as a "more rigorous true intentional tort test." If that "true intentional tort test" is indeed "more rigorous," then by the majority's own description section 1-54(3) is not applicable. Therefore, this claim, as with intentional infliction of emotional distress, must be controlled by the catch-all three-year statute of limitations in section 1-52(5). *See also Smith v. Cessna Aircraft Co., Inc.*, 571 F.Supp. 433 (M.D.N.C. 1983) (holding that absent other specific limitation, N.C. Gen. Stat. § 1-52(5) is applicable).

For these reasons, I respectfully dissent and vote to reverse the trial court's grant of summary judgment.

STATE OF NORTH CAROLINA v. SHANNON DEWAYNE WILLIAMS

No. COA01-496

(Filed 4 June 2002)

1. Assault— inflicting serious bodily injury—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of assault inflicting serious bodily injury even though defendant contends there was insufficient evidence the victim suffered serious bodily injury as found under part of N.C.G.S. § 14-32.4 and the jury instructions defined serious bodily injury as an injury that creates or causes a permanent or protracted condition that causes extreme pain, because: (1) the

evidence tends to show the victim suffered a broken jaw which was wired shut for two months, and during those two months the victim lost thirty pounds; (2) the victim testified that the injury to his jaw resulted in $6,000 worth of damage to his teeth, that his ribs were broken, that he suffered back spasms on two occasions that made it so difficult for him to breathe that he had to visit the emergency room, and that his back spasms had continued up until the day he testified at trial; and (3) a doctor testified that the type of injury suffered by the victim, the broken jaw, would cause a person quite a bit of pain and discomfort.

2. Evidence— limitation on cross-examination—prior convictions for shoplifting

Assuming arguendo that the trial court erred in an assault inflicting serious bodily injury case by failing to allow defense counsel to further cross-examine one of the State's witnesses with respect to her prior convictions for shoplifting, defendant has failed to show prejudicial error because: (1) defendant has failed to meet his burden of showing that there is a reasonable possibility that a different result would have been reached absent the alleged error; and (2) contrary to defendant's contention that this witness was the only one who testified that defendant actually delivered blows to the victim, two other witnesses testified that defendant joined a coparticipant in the actual beating and kicking of the victim.

3. Burglary and Unlawful Breaking or Entering— misdemeanor breaking or entering—first-degree trespass

The trial court erred by sentencing a defendant for both first-degree trespass and misdemeanor breaking or entering, and defendant's conviction for first-degree trespass must be vacated and his conviction for resisting a public officer that was consolidated with his conviction for first-degree trespass must be remanded for resentencing, because: (1) first-degree trespass is a lesser included offense of misdemeanor breaking or entering; and (2) whether defendant's conviction of resisting a public officer warrants the sentence imposed in connection with the two consolidated crimes is a matter for the trial court to reconsider.

Appeal by defendant from judgments entered 24 October 2000 by Judge Loto G. Caviness in Haywood County Superior Court. Heard in the Court of Appeals 14 February 2002.

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

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

CAMPBELL, Judge.

Defendant was indicted for assault inflicting serious bodily injury in violation of N.C. Gen. Stat. § 14-32.4, felonious breaking or entering, first degree trespass, and resisting a public officer. Defendant was tried at the 23 October 2000 Criminal Session of Haywood County Superior Court. Defendant was found guilty of assault inflicting serious bodily injury, misdemeanor breaking or entering, first degree trespass, and resisting a public officer. Defendant was sentenced to a minimum prison term of 25 months with a maximum term of 30 months for the assault inflicting serious bodily injury conviction. Defendant was sentenced to a consecutive term of 120 days for the misdemeanor breaking or entering conviction. Defendant's convictions for first degree trespass and resisting a public officer were consolidated for judgment, and defendant was sentenced to an additional consecutive term of 60 days. Defendant appeals. For the reasons stated herein, we hold no error as to defendant's convictions for assault inflicting serious bodily injury and misdemeanor breaking or entering; however, we vacate defendant's first degree trespass conviction and remand defendant's resisting a public officer conviction for a new sentencing hearing.

The State's evidence tended to show that around midnight on the evening of 16 February 2000, Ronald Barton Moore ("Moore") was asleep in his home when he was awakened by Amber, his teenage daughter, and Rose Marie Chapman ("Chapman"). Chapman is the mother of one of Amber's friends, and Amber was staying at Chapman's apartment that night. Chapman came to Moore's house to seek his help in making several young men leave her apartment. Moore rode with Chapman to her apartment, and upon entering the apartment, found defendant and four or five other young men in the apartment drinking liquor. At the request of Chapman, Moore asked the men to leave the apartment, to which the men responded that it was not Moore's house and he had no right to ask them to leave. When the men refused to leave, Chapman told Moore that it would probably be better if Moore and Amber left, and that she would probably call the police. As Moore and Amber were walking to the vehicle of a neighbor who was to take them home, defendant and one

of the other men, Jason Caldwell ("Caldwell"), attacked Moore. Caldwell punched Moore in the face, knocking him to the ground, and Caldwell and defendant began kicking Moore. The two men stopped after a few minutes and Moore was helped onto the porch, whereupon defendant punched Moore in the eye and kicked him three or four more times before Moore passed out.

As a result of the attack by defendant and Caldwell, Moore suffered a broken jaw which had to be wired shut for two months. During those two months, Moore lost thirty pounds. Moore also testified that his ribs were broken and that he had been forced to go to the emergency room on two occasions since the attack due to back spasms that made it difficult for him to breathe. Moore testified that he was still suffering from back spasms at the time of the trial. In addition, Moore testified that he suffered from blurred vision after the attack, and that he had $6,000.00 in damage to his teeth.

Dr. Tannehill's testimony confirmed that Moore's jaw had been broken and that Dr. Tannehill had performed the surgery in which Moore's jaw was wired shut. Dr. Tannehill further testified that a broken jaw is the type of injury that causes "quite a bit" of pain and discomfort that "gradually subsides over a period of time, in varying degrees to the type of [] injury." Dr. Tannehill testified that Moore had bruised, not broken, ribs.

Darrell Burnette ("Burnette"), a neighbor of Chapman, testified that he was awakened in the early morning hours of 17 February 2000 by defendant and Caldwell knocking on his back door. When Burnette opened the door to see what the two men wanted, they asked to use the telephone. Burnette noticed that the two men were "badly intoxicated," told them that his telephone did not work, shut the door, and started back to bed. Defendant and Caldwell knocked on the door a second time, and when Burnette again opened it, the two men asked for a "light." Burnette told them that he did not have a "light," and that they should go about their business. Burnette again shut the door, turned out the light, and started back to bed, whereupon he heard a window next to the back door break. At that point, Burnette picked up a mattock handle, opened the back door again, and began arguing with defendant and Caldwell. As Burnette and the two men were arguing, Officer Tamara Vandermolan, who had been summoned to the scene as a result of Burnette's wife's call to 911, arrived at the house. As Officer Vandermolan was preparing to handcuff the two men, they ran off,

with Officer Vandermolan pursuing one and Burnette pursuing the other.

At the outset, we note that defendant sets forth twenty-three assignments of error, but fails to address many of them in his brief. Those assignments of error not presented or discussed in defendant's brief are deemed abandoned pursuant to Rule 28(a) of the North Carolina Rules of Appellate Procedure.

[1] Defendant first contends that the trial court erred in denying his motion to dismiss the felony assault charge, arguing that the evidence was insufficient to show that the victim, Moore, suffered "serious bodily injury," as defined in N.C.G.S. § 14-32.4.

In ruling on a motion to dismiss on the ground of insufficiency of the evidence, the trial court must determine "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence is that which a reasonable juror would consider sufficient to support a conclusion that each essential element of the crime exists." *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000). "[I]t is well settled that the evidence is to be considered in the light most favorable to the State and that the State is entitled to every reasonable inference to be drawn therefrom." *State v. Alexander*, 337 N.C. 182, 187, 446 S.E.2d 83, 86 (1994).

Defendant was charged and convicted of assault inflicting serious bodily injury, which "requires proof of two elements: (1) the commission of an assault on another, which (2) inflicts serious bodily injury." *State v. Hannah*, 149 N.C. App. 713, — S.E.2d — (COA 00-1377, filed 16 April 2002) (citing *State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563 (2001)); N.C. Gen. Stat. § 14-32.4 (1999). While it is clear that there is substantial evidence of the first element of this offense, defendant argues that there was insufficient evidence that he inflicted "serious bodily injury" on Moore. We disagree.

In 1996, the General Assembly created the offense of assault inflicting "serious bodily injury" by enacting N.C.G.S. § 14-32.4, which reads:

> Unless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts serious bodily injury is guilty of a Class F felony. "Serious bodily injury" is defined as bodily injury

> that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C.G.S. § 14-32.4 (1999).

Prior to passage of N.C.G.S. § 14-32.4, the primary statutes dealing with assaults in this jurisdiction were N.C.G.S. §§ 14-32 and 14-33. N.C.G.S. § 14-33 makes an assault that inflicts "serious injury" a Class A1 misdemeanor. N.C.G.S. § 14-32 makes an assault with a deadly weapon that inflicts "serious injury" a Class E felony, and makes an assault with a deadly weapon with intent to kill that inflicts "serious injury" a Class C felony. In the past, the courts of this State have declined to define "serious injury" for purposes of assault prosecutions other than stating that the term "serious injury" means physical or bodily injury resulting from an assault, *Alexander*, 337 N.C. at 188, 446 S.E.2d at 87, and that "[f]urther definition seems neither wise nor desirable." *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962). In *State v. Hedgepeth*, 330 N.C. 38, 409 S.E.2d 309 (1991), the Supreme Court explained:

> Whether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions. A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury is serious. Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury.

Id. at 53, 409 S.E.2d at 318 (internal citations omitted). In sum, the case law addressing the issue of the sufficiency of evidence of serious injury in an assault prosecution stands for the proposition "that as long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine whether the injury was serious." *Alexander*, 337 N.C. at 189, 446 S.E.2d at 87.

Subsequent to the definition of "serious injury" becoming well settled in case law, the General Assembly enacted N.C.G.S. § 14-32.4, which makes an assault inflicting "serious bodily injury" a Class F felony, "[u]nless the conduct is covered under some other provision of law providing greater punishment." N.C.G.S. § 14-32.4. The

General Assembly also expressly defined what it meant by the term "serious bodily injury." In so doing, we conclude that the General Assembly intended for N.C.G.S. § 14-32.4 to cover those assaults that are especially violent and result in the infliction of extremely serious injuries, and are not covered by some other provision of law providing for greater punishment. Thus, this Court has concluded that "serious bodily injury," as set forth in N.C.G.S. § 14-32.4, requires proof of more severe injury than the "serious injury" element of other assault offenses. *Hannah*, 149 N.C. App. at 717, — S.E.2d at —.

In determining whether the trial court in the instant case erred in denying defendant's motion to dismiss, we must determine whether the record contains substantial evidence that Moore suffered "serious bodily injury" as defined by N.C.G.S. § 14-32.4. However, in making this determination, we do not consider the entire definition set forth in N.C.G.S. § 14-32.4; rather we are limited to that part of the definition set forth in the trial court's instructions to the jury. In instructing the jury, the trial court defined "serious bodily injury" as "an injury that creates or causes a permanent or protracted condition that causes extreme pain." It is well settled that a defendant may not be convicted of an offense on a theory of guilt different from that presented to the jury. *State v. Helton*, 79 N.C. App. 566, 568, 339 S.E.2d 814, 816 (1986). Had the trial court instructed the jury on the complete definition of "serious bodily injury" set out in N.C.G.S. § 14-32.4, defendant's conviction could be sustained on any one of the discrete portions of the definition. However, since the trial court limited its instruction in the way it did, we must determine whether the record contains substantial evidence that Moore suffered from "a permanent or protracted condition that causes extreme pain."

Viewing the evidence in the light most favorable to the State, we hold that there was sufficient evidence that the victim suffered a "serious bodily injury" consistent with the instruction given to the jury. The evidence tends to show that Moore suffered a broken jaw which was wired shut for two months. During those two months, Moore lost thirty pounds. Moore testified that the injury to his jaw resulted in $6,000.00 worth of damage to his teeth. Moore also testified that his ribs were broken and that he suffered back spasms on two occasions that made it so difficult for him to breathe that he had to visit the emergency room. Finally, Moore testified that his back spasms had continued up until the day he testified at trial. Dr. Tannehill testified that the type of injury suffered by Moore, the broken jaw, would cause a person "quite a bit" of pain and discom-

fort. We conclude that a reasonable juror could find this evidence sufficient to conclude that Moore's injuries created a "protracted condition that cause[d] extreme pain." Thus, the trial court did not err in denying defendant's motion to dismiss, and defendant's first assignment of error is overruled.

[2] Defendant next contends that the trial court erred in not allowing defense counsel to cross-examine one of the State's witnesses, Rose Marie Chapman, with respect to her prior convictions for shoplifting.

It is the well-settled rule in North Carolina that for the purposes of impeachment, a witness may be cross-examined with respect to prior convictions of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor. N.C. Gen. Stat. § 8C-1, Rule 609(a) (1999); *State v. Finch*, 293 N.C. 132, 141, 235 S.E.2d 819, 824 (1977); *State v. Gallagher*, 101 N.C. App. 208, 211, 398 S.E.2d 491, 493 (1990). In the instant case, the following exchange occurred during cross-examination of Chapman by defense counsel:

> Q What, if any, crimes have you been convicted of in the last 10 tens [sic] [years] that carries [sic] a sentence of 60 days or more?
>
> A I've been caught for shoplifting twice.
>
> Q When was that?
>
> A Ummm, let's see, back in '98 and then it was in '99.
>
> Q Were you found guilty of those two charges?
>
> MR. JONES: Your Honor, I would object. Those aren't charges that carries [sic] more than 60 days anyway.
>
> THE COURT: Sustained at this point.

At that point, defense counsel moved on to another line of questioning. On appeal, defendant contends that the trial court erred in sustaining the State's objection because a second offense of shoplifting is a Class 2 misdemeanor, and, therefore, a proper subject of impeachment under Rule 609(a).

Assuming, *arguendo*, that the trial court erred in not allowing defense counsel to question the witness further concerning her possible prior convictions, we conclude that defendant has failed to meet his burden of showing that there is a reasonable possibility that, had the alleged error in question not been committed, a different result

would have been reached at trial. N.C. Gen. Stat. § 15A-1443 (1999). Thus, defendant has failed to show prejudicial error.

While defendant maintains that Rose Marie Chapman was the State's most damaging witness, and the only reliable witness who testified that defendant was involved in the actual beating and kicking of Moore, the record reveals otherwise. In addition to the victim's testimony that defendant hit him in the eye and kicked him three or four times, Amber Moore and Chris Reagan both testified that defendant joined Jason Caldwell in the actual beating and kicking of the victim. Thus, we disagree with defendant's contention that Rose Marie Chapman was the only witness who testified that defendant actually delivered blows to the victim, and we find no prejudicial error.

[3] Defendant next contends that the trial court erred in entering judgment against him for both first degree trespass and misdemeanor breaking or entering. The State concedes that first degree trespass is a lesser included offense of misdemeanor breaking or entering, *see* N.C. Gen. Stat. § 14-159.14 (1999), and, therefore, that defendant is correct that his conviction for first degree trespass must be vacated and judgment thereon arrested.

However, the State argues that since defendant's conviction for first degree trespass was consolidated for judgment with his conviction for resisting a public officer, both of which are classified as Class 2 misdemeanors, resentencing is not required for defendant. The record shows that the trial court consolidated both crimes for judgment and sentenced defendant to 60 days, within the range for a Class 2 misdemeanor committed by someone at defendant's prior record level. N.C. Gen. Stat. § 15A-1340.23(c) (1999). The State contends that since defendant's conviction for resisting a public officer remains undisturbed, resentencing is not necessary. We disagree.

In *State v. Brown*, 350 N.C. 193, 513 S.E.2d 57 (1999), the defendant received a consolidated sentence of thirty years for her conviction of solicitation to commit murder and conspiracy to commit murder. On appeal, the Supreme Court vacated the conviction of solicitation to commit murder. The Court held that judgment on the conspiracy to commit murder conviction must be remanded to the trial court for resentencing because "we cannot assume that the trial court's consideration of two offenses, as opposed to one, had no affect [sic] on the sentence imposed." *Id.* at 213, 513 S.E.2d at 70.

In the instant case, defendant's conviction of resisting a public officer would support a sentence of 60 days. However, whether that crime warrants the sentence imposed in connection with the two consolidated crimes is a matter for the trial court to reconsider. *See State v. Parker*, 143 N.C. App. 680, 550 S.E.2d 174 (2001). Thus, defendant's conviction of resisting a public officer must be remanded for a new sentencing hearing.

Having ruled in defendant's favor on this assignment of error, we need not consider defendant's remaining assignments of error pertaining to his first degree trespass conviction.

Accordingly, we hold that defendant received a fair trial free from prejudicial error on assault inflicting serious bodily injury and misdemeanor breaking or entering, that defendant's conviction for first degree trespass is hereby vacated and judgment thereon arrested, and that the judgment on the resisting a public officer conviction is hereby remanded for resentencing.

No. OO CRS 3039: Assault inflicting serious bodily injury: No error.

No. OO CRS 3901: Misdemeanor breaking or entering: No error;
First degree trespass: Conviction vacated and judgment arrested;
Resisting a public officer: Remanded for resentencing.

Judges MARTIN and HUDSON concur.

WENDLE SHEEHAN, EMPLOYEE, PLAINTIFF v. PERRY M. ALEXANDER CONSTRUCTION COMPANY, EMPLOYER, SELF-INSURED, PCA SOLUTIONS, SERVICING AGENT, DEFENDANT

No. COA01-606

(Filed 4 June 2002)

1. Workers' Compensation— back injury—date treatment sought—orthopaedic clinic rather than triage area—typographical error

The Industrial Commission did not err in focusing on the date that plaintiff was seen in the orthopaedic clinic of a hospital for

a back injury rather than the date on which plaintiff was seen in the triage area of the hospital, and the Commission's use of the incorrect year was a typographical error which was not a ground for reversal.

2. Workers' Compensation— credibility—doctor's testimony—history given by plaintiff

The Industrial Commission did not act arbitrarily or contrary to reason in concluding that plaintiff failed to carry his burden of proving that his back injury is compensable where the only record evidence of how plaintiff injured his back consists of the account given by plaintiff and the statements of others, including doctors, that are based on plaintiff's account. Once the Commission determined that plaintiff's account of his injury was not credible, it acted within its authority in refusing to give much weight to a doctor's history which was based upon the history supplied by plaintiff. The Commission's credibility determinations were within its discretion and its findings are supported by competent evidence.

3. Workers' Compensation— consideration of evidence—determination of credibility

The Industrial Commission in a workers' compensation action on remand from the Court of Appeals considered the evidence appropriately where the Commission determined that plaintiff's account of his injury was not credible and decided not to rely on the portion of the medical evidence based on plaintiff's account. The Commission may not discount or disregard evidence, but may choose not to believe evidence after considering it.

Appeal by Plaintiff from opinion and award entered 14 February 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 February 2002.

H. Paul Averette, for plaintiff-appellant.

Teague, Rotenstreich & Stanaland, L.L.P., by Elizabeth M. Stanaland and Paul A. Daniels, for defendant-appellee.

HUDSON, Judge.

Wendle Sheehan ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission (the "Commission") denying him workers' compensation benefits. We affirm.

Plaintiff was born on 19 June 1948. He has a ninth-grade education and served in the U.S. Army from 1966 until 1969. Since his discharge from the Army, plaintiff has worked primarily in heavy equipment and construction. Prior to his employment with Perry M. Alexander Construction Company ("defendant"), plaintiff had a history of lower back problems and work-related injuries. He underwent three lumbar procedures in 1980, 1982, and 1990. Although plaintiff continued to experience pain and discomfort in his back following the 1990 surgery, he was able to work.

Plaintiff began working as a bulldozer operator for defendant in November 1990. He alleges that on 13 April 1992, while he was working at a construction site in Marion, North Carolina, he hurt his back while operating the bulldozer. According to plaintiff's testimony before the Deputy Commissioner, he backed up his bulldozer over a large rock, and the bulldozer fell about three to four feet, jarring him and causing pain in his back and down his leg.

On 4 May 1992, plaintiff went to the emergency room at Transylvania Community Hospital, where he reported that he had hurt his back in a bulldozer accident. Plaintiff continued to work, although he experienced continual pain and discomfort. On 19 May 1992, plaintiff was terminated from his job with defendant.

On 27 July 1992, plaintiff began a course of treatment at the Veteran's Administration Medical Center (the "VAMC"). He reported to medical personnel at the VAMC that he had injured his back in a bulldozer accident. He was first seen in the orthopaedic clinic of the VAMC on 17 August 1992. On 8 November 1993, after his leg gave way causing him to fall at home, plaintiff was seen by Glyndon B. Shaver, Jr., M.D., Chief of Orthopaedic Surgery at the VAMC.

Plaintiff filed a Form 18, Notice of Accident to Employer, on 18 September 1992, and defendant denied workers' compensation to plaintiff. Plaintiff's claim was heard by a Deputy Commissioner on 26 November 1996. The Deputy Commissioner awarded compensation, and defendant appealed. On 1 September 1999, the Full Commission reversed the Deputy Commissioner's opinion and award, and plaintiff appealed to this Court.

In an unpublished opinion, we vacated the opinion and award of the Full Commission. We overruled several assignments of error to certain of the Commission's findings of fact, but we found merit in plaintiff's assignment of error to the following findings:

11. Plaintiff's claim that he injured his back while operating a bulldozer on 13 April 1992 is not credible.

. . . .

13. Given our finding that plaintiff's claim that he suffered an accidental, work-related injury is not credible, his current condition is due to non-compensable causes.

We held as follows:

> In the case at bar, the Commission impermissibly disregarded the testimony of Dr. Shaver. The Commission made no reference to Dr. Shaver's testimony in its findings of fact or conclusion of law. This omission was error, particularly because Dr. Shaver's testimony corroborated plaintiff's testimony. Accordingly, we vacate the opinion and remand the case to the Commission for it to consider all of the evidence, make complete findings of fact and proper conclusions of law, and enter an appropriate award.

On remand, the Commission replaced the findings of fact quoted above with the following new findings:

> 11. Plaintiff sought medical treatment for his back on 4 May 1992 at Transylvania Community Hospital and subsequently through the Veteran's Administration Medical Center where he was seen in the orthopaedic clinic on 17 August 1993. Thereafter, plaintiff fell at home when his leg gave way. Consequently, plaintiff was then seen on 8 November 1993 for the first time by Dr. Glyndon Shaver who was Chief of Orthopaedic Surgery at the Veteran's Administration Medical Center. Plaintiff related the alleged injury of 13 April 1992 to Dr. Shaver as well as to several other physicians. Next, Dr. Shaver saw plaintiff on 19 November 1993 at which time plaintiff was rated with a 40-50% permanent partial impairment to the back under the AMA guidelines.
>
> 12. Plaintiff's claim that he injured his back while operating a bulldozer on 13 April 1992 is not credible. Furthermore, any medical evidence of record that corroborates plaintiff's alleged injury including the records and testimony of Dr. Shaver is given little weight as it is based on an inaccurate history provided by plaintiff. Moreover, although Dr. Shaver based his opinion that plaintiff suffered an exacerbation of his back condition on 13 April

> 1993 on a thorough review of plaintiff's medical records, these records also contain inaccuracies and lack credibility.
>
> . . . .
>
> 14. Given that plaintiff's claim that he suffered an accidental, work-related injury is not credible and any medical evidence supporting plaintiff's claim including that of Dr. Shaver has been tainted by an inaccurate history provided by plaintiff, plaintiff's current condition is due to non-compensable causes.

Plaintiff now appeals, assigning error to these findings of fact.

On review of a decision of the Commission, we are "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). An appellate court "does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (internal quotation marks omitted).

The Full Commission is the "sole judge of the weight and credibility of the evidence." *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Furthermore,

> the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission's explanation of those credibility determinations would be inconsistent with our legal system's tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.

Id. at 116-17, 530 S.E.2d at 553. Additionally, in making its determinations, the Commission "is not required . . . to find facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission. Instead the Commission must find those facts which are necessary to support its conclusions of law." *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000) (internal quotation marks omitted) (alteration in original); *see* N.C.

Gen. Stat. § 97-86 (1999). Moreover, the Commission must "make specific findings with respect to crucial facts upon which the question of plaintiff's right to compensation depends." *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977).

[1] In his first assignment of error, plaintiff contends that Finding of Fact No. 11 is not supported by competent evidence. In particular, plaintiff assigns error to the finding that "Plaintiff sought medical treatment for his back on 4 May 1992 at Transylvania Community Hospital and subsequently through the Veteran's Administration Medical Center where he was seen in the orthopaedic clinic on 17 August 1993." Plaintiff observes that, according to his medical records from the VAMC, he first sought treatment for his back there on 27 July 1992. Plaintiff argues that the date on which he first sought treatment is a crucial fact, and that the Commission's inaccurate finding of this fact demonstrates that the Commission disregarded competent evidence, namely all of plaintiff's visits to the VAMC occurring between July 1992 and August 1993.

Although plaintiff first sought treatment at the VAMC on 27 July 1992, he was not seen in the orthopaedic clinic until 17 August 1992. We do not believe the Commission erred in focusing on the date that plaintiff was seen in the orthopaedic clinic rather than the date on which plaintiff was seen in the triage area of the hospital, especially since it accurately found that the first date he sought any treatment after the alleged accident was 4 May 1992. With respect to the year, our review of plaintiff's medical records reveals that he was not seen at the VAMC on 17 August 1993, but that he was seen there on 17 August 1992. We agree with defendant that the Commission's use of "1993" rather than "1992" is apparently a typographical error. In light of our disposition of the plaintiff's next contentions, we do not believe that the error is grounds for reversal. Accordingly, this assignment of error is overruled.

[2] Plaintiff next assigns error to Findings of Fact No. 12 and No. 14, on the ground that these findings are "totally unsupported by competent evidence" and are "so arbitrary that they do not appear to be the result of a reasoned decision." Hence, plaintiff argues, the Commission's conclusion that plaintiff's injury was not compensable, being based on unsupported findings, is also in error. We disagree.

Plaintiff contends that there is no competent evidence supporting the Commission's finding that the medical evidence that tends

to corroborate plaintiff's account is based on an inaccurate history provided by plaintiff. Plaintiff observes that "all of Plaintiff's statements given to medical personnel from his first visit to the emergency room on 4 May 1992 and continuing throughout the course of his treatment say the same thing—that he began experiencing pain in his lower back and right leg after being involved in a bulldozer accident on the job in April of 1992." Although this accurately characterizes the record evidence, it does not resolve the credibility of plaintiff's statements, which assessment is not within our province. *See Deese*, 352 N.C. at 116-17, 530 S.E.2d at 553; *see also Weaver v. American National Can Corp.*, 123 N.C. App. 507, 510, 473 S.E.2d 10, 12 (1996) (stating that the Commission is "the sole judge of the credibility of the witness and the weight to be given its testimony" (internal quotation marks omitted)). The fact that plaintiff repeatedly gave the same account of his injury tends to lend credence to that account. Nevertheless, the Commission found that plaintiff's account of his bulldozer accident was not credible, and we cannot overturn the Commission's finding regarding plaintiff's credibility. Moreover, while the Commission is not required to explain its credibility determinations, and this Court does not review the Commission's explanation of its credibility determinations, *see Deese*, 352 N.C. at 116-17, 530 S.E.2d at 553, we note that the Commission found facts that tended to undermine plaintiff's allegation that he sustained an injury at work. For example, the Commission made the following findings of fact, which we affirmed as supported by the record when this case was previously before us:

> 7. Randy Lee Keever, plaintiff's co-worker, testified that there were no large rocks on the Marion project site at the time plaintiff was operating his bulldozer. Plaintiff was scraping topsoil and spreading dirt, and no rocks were unearthed until later in the project when the digging was much deeper. Plaintiff's explanation of the cause of the alleged specific traumatic incident is deemed not credible.
>
> 8. Plaintiff claimed to have told one of the pan operators, probably Randy Keever, to report to Jerry Cochran that plaintiff had hurt himself. Thereafter, plaintiff testified that he told Cochran himself of the injury. Plaintiff stated that Mr. Cochran was the grading foreman and in charge of the job. Plaintiff did not work the rest of the day, and Cochran finished the dozing. Plaintiff stated that he also told another co-worker, Tony Keever, of his injury.

9. Randy Keever testified that plaintiff never told him of a back injury. Karen Smyly, personnel manager and bookkeeper for defendant, testified that she never received an injury report regarding plaintiff's alleged incident. Kevin Hensley, a field mechanic for defendant, was on the Marion job site checking the equipment at least once every day while plaintiff was there. He testified that plaintiff never told him he had injured his back while working there. Leroy Peek, superintendent of the job at which plaintiff claimed to have been injured, testified that plaintiff never reported to him that he had been injured. Further, Mr. Peek worked with plaintiff daily at the next job he worked on, and plaintiff never mentioned that he had incurred a back injury on the Marion job. Mr. Peek also testified that had plaintiff injured his back on the job, he knew the procedures for notifying the office of the injury and obtaining medical care.

Plaintiff also asserts that the history of the injury he provided to medical personnel is "unrefuted and without contradiction" in his medical records. We first note that plaintiff's medical records and Dr. Shaver's testimony suggest that plaintiff did in fact re-injure his back, and the Commission did not make a contrary finding. However, the issue here is not whether plaintiff was injured, but whether his injury was work-related. Plaintiff bears the burden of proving that his injury was work-related. *See Gibbs v. Leggett & Platt, Inc.*, 112 N.C. App. 103, 107, 434 S.E.2d 653, 656 (1993).

The medical records reflect that plaintiff reported to medical personnel that he injured his back in a bulldozer accident, and Dr. Shaver's opinion that plaintiff's back injury was exacerbated by a bulldozer accident was based on the history provided by plaintiff and recorded in his medical records. For example, Dr. Shaver testified that "[t]he history that [plaintiff] gave from the record was that he had injured himself in a bulldozer accident." Dr. Shaver also testified that it was his "considered opinion . . . that Mr. Sheehan, *by history*, had a definite exacerbation of a preexisting condition as the result of his bulldozer accident." (emphasis added). Similarly, Dr. Shaver testified that "Mr. Sheehan's exacerbations, *according to the record*, *appear to be related to* a bulldozer accident in April, 1992." (emphasis added). After a colloquy revealed that Dr. Shaver did not personally take plaintiff's history, Dr. Shaver testified as follows:

Q. Basically, Dr. Shaver, you read the record . . ., didn't you?

A. Yes.

Q. And the record showed clearly that Mr. Sheehan reported that he had had a bulldozer accident?

A. That's correct.

Q. And not only on just one occasion, but that record indicates that he had made that report several times, does it not?

A. That's true.

Q. Now you may go ahead, if you have an opinion.

A. Well, I have an opinion, and the opinion is that the accident certainly was of the degree that it could have caused a recurrent disk rupture at that level, even though he had been operated on three times previously.

In sum, while Dr. Shaver indicated that plaintiff's condition was consistent with injury in a bulldozer accident, as plaintiff described, Dr. Shaver had no independent knowledge that such an incident occurred.

Once the Commission determined that plaintiff's account of his injury was not credible, it acted within its authority in refusing to give much weight to Dr. Shaver's opinion based on the history supplied by plaintiff. Therefore, we conclude that the Commission's credibility determinations were within its discretion and its findings are supported by competent evidence. *See Chapman v. Southern Import Co.*, 63 N.C. App. 194, 196, 303 S.E.2d 824, 825 (1983) ("If there is evidence of substance which directly or by reasonable inference tends to support the findings, the Court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary." (internal quotation marks omitted)).

The only record evidence regarding how plaintiff injured his back consists of the account given by plaintiff and the statements of others that are based on plaintiff's account. Once the Commission rejected that account, no evidence remained indicating that plaintiff sustained his injury in a work-related accident. Accordingly the Commission did not act arbitrarily or contrary to reason in concluding that plaintiff failed to carry his burden of proving that his injury is compensable. *See Gibbs*, 112 N.C. App. at 107, 434 S.E.2d at 656.

[3] In his final assignment of error, plaintiff contends that the Commission failed to consider all of the evidence and make complete

findings of fact, as mandated by this Court on remand. As a result, plaintiff maintains, the Commission failed to make proper conclusions of law and failed to enter an appropriate award. We disagree.

In its first opinion and award, the Commission made no mention whatsoever of Dr. Shaver's testimony. We were thus forced to conclude that the Commission had "impermissibly disregarded the testimony of Dr. Shaver," which it may not do. *See Harrell v. Stevens & Co.*, 45 N.C. App. 197, 205, 262 S.E.2d 830, 835, *disc. review denied*, 300 N.C. 196, 269 S.E.2d 623 (1980). Therefore, we remanded for the Commission "to consider all of the evidence, make complete findings of fact and proper conclusions of law, and enter an appropriate award."

Our directive did not require the Commission to comment at length on all of the evidence it reviews. Rather, the Commission is required to make "definitive" factual findings, which are findings sufficient to "determine the critical issues raised by the evidence in [the] case." *Id.*; *see Peagler*, 138 N.C. App. at 602, 532 S.E.2d at 213 ("[T]he Commission must find those facts which are necessary to support its conclusions of law."). In the opinion and award currently before us, the Commission determined that plaintiff's account of the injury was not credible and, as it indicated in Finding of Fact No. 12, decided not to rely on the portion of the medical evidence based on plaintiff's account. *See Weaver*, 123 N.C. App. at 510, 473 S.E.2d at 12 ("The Industrial Commission may not discount or disregard any evidence, but may choose not to believe the evidence *after* considering it."). Therefore, the Commission gave "little weight" to Dr. Shaver's testimony. Finding that plaintiff was not injured in a bulldozer accident as he described, the Commission concluded that "plaintiff's current condition is due to non-compensable causes."

We hold that the Commission considered the evidence appropriately, made sufficient findings of fact, drew proper conclusions of law based thereon, and entered an appropriate award. Accordingly, we affirm the opinion and award.

Affirmed.

Judges MARTIN and CAMPBELL concur.

EASTERN OUTDOOR, INC., PETITIONER v. BOARD OF ADJUSTMENT OF JOHNSTON COUNTY, RESPONDENT

No. COA01-546

(Filed 4 June 2002)

1. **Administrative Law— judicial review of agency decision— outdoor advertising signs—billboards—de novo standard of review**

The trial court's order upholding respondent board of adjustment's decision approving the revocation of land-use permits issued to petitioner for the erection of outdoor advertising signs or billboards clearly delineated and applied the appropriate de novo standard of review.

2. **Zoning— outdoor advertising signs—billboards—revocation of land-use permits**

The trial court did not err by upholding respondent board of adjustment's decision approving the revocation of land-use permits issued to petitioner for the erection of outdoor advertising signs or billboards, because: (1) N.C.G.S. § 153A-362 gives a county the authority to revoke permits that are issued in violation of a county zoning ordinance, and the Johnston County Zoning Ordinance did not permit the erection of billboards in the AR/R-40 zoning district; (2) petitioner's permits were issued under mistake of law and respondent was authorized to revoke petitioner's permit; and (3) the fact that petitioner made a substantial investment in the property does not give it the right to violate an existing ordinance.

Judge TYSON dissenting.

Appeal by petitioner from order entered 27 December 2000 by Judge Knox V. Jenkins in Johnston County Superior Court. Heard in the Court of Appeals 20 February 2002.

Waller Law Firm, P.L.L.C., by Betty S. Waller, for petitioner appellant.

Johnston County Attorney J. Mark Payne for respondent appellee.

TIMMONS-GOODSON, Judge.

Eastern Outdoor, Inc. ("petitioner") appeals from the trial court's order upholding the decision by the Johnston County Board of Adjustment ("respondent") approving the revocation of certain land-use permits issued to petitioner. For the reasons stated herein, we affirm the order of the trial court.

The facts pertinent to the instant appeal are as follows: On 17 December 1999, the Johnston County Planning Department ("Planning Department") issued two land-use permits to petitioner for the erection of outdoor advertising signs, or billboards. The permits allowed the placement of billboards on two parcels of private property adjacent to North Carolina Highway 42 within the zoning jurisdiction of Johnston County. The applicable zoning designation for these parcels of land was "AR/R-40." Pursuant to the issuance of the permits, petitioner began construction for the placement of its billboards on the two sites. On 8 February 2000, however, the director of the Planning Department revoked the permits on the grounds that the AR/R-40 zoning district did not permit outdoor advertising.

Petitioner appealed the revocation of its permits to respondent, which held a hearing on the matter on 31 May 2000. In its subsequent order upholding the decision of the Planning Director, respondent concluded that, because the AR/R-40 zoning designation of the land for which petitioner's permits were issued did not permit billboards, "the permits issued to [petitioner] were issued under a mistake of law. As such, the permits were not valid permits and the Planning Director acted within his authority to revoke the subject permits." Respondent therefore issued an order upholding the Planning Director's decision to revoke petitioner's permits.

Petitioner sought a writ of *certiorari* from the Johnston County Superior Court, which heard the matter on 12 December 2000. Reviewing respondent's decision *de novo*, the trial court concluded that respondent had committed no error of law, and further, that upon review of the whole record, respondent's order "was supported by competent, material and substantial evidence" and "was neither arbitrary nor capricious." The court further determined that respondent had "followed procedures specified by law, in statute and ordinance" and had not violated petitioner's due process rights. The trial court therefore issued an order upholding respondent's decision, from which order petitioner now appeals.

Petitioner contends that the trial court did not consider and rule upon all of the issues raised by petitioner, and further, that the trial court failed to specify the standard under which it reviewed those issues upon which it did rule. Petitioner further argues that the trial court erred in affirming respondent's decision.

Upon reviewing a decision by a board of adjustment, the superior court's scope of review 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.

Simpson v. City of Charlotte, 115 N.C. App. 51, 54, 443 S.E.2d 772, 775 (1994). Depending upon the nature of the alleged error, the superior court must apply one of two standards of review in an administrative appeal of a decision by a board of adjustment. Where the petitioner asserts that the board's decision is based on an error of law, *de novo* review is proper. *See Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 140 N.C. App. 99, 102, 535 S.E.2d 415, 417 (2000), *affirmed*, 354 N.C. 298, 554 S.E.2d 634 (2001). If the petitioner contends that the board's decision is arbitrary or capricious, or is unsupported by the evidence, the court applies the "whole record" test. *See In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993). When this Court reviews such appeals from the superior court, our review is limited to determining whether (1) the superior court determined the appropriate scope of review and (2) whether the superior court, after determining the proper scope of review, properly applied such a standard. *See id.* at 166, 435 S.E.2d at 363.

[1] By its first assignment of error, petitioner asserts that the trial court's order must be reversed because it failed to specify the standard under which the court reviewed respondent's decision. Petitioner also contends that the trial court erred in fail-

ing to address constitutional and equitable estoppel issues raised by petitioner.

In a case remarkably similar to the one at bar, *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 146 N.C. App. 388, 552 S.E.2d 265 (2001), the petitioner was engaged in the business of outdoor advertising. The Planning Department of Guilford County issued the petitioner a building permit, but later revoked it because such permit was issued in violation of a development ordinance. The petitioner appealed the revocation of its permit to the Guilford County Board of Adjustment, which affirmed the Planning Department's decision. Like present petitioner, the petitioner in *Capital Outdoor* thereafter filed a writ of *certiorari* with the Guilford County Superior Court, alleging that the Board's decision was arbitrary and capricious, unsupported by the evidence, and violative of the petitioner's constitutionally protected rights of free speech, due process and equal protection. The petitioner further asserted that the Board was equitably estopped from revoking the permit. The superior court affirmed the Board's decisions, stating that they were "supported by competent material and substantial evidence and are not affected by error of law." *Id.* at 391, 552 S.E.2d at 267.

On appeal, this Court reversed the trial court's judgment, holding that, because the trial court had failed to delineate which standard it had applied in resolving each separate issue raised, "this Court cannot readily ascertain whether the superior court applied the appropriate standard of review to each allegation." *Id.* We therefore reversed and remanded the case to the superior court "with instructions to characterize the issues before the court and clearly delineate the standard of review used to resolve each issue raised by the parties." *Id.* at 392, 552 S.E.2d at 268.

Judge Greene dissented from the majority opinion, stating that the dispositive issue in the case was whether the Board had committed an error of law in its interpretation of the applicable development ordinance. Thus, Judge Greene reasoned, whether the superior court had utilized a *de novo* or a "whole record" review was immaterial, as the court specifically concluded that the Board committed no errors of law. Judge Greene noted that "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." *Id.* (Greene, J., dissenting) (citation omitted). Judge Greene then went on to analyze the applicable development

ordinance, ultimately concluding that the Board, and likewise the trial court, had erred in its interpretation of the ordinance, and thus determined that the order should be reversed for reinstatement of the petitioner's billboard permit. In a decision issued *per curiam*, our Supreme Court subsequently reversed this Court's opinion in *Capital Outdoor*, "[f]or the reasons stated in the dissenting opinion[.]" *Capital Outdoor, Inc. v. Guilford Cty. Bd. of Adjust.*, 355 N.C. 269, 559 S.E.2d 547 (2002).

As was the case in *Capital Outdoor*, the dispositive issue in the instant case is respondent's interpretation of the applicable zoning ordinance. The superior court indicated that it had reviewed the record *de novo* for all alleged errors of law and concluded that, as respondent had correctly interpreted and applied the zoning ordinance, it had committed no error in law. Thus, the superior court clearly delineated and applied the appropriate standard of review to the dispositive issue presented by petitioner. We therefore overrule petitioner's first assignment of error.

[2] By its second assignment of error, petitioner contends the trial court erred in upholding respondent's decision to revoke petitioner's permits. Petitioner asserts that the permits were not issued under a mistake of law, but rather as a result of an informed and deliberate decision by respondent. Petitioner therefore argues that the trial court erred in affirming respondent's position that the permits were issued under mistake of law. We disagree.

Section 153A-362 of the North Carolina General Statutes, which governs the revocation of building permits issued by a county, provides that:

> The appropriate inspector may revoke and require the return of any permit by giving written notice to the permit holder, stating the reason for the revocation. Permits shall be revoked for any substantial departure from the approved application or plans and specifications, for refusal or failure to comply with the requirements of any applicable State or local laws or local ordinances or regulations, or for false statements or misrepresentations made in securing the permit. *A permit mistakenly issued in violation of an applicable State or local law or local ordinance or regulation also may be revoked.*

N.C. Gen. Stat. § 153A-362 (2001) (emphasis added). Thus, under section 153A-362, a county has the authority to revoke permits that

are issued in violation of a county zoning ordinance. Under section 4.4 of the Johnston County Zoning Ordinance, the AR/R-40 zoning district is designated "Agricultural-Residential." The ordinance further states that

> [w]ithin the districts indicated on the zoning map no building or land shall be used, and no building shall be erected or altered which is intended or designed to be used in whole or in part, for any use other than those listed as permitted for that district in this article.

The following types of signs are expressly permitted in the AR/R-40 zoning district under section 4.4:

> a. One (1) professional or announcement sign per lot for home occupations and rural home occupations. Such signs shall not exceed three (3) square feet in area.
>
> b. Signs pertaining only to the lease, rent or sale of the property upon which displayed. Such signs shall not exceed six (6) square feet in area exposed to view. No such sign shall be illuminated.
>
> c. Church bulletin board or sign not exceeding twelve (12) square feet for the purpose of displaying the name of the institution and other related information. Such signs shall be set back at least twenty (20) feet from the street right-of-way line.

Section 4.4 makes no mention, however, of outdoor advertising signs, which are expressly permitted in several other zoning districts. Respondent therefore correctly concluded that section 4.4 of the Johnston County Zoning Ordinance did not permit the erection of billboards in the AR/R-40 zoning district. As the zoning district did not permit billboards, respondent's conclusion that petitioner's permits were issued under mistake of law was also correct. Respondent was therefore authorized under section 153A-362 of the General Statutes to revoke petitioner's permit. The fact that petitioner made a substantial investment in the property does not give it the right to violate an existing ordinance. *See Town of Hillsborough v. Smith*, 276 N.C. 48, 58, 170 S.E.2d 904, 912 (1969) (stating that, "[o]ne does not acquire a right to violate an otherwise valid zoning ordinance, already in existence, by making expenditures or incurring obligations merely because when he made them he did not know the ordinance had been adopted"). The trial court did not err in upholding respondent's decision, and we therefore overrule petitioner's second assignment of error.

In conclusion, we hold that the trial court's order affirming the decision and order by the Johnston County Board of Adjustment revoking petitioner's permits appropriately applied the proper standard of review. We therefore affirm the order of the trial court.

Affirmed.

Judge WYNN concurs.

Judge TYSON dissents.

TYSON, Judge, dissenting.

I respectfully dissent from the majority's opinion. The majority's opinion affirms the trial court's order that affirmed respondent's revocation of petitioner's permits and concludes that respondent lawfully revoked petitioner's permit under the statutory authority contained in N.C.G.S. 153A-362. "A permit mistakenly issued in violation of an applicable State or local law or local ordinance or regulation also may be revoked." N.C. Gen. Stat. § 153A-362 (2001). Petitioner argues that the permits were not issued under a mistake of law, rather according to a consistent and long-standing interpretation of the ordinance by respondent's Planning Director. I agree.

The uncontradicted testimony from Mr. Genereux, respondent's Planning Director who issued the permits, shows that he issued the permits consistent with Johnston County's interpretation of the zoning ordinance since its adoption eight years earlier. There was no evidence before respondent, nor any in the record, to show that the permits were issued under a mistake of law.

Respondent revoked petitioner's permits after adopting a new interpretation of the ordinance and applying it retroactively only to permits issued within twelve months prior to the new interpretation. Petitioner argues that this action was arbitrary and capricious.

Four outdoor advertising permits had been issued within twelve months prior to the new interpretation of the ordinance, two of which are before us. Petitioner had received its zoning permits, submitted its site plans, received its building permits, completed construction of the structure on one permit, purchased materials, and delivered them to the site on the other, prior to when its permits were revoked.

Of the remaining two outdoor advertising permits issued within twelve months prior to the adoption of the new interpretation, one expired within two weeks of the new interpretation with no building permit issued. The remaining permit was to expire five months after the new interpretation was adopted and the building permit previously issued had expired.

Respondent did not apply its "new interpretation" to all outdoor advertising permits previously issued for eight years under the original interpretation of the ordinance. The retroactive application of the new interpretation, arrived at in a closed door session where petitioner neither had notice nor opportunity to appear, was applied and enforced in a manner to impact only petitioner's permits after it had materially changed its position in reliance of the issuance of the two permits.

The facts at bar are analogous to the facts in *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904 (1969). I would reverse the decision of the superior court. Therefore, I respectfully dissent.

RALPH DOUGLAS SHOEMAKER v. CREATIVE BUILDERS AND N.C. FARM BUREAU MUTUAL INSURANCE COMPANY

No. COA01-722

(Filed 4 June 2002)

1. Workers' Compensation— disability—sufficiency of evidence

The Industrial Commission did not err in a workers' compensation action by finding plaintiff to be totally and permanently disabled where he returned to work but was unable to maintain any employment for more than a few weeks, was unable to find regular work even with the assistance of a vocational specialist, and there was medical testimony that he would never be able to work again.

2. Workers' Compensation— vocational rehabilitation—futile

There was competent evidence in a workers' compensation action to support the Industrial Commission's finding that vocational rehabilitation was futile.

3. Workers' Compensation— medical expenses—motor vehicle accident after injury

The Industrial Commission did not err by concluding that defendants are responsible for medical expenses associated with plaintiff's motor vehicle accident where plaintiff injured his back while working as a carpenter, he contracted encephalitis after back surgery and was left with an organic brain injury, and he crashed his motor vehicle into a telephone pole during a seizure-like episode. Although the doctors are uncertain as to whether the seizure-like activity was due to an actual seizure or an anxiety or panic attack, they agree that either condition was the result of his cognitive or emotional disabilities caused by the compensable encephalitis.

4. Workers' Compensation— personality disorder—encephalitis after back surgery—injury as cause

The Industrial Commission did not err in a workers' compensation case by finding that plaintiff's 1992 injury was the cause of his personality disorder where he contracted encephalitis after back surgery and one doctor testified that he could not relate any of plaintiff's symptoms to his encephalomalacia with any degree of medical certainty, but extensive medical records establish that the surgery for the back injury caused the encephalitis, which in turn resulted in plaintiff's cognitive and personality changes.

5. Workers' Compensation— depression—hospitalization—no prior approval

The Industrial Commission did not err by concluding that defendants were responsible for the cost of plaintiff's treatment for depression, insomnia, and severe panic attacks in a hospital where plaintiff did not receive prior authorization and there was no evidence of an emergency, but there was extensive evidence detailing the severity of plaintiff's emotional problems and the need for continuous medical treatment.

Appeal by defendants from opinion and award entered 16 January 2001 by Commissioner Dianne C. Sellers of the N.C. Industrial Commission. Heard in the Court of Appeals 14 March 2002.

Patterson, Harkavy & Lawrence, L.L.P., by Henry N. Patterson, Jr. and Martha A. Geer for plaintiff-appellee.

Young Moore and Henderson P.A., by J.D. Prather and Dawn Dillon Raynor for defendants-appellants.

THOMAS, Judge.

Defendants appeal from an opinion and award of the Industrial Commission (Commission) ordering them to pay compensation to plaintiff for permanent total disability in the amount of $253.53 per week, plus medical expenses and reasonable attorneys' fees. They set forth six assignments of error. For the reasons herein, we affirm.

The facts are as follows: Plaintiff, Ralph Douglas Shoemaker, worked as a carpenter for defendant, Creative Builders. On 14 July 1992, he suffered a back injury that caused him to undergo surgery. Plaintiff and defendants then executed an Industrial Commission Form 21, after which plaintiff began receiving temporary total disability compensation.

As a result of the back surgery, however, plaintiff experienced encephalitis, which in turn caused him to suffer a frontal lobe syndrome coupled with an organic affective disorder. These complications led plaintiff, who was described as a caring, emotionally strong person with a good personality prior to the injury, to become flippant, emotionally labile, euphoric, easily distracted, and uninhibited. He experienced lapses in judgment, scattered thinking, and significant impairment of attention and concentration skills. Because of the organic brain injury, plaintiff now suffers from a panic disorder and depression.

Dr. William Lestini, an orthopedic surgeon, performed plaintiff's back surgery. Lestini stated that plaintiff had reached maximum medical improvement and had sustained a 45% permanent partial disability to his spine. He limited plaintiff on a permanent basis to "light duty restriction as a trim carpenter." Dr. Barrie Hurwitz, a neurologist, found evidence of focal slowing in plaintiff's brain and later determined that plaintiff had significant psychological distress and cortical dysfunction consistent with encephalitis. Dr. Patrick Logue, a psychologist, agreed that plaintiff experienced significant cognitive deficits and psychological distress as a result of the encephalitis, and referred him to psychiatry.

Plaintiff was then evaluated by three psychiatrists. Dr. Victor Morcos gave a prognosis that plaintiff would not be able to function in a normal work environment because of his distractability, emotional instability, and jocular disinhibitive behavior. Plaintiff was seen by Morcos's partner, Dr. Raouf Badawi, who determined that plaintiff had a frontal lobe syndrome coupled with an organic affective disorder, and was unable to function even in a structured environment such as Goodwill Industries. Dr. Indu Varia later diagnosed plaintiff as suffering from obsessive compulsive disorder and panic disorder. Dr. Angus McInnis, plaintiff's family physician since 1976, noticed the post-surgery personality change as well.

Plaintiff attempted to work on a part-time basis constructing homes for Alan Miller, but was disruptive on the job site and dismissed. Plaintiff then worked with a private vocational specialist retained by defendants from August 1995 through April 1996. Both alone and with the specialist, plaintiff underwent an extensive but unsuccessful job search in Rockingham County. Brenda Wrenn, who had previously employed plaintiff at her landscaping business, rehired him but found his attention span to be too short to complete necessary tasks. She also dismissed plaintiff.

By order entered 9 December 1996, Deputy Commissioner Wanda Blanche Taylor found that plaintiff had sustained a compensable injury to his back. Deputy Commissioner Taylor amended the compensation rate for plaintiff's temporary total disability, which had been wrongly calculated, and awarded plaintiff reimbursement for travel expenses incurred for participation in the rehabilitation program and job search directed by defendants' vocational consultant.

In an administrative order dated 18 December 1996, Deputy Commissioner Taylor denied defendants' motion to compel plaintiff to participate in a thirty-day Goodwill Industries work skill evaluation program. Defendants appealed the order by filing a Form 33 Request for Hearing. In response, plaintiff asserted that the evidence supported denial of the motion. He claims to be permanently and totally disabled and therefore should not be required to engage in a futile search for employment.

In January, 1997, prior to the hearing, plaintiff was driving a motor vehicle and crashed into a power pole. Plaintiff said he started to jerk all over just before the collision and his hands were "spinning." He next remembered a state trooper knocking on his window.

Plaintiff was treated for fractures resulting from the car wreck. He had at least two additional seizure-like episodes in April.

Plaintiff was admitted to Greensboro Charter Hospital on 30 June 1997 and remained there until 9 July 1997 under the care of Dr. Rupinder Kaur, a psychiatrist, for treatment of depression, insomnia, and severe panic attacks. Kaur's findings were consistent with the diagnosis of a frontal lobe syndrome with affective lability due to encephalitis. Approximately a year later, plaintiff was again hospitalized at Greensboro Charter Hospital after he told Kaur that he was suicidal and planned to shoot himself. Kaur said that plaintiff's depression requires a psychiatrist to monitor his condition and medications for the remainder of his life. She also said plaintiff is not capable of entering into the workplace or even a sheltered workshop because of his psychiatric problems, namely, his inability to deal with people. Hurwitz, meanwhile, treated plaintiff again several times in 1997. He considered the option of basic work for plaintiff in a sheltered workshop, but eventually came to the conclusion that it would not be appropriate because of plaintiff's personality disorder.

At the hearing in September, 1997, Deputy Commissioner William C. Bost ruled in favor of plaintiff, finding that he was not required to participate in a vocational evaluation at Goodwill Industries, and that he was permanently totally disabled and thus entitled to compensation for the remainder of his life. Defendants appealed to the Full Commission.

By order entered 16 January 2001, the Full Commission found that "[s]ince January 24, 1995, plaintiff has been incapable of earning wages . . . as a result of physical, cognitive[,] and emotional impairments from his July 14, 1992 injury by accident and related encephalitis." It further concluded that defendant is "totally and permanently disabled . . . for the remainder of his life." The Commission awarded plaintiff benefits in the amount of $253.53 per week for the remainder of his life, reasonable medical expenses, and $750.00 in attorneys' fees because of defendants' appeal to the Full Commission. Defendants appeal.

In reviewing an award of the Commission, the appellate court is limited to determining whether there was competent evidence before the Commission and whether the findings of fact support the Commission's conclusions of law. *Deese v. Champion Int'l. Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). The Commission's find-

ings of fact are conclusive on appeal even when there is evidence to support contrary findings. *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 186, 345 S.E.2d 374, 379 (1986).

[1] By defendants' first assignment of error, they contend the Commission erred in finding plaintiff to be permanently and totally disabled. They point to evidence that he returned to work and earned wages from at least two employers while he was receiving total disability compensation. However, "mere proof of return to work is insufficient to rebut the . . . presumption [of disability]," because capacity to earn in suitable employment is the "benchmark test of disability." *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 81, 476 S.E.2d 434, 439 (1996), *disc. review denied*, 345 N.C. 343, 483 S.E.2d 169 (1997).

Here, the facts establish that plaintiff was unable to find regular work even with the assistance of a vocational specialist. He was unable to maintain any employment for more than a few weeks. Moreover, plaintiff offered medical testimony that he would never be able to work again. The competent evidence presented to the Commission supports its finding that plaintiff is totally and permanently disabled. This assignment of error is overruled.

[2] By defendants' second assignment of error, they contend the Commission erred by finding plaintiff would not benefit from participating in a vocational rehabilitation program at Goodwill Industries.

The Commission may order vocational rehabilitation which it determines to be reasonably necessary. *See* N.C. Gen. Stat. § 97-25 (1999). In support of their argument, defendants cite the deposition of McInnis, who stated that plaintiff "could be employed with a lot of help."

McInnis, however, continued: "But as an independent employee . . . with all the responsibilities that people normally have, I think there are problems with that." McInnis further stated that defendant would need to work with "people that are very . . . sympathetic . . . to his problems" and are "able [and] willing to work with him." He was then asked if, in his opinion, it would be appropriate to first put plaintiff into something like a sheltered workshop in order to develop a vocational rehabilitation plan. McInnis replied: "I think so. I haven't discussed it with him, and I don't know how he would react to it."

Kaur, who most recently treated plaintiff, repeatedly recommended against sending plaintiff to Goodwill Industries. Badawi concurred, saying plaintiff could not function "even in such a structured environment as Goodwill Industries offers." Requiring him to work even in a structured environment would, according to Badawi, ultimately lead to hospitalization. The Commission's finding that vocational rehabilitation in this case is futile is supported by competent evidence and we therefore reject this assignment of error.

[3] By their third assignment of error, defendants contend the Commission erred in concluding that defendants are responsible for medical expenses associated with plaintiff's motor vehicle accident on 30 January 1997.

"The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury." 1 Arthur Larson, *The Law of Workmen's Compensation* § 10.01 (2000). Plaintiff testified here that the accident was precipitated by seizure-like activity. Although the doctors are uncertain as to whether the seizure-like activity was due to an actual seizure or an anxiety or panic attack, they agree that either condition was the result of his cognitive or emotional disabilities caused by the compensable encephalitis. In either case, the relationship is direct. Further, case law clearly establishes that injuries resulting from an intervening cause do not preclude compensation, unless the employee intentionally caused the subsequent injury. *See English v. J.P. Stevens & Co.*, 98 N.C. App. 466, 471, 391 S.E.2d 499, 502 (1990). There is substantial, competent evidence adequately supporting the finding that plaintiff's accident is the direct and natural result of his brain damage. We overrule this assignment of error.

[4] By defendants' fourth assignment of error, they argue that plaintiff's 1992 injury was not the cause of his personality disorder. Defendants concede that plaintiff's encephalitis came into existence after the injury in 1992, but contest the existence of a causal link between the injury and the encephalitis. The causal link between the encephalitis and plaintiff's personality disorder, defendants maintain, is even more tenuous.

In support of their argument, defendants rely solely on the deposition testimony of Hurwitz, who said that he could not "relate any of [plaintiff's] symptoms to his encephalomalacia with any degree of medical certainty." Extensive medical records, however, establish

that the surgery for the back injury caused the encephalitis, which in turn resulted in plaintiff's cognitive and personality changes. In 1994, Lestini specifically related plaintiff's encephalitis to his back injury. The diagnoses of Morcos, Varia, and Logue also confirm the causal connection between the compensable injury and ensuing personality disorder. Kaur and McInnis agree that the encephalitis caused plaintiff's personality problems. Therefore, the Commission's findings are supported by competent evidence and we reject this assignment of error.

[5] By their final assignment of error, defendants contend the Commission erred in concluding that they are responsible for the cost of plaintiff's treatment at Charter Hospital beginning on 30 June 1997. Defendants argue that plaintiff did not receive prior authorization for admission and there is no evidence his admission was an emergency under N.C. Gen. Stat. § 97-25 (1999). Defendants also point out that plaintiff had an appointment on 30 June 1997 with the physician who had treated his fractures from the automobile accident, but admitted himself to Charter Hospital instead. Had plaintiff kept his appointment, defendants claim, the doctor likely could have assisted plaintiff and defendants in coordinating mutually agreeable psychologic or psychiatric treatment.

Section 97-25 states that "[m]edical compensation shall be provided by the employer." N.C. Gen. Stat. § 97-25. Under the statute "an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission." *Id.* Thus, a plaintiff may choose his own physician provided he: (1) obtains the approval of the Commission within a reasonable time after such procurement; and (2) the treatment sought is for recovery or rehabilitation, or to "give relief." N.C. Gen. Stat. § 97-2(19) (1999); *Braswell v. Pitt County Mem. Hosp.*, 106 N.C. App. 1, 5, 415 S.E.2d 86, 88 (1992). "Approval is not necessary prior to [the injured employee] seeking assistance from another physician." *Id.* Moreover, an emergency is not required for the Commission to award compensation under the statute. Even in the absence of an emergency, the employee is entitled to choose a physician for treatment, subject to the approval of the Commission. *Schofield v. Tea Co.*, 299 N.C. 582, 591, 264 S.E.2d 56, 62 (1980).

Here, the Commission found that the hospitalization "was necessary to treat plaintiff's depression and in particular because plaintiff was suicidal." It then concluded as a matter of law that the treatment

was necessary to "effect a cure or give relief from . . . the emotional effects of plaintiff's injury." There is extensive evidence in the record detailing the severity of plaintiff's emotional problems and the need for continuous medical treatment. Again, the Commission's findings are clearly supported by competent evidence and we overrule this final assignment of error.

AFFIRMED.

Judges MARTIN and HUDSON concur.

MARGARET O. LIBORIO, ADMINISTRATRIX OF THE ESTATE OF LOWELL THOMAS LIBORIO, PLAINTIFF v. WILLIAM W. KING, M.D. AND WILMINGTON HEALTH ASSOCIATES, P.A., DEFENDANTS

No. COA01-32

(Filed 4 June 2002)

1. **Medical Malpractice— informed consent—negligent misrepresentation**

The trial court did not err in a medical malpractice action that arose from a death following an endoscopic diagnostic procedure (ERCP) by refusing plaintiff's request to instruct the jury that the deceased's consent to the procedure was invalid if it was obtained by negligent misrepresentation of a material fact. N.C.G.S. § 90-21.13(b) provides that the statutory presumption of validity for informed consent may be rebutted by proof of misrepresentation, but the requested charge suggests that misrepresentation renders the consent invalid as a matter of law. Moreover, the legislature intended to refer only to intentional misrepresentation, and a doctor who obtains consent by informing the patient according to his honest diagnosis is still liable for negligence in arriving at the diagnosis or in providing the patient with appropriate information.

2. **Trial— jury request for the "written law"—particular statute not furnished**

The trial court did not abuse its discretion in a medical malpractice action which involved informed consent by denying plaintiff's request that the jury be provided with a written copy

of N.C.G.S. § 90-21.13 when it requested a copy of "the written law." The phrase "the written law" was too general to identify which statute the jury was requesting; when asked for clarification, the jury answered that it would read the charge and inform the judge if they needed more information, but made no more requests.

Appeal by plaintiff from judgment entered 23 May 2000, and from order entered 27 June 2000, by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 18 February 2002.

Law Offices of Wade E. Byrd, by Wade Byrd and Sally A. Lawing for plaintiff-appellant.

Cranfill, Sumner & Hartzog, by John D. Martin, for defendant-appellees.

BIGGS, Judge.

This case arises from a medical malpractice action filed by Margaret Liborio (plaintiff) following the death of her husband, Thomas Liborio (Liborio). Plaintiff appeals from the verdict and judgment entered following jury trial, and from the trial court's denial of her motion for a new trial. For the reasons that follow, we conclude that there was no error in the jury verdict, and affirm the trial court's denial of plaintiff's motion.

On 31 December 1995, Liborio went to the emergency room at Cape Fear Memorial Hospital in Wilmington, North Carolina, complaining of nausea, abdominal pain, and gastric distress. The emergency room physician, Dr. Kastner, examined him and ordered an ultrasound, before contacting Dr. Thompson, the physician on call for Liborio's family physician, Dr. Visser. When Dr. Thompson arrived, he examined Liborio and prescribed medication for pain and nausea. Dr. Kastner's and Dr. Thompson's initial assessment was that Liborio suffered from either gallstones or hepatitis. Because gallstones would require surgery, Dr. Thompson contacted Dr. Miles, the surgeon on duty. Dr. Miles examined Liborio, reviewed the test results, and concluded that Liborio's symptoms might be caused by gallstones. Dr. Miles did not want to perform gall bladder surgery until after Liborio had an endoscopic retrograde cholangiopancreatography (ERCP), a diagnostic surgical procedure. Accordingly, Dr. Thompson called in Dr. King (defendant), who was a gastroenterologist with experience performing ERCPs.

Defendant came to the hospital the next morning and reviewed Liborio's medical charts and test results. Defendant agreed with the preliminary diagnosis of Dr. Kastner, Dr. Thompson, and Dr. Miles, that Liborio likely suffered from gallstones or hepatitis. The test results offering conclusive proof of hepatitis take 96 hours to process, by which time Liborio could be in critical condition if he were suffering from gallstones. Consequently, defendant agreed with the other doctors, that an ERCP was the logical next step in Liborio's treatment, and that it should be performed as soon as possible. Defendant met with plaintiff and Liborio, and discussed the ERCP procedure with them, including a description of possible risks, before obtaining Liborio's signature on an informed consent form. The ERCP was performed that day and revealed that Liborio did not have gallstones, as previously believed. Unfortunately, Liborio developed pancreatitis and other serious complications from the surgery. He did not recover, and died on 1 March 1996.

On 25 February 1998, plaintiff filed suit against defendant, the hospital, and several of the physicians who had treated Liborio. Before trial, plaintiff's claims were resolved with respect to all those named in the suit except the defendants in the present appeal. The case was tried before a jury on 24 April 2000. During the charge conference, plaintiff asked the trial court to instruct the jury that informed consent is invalid if obtained by misrepresentation of a material fact; the trial court denied this request. During its deliberations, the jury asked for a copy of the court's charge, and also requested a copy of "the written law." The court provided a copy of its instructions to the jury and then asked for clarification on the meaning of "the written law." The jury indicated that it would review the charge and would inform the court if they needed more information; however, the jury made no further requests for written documents. At this point, plaintiff renewed her request that the jury be instructed on the effect of misrepresentation on informed consent, or that the jury be given a copy of the relevant statute; the request was denied.

On 11 May 2000, the jury returned a verdict finding defendants not liable for damages. The trial court entered judgment for defendants on 23 May 2000. On 1 June 2000, plaintiff filed a motion for a new trial, pursuant to N.C.G.S. § 1A-1, Rule 59. Her motion was denied on 26 June 2000. Plaintiff appeals from the verdict and judgment at trial, and from the order denying her motion for a new trial.

As a preliminary matter, we note that plaintiff set out eleven assignments of error in the Record, but argues only two of these in her brief. The assignments of error not argued or supported by legal authority in defendant's brief are deemed abandoned. N.C.R. App. P. 28(b)(5) ("Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.")

I.

[1] Plaintiff argues first that the trial court erred in refusing plaintiff's request to instruct the jury that Liborio's consent to the ERCP was invalid if obtained by misrepresentation of a material fact.

To prevail on this issue, the plaintiff must demonstrate that (1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and that (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury. *Faeber v. E. C. T. Corp.*, 16 N.C. App. 429, 430, 192 S.E.2d 1, 2 (1972) (upholding instruction on grounds that it "sufficiently covered the meaning of the terms" that defendant requested the trial court to define in its charge to jury).

When a request is made for a specific jury instruction that is correct as a matter of law and is supported by the evidence, the trial court is required to give an instruction expressing "at least the substance of the requested instruction." *Parker v. Barefoot*, 130 N.C. App. 18, 20, 502 S.E.2d 42, 44 (1998), *rev'd on other grounds*, 351 N.C. 40, 519 S.E.2d 315 (1999) (citations omitted). On appeal, this Court "must consider and review the challenged instructions in their entirety; it cannot dissect and examine them in fragments," in order to determine if the court's instruction provided "the substance of the instruction requested[.]" *Id.*

N.C.G.S. § 90-21.13 (2001), which governs informed consent to medical treatment, provides in relevant part that:

> (b) A consent which is evidenced in writing and which meets the foregoing standards, and which is signed by the patient or other authorized person, shall be presumed to be a valid consent. This presumption, however, may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact.

N.C.G.S. § 90-21.13(b) (2001). Plaintiff acknowledges that defendant did not obtain consent to the ERCP through fraud or deception; however, she contends that Liborio's consent was obtained through the negligent misrepresentation of a material fact. She argues that in the context of G.S. § 90-21.13(b) the word 'misrepresentation' may include innocent or negligent misrepresentation. On this basis, plaintiff argues that the trial court was required to specifically instruct the jury that consent obtained by misrepresentation, as in this case negligent misrepresentation, is invalid. The specific instruction requested reads in pertinent part:

> However, under North Carolina law, the otherwise valid consent of a patient to a procedure *is not valid* when the consent is obtained by the misrepresentation of a material fact. The plaintiff contends that the defendant was negligent in that no valid consent was obtained by the defendant, Dr. King, to the performance of the ERCP procedure because Dr. King misrepresented certain material facts to Lowell Thomas Liborio and obtained his consent through said misrepresentation. The plaintiff contends that Dr. King stated to Lowell Thomas Liborio that his gallbladder was "packed full of stones" and that this was not true and that this was a misrepresentation of a material fact. (emphasis added)

We believe plaintiff's requested instruction is an incorrect statement of the law and that the trial court did not err in declining to give it. First, the plain language of G.S. § 90-21.13(b) provides that the presumption of validity "may be subject to rebuttal only upon proof that such consent was obtained by fraud, deception or misrepresentation of a material fact." This language does not support plaintiff's requested instruction that "under North Carolina law, the otherwise valid consent of a patient to a procedure is not valid when the consent is obtained by the misrepresentation of a material fact." The statute provides that informed consent may be rebutted by proof of misrepresentation; however, the requested charge suggests that misrepresentation renders a patient's consent invalid as a matter of law.

In addition, we reject plaintiff's argument that the word misrepresentation, as it appears in N.C.G.S. § 90-21.13(b), includes negligent misrepresentation. Defendant urges this Court to apply the rule of statutory construction *ejusdem generis* to discern whether the legislature intended the term 'misrepresentation' in G.S. § 90-21.13(b) to encompass negligent misrepresentation. We agree that such analysis is appropriate here. Where a statute is unclear in its meaning, the

Court may resort to judicial construction to determine the legislative intent. *In re Banks*, 295 N.C. 236, 244 S.E.2d 386 (1978).

"Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Norfolk and Western R. Co. v. Train Dispatchers*, 499 U.S. 117, 129, 113 L. Ed. 2d 95, 107 (1991). *Ejusdem generis* has been further explained as follows:

> Where words of general enumeration follow those of specific classification, the general words will be interpreted to fall within the same category as those previously designated. The maxim *ejusdem generis* applies especially to the construction of legislative enactments. It is founded upon the obvious reason that if the legislative body had intended the general words to be used in their unrestricted sense the specific words would have been omitted.

Meyer v. Walls, 347 N.C. 97, 106, 489 S.E.2d 880, 885 (1997) (where statute lists state level agencies, followed by phrase "all other departments, institutions, and agencies[,]" *ejusdem generis* excludes application of statute to county level board or agency). *See also State v. Gamble*, 56 N.C. App. 55, 57, 286 S.E.2d 804, 805 (1982) (criminal statute defining "building" as "dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and 'any other structure' . . . " excludes "fenced in area" from "any other structure" under principle of *ejusdem generis*); *Adler v. Trust Co.*, 4 N.C. App. 600, 605, 167 S.E.2d 441, 444 (1969) ("personal effects" do not include houseboat; Court holds that houseboat "not *ejusdem generis* with articles of jewelry, clothing, household furniture, china, silver or crystal" listed before "personal effects" in will).

Standing alone, the term 'misrepresentation' appears broad enough to encompass negligent misrepresentation; however, as the last in the series "fraud, deception or misrepresentation," the principle of *ejusdem generis* indicates that only knowing and intentional behavior is intended. Having found no North Carolina case law that specifically addresses this point, we find the Maryland case cited by defendant, though not authoritative, to be persuasive. In *Luskin's v. Consumer Protection*, 353 Md. 335, 726 A.2d 702 (1999), the Maryland Court of Special Appeals construed a statute prohibiting "[d]ecep-

tion, fraud, false pretense, false premise, [and] misrepresentation," and held:

> Although the word "misrepresentation," unqualified, may mean either an intentional or an innocent misrepresentation, "misrepresentation" as found in § 13-301(9) is included in an enumeration of proscribed commissions, each of which connotes intentional misrepresentation. Consequently, under the rule of *ejusdem generis*, "misrepresentation" in § 13-301(9) should be given the same meaning as the accompanying terms.

353 Md. at 366-67, 726 A.2d at 717.

We conclude that the legislature, in enacting G.S. § 90-21.13(b), intended the word 'misrepresentation' to refer only to intentional misrepresentation, and not to encompass innocent or negligent misrepresentation. Accordingly, the trial court did not err in rejecting plaintiff's requested instruction.

Moreover, we do not agree with plaintiff's contention that this construction of the statute will bar recovery in any but the most "bizarre" circumstance of a physician intentionally concealing information from his patient. A doctor who obtains a patient's consent for treatment by informing the patient according to his honest diagnosis is still liable for negligence in arriving at the diagnosis, or in providing the patient with appropriate information. The instructions given by the trial court in the case *sub judice* addressed this possibility, and directed the jury to consider the following allegations of negligence in regards to informed consent: (1) that defendant failed to tell Liborio about alternatives to ERCP; (2) that defendant inappropriately minimized the dangers of the ERCP; and (3) that defendant failed to provide information to the patient sufficient to give him a general understanding of the risks and hazards inherent in an ERCP.

We conclude that the trial court's charge sufficiently instructed the jury on negligence as it pertains to informed consent. We note that defendant has also argued that this Court is required by the holdings of *Hunt v. Bradshaw*, 242 N.C. 517, 88 S.E.2d 762 (1955), and *Butler v. Berkeley*, 25 N.C. App. 325, 213 S.E.2d 571 (1975), to rule in his favor on this issue. However, we conclude that neither case is directly on point. Our decision, therefore, does not rest upon these cases.

For the reasons discussed above, we hold that the plaintiff has failed to show that the requested instruction was a correct statement of law; accordingly, this assignment of error is overruled.

II.

[2] Plaintiff next argues that the trial court committed reversible error by denying plaintiff's request that, upon the jury's request for a copy of "the written law," they be provided with a written copy of G.S. § 90-21.13. We disagree.

The phrase "the written law" is too general to identify which statute the jury was requesting. Consequently, the trial court asked the jury to clarify what it meant by the request. The jury answered that it would read the charge, and would inform the judge if they needed more information. We conclude that this procedure was an appropriate response to the jury's question. Plaintiff has produced no evidence to show that the jury was specifically requesting a copy of G.S. § 90-21.13, and we discern none. Moreover, even if the jury's question were construed as a request for the statute, the decision of whether to provide a written copy rests in the trial court's discretion. *See State v. Moore*, 339 N.C. 456, 451 S.E.2d 232 (1994) (trial court has authority to provide the jury with written instructions upon request). We perceive no abuse of discretion in the present case. This assignment of error is overruled.

For the reasons discussed above, we conclude that the trial court did not err in its jury instructions, nor in its response to the jury's broad request for "the written law." Accordingly, we conclude that there was no error in the verdict and judgment and affirm the trial court's denial of plaintiff's motion for a new trial.

No Error.

Chief Judge EAGLES and Judge McCULLOUGH concur.

INTERMOUNT DISTRIBUTION, INC., PLAINTIFF-APPELLEE v. PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC., DEFENDANT-APPELLANT

No. COA01-238

(Filed 4 June 2002)

1. Appeal and Error— appealability—interlocutory order—certification for immediate appeal

Although defendant's appeal from the grant of partial summary judgment is an appeal from an interlocutory order, the order was appealable because the trial court certified the case for immediate appeal under N.C.G.S. § 1A-1, Rule 54(b).

2. Easements— right-of-way—reasonableness of amount of space to operate gas pipelines

The trial court erred by granting partial summary judgment in favor of plaintiff and concluding as a matter of law that the enforceable width of an easement or right-of-way for a gas pipeline claimed by defendant was eight inches, because the reasonableness of the amount of space needed to operate and maintain defendant's pipelines raises a question of fact that precludes summary judgment.

Appeal by defendant from judgment entered 21 December 2000 by Judge Ronald K. Payne in Henderson County Superior Court. Heard in the Court of Appeals 5 December 2001.

Ronald E. Sneed for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes & Davis, P.A., by Jones P. Byrd, P. Michelle Rippon and Donald R. Pocock, for defendant-appellant.

TIMMONS-GOODSON, Judge.

Public Service Company of North Carolina, Inc. ("PSNC") appeals from an order granting partial summary judgment in favor of Intermount Distribution, Inc. ("Intermount"). The relevant facts are as follows: Intermount acquired title to certain property located in Henderson County, North Carolina from Bessie Riddle ("Riddle"). The land was subject to an easement acquired by PSNC from Riddle pursuant to a right-of-way agreement dated 7 October 1955. The agreement granted PSNC and its successors and assigns, the right to maintain, construct, replace, change the size of, or lay one or more

pipelines across the property for the transportation of natural gas and other materials that may be transported through a pipeline. The agreement gave PSNC the right to select the route by laying the first pipeline. Shortly after obtaining the right-of-way across the property, PSNC laid an eight-inch diameter high pressure transmission pipeline ("T-1") for the transportation of natural gas from Gastonia, North Carolina to Asheville, North Carolina.

In late 1997, PSNC began installing its second pipeline ("T-1B") on the property. The second pipeline was twelve inches in diameter and parallel to T-1. The installation of T-1B was necessary to satisfy increasing demands on its pipeline system in Western North Carolina. In March of 1998, PSNC sent a letter to Intermount concerning the installation of its proposed pipeline.

Before installing T-1B, PSNC learned that Intermount planned to construct a building to the east of T-1. In accordance with industry and its own regulations, PSNC had maintained for many years that its easement was thirty-five (35) feet to the west and fifteen feet (15) to the east. However, in an effort to accommodate Intermount's construction plans, PSNC relocated its easement and constructed T-1B to the west of T-1 rather than to the east, which gave Intermount an additional twenty feet east of T-1 to start construction. This accommodation would keep any building construction fifteen feet from T-1 and would also provide sufficient space to maneuver and operate any specialized equipment required to install, maintain, and repair the pipelines.

Intermount subsequently began to design and construct its building within ten feet of T-1. PSNC continued to advise Intermount that a clearance of fifteen feet was necessary for safety reasons. When PSNC refused to acquiesce, Intermount filed this action.

On 14 April 2000, PSNC moved for summary judgment. The only issue before the court was the enforceable width of the easement or right-of-way claimed by PSNC. On 21 December 2000, the court granted partial summary judgment holding that PSNC's pipeline easement was eight inches wide. The court then certified that its order affected a substantial right of the parties, particularly PSNC, therefore providing the basis for this appeal.

The dispositive issue on appeal is whether the trial court erred in entering partial summary judgment in favor of Intermount and deter-

mining, as a matter of law, that the actual width of PSNC's easement is eight inches.

[1] At the outset, we note that the denial of a motion for summary judgment is not typically appealable. *See Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 424, 302 S.E.2d 868, 871 (1983). Likewise, "[a] grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). The order appealed from in the instant case granted partial summary judgment in favor of plaintiff and therefore, it is an interlocutory order. "As a general rule, a party has no right to immediate appellate review of an interlocutory order." *See Tise v. Yates Construction Co.*, 122 N.C. App. 582, 584, 471 S.E.2d 102, 105 (1996). However, appeal from an interlocutory order is permissible under two specific statutory exceptions. *Town Center Assoc. v. Y & C Corp.*, 127 N.C. App. 381, 384, 489 S.E.2d 434, 436 (1997). "First, if the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), an immediate appeal will lie." *N.C. Dept. of Transportation v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995). The order appealed from in the instant case contained the trial court's certification pursuant to Rule 54(b). We now allow the appeal and address the merits of the case.

[2] Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). The party moving for summary judgment has the burden of showing that either an essential element of the plaintiff's claim does not exist or that plaintiff cannot produce evidence to support an essential element of the claim. *Evans v. Appert*, 91 N.C. App. 362, 365, 372 S.E.2d 94, 96, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 584 (1988). The evidence presented is viewed in the light most favorable to the non-movant. *Bruce-Terminex Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

The deed in the instant case was created in 1955 and granted PSNC an easement for the purpose of laying, constructing, maintaining, operating, repairing, altering, replacing and removing pipelines,

for the transportation of natural gas, and other substances. Although the right-of-way agreement did not distinctly specify the width of the easement, the agreement provided that PSNC shall have "all other rights and benefits necessary or convenient for the full enjoyment or use of the rights herein granted including the right from time to time, to lay, construct, maintain, alter, repair, remove, change the size of, and replace one or more additional lines of pipe approximately parallel with the first pipe line laid by" PSNC.

We begin by noting that an easement deed, such as the one disputed in the instant case, is a contract. *See Cochran v. Keller*, 84 N.C. App. 205, 211, 352 S.E.2d 458, 462 (1987), *disc. review denied*, 322 N.C. 605, 370 S.E.2d 244 (1988). "In North Carolina, it is an established principle that the possessor of an easement has all rights that are necessary to the reasonable and proper enjoyment of that easement." *Keller v. Cochran*, 108 N.C. App. 783, 784, 425 S.E.2d 432, 434 (1993). Deeds of easement are construed according to the rules of construction of contract so as to ascertain the intention of the parties as gathered from the entire instrument at the time it was created. *See Higdon v. Davis*, 315 N.C. 208, 216, 337 S.E.2d 543, 547 (1985). This Court has held that "[w]hen an easement is created by express conveyance and the conveyance is 'perfectly precise' as to the extent of the easement, the terms of the conveyance control." *Williams v. Abernethy*, 102 N.C. App. 462, 464-65, 402 S.E.2d 438, 440 (1991) (citation omitted). " 'If the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement.' " *Swaim v. Simpson*, 120 N.C. App. 863, 864, 463 S.E.2d 785, 786-87 (1995) (quoting Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina*, § 15-21 (4th ed. 1994)), *affirmed*, 343 N.C. 298, 469 S.E.2d 553 (1996). However, in this situation, a reasonable use is implied. *Id.* In such cases, " '[a]n easement in general terms is limited to a use which is reasonably necessary and convenient . . . for the use contemplated.' " *Shingleton v. State*, 260 N.C. 451, 457, 133 S.E.2d 183, 188 (1963) (quoting 12A Am. Jur., *Easements*, § 113, pp. 720, 721); *see also Keller*, 108 N.C. App. at 784-85, 425 S.E.2d at 434. "Whether a specific use of an easement constitutes a reasonable use is a question of fact and is not a matter of law." *Id.*

In the instant case, Intermount maintains that the width of the right-of-way became "fixed" when the original pipeline was installed. Therefore, the width of the easement is only the width of the pipe itself and the minimal amount necessary for the maintenance of its

pipelines. Contrary to Intermount's assertions, PSNC contends that the owner of a pipeline right-of-way is entitled to reasonable access to the land for the purpose of maintaining and making repairs. In support of this proposition, PSNC relies on a line of cases that have held that a fifty-foot wide easement is reasonable and necessary for the safety and maintenance of gas pipelines. *See Columbia Gas Transmission Corp. v. Tarbuck*, 62 F.3d. 538, 544 (3rd Cir. 1995) (holding that fifty feet is a reasonable and necessary width needed to operate a twenty-inch gas pipeline); *Columbia Gas Transmission Corp. v. Savage*, 863 F.Supp. 198, 202 (M.D.Pa. 1994) (finding fifty feet necessary for an easement in order to safely maintain a 14-inch pipeline); and *Crane Hollow, Inc. v. Marathon Ashland Pipe Line LLC*, 138 Ohio App. 3d. 57, 69, 740 N.E.2d 328, 336 (2000) (holding that evidence supported a finding that use and acquiescence of the easement established a fifty-foot width for pipeline easement).

Although not specifically addressed in North Carolina, we find guidance in other jurisdictions that have held that when the width of an easement is not specifically defined in the grant, such as the one in the instant case, then the "previously undefined width is then established by the rule of reasonable enjoyment." *Sunnyside Valley Irrigation District v. Dickie*, 111 Wash. App. 209, 215, 43 P.3d 1277, 1281 (2002). Under the doctrine of reasonable enjoyment, the width of an undefined easement is determined by considering the purpose of the easement and establishing a width necessary to effectuate that purpose. *Id.* Where an easement is granted without limitations on its use, "the grantee may partake in other reasonable uses that develop over time if such uses significantly relate to the object for which the easement was granted." 61 Am. Jur. 2d, *Pipelines*, § 31 (2002). "Determination of the necessary width under the doctrine of reasonable enjoyment [presents] a question of fact." *Sunnyside Valley Irrigation District*, 111 Wash App. at 215, 43 P.3d. at 1281. Although the extent of an easement is limited to that which has been granted, courts have also consistently permitted express easements to accommodate modern developments, "so long as the use remains consistent with the purpose of which the right was originally granted." *Savage*, 863 F.Supp. at 202. "This is based upon a presumption that advances in technology are contemplated in the grant of the easement." *Id.*

In the instant case, the original deed as granted in 1955, expressly stated the purpose of the grant, which was the right from time to time, to lay, construct, maintain, operate, . . . change the size of and

replace one or more additional lines of pipe[.]" Clearly, the reasonableness of the amount of space needed to operate and maintain PSNC's pipelines raises a question of fact that precludes summary judgment. We therefore conclude that the trial court erred in concluding as a matter of law that the width of the easement was eight inches and remand this case for a factual finding regarding the reasonableness of the amount of space needed to operate PSNC's gas pipelines.

Reversed and remanded.

Judges HUDSON and TYSON concur.

STATE OF NORTH CAROLINA v. RONALD ROSS EDWARDS

No. COA01-776

(Filed 4 June 2002)

1. False Pretense— obtaining property by false pretenses— deception

The trial court did not err in an obtaining property by false pretenses case by excluding evidence elicited from a store owner on cross-examination that he was not deceived by the purchase order presented by defendant, because: (1) N.C.G.S. § 14-100 does not require that a particular person, such as the store owner, be deceived; and (2) the State established that defendant made a false representation with the intent to deceive, which did in fact deceive a store clerk.

2. False Pretense— obtaining property by false pretenses— sufficiency of evidence

Although defendant contends the trial court erred by denying his motion to dismiss all charges at the close of the State's evidence including obtaining property by false pretenses based on alleged insufficient evidence of deception, there was sufficient evidence that defendant made a false representation which did in fact deceive.

3. Assault— deadly weapon with intent to kill—mistrial

The trial court did not abuse its discretion by declaring a mistrial and failing to declare defendant not guilty of the felony charge of attempted assault with a deadly weapon with intent to kill, because: (1) a deadlocked or hung jury is a classic example of manifest necessity requiring the declaration of a mistrial; and (2) the jury was not merely silent on the attempted assault charge, but sent a written note to the trial court indicating that it was unable to reach a unanimous verdict.

4. Sentencing— habitual felon—defendant's stipulation

The trial court erred by sentencing defendant as an habitual felon based on defendant's stipulation to being an habitual felon, because the trial court did not establish a record that defendant's stipulation was a guilty plea.

Appeal by defendant from judgment entered 1 February 2001 by Judge Benjamin G. Alford in Lenoir County Superior Court. Heard in the Court of Appeals 18 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Daniel S. Johnson, for the State.

William D. Spence, for defendant-appellant.

TYSON, Judge.

I. Facts

On 25 May 2000, Ronald Ross Edwards ("defendant") entered the Ace Hardware in Kinston, North Carolina. Defendant removed a saw, a drill set, a trimmer, and spray paint from the shelves and carried the items to the cashier. Defendant presented a "Purchase Order" from his employer, Curtis and Curtis, Inc., and attempted to have the items charged to their account.

The cashier, Christy Thornton Willoughby ("Thornton"), unsuccessfully attempted to call Sandy Shimer ("Shimer"), the store owner, for approval of the Purchase Order. Thornton completed the sale. As Thornton was carrying the merchandise to defendant's car, Shimer drove up. Thornton asked Shimer to look at the Purchase Order. Shimer informed Thornton and defendant that he needed to call Curtis and Curtis, Inc. Shimer testified that he knew there was a problem and that he had not approved the Purchase Order. As Thornton was calling Curtis and Curtis, Inc., defendant ran back to his car and

left the store premises. Shimer was unable to stop defendant's car, but Thornton obtained the license plate number.

Detective Tommy Lewis ("Lewis"), of the Kinston Police Department, ran the license tag through the Department of Motor Vehicles and learned that the vehicle was registered to defendant. Lewis also learned that defendant was employed by Curtis and Curtis, Inc. Lewis went to the job site where defendant was working and arrested him. A stolen .22 caliber pistol was found in defendant's vehicle.

Defendant was tried on the charges of obtaining property by false pretenses, possession of stolen goods, attempted assault with a deadly weapon with intent to kill, and was also indicted as an habitual felon. Defendant presented no evidence. The charge of possession of stolen goods was dismissed by the trial court. The jury found defendant guilty of obtaining property by false pretenses and was deadlocked on the attempted assault with a deadly weapon charge. The trial court declared a mistrial as to the attempted assault.

During the habitual felon hearing, defendant admitted to three prior felony convictions and stipulated to being an habitual felon. The trial court adjudged defendant to be an habitual felon and enhanced defendant's sentence to a minimum of eighty-four months and a maximum of 110 months. Defendant appeals.

II. Issues

The issues presented are whether: (1) the trial court erred in not permitting testimony by Shimer on cross-examination, (2) the trial court erred in denying defendant's motion to dismiss all of the charges, (3) the trial court erred in declaring a mistrial and not declaring defendant not guilty of the felony charge of attempted assault with a deadly weapon with intent to kill, and (4) the trial court erred in sentencing defendant as an habitual felon.

III. Cross-examination Testimony

[1] Defendant argues the trial court erred in excluding evidence elicited from Shimer on cross-examination that he was not deceived by the Purchase Order presented by defendant. The State's objection was sustained, and defendant made an offer of proof. According to defendant, Shimer's testimony refutes an essential element of the crime of obtaining property by false pretenses.

N.C.G.S. § 14-100 defines obtaining property by false pretenses and provides in pertinent part:

> 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) (2001) (emphasis supplied). According to our statute, it is not necessary that a particular person, such as Shimer, be deceived.

Our Supreme Court has defined the offense of false pretenses as "(1) a false representation of a subsisting fact or a future fulfillment or event, (2) which is calculated and intended to deceive, (3) which does in fact deceive, and (4) by which one person obtains or attempts to obtain value from another." *State v. Cronin*, 299 N.C. 229, 242, 262 S.E.2d 277, 286 (1980). Defendant contends that there was no substantial evidence of element number three: that Thorton or Shimer were in fact deceived.

Here, Robert Curtis, part owner and vice-president of Curtis and Curtis, Inc., testified that defendant did work for the company but at no time was defendant authorized to have a purchase order nor buy equipment with a purchase order. Thornton testified that defendant told her that his boss asked him to purchase the items, that it was defendant who presented the Purchase Order to her, and that he filled it out with the items before she rang them up. While Thorton questioned another employee about the Purchase Order, she testified that she believed defendant was purchasing the items on account for his employer with his employer's authorization. Thorton also testified that the purchase was completed and that she was loading defendant's car when Shimer drove up. We conclude that the State established that defendant made a false representation with the intent to deceive, which did in fact deceive Thornton. This assignment of error is dismissed.

IV. Motion to Dismiss

[2] The defendant contends that the trial court erred in denying his motion to dismiss all charges at the close of the State's evidence. Defendant argues that there was insufficient evidence that Thornton

or Shimer were deceived. We have already concluded that there was sufficient evidence that defendant made a false representation which did in fact deceive. This assignment of error is dismissed.

V. Attempted Assault

[3] Defendant was indicted on a charge of attempted assault with a deadly weapon with intent to kill based on his attempt to run over Shimer with his car. The trial court instructed the jury on the felony charge and the lesser included misdemeanor charge of attempted assault with a deadly weapon. The jury was unable to reach a unanimous verdict as to either attempted assault charge, sending a note to the court that seven members of the jury felt that defendant was guilty of misdemeanor attempted assault and five members felt defendant was not guilty. Defendant moved the trial court to declare him "not guilty" of the felony attempted assault charge and limit any retrial by the State to the misdemeanor attempted assault charge. The trial court refused and declared a mistrial with respect to the felony charge of attempted assault with a deadly weapon with intent to kill.

Defendant argues that it was obvious that the jury found him not guilty of felony attempted assault, and that the trial court erred in declaring a mistrial as to the second count: attempted assault with a deadly weapon with intent to kill. We disagree.

The decision to grant a mistrial lies within the sound discretion of the trial court. *State v. Pakulski*, 319 N.C. 562, 568, 356 S.E.2d 319, 323 (1987). The trial court is not required to make specific findings of fact so long as there is sufficient evidence in the record to support his decision. *State v. Odom*, 316 N.C. 306, 310, 341 S.E.2d 332, 334 (1986) (citing *Arizona v. Washington*, 434 U.S. 497, 54 L. Ed. 2d 717 (1978)). Our cases describe a deadlocked or "hung" jury as a classic example of "manifest necessity" requiring the declaration of a mistrial. *Id.* Similarly, a court may declare a mistrial where "[i]t appears there is no reasonable probability of the jury's agreement upon a verdict." *See* N.C. Gen. Stat. § 15A-1063(2) (2001); *see also* N.C. Gen. Stat. § 15A-1235(d) (2001).

Defendant contends that a verdict as to one charge amounts to an acquittal of any other charge being tried at the same time and relies on a line of cases citing the doctrine of "implied acquittal." Defendant's reliance on implied acquittal is misplaced.

We find *State v. Booker*, 306 N.C. 302, 293 S.E.2d 78 (1982), to be controlling authority in this case. In *Booker*, defendant was charged in separate bills of indictments with first-degree murder and armed robbery. *Id.* at 303, 293 S.E.2d at 79. The first trial ended in a mistrial because the jury could not agree upon a verdict. *Id.* At the first trial, the jury sent a note to the court that they were deadlocked seven to five in favor of a verdict of guilty of second-degree murder. *Id.* at 304, 293 S.E.2d at 79. On appeal from the second trial, defendant argued that the note indicated that the jury had implicitly found defendant not guilty of first-degree murder. *Id.* Our Supreme Court disagreed and held that before there can be an implied acquittal there must be a final verdict. *Id.* at 305, 293 S.E.2d at 80 (citations omitted). A "written memorandum to the trial judge did not constitute an acquittal." *Id.* at 307, 293 S.E.2d at 81 (citing *State v. Alston*, 294 N.C. 577, 583, 243 S.E.2d 354, 359 (1978)).

In the present case, the jury was not merely silent on the attempted assault charge but sent a written note to the trial court indicating that they were unable to reach a unanimous verdict. We hold that the trial court properly declared a mistrial as to the felony attempted assault charge and that a retrial of defendant on the charge will not result in double jeopardy. *See State v. Lachat*, 317 N.C. 73, 82-83, 343 S.E.2d 872, 877 (1986) (the prohibition against double jeopardy does not prevent the second trial of an accused when his previous trial ended in a mistrial). This assignment of error is overruled.

VI. Sentencing

[4] Defendant contends that his stipulation to being an habitual felon does not constitute a guilty plea, and absent a finding of guilty as an habitual felon his conviction must be reversed. We agree.

There is no requirement that a defendant give an express admission of guilt for a guilty plea to be valid. *State v. Bolinger*, 320 N.C. 596, 359 S.E.2d 459 (1987). This Court previously held that a stipulation to three prior convictions, as well as a stipulation to the status of habitual felon, "in the absence of an inquiry by the trial court to establish a record of a guilty plea, is not tantamount to a guilty plea." *State v. Gilmore*, 142 N.C. App. 465, 471, 542 S.E.2d 694, 699 (2001) (citing *State v. Williams*, 133 N.C. App. 326, 330, 515 S.E.2d 80, 83 (1999)). In *Williams*, this Court concluded that a stipulation by defendant to being an habitual felon amounted to a guilty plea where the trial court

established a record of defendant's plea of guilty on the habitual felon charge. *Williams*, 133 N.C. App. at 330, 515 S.E.2d at 83.

The State contends that the charge of habitual felon is not an independent crime subject to the requirements of Chapter 15A of the North Carolina General Statutes. Our Supreme Court in *State v. Allen*, 292 N.C. 431, 435, 233 S.E.2d 585, 588 (1977), held that "[b]eing an habitual felon is not a crime but is a status the attaining of which subjects a person thereafter convicted of a crime to an increased punishment for that crime." While not a crime, our statutes still require either a verdict by the jury that defendant is an habitual felon, *see* N.C. Gen. Stat. § 14-7.5 (2001), or a guilty plea to the charge of being an habitual felon. *See Gilmore*, 142 N.C. App. at 471, 542 S.E.2d at 699. A trial court may not accept a guilty plea from a defendant without establishing that the plea was voluntary, knowing, and intelligent. *See* N.C. Gen. Stat. § 15A-1022 (1999); *Bryant v. Cherry*, 687 F.2d 48, 49 (4th Cir. 1982) (citing *Brady v. United States*, 397 U.S. 742, 755, 25 L. Ed. 2d 747, 760 (1970)).

In the present case, the record shows that defendant admitted, in the jury's presence, to three prior felony convictions as they were introduced into evidence by the State. Upon inquiry by the trial court, out of the presence of the jury, defendant admitted his status as an habitual felon. The trial court did not establish a record that defendant's stipulation was a guilty plea.

We are bound by the holding in *Gilmore*. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (This Court is bound by a prior decision of another panel of this Court addressing the same question but in another case.). Therefore, we reverse defendant's conviction of being an habitual felon and remand for a new habitual felon hearing. Because defendant's conviction on this charge allowed the trial court to enhance defendant's sentence on the underlying offense of obtaining property by false pretenses, we reverse and remand for resentencing on that offense.

V. Conclusion

No error as to defendant's conviction of obtaining property by false pretenses, Case No. 00 CRS 006112.

Reversed as to defendant's conviction of being an habitual felon, Case No. 00 CRS 008383.

Remanded for a new habitual felon hearing and resentencing on the conviction of obtaining property by false pretenses.

No error in part; reversed and remanded in part.

Judges MARTIN and THOMAS concur.

CURTIS EDWARDS, PLAINTIFF v. FREDERICO CERRO AND HAM FARMS, INC., DEFENDANTS

No. COA01-309

(Filed 4 June 2002)

1. **Motor Vehicles— nighttime collision—contributory negligence not shown**

Plaintiff's evidence did not establish that he was contributorily negligent as a matter of law in an action arising from a collision between a pickup truck and a forklift where plaintiff was driving the truck at night with properly operating headlights and the evidence indicated that he applied his brakes and skidded for at least twenty-five feet before colliding with the forklift, which was being operated without reflectors or tail lights.

2. **Negligence— insurance—not mentioned at trial—briefly discussed by jury**

The trial court did not abuse its discretion in a negligence action by denying a motion for judgment n.o.v. and a new trial where neither the parties nor the witnesses at trial mentioned insurance, insurance was briefly discussed during a self-initiated conversation in jury deliberations, this conversation did not amount to misconduct, and there was no evidence that it affected or biased the jury's decisions.

3. **Discovery— driver's failure to answer interrogatories—sanction—negligence established—effect on employer**

In an action to recover for personal injuries received in a collision between plaintiff's pickup truck and a forklift driven by the individual defendant and owned by defendant employer, the trial court did not err in sanctioning the forklift driver for failing to answer interrogatories, both as an individual and as an employee

and agent of defendant employer, by ruling that the issue of the forklift driver's negligence was established in accordance with plaintiff's claim, thus preventing the issue of defendant employer's negligence to be submitted to the jury, where defendant employer admitted in its answer that the forklift driver was its employee and was operating the forklift in the course of his employment, and the driver's negligence was thus imputed to defendant employer.

Appeal by defendants from an order entered 17 July 2000 and a judgment entered 20 March 2000 by Judge Giles R. Clark in Greene County Superior Court. Heard in the Court of Appeals 30 January 2002.

Jones, Marcari, Russotto, Walker & Spencer, P.C., by Donald W. Marcari, for the plaintiff-appellee.

Wallace, Morris & Barwick, P.A., by Elizabeth A. Heath and Edwin M. Braswell, Jr., for the defendants-appellants.

HUDSON, Judge.

Defendants appeal a judgment and an order on post-trial motions entered awarding damages to plaintiff in this personal injury suit. Plaintiff claimed that defendants owed damages for injuries resulting from a collision between his vehicle and machinery owned by defendant Ham Farms, Inc. ("Ham Farms") and operated by defendant Frederico Cerro ("Mr. Cerro").

On 12 December 1996, plaintiff filed a complaint against Ham Farms and Mr. Cerro alleging that the defendant's negligence caused a motor vehicle crash on 22 June 1996 in Greene County, North Carolina. Plaintiff was driving a Datsun pickup truck with his five-year old daughter when he collided with a Caterpillar forklift owned by Ham Farms and operated by Mr. Cerro. Both vehicles were traveling north on R.P. 1400 at approximately 9 p.m. In his complaint, plaintiff alleged:

7. That at the time above stated, as the plaintiff proceeded in a lawful manner on RP 1400, there was a collision with the forklift operated on the public highway by defendant Frederico Cerro. The defendant, Frederico Cerro was negligent in that he:

a. Operated the forklift on the said highway after sunset without any rear, tail light, or reflectors, rendering visibility impossible;

b. Otherwise operated the vehicle in a manner different from that of a reasonable and prudent person under the same or similar circumstance.

Plaintiff also alleged that Ham Farms, as the owner of the forklift and the employer of Mr. Cerro, was responsible for the injuries sustained by plaintiff. Ham Farms admitted in its Answer,

> 6. . . . that the defendant Frederico Cerro was an employee of the defendant Ham Farms, Inc. and was operating the forklift owned by Defendant Ham Farms, Inc. in the course of his employment with Ham Farms, Inc.; it is also admitted that defendant Frederico Cerro was operating said forklift with the knowledge, approval, and consent of defendant Ham Farms, Inc.

Ham Farms alleged as its "Second Defense" that plaintiff was contributorily negligent in his operation of his vehicle when he collided with the forklift operated by Mr. Cerro.

Plaintiff served interrogatories on both defendants, however, Mr. Cerro did not respond. On 2 March 1998, an Order to Compel was entered ordering Mr. Cerro to respond to plaintiff's interrogatories. Again, he did not respond and plaintiff moved the court to sanction both defendants, by, among other sanctions, striking Ham Farms' Answer from the record. The trial court ordered on 8 December 1998 that:

> Frederico Cerro, individually, and as an employee and agent of Ham Farms, Inc. is sanctioned as follows:
>
> 1. The issue of negligence of Frederico Cerro is hereby answered in favor of the plaintiff Curtis Edwards.
>
> . . .
>
> 3. The issue of contributory negligence of the plaintiff Curtis Edwards, and the amount of damages, are to be reserved for trial.

As a consequence of ruling that both Mr. Cerro and Ham Farms were negligent, the Court did not submit that issue to the jury. The jury then found that plaintiff was not contributorily negligent and that

plaintiff was entitled to recover $85,000 from defendants. The trial court then entered Judgment ordering defendants to pay plaintiff the amount determined by the jury in addition to attorney's fees and costs. The trial court denied Ham Farms' Motion to Set Aside and Motion for New Trial. Ham Farms appeals.

We note at the outset that the Notice of Appeal purports to be on behalf of both defendants, but only Ham Farms has assigned errors. However, Mr. Cerro has not assigned as error any portion of the judgments or orders pertaining to plaintiff's suit. *See* N.C. R. App. Proc. 10 (2001) (providing that "the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal"). Questions not properly assigned and brought forward are deemed abandoned. *See* N.C. R. App. Proc. 28(a) (2001). It appears from the Record on Appeal that Mr. Cerro has not filed any briefs or memoranda with the trial court or this Court at any time. Thus, while Ham Farms has properly brought forward issues for review, Mr. Cerro has not. Therefore, we only address Ham Farms' contentions.

[1] First, Ham Farms argues that the "trial court committed reversible error in denying defendants' motion for directed verdict, judgment notwithstanding the verdict and for a new trial because the evidence showed that the plaintiff was contributorily negligent as a matter of law." Ham Farms argues that the plaintiff's evidence establishes that he was contributorily negligent as a matter of law. We disagree.

> With respect to contributory negligence as a matter of law, "[t]he general rule is that a directed verdict for a defendant on the ground of contributory negligence may only be granted when the evidence taken in the light most favorable to plaintiff establishes [his] negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge."

Rappaport v. Days Inn, 296 N.C. 382, 384, 250 S.E.2d 245, 247 (1979) (quoting *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976); *accord*, *Bowen v. Rental Co.*, 283 N.C. 395, 196 S.E.2d 789 (1973)). A similar standard of review applies to defendant's claim that the trial court improperly denied defendant's motion for judgment notwithstanding the verdict and a new trial. " '[T]he standard of review for a judgment notwithstanding the verdict is . . . whether,

upon examination of all the evidence in the light most favorable to the nonmoving party, and that party being given the benefit of every reasonable inference drawn therefrom, the evidence is sufficient to be submitted to the jury.' " *Lassiter v. Cecil*, 145 N.C. App. 679, 683, 551 S.E.2d 220, 223 (quoting *Fulk v. Piedmont Music Ctr.*, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000)), *disc. rev. denied*, 354 N.C. 363, 556 S.E.2d 302 (2001).

In *White v. Mote*, 270 N.C. 544, 155 S.E.2d 75 (1967), plaintiff collided with the rear of the city's fogging machine. However, the "plaintiff immediately acted upon seeing the danger," and was not held to be contributorily negligent. *See id.* at 553, 155 S.E.2d at 81; *see also Burchette v. Lynch*, 139 N.C. App. 756, 535 S.E.2d 77 (2000) (holding that automobile driver who collided with farm tractor parked partially on the road was not contributorily negligent). The Court in *White* explained that

> [t]he more serious question raised by the rear-end collision is whether plaintiff was keeping a proper lookout. We recognize the rule that "One who operates a motor vehicle must be reasonably vigilant and anticipate the use of the highways by others. A failure to maintain a reasonable lookout is negligence." But he will not be held to the duty of being able to bring his automobile to an immediate stop on the sudden arising of a dangerous situation which he could not have reasonably anticipated.

White, 270 N.C. at 553-54, 155 S.E.2d at 81 (internal citations omitted). Here the plaintiff's evidence leads to a conclusion similar to that in *White*.

The plaintiff's evidence at trial indicated that Mr. Cerro was operating the forklift on State Road 1400 at 9:00 p.m., in the dark, and without tail lights or reflectors affixed to the rear of the machinery. Trooper R. E. Westbrook, the officer who investigated the collision, found twenty-five feet of skid marks on the road immediately behind the forklift, indicating that plaintiff applied his brakes for at least that distance before he crashed into the rear of the forklift. Neither party introduced evidence indicating that plaintiff's car was malfunctioning during the accident. Plaintiff testified that he had no problem with the headlights on the truck prior to the accident. Carolyn Applewhite, plaintiff's girlfriend and the mother of plaintiff's daughter, testified that she had driven the truck involved in that accident and had never noticed any problem with the headlights. Plaintiff testified in addition that he was driving at approximately 55 miles per hour, the speed

limit, when he spotted the forklift in front of him. He slammed on his brakes when he saw it and swerved to the left in an attempt to miss the forklift, but could not avoid the collision. Both plaintiff and his daughter were taken to the hospital shortly after the collision. Defendant presented no evidence at all.

We conclude that the evidence at trial gives rise to a reasonable inference that the forklift could not have been seen or avoided by a person exercising reasonable care. *See Norwood v. Sherwin-Williams, Co.*, 303 N.C. 462, 469, 279 S.E.2d 559, 563 (1981). Plaintiff was driving a truck at night with properly operating headlights when, despite his efforts to avoid the crash, he collided with the forklift, which was being operated without reflectors or tail lights. The evidence indicates that he applied his brakes and then skidded for at least twenty-five feet before the collision. We cannot conclude that as a matter of law plaintiff was contributorily negligent.

Thus, we hold that plaintiff's evidence was sufficient to withstand defendant's directed verdict motion and to take his case to the jury. *See Rappaport*, 296 N.C. 382, 250 S.E.2d 245. Similarly, we hold that plaintiff's evidence was sufficient to support the trial court's denial of defendant's motion for judgment notwithstanding the verdict and for a new trial. *See Lassiter*, 145 N.C. App. at 683, 551 S.E.2d at 223. We reject defendant's argument to the contrary.

[2] Second, defendant contends that the trial court committed reversible error by denying the defendants' motion for judgment notwithstanding the verdict and for a new trial on the ground of misconduct by the jury in discussing insurance coverage. We disagree. Generally, "[w]here testimony is given, or reference is made, indicating directly and as an independent fact that defendant has liability insurance, it is prejudicial, and the court should, upon motion therefor aptly made, withdraw a juror and order a mistrial." *Fincher v. Rhyne*, 266 N.C. 64, 69, 145 S.E.2d 316, 319 (1965). However, "there are circumstances in which it is sufficient for the court, in its discretion, because of the incidental nature of the reference, to merely instruct the jury to disregard it." *Id.* at 69, 145 S.E.2d at 319-20. "The decision of whether a mistrial is required to prevent undue prejudice to a party or to further the ends of justice is a decision vested in the sound discretion of the trial judge." *Medlin v. FYCO, Inc.*, 139 N.C. App. 534, 540, 534 S.E.2d 622, 626 (2000) (holding that the trial court did not abuse his discretion in denying defendant's motion for a mistrial based on a witness' mention at trial of defendant's relationship

with defendant's insurer), *disc. rev. denied*, 353 N.C. 377, 547 S.E.2d 12 (2001).

Here, insurance was never mentioned by plaintiff, defendant, or any witness at trial. According to the individual jury members, one juror, Ms. Ezelle, asked the jury "had anybody heard anything as far as was his (plaintiff's) medical bills covered by insurance." Another juror, Mr. Piantanida responded, "I don't feel like that's germane to the case as far as whether he has insurance or doesn't have insurance. It's whether he's entitled to recover or not." All of the jurors testified that they had a brief discussion during deliberations about whether the parties were covered by some sort of insurance. According to the jurors' testimony, the word "insurance" was mentioned between one and four times, and the jurors did not discuss it again.

Here, neither the parties nor the witnesses at trial mentioned insurance, and we will not require a new trial under these circumstances. *See Fincher*, 266 N.C. 64, 145 S.E.2d 316. Insurance was briefly discussed during a self-initiated conversation in jury deliberations. This conversation by the jurors did not amount to misconduct and there was no evidence that it affected or biased their decisions. The trial court acted within its discretion when it denied Ham Farms' motion for judgment notwithstanding the verdict and for a new trial on this basis. *See Medlin*, 139 N.C. App. 534, 534 S.E.2d 622. We find no abuse of discretion.

[3] In its third assignment of error, Ham Farms contends that the trial court improperly answered the issue of negligence in favor of the plaintiff, "thereby precluding submission of the negligence issue to the jury." Ham Farms admitted in its Answer that Mr. Cerro was an employee of Ham Farms and was operating the fork lift on the night in question with the consent and knowledge of Ham Farms. Mr. Cerro did not file any separate pleadings with the court, and the Answer appearing in the record purports to be on behalf of both defendants. As an employee and agent of Ham Farms operating the forklift "in the course of his employment with Ham Farms," Mr. Cerro's negligence is imputed to Ham Farms, his employer. *See King v. Motley*, 233 N.C. 42, 45, 62 S.E.2d 540, 543 (1950); *Willoughby v. Wilkins*, 65 N.C. App. 626, 633, 310 S.E.2d 90, 95 (1983), *disc. rev. denied*, 310 N.C. 631, 315 S.E.2d 698 (1984).

It is undisputed that the interrogatories provided in the Record on Appeal were not answered as ordered by the trial court. Rule 37(b)

and (d) of the North Carolina Rule of Civil Procedure (2001) clearly state that among the sanctions available for such failure are that certain matters "shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order." Thus, the court was specifically authorized to rule that the issue of negligence was "established" in accordance with plaintiff's claim. Here, where the defenses to negligence were not asserted separately by the two defendants, and where negligence of the employee (Cerro) was, once established, imputed to Ham Farms, the liability of Ham Farms necessarily followed. We hold that under these circumstances this sanction was not improper.

Affirmed.

Judges WYNN and THOMAS concur.

STATE OF NORTH CAROLINA v. ALFRED HAMILTON

No. COA01-562

(Filed 4 June 2002)

1. **Homicide— first-degree murder—evidence sufficient**

The trial court did not err by denying defendant's motion to dismiss a charge of first-degree murder where there was substantial evidence to support each element of the offense.

2. **Homicide— first-degree murder—premeditation and deliberation—evidence sufficient**

There was sufficient evidence of premeditation and deliberation in a first-degree murder prosecution where there was no evidence of provocation by the victim; defendant claimed he did not know her; the victim was stabbed seven times, which would indicate both brutality and that she had been rendered helpless prior to the end of the assault; and the large number of stab wounds led to her bleeding to death.

3. **Evidence— prior bad acts or crimes—assault on defense witness**

There was no error in a first-degree murder prosecution in which defendant was accused of stabbing the victim in the admis-

sion of evidence of a prior assault on a defense witness by defendant where knives from defendant's collection were used in both assaults, defendant cut the victim in this case seven times and the witness six times, and the period between the two assaults was two years. N.C.G.S. § 8C-1, Rule 404(b).

4. Evidence— defendant HIV positive—admitted elsewhere

The trial court did not err in a first-degree murder prosecution by allowing into evidence a nurse's testimony that defendant is HIV positive where defendant subsequently stated on direct examination that he was infected with AIDS.

5. Criminal Law— limiting instruction—not requested

There was no plain error in a first-degree murder prosecution in the trial court's failure to give limiting instructions on evidence of a prior assault by defendant and defendant's medical history where the evidence was admissible to establish identity and motive, but not as substantive evidence, and defendant would have been entitled to the instruction upon request. Defendant failed to request limiting instructions and there was no other requirement that they be given.

Appeal by defendant from judgment entered 27 July 2000 by Judge G.K. Butterfield, Jr. in Edgecombe County Superior Court. Heard in the Court of Appeals 14 March 2002.

Roy Cooper, Attorney General, by Jonathan P. Babb, Special Deputy Attorney General, for the State.

Lamont Wiggins for defendant-appellant.

THOMAS, Judge.

Defendant, Alfred Hamilton, appeals a conviction of first-degree murder. He was sentenced to life imprisonment without parole.

In four assignments of error, defendant contends the trial court erred by: (1) denying his motion to dismiss; (2) allowing testimony concerning a prior bad act by defendant that did not involve the victim; (3) allowing defendant's medical history into evidence; and (4) failing to give a limiting instruction regarding the evidence admitted in (2) and (3) above. For the reasons discussed herein, we find no error.

The State's evidence tends to show the following: On the morning of 16 July 1997, defendant ran to the home of Nelson Moody and said he had just seen a body lying in a nearby alley. Moody immediately called the police. Rocky Mount Police Department detectives were dispatched and found the dead body of Rometta Marie Bellamy, a known prostitute, behind some trash carts. A sock was tied around her neck and she was naked except for her shoes and socks.

Detective Michael Lewis interviewed defendant. Defendant told Lewis that as he walked down the street at 8:00 a.m. on 16 July 1997, he saw legs protruding from behind a trash cart. He then walked within ten feet of the body and, after getting a closer look, ran to Moody's home.

Detective Sandra Kay Rose, a Crime Scene Investigator with the Rocky Mount Police Department, described the trash carts near the victim as having "wiping marks" on them, as "if you took a wet rag and you wiped . . . [the] area." She testified that the body could only be seen by looking back at an angle after walking towards the house. It could not be seen from the street.

Defendant usually stayed at the home of his sister, Janet Dukes, while in Rocky Mount. After obtaining consent from Dukes to search her home, Rose said she seized assorted white socks, a pair of blue shorts, and a brown carry bag containing three knives from a closet in the room where defendant slept. Brenda Bissette, an expert in the field of forensic D.N.A. analysis, testified that the blood found on the inside of defendant's blue shorts matched the blood of the victim. Dr. Marcia Eisenberg, an expert in the same field, determined that D.N.A. taken from defendant's shorts matched the victim's. Dr. Louis Levy, the pathologist who performed the autopsy, said Bellamy died from loss of blood due to several stab wounds.

Eugene Young, who also lived in Dukes's home, said he let defendant in the house around 2:00 or 2:30 a.m. on 16 July 1997, after defendant had returned from a trip to New York. Defendant went back out after Young loaned him his house key. Young fell asleep and the next thing he remembered was defendant coming back in the house, going into a closet, and then leaving again. Young did not know what time it was.

Dukes was awake when defendant arrived at her home from New York around 2:00 a.m. When she saw him again at approximately 5:45 a.m., she noticed he was not wearing any socks. She briefly went to

another room and, upon returning, saw that defendant had put on some socks. Dukes also said the washing machine had been used during the night and that defendant's clothes and shoes were in it.

Defendant's evidence, meanwhile, tends to show the following: Defendant traveled to New York with Moses Battle, Jr., Dukes's boyfriend, and did not return until around 2:00 a.m. on 16 July 1997.

Denise Smith, a former girlfriend of defendant's, said that on the morning of 16 July 1997 defendant gave her money to purchase cocaine for him. On cross-examination, Smith admitted that on 23 May 1995, defendant cut her six times with a nineteen-inch butcher knife.

Franklin Whitfield stated that he saw Bellamy alive at 3:30 a.m. on the morning of 16 July 1997.

Defendant also called an adverse witness, Blondie Hinton, who was the victim's first cousin. Hinton testified that around 6:30 or 7:00 a.m. on 16 July 1997, she saw a man "bent down like he was removing something from a car and took it behind a house" near the location where the body was found. Hinton saw only the side of the man's face and was unable to immediately identify him. After police officers showed her pictures of defendant's side profiles, however, she identified defendant as the man she saw.

Defendant took the stand in his own defense. He testified that after returning from his trip, he spent a few minutes smoking crack cocaine with Smith and then went to the house he shared with Young and Dukes. Young let him in because he had no key. After retrieving a lighter and "stem" from inside, defendant sat on the porch and smoked more crack. He then went in search of Smith to recover a lighter he had loaned her. After she told him she had lost it, he returned home, put some clothes in the washer, and went to sleep.

Defendant said he left home around 7:00 a.m. to visit Moody. On the way, he saw the victim's legs in the alley, panicked, and ran to Moody's house. Defendant claimed he brushed against a trash cart as he was looking at the victim. Moody called the authorities and defendant waited for them to arrive. Defendant volunteered to speak with the police and said he did not know the victim.

Defendant also testified that his assault on Smith was actually self-defense. They were fighting and Smith had been threatening him with a razor. He said her wounds were superficial; he just "stabbed

her in the hand and arm." Defendant also testified that he uses more than four aliases and collects knives.

In rebuttal, Rocky Mount Police Department Detective Brian McGrath testified that defendant never mentioned touching a trash cart in his statement to the police. Also in rebuttal, Rose noted there was no blood on the outside of the trash carts. She said there were only wiping marks on the outside of the carts and a rag stained with the victim's blood inside one of them.

Defendant was convicted of first-degree murder. The State did not seek the death penalty and defendant was sentenced to life imprisonment. He appeals.

[1] By his first assignment of error, defendant contends the trial court erred by denying his motion to dismiss based on the State's failure to prove every essential element of first-degree murder.

> On a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it. If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

State v. Locklear, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988) (citations omitted). Murder in the first degree is the "intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Fisher*, 318 N.C. 512, 517, 350 S.E.2d 334, 337 (1986). Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

Here, the State presented evidence that: (1) the victim's blood was on the inside of defendant's shorts; (2) one of the three knives owned by defendant was consistent with the weapon used to inflict the victim's wounds; (3) defendant returned home from New York at two in the morning, went back out, returned home, showered, and then washed his clothes and shoes; (4) defendant was identified by Hinton as the man she saw around 6:30 a.m. bending down as if removing something from a car and taking it behind a house; (5) defendant claimed to have discovered the body, saying he saw the victim's legs protruding from behind the trash carts when, actually, the victim's body could not be seen from the street; (6) defendant

claimed for the first time at trial that the blood inside his shorts resulted from his "rubbing" against a trash cart; and (7) Detective Rose testified that there was no blood on the outside of the trash carts because they had been wiped and that a rag stained with the victim's blood was found in one of the carts. Viewing the evidence in the light most favorable to the State, there is substantial evidence to support a finding that defendant committed the murder.

[2] Defendant further contends, however, that the State failed to present substantial evidence of premeditation and deliberation. No particular amount of time is required for premeditation, and the time can be very short. *See, e.g., State v. Taylor*, 344 N.C. 31, 45, 473 S.E.2d 596, 604 (1996). Our Supreme Court sets forth the analysis as follows:

> When determining whether there is sufficient evidence that a killing was done with premeditation and deliberation, the court may consider several circumstances, including the following: (1) want of provocation on the part of the deceased; (2) the conduct and statements of defendant before and after the killing; (3) the dealing of lethal blows after the deceased has been felled and rendered helpless; (4) evidence that the killing was done in a brutal manner; and (5) the nature and number of the victim's wounds.

State v. Quick, 329 N.C. 1, 20, 405 S.E.2d 179, 191 (1991) (citations omitted). Here, there was no evidence of provocation on the part of the victim. Defendant claimed he did not know her. There was evidence of a struggle. The victim was stabbed seven times, which would indicate both brutality and that she had been rendered helpless prior to the end of the assault. The large number of stab wounds led to her bleeding to death. Based on the foregoing, there was substantial evidence of premeditation and deliberation. The State thus presented relevant evidence adequate to support a finding that defendant intentionally and unlawfully killed a human being with malice and with premeditation and deliberation. Accordingly, this assignment of error is without merit.

[3] By his second assignment of error, defendant contends the trial court erred in admitting evidence of a prior assault of Smith by defendant. Evidence of prior bad acts is inadmissible under Rule 404(b) if its only purpose is "to prove the character of a person in order to show that he acted in conformity therewith." N.C.R. Evid. 404(b).

Evidence of the assault here, which occurred two years prior to the murder of the victim, was admitted before and after defendant's sole objection to this evidence. Smith, defendant's own witness, stated on cross-examination that defendant had assaulted her with a butcher knife. Defendant then lodged a general objection to the State's question: "Can you describe the knife for the jury?" It was overruled. The witness then repeated that defendant had stabbed her with a knife. She also answered questions, without objection, regarding where and how many times defendant had cut her and the medical treatment she received. "Where evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984).

Even if defendant had properly objected, however, this evidence would have been admissible under Rule 404(b) of the North Carolina Rules of Evidence. Rule 404 excludes evidence of other bad acts 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. N.C.R. Evid. 404(b). The Rule allows evidence of prior bad acts to prove, among other things, identity. *Id.*

Here, the risk of undue prejudice does not outweigh the probative value of the evidence, *see* N.C.R. Evid. 403, because of the similarity and temporal proximity of the incidents. Knives were used in both assaults. Defendant said that he collected knives, and that the fourth knife in his collection was the one used to assault Smith. One of the remaining knives in defendant's collection was consistent with the wounds suffered by the victim in this case. Smith testified that defendant cut her six times; the victim here was stabbed seven times. The time period between the two assaults is two years. *See State v. Parker*, 113 N.C. App. 216, 225, 438 S.E.2d 745, 751 (1994) (bad act occurring five years before the crime charged sufficiently similar and not so remote in time as to be more probative than prejudicial). Accordingly, the probative value of the evidence introduced in the case was not only to show propensity. We therefore overrule this assignment of error.

[4] By his third assignment of error, defendant contends the trial court erred by allowing defendant's medical history into evidence, specifically, that defendant is HIV positive. A nurse testified to his being HIV positive. Defendant lodged an objection. Subsequently, however, defendant stated on direct examination that he was infected with the AIDS virus. The benefit of defendant's objection

was thus lost. *Whitley*, 311 N.C. at 661, 319 S.E.2d at 588. Accordingly, this assignment of error is without merit.

[5] By his fourth assignment of error, defendant argues that the trial court committed plain error by failing to give limiting instructions regarding the evidence of the prior assault and his medical history. However, defendant did not request a limiting instruction at trial and therefore his argument is based on the contention that the trial court committed plain error. N.C.R. App. P. 10(b)(2). In order to prevail under a plain error analysis, a defendant must show: (1) there was error; and (2) without this error, the jury would probably have reached a different verdict. *State v. Faison*, 330 N.C. 347, 361, 411 S.E.2d 143, 151 (1991).

Because the evidence was admissible as bases for establishing defendant's identity and motive, but not as substantive evidence, defendant was entitled, upon request, to instructions regarding the limitation of the evidence to its proper scope. *See* N.C.R. Evid. 105 (when evidence admissible for one purpose but not for another purpose is admitted, the court, upon request, shall instruct the jury accordingly). Our Supreme Court stated in *State v. Maccia*:

> Although it is true that the jury was not instructed in the present case to limit its consideration of the evidence to purposes of impeachment, it does not appear from the record that the defendant requested a limiting instruction. The admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by the defendant for limiting instructions. *State v. Montgomery*, 291 N.C. 91, 229 S.E.2d 572 (1976); *State v. Goodson*, 273 N.C. 128, 159 S.E.2d 310 (1968).

State v. Maccia, 311 N.C. 222, 228-29, 316 S.E.2d 241, 245 (1984); *see also State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988).

Here, defendant failed to request limiting instructions and there was no requirement otherwise for the trial court to give them. He is therefore unable to prevail on this assignment.

NO ERROR.

Judges MARTIN and HUDSON concur.

STATE OF NORTH CAROLINA v. STEVEN D. STAFFORD

No. COA01-532

(Filed 4 June 2002)

1. **Evidence— leading question—reiteration of prior testimony**

The trial court did not abuse its discretion in a first-degree murder prosecution when the State was allowed on direct examination to ask a leading question which referred to defendant shooting the victim. The State was simply reiterating and further developing the testimony already given by the witness.

2. **Constitutional Law— reference to codefendant—sanitized statement—not prejudicial**

The trial court did not err in a first-degree murder prosecution by allowing testimony and an out-of-court statement which excluded mention of a codefendant. Exclusion of the reference to the codefendant was required by *Bruton v. United States*, 391 U.S. 123; moreover, defendant was not prejudiced by the sanitized statement because it was not materially altered by deleting the reference.

3. **Evidence— defendant's temper—question not prejudicial**

There was no prejudicial error in a first-degree murder prosecution where the State improperly attempted to offer evidence of defendant's temper before he opened the door and put his character at issue, but defendant did not admit that he had a temper, the State did not elaborate further, and there was considerable evidence from which a jury could conclude that defendant was guilty of first-degree murder. N.C.G.S. § 8C-1, Rule 404(a).

4. **Homicide— first-degree murder—no instructions on second-degree or involuntary manslaughter**

The trial court did not err in a first-degree murder prosecution by not instructing the jury on second-degree murder or involuntary manslaughter where the State's evidence tended to show that defendant intentionally shot the victim and defendant offered evidence that he had not fired a gun on the night in question and that the gun used in the murder had never been in his possession. There was no evidence offered to support a finding of second-degree murder or involuntary manslaughter.

Appeal by defendant from judgment entered 11 August 2000 by Judge L. Oliver Noble in Mecklenburg County Superior Court. Heard in the Court of Appeals 21 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Jane Ammons Gilchrist, for the State.

Thomas Blackwood, for defendant-appellant.

CAMPBELL, Judge.

Defendant appeals a judgment finding him guilty of first-degree murder under the first-degree felony murder rule. We find no error.

On 6 June 1998, defendant and two other men, one of whom was co-defendant Tamarus Davis ("Davis"), were playing basketball at Clemson Park in Charlotte, North Carolina. Angela Kirkpatrick ("Kirkpatrick") and her two daughters were also at the park that day and joined the three men for several games of basketball. Subsequently, the men followed Kirkpatrick back to her house to play cards and socialize. Defendant remained on the porch during most of the time he and the other men were at Kirkpatrick's house.

After spending several hours with Kirkpatrick and her daughters, defendant and Davis left to visit various other places before finally arriving at Davis' house sometime after midnight. While outside Davis' house, defendant and Davis saw Plevus Stewart ("Stewart") driving down the street and motioned for Stewart to stop his car. Both men spoke briefly with Stewart before getting into the car with him and driving around the block. Eventually, the men arrived on Kirkpatrick's street just as Josh Livingston ("Livingston"), a co-worker and friend of Kirkpatrick's, was backing his car out of Kirkpatrick's driveway. As Livingston pulled into the street, he came to a stop behind Stewart's car, which had stopped in the street. An occupant of Stewart's car exited and shot Livingston while he was sitting in his car. Stewart drove away from the scene. Defendant and Davis ran.

Kirkpatrick, who saw the shooting from her front porch, told investigators that she recognized defendant and Davis from their basketball game earlier that day. The following day (7 June 1998), defendant was arrested. The police searched defendant and found shotgun shells in his pocket. Defendant, Davis, and Stewart were all charged with the first-degree murder of Livingston.

On 7 August 2000, the defendant's case was called for trial in the Mecklenburg County Superior Court, Judge L. Oliver Noble presiding. At the trial, the State's evidence consisted of the following:

Kirkpatrick testified that she saw defendant get out of the driver's side of Stewart's car and shoot Livingston. She further testified that she recognized defendant by his clothing and his mannerisms.

Stewart testified for the State after the charges against him were dismissed. He testified that defendant held him at gunpoint and ordered him to drive to Kirkpatrick's house. Upon reaching Kirkpatrick's house, defendant and Davis exited the car with the gun. Stewart immediately drove away once the two men exited the car.

There was also testimony given by James Culp ("Culp"), an inmate at the Mecklenburg County Jail from 28 August 1997 until 6 May 1999. Culp testified that he and defendant met while in jail and had discussed the murder charge against defendant. During their discussion, defendant stated that: (1) defendant forced Stewart to take him to Kirkpatrick's house; (2) Stewart drove away after defendant got out of the car; and (3) defendant used a shotgun to kill Livingston.

Finally, the State offered testimony from a homicide investigator. The investigator testified that the spent shotgun shells found at the crime scene were identical to the shotgun shells found in defendant's pocket the day after the murder.

Defendant's evidence tended to show that he and Davis got into Stewart's car without the use of force or intimidation. Defendant got into the front passenger's seat, and Davis got into the back seat of the car. While in the car, Stewart began looking for marijuana and, in the process, pulled several shotgun shells out of his pocket. Stewart asked defendant to hold the shotgun shells while he continued looking for the marijuana. As Stewart drove past Kirkpatrick's house, he saw Livingston leaving and said, "[T]hat's that motherf—ker right there." Stewart stopped the car, exited the car, and approached Livingston's car. Defendant, a long-time friend of Livingston's, placed the shotgun shells in his pocket and also exited the car to prevent an altercation from ensuing. As Stewart raised the gun to shoot Livingston, defendant attempted to hit the gun away from him. Nevertheless, the gun went off. Defendant and Davis, who had gotten out of the car at that point, ran away in fear.

On 11 August 2000, the jury returned a verdict finding defendant guilty of first-degree murder under the first-degree felony murder rule. He was sentenced to life in prison without parole. Co-defendant Davis was found not guilty. Defendant appeals this judgment.

Defendant brings forth four assignments of error. For the following reasons, we find no error in the trial court's judgment.

I.

[1] By defendant's first assignment of error he argues the trial court erred when it overruled his objection to the State asking witness Kirkpatrick a leading question on direct examination that referenced defendant shooting Livingston. We disagree.

"A leading question is generally defined as one which suggests the desired response and may frequently be answered yes or no." *State v. Britt*, 291 N.C. 528, 539, 231 S.E.2d 644, 652 (1977) (citation omitted). "Historically, leading questions were generally only permissible on cross-examination, however, over the years other permissible circumstances have evolved." *State v. Summerlin*, 98 N.C. App. 167, 173, 390 S.E.2d 358, 361 (1990); N.C. Gen. Stat. § 8C-1, Rule 611(c) (2001). Two such permissible circumstances include the use of leading questions on direct examination if they were "either necessary to develop the witness' testimony or were questions which elicited testimony already received into evidence without objection." *Id. at* 173, 390 S.E.2d at 361. "Rulings by the trial judge on the use of leading questions are discretionary and reversible only for an abuse of discretion." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986).

Here, defendant takes issue with the State asking Kirkpatrick on direct examination, "[D]id you describe the clothing that the Defendant Stafford had been wearing when he shot [Livingston]?" Defendant argues that by overruling his objection, the trial court eased the burden on the State, gave credibility to the State's witness, and possibly led the jury to believe the court was of the opinion that defendant had shot Livingston. However, after reading the trial transcript, we note that this question was preceded by the State asking Kirkpatrick what defendant did after she observed him with a shotgun in his hand. Kirkpatrick testified, "I saw him turn—walk on the driver side of [the victim's] car, he walked up to the car, stuck the shotgun in and said, who are you, man; who are you, man, and shot him." There was no objection made by defense counsel to this testi-

mony. Thereafter, when the State asked Kirkpatrick the question at issue, it was simply reiterating and further developing the testimony already given by this witness. Thus, we overrule this assignment of error because there was no abuse of discretion by the trial court.

II.

[2] By his second assignment of error defendant argues the trial court committed reversible error by allowing the testimony and prior out-of-court statement of witness Culp to exclude any mention of co-defendant Davis. We disagree.

The United States Supreme Court addressed the exclusion of statements detrimental to a co-defendant in *Bruton v. United States*, 391 U.S. 123, 20 L. Ed. 2d 476 (1968). This Court explained the *Bruton* decision in *State v. Johnston*, 39 N.C. App. 179, 249 S.E.2d 879 (1978), as follows:

> G.S. 15A-927(c)(1) codifies substantially the [*Bruton*] decision . . ., which held that the receipt in evidence of the confession of one codefendant posed a substantial threat to the other codefendant's Sixth Amendment right of confrontation and cross-examination because the privilege against self-incrimination prevents those who are implicated from calling the defendant who made the statement to the stand.

Id. at 182, 249 S.E.2d at 881. Additionally, this Court has held that an out-of-court statement that contains deleted references to a co-defendant is admissible as long as the "deletions [do] not materially change the nature of [the] statement." *State v. Giles*, 83 N.C. App. 487, 494, 350 S.E.2d 868, 872 (1986).

In the present case, the State called Culp as a witness to testify about conversations he had with defendant, in which defendant stated that he had gotten a gun from his "friend" and shot Livingston. Pursuant to *Bruton*, the trial court prohibited Culp from testifying that defendant was assisted by his "friend" due to the likelihood this reference would implicate co-defendant Davis. Like the trial court, we conclude that *Bruton* requires this reference to Davis be deleted to prevent possibly implicating him in the shooting and substantially threatening his Sixth Amendment rights. Also, since the essence of Culp's testimony was that defendant shot Livingston, defendant was not "prejudiced by the admission of the 'sanitized' statement" because it was not materially altered by deleting reference to Davis. *Id.*

III.

[3] Next defendant assigns error to the trial court's overruling his objection to the State's question regarding his temper. In particular, defendant takes issue with the State asking him on cross-examination, "[D]o you recall telling [the investigating officer] that it is easy for you to become angry, that you've had a temper all your life?" Defendant replied, "If it's on tape, I said it, but it's—but at this time I don't remember saying that." Defendant argues this question was inadmissible character evidence pursuant to Rule 404(a) of our statutes.

Rule 404(a) states that generally "[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 . . . ." N.C. Gen. Stat. § Rule 8C-1, Rule 404(a) (2001). Such character evidence is admissible when the defendant has first "opened the door" to a pertinent trait of his character. See *State v. Taylor*, 117 N.C. App. 644, 651, 453 S.E.2d 225, 229 (1995). In the case *sub judice*, the State attempted to offer evidence of defendant's temper before he "opened the door" and put his character at issue. Thus, the State's question was an attempt to elicit inadmissible evidence.

"Defendant must also show, however, that he was prejudiced by the erroneous admission of this evidence. A defendant is prejudiced 'when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached . . . .' " *Id.* at 652, 453 S.E.2d at 230 (quoting N.C. Gen. Stat. § 15A-1443(a)). Here, the State's question did not lead to the admission of any improper evidence because defendant did not admit he had a temper and the State did not elaborate further on defendant's "alleged" temper. Furthermore, considerable evidence was presented during the trial from which a jury could otherwise conclude that defendant was guilty of first-degree murder. This evidence included defendant admitting he was at the scene of the murder, Stewart testifying that defendant got out of his car and approached Livingston's car with a gun, and Kirkpatrick testifying that she saw defendant shoot Livingston. Therefore, the court's failure to sustain defendant's objection to the State's question regarding his temper was not prejudicial.

IV.

[4] Finally, defendant assigns as error the court's failure to instruct the jury with regard to a possible verdict finding him guilty of second-

degree murder or involuntary manslaughter. We find this assignment of error to be without merit.

A "[d]efendant is 'entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.' " *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (quoting *Keeble v. United States*, 412 U.S. 205, 208, 36 L. Ed. 2d 844, 847 (1973)). Our Supreme Court has held as a determinative factor that a second-degree murder instruction is not required if there is sufficient evidence "to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree . . . and there is no evidence to negate these elements other that defendant's denial that he committed the offense[.]" *State v. King*, 353 N.C. 457, 484, 546 S.E.2d 575, 595 (2001) (quoting *State v. Gary*, 348 N.C. 510, 524, 501 S.E.2d 57, 66-67 (1998)). This determinative factor can also be applied to an involuntary manslaughter instruction because "[a] jury should only be instructed with regard to a possible verdict if there is evidence to support it." *State v. Clark*, 325 N.C. 677, 684, 386 S.E.2d 191, 195 (1989) (citations omitted).

In the present case, defendant presented no evidence to support a second-degree murder or involuntary manslaughter instruction. The State's evidence tended to show that Livingston died as a result of defendant intentionally shooting Livingston while he was sitting in his car. If the jury were to believe this evidence, defendant is guilty of first-degree felony murder for shooting into an occupied vehicle and killing an occupant of that vehicle. *See* N.C. Gen. Stat. §§ 14-32, -34.1 (2001). Defendant offered evidence that he did not fire a gun at any time on the night in question and that the gun used to kill Livingston was never in his possession. If the jury were to believe this evidence, defendant is not guilty of any degree of homicide. After considering *all* the evidence, the jury unanimously found defendant guilty of first-degree murder under the first-degree felony murder rule based on the State's ability to support and prove every element of this crime. Since there was no evidence offered to support a finding of second-degree murder or involuntary manslaughter, the trial judge did not err in failing to submit an instruction on these two crimes to the jury.

Accordingly, the trial court did not err in entering a judgment finding defendant guilty of first-degree murder under the first-degree felony murder rule.

No error.

Judges MARTIN and HUDSON concur.

PIEDMONT REBAR, INC., D/B/A CAROLINA REBAR, PLAINTIFF V. SUN CONSTRUCTION, INC. AND EAST COAST HOSPITALITY, L.L.C., DEFENDANTS

No. COA01-558

(Filed 4 June 2002)

1. **Judgments— default—subcontractor action—general contractor not served—summary judgment against owner—lien on owner's property**

The trial court did not err by denying defendant motel owner's motion for relief from an order granting plaintiff subcontractor a default judgment against the motel owner and the general contractor in an action for breach of contract and granting plaintiff a lien against the owner's property for materials furnished for construction of the motel, even though defendant general contractor was not timely served with process, since (1) the action did not discontinue as to the owner which was properly served with process, and (2) where an action is brought against two or more defendants who are jointly or severally liable, and the summons is served on one or more, but not all of them, the plaintiff may proceed against the defendants served, and judgment for the plaintiff may be entered against all defendants who are jointly indebted and enforced against the joint property of all and the separate property of the defendant served.

2. **Lien— amount—general contractor not served—enforcement against owner's property**

The amount of the lien against the real property of a motel owner awarded by the trial court in favor of plaintiff subcontractor arises from the lien itself, not from monetary damages assessed against the general contractor, and the lien can be enforced against the motel owner's real property even though the general contractor was not properly served with process where the owner was properly served.

Judge TYSON concurring in the result.

Appeal by defendant East Coast Hospitality, L.L.C., from order entered 20 February 2001 by Judge Thomas W. Seay, Jr., in Randolph County Superior Court. Heard in the Court of Appeals 20 February 2002.

No brief filed for plaintiff appellee.

Stubbs & Perdue, P.A., by Trawick H. Stubbs, Jr., and John W. King, Jr., for defendant appellant East Coast Hospitality, L.L.C.

TIMMONS-GOODSON, Judge.

East Coast Hospitality, L.L.C. ("East Coast") appeals from an order of the trial court denying its motions seeking relief from a default judgment granting Piedmont Rebar, Inc. ("Piedmont") a lien against certain real property owned by East Coast. For the reasons stated herein, we affirm the order of the trial court.

On 6 October 1998, Piedmont filed a complaint in Randolph County Superior Court against East Coast and Sun Construction, Inc. ("Sun Construction") for breach of contract. The complaint alleged that Sun Construction and East Coast entered into a contract for Sun Construction to build a motel on certain property owned by East Coast. Piedmont thereafter entered into a subcontract with Sun Construction "to provide reinforcing rod for the Project." According to the complaint, Piedmont provided the contracted materials but was never reimbursed for such supplies, resulting in a loss to Piedmont of over ten thousand dollars. Piedmont asserted recovery based upon quantum meruit and breach of its contract with Sun Construction, and it requested a lien upon any funds owed by East Coast to Sun Construction, as well as a subrogation lien on the property owned by East Coast.

Neither Sun Construction nor East Coast responded to the complaint, and Piedmont subsequently obtained a default judgment against both of them. On 8 February 1999, the trial court entered an order and judgment awarding Piedmont judgment against Sun Construction for the principal sum of $10,568.20, plus interest in the amount of $1,426.70. The trial court also decreed Piedmont to have a lien against any funds owed to Sun Construction by East Coast, as well as a lien against the real property owned by East Coast.

On 29 January 2001, East Coast filed a motion in the cause requesting that the 8 February 1999 judgment "be amended to reflect

that East Coast Hospitality, LLC did not violate the Notice of Claim of Lien of the Plaintiff" and that "any claim against the real estate owned by [East Coast] be vacated." On 8 February 2001, East Coast filed a motion seeking relief from the default judgment under Rule 60(b)(6) of the Rules of Civil Procedure. The trial court heard the matter on 19 February 2001. Upon review of the relevant materials and argument by counsel, the trial court concluded that East Coast had "failed to demonstrate sufficient grounds to support its Motions" and therefore denied such motions. East Coast filed a timely notice of appeal to this Court.

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[1] East Coast contends that the trial court erred by denying its motion to set aside the default judgment on the grounds that the judgment was void for lack of jurisdiction. East Coast also submits that the court erred in denying its motion in the cause.

Under section 1A-1, Rule 60(b)(6) of our Rules of Civil Procedure, a judgment may be set aside for any reason "justifying relief from the operation of the judgment." N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2001). A motion to set aside a judgment based on lack of personal service is proper under this section. *See Nye, Mitchell, Jarvis & Bugg v. Oates*, 109 N.C. App. 289, 291-92, 426 S.E.2d 291, 293 (1993). Rule 60(b)(6) is equitable in nature and permits a trial judge to exercise his discretion in granting or withholding the desired relief. *See State ex. rel. Envir. 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). As such, the trial judge's ruling may be reversed on appeal only upon a showing that the decision results in a substantial miscarriage of justice. *See id.*

East Coast argues that the default judgment is void for lack of process. East Coast notes that, although it received proper and timely notice of Piedmont's complaint, Sun Construction was not served with notice until thirty-three days after the issuance of the summons. East Coast asserts that the lack of proper service to Sun Construction rendered the default judgment void. This argument has no merit.

When Piedmont filed its complaint, it had thirty days[1] after the date of the issuance of the summons in which to effect personal service of summons. *See* N.C. Gen. Stat. § 1A-1, Rule 4(c) (1999). Where

1. The time period in which to effect personal service has recently been expanded to sixty days. *See* 2001 N.C. Sess. Laws ch. 379, § 1; N.C. Gen. Stat. § 1A-1, Rule 4(c) (2001).

personal service is not effected within the time specified, "the action is discontinued *as to any defendant not theretofore served* with summons within the time allowed." N.C. Gen. Stat. § 1A-1, Rule 4(e) (2001) (emphasis added). As East Coast was properly served within the time specified by statute, the action clearly did not discontinue as to East Coast. Moreover, where an action is brought against two or more defendants who are jointly or severally liable, and the summons is served on one or more, but not all of them, the plaintiff may proceed against the defendants served, and if the plaintiff recovers judgment, such judgment may be entered against all the defendants who are jointly indebted, and enforced against the joint property of all and the separate property of the defendants served. *See* N.C. Gen. Stat. § 1-113 (2001); *Hancock v. Southgate*, 186 N.C. 278, 282, 119 S.E. 364, 366 (1923).

[2] East Coast contends, however, that the monetary portion of the judgment concerned Sun Construction and not East Coast. East Coast asserts that, because service to Sun Construction was defective, that portion of the judgment as to Sun Construction is void, and if the monetary portion of the judgment is void, then the lien against the real property cannot be enforced. We disagree.

The 8 February 1999 order and judgment of the trial court decrees that "Plaintiff has a lien on the Property in the full amount of this judgment. The lien has an effective date of February 20th, 1998. Pursuant to N.C.G.S. 44A-13(b), the Property shall be sold to satisfy the lien[.]" The amount of the lien filed by Piedmont was $10,568.20. The amount of the lien against the real property awarded by the trial court in favor of Piedmont arises from the lien itself, and not from the monetary damages assessed against Sun Construction.

We conclude that the trial court did not abuse its discretion in denying East Coast's motion for relief from the default judgment. The judgment against East Coast was not void, and the record reveals no extraordinary circumstances or other showing by East Coast that would warrant relief from the judgment. *See Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987) (noting that relief under Rule 60(b)(6) is properly granted only if extraordinary circumstances exist and the movant makes a showing that justice demands the granting of such relief). East Coast argues that, as a subcontractor, Piedmont had no right to the lien unless the general contractor could enforce the lien, and that Piedmont failed to show that Sun Construction had any rights against East Coast. East Coast failed to assert this defense at trial, however, and did not appeal the default judgment. East Coast is

therefore precluded from seeking relief under Rule 60(b)(6) on this basis. *See Concrete Supply Co. v. Ramseur Baptist Church*, 95 N.C. App. 658, 660, 383 S.E.2d 222, 223 (1989) (holding that, where the defendant property owner failed to appeal from judgment against it in favor of a subcontractor, it was not entitled to relief under Rule 60(b)(6) on the grounds that it had already paid the general contractor all that was due under the contract). We therefore overrule East Coast's first assignment of error.

By its second assignment of error, East Coast argues that the trial court erred in denying its motion in the cause to determine the extent to which it violated the notice of claim of lien served by Piedmont. East Coast points to that portion of the default judgment which states that, "Plaintiff [has] a lien on the Property to the extent it is determined that East Coast violated the Notice of Claim of Lien[.]" Because the default judgment makes no findings regarding the extent to which East Coast violated the notice of claim of lien, East Coast asserts that the lien cannot be enforced. We do not agree with this argument.

East Coast concedes that the above-stated language represents only a portion of the default judgment. As noted *supra*, the default judgment clearly orders that, "Plaintiff has a lien against the Property in the full amount of this judgment." This language fully supports the enforcement of Piedmont's lien against the real property. Moreover, East Coast did not appeal from the default judgment. In fact, the record shows that East Coast took no steps in this matter whatsoever until 29 January 2001, nearly two years after the default judgment was entered against it, and nearly four years after it was served notice of Piedmont's claim of lien. We conclude that the trial court properly denied the motion in the cause, and we overrule East Coast's second assignment of error.

In conclusion, we hold that the trial court properly denied the motions brought by East Coast. The order of the trial court is therefore

Affirmed.

Judge WYNN concurs.

Judge TYSON concurs in the result.

TYSON, Judge, concurring in the result.

I concur in the result of the majority's opinion. N.C.G.S. § 44A-23 provides first, second, and third tier subcontractors a right of subrogation to the lien of the contractor who dealt with the owner, regardless of any lien upon the funds. *Electric Supply Co. of Durham, Inc. v. Swain Elec. Co., Inc.*, 328 N.C. 651, 654, 403 S.E.2d 291, 293 (1991).

Plaintiff was a first tier subcontractor. Article 2, Part 2 of Chapter 44A of the General Statutes provides for perfection of liens by subcontractors. A lien in favor of a subcontractor may arise either: (1) directly under N.C.G.S. § 44A-18 and N.C.G.S. § 44A-20; or (2) by subrogation under N.C.G.S. § 44A-23. *Mace v. Bryant Constr. Corp.*, 48 N.C. App. 297, 304, 269 S.E.2d 191, 195 (1980).

N.C.G.S. § 44A-23 provides that:

> a first, second, or third tier subcontractor, who gives notice as provided in this Article, may, to the extent of his claim, *enforce the lien of the contractor* created by Part 1 of Article 2 of this Chapter. The manner of such enforcement shall be as provided by G.S. 44A-7 through 44A-16. The lien is perfected as of the time set forth in G.S. 44A-10 upon filing of claim of lien pursuant to G.S. 44A-12. Upon the filing of the notice and claim of lien and the commencement of the action, no action of the contractor shall be effective to prejudice the rights of the subcontractor without his written consent.

N.C. Gen. Stat. § 44A-23(a), (b) (2001) (Emphasis supplied). Under this provision, a claim of lien against real property is perfected, or enforceable, upon the filing and service of both a notice of claim of lien pursuant to N.C.G.S. § 44A-19 and a claim of lien pursuant to N.C.G.S. § 44A-12. *Universal Mechanical, Inc. v. Hunt*, 114 N.C. App. 484, 486, 442 S.E.2d 130, 131-32 (1994).

Entry of default against a defendant results in all allegations of plaintiff's complaint being deemed admitted against that defendant, and thereafter, defendant is prohibited from defending on the merits of the case. *Spartan Leasing, Inc. v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991). While defendant East Coast may have had a meritorious defense had it answered the complaint, because of its failure to appear or file an appeal from the default judgment, defendant East Coast is bound by the judgment validly entered. *Waters v. Qualified Personnel, Inc.*, 32 N.C. App. 548, 233 S.E.2d 76 (1977).

THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION v.
WHIPPOORWILL LAKE, INC.

No. COA01-713

(Filed 4 June 2002)

1. **Eminent Domain— condemnation proceeding by city—filing answer after expiration of statutory deadline**

The trial court did not abuse its discretion in a city's condemnation action by allowing defendant to file an answer after expiration of a statutory twelve-month deadline under N.C.G.S. § 136-107, because: (1) the trial court stated in its order that for good cause shown defendant would be allowed a thirty-day extension for filing an answer; and (2) final judgment had not been entered against defendant.

2. **Eminent Domain— condemnation proceeding by city—amount of compensation—jury verdict—supporting evidence**

The trial court did not abuse its discretion in a condemnation action by denying plaintiff city's motion for a new trial under N.C.G.S. § 1A-1, Rule 59(a)(7), because there was sufficient evidence presented to the jury by defendant's two appraisers and a non-expert witness to support the jury's verdict.

3. **Appeal and Error— appealability—cross-assignments of error—cross-appeal**

Defendant's cross-assignments of error that fail to provide an alternative basis in law will not be considered because the proper method to raise these issues would have been by cross-appeal, N.C. R. App. P. 10(d).

Appeal by plaintiff from judgment entered 7 March 2001 by Judge James W. Morgan in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 March 2002.

Rosenman & Colin LLP, by Francis M. Pinckney, III, for plaintiff-appellant.

The Hamel Lawfirm, P.A., by William F. Hamel and W.B. Hamel; and DeVore Acton & Stafford, P.A., by Fred W. DeVore, for the defendant-appellee.

THOMAS, Judge.

Plaintiff, the City of Charlotte, appeals a jury award of $530,635.55 in a condemnation action against defendant, Whippoorwill Lake, Inc. The tract at issue is 11.6 acres, including a lake, and is near Charlotte/Douglas International Airport.

The City sets forth two assignments of error: (1) the trial court erred in allowing defendant to file an answer after expiration of a statutory twelve-month deadline; and (2) the trial court abused its discretion in denying plaintiff's motion for a new trial because the evidence did not support the jury's verdict. Defendant sets forth two cross-assignments of error: (1) the trial court erred in finding that plaintiff obtained proper service of process against it; and (2) the trial court erred in excluding evidence of the sales of comparable properties that were not purchased under the threat of condemnation.

As to the City's assignments of error, we hold that the trial court did not err. For the reasons herein, we decline to consider defendant's cross-assignments of error.

Defendant was incorporated in 1952 and owns the acreage involved in this case. Because it failed to maintain a registered agent or office, the City's service of process was obtained on 28 September 1998 by delivery of summons and complaint to the North Carolina Secretary of State. *See* N.C. Gen. Stat. § 55-5-04 (1999). The Secretary of State, however, had no address for defendant and therefore did not transmit copies of the summons and complaint.

Defendant's evidence tended to show that, prior to attempting service through the Secretary of State, the City had actual and constructive knowledge of Whippoorwill Hills Club, Inc.'s ownership of stock in defendant, and the addresses of Roy Stilwell, defendant's president, and Della Medlin, who annually received defendant's property tax bill.

On 9 November 1999, more than a year after obtaining service of process through the Secretary of State, the City filed a Notice of Hearing on a motion for entry of default. However, no copy of such a motion was included in the record on appeal. It served the notice on Stilwell, Medlin, and the incorporator of defendant, attorney James B. Craighill. Defendant then moved to extend time to file an answer to the original complaint. The City followed by filing an Affidavit of Service and a Motion for Entry of Default. By order entered 29 November 1999, the trial court denied the City's motion and allowed

defendant thirty days from the date of the order to file responsive pleadings.

The City had deposited $81,000.00 into the Mecklenburg County Clerk of Superior Court's office upon filing the complaint. At trial, the sole issue before the jury was the property's fair valuation at the time of the taking.

The evidence showed that part of the property had originally been developed in 1952 as an eleven-acre lake, thirty-five feet deep, with a 0.6 acre dam. The lots surrounding the lake were residential, and the lake was used for recreational fishing and swimming. Due to airport expansion in the 1980s, however, the City purchased by voluntary sale all but one home and three residential lots surrounding the lake. In 1990, state officials ordered the earthen dam breached. The lake was lowered twenty feet and its size reduced to three acres.

Defendant presented two expert appraisers, Stewart Tedford and John McPherson, while Jack Morgan and Paul Finnen testified as experts for the City. All four appraisers valued the property as a lake, using the sales comparison approach to determine fair market value. Tedford and McPherson testified that the property's highest and best use was as a view amenity for assemblage with the surrounding properties. They valued the property at $464,000.00 and $437,320.00, respectively.

Additionally, Stilwell testified that based on his knowledge of "other land that sold around the property," the value of the property was $580,000.00. While Stilwell did not provide information about specific comparable sales that supported his opinion, he did testify that he was one of the original developers of the land and had lived most of his life on it.

One of plaintiff's witnesses, Evander Rowell, a civil engineer, testified that the cost of converting the property to a view amenity would be at least $150,000.00 and as much as $500,000.00 because of the land's topography. Based on the conversion cost, Morgan and Finnen said that use of the lake as a view amenity was not practical since development of the 8.6 acres surrounding the lake was cost prohibitive. They claimed the highest and best use of the property to be light industrial. Morgan valued the property on the date of taking at $53,200.00. Finnen, who has worked for the City of Charlotte as an airport consultant since 1988, valued the property at $85,000.00.

[1] By the City's first assignment of error, it contends the trial court erred in allowing defendant to file an answer after expiration of the statutory twelve-month deadline. Section 136-107 of our General Statutes states:

> Any person named in and served with a complaint and declaration of taking shall have 12 months from the date of service thereof to file answer. Failure to answer within said time shall constitute an admission that the amount deposited is just compensation and shall be a waiver of any further proceeding to determine just compensation; in such event the judge shall enter final judgment in the amount deposited and order disbursement of the money deposited to the owner. Provided, however, at *any time prior to the entry of the final judgment the judge may, for good cause shown and after notice to the plaintiff, extend the time for filing answer for 30 days.*

N.C. Gen. Stat. § 136-107 (1999) (emphasis added). Based on the plain language of the statute, we reject the City's argument that, because the twelve-month time limit had expired, the trial court had no discretion "prior to the entry of the final judgment . . . for good cause shown . . . to . . . extend the time for filing answer for 30 days."

In *City of Durham v. Woo*, 129 N.C. App. 183, 497 S.E.2d 457, *cert. denied*, 348 N.C. 496, 510 S.E.2d 380 (1998), this Court dealt with a condemnation statute, N.C. Gen. Stat. § 40A-46, that uses language identical to section 136-107 except that the time period for filing an answer is 120 days. N.C. Gen. Stat. § 40A-46 (1999). In *Woo*, the 120-day time period had expired for the defendant to file an answer, but final judgment had not yet been entered against him. *Id.* at 188, 497 S.E.2d at 461. After finding that an entry of default would be unfair, the trial court allowed the defendant a thirty-day extension from the date of its order to answer. *Id.* The *Woo* Court held that the trial court properly exercised its discretion under section 40A-46. *Id.*

Here, the trial court stated in its order that "for good cause shown" defendant should be allowed a thirty-day extension for filing an answer. Final judgment had not been entered against defendant. Accordingly, the trial court did not abuse its discretion and we reject this assignment of error.

[2] The City's second assignment of error is that the trial court abused its discretion in denying its motion for a new trial pursuant to Rule 59(a)(7) of the North Carolina Rules of Civil Procedure. The City

contends the evidence regarding valuation of the property was insufficient as a matter of law to support the jury's verdict of $530,635.55. We disagree.

It is well-established that a "trial court's decision to exercise its discretion to grant or deny a Rule 59(a)(7) motion for a new trial for insufficiency of the evidence must be based on the greater weight of the evidence as observed firsthand only by the trial court." *In re Buck,* 350 N.C. 621, 629, 516 S.E.2d 858, 863 (1999) (emphasis omitted).

Here, the evidence establishes: (1) defendant's experts appraised the property at $464,000.00 and $437,320.00; (2) the City's experts valued the land at $85,000.00 and $53,200.00; and (3) Stilwell valued the land at $580,000.00. We note that Stilwell was long familiar with the property at issue as well as its contiguous lands. His testimony was therefore properly admitted. *See City of Burlington v. Staley,* 77 N.C. App. 175, 177, 334 S.E.2d 446, 449 (1985). ("Any witness familiar with the land may testify as to his opinion of the value of the land taken and as to the contiguous lands before and after the taking.").

The jury's award of $530,635.55 is consistent with defendant's evidence. We hold that there was sufficient evidence presented to the jury by defendant's two appraisers and a non-expert witness to support its verdict. Therefore, the City's contentions that, due to the lack of evidence, the verdict is excessive, *see* N.C.R. Civ. Pro. 59(a)(6), and shows a manifest disregard by the jury of the trial court's instructions, *see* N.C.R. Civ. Pro. 59(a)(5), are also without merit. Accordingly, the trial court did not abuse its discretion in denying the City's motion for a new trial.

[3] By its third assignment of error, the City contends defendant's cross-assignments of error should be denied on both procedural and substantive grounds. Rule 10(d) of our Rules of Appellate Procedure provides that, "an appellee may cross-assign as error any action or omission by the trial court . . . which deprived the appellee of an alternative basis in law for supporting the judgment . . . from which an appeal has been taken." N.C.R. App. P. 10(d).

Defendant sets forth two cross-assignments of error: (1) the trial court erred in finding valid process of service on defendant when the City failed to use due diligence and the Secretary of State failed to mail copies to defendant; and (2) the trial court erred in disallowing certain evidence of comparable sales. The first cross-assignment of

error concerns claims that the trial court erred in its findings of fact and conclusions of law. Those claims do not provide an alternate basis in law for supporting the judgment. *See Lewis v. Edwards*, 147 N.C. App. 39, 51, 554 S.E.2d 17, 24 (2001). The second cross-assignment of error is an evidentiary argument that also does not provide an alternate basis in law. *See Welling v. Walker*, 117 N.C. App. 445, 449, 451 S.E.2d 329, 332 (1994), *disc. review allowed*, 339 N.C. 742, 454 S.E.2d 663, *and review dismissed as improvidently granted*, 342 N.C. 411, 464 S.E.2d 43 (1995). The proper method to raise these issues would have been by cross-appeal. *Lewis*, 147 N.C. App. at 51, 554 S.E.2d at 24. Accordingly, we do not consider defendant's cross-assignments of error.

NO ERROR.

JUDGES MARTIN and HUDSON concur.

JAMES A. WELLS, GUARDIAN FOR FRANK WELLS, PLAINTIFF v. CUMBERLAND COUNTY HOSPITAL SYSTEM, INC. AND S & R HEALTH CARE, INC., D/B/A OPEN ARMS REST HOME, DEFENDANTS

No. COA01-924

(Filed 4 June 2002)

1. Venue— local hospital authority—multi-county system—inherently local

Venue was properly changed from Robeson to Cumberland County in a medical malpractice action against the Cumberland County Hospital System because non-profit hospital authorities created under N.C.G.S. § 131E-20 are closely connected with local government, and actions against public officers are required by N.C.G.S. § 1-77 to be tried in the county where the cause arose. Although plaintiff contends that defendant is not an inherently public agency under N.C.G.S. § 1-77(2) because it operates in multiple counties, there are no territorial limitations applicable to municipal hospitals under the Municipal Hospital Act and, under *Coats v. Hospital*, 264 N.C. 332, municipal or quasi-municipal corporations or their agents are inherently local in their nature.

2. Medical Malpractice— venue—origin of cause of action

A medical malpractice action arose in Cumberland County because plaintiff was treated there and alleged no acts or omissions in other locations.

Appeal by plaintiff from order entered 25 April 2001 by Judge B. Craig Ellis in Robeson County Superior Court. Heard in the Court of Appeals 24 April 2002.

Gill & Tobias, LLP, by Douglas R. Gill; and H. Bright Lindler for plaintiff appellant.

Patterson, Dilthey, Clay & Bryson, L.L.P., by Mark E. Anderson and Charles George, for Cumberland County Hospital System, Inc., defendant appellee.

McCULLOUGH, Judge.

On 18 August 2000, plaintiff James A. Wells, the guardian and son of Frank Wells, filed a complaint in Robeson County on behalf of his father alleging medical negligence against Cumberland County Hospital System, Inc. (CCHS) and S & R Health Care, Inc., doing business as Open Arms Rest Home. CCHS is a private, non-profit corporation that operates hospitals and conducts activities in a number of North Carolina locations, including Cumberland, Robeson, Hoke, Bladen, Sampson, Scotland, and Harnett Counties. Among the facilities operated by CCHS was Cape Fear Valley Medical Center in Cumberland County, where plaintiff's father received medical treatment in 1995. Plaintiff's complaint alleged that CCHS and Open Arms Rest Home were negligent with Frank Wells' medical care, causing Mr. Wells to develop severe pressure ulcers and other ailments. Plaintiff's complaint also included claims for bad faith retention of medical records, a pattern of willful, wanton, and reckless abuse, and *res ipsa loquitur*.

On 9 October 2000, CCHS filed a document entitled "Motions and Answer of Defendant Cumberland County Hospital System, Inc." Included in the document was a motion for change of venue, which stated:

FIRST DEFENSE—MOTION FOR CHANGE OF VENUE

Defendant Cumberland County Hospital System, Inc., pursuant to N.C. Gen. Stat. § 1-77, moves this Court for a change of venue to the Superior Court of Cumberland County in that

> Defendant Cumberland County Hospital System, Inc., is a non-profit corporation governed by the Board of Trustees appointed by Cumberland County and, as such, is an entity that is a public agency that must be sued in the county where the cause of action, or some part thereof, arose.

CCHS also provided the trial court with an affidavit from Mr. Harold W. Maynard, the Assistant Risk Manager for Cape Fear Valley Medical Center and a representative of CCHS. Mr. Maynard stated that CCHS is a non-stock, non-profit corporation organized under Chapter 55A of the North Carolina General Statutes; that it is governed by a board of trustees appointed by the Cumberland County Board of Commissioners; that it was established to operate and maintain its hospital facilities as an instrumentality of Cumberland County and to assist in planning future hospital needs as authorized by former Chapter 131 of the North Carolina General Statutes; and that it was authorized to act as an agent of the State as it carried out its functions.

By order dated 25 April 2001, the trial court allowed CCHS' motion to change venue and transferred venue from Robeson County Superior Court to Cumberland County Superior Court. Plaintiff appealed. Plaintiff's sole assignment of error concerns the change of venue. Plaintiff maintains CCHS accepted and used power to operate in a manner not available for a public agency (i.e., by operating satellite facilities in nearby counties), and therefore could not request a change of venue pursuant to N.C. Gen. Stat. § 1-77 (2001). After careful consideration of this matter, we disagree with plaintiff's argument and affirm the order of the trial court.

N.C. Gen. Stat. § 1-77 provides:

> Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:
>
> . . . .
>
> (2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer.

The purpose of section 1-77 is to avoid requiring public officers to " 'forsake their civic duties and attend the courts of a distant forum.' " *Coats v. Hospital*, 264 N.C. 332, 333, 141 S.E.2d 490, 491 (1965) (quoting McIntosh, *North Carolina Practice and Procedure* § 284 (1st ed. 1929)). Furthermore, "[a]ny consideration of G.S. 1-77(2) involves two questions: (1) Is defendant a 'public officer or person especially appointed to execute his duties'? (2) In what county did the cause of action in suit arise?" *Id.*

I.

[1] Plaintiff argues Chapter 131E of the North Carolina General Statutes (formerly Chapter 131) expressly authorizes the creation of non-profit hospital authorities closely connected to a local government. N.C. Gen. Stat. § 131E-20 (2001) states:

> (a) The territorial boundaries of a hospital authority shall include the city or county creating the authority and the area within 10 miles from the territorial boundaries of that city or county. However, a hospital authority may engage in health care activities in a county outside its territorial boundaries pursuant to:
>
> (1) An agreement with a hospital facility if only one hospital currently exists in that county;
>
> (2) An agreement with any hospital if more than one hospital currently exists in that county; or
>
> (3) An agreement with any health care agency if no hospital currently exists in that county.
>
> In no event shall the territorial boundaries of a hospital authority include, in whole or in part, the area of any previously existing hospital authority. All priorities shall be determined on the basis of the time of issuance of the certificates of incorporation by the Secretary of State.
>
> (b) After the creation of an authority, the subsequent existence within its territorial boundaries of more than one city or county shall in no way affect the territorial boundaries of the authority.

Plaintiff maintains that, because CCHS operates in multiple counties, it enjoys greater powers and operates in a manner different from that contemplated by Chapter 131E of the North Carolina General

Statutes, so that it is not an inherently public agency under N.C. Gen. Stat. § 1-77(2). We disagree.

The record clearly indicates that CCHS was created on 13 June 1969, when Highsmith-Rainey Memorial Hospital, Inc., and Cape Fear Valley Hospital, Inc., filed Articles of Merger with the Secretary of State and merged into Cumberland County Hospital Authority, Inc. (whose name was later changed to CCHS in October 1971). Mr. Maynard's affidavit (referred to previously) shows that CCHS, as organized, is a municipal hospital. *See* N.C. Gen. Stat. §§ 131E-6(5) and 131E-9 (2001).

We note there are no territorial limitations applicable to municipal hospitals under the Municipal Hospital Act. The provision relied upon by plaintiff, N.C. Gen. Stat. § 131E-20 (2001), applies to hospital authorities organized pursuant to N.C. Gen. Stat. §§ 131E-15 to 131E-39 (2001) (the Hospital Authorities Act). This fact was recognized by CCHS when it issued its 1999 Articles of Amendment. Article VI was amended to read:

> [CCHS] shall have and exercise all powers granted or available to public or municipal hospitals in North Carolina, by statute, regulation, rule, or otherwise by law, including those powers formerly granted by former North Carolina General Statute § 131-98 as it existed on June 13, 1975.

Under *Coats*, actions against municipal or quasi-municipal corporations or their agents are " 'inherently local in their nature.' " *Coats*, 264 N.C. at 333, 141 S.E.2d at 491 (quoting McIntosh § 284). Former N.C. Gen. Stat. § 131-126.28 (1981) provided that "the planning, acquisition, establishment, development, construction, improvement, maintenance, equipment, operation, and regulation of hospital facilities and the exercise of any other powers herein granted to municipalities, to be severally or jointly exercised, are hereby declared to be public and governmental functions[.]" *Coats*, 264 N.C. at 334, 141 S.E.2d at 492. This provision is similar to N.C. Gen. Stat. § 131E-12 (2001), which states:

> [t]he exercise of the powers, privileges and authorities conferred on municipalities by [the Municipal Hospital Act] are public and government functions, exercised for a public purpose and matters of public necessity. In the case of a county, the exercise of the powers, privileges and authorities conferred by [the Municipal Hospital Act] is a county function and purpose, as well

> as a public and governmental function. In the case of any municipality other than a county, the exercise of the powers, privileges, and authorities conferred by [the Municipal Hospital Act] is a municipal function and purpose, as well as a public and governmental function.

In *Coats*, plaintiffs were residents of Harnett County who sued to recover money allegedly due them for materials and labor they provided toward the construction of Sampson County Memorial Hospital. *Coats*, 264 N.C. at 332, 141 S.E.2d at 491. Sampson County Memorial Hospital was a non-stock, non-profit corporation governed by a board of trustees who were appointed by the Sampson County Board of Commissioners. Sampson County delegated to the hospital the authority to maintain and operate hospital facilities. *Id.* In the present case, CCHS was the same type of corporation, governed by a board of trustees who were appointed by the Cumberland County Board of Commissioners. We discern no organizational differences between the hospital in *Coats* and CCHS. Therefore, we conclude CCHS qualifies as a "public officer" under N.C. Gen. Stat. § 1-77(2), and venue was properly changed from Robeson County to Cumberland County.

II.

[2] " 'A broad, general rule applied or stated in many cases is that the cause of action arises in the county where the acts or omissions constituting the basis of the action occurred.' " *Coats*, 264 N.C. at 334, 141 S.E.2d at 492 (quoting Annot., Venue Of Actions Or Proceedings Against Public Officers, 48 A.L.R. 2d 423, 432). *See also Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976). In the present case, plaintiff's cause of action arose in Cumberland County because Frank Wells was treated at Cape Fear Valley Medical Center in Cumberland County and plaintiff alleged no acts or omissions in other locations. "A party is bound by his pleadings and, unless withdrawn, amended, or otherwise altered, the allegations contained in all pleadings ordinarily are conclusive as against the pleader. He cannot subsequently take a position contradictory to his pleadings." *Davis v. Rigsby*, 261 N.C. 684, 686, 136 S.E.2d 33, 34 (1964).

We conclude CCHS is a municipal corporation, and therefore, a public officer under N.C. Gen. Stat. § 1-77(2). Venue was properly changed from Robeson County to Cumberland County, where plaintiff's cause of action occurred.

The order of the trial court transferring venue to Cumberland County is hereby

Affirmed.

Judges WYNN and BIGGS concur.

CHARLENE R. HEADLEY, AS ADMINISTRATRIX OF THE ESTATE OF LARRY STEPHEN HEADLEY, PLAINTIFF v. JENNIFER LYNN WILLIAMS, DEFENDANT

No. COA01-951

(Filed 4 June 2002)

Negligence— automobile accident—summary judgment

The trial court erred in a negligence case arising out of an automobile-motorcycle collision by granting summary judgment for defendant automobile driver because the evidence raised genuine issues of material fact as to whether the motorcycle driver's death was caused by defendant's negligence where the evidence was conflicting as to which driver caused the accident by driving left of the center line, and there was evidence that defendant was driving in violation of the restriction on her driver's license requiring that she wear corrective lenses.

Appeal by plaintiff from judgment entered 14 May 2001 by Judge Timothy S. Kincaid in Watauga County Superior Court. Heard in the Court of Appeals 25 April 2002.

Horack, Talley, Pharr & Lowndes, P.A., by Neil C. Williams, for plaintiff-appellant.

Davis & Hamrick, L.L.P., by Kent L. Hamrick, for defendant-appellee.

MARTIN, Judge.

Plaintiff, as Administratrix of the Estate of Larry Stephen Headley (decedent), brought this action alleging that decedent was killed as a result of defendant's negligence. Defendant answered, denying negligence, alleging that decedent was negligent, and asserting a counterclaim for property damage. Defendant's motion for sum-

mary judgment dismissing plaintiff's claim was allowed and defendant submitted to a voluntary dismissal of her counterclaim. Plaintiff appeals.

The pleading, affidavits, and other evidentiary materials before the trial court tended to show that decedent was operating a motorcycle in a southeasterly direction along Castle Ford Road, a two-lane, two direction road in Watauga County; defendant was driving an automobile in the opposite direction on Castle Ford Road. At a point in the road where decedent had come out of a curve to his right and defendant was approaching the curve to her left, the vehicle driven by defendant collided with decedent's motorcycle. Decedent died as a result of injuries received in the collision.

There were no eye-witnesses to the collision other than defendant. However, Christopher Michael Mason had been driving behind decedent along Castle Ford Road for a mile and a half prior to the accident. In his affidavit, Mason stated that decedent was operating the motorcycle in a normal manner at a speed of 30 to 35 miles per hour, and was staying within his lane of travel. As decedent entered the curve, Mason lost sight of him due to the curve. As Mason rounded the curve, he came upon the scene of the crash, and stopped his vehicle "directly in front of an automobile with a damaged front left corner which was stopped and sitting approximately two-thirds of the way into my lane of travel." Mason saw debris in the motorcycle's lane of travel.

Trooper Douglass Blake Garland of the North Carolina State Highway Patrol arrived on the scene following the crash and conducted a preliminary investigation. He stated that conditions were dry and clear, but it was dark when he received the call around 6:30 p.m., just a few minutes after the collision occurred. He stated that he noticed defendant's automobile "straddling the yellow lines." Trooper Garland was unable to complete his investigation on the night of the crash and returned to the scene on two occasions in December 1999. Although Trooper Garland had originally been of the opinion that defendant had traveled left of the center line, he filed a collision reconstruction report on 10 March 2000 in which he concluded that decedent

> entered a right hand curve and appears to have leaned to [sic] far into the curve. This caused the crash bar on the motorcycle to touch the asphalt as it leaned right. The motorcycle then began to travel out of control and was leaned to the left side causing it to

> travel across the center of the roadway into the path of Ms Williams [sic] 1995 Mazda.

Trooper Garland acknowledged that he originally concluded that defendant had traveled left of center causing the collision; however, he concluded in his final report that "it was absolutely impossible that the car had traveled left of center and struck the motorcycle in the manner that I had originally concluded." Trooper Garland also indicated that defendant, whose driver's license restricted her to wearing corrective lenses, had failed to comply with the restriction at the time of the collision. In his deposition, Trooper Garland testified that debris was present in decedent's lane of travel following the crash, and that scrape marks were present in decedent's lane. Trooper Garland also noted that the motorcycle was found in decedent's lane of travel.

Eric Bare, a registered engineer, testified by deposition that he was employed by defendant's insurance carrier to investigate the accident. Mr. Bare testified that in his opinion the collision occurred in defendant's lane of travel.

Plaintiff assigns error to the entry of summary judgment in defendant's favor, contending the materials before the court created genuine issues of material fact upon the issues of negligence and contributory negligence. We agree and reverse.

Summary judgment is appropriate when the materials before the court reveal that 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); N.C. Gen. Stat. § 1A-1, Rule 56(c). In reviewing a trial court's grant of summary judgment, the evidence must be viewed in a light most favorable to the non-moving party. *Craven County Bd. of Educ. v. Boyles*, 343 N.C. 87, 468 S.E.2d 50 (1996). 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 exists any issues of fact material to the outcome of the case. *Caldwell v. Deese*, 288 N.C. 375, 218 S.E.2d 379 (1975).

> Summary judgment is a drastic remedy. Its purpose is not to provide a quick and easy method for clearing the docket, but is to

> permit the disposition of cases in which there is no genuine controversy concerning any fact, material to issues raised by the pleadings, so that the litigation involves questions of law only.

First Federal Savings & Loan Ass'n, 282 N.C. at 51, 191 S.E.2d at 688 (citing *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971)). Based upon our review of the evidentiary materials in the record before us, we conclude there are genuine issues of fact which are material to the questions of whether defendant was negligent and whether such negligence was a proximate cause of the accident. There was evidence that decedent had been operating his motorcycle within the speed limit and entirely within his travel lane for some distance before the collision, and there was no evidence of any condition of the roadway which may have caused him to lose control in the vicinity where the collision occurred. Immediately after the collision, defendant's car was found at rest across the center line of the roadway in decedent's lane of travel; decedent's motorcycle came to rest in its proper travel lane. Decedent was found in a ditch to the right side of his travel lane. There are differing inferences which may be drawn from the various skid and gouge marks found at the scene and from the damage to the motorcycle and to defendant's automobile; although the opinions of the reconstruction witnesses based upon the physical evidence are admissible as helpful to a jury in understanding such evidence, the weight and credibility to be given to those opinions is for the jury. *State v. Purdie*, 93 N.C. App. 269, 377 S.E.2d 789 (1989); *see Laughter v. Southern Pump & Tank Co.*, 75 N.C. App. 185, 330 S.E.2d 51, *disc. review denied*, 314 N.C. 666, 335 S.E.2d 495 (1985) (reasonable persons could reach different conclusions from affidavits of eyewitness and accident reconstruction expert). Finally, there was evidence that defendant was driving in violation of the restriction on her driver's license requiring that she wear corrective lenses.

Considering the evidence in a light most favorable to the plaintiff as the non-moving party, as we are constrained to do, we cannot unequivocally say there is no genuine issue of material fact such that defendant is entitled to judgment as a matter of law. Since the evidence raises genuine issues of fact as to whether decedent's death was proximately caused by negligence on the part of defendant, we hold summary judgment dismissing plaintiff's claim was error.

In light of our decision, we need not discuss plaintiff's remaining assignments of error, which relate to evidence offered by defend-

ant at the summary judgment hearing. Summary judgment in defendant's favor is reversed and this case is remanded to the Superior Court of Watauga County for further proceedings consistent with this opinion.

Reversed and remanded.

Judges TYSON and THOMAS concur.

PIEDMONT TRIAD REGIONAL WATER AUTHORITY, PLAINTIFF v. JOHN LEON LAMB, AND WIFE, HAZEL RUTH LAMB, KRISTLE L. MARSH HYATT (FORMERLY KRISTLE L. MARSH), JIMMY C. HYATT, JR. AND NORTH CENTRAL FARM CREDIT, ACA, DEFENDANTS

No. COA01-970

(Filed 4 June 2002)

1. **Eminent Domain— damages—equipment taken with property**

The trial court did not err in a condemnation proceeding by allowing defendants' witnesses to include equipment in their determination of the value of the property taken where the complaint and declaration of taking stated that defendants would not be permitted to remove buildings or fixtures situated on the property; defendants' witnesses testified that the equipment in question was part of and typically sold with chicken houses which were included in the taking; there was no request for instructions regarding whether this equipment was included in the definition of property; and there was no objection to the trial court's instructions that the jury was to determine whether the equipment was included within the definition of property.

2. **Trials— verdict—average of four valuations—evidence of compromise insufficient**

The trial court did not err by denying defendant's motion for a new trial where plaintiff alleged that the jury reached a compromise or quotient verdict, but the only indication of an unlawful verdict was that the jury's dollar amount approximated the average of the valuations presented by the four experts.

Appeal by plaintiff from judgment entered 26 February 2001 and order entered 9 March 2001 by Judge Thomas W. Seay, Jr. in Randolph County Superior Court. Heard in the Court of Appeals 24 April 2002.

Roberson Haworth & Reese, PLLC, by Robert A. Brinson and Christopher C. Finan, for plaintiff-appellant.

Wyatt Early Harris Wheeler, L.L.P., by Scott F. Wyatt, for defendants-appellees.

WALKER, Judge.

On 25 May 1999, plaintiff, a public authority with the power of eminent domain, served official notice on defendants that it intended to institute condemnation proceedings to acquire a tract of land owned by defendants to construct the Randleman Lake Project. On 20 July 1999, plaintiff filed its complaint and declaration of taking which alleged the following in part:

> 3. . . . [T]he Plaintiff, Piedmont Triad Regional Water Authority, has determined that it is necessary and in the public interest to acquire by condemnation the real property interest described in Exhibit A for the public use and purpose set forth in Exhibit B.
>
> . . .
>
> 11. The property and area described in Exhibit A, Paragraphs 2-3, are hereby DECLARED TO BE TAKEN and condemned, and title thereto, together with the right of possession, shall vest in the plaintiff according to the provisions of N.C.G.S. § 40A-42. Right of entry shall vest with the Plaintiff with the placing of the deposit set forth herein in accordance with N.C.G.S. § 40A-42.
>
> 12. The owners will not be permitted to remove any timber, buildings, structures, permanent improvements or fixtures situated on or affixed to the property.

Defendants filed an answer asserting they lacked sufficient information regarding the accuracy of the descriptions of the property described in Exhibit A.

Located on defendants' property were two chicken houses which had not been used since 1995, along with various pieces of equipment situated in and around the chicken houses. This equipment included

feed silos, mist cooling systems, egg conveyor systems, drinkers, automatic chicken feeders and egg laying nests.

After a jury trial, the only issue for the jury to determine was just compensation for the taking. Defendants offered the testimonies of Edmund Lindsey Dean and Geoffrey Greg, two experts in the field of real estate appraisals. Both Mr. Dean and Mr. Greg considered the items of equipment as part of the improvements to the property in making their appraisals. Mr. Dean valued the property taken at $222,625, while Mr. Greg valued it at $252,900.

Plaintiff offered the testimonies of Roy Neal Moore and Howard Williams, two experts in the field of real estate appraisals. Neither of plaintiff's experts included the equipment in the valuation of the property. Mr. Moore valued the property taken at $87,300, while Mr. Williams valued it at $75,500. The jury found just compensation for the taking of the property to be $158,500. Plaintiff moved for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rules 59(a)(5), (6) and (7) (2001) which was denied.

[1] Plaintiff first contends that the trial court erred in admitting testimony regarding the value of the equipment located on the property. Plaintiff claims that N.C. Gen. Stat. § 40A-2(7) limits property which is subject to taking to real property. Thus, plaintiff claims that since the equipment is personal property, it is not subject to taking and evidence of its value is inadmissible.

The admissibility of evidence is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion. *Lane v. R.N. Rouse & Co.*, 135 N.C. App. 494, 498, 521 S.E.2d 137, 140 (1999), *disc. rev. denied*, 351 N.C. 357, 542 S.E.2d 212 (2000).

Under N.C. Gen. Stat. § 40A-2(7), property is defined as "any right, title, or interest in land, including leases and options to buy or sell. 'Property' also includes rights of access, rights-of-way, easements, water rights, air rights, and any other privilege or appurtenance in or to the possession, use, and enjoyment of land." Plaintiff relies on the recent case from this Court, *City of Durham v. Woo*, 129 N.C. App. 183, 497 S.E.2d 457, *cert. denied*, 348 N.C. 496, 510 S.E.2d 380 (1998), for the proposition that equipment is not subject to taking. However, in *Woo*, this Court relied on the fact that the City gave notice to the owners that the equipment was not part of the taking and it specifically gave the owners an opportunity to remove the

equipment. *Woo*, 129 N.C. App. at 191, 497 S.E.2d at 462-63. This Court reversed the award for the taking of "fixtures and personal property." *Id.* The Court noted that "the City specified that it was condemning defendants' real property, excluding the restaurant and kitchen equipment, and allowed defendants approximately four months to remove such equipment. Because defendants never removed those items despite the opportunity to do so, those items are deemed to have been abandoned." *Id.* at 191, 497 S.E.2d at 462. Thus, the value of the fixtures and personal property was not to be included in the value of the taking. *Id.*

To the contrary, in this case, the complaint and declaration of taking in paragraph twelve alleged that defendants "will **not** be permitted to remove any timber, buildings, structures, permanent improvements or fixtures situated on or affixed to the property." (Emphasis added). Defendants only answered that they lacked sufficient information regarding the accuracy of the description of the property taken. We find nothing in the complaint nor in the record which indicated what property defendants were entitled to remove. Defendants' witnesses testified that these items of equipment were part of and typically sold with the chicken houses, which plaintiff admitted were included in the taking.

Furthermore, the trial court gave instructions on the amount of just compensation due defendants for the taking of "property." There was no request for instructions regarding whether this equipment was included in the definition of "property." There was no objection by plaintiff to the trial court's jury instructions. The jury was to determine whether the equipment was included within the definition of "property." Since the record does not indicate that plaintiff ever excluded it from the taking, we conclude the trial court did not abuse its discretion in allowing defendants' witnesses to include the equipment in their determination of the value of the property taken.

[2] Plaintiff further contends the trial court erred in denying its motion for a new trial because the jury reached an unlawful compromise or quotient verdict. "A compromise verdict is one in which the jury answers the issues without regard to the pleadings, evidence, contentions of the parties or instructions of the court." *City of Burlington v. Staley*, 77 N.C. App. 175, 178-79, 334 S.E.2d 446, 450 (1985) (*citing Vandiford v. Vandiford*, 215 N.C. 461, 2 S.E.2d 364 (1939)). "It is the well-established law of North Carolina that no quotient verdict exists unless the jurors reach a prior agreement to be

bound by the average of the amount each submits as damages." *Seaman v. McQueen*, 51 N.C. App. 500, 506, 277 S.E.2d 118, 121 (1981); *see also Gram v. Davis*, 128 N.C. App. 484, 490, 495 S.E.2d 384, 388 (1998). The dollar amount of the verdict alone is insufficient to set aside the verdict as being either an unlawful compromise or a quotient verdict. *Staley*, 77 N.C. App. at 179, 334 S.E.2d at 450; *Gram*, 128 N.C. App. at 490, 495 S.E.2d at 388.

Here, the only indication of an unlawful compromise or a quotient verdict was that the jury's dollar amount for just compensation approximated the average of the valuations presented by the four experts. There is nothing else in the record to show that the jury had a "prior agreement" to be bound by any averages nor is there any showing that the jury acted without regard to the pleadings, evidence, contentions of the parties, or instructions of the trial court. As instructed, the jury was free to believe all, part, or none of a witness's testimony as to the value of the taking. Because plaintiff has failed to establish that the jury's verdict was an unlawful compromise or quotient verdict, we find the trial court did not err in denying plaintiff's motion for a new trial.

In conclusion, the trial court did not abuse its discretion in allowing defendants' experts to testify regarding the value of the plaintiff's taking. The trial court did not err in denying plaintiff's motion for a new trial.

No error.

Judges McGEE and CAMPBELL concur.

MAX HERRING, AS ASSIGNEE OF BRANCH BANKING & TRUST CO., PLAINTIFF v. BENNETT M. KEASLER, JR., DEFENDANT

No. COA01-1000

(Filed 4 June 2002)

Execution— limited liability companies—distributions—ownership interests

The trial court did not err in ordering that a judgment be satisfied through the application of the distributions and allocations of defendant's membership interests in several limited

liability companies and in denying plaintiff's motion to have defendant's membership interests seized and sold. N.C.G.S. § 57C-5-03 (2001).

Appeal by plaintiff from order filed 16 May 2001 by Judge Jack W. Jenkins in Wake County Superior Court. Heard in the Court of Appeals 14 May 2002.

Michael W. Strickland & Associates, P.A., by Nelson G. Harris, for plaintiff-appellant.

Hunton & Williams, by John D. Burns, for defendant-appellee.

GREENE, Judge.

Max Herring (Plaintiff), as assignee of Branch Banking & Trust Company (BB&T), appeals an order filed 16 May 2001 enjoining Plaintiff from seizing or selling Bennett M. Keasler, Jr.'s (Defendant) membership interests in various limited liability companies.

On 3 January 1996, BB&T obtained a default judgment (the judgment) against Defendant and his wife in the amount of $29,062.57 plus interest.[1] On 12 December 2000, BB&T assigned its interest in the judgment to Plaintiff, and Plaintiff obtained a writ of execution against Defendant on 19 March 2001. Subsequently, on 19 April 2001, Defendant filed an emergency motion seeking an order to restrain Plaintiff from attempting to have Defendant's membership interests in several limited liability companies seized and sold. In Defendant's affidavit, he stated he had a 20% membership interest in several limited liability companies, "including River Place I, LLC; River Place II, LLC; River Place III, LLC[;] and River Place IV, LLC [(collectively, the LLCs)], which were created for the purpose of developing real estate in Wake County, North Carolina."

In an order dated 20 April 2001, the trial court temporarily restrained Plaintiff from seeking the seizure and sale of Defendant's membership interests in the LLCs. Thereafter, Plaintiff filed a motion on 23 April 2001 seeking an order under N.C. Gen. Stat. § 1-362 directing Defendant's membership interests in the LLCs be sold and the proceeds applied towards the judgment. Pending the sale of Defendant's membership interests in the LLCs, Plaintiff requested an

1. The judgment as to Defendant's wife was subsequently vacated.

order directing any distributions and allocations of those interests to be applied towards the satisfaction of the judgment (charging order). On 16 May 2001, the trial court filed an order: enjoining Plaintiff from seeking the seizure or sale of Defendant's membership interests in the LLCs; denying Plaintiff's motion, insofar as he sought to have Defendant's membership interests in the LLCs sold or transferred; and granting Plaintiff's motion for a charging order. With respect to the charging order, the trial court directed: Defendant's membership interests in the LLCs to be charged with payment of the judgment, plus interest; the LLCs to deliver to Plaintiff any distributions and allocations that Defendant would be entitled to receive on account of his membership interests in the LLCs; Defendant to deliver to Plaintiff any allocations and distributions he would receive; and Plaintiff to not obtain any rights in the LLCs, except as those of an assignee and under the respective operating agreement.

The dispositive issue is whether N.C. Gen. Stat. § 57C-5-03 permits a trial court to order a judgment debtor's membership interest in a limited liability company seized and sold and the proceeds applied towards the satisfaction of a judgment.

Generally, a trial court

> may order any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of [a] judgment.

N.C.G.S. § 1-362 (2001). North Carolina General Statutes § 57C-5-03, however, provides that with respect to a judgment debtor's membership interest in a limited liability company, a trial court "may charge the membership interest of the member with payment of the unsatisfied amount of the judgment with interest." N.C.G.S. § 57C-5-03 (2001). This "charge" entitles the judgment creditor "to receive . . . the distributions and allocations to which the [judgment debtor] would be entitled." N.C.G.S. § 57C-5-02 (2001). The "charge" "does not dissolve the limited liability company or entitle the [judgment creditor] to become or exercise any rights of a member." *Id.* Furthermore, because the forced sale of a membership interest in a limited liability company to satisfy a debt would necessarily entail the transfer of a member's ownership interest to another, thus permitting the purchaser to become a member, forced sales of the type permitted in sec-

tion 1-362 are prohibited. *See* N.C.G.S. § 57C-3-03 (2001) (except as provided in the operating agreement or articles of organization, consent of all the members of a limited liability company required to "[a]dmit any person as a member").

In this case, despite Plaintiff's attempts to have Defendant's membership interests in the LLCs seized and sold, his only remedy is to have those interests charged with payment of the judgment under N.C. Gen. Stat. § 57C-5-03. Accordingly, the trial court did not err in ordering that the judgment be satisfied through the application of the distributions and allocations of Defendant's membership interests in the LLCs and in denying Plaintiff's motion to have Defendant's membership interests seized and sold.

Affirmed.

Judges HUDSON and BIGGS concur.

LLOYD DAVIS GREGORY, III, AS EXECUTOR OF THE ESTATES OF JOHN MARK GREGORY, SR. AND KATHRYN GRUBBS GREGORY, PLAINTIFF v. KEVIN KILBRIDE, DEFENDANT

No. COA00-667

(Filed 18 June 2002)

1. Psychologists and Psychiatrists— failure to involuntarily commit patient—medical negligence standard of care

The trial court did not err by requiring a deceased husband's executor to prove a medical negligence breach of the standard of care in a wrongful death action against a psychiatrist arising from the psychiatrist's decision not to involuntarily commit the husband, who thereafter killed his wife and himself, because (1) plaintiff alleged a medical negligence standard of care; (2) the duty required was that defendant psychiatrist conform to a psychiatric standard of care, and (3) plaintiff was properly permitted to present expert testimony to prove the applicable psychiatric standard of practice or conduct and to prove whether defendant psychiatrist breached that standard of practice.

2. Psychologists and Psychiatrists— failure to involuntarily commit patient—third-party wrongful death—general negligence principles

General tort principles of negligence apply to an action against a psychiatrist for the wrongful death of a wife who was killed by her husband after the psychiatrist refused to involuntarily commit the husband to a mental health facility.

3. Psychologists and Psychiatrists— failure to warn third party—not negligence

A psychiatrist could not be held liabile in negligence for the wrongful death of a wife based upon the psychiatrist's failure to warn the wife of her husband's violent propensities after the psychiatrist examined the husband and determined that he should not be involuntarily committed, following which the husband killed the wife, because North Carolina does not recognize a duty by a psychiatrist to warn third persons.

4. Mental Illness— involuntary committment statutes—violation not negligence per se

The trial cour did not err in a wrongful death action by finding that N.C.G.S. § 122C-263 and the related involuntary commitment statutes are not public safety statutes, because although there may be some generalized safety implications in those statutes, the involuntary commitment statutes are designed to protect against arbitrary or ill-considered involuntary commitment. Therefore, a violation of the statutes does not constitute negligence per se.

5. Appeal and Error— preservation of issues—grant of pretrial motion in limine—failure to present evidence

Although plaintiff contends the trial court erred in a wrongful death action by granting defendant psychiatrist's motion to limit testimony regarding violations of certain requirements of the North Carolina Administrative Code including 10 N.C.A.C. § 15A.0129(a), plaintiff is not entitled to appellate review of the trial court's grant of defendant's pretrial motion in limine because: (1) to preserve the evidentiary issue for appeal where a motion in limine has been granted, the nonmovant must attempt to introduce the evidence at trial; and (2) plaintiff failed to offer the evidence at trial even though plaintiff contends his experts were prepared to testify regarding the requirements of the administrative code.

6. Evidence— expert testimony—involuntary commitment—dangerousness—police officers and nurse unqualified

In an action against a psychiatrist for the wrongful death of a husband and wife based upon the psychiatrist's decision not to involuntarily commit the husband who thereafter killed the wife and himself, two police officers and a nurse were not qualified to testify as experts on the issue of whether the husband met the "dangerousness" standard set forth in the involuntary commitment statutes because the statutes require the ultimate determination of dangerousness to self or others to be made by a physician or eligible psychologist.

7. Evidence— expert testimony—involuntary commitment—qualification of experts

Witnesses for defendant psychiatrist in a wrongful death action arising from the psychiatrist's decision not to involuntarily commit a husband who thereafter killed his wife and himself were properly permitted to testify as experts under N.C.G.S. § 8C-1, Rule 702, even though they did not spend the majority of their time in clinical practice or teaching as required in medical malpractice actions, since this case is not a classic medical malpractice case, and the witnesses qualified as experts under the general provisions of Rule 702.

8. Trials— motion for new trial—consideration of extrinsic information

The trial court did not abuse its discretion in a wrongful death action against a psychiatrist by failing to grant plaintiff a new trial on the basis that the jury considered alleged prejudicial extrinsic information during their deliberations, including a copy of N.C.G.S. § 122C-3 containing the definition of "mental illness" along with the additional "next of kin" definition on the same page, because the copy did not constitute prejudicial extraneous information since: (1) plaintiff did not object to the publication to the jury of the document containing the mental illness definition; and (2) the record indicates that copies of the document were provided to all members of the jury during the trial, and that the jurors retained those copies in open court without objection.

9. Appeal and Error— appealability—denial of motion for summary judgment—denial of motion to dismiss—final judgment on the merits

The trial court did not err in a wrongful death action by denying defendant's motion for summary judgment and motion to dismiss on the basis of qualified immunity, because a denial of these motions do not constitute reversible error where there was a final judgment in defendant's favor rendered at the trial on the merits.

Judge GREENE dissenting.

Appeal by plaintiff from judgment entered 11 March 1998 by Judge Howard E. Manning, Jr., in Cabarrus County Superior Court. Heard in the Court of Appeals 15 May 2001.

Faison & Gillespie by O. William Faison and John W. Jensen for Plaintiff-Appellant.

Northup & McConnell, P.L.L.C. by Isaac N. Northup and Elizabeth E. McConnell for Defendant-Appellee.

BRYANT, Judge.

This wrongful death action arises from the alleged negligent failure of Dr. Kevin Kilbride (Dr. Kilbride), a psychiatrist at Broughton Hospital, to involuntarily commit John Mark Gregory (Mark) and warn Kathryn Gregory (Kathryn) of her husband's violent propensities.

The underlying facts to the complaint tend to show Mark made numerous threats to kill his wife, Kathryn, and to kill himself during the thirty-six hours leading up to his evaluation by Dr. Kilbride. Fearing for Mark and Kathryn's safety, Mark's father, Lloyd Davis Gregory (plaintiff), petitioned for his involuntary commitment. Magistrate Judge Rowland signed the order of involuntary commitment on 9 April 1995.

After a brief standoff, Mark was taken into custody and transported to Cabarrus County Memorial Hospital where he was evaluated by a psychiatric social worker and an emergency room physician with training in psychology. Both found that Mark met the criteria for involuntary commitment. Mark was then taken to Broughton Hospital where he was evaluated by Dr. Kilbride for a statutorily-required second opinion. Although Dr. Kilbride determined that Mark

suffered from a mental illness (adjustment disorder) contained in DSM-III-R, he concluded that Mark's condition did not meet the requirements for involuntary commitment. Accordingly, Dr. Kilbride declined to involuntarily commit Mark and released him from the hospital.

Tragically, upon arriving home, Mark put three weapons in his truck—a shotgun, a .45 caliber pistol and an SRS rifle—and several hundred rounds of ammunition. He then drove to the house where Kathryn and their six-year-old son were staying, broke down the front door of the house and threatened to kill an occupant of the house while searching for Kathryn. After finding her, he killed her by firing seven bullets into her body at point-blank range using two different weapons. Thereafter, he shot and killed himself.

Plaintiff brought this action on behalf of his son and daughter-in-law's estates alleging among other things that Dr. Kilbride negligently (a) evaluated Mark at Broughton Hospital; (b) failed to adequately assess Mark for behaviors indicating that he was a danger to himself and others pursuant to N.C.G.S. § 122C-3; (c) failed to involuntarily commit Mark for treatment, thereby breaching the standard of care; (d) failed to exercise control over Mark to prevent him from hurting himself; and (e) breached a legal duty to warn Kathryn of Mark's dangerous condition. In response, Dr. Kilbride moved to dismiss the action on the grounds of qualified immunity; the trial court denied that motion as well as Dr. Kilbride's later motion for summary judgment.[1]

At the close of all the evidence, the trial court granted a partial directed verdict in favor of Dr. Kilbride on the grounds that "Kilbride did not have a separate legal duty to warn Kathy Gregory of Mark Gregory's release separate and apart from any general duty of care imposed under the common law of negligence." The remaining claims were sent to the jury which returned a verdict in favor of the defendant. Following a denial of a motion for a new trial, plaintiff appealed to this Court.

The issues on appeal are: Whether the trial court erred in (I) requiring plaintiff to prove a medical negligence breach of the standard of care; (II) granting Dr. Kilbride's motion for directed verdict; (III) finding that N.C.G.S. § 122C-263 is not a public safety statute;

1. The trial court's order references briefs filed in support of and in opposition to the motion for summary judgment; however the briefs were not included in the four volume record on appeal.

(IV) granting Dr. Kilbride's motion to limit testimony regarding violations of certain requirements of the North Carolina Administrative Code; (V) excluding certain of plaintiff's expert witnesses; and (VI) failing to grant plaintiff a new trial.

I.

[1] Plaintiff first argues that the trial court erred by requiring plaintiff to prove a medical negligence breach of the standard of care. Unlike previous cases cited by the plaintiff addressing the negligent or wrongful *release* of a mental patient who had already been committed, this case presents a matter of first impression concerning *failure of a psychiatrist to involuntarily commit an individual* to a mental hospital an issue which has not been directly addressed by our courts.

In *Pangburn v. Saad*, 73 N.C. App. 336, 326 S.E.2d 365 (1985), this Court held that where a psychiatrist released a mental patient with a history of violent behavior who later stabbed his sister about twenty times, the action did not lie in medical malpractice. *Id.* at 338, 326 S.E.2d at 367. The Court relied in part on a similar Georgia case that distinguished the legal duty in negligent release cases from the legal duty in "classic medical malpractice" cases:

> "[W]here the course of treatment of a mental patient involves an exercise of 'control' over [the patient] by a physician who knows or should know that the patient is likely to cause bodily harm to others, an independent duty arises from that relationship and falls upon the physician to exercise that control with such reasonable care as to prevent harm to others at the hands of the patient."

Id. (alterations in original) (quoting *Bradley Center, Inc. v. Wessner*, 287 S.E.2d 716, 721 (Ga. Ct. App. 1982), *aff'd*, 296 S.E.2d 693 (Ga. 1982)). Where a mental patient is wrongfully discharged and injures a third party outside the physician-patient relationship, general tort principles of negligence apply. *Id.*

[2] Plaintiff further cites *Davis v. N.C. Dept. of Human Resources*, 121 N.C. App. 105, 465 S.E.2d 2 (1995), *cert. denied*, 343 N.C. 750, 473 S.E.2d 612 (1996), to support his contention that he should only have been required to prove that Dr. Kilbride was liable under ordinary tort principles of negligence. In *Davis*, a person with a history of aggressive and hostile behavior was involuntarily committed to a state mental hospital after beating a man to death and chasing a woman with a

knife. He was released after his condition improved through medication, although he was still mentally ill. The patient then attacked and killed a motorist. The defendant-physician argued that the plaintiff had the burden of proving a medical malpractice standard of care. *Id.* at 112, 465 S.E.2d at 7. This Court recognized that, as a general rule, there is no duty to protect others against harm from third persons. *Id.* However, under *Pangburn*, an independent duty arises to protect third persons from harm by the release of a mental patient who is involuntarily committed. *Id.* The *Davis* Court rejected the defendant's argument that the plaintiff has the burden of showing breach of a medical malpractice standard of care. *Id.* at 112-13, 465 S.E.2d at 7. Rather, the Court decided *Davis* based on a common law negligence theory, holding that the defendant "had a duty to exercise *reasonable care* in the protection of third parties from injury by [the mental patient]." *Id.* at 113, 465 S.E.2d at 7 (emphasis added). The application of ordinary negligence principles to actions by third parties is consistent with cases in other jurisdictions that have recognized a cause of action for wrongful release. *See, e.g., Semler v. Psychiatric Institute of Washington, D.C.*, 538 F.2d 121, *cert. denied*, 429 U.S. 827, 50 L. Ed. 2d. 90 (4th Cir. 1976); *Hicks v. United States*, 511 F.2d 407 (D.C. Cir. 1975); *Bradley Center, Inc. v. Wessner*, 296 S.E.2d 693 (Ga. 1982). From the outset we acknowledge the difficulty the trial court experienced in trying to determine the correct standard of care in this wrongful death action brought jointly on behalf of the third party wife (Kathryn) and the "patient" (Mark). The analysis of the legal duty owed by a defendant to a "patient" in a wrongful death claim based on failure to involuntarily commit a "patient" differs from the analysis of defendant's duty in a wrongful death claim for failure to warn a third party. Based on this Court's analyses in *Davis* and *Pangburn*, general negligence is clearly the proper theory to apply in the instant case as it relates to the third party action involving failure to warn the spouse.

The analysis of the proper theory to apply to a claim by a "patient" for the failure to involuntarily commit the "patient" is more a problematic one. A review of the trial court procedure in the instant case is helpful to this analysis. First, in his complaint plaintiff alleges "[Dr. Kilbride's] acts were not in accordance with the standards of practice among members of the same health care profession with similar experience situated in similar communities at the time Dr. Kilbride performed the referenced acts." In response Dr. Kilbride denied the existence of a physician-patient relationship. At trial the parties agreed that this was not a classic medical malpractice action.

However, the parties agreed that expert testimony was necessary on the issue of negligence based upon the facts in this case. Following the presentation of evidence at trial, the parties fully participated in the charge conference wherein the court declined to give the classic malpractice instruction but gave a modified instruction based on *Alt*[2] and *Pangburn*. The court instructed the Kilbride jury that a psychiatrist must use "accepted professional judgment, professional practice and professional standards of practice exercised by psychiatrists with similar training and experience situated in the same or similar communities . . . ."

> The elements of a cause of action based on negligence are: a duty, breach of that duty, a causal connection between the conduct and the injury and actual loss. A duty is defined as an 'obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks.' A breach of that duty occurs when the person fails to 'conform to the standard required.'

Davis, 121 N.C. App. at 112, 465 S.E.2d at 6 (quoting W. Page Keeton et al., *Prosser and Keeton on The Law of Torts* § 30, at 164-65 (5th ed. 1984) (citations omitted)).

In the instant case, the duty required was that Dr. Kilbride conform to a psychiatric standard of practice. The record reveals the trial court found and the parties agreed, that expert testimony was necessary to prove the applicable psychiatric standard of practice or conduct. Such testimony was also necessary to prove whether or not Dr. Kilbride breached the psychiatric standard of practice, in essence a medical negligence standard. Plaintiff relies on *Davis* as support for his contention that requiring proof of liability under medical negligence was in error. However, we are not convinced that *Davis* or *Pangburn* would bar expert testimony of a medical negligence standard of care based on the facts of this case as relates to failure to involuntarily commit a "patient." As stated earlier in this opinion, general negligence is the proper theory to apply to a third party action involv-

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2. *Alt v. John Umstead Hospital*, 125 N.C. App. 193, 479 S.E.2d 800 (1997). In *Alt*, the Court stated "[T]he dispositive issue is whether the actions of defendant's employees [doctor and nurse] conformed to the applicable standards of medical practice among members of the same health care profession with similar training and experience." *Id.* at 198, 479 S.E.2d at 804. In affirming the award of the Industrial Commission, the Court of Appeals determined that the actions of the doctor and nurse were "not in keeping with the applicable psychiatric standards of practice." *Id.* at 200, 479 S.E.2d 804-05.

ing failure to warn the spouse based on *Davis* and *Pangburn*. In ruling that "Kilbride did not have a separate legal duty to warn Kathy Gregory of Mark Gregory's release separate and apart from any general duty of care imposed under the common law of negligence," it is clear the trial court was not holding plaintiff to a higher standard of care with respect to the issue of failure to warn.

As to the standard necessary to prove liability of a doctor to one whom he fails to involuntarily commit, physician-patient privity notwithstanding, neither *Davis* nor *Pangburn* address the applicable standard. Therefore, we conclude that *Davis* and *Pangburn* do not bar expert testimony of a medical negligence standard of care in this wrongful death action involving the patient-decedent based on failure to involuntarily commit.

Having concluded that neither *Davis* nor *Pangburn* bar expert testimony of the standard of care, we hold the trial court did not err in allowing expert testimony and in instructing the jury on same. Moreover, because plaintiff alleged a medical negligence standard of care and presented trial testimony regarding that standard we cannot hold the court's requirement that plaintiff prove breach under these circumstances to be in error. This assignment of error is overruled.

II.

[3] Plaintiff's next argument is that the trial court erred by granting Dr. Kilbride's motion for directed verdict on plaintiff's claim alleging breach of a duty to warn.

A motion for a directed verdict tests the legal sufficiency of the evidence to take the case to the jury. *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 701, 365 S.E.2d 621, 623 (1988). In ruling upon the motion, the evidence is viewed in the light most favorable to the nonmoving party, who is to be given the benefit of every reasonable inference which may be drawn from it. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977). Appellate review of an order granting a directed verdict is limited to the grounds asserted by the moving party at the trial level. *Crane v. Caldwell*, 113 N.C. App. 362, 438 S.E.2d 449 (1994).

The landmark case, *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976), held that when a psychiatrist determines, or should have determined, that the patient presents a danger to another, he has a duty to warn the intended victim. *Id.* at

340. In the present case, plaintiff mistakenly relies on *Pangburn*, *Davis* and *King v. Durham County Mental Health Authority*, 113 N.C. App. 341, 439 S.E.2d 771 (1994), to support his argument that North Carolina recognizes this "*Tarasoff*" duty to warn. The cases cited by plaintiff address a "duty . . . to exercise control over the patient 'with such reasonable care as to prevent harm to others at the hands of the patient,' " *Davis*, 121 N.C. App. at 112, 465 S.E.2d at 7 (quoting *Pangburn*, 73 N.C. App. at 338, 326 S.E.2d at 367), and not a duty to warn. *See King*, 113 N.C. App. at 345-46, 439 S.E.2d at 774. Thus, unlike the holding in *Tarasoff*, North Carolina does not recognize a psychiatrist's *duty to warn* third persons. Therefore, we find no error by the trial court in granting a directed verdict for Dr. Kilbride regarding this issue.

III.

[4] Plaintiff's next argument is that the trial court erred by finding that N.C.G.S. § 122C-263 is not a public safety statute. We disagree.

Our Supreme Court has held that when a statute imposes a duty on a person for the protection of others, it is a public safety statute and a violation of such a statute is negligence per se. *McEwen Funeral Service v. Charlotte Coach Lines*, 248 N.C. 146, 102 S.E.2d 816 (1958); *Lutz Industries, Inc. v. Dixie Home Stores*, 242 N.C. 332, 88 S.E.2d 333 (1955). A court may determine that a statute creates a minimum standard of care required to avoid liability for negligence. Nevertheless, "not every statute purporting to have generalized safety implications may be interpreted to automatically result in tort liability for its violation. Instead, a court should look at the statute's purpose in determining whether to adopt the statutory mandate as the reasonable man standard." *Baldwin v. GTE South, Inc.*, 110 N.C. App. 54, 57, 428 S.E.2d 857, 859-60 (1993), *rev'd on other grounds*, 335 N.C. 544, 439 S.E.2d 108 (1994).

The primary purpose of an involuntary commitment proceeding is to protect the person who, after due process, has been found to be both mentally ill and imminently dangerous, by placing such a person in a more protected environment where the danger may be minimized and his treatment facilitated; in a real sense the proceeding is an important step in his medical and psychiatric treatment. *See In re Farrow*, 41 N.C. App. 680, 255 S.E.2d 777 (1979).

In the instant case, we conclude that N.C.G.S. § 122C-263 and the related involuntary commitment statutes are not public safety

statutes. The purpose of the statutes is to provide a second examination to protect the rights of the individual who is the subject of the involuntary commitment proceedings. *See In re Lowery*, 110 N.C. App. 67, 428 S.E.2d 861 (1993). We hold that the involuntary commitment statutes are designed to protect against arbitrary or ill-considered involuntary commitment and although there may be some "generalized safety implications" in those statutes, they are not considered public safety statutes as defined by our Supreme Court and therefore any violation thereof cannot be considered negligence per se.

IV.

[5] Plaintiff's next argument is that the trial court erred when it granted Dr. Kilbride's motion to limit testimony that the requirements of the North Carolina Administrative Code, 10 N.C.A.C. § 15A.0129(a), had been violated. Section 15A.0129(a)[3] provides in part: "differences of opinion . . . regarding admission, treatment or discharge issues shall be resolved through negotiation involving appropriate hospital and area program staff . . . ."

A trial court's ruling on a motion in limine is preliminary and is subject to change depending on the actual evidence offered at trial. The granting or denying of a motion in limine is not appealable. To preserve the evidentiary issue for appeal where a motion in limine has been granted, the non-movant must attempt to introduce the evidence at trial. *Condellone v. Condellone*, 129 N.C. App. 675, 681, 501 S.E.2d 690, 695, *review denied*, 349 N.C. 354, 517 S.E.2d 889 (1998).

Plaintiff contends that his experts were *prepared* to testify regarding the requirements of the administrative code but plaintiff failed to offer this evidence at trial. Therefore, plaintiff is not entitled to appellate review of the trial court's grant of defendant's pretrial motion in limine and the trial court's exclusion of this evidence is not properly before this Court.

V.

[6] Plaintiff's next argument is that the trial court erred by excluding certain of plaintiff's expert witnesses while allowing defendant to call experts.

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3. Rule .0126 superseded Rule .0129, until the effective date of the repeal of Rule .0129 on 1 July 1998.

Rule 702 of the North Carolina Rules of Evidence controls the admissibility of expert testimony:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

N.C.G.S. § 8C-1, Rule 702(a) (2001). A "trial court has wide discretion in determining whether expert testimony is admissible . . . [and] may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *State v. Owen*, 133 N.C. App. 543, 549, 516 S.E.2d 159, 164, *review denied*, 351 N.C. 117, 540 S.E.2d 744 (1999).

First, we conclude that the trial court did not abuse its discretion by excluding expert testimony of several of plaintiff's witnesses. The witnesses—two police officers and a nurse—were prepared to testify on the issue of whether Mark met the "dangerous" standard, set forth under the involuntary commitment statutes, when he was examined by Dr. Kilbride. Plaintiff contends that the witnesses should have been allowed to testify because N.C.G.S. § 122C-261(a) provides:

> *Anyone* who has knowledge of an individual who is mentally ill and either (i) dangerous to self, as defined in G.S. 122C-3(11)a., or dangerous to others, as defined in G.S. 122C-3(11)b. . . . may appear before a clerk or assistant or deputy clerk of superior court or a magistrate and execute an affidavit to this effect, and petition the clerk or magistrate for issuance of an order to take the respondent into custody for examination by a physician or eligible psychologist.

N.C.G.S. § 122C-261(a) (2001) (emphasis added). This portion of the involuntary commitment statutes refers to the process for petitioning the clerk or magistrate to make an initial determination as to whether an individual should be taken into custody for an examination. Other relevant portions of the involuntary commitment statutes require the *ultimate* determination of dangerousness to self or others as defined in N.C.G.S. § 122C-3(11)(a) and (b) to be made by a *physician or eligible psychologist*, and it is the physician or psychologist who makes the recommendation for inpatient commitment. Therefore, the trial court did not err in finding that plaintiff's wit-

nesses did not qualify as experts on the issue of "dangerousness" as defined by the involuntary commitment statutes.

[7] Second, with respect to defendants' experts, plaintiff contends they do not meet the Rule 702 standard. Plaintiff asserts that defendant's experts did not qualify as experts because they did not spend the majority of their time in clinical practice or teaching. Plaintiff wanted the trial court to use the 702(b) requirements that the expert witness must: 1) specialize in the same specialty as the defendant; and 2) during the year preceding the date of the involuntary commitment proceedings, the expert witness must have devoted a majority of his or her professional time to either or both of the following: a) active clinical practice of the same or similar speciality that is the subject of the complaint; or b) teaching in an accredited health professional school or residency or clinical research program in the same health profession as the defendant. *FormyDuval v. Bunn*, 138 N.C. App. 381, 530 S.E.2d 96, *review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000). However, plaintiff relies on 702(b), which applies to medical malpractice actions and this is not a classic medical malpractice case. The trial court properly found that these witnesses qualified as experts under the general provisions of Rule 702. Therefore, we hold that the trial court did not abuse its discretion by determining that all three witnesses were qualified to give expert testimony.

VI.

[8] Plaintiff's final argument is that the trial court erred by failing to grant plaintiff a new trial on the basis that the jury considered prejudicial extrinsic information during their deliberations.

Plaintiff contends that the defense verdict for Dr. Kilbride was based in large part on extrinsic evidence brought into the jury room. The alleged extrinsic evidence was a copy of N.C.G.S. § 122C-3, which contained the definition of "mental illness" of which the court took judicial notice. The "next of kin" definition was one of several definitions on the same page. Plaintiff contends that the majority of jurors based their verdict on the "next of kin" definition even though that definition was not at issue in the case. Several jurors testified by affidavit that based on the "next of kin" definition, they could not find for the plaintiff.

We will not reverse a trial court's decision denying a new trial, unless an abuse of discretion is clearly shown resulting in a substantial miscarriage of justice. *Horner v. Byrnett*, 132 N.C. App. 323, 511

S.E.2d 342 (1999). Generally, once a verdict is rendered, jurors may not impeach it. *State v. Cherry*, 298 N.C. 86, 100, 257 S.E.2d 551, 560 (1979), *cert. denied*, 446 U.S. 941, 64 L. Ed. 2d 796 (1980). However, N.C.G.S. § 8C-1, Rule 606(b) permits testimony by a juror as to whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. *State v. Lyles*, 94 N.C. App. 240, 244, 380 S.E.2d 390, 393 (1989). Extraneous information is information that reaches a juror without being introduced in evidence and does not include information which a juror has gained in his own experience. *State v. Rosier*, 322 N.C. 826, 832, 370 S.E.2d 359, 363 (1988). A juror may not, however, testify "as to . . . the effect of anything upon his or any other *juror's mind* or emotions as influencing him to assent to or dissent from the verdict . . . or concerning his mental processes in connection therewith . . . ." N.C.G.S. § 8C-1, Rule 606(b) (2001) (emphasis added).

Here, the court was asked to take judicial notice of the "mental illness" definition found in N.C.G.S. § 122C-3. Plaintiff did not object to the publication to the jury of the document containing the mental illness definition. The record indicates that copies of the document were provided to all members of the jury during the trial, and that the jurors retained those copies in open court without objection. The "next-of-kin" definition was on the same page as the definition of "mental illness," as were other definitions. Plaintiff's motion for a new trial was based in part on the fact that the jury had a copy of N.C.G.S. § 122C-3 in its possession during deliberations. After the verdict, plaintiff obtained affidavits from several jurors setting forth the effect of the "extraneous information" on their verdict. The trial court struck the affidavits as an improper attempt by the jurors to impeach their own verdict in violation of Rule 606(b).

We hold that the trial court did not abuse its discretion by denying plaintiff a new trial based on the jury's possession of a copy of N.C.G.S. § 122C-3 as it did not constitute prejudicial extraneous information.

DEFENDANT'S CROSS ASSIGNMENTS OF ERROR

VII.

[9] Dr. Kilbride contends that the trial court erred in denying defendant's motion for summary judgment on the basis of qualified immunity.

The purpose of summary judgment is to bring litigation to an early decision on the merits without the delay and expense of a trial when no material facts are at issue. *McNair v. Boyette*, 282 N.C. 230, 192 S.E.2d 457 (1972). The denial of a motion for summary judgment based on the defense of qualified immunity does affect a substantial right and is immediately appealable. *See Rousselo v. Starling*, 128 N.C. App. 439, 495 S.E.2d 725 (1998). However, after there has been a trial, the purpose of summary judgment cannot be served. Improper denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts, either judge or jury. *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985).

Here, Dr. Kilbride moved for summary judgment based on qualified immunity. The trial court denied the motion for summary judgment. Dr. Kilbride did not appeal the denial of the motion for summary judgment based on qualified immunity and the case proceeded to trial. The jury returned a verdict in favor of Dr. Kilbride. Based on the foregoing we hold that the trial court's denial of Dr. Kilbride's motion for summary judgment does not constitute reversible error where, as here, there was a final judgment in his favor rendered at the trial on the merits.

VIII.

Dr. Kilbride argues that the trial court erred in denying his motion to dismiss based on his claim of sovereign immunity because: (A) plaintiff did not adequately plead a cause of action against Dr. Kilbride individually; (B) the trial court was without jurisdiction to decide claims for negligence against a defendant sued in his official capacity; and (C) plaintiff has failed to adequately plead a cause of action against Dr. Kilbride as a public official giving rise to individual liability.

Based on our ruling in Section VII we do not deem it necessary to further address the cross assignments of error stated herein.

NO ERROR.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissents with a separate opinion.

GREENE, Judge, dissenting.

I believe the evidence before the trial court at the summary judgment hearing entitled Dr. Kilbride to a judgment in his favor based on section 122C-210.1 immunity. I, therefore, dissent.

Summary Judgment

While the majority refuses to address the correctness of the trial court's denial of Dr. Kilbride's motion for summary judgment, I believe the issue is properly before this Court and must be addressed.

Ordinarily, an improper " 'denial of a motion for summary judgment is not reversible error when the case has proceeded to trial and has been determined on the merits by the trier of the facts.' " *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 680, 340 S.E.2d 755, 757 (citation omitted), *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). This is so because granting " 'a review of the denial of the summary judgment motion after a final judgment on the merits . . . would mean that a party who prevailed at trial after a complete presentation of evidence by both sides with cross-examination could be deprived of a favorable verdict,' " thus allowing " 'a verdict reached after the presentation of all the evidence to be overcome by a limited forecast of the evidence.' " *Id.* at 681, 340 S.E.2d at 757 (citation omitted).

In this case, the logic behind refusing to review denials of summary judgment motions does not apply as Dr. Kilbride, the party moving for summary judgment, received a favorable verdict after a trial on the merits. In addition, Dr. Kilbride has not appealed the trial court's denial of his summary judgment motion but has cross-assigned error to that denial because it deprives him "of an alternative basis in law for supporting the judgment." *See* N.C.R. App. P. 10(d). Thus, if summary judgment had been granted in favor of Dr. Kilbride, the result would have been the same as the trial court's final judgment.

With respect to Dr. Kilbride's ability to appeal the denial of his summary judgment motion, this Court has specifically held that the denial of a summary judgment motion raising a qualified immunity defense affects a substantial right and is immediately appealable. *Rousselo v. Starling*, 128 N.C. App. 439, 443, 495 S.E.2d 725, 728, *appeal dismissed and disc. review denied*, 348 N.C. 74, 505 S.E.2d 876 (1998). Even though Dr. Kilbride was entitled to an immediate

appeal based on a substantial right, he was not required to immediately appeal the trial court's denial of his summary judgment motion. *See Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 710 (1999) (where "a party is entitled to an interlocutory appeal based on a substantial right, that party may appeal but is not required to do so"). Thus, Dr. Kilbride was not required to immediately appeal the trial court's denial of his summary judgment motion, but he could wait for final judgment and timely appeal the interlocutory order. *See Floyd and Sons, Inc. v. Cape Fear Farm Credit*, 350 N.C. 47, 51, 510 S.E.2d 156, 159 (1999).

Immunity

At the time plaintiff's cause of action arose, North Carolina General Statutes provided:

> No facility or any of its officials, staff, or employees, or any physician or other individual who is responsible for the examination, management, supervision, treatment, or release of a client and who follows accepted professional judgment, practice, and standards is civilly liable, personally or otherwise, for actions arising from these responsibilities or for actions of the client. This immunity is in addition to any other legal immunity from liability to which these facilities or individuals may be entitled.

N.C.G.S. § 122C-210.1 (Supp. 1985).[4] This Court has interpreted section 122C-210.1 as providing immunity from liability as long as physicians' decisions are "an exercise of professional judgment." *Alt v. Parker*, 112 N.C. App. 307, 314, 435 S.E.2d 773, 777 (1993), *cert. denied*, 335 N.C. 766, 442 S.E.2d 507 (1994). This is so because in deciding what actions to take regarding a client, a facility's staff "should not be required to make each decision in the shadow of an action for damages." *Youngberg v. Romeo*, 457 U.S. 307, 325, 73 L. Ed. 2d 28, 43 (1982). It is not appropriate for the courts to decide " 'which of several professionally acceptable choices should have been made,' " *id.* at 321, 73 L. Ed. 2d at 41 (citation omitted); *Alt*, 112 N.C. App. at 314, 435 S.E.2d at 777, and although an expert's opinion may differ from the judgment exercised by the professional, that opinion "represents only another 'professionally acceptable choice,' "

4. This section was amended in 1995, effective 1 January 1997 and applicable to commitments on or after that date, to insert "custody" in the first sentence before "examination" and added "and applies to actions performed in connection with, or arising out of, the admission or commitment of any individual pursuant to this Article" in the second sentence after "entitled." 1995 N.C. Sess. Laws ch. 739, § 3.

Alt, 112 N.C. App. at 316, 435 S.E.2d at 778. Therefore, if a decision is made by a professional, it "is presumptively valid," and "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg*, 457 U.S. at 323, 73 L. Ed. 2d at 42. In other words, liability can be imposed only if "the decision was 'so completely out of professional bounds as to make it explicable only as an arbitrary, nonprofessional one. This standard appropriately defers to the necessarily subjective aspects of the decisional process of institutional medical professionals.' " *Patten v. Nichols*, 274 F.3d 829, 845 (4th Cir. 2001) (citation omitted); *see also Shaw v. Strackhouse*, 920 F.2d 1135, 1146 (3d Cir. 1990) (professional judgment "falls somewhere between simple negligence and intentional misconduct").

According to Dr. Kilbride's deposition testimony, he evaluated Mark consistent with his normal methods and the procedures of Broughton Hospital. In addition, Dr. Kilbride presented depositions from several experts stating their diagnosis of Mark would have been similar to Dr. Kilbride's diagnosis and in their professional opinion, they did not believe Mark met the requirements for involuntary commitment under North Carolina law. Moreover, the experts testified Dr. Kilbride's diagnosis of Mark was not unreasonable. Assuming plaintiff had experts stating Dr. Kilbride's release of Mark was error, that is but "another 'professionally acceptable choice.' " Thus, no genuine issues of material fact were raised by the evidence at the summary judgment hearing and Dr. Kilbride was entitled to a judgment as a matter of law. There is no evidence in the record that Dr. Kilbride substantially departed from accepted professional judgment or that his judgment was arbitrary or unprofessional. Accordingly, the trial court erred in denying his motion for summary judgment based on section 122C-210.1 immunity. I, therefore, would not address the issues raised by plaintiff's appeal.[5]

5. Plaintiff argues that even if section 122C-210.1, as it presently reads, is construed to provide immunity to Dr. Kilbride, the version of that statute in effect in 1995 did not provide immunity. I disagree. In 1995, the legislature did add a sentence specifically granting immunity to a physician admitting a person to a mental health institution. The prior version of the statute, however, extended immunity to any physician responsible for a client's "examination," and the admission process necessarily involved an examination of the client. The amendment of section 122C-210.1 must, therefore, be read as simply clarifying the statute, not altering or providing for additional immunity. *See Davis v. N.C. Dep't of Human Resources*, 121 N.C. App. 105, 114-15, 465 S.E.2d 2, 8 (1995) (legislative amendment may be viewed as clarifying the law, not changing it), *disc. review denied*, 343 N.C. 750, 473 S.E.2d 612 (1996).

VILONA BLEDSOLE, PLAINTIFF v. RICKY LEE JOHNSON, DEFENDANT

No. COA01-866

(Filed 18 June 2002)

1. Arbitration and Mediation— failure to participate in good faith and meaningful manner—motion for trial de novo

The trial court did not abuse its discretion in an action arising out of an automobile accident by striking defendant's demand for a trial de novo based upon defendant's violation of Rule 3(l) of the Rules for Court-Ordered Arbitration by failing to participate in the arbitration hearing in a good faith and meaningful manner, because: (1) defendant did not appear at the arbitration hearing and there is no evidence in the record that the attorney purporting to represent defendant at the hearing was appearing with the authority to make binding decisions on defendant's behalf; (2) there is no evidence tending to show that the reasons for defendant's failure to appear at the rescheduled arbitration hearing were beyond his control; (3) even if there were evidence that the reasons for defendant's failure to appear were beyond his control, defendant failed to employ the most appropriate remedy for his failure to appear, which was moving for a rehearing under Rule 3(j) of the Rules for Court-Ordered Arbitration; (4) contrary to defendant's assertion, nothing in the Rules for Court-Ordered Arbitration requires a party to object to an opposing party's failure to appear at an arbitration hearing or to object to any violations of the Rules at the arbitration hearing in order to preserve the right to later seek sanctions based upon such violation; (5) even though plaintiff's motion for sanctions was not made until forty-three days after defendant filed its demand for trial de novo and one week before trial was scheduled, the Rules of Court-Ordered Arbitration do not include a deadline for filing a motion for sanctions based upon an opposing party's failure to appear at the arbitration hearing; and (6) there is no indication in the order that the trial court's conclusion was dependent upon the erroneous finding requiring the attendance of a representative of a party's insurance company when such insurance company is not a named party in the action.

2. Costs— attorney fees—basis of award

The trial court's award of attorney fees in favor of plaintiff in an action arising out of an automobile accident for fees incurred

during the time period from the date of the arbitrator's award to 9 October 2000, and for the preparation and filing of the motion for sanctions, is remanded to the trial court for entry of an order clarifying the basis of such award.

3. Arbitration and Mediation— altering terms by awarding costs—basis of award

The trial court erred in an action arising out of an automobile accident by altering the terms of the arbitration award by awarding costs incurred prior to the arbitration award which were not included in the award, and the trial court's award of costs incurred by plaintiff after the arbitration award is remanded to the trial court for entry of an order clarifying the basis for this award.

Judge GREENE dissenting.

Appeal by defendant from orders entered 23 January 2001 and 24 January 2001 by Judge Kimbrell Kelly Tucker in Cumberland County District Court. Heard in the Court of Appeals 23 April 2002.

Hatley & Stone, P.A., by Angela M. Hatley, for plaintiff-appellee.

Walker, Clark, Allen, Herrin & Morano, L.L.P., by Jerry A. Allen, Jr. and Gay Parker Stanley, for defendant-appellant.

HUNTER, Judge.

Rickie Lee Johnson ("defendant") appeals from an order striking defendant's Request for Trial De Novo and awarding Vilona Bledsole ("plaintiff") attorney's fees and costs. We hold the trial court did not err in striking defendant's Request for Trial De Novo. We also hold the trial court erred in awarding plaintiff costs incurred prior to the arbitration award, and we remand to the trial court for an order clarifying the basis for the award of attorney's fees and costs incurred after the arbitration award.

Plaintiff and defendant were involved in a motor vehicle accident in November of 1998 in Cumberland County, North Carolina. Plaintiff filed a complaint on 4 April 2000 seeking damages. Defendant filed a response raising various defenses. Defendant also demanded a jury trial. On 30 June 2000, the trial court ordered the parties to participate in non-binding arbitration pursuant to N.C. Gen. Stat. § 7A-37.1 (2001). The arbitration hearing was scheduled but then continued by consent of the parties, and the hearing was

rescheduled for 31 August 2000. The trial court sent copies of a "Notice of Arbitration Hearing" to Angela M. Hatley, the attorney representing plaintiff, and to Gay Parker Stanley, an attorney hired by defendant's insurance company, Allstate Insurance Company ("Allstate"), to represent defendant.

At the arbitration hearing, plaintiff and her attorney appeared, as well as Scott T. Stroud, an attorney from the same firm as Ms. Stanley. Defendant did not appear in person. In addition, no adjuster or representative on behalf of Allstate appeared at the hearing. The hearing lasted for thirty minutes, during which time plaintiff presented her medical bills and records, and Mr. Stroud presented photographs of plaintiff's vehicle and presented arguments. The arbitrator entered an award of $7,000.00 in plaintiff's favor, and also taxed costs of the action to defendant, although no amount of costs were included. The arbitrator did not award any attorney's fees to plaintiff.

On 11 September 2000, defendant filed a "Request for Trial De Novo" pursuant to Rule 5(a) of the Rules for Court-Ordered Arbitration ("Arb. Rule 5(a)"). The parties then proceeded to engage in discovery, conducting a deposition of plaintiff on 5 October 2000, and a *de bene esse* video deposition of plaintiff's chiropractor on 17 October 2000. On 24 October 2000, plaintiff filed a "Motion for Sanctions" seeking to strike defendant's Request for Trial De Novo and enforce the arbitration award, or, in the alternative, to be awarded attorney's fees and costs as a result of defendant's failure to participate in the arbitration hearing. In this motion, plaintiff argued that defendant had violated Rule 3(l) of the Rules for Court-Ordered Arbitration ("Arb. Rule 3(l)") by failing to participate in the arbitration hearing in a good faith and meaningful manner. A hearing on this motion was scheduled for 6 November 2000, the same day as the trial. On 6 November 2000, prior to the hearing and trial, plaintiff filed an additional motion seeking attorney's fees of $3,300.00 and costs of $1,270.70. Following a hearing on 6 November 2000, and a second hearing on 5 December 2000, the trial court entered an order on 23 January 2001 granting plaintiff's initial motion for sanctions by striking defendant's Request for Trial De Novo and enforcing the arbitration award, and also granting plaintiff attorney's fees of $1,912.50 and costs of $175.30. Defendant filed a "Motion for Reconsideration and Rehearing" on 14 December 2000, and the trial court denied this motion by order dated 24 January 2001. Defendant appeals from both orders.

I.

[1] On appeal, defendant first argues that the trial court erred in striking defendant's Request for Trial De Novo and in enforcing the arbitration award. Rule 3(p) of the Rules for Court-Ordered Arbitration ("Arb. Rule 3(p)") requires that "[a]ll parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator." R. Ct.-Ordered Arbitration in N.C. 3(p), 2002 N.C. R. Ct. 233. Arb. Rule 3(l) further provides that "[a]ny party failing or refusing to participate in an arbitration proceeding in a good faith and meaningful manner shall be subject to sanctions by the court on motion of a party, or report of the arbitrator, as provided in N.C.R. Civ. P. 11, 37(b)(2)(A)-37(b)(2)(C) and N.C. Gen. Stat. § 6-21.5." R. Ct.-Ordered Arbitration in N.C. 3(l), 2002 N.C. R. Ct. 233.

Here, the trial court found as fact that defendant did not appear at the arbitration hearing, and that "[t]here is no evidence in the record that Mr. Stroud was appearing at the arbitration hearing with the authority to make binding decisions on defendant's behalf in all matters in controversy before the arbitrator." Based upon these findings, the trial court concluded that defendant failed "to participate in the arbitration proceeding in a good faith and meaningful manner," as required by Arb. Rule 3(l), and therefore determined that sanctions were warranted.

There is no dispute that defendant himself did not attend the arbitration hearing. Defendant contends that Mr. Stroud's appearance satisfied Arb. Rule 3(p) because Mr. Stroud was authorized to make binding decisions on defendant's behalf in all matters in controversy before the arbitrator. However, the record does not contain any evidence to support this contention. This Court has previously held that where a defendant fails to appear at arbitration, and where there is no evidence in the record that the attorney purporting to represent the defendant at the hearing had the authority to make binding decisions in all matters on defendant's behalf, a trial court's ruling that the defendant has violated Arb. Rule 3(p) is not an abuse of discretion. *Mohamad v. Simmons*, 139 N.C. App. 610, 613-15, 534 S.E.2d 616, 618-20 (2000) (noting that such evidence could include the defendant's contract with the attorney, or an affidavit setting forth the nature of the representational relationship and the authority of the attorney). Furthermore, this Court has held that, under such circumstances, a trial court's award of sanctions against the defendant

in the form of striking the defendant's demand for trial *de novo* and enforcing the arbitration award in favor of the plaintiff is not an abuse of discretion. *Id.* at 614-15, 534 S.E.2d at 619-20.

Defendant argues that *Mohamad* is distinguishable from the instant case for two reasons. We address each in turn.

A.

First, defendant argues, unlike in *Mohamad*, there is evidence in this case that defendant never received notice of the rescheduled hearing and, thus, the reasons for his failure to appear at the hearing were beyond his control. We find this argument to be unpersuasive for a number of reasons.

First and foremost, there is no evidence in the record tending to show that the reasons for defendant's failure to appear were beyond his control. Defendant sought to attach to his "Motion for Reconsideration and Rehearing" two affidavits purportedly averring that defendant had not received any notice regarding the rescheduled arbitration hearing. In its 24 January 2001 order denying the Motion for Reconsideration and Rehearing, the trial court found that defendant had failed without justification to produce any such affidavits at the hearings on 6 November 2000 and 5 December 2000. As noted above, the trial court denied the Motion for Reconsideration and Rehearing, and further, in settling the record on appeal, ruled that all exhibits attached to the motion should be deleted from the record on appeal. It is well established that "[a] trial court's order settling the record on appeal is final and will not be reviewed on appeal." *Penland v. Harris*, 135 N.C. App. 359, 363, 520 S.E.2d 105, 108 (1999). Furthermore, "[r]eview of an order settling the record on appeal is available, if at all, only by way of *certiorari*." *Id.* Defendant has not applied for *certiorari*. Since there is no evidence in the record on appeal to show that defendant failed to attend the hearing for "good cause," defendant cannot establish that *Mohamad* may be distinguished on this basis.

Second, defendant's argument is founded upon the premise that defendant's failure to appear at the hearing was the fault of his attorneys in not notifying him of the rescheduled date, and not his own fault. Even if this were true, it is not clear that it would make a difference from a legal standpoint. Parties are generally held responsible for the negligence of their lawyers in handling their case in order to ensure that both clients and lawyers take care to act responsibly. *See Briley v. Farabow*, 348 N.C. 537, 546-47, 501 S.E.2d 649, 655

(1998) (an attorney's negligent conduct is not "excusable neglect" under N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2001)).

> Allowing an attorney's negligence to be a basis for providing relief from orders would encourage such negligence and present a temptation for litigants to use the negligence as an excuse to avoid court-imposed rules and deadlines. Plaintiffs have argued that this Court should provide relief from an order if only the attorney, rather than the client, was negligent. Looking only to the attorney to assume responsibility for the client's case, however, leads to undesirable results.

Id. at 546, 501 S.E.2d at 655. Thus, even if defendant could show that his attorney received notice of the rescheduled hearing and failed to notify defendant, such fact would not necessarily compel the conclusion that defendant's failure to appear was for "good cause" or was due to reasons beyond his control.

Finally, even if there were evidence that the reasons for defendant's failure to appear were beyond his control, defendant nonetheless failed to employ the most appropriate remedy for his failure to appear: namely, moving for a rehearing pursuant to Rule 3(j) of Rules for Court-Ordered Arbitration ("Arb. Rule 3(j)"). This rule provides:

> If a party who has been notified of the date, time and place of the hearing fails to appear without good cause therefor, the hearing may proceed and an award may be made by the arbitrator against the absent party upon the evidence offered by the parties present, but not by default for failure to appear. . . . The court may order a rehearing of any case in which an award was made against a party who failed to obtain a continuance of a hearing and failed to appear for reasons beyond the party's control. Such motion for rehearing shall be filed with the court within the time allowed for demanding trial de novo stated in Arb. Rule 5(a).

R. Ct.-Ordered Arbitration in N.C. 3(j), 2002 N.C. R. Ct. 232-33. If defendant had desired to contest the arbitration award against him on the basis that the reasons for his failure to appear were beyond his control, the appropriate remedy would have been filing a motion for rehearing pursuant to Arb. Rule 3(j), which defendant failed to do.

B.

The second reason defendant argues that *Mohamad* is distinguishable is that here, unlike in *Mohamad,* plaintiff failed to object to

defendant's absence during the arbitration hearing, and that plaintiff here did not raise an objection to defendant's absence until forty-three days after defendant filed the Request for Trial De Novo. Again, we find this argument unpersuasive for a number of reasons.

First, there is nothing in *Mohamad* indicating that the Court in that case placed any significance upon the fact that the plaintiff objected to the defendants' failure to appear; the court merely noted this fact in passing during a recitation of the procedural background. *See Mohamad*, 139 N.C. App. at 611, 534 S.E.2d at 618). Second, nothing in the Rules for Court-Ordered Arbitration requires a party to object to an opposing party's failure to appear at an arbitration hearing, or to object to any violation of the Rules at the arbitration hearing, in order to preserve the right to later seek sanctions based upon such violation.

Moreover, we see no reason for imposing such a requirement in this context. Generally, parties must enter objections before the lower court in order to preserve an issue for appeal because: (1) appellate courts are limited to a review of alleged errors in the rulings of the trial court, and, absent an objection and an opportunity for the trial court to rule on the objection, there is nothing for an appellate court to review, *see Cotton Mill Co. v. Textile Workers Union*, 234 N.C. 748, 749, 68 S.E.2d 809, 810 (1952); and (2) requiring parties to object at trial increases the likelihood that the error will be called to the trial court's immediate attention and corrected, thereby eliminating the need for a new trial, *see Penland v. Green*, 289 N.C. 281, 285, 221 S.E.2d 365, 369 (1976).

However, in the context of a trial *de novo* following an arbitration hearing, the trial court is not limited to a review of alleged errors in the rulings of the arbitrator at the arbitration hearing. There is no official transcript of the arbitration hearings, *see* Arb. Rule 3(k), and, as a result, a trial *de novo* is not technically considered to be an "appeal" from an arbitration award, *see* Comment to Arb. Rule 6. Furthermore, only the trial court, and not the arbitrator, has authority to punish arbitration parties for contempt, *see* Arb. Rule 3(g), 3(l), 3(p), and only the trial court has authority to schedule or reschedule arbitration hearings, *see* Arb. Rule 8(b), or to order a rehearing, *see* Arb. Rule 3(j). Thus, an objection at the arbitration hearing to a party's failure to appear would not have the effect of providing the arbitrator an opportunity to enter any contempt ruling based upon the party's failure to appear or to order that the hearing be rescheduled.

C.

Defendant has asserted various other grounds in support of his contention that the trial court erred in striking the demand for trial *de novo*. Defendant draws our attention to the fact that plaintiff's motion for sanctions was not made until forty-three days after defendant filed its demand for trial *de novo*, and one week before trial was scheduled. While we agree that such delay can result in significant inconvenience and cost for the opposing party, who is left having unnecessarily prepared for trial if the demand for trial *de novo* is ultimately stricken, only our Supreme Court has the authority to "adopt rules governing" the procedure for court-ordered, nonbinding arbitration. *See* N.C. Gen. Stat. § 7A-37.1(b). At present, the Rules for Court-Ordered Arbitration do not include a deadline for filing a Motion for Sanctions based upon an opposing party's failure to appear at the arbitration hearing in violation of Arb. Rule 3(l).

Defendant also contends that the trial court erred in finding that Mr. Stroud "did not conduct any cross-examination and presented no evidence during the course of the arbitration hearing." Defendant contends that Mr. Stroud did, in fact, present evidence at the hearing. Even assuming *arguendo* that defendant is correct, and that the trial court's finding to the contrary is not supported by the evidence in the record, such finding was not necessary to the court's conclusion that defendant failed to participate in the arbitration proceeding in a good faith and meaningful manner. This conclusion was adequately supported, as noted above, by the trial court's findings that defendant did not appear at the arbitration hearing, and that "[t]here is no evidence in the record that Mr. Stroud was appearing at the arbitration hearing with the authority to make binding decisions on defendant's behalf in all matters in controversy before the arbitrator."

Defendant also contends the trial court erred in finding that no "person from Allstate Insurance Company appeared at the arbitration hearing." We agree with defendant that this finding would not be a proper basis for concluding that defendant failed to participate in the arbitration proceeding in a good faith and meaningful manner. This is because nothing in the Rules for Court-Ordered Arbitration requires the attendance of a representative of a party's insurance company when such insurance company is not a named party in the action. *See Johnson v. Brewington*, 150 N.C. App. 425, 562 S.E.2d. 919 (2002). However, there is no indication in the order that the trial court's conclusion was dependent upon this finding, and thus, any error in entering this finding was inconsequential.

II.

[2] Defendant next assigns error to the trial court's award of attorney's fees in favor of plaintiff. The arbitration award did not include an award of attorney's fees in favor of plaintiff. The trial court in its order awarded plaintiff attorney's fees only for fees "incurred during the time period from the date of the arbitrator's award to October 9, 2000 and for the preparation and filing of the motion for sanctions." However, the order does not clearly indicate the basis upon which such fees were awarded.

It is possible that the trial court intended to award such attorney's fees pursuant to N.C. Gen. Stat. § 6-21.5 (2001) as sanctions for defendant's failure to appear at arbitration.[1] However, such basis for the award of attorney's fees would have been improper. Section 6-21.5 of our General Statutes allows a court to "award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading." N.C. Gen. Stat. § 6-21.5. Here, the trial court did not find facts that would support such a conclusion, the trial court did not enter such a conclusion in its order, and the record does not, in fact, support such a conclusion.

It is also possible that the trial court intended to award attorney's fees, not as a sanction pursuant to N.C. Gen. Stat. § 6-21.5, but, rather, based upon some other statutory authority (for example, plaintiff's motion for attorney's fees and costs expressly refers to Rule 11, Rule 37, and N.C. Gen. Stat. § 6-21.1). Because the trial court may have intended to award attorney's fees based upon some statutory authority other than N.C. Gen. Stat. § 6-21.5, we remand the case to the trial court. If the only basis for the trial court's award of attorney's fees was N.C. Gen. Stat. § 6-21.5, the trial court is instructed to enter an order denying plaintiff's motion for attorney's fees. If the award of attorney's fees was intended to be made upon some other basis, the trial court is instructed to enter an order clarifying the basis for the attorney's fee award.

III.

[3] Finally, defendant argues that the trial court erred in awarding costs of $175.30 to plaintiff ($91.30 for costs incurred through the

1. Arb. Rule 3(l) authorizes a trial court to award sanctions pursuant only to Rule 11, Rule 37(b)(2)(a)-(c), and N.C. Gen. Stat. § 61-21.5. The trial court's order references only Rule 37 and N.C. Gen. Stat. § 61-21.5. Because the order does not reference Rule 11, and because Rule 37(b)(2)(a)-(c) does not authorize attorney's fees as sanctions,

date of the arbitration hearing, and $84.00 for costs incurred since the arbitration hearing). The Arbitration Award and Judgment states that costs are to be taxed against defendant, but it does not actually specify any particular amount to be awarded to plaintiff as costs. Defendant contends that no specific costs were included in the award because plaintiff did not present any evidence of her costs at the arbitration hearing. Defendant further contends that any costs awarded to plaintiff by the trial court would essentially constitute a modification of the Arbitration Award and Judgment, and that such modification would be improper since defendant's Motion for Trial De Novo was stricken, and plaintiff did not appeal from the arbitration award. To the extent that the trial court awarded plaintiff costs incurred up to the date of the arbitration hearing, we agree.

It is important to understand the status of this action at the time the trial court struck defendant's Request for Trial De Novo. Rule 6(b) of the Rules for Court-Ordered Arbitration ("Arb. Rule 6(b)") provides in pertinent part:

> If the case is not terminated by agreement of the parties, and no party files a demand for trial de novo within 30 days after the award is filed, the clerk or the court shall enter judgment on the award, which shall have the same effect as a consent judgment in the action.

R. Ct.-Ordered Arbitration in N.C. 6(b), 2002 N.C. R. Ct. 234. Initially, we hold that the same result (entry of judgment on the award with the effect of a consent judgment) obtains where, as here, (1) an Arbitration Award and Judgment is entered, (2) one of the parties demands a trial *de novo*, and (3) the trial court strikes the demand for trial *de novo* as a form of sanctions based upon a violation of Rule 3(1). Thus, as a result of the trial court's 23 January 2001 order striking defendant's demand for trial *de novo*, and because plaintiff did not file a demand for trial *de novo* within thirty days, the trial court's order entering judgment on the arbitration award has the same effect as a consent judgment.

The trial court awarded costs incurred by plaintiff prior to the arbitration award, even though such costs were not specifically included in the arbitration award. This award of costs incurred before the arbitration award was improper and must be reversed. There is nothing in the Rules for Court-Ordered Arbitration indicating

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the trial court may have intended to award attorney's fees pursuant to N.C. Gen. Stat. § 61-21.5.

that, following entry of judgment by the clerk or the trial court on an arbitration award which then has "the same effect as a consent judgment," the trial court has authority to alter the terms of the arbitration award by awarding costs incurred prior to the arbitration award which were not included in the award. *See Taylor v. Cadle*, 130 N.C. App. 449, 454, 502 S.E.2d 692, 695 (1998) (holding that failure of a party to request a trial *de novo* within thirty days of the arbitrator's award acts as a waiver of that party's right to appeal the arbitrator's determination on the issue of attorney's fees or costs).

As to the trial court's award of costs incurred by plaintiff after the arbitration award, the trial court's order fails to indicate the statutory basis for this award. As to these costs, we remand to the trial court for entry of an order clarifying the basis for this award.

In summary, we affirm the trial court's 23 January 2001 order to the extent that it strikes defendant's demand for trial *de novo* based upon defendant's violation of Rule 3(l). We reverse the trial court's order to the extent it purports to award plaintiff costs incurred prior to the arbitration award. As to the trial court's award of attorney's fees and costs incurred after the arbitration award, we remand to the trial court for entry of an order clarifying the basis for such awards.

Affirmed in part, reversed in part, and remanded.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissents in a separate opinion.

GREENE, Judge, dissenting.

All parties to a case that is to be arbitrated pursuant to the Rules for Court-Ordered Arbitration (the Rules) are required to be present at the arbitration hearing or to have a representative present who is authorized to make binding decisions on their behalf. N.C. Arb. R. 3(p). If a party or its authorized representative does not appear at the hearing and the arbitrator enters an award against that party, that party may within 30 days of the filing of the award move the trial court to order a rehearing on the grounds that he "failed to appear for reasons beyond [his] control." N.C. Arb. R. 3(j), 5(a).

In this case, the arbitration hearing was conducted on 31 August 2000. Defendant was not present for the hearing, although his attor-

ney was present. At the hearing, the issue of whether defendant's attorney had the authority to make binding decisions on behalf of his client was never raised. After the hearing, on 1 September 2000, an "Award and Judgment," which noted that "[a]ll parties were present in person or through an attorney," was filed. Subsequently, on 11 September 2000, defendant moved for a trial *de novo* pursuant to Rule 5(a). On 24 October 2000, plaintiff filed her motion for sanctions requesting defendant's trial *de novo* request be denied because he did not appear at the arbitration hearing or have anyone present "authorized to make binding decisions on his behalf." The trial court allowed plaintiff's motion on the grounds that defendant was neither present for the arbitration hearing nor had a representative there with the authority to make binding decisions on his behalf.

Because plaintiff did not raise the issue of whether defendant's attorney had the requisite Rule 3(p) authority until after expiration of the time for defendant to move the trial court for an arbitration rehearing, she is barred from raising the issue. To hold otherwise would allow her to simply wait until it is too late for defendant to attempt to correct the problem that is the basis of her motion, and this would be inconsistent with any reasonable construction of the Rules. In other words, unless a party makes a timely Rule 3(p) objection, it cannot seek to deny another party the right to request a Rule 5(a) trial *de novo* on the grounds that party has failed to comply with Rule 3(p). *See Mohamad v. Simmons*, 139 N.C. App. 610, 611, 534 S.E.2d 616, 618 (2000) (the plaintiff "objected to the failure of the individual defendants to appear [at the arbitration hearing], but proceeded with the hearing without waiving or withdrawing the objection"). A timely objection is one entered either at the hearing or at the time the award is filed. As plaintiff never entered a Rule 3(p) objection, the failure of the record to show defendant's attorney had Rule 3(p) authority cannot be the basis for denying defendant a trial *de novo*, awarding plaintiff attorney's fees, or awarding costs. Accordingly, I would reverse and remand for an entry of an order granting defendant's request for a trial *de novo*.

STATE OF NORTH CAROLINA v. CLAYTON BULLIN

No. COA01-729

(Filed 18 June 2002)

1. Criminal Law— joinder—trafficking in drugs—conspiracy to traffic in drugs—possession of controlled substances

The trial court did not abuse its discretion by joining for trial under N.C.G.S. § 15A-926(a) the three charges against defendant of trafficking in drugs, conspiracy to traffic in drugs, and possession of controlled substances because the charges against defendant stemmed from a series of actions occurring over a short period of time that were part of one general transaction.

2. Witnesses— motion to sequester—suppression hearing

The trial court did not abuse its discretion in a trafficking in drugs, conspiracy to traffic in drugs, and possession of controlled substances case by denying defendant's motion to sequester the State's witnesses during the suppression hearing, because: (1) the trial court denied the motion after hearing arguments and making appropriate inquiries of both sides; and (2) any alleged conflicts in paperwork that were claimed by defendant could be illustrated through the documents at issue.

3. Evidence— drugs—motion to suppress—probable cause for arrest warrant—protective sweep of residence

The trial court did not err in a trafficking in drugs, conspiracy to traffic in drugs, and possession of controlled substances case by denying defendant's motion to suppress evidence seized at defendant's residence pursuant to his arrest, because: (1) the totality of circumstances reveals that there was probable cause to issue the arrest warrant against defendant including the chain of events, along with the information regarding defendant's reputation and previous involvement with drugs; (2) the officers legally entered defendant's residence pursuant to a valid arrest warrant, and given defendant's actions and his previous involvement with drugs, as well as the dangerous and unpredictable nature of drug trafficking, a prudent officer could reasonably believe that a protective sweep of defendant's home was necessary to make certain that no one else was hiding in the residence; and (3) the search was limited in scope and duration and aimed at ensuring the officers' safety.

4. Arrest— delay following arrest—detention pending execution of search warrant

The trial court did not err in a trafficking in drugs, conspiracy to traffic in drugs, and possession of controlled substances case by concluding that defendant's detention by the arresting officers for almost two hours at his residence pending execution of the search warrant did not violate his rights under N.C.G.S. §§ 15A-501 and 15A-257, because: (1) a two-hour delay at defendant's residence, during which officers asked defendant no questions, was not an unnecessary delay in violation of N.C.G.S. § 15A-501; and (2) defendant failed to preserve the issue of N.C.G.S. § 15A-257 by failing to raise this issue at the trial court and by failing to designate the alleged violation in his assignments of error.

5. Constitutional Law— effective assistance of counsel— motion for appropriate relief

The trial court did not err in a trafficking in drugs, conspiracy to traffic in drugs, and possession of controlled substances case by allegedly denying defendant's motion for appropriate relief regarding effective assistance of counsel for failure to perfect defendant's appeal, because: (1) the trial court granted defendant's motion for appropriate relief in part by ordering the return of defendant's files and allowing defendant's new counsel to perfect his appeal; and (2) defendant made no allegations concerning his counsel's performance at trial, and therefore an evidentiary hearing on defense counsel's performance at trial was unnecessary in order to grant defendant's relief.

Appeal by defendant from judgments entered 2 August 2000 by Judge Michael E. Beale in Iredell County Superior Court and from order entered 27 February 2001 by Judge C. Preston Cornelius in Iredell County Superior Court. Heard in the Court of Appeals 16 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Judith Tillman, for the State.

Deborah P. Brown for defendant appellant.

TIMMONS-GOODSON, Judge.

On 9 June 1997, a grand jury for Iredell County indicted Clayton Doyle Bullin ("defendant") on charges of trafficking in drugs, con-

spiracy to traffic in drugs, and possession of controlled substances with the intent to manufacture, sell or deliver. Defendant thereafter filed a motion to suppress evidence seized by law enforcement officers at defendant's residence. On 2 August 2000, the trial court conducted a hearing regarding defendant's motion to suppress.

At the hearing, the State presented evidence tending to show the following pertinent facts: In September 1996, law enforcement officers in Iredell County began investigating Ralph Jarvis ("Jarvis") for suspected drug trafficking. When the officers confronted Jarvis with evidence of his involvement in drug trafficking, Jarvis agreed to assist the officers in purchasing controlled substances. On 17 October 1996, Jarvis participated in a controlled purchase of cocaine from Jeff Feimster ("Feimster"). During the 17 October 1996 transaction, officers observed a black Chevy Blazer at Feimster's residence. Jarvis subsequently participated in two additional purchases from Feimster. During each transaction, Jarvis was unable to purchase cocaine until the black Chevy Blazer arrived, which Feimster identified as his source for cocaine. Through investigation, officers learned that the Chevy Blazer was registered to Jesse McNeil Hedrick ("Hedrick"), whom they also observed driving the vehicle. Officers subsequently began surveillance of Hedrick's residence.

On 26 November 1996, Jarvis arranged to purchase cocaine from Feimster. When Jarvis arrived at Feimster's residence, he purchased Valium, but Feimster told him that he did not have any cocaine. Feimster informed Jarvis that he had "just called his man" and instructed Jarvis to return in thirty minutes in order to purchase the cocaine. Jarvis left Feimster's residence. Approximately four minutes after Jarvis departed, officers observed Hedrick leave his residence in the Chevy Blazer. Hedrick drove directly to defendant's residence, entered the home, and re-emerged four minutes later. Hedrick then began driving "on the most direct route" to Feimster's residence. When officers following Hedrick noticed him engaging in "unusual" and "erratic driving maneuvers," they activated the vehicle's blue lights and indicated for Hedrick to stop his vehicle. After a brief chase, officers stopped Hedrick and discovered more than twenty-eight grams of cocaine concealed on his person.

Meanwhile, officers investigating defendant learned that he had been previously convicted for felony possession of marijuana and possession with intent to sell marijuana. Officers also learned that one of defendant's family members had contacted the Iredell County Sheriff's Department a few months earlier regarding defendant's

involvement in selling controlled substances from his home. Acting on this information, as well as on the evidence obtained by their surveillance of defendant's residence and by Hedrick's arrest, the officers applied for and received a warrant for defendant's arrest.

Detective David Lynn Woodward ("Detective Woodward") of the Statesville Police Department went to defendant's residence and spoke with defendant. When he informed defendant that he had a warrant for his arrest, defendant attempted to close the door, whereupon Detective Woodward and two other officers entered the home, arrested defendant, and made a brief search of the residence in order to ensure that no one else was in the home. During the search, Detective Woodward found a small scale, a knife, a spoon, a clear glass jar containing rice, and clear plastic bags containing cocaine, on the floor of a closet in the master bedroom. The officers made no further search of the residence, but waited for the issuance of a search warrant. After advising defendant of his *Miranda* rights, the officers waited with defendant at his residence until the search warrant was issued. Upon searching defendant's residence, officers found, among other items, "over 50 grams of cocaine; pounds of marijuana; at least five or six different guns, some of them being assault rifles; and at least $22,000 in cash."

Based on the above-stated evidence, the trial court concluded that there was probable cause for the magistrate to issue a warrant for defendant's arrest and for a search of his residence. The trial court further concluded that the officers had the right to conduct a protective sweep of defendant's residence, and that the seizure of items located in the master bedroom closet was reasonable. Finally, the trial court concluded that defendant's detention was reasonable and did not violate his statutory rights. Finding no violation of defendant's constitutional or statutory rights, the trial court denied defendant's motion to suppress evidence found at his residence.

Upon the trial court's denial of his motion to suppress, defendant pled guilty to the charges against him and notified the court of his intention to appeal the denial of his motion. The trial court sentenced defendant to a minimum term of thirty-five (35) months' and a maximum term of forty-two (42) months' imprisonment and fined him $50,000.00 on the charges of trafficking in cocaine and conspiracy to traffic in cocaine. Defendant also received a suspended sentence of six to eight months' imprisonment and a fine of five hundred dollars for the possession of marijuana charge. On 27 February 2001, the trial

court entered an order denying in part defendant's motion for appropriate relief, from which order, together with his convictions and resulting sentences, defendant now appeals.

Although defendant designated eighteen assignments of error in the record on appeal, his brief to this Court contains arguments concerning only five assignments of error. Assignments of error in support of which no reason or argument is stated or authority cited are deemed abandoned. *See* N.C.R. App. P. 28(a) (2002). We therefore limit our review to those assignments of error addressed by defendant in his brief.

Defendant argues that the trial court erred in (I) joining the three charges against defendant for trial; (II) denying defendant's motion to sequester witnesses; (III) denying defendant's motion to suppress; (IV) concluding that defendant's statutory rights had not been violated; and (V) denying defendant's motion for appropriate relief. We address these arguments in turn.

I. Joinder of Charges

[1] Defendant first argues that the trial court erred in joining his charges for trial. Under section 15A-926(a) of our General Statutes, "[t]wo or more offenses may be joined in one pleading or for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. § 15A-926(a) (2001). In determining whether joinder of offenses is appropriate

> the trial court must determine whether the offenses are "*so separate in time and place* and *so distinct in circumstances* as to render the consolidation unjust and prejudicial to defendant." Thus, there must be some type of "transactional connection" between the offenses before they may be consolidated for trial. In addition, the trial judge's exercise of discretion in consolidating charges will not be disturbed on appeal absent a showing that the defendant has been denied a fair trial by the order of consolidation.

State v. Oxendine, 303 N.C. 235, 240, 278 S.E.2d 200, 203 (1981) (quoting *State v. Johnson*, 280 N.C. 700, 704, 187 S.E.2d 98, 101 (1972)) (citations omitted) (alteration in original).

Defendant argues that the connection between the trafficking in cocaine and conspiracy to traffic in cocaine charges and the posses-

sion of marijuana charge was insufficient to support their consolidation. We disagree.

The charges against defendant stemmed from a series of actions occurring over a short period of time that were part of one general transaction. The evidence showed that law enforcement officers arranged for Jarvis to purchase cocaine from Feimster on 26 November 1996. When Jarvis arrived at the Feimster residence at 2:00 p.m., Feimster informed him that "his man" would not arrive until 2:30 p.m., and Jarvis left approximately five minutes later. Meanwhile, officers watching Hedrick's residence observed him leave his home at 2:09 p.m. and drive directly to defendant's residence, where he remained for only four minutes. When officers subsequently stopped Hedrick's vehicle, they found cocaine hidden on Hedrick's person. The officers then obtained an arrest warrant for defendant, who by 3:30 p.m. was in custody. A search of defendant's residence produced more than fifty grams of cocaine, "pounds" of marijuana, numerous weapons, and $22,000.00 in cash.

Given this evidence, we conclude that the cocaine trafficking and conspiracy charges were not "so separate in time and place and so distinct in circumstances" from the marijuana possession charge "as to render the consolidation unjust and prejudicial to defendant." *Johnson*, 280 N.C. at 704, 187 S.E.2d at 101. As there was a sufficient "transactional connection" between the charged offenses, the trial court did not abuse its discretion in joining the offenses for trial. We therefore overrule defendant's first assignment of error.

II. Motion to Sequester

[2] By his second assignment of error, defendant argues that the trial court abused its discretion in denying defendant's motion to sequester the State's witnesses during the suppression hearing. We disagree.

Sequestration serves the dual purpose of acting "as a restraint on witnesses tailoring their testimony to that of earlier witnesses" as well as "detecting testimony that is less than candid." *State v. Harrell*, 67 N.C. App. 57, 64, 312 S.E.2d 230, 236 (1984). When a party moves to sequester witnesses in a criminal case, "the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify[.]" N.C. Gen. Stat. § 15A-1225 (2001). The decision to sequester witnesses rests within the full discretion of the trial court. *See State v. Johnson*, 128 N.C.

App. 361, 370, 496 S.E.2d 805, 811 (1998), *cert. denied*, 350 N.C. 842, 538 S.E.2d 581 (1999).

Defendant acknowledges that we may only review the trial court's denial of his motion to sequester the witnesses for abuse of discretion, but he nevertheless asserts that "the trial court made a perfunctory ruling on the Defendant's Motion to Sequester, without carefully considering the basis for the motion, and denied the motion without weighing the concerns expressed by the Defendant." Defendant's argument is wholly without merit.

The record reveals that the trial court denied defendant's motion to sequester after hearing arguments and making appropriate inquiries of both sides. Further, the sole basis for the motion to sequester advanced by defendant before the trial court was his contention that "there's some conflicts between paperwork which was submitted in discovery between officers' statements, between paperwork that was filed with the [trial court], and that the officers' credibility as to the time in which events occurred in this case may be called into question[.]" We agree with the State that if, in fact, any conflicts in paperwork existed, such discrepancies could be illustrated through the documents at issue. We conclude that the trial court did not abuse its discretion in denying defendant's motion to sequester the witnesses, and we therefore overrule defendant's second assignment of error.

III. Motion to Suppress

[3] Defendant next argues that there was insufficient evidence to support the issuance of the warrant for his arrest, and that the trial court therefore erred in denying his motion to suppress evidence seized at defendant's residence pursuant to his arrest. Defendant further contends that the trial court erred in denying his motion to suppress on the grounds that the initial search of his residence conducted by officers immediately pursuant to his arrest was unreasonable. Thus, argues defendant, any evidence seized as a result of the unreasonable and therefore illegal search should have been suppressed. We address defendant's arguments in turn.

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).

In the instant case, the trial court concluded that there was probable cause to support the issuance of the arrest warrant against defendant. Under section 15A-304 of our General Statutes,

> [a] judicial official may issue a warrant for arrest only when he is supplied with sufficient information, supported by oath or affirmation, to make an independent judgment that there is probable cause to believe that a crime has been committed and that the person to be arrested committed it. The information must be shown by one or more of the following:
>
> (1) Affidavit;
>
> (2) Oral testimony under oath or affirmation before the issuing official[.]

N.C. Gen. Stat. § 15A-304(d) (2001). "Probable cause" under this section "refers to the existence of a reasonable suspicion in the mind of a prudent person, considering the facts and circumstances presently known." *State v. Sturdivant*, 304 N.C. 293, 298, 283 S.E.2d 719, 724 (1981). Thus, to establish probable cause, "the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973).

> In dealing with probable cause, . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act . . . . Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.

Illinois v. Gates, 462 U.S. 213, 231-32, 76 L. Ed. 2d 527, 544 (1983) (citations omitted). The standard to be met when considering whether probable cause exists is the totality of the circumstances. *See id.* at 233, 76 L. Ed. 2d at 545.

Examining the totality of the circumstances in the instant case, we conclude that there was probable cause to issue the arrest

warrant against defendant. The evidence before the magistrate who issued the arrest warrant supported the reasonable probability that defendant was involved in drug trafficking. The facts showed that officers had observed Hedrick's vehicle, which Feimster identified as his drug source, on "numerous occasions" at Feimster's residence during drug transactions. On 26 November 1996, immediately prior to a planned drug sale, officers followed Hedrick to defendant's house, whereupon Hedrick entered defendant's residence and remained for only four minutes before proceeding on a route towards Feimster's residence, where Feimster was expecting "his man." When officers stopped Hedrick's vehicle shortly afterwards, they discovered more than twenty-eight grams of cocaine on his person. Further, although Detective Woodward could not specifically recall whether or not he informed the magistrate of defendant's reputation and previous involvement with drugs, he testified that it was his normal practice to do so. The trial court therefore found "that Det. Woodward did inform the magistrate of the Defendant's drug record and reputation in the community as a drug dealer when he applied for the arrest warrant."

We conclude that the above-stated chain of events, as found by the trial court, along with the information regarding defendant's reputation and previous involvement with drugs, supported the reasonable and "common-sense conclusion" that defendant had supplied the drugs that officers found on Hedrick's person. *See Illinois,* 462 U.S. at 231, 76 L. Ed. 2d at 544. The trial court therefore did not err in concluding that there was probable cause to issue the arrest warrant.

Defendant further asserts that the initial search of his residence pursuant to his arrest was unreasonable and therefore unlawful. He contends that the trial court erred in concluding that the arresting officers had the right to conduct a protective sweep of defendant's premises to ensure their safety. Defendant's argument is without merit.

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "[A] governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement involving exigent circumstances." *State v. Cooke,* 306 N.C. 132, 135, 291 S.E.2d 618,

620 (1982). Evidence obtained as a result of an unreasonable search and seizure must be excluded. *See State v. Scott*, 343 N.C. 313, 327, 471 S.E.2d 605, 613 (1996).

Protective sweeps of a residence performed by law enforcement officers in conjunction with an in-home arrest are reasonable if there are "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Maryland v. Buie*, 494 U.S. 325, 334, 108 L. Ed. 2d 276, 286 (1990). The purpose of a protective sweep is to ensure the security of law enforcement officers. *See id.* To that end, the protective sweep must be limited to a cursory inspection of places where a person may hide and last no longer than is necessary to dispel the reasonable suspicion of danger. *See id.* at 335-36, 108 L. Ed. 2d at 287.

In the instant case, officers legally entered defendant's residence pursuant to a valid arrest warrant and performed a protective sweep of the home. The facts known to the officers at the time of defendant's arrest included the following information: (1) defendant had a history of drug dealing; (2) officers had received information that defendant was currently involved in drug trafficking; (3) defendant was a current suspect in a drug trafficking investigation involving numerous individuals; and (4) defendant resisted arrest when informed of the warrant. Given defendant's actions and his previous involvement with drugs, as well as the dangerous and unpredictable nature of drug trafficking, a prudent officer could reasonably believe that under these facts, a protective sweep of defendant's home was necessary to make certain that no one else was hiding in the residence. Furthermore, the evidence shows that the search was limited in scope and duration and aimed at ensuring the officers' safety. The officers involved in the protective sweep testified repeatedly that they searched the premises because they wanted to "make sure no one was there that could hurt . . . [the] officer[s] in that residence." Detective Woodward confirmed that, "[o]nce we were satisfied no one else was in the residence, we went back . . . and waited for the search warrant." Moreover, the officers limited their search to obvious hiding places. Detective Woodward discovered the cocaine and drug paraphernalia seized during the initial search in a walk-in closet, an area where a reasonable officer could expect someone to conceal themselves. *See Maryland*, 494 U.S. at 334, 108 L. Ed. 2d at 286.

Under the facts of the present case, the initial search of defendant's residence was reasonable, and the trial court did not err in so concluding. As probable cause existed to support the issuance of the warrant for defendant's arrest, and because the protective sweep conducted by officers pursuant to defendant's arrest was lawful, the trial court properly denied defendant's motion to suppress evidence seized at his residence. We therefore overrule defendant's third assignment of error.

IV. Delay Following Arrest

[4] By his fourth assignment of error, defendant contends the trial court erred in concluding that his statutory rights were not violated. Specifically, defendant argues that his detention by the arresting officers for almost two hours at his residence pending execution of the search warrant represented a violation of his rights under section 15A-501 of the North Carolina General Statutes. Section 15A-501 states, in pertinent part, that

> Upon the arrest of a person, with or without a warrant, but not necessarily in the order hereinafter listed, a law-enforcement officer:
>
> . . . .
>
> (2) Must, with respect to any person arrested without a warrant and, for purpose of setting bail, with respect to any person arrested upon a warrant or order for arrest, take the person arrested before a judicial official without unnecessary delay.

N.C. Gen. Stat. § 15A-501 (2001). In the case at bar, defendant was taken to a magistrate approximately two hours after he was arrested and advised of his rights. Detective Woodward explained that he did not take defendant to the magistrate immediately after arrest because

> [i]t is my experience from being a narcotics officer, when you serve a search warrant with no one home, generally it becomes an issue that officers planted evidence. Allegations of that type were being made. I wanted to not have any problem with that. So we allowed [defendant] to stay with us while we executed a search warrant.

We conclude that a two-hour delay at defendant's residence, during which officers asked defendant no questions, was not an "unnecessary delay" in violation of section 15A-501. *See State v. Littlejohn*, 340

N.C. 750, 758, 459 S.E.2d 629, 634 (1995) (finding no violation in a thirteen-hour delay); *State v. Sings*, 35 N.C. App. 1, 6, 240 S.E.2d 471, 474 (1978) (upholding a seven-hour delay), *disc. review denied*, 294 N.C. 738 (1978).

Defendant additionally contends that the officers violated section 15A-257, which requires an officer "without unnecessary delay" to return to the clerk of the issuing court the search warrant, along with a written inventory of items seized. *See* N.C. Gen. Stat. § 15A-257 (2001). Defendant never raised this issue before the trial court, however, nor did he designate the alleged violation in his assignments of error in the record on appeal. Having failed to preserve this alleged error, defendant has waived his right to argue its merits on appeal. *See* N.C.R. App. P. 10(b)(1) (2002). Accordingly, we do not address this argument and overrule defendant's fourth assignment of error.

V. Motion For Appropriate Relief

[5] In his final assignment of error, defendant asserts that the trial court erred in denying his motion for appropriate relief. In his motion for appropriate relief, defendant alleged that he had been denied effective assistance of counsel, in that his defense counsel had failed to perfect his appeal. Defendant therefore requested that the trial court vacate defendant's guilty plea and grant him a new trial. Alternatively, defendant asked the court to enter an order allowing new counsel to perfect his appeal. Defendant also requested sanctions against his former counsel for her failure to perfect defendant's appeal.

The trial court heard the matter on 26 February 2001 and found that defendant's former attorney "failed to take any steps to perfect the Defendant's appeal, despite receipts showing that she had been paid to represent the Defendant in his appeal." The trial court therefore granted defendant's motion in part, ordering the return of defendant's files and allowing defendant's new counsel to perfect his appeal to this Court. Defendant now argues that the trial court erred in "denying defendant's motion for appropriate relief due to ineffective assistance of counsel without conducting an evidentiary hearing." We disagree.

First, as noted above, the trial court did not deny defendant's motion for appropriate relief, but rather granted it in part. Further, the basis of defendant's ineffective assistance of counsel claim in his motion for appropriate relief focused exclusively on the failure of

defendant's former counsel to perfect his appeal. Defendant made no allegations, however, concerning his counsel's performance at trial. The trial court therefore found that an evidentiary hearing on defense counsel's performance at trial was unnecessary in order to grant defendant relief. Because the allegations concerning defense counsel's ineffective assistance did not concern her performance at trial, but rather her performance on appeal, defendant's request for a new trial was properly denied by the trial court. The trial court supplied defendant with appropriate relief by allowing new counsel to perfect his present appeal. We therefore overrule defendant's final assignment of error.

In conclusion, we hold that the trial court did not abuse its discretion in joining the charged offenses against defendant, and properly denied defendant's motions to sequester witnesses and to suppress evidence. The trial court also properly denied in part and granted in part defendant's motion for appropriate relief. We therefore affirm the order and judgments of the trial court.

Affirmed.

Judges GREENE and HUNTER concur.

STATE OF NORTH CAROLINA v. AARON LEE McCAIL

No. COA01-211

(Filed 18 June 2002)

1. Evidence— hearsay—unavailable witness

The trial court did not err in an armed robbery and murder case by sustaining the State's objection to a witness's testimony which tended to indicate that a man other than defendant allegedly told the witness that he committed the murder, because: (1) defendant could not prove the alleged confessor's unavailability by reason of his death under N.C.G.S. § 8C-1, Rule 804(a)(4); and (2) even if the confessor was alive but unavailable, his alleged statements would still be inadmissible since a statement tending to expose the unavailable declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the state-

ment, N.C.G.S. § 8C-1, Rule 804(b)(3), and the evidence as a whole does not provide the corroborating circumstances clearly indicative of the trustworthiness of the alleged confession.

2. Venue— motion for change—pretrial publicity

The trial court did not abuse its discretion in an armed robbery and murder case by denying defendant's motion for a change of venue, or in the alternative for a special venire, based on pretrial publicity because: (1) there is no showing of prejudicial pretrial publicity when jurors who served in a case all indicate unequivocally that they will decide the case based on the evidence at trial and not on a formed impression or preconceived opinion; and (2) those prospective jurors who had heard about the murder and were ultimately seated on the jury all stated that they could decide the issues in defendant's case solely on the trial evidence and not on information previously learned outside the courtroom.

3. Discovery— Brady material—information regarding the State's unidentified witnesses—due process

The trial court did not violate defendant's due process rights in an armed robbery and murder case by denying defendant's pretrial motion requesting Brady material to discover information regarding the State's nine unidentified witnesses, because: (1) the transcript shows that defendant either already possessed the information sought or timely received the requested discovery from the State during the trial; and (2) there is no indication that defense counsel's receipt at that time prevented development of important impeachment evidence, or resulted in ineffective cross-examination of any witnesses or representation of defendant.

4. Criminal Law— prosecutor's argument—black male defendant's actions characterized as Curious George

The prosecutor's jury argument in an armed robbery and murder case characterizing a black male defendant's actions of placing his muddy shoe in the victim's car to those of the monkey Curious George, did not constitute reversible error because: (1) the trial court gave a curative instruction ex mero motu after the statement was made to disregard counsel's characterization of defendant even though defense counsel neither requested this instruction nor objected; and (2) even if defendant had objected, the prosecutor's statement did not so infect the trial with unfair-

ness since substantial evidence had already been presented during the trial of defendant's guilt.

Appeal by defendant from judgments entered 29 October 1999 by Judge Timothy S. Kincaid in Caldwell County Superior Court. Heard in the Court of Appeals 12 March 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General James Peeler Smith, for the State.

Edwin L. West, III, P.L.L.C., by Edwin L. West, III, for defendant-appellant.

CAMPBELL, Judge.

Defendant, a black male, was indicted on 26 May 1998 by the Caldwell County Grand Jury for the armed robbery and murder of Jennifer Butler Cox ("Jennifer"). Defendant pled not guilty and was tried capitally before a jury at the 11 October 1999 Criminal Session of the Caldwell County Superior Court, Judge Timothy S. Kincaid presiding. The following evidence was introduced at trial:

The State's evidence tended to show that shortly before midnight on the evening of 9 September 1995, Jennifer stopped at the Holiday Food Store ("store") on Highway 321 in Lenoir, North Carolina to call her husband from a phone booth. After Jennifer's husband had spoken with her on the phone for only a few minutes, he heard her say, "Oh, my God." He then heard a scream and two "bang" sounds. Jennifer's husband waited ten to fifteen minutes for her to return to the phone to no avail.

At approximately 1:00 a.m. on the morning of 10 September 1995, Patrolman Keith Bass ("Patrolman Bass") spotted a vehicle, later identified as Jennifer's, parked at the store. The vehicle's headlights were shining towards a phone booth (with the phone's receiver off the hook), and the driver's side door of the vehicle was open. Upon approaching the vehicle, Patrolman Bass saw a baby in a car seat. As Patrolman Bass walked along the side of the store, he discovered Jennifer's dead body lying on the ground near a muddy area. An autopsy later revealed that Jennifer's death was the result of a gunshot wound to her upper left arm and chest from a 9 mm. pistol fired at close range.

Lieutenant Tom Deighton arrived at the scene to assist Patrolman Bass in identifying the body. There was no purse nor any other item

in the vehicle from which they could identify Jennifer. However, there were muddy shoe prints found on the driver's seat, as well as mud on the driver's side door and window. Pictures were taken of the muddy areas and shoe prints.

During the investigation, the police spoke with several individuals who were in the vicinity of the store around the time of Jennifer's murder. Aquala Hendrix, one of these individuals, told the police that as she drove past the store around midnight, she saw a white male on the telephone and a teal green vehicle in the parking lot. The vehicle's lights were on and the vehicle's door was open. The vehicle was in the same position when she drove past the store again about an hour later. Douglas Smith, a store employee, also spoke with the police and told them that he saw a suspicious white male in the store on the evening of 9 September 1995 around 11:00 p.m.

Floyd Bethea ("Bethea"), defendant's neighbor, testified that he saw defendant and defendant's friend, Gary Johnson ("Johnson"), on the evening of 9 September 1995 at Friendly Billiards in Lenoir. Defendant was wearing a jogging suit. Bethea saw defendant again sometime after midnight when defendant asked Bethea about selling a pistol for him.

Michelle Tester, Johnson's live-in girlfriend, testified that she and Johnson were awakened by defendant at approximately 3:00 a.m. on the morning of 10 September 1995. Defendant was wearing boots and a burgundy jogging suit. Mud was on the left-hand side of defendant's jogging suit. Defendant told them he had just robbed and killed a white girl.

On 9 September 1995, Patricia McKnight McCail (also known as "Mud Duck") saw defendant leave their apartment around 4:00 p.m. wearing boots and a burgundy jogging suit. He returned to the apartment, seemingly in a hurry, sometime after 2:00 a.m. the next morning and climbed up to the vacant apartment above theirs. The police later found a burgundy jogging suit under a mattress in that upper apartment. Mud Duck was arrested later that year. On 1 February 1996, she and defendant were married by a magistrate while they were both confined to the Caldwell County Jail (the "jail").

The State's evidence also consisted of other testimony from witnesses to whom defendant had made incriminating statements. Angelletta Ferguson, an inmate who communicated with defendant

through the "toilet phone system" at the jail,[1] testified that defendant married Mud Duck to keep her from testifying against him. Joseph Huffman, another inmate at the jail, overheard defendant tell Mud Duck (also over the "toilet phone system") not to ruin his alibi. Rich Ouellette, a former police officer who talked with defendant at the jail, testified defendant made several questionable statements to him such as: "I didn't leave any blood [at the crime scene]. I mean I wasn't there to leave blood. I didn't kill no girl. No one saw me there. And I didn't leave no evidence." Thomas Boyd, one of defendant's fellow inmates while he was at the Craggy Correctional Center (the "center"), testified that defendant told him he had killed a white girl who had a baby in her vehicle. Finally, Thomas Conners, another inmate of defendant's at the center, testified that defendant admitted to robbing a girl with a 9 mm. pistol after an unprofitable robbery of a McDonald's restaurant.[2]

Defendant also presented evidence. Stephanie Medlin testified that she had stopped to make a phone call at the store phone booth around 11:30 p.m. on the night of 9 September 1995. While on the phone, she noticed a suspicious white male walking around her. Frightened, Ms. Medlin asked a group of men to watch her as she returned to her vehicle.

John Wilson ("Wilson") and Oscar Brackett ("Brackett"), two corrections officers at the center, testified on defendant's behalf. They were familiar with defendant, as well as prosecution witnesses Conners and Boyd. Wilson testified that Boyd ran the gambling system at the center, and defendant had to receive protective custody at the center because he could not pay his gambling debts. He also stated that both Boyd and Conners were near the top of the prison system's "pecking order." Inmates at the lower end of the "pecking order" were easily victimized physically, financially, and emotionally. Brackett confirmed Wilson's testimony and added that defendant was at the lower end of the "pecking order." Inmates in defendant's position were prone to exaggerate about their crimes to appear stronger.

Defendant also attempted to offer the testimony of Patricia Ann Bradley ("Bradley"). Bradley was the former girlfriend of Ronnie

1. Inmates would carry on conversations with one another using the jail plumbing system by draining the toilets, rolling up a newspaper, and speaking into the newspaper.

2. There was also testimony that a McDonald's restaurant in Lenoir was robbed on the morning of 10 September 1995. The restaurant's surveillance video showed what appeared to be a black male wearing a jogging suit as the robber.

Summerville ("Summerville"),[3] a white man Bradley claimed admitted to her that he had shot Jennifer in the arm and chest while another man held her. The State objected to Bradley's testimony on hearsay grounds. Defendant argued Bradley's testimony was admissible as a statement against interest, an exception to the hearsay rule, because Summerville was unavailable. After conducting a *voir dire*, the court sustained the State's objection ruling that it could not "conclude as a matter of law that [Summerville was] unavailable or that his testimony ha[d] that degree of truthfulness or certainty so as to allow the admissibility of the same."

Defendant's trial concluded on 27 October 1999 when the jury returned verdicts of (1) guilty of robbery with a firearm and (2) guilty of first-degree murder under the first-degree felony murder rule and on the basis of malice, premeditation, and deliberation. Under verdict (1), defendant was sentenced to a minimum term of 117 months and a maximum term of 150 months. Under verdict (2), he was sentenced to life imprisonment without parole. Defendant appeals these judgments.

Defendant brings forth four assignments of error. For the following reasons, we find no error in the trial court's judgments.

I.

[1] By his first assignment of error defendant argues the trial court erred in sustaining the State's objection to Bradley's testimony, which tended to indicate that Summerville committed Jennifer's murder. We disagree.

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted" and is not admissible except as provided by statute or by the North Carolina Rules of Evidence. N.C. Gen. Stat. §§ 8C-1, Rule 801(c), Rule 802 (2001). Rule 804 of our rules of evidence provides various exceptions to the general prohibition against the admission of hearsay where the declarant is "unavailable as a witness." One such exception under Rule 804 states that a witness-declarant is unavailable if he is "unable to be present or to testify at the hearing because of death[.]" *See* § 8C-1, Rule 804(a)(4).

In the present case, defendant was unable to prove Summerville was unavailable due to death. Bradley, Summerville's ex-girlfriend, testified on *voir dire* that she had not seen Summerville in some time

3. The trial transcript used "Ronnie Summerville" and "Ronnie Summerbell" interchangeably.

and that his sister's boyfriend had informed her that Summerville had been killed in Washington, D.C. Thereafter, an investigator also testified that he had heard Summerville was in the Washington, D.C. area. However, despite their testimony, no additional evidence was presented by defendant that either he, Bradley, or the investigator had actually tried to verify Summerville's alleged presence or death in Washington, D.C. Absent a showing of at " 'least a good-faith, genuine, and bona fide effort to procure the declarant's attendance[,]' " defendant cannot prove Summerville's unavailability by reason of his death under Rule 804(a)(4). *State v. Harris*, 338 N.C. 211, 223 n.1, 449 S.E.2d 462, 468 n.1 (1994) (quoting 32B Am. Jur. 2d *Federal Rules of Evidence* § 265 (1982)).

Furthermore, if Summerville were alive but unavailable, his alleged statements to Bradley would still be inadmissible. Rule 804(b) provides, in part, that a "statement tending to expose the [unavailable] declarant to criminal liability is not admissible in a criminal case unless corroborating circumstances clearly indicate the trustworthiness of the statement." § 8C-1, Rule 804(b)(3). Here, the investigator also testified that he had interviewed Summerville on 14 September 1995 after first learning of his alleged involvement in the crime. During the interview, Summerville stated that he was on a fishing trip the weekend of Jennifer's murder with two friends and did not return home until the afternoon following the murder. Summerville's statements were corroborated by his friends and neighbors and are directly contrary to the testimony offered by Bradley. Thus, the evidence heard on *voir dire* as a whole does not provide the corroborating circumstances clearly indicative of the trustworthiness of Summerville's alleged confession to Bradley.

II.

[2] By defendant's second assignment of error he argues the trial court erred in denying his motion for change of venue, or, in the alternative, for a special venire because the degree of publicity the case had received made it highly unlikely that he would receive a fair trial in Caldwell County. We disagree.

"Due process requires that [a defendant] receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362, 16 L. Ed. 2d 600, 620 (1966). If the defendant believes the outside influences in a particular county will prevent him from obtaining a fair trial, he can move for a change of venue or special venire panel. *See State v. Boykin*, 291 N.C. 264, 229 S.E.2d 914

(1976). However, in order to succeed on either of these motions, the defendant must show that:

> '[D]ue to pretrial publicity, there is a reasonable likelihood that the defendant will not receive a fair trial.' *State v. Jerrett*, 309 N.C. 239, 254, 307 S.E.2d 339, 347 (1987). It is within the sound discretion of the trial court to determine whether the defendant has carried this burden. *State v. Madric*, 328 N.C. 223, 226-27, 400 S.E.2d 31, 33-34 (1991). On appeal, the trial court's ruling will not be overturned absent a showing of abuse of discretion. *Id.*

State v. Kyle, 333 N.C. 687, 700, 430 S.E.2d 412, 419 (1993).

Prior to trial, defendant moved for a change of venue, or in the alternative, for a special venire. *See* N.C. Gen. Stat. §§ 15A-957, -958 (2001). In support of his motion, defendant submitted evidence of media publicity from September of 1995, following Jennifer's murder, and from May of 1998, when he was arrested for her murder. Defendant's evidence included radio and newspaper stories released after the murder that discussed the circumstances of the crime and quoted residents as being afraid for their safety. Stories released after defendant's arrest mentioned his criminal history, including reports that defendant was completing a prison sentence in Ohio for breaking and entering at the time of his arrest for Jennifer's murder. These news stories also recounted the circumstances of the crime and noted that defendant underwent drug rehabilitation in 1995.

As the trial began, prospective jurors were questioned by the court and counsel regarding what each juror had heard about Jennifer's murder from news stories and/or other individuals. Those prospective jurors who had heard about the murder and were ultimately seated on the jury all stated that they could decide the issues in defendant's case solely on the trial evidence and not on information previously learned outside the courtroom. Our Supreme Court has held that the responses of prospective jurors on *voir dire* are the most persuasive evidence of prejudicial pre-trial publicity. *See State v. Richardson*, 308 N.C. 470, 480, 302 S.E.2d 799, 805 (1983). Furthermore, there is no showing of prejudicial pre-trial publicity when "jurors who served in [a] case all indicate[] unequivocally that they [will] decide the case based on the evidence at trial and [] not [on a] formed [] impression or preconceived opinion about the guilt or innocence of the defendant." *State v. Hunt*, 325 N.C. 187, 199, 381 S.E.2d 453, 461 (1989). Since all the jurors made such an unequivocal assertion, there is no reasonable likelihood that defendant did not

receive a fair trial in Caldwell County. Therefore, the court did not abuse its discretion when it denied defendant's motion for change of venue or special venire.

III.

[3] Defendant's next assignment of error arises from his 5 August 1999 pre-trial motion requesting *Brady* material pursuant to the Due Process Clause of the United States Constitution and the Law of the Land Clause of Article I, Section 19 of the North Carolina Constitution. By this motion, defendant sought to discover information regarding whether the State's nine unidentified witnesses: (1) had initiated contact with the district attorney's office or investigators in defendant's case; (2) had been paid monies or offered any assistance for providing information about the investigation; (3) had recanted prior statements or made inconsistent statements; and/or (4) had any mental, emotional, or substance abuse problems. The State objected and argued defendant was not entitled to the discovery of statements by and information about specific persons who might be called as witnesses until those persons were actually called to testify. On 25 August 1999, defendant's motion for pre-trial discovery materials was denied. We hold that the trial court properly denied defendant's motion.

At common law, no right of discovery existed in criminal cases. *State v. McDougald*, 38 N.C. App. 244, 248 S.E.2d 72 (1978). Therefore, any questions concerning discovery must be resolved by reference to statutes and due process principles. *Id.* Section 15A-903 of our statutes governs the discovery of witnesses' statements by a defendant. *See* N.C. Gen. Stat. § 15A-903 (2001). With respect to statements made by the State's witnesses, Section 15A-903 provides:

> In any criminal prosecution brought by the State, no statement or report in the possession of the State that was made by a State witness or prospective State witness, other than the defendant, shall be the subject of subpoena, discovery, or inspection *until that witness has testified on direct examination in the trial of the case.*

§ 15A-903(f)(1) (emphasis added). This statute is not to be construed as allowing suppression of relevant information, because under *Brady v. Maryland*, 373 U.S. 83, 87, 10 L. Ed. 2d 215, 218 (1963), "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material

either to guilt or to punishment[.]" However, § 15A-903 does allow the State to withhold statements or reports in its possession relating to the subject matter of a witness' testimony until after that witness has been called by the State to testify on direct examination and the trial court has ruled favorably on a defendant's motion to discover that information. *See* § 15A-903(f)(2). *See also State v. Kilpatrick*, 343 N.C. 466, 471, 471 S.E.2d 624, 627 (1996).

In the instant case, defendant contends that the information he sought to discover was necessary to provide defense counsel with a pre-trial opportunity to develop important impeachment evidence against the State's witnesses. However, the prosecutor only argued that defendant was not entitled to the information at the time he requested it, i.e., at pretrial. Defendant does not argue that the pre-trial information requested was not eventually turned over to him during the trial. In fact, the transcript shows that defendant either already possessed the information sought or timely received the requested discovery from the State during the trial. There is no indication that defense counsel's receipt at that time (1) prevented development of important impeachment evidence or (2) resulted in ineffective cross-examination of any witnesses or representation of defendant. Thus, defendant's constitutional rights were not violated by the court's denial of his pre-trial discovery motion because "[d]ue process is concerned that the suppressed evidence might have affected the outcome at trial and not that the suppressed evidence might have aided the defense in preparing for trial." *State v. Hardy*, 293 N.C. 105, 127, 235 S.E.2d 828, 841 (1977).

IV.

[4] Finally, defendant argues reversible error was committed when the prosecutor attempted to inflame racial prejudice in the jury by characterizing the actions of defendant, a black male, to those of "Curious George," a monkey in a series of children's books, in the State's closing argument. We disagree.

Trial counsel are generally granted wide latitude in the scope of their arguments. *State v. Rose*, 339 N.C. 172, 203, 451 S.E.2d 211, 229 (1994). "[C]ontrol of counsel's arguments is left largely to the discretion of the trial court." *State v. Alston*, 341 N.C. 198, 239, 461 S.E.2d 687, 709 (1995). Nevertheless, when errors are alleged, this Court must determine whether the arguments in question "so infected the trial with unfairness as to make the resulting conviction a denial of due process[.]" *Rose*, 339 N.C. at 202, 451 S.E.2d at

229 (quoting *Darden v. Wainwright*, 477 U.S. 168, 91 L. Ed. 2d 144, 157 (1986)).

Here, one of the State's theories was that a muddy shoe print was found in Jennifer's vehicle because defendant may have placed his foot in the seat to tie his shoe. The prosecution attempted to link defendant to this shoe print by stating in his closing argument, "And that mud print in the seat—You think, oh, Curious George just ran around with one good foot, his right foot?" Immediately after the statement was made, the judge gave the following curative instruction, *ex mero motu*: "Excuse me, [prosecutor]. Ladies and gentlemen of the jury, you're to disregard counsel's characterization of the defendant." Defense counsel neither requested this instruction nor objected and moved for a mistrial. However, even if he had objected, the prosecutor's statement did not so infect the trial with unfairness because substantial evidence had already been presented during the trial by which the jury could find defendant guilty of the crimes accused. Therefore, although the State's characterization of defendant was improper, no prejudicial error resulted.

Accordingly, for the aforementioned reasons, we find no error in the trial court's judgments.

No error.

Judges GREENE and McGEE concur.

JACK BRYSON, EMPLOYEE, PLAINTIFF v. PHIL CLINE TRUCKING, EMPLOYER, SELF-INSURED (KEY RISK MANAGEMENT SERVICES), ADMINISTRATOR, DEFENDANTS

No. COA01-708

(Filed 18 June 2002)

Costs; Workers' Compensation— attorney fees—unfounded litigiousness

Although both parties in a workers' compensation case appeal the Industrial Commission's award of attorney fees under N.C.G.S. § 97-88.1 to plaintiff in the amount of $2,500, approximately one quarter of plaintiff's reasonable attorney expenses, as a punitive measure for defendant's unfounded litigiousness based on defendant's refusal to authorize a dorsal column stimulator to

control plaintiff's pain, the Industrial Commission did not abuse its discretion, because: (1) there is no indication that the Commission substantially relied upon the isolated findings of fact which plaintiff contends are unsupported by the record; (2) plaintiff made no showing that the Commission's recognition in its conclusions of law of the earlier award of attorney fees granted to plaintiff under N.C.G.S. § 97-90 impacted its decision to award plaintiff $2,500 under N.C.G.S. § 97-88.1; (3) although plaintiff contends the amount awarded was less than a slap on the wrist to defendants, there were no findings to indicate that defendants' actions were otherwise particularly egregious or outrageous; (4) defendant had reasonable grounds to appeal the deputy commissioner's award of $10,500 in attorney fees, and defendant prevailed in part on the sole issue of attorney fees on appeal; and (5) the evidence adequately supports the Commission's finding that defendant has not offered sufficient medical evidence to contradict the doctor's recommendation that the requested treatment is reasonable and necessary to control plaintiff's pain, and that defendant's continued refusal to authorize the treatment and to force the issue to a hearing constituted unfounded litigiousness.

Appeal by plaintiff and cross-appeal by defendants from opinion and award entered 31 January 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 March 2002.

Donaldson & Black, P.A., by Anne R. Harris, for plaintiff appellant.

Morris York Williams Surles & Barringer, L.L.P., by C. Michelle Sain, for defendant appellees.

TIMMONS-GOODSON, Judge.

Jack Bryson ("plaintiff") and Phil Cline Trucking ("employer"), along with Key Risk Management Services ("administrator") (collectively, "defendants"), appeal from an opinion and award of the North Carolina Industrial Commission ("the Commission"). For the reasons stated herein, we affirm the opinion and award of the Industrial Commission.

The facts pertinent to the instant appeal are as follows: On 12 March 1994, plaintiff suffered injury to his lower back and left hip while performing maintenance work on a truck leased to employer.

As a result of his injury, plaintiff underwent several surgical procedures to improve the condition of his back. By opinion and award filed 26 October 1995, the Commission concluded that plaintiff's injury was compensable under the North Carolina Workers' Compensation Act and ordered defendants to pay temporary total disability compensation and reasonable medical expenses.

On 24 March 1999, plaintiff filed a Form 33, Request That Claim Be Assigned For Hearing. Plaintiff's dispute with defendants arose from their refusal to authorize his request for a dorsal column stimulator ("stimulator"), a surgical device recommended by plaintiff's anesthesiologist in order to provide improved control of plaintiff's pain and thereby decrease his reliance on medication. Plaintiff asserted that the stimulator was a reasonable and necessary medical treatment and requested attorneys' fees pursuant to section 97-88.1 of the General Statutes for defendants' allegedly unreasonable defense of his claim.

On 28 December 1999, a deputy commissioner for the Commission filed an opinion and award concluding that plaintiff had proven by the greater weight of the evidence that he was entitled to receive the stimulator as a reasonable and necessary medical treatment. The deputy commissioner further concluded that defendants had presented no credible evidence to support their denial of such treatment, and as such, had willfully violated the prior order by the Commission. The deputy commissioner therefore ordered defendants to pay attorneys' fees of $10,500.00, as well as $448.64 in expenses.

Defendants appealed the deputy commissioner's opinion and award to the Full Commission, which affirmed the opinion in all respects except for the award of attorneys' fees. The Commission found that, as a result of defendants' unreasonable denial of treatment, plaintiff had "incurred reasonable attorney's fees in the amount of $200.00." The Commission therefore ordered defendants to pay for the placement of plaintiff's dorsal column stimulator and attorneys' fees of $200.00.

Plaintiff thereafter moved for reconsideration of the Commission's order and for allowance of reasonable attorneys' fees pursuant to section 97-88 of the General Statutes. Upon reconsideration of its order, the Commission concluded that, "plaintiff should be awarded a reasonable attorney's fee in the amount of $2,500, in addition to reasonable expenses of $448.64." Finding that defendants had reason-

able grounds to appeal the $10,500.00 award of attorneys' fees by the deputy commissioner, the Commission denied plaintiff's request for attorneys' fees pursuant to section 97-88. This opinion and award was filed 31 January 2001, from which plaintiff appeals and defendants cross-appeal.

The primary issue on appeal is whether the Commission properly awarded to plaintiff attorneys' fees in the amount of $2,500.00. For the reasons stated herein, we affirm the opinion and award of the Industrial Commission.

Under section 97-88.1 of the North Carolina General Statutes, the Commission may award attorneys' fees if it determines that "any hearing has been brought, prosecuted, or defended without reasonable ground[.]" N.C. Gen. Stat. § 97-88.1 (2001). The purpose of 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) (quoting *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 664, 286 S.E.2d 575, 576 (1982)). The Commission, therefore, may assess the entire cost of litigation, including attorneys' fees, against any party who prosecutes or defends a hearing without reasonable grounds. *See Troutman v. White & Simpson, Inc.*, 121 N.C. App. 48, 54, 464 S.E.2d 481, 485 (1995), *disc. review denied*, 343 N.C. 516, 472 S.E.2d 26 (1996). "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. 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) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). With this standard in mind, we examine plaintiff's assignments of error.

Plaintiff's Appeal

Plaintiff first contends that the Commission erred as a matter of law in considering certain factors in determining whether to award attorneys' fees to plaintiff. Specifically, plaintiff objects to the following two findings by the Commission: (1) that "[d]orsal column

stimulators are controversial and expensive" and that (2) "Defendant had a reasonable basis to question the efficacy of a dorsal column stimulator in this case." Plaintiff asserts that these findings are unsupported by any evidence in the record and as such, cannot support the Commission's decision concerning the attorneys' fees awarded to plaintiff. We disagree.

Although the Commission found that the requested medical treatment was "controversial and expensive" and that defendants' initial questioning of its efficacy was reasonable, the Commission further found that "at some point prior to the hearing before the deputy commissioner, defendant did not make sufficient efforts to substantiate its opposition to this form of treatment." The Commission also found that "Defendant has not offered sufficient medical evidence to contradict Dr. Gooding's recommendation that the stimulator is reasonable and necessary to attempt to control plaintiff's pain[,]" and further that, "Defendant's continued refusal to authorize the treatment with the dorsal column stimulator, and to force the issue to a hearing, constituted unfounded litigiousness." The Commission therefore concluded that, "Plaintiff is entitled to a reasonable attorney's fee as a result of defendant's unfounded litigiousness in the amount of $2,500.00, and expenses in the amount of $448.64."

Plaintiff has not shown that the findings to which he objects played any role, significant or otherwise, in the Commission's decision to award attorneys' fees in the amount of $2,500.00. Although the Commission found that plaintiff's medical treatment was controversial and expensive, this statement appears to primarily relate to the Commission's next sentence in the same finding, which states that "Defendant had a reasonable basis to question the efficacy of a dorsal column stimulator in this case." Despite these findings, however, the Commission made numerous additional findings condemning defendants' subsequent behavior, ultimately concluding that defendants' refusal to authorize the requested treatment constituted unfounded litigiousness. Had the Commission assigned real weight to the findings to which plaintiff objects, it would have presumably concluded that defendants' defense of the case was reasonable and would therefore have awarded no attorneys' fees to plaintiff. As stated *supra*, the award of attorneys' fees under section 97-88.1 is a discretionary matter for the Commission. Because there is no indication that the Commission substantially relied upon the isolated findings of fact which plaintiff contends are unsupported by the record, we overrule plaintiff's assignment of error.

Plaintiff further argues that the Commission improperly considered a previous attorneys' fee award granted to plaintiff pursuant to section 97-90 of the General Statutes when it awarded plaintiff attorneys' fees under section 97-88.1. In its conclusions of law, the Commission stated that:

> A prior Opinion and Award filed in this case on 15 January 1998 approved a 25% attorney's fee for plaintiff's counsel as a reasonable fee, in accordance with G.S. 97-90(c). That 25% attorney's fee award is ongoing for the period of plaintiff's total disability and is an issue that was decided by a previous panel and was not appealed in accordance with the Act. G.S. 97-90(c). The award of attorney's fees herein is pursuant to G.S. 97-88.1 and is, therefore, an award left to the sound discretion of the Commission. G.S. 97-88.1.

Plaintiff argues that the Commission improperly considered the earlier award of attorneys' fees granted under section 97-90 in assigning its award in the present case pursuant to section 97-88.1. Again, we must disagree with plaintiff's interpretation of the Commission's opinion.

As in his previous assignment of error, plaintiff makes no showing that the Commission's recognition in its conclusions of law of the earlier award of attorneys' fees granted to plaintiff pursuant to section 97-90 impacted its instant decision to award plaintiff $2,500.00 in attorneys' fees pursuant to section 97-88.1. Indeed, the Commission's conclusion concerning the earlier award of attorneys' fees is more reasonably interpreted in exactly the opposite manner from plaintiff's assertion: namely, that the Commission, well aware of the earlier award of attorneys' fees, made conclusions regarding such award because it wanted to make clear to both parties that the previous award played no role in its decision to impose punitive attorneys' fees. Thus, the Commission took pains to recognize in its opinion the difference between the two statutory sections that authorize the Commission to impose attorneys' fees, as well as the fact that the earlier award had not been appealed and was therefore not under current consideration. Because plaintiff's argument is based on little more than his own conjecture, we overrule this assignment of error.

Plaintiff further contends that the Commission abused its discretion in awarding $2,500.00 in attorneys' fees. Plaintiff argues that, because section 97-88.1 authorizes the Commission to order the

entire costs of the proceedings to be paid by an unreasonable party as punishment for its unfounded litigiousness, the statute implies that the amount awarded should be commensurate with the reasonable party's actual expenses. To award less, according to plaintiff, ignores the stated purpose of the statute to punish those who defend or pursue litigation without reasonable grounds. By plaintiff's account, his reasonable attorney expenses amounted to $10,500.00, and the award of only $2,500.00, argues plaintiff, represents "less than a slap on the wrist" to defendants, thereby defeating the purpose of section 97-88.1. Plaintiff therefore argues that the Commission abused its discretion in making its award. We disagree.

As emphasized heretofore, an award under section 97-88.1 is "in the sound discretion of the Commission" and we may not overturn such a decision unless it is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Long*, 137 N.C. App. at 465, 528 S.E.2d at 635. Although defendants' behavior in denying plaintiff's medical treatment was unreasonable, there were no findings to indicate that defendants' actions were otherwise particularly egregious or outrageous. Based on these facts, we are not prepared to hold that the Commission's decision to award plaintiff approximately one quarter of his reasonable attorney expenses as a punitive measure against defendants was, as a matter of law, completely without basis or reason. We therefore overrule this assignment of error.

Finally, plaintiff argues that the Commission erred in denying his request for attorneys' fees pursuant to section 97-88 for the costs of the appeal from the deputy commissioner to the Full Commission. Section 97-88 of the General Statutes, entitled "Expenses of appeals brought by insurers," provides that:

> If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court *may* further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

N.C. Gen. Stat. § 97-88 (2001) (emphasis added). As clearly indicated in the statute, the decision to award attorneys' fees attributable to the appeal rests within the discretion of the Commission, and its decision must be upheld unless there is an abuse of that discretion. *See Taylor v. J.P. Stevens*, 57 N.C. App. 643, 648, 292 S.E.2d 277, 280 (1982), *modified and affirmed*, 307 N.C. 392, 298 S.E.2d 681 (1983). An award of attorneys' fees is proper where the Commission finds that the defendant had no reasonable basis for appealing the decision of the deputy commissioner to the Full Commission. *See Mullinax v. Fieldcrest Cannon, Inc.*, 100 N.C. App. 248, 253, 395 S.E.2d 160, 163 (1990).

In the case at bar, the Commission found that, although defendants' unreasonable refusal to authorize plaintiff's medical treatment forced the issue to a hearing and therefore constituted unfounded litigiousness, "Defendant had reasonable grounds to appeal the deputy commissioner's award of attorney's fees." The Commission also found that, "Defendant has prevailed, in part, on the attorney's fees issue[.]" The Commission therefore concluded that "Plaintiff is not entitled to attorney's fees for the current appeal to the full Commission pursuant to G.S. 97-88, because defendant has prevailed, in part, on the sole issue on appeal."

Whether defendants were liable for attorneys' fees as a punitive measure for their unfounded litigiousness concerning their refusal to authorize plaintiff's medical treatment was clearly a separate issue from whether defendants had reasonable grounds to appeal the $10,500.00 in attorneys' fees initially awarded by the deputy commissioner. Where the Commission found that defendants had reasonable grounds to appeal the issue of attorneys' fees, we discern no abuse of discretion by the Commission in denying plaintiff's request for attorneys' fees pursuant to section 97-88. We therefore overrule plaintiff's final assignment of error. We now address defendants' cross-appeal.

Defendants' Cross-Appeal

Defendants argue that the Commission erred in finding that defendants' behavior constituted unfounded litigiousness and in awarding plaintiff $2,500.00 in attorneys' fees. Defendants contend that there was evidence in the record supporting their denial of payment for the stimulator, and that the Commission therefore erred in finding that defendants' behavior was unreasonable.

Appellate review of decisions by the Commission is strictly limited to (1) whether there is competent evidence to support the

Commission's findings of fact; and (2) whether these findings of fact support the Commission's conclusions of law. *See Foster v. Carolina Marble and Tile Co.*, 132 N.C. App. 505, 507, 513 S.E.2d 75, 77, *disc. review denied*, 350 N.C. 830, 537 S.E.2d 822 (1999). "If there is any evidence of substance which directly or by reasonable inference tends to support the findings, the court is bound by such evidence, even though there is evidence that would have supported a finding to the contrary." *Russell v. Yarns, Inc.*, 18 N.C. App. 249, 252, 196 S.E.2d 571, 573 (1973).

Plaintiff here presented significant medical evidence before the Commission tending to show that the treatment he sought was reasonably necessary to lessen the pain caused by the injury he suffered while in defendants' employment. Dr. Daniel E. Gooding, a physician specializing in pain management and relief, testified that plaintiff was a "good candidate" for a trial placement of the stimulator, and that such a treatment would "make a significant difference in [plaintiff's] life." Specifically, Dr. Gooding opined that the stimulator could lessen plaintiff's pain by fifty percent. Dr. Gooding also testified that none of the other, more conservative medical treatments had effectively lessened plaintiff's pain. Dr. Bruce V. Darden, II, an orthopedic surgeon who treated plaintiff, testified that he referred plaintiff to the Mid-Atlantic Pain Center in order to address plaintiff's continued difficulties managing his pain. Dr. Darden stated that a dorsal column stimulator would be "a worthwhile undertaking" and that he had "a lot of faith" in Dr. Gooding and the physicians at the pain management center. Defendants did not undertake an independent medical evaluation of plaintiff, nor did they present any medical evidence to rebut the testimony by plaintiff's physicians.

We conclude that the above-stated evidence adequately supports the Commission's finding that "Defendant has not offered sufficient medical evidence to contradict Dr. Gooding's recommendation that the stimulator is reasonable and necessary to attempt to control plaintiff's pain" and that "Defendant's continued refusal to authorize the treatment with the dorsal column stimulator, and to force the issue to a hearing, constituted unfounded litigiousness." The Commission's conclusion that plaintiff was entitled to reasonable attorneys' fees of $2,500.00 as a punitive measure was therefore properly supported by its findings and by substantial evidence of record and fully within the Commission's discretion to grant. We therefore overrule defendants' assignment of error.

In conclusion, we detect no error and no abuse of discretion by the Commission in its opinion and award. The opinion and award by the Industrial Commission is therefore affirmed in all respects.

Affirmed.

Judges GREENE and HUNTER concur.

STATE OF NORTH CAROLINA v. KIM LOUISE SUMMEY

No. COA01-1033

(Filed 18 June 2002)

1. Search and Seizure— investigatory stop—motion to suppress—crack cocaine

The trial court did not err in a felony possession of cocaine case by denying defendant's motion to suppress evidence of crack cocaine seized after the stop of a truck in which defendant was a passenger based on the officers having sufficient cause to stop and search defendant, because: (1) the circumstances, including a truck matching the description relayed to the officers had just left a residence which had been in an area of prior drug activity and in front of the residence the driver of the truck had engaged in a course of conduct which was characteristic of a drug transaction, created a reasonable suspicion of criminal activity such that the officers were justified in conducting an investigatory stop of the truck; and (2) the circumstances justified a limited search of defendant, including forcing defendant to open her hand, since the truck which defendant occupied was reported to have just been involved in a suspected drug transaction, when the officers approached the truck defendant's hand was hidden in a suspicious manner underneath a piece of fabric, and defendant refused to open her hand when asked by the officers.

2. Evidence— crack cocaine—motion to suppress—excessive force

The trial court did not err in a felony possession of cocaine case by denying defendant's motion to suppress evidence of crack cocaine seized after the stop of a truck in which defendant

was a passenger even though defendant alleges an officer used excessive force in opening her hand, because: (1) the officer's use of force to pressure open defendant's hand was justifiable in view of the officer's need to ensure that defendant was not in possession of a weapon capable of inflicting injury or that defendant would destroy evidence; and (2) there is no evidence indicating that the officer's use of pressure was overly intrusive as to render the seizure of the crack cocaine unreasonable.

3. Drugs— felony possession of cocaine—motion to dismiss— prior dismissal of same charge

The trial court did not err by denying defendant's motion to dismiss the charge of felony possession of cocaine even though defendant contends the State waived the right to prosecute her for any crime arising out of the incident when it allowed her coparticipant on 28 January 2000 to plead guilty to possession of drug paraphernalia and voluntarily dismissed the charge of possession of cocaine against defendant, because: (1) defendant fails to cite any authority which holds that the doctrine of waiver applies to this situation; (2) the record is devoid of any indication that defendant relinquished her constitutional rights in reliance on a promise made by the prosecutor; and (3) the prosecutor testified that he made no promises to defendant and that he initially dismissed the charges against her since the prosecutor could not locate the lab report confirming that the substances seized by the officers were crack cocaine.

Appeal by defendant from judgment entered 25 January 2001 by Judge W. Douglas Albright in Henderson County Superior Court. Heard in the Court of Appeals 15 May 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Douglas A. Johnston, for the State.

Carter & Kropelnicki, P.A., by Steven Kropelnicki, Jr., for defendant-appellant.

WALKER, Judge.

Defendant appeals her conviction for felony possession of cocaine. The State's evidence tended to show the following: On 3 October 1999, officers of the Hendersonville Police Department were conducting a drug surveillance operation in the Green Meadows neighborhood of Henderson County. At the time, Green Meadows

was considered a "known drug area" due to the large number of drug arrests made in the neighborhood. As part of the surveillance, Lieutenant Tim Griffin (Lt. Griffin) positioned himself in view of a residence which had been the subject of a nuisance abatement proceeding for drug-related activities. A group of men were standing in the front yard of the residence.

At approximately 5:30 p.m., Lt. Griffin observed a white Nissan pickup truck with the rear window missing drive towards the residence and stop alongside the road. One of the men standing in the yard approached the truck and appeared to engage in a brief conversation with the driver. A few moments later, the man returned to the yard and the truck drove away.

Lt. Griffin believed he had just observed a drug transaction so he dispatched, via his police radio, a detailed description of the truck and the direction in which it was traveling. About seven blocks away, Officers Richard Olsen (Officer Olsen) and Mike Vesely (Officer Vesely) were involved in an unrelated traffic stop and heard Lt. Griffin's dispatch. Shortly thereafter, a truck matching the description provided by Lt. Griffin neared the officers and stopped because another vehicle was blocking the roadway. Officer Olsen approached the driver, Allen Rogers (Rogers), and asked him to step out of the truck. At that time, he observed defendant seated in the passenger seat with her left hand hidden underneath "some type of fabric material."

Meanwhile, Officer Vesely approached the truck's passenger side door and recognized defendant from previous investigative stops. He also observed defendant hiding her left hand under a piece of fabric. Out of concern that defendant might be hiding a small weapon, Officer Vesely asked defendant to show him what was in her hands. Defendant lifted her hands but kept her left hand closed in a fist. The officer then noticed a rock-like substance, which he believed to be crack cocaine, wedged in a gap between defendant's fingers. He again asked defendant to open her hand. She again refused and Officer Vesely took hold of defendant's wrist forcing her left arm out the truck's window. Defendant continued to resist opening her hand and began to pull her arm back into the truck. Officer Olsen then handcuffed Rogers and proceeded to assist Officer Vesely. Using his knuckle, Officer Olsen applied pressure to the back of defendant's hand and forced it open. The officers next observed a "waxy, rock-like substance" fall to the ground, while another "rock-like substance" remained stuck to defendant's palm. Each officer, based on

his experience with drug investigations, concluded the substances were crack cocaine. As a result, defendant and Rogers were placed under arrest.

Defendant's evidence tended to show that she and Rogers routinely traveled to Green Meadows in connection with Rogers' scrap metal and auto repair business. On 3 October 1999, as they were leaving the neighborhood, they drove past the residence which was under Lt. Griffin's surveillance. A man standing in the front yard recognized Rogers and motioned for him to stop. The man then asked Rogers if he could find a bumper for a Cadillac. Rogers responded that he would do his best and drove away.

Shortly thereafter, they stopped at the location where Officers Olsen and Vesely were involved with the unrelated traffic stop. Defendant testified that, prior to stopping, she was holding in her left hand $1.98 in change which she intended to use to purchase cigarettes. She also testified that when Officer Vesely asked her to show him her hands, she readily complied but was unable to open her left hand because he was "holding it shut," "twisting" it and "pulling me out the window." Officer Olsen then applied pressure to the back of her hand forcing it to open.

Defendant further testified that, shortly following her arrest, she received medical treatment on her left arm and wrist. She continues to have "little feeling" in her left hand and asserts that she is unable to hold employment due to an inability to use her left hand.

On 28 January 2000, Rogers entered a negotiated guilty plea for misdemeanor possession of drug paraphernalia. On that date, the State also voluntarily dismissed a possession of cocaine charge against defendant arising out of the 3 October 1999 incident. The prosecutor, who dismissed the charge, testified that he was unable to locate a lab report confirming that the two rock-like substances seized by Officers Olsen and Vesely were cocaine. He, therefore, dismissed the charge against defendant for insufficient evidence.

In April 2000, defendant filed a civil rights action against Officer Olsen, Officer Vesely and the City of Hendersonville, alleging the officers had used excessive force in opening her hand. Approximately two months later, the prosecutor located the lab report and indicted defendant for possession of cocaine. Prior to her trial, defendant moved the trial court to suppress the crack cocaine and for a dismissal of the charge. The trial court denied both of these motions.

I.

[1] Defendant first contends the trial court erred in denying her motion to suppress. Appellate review of a motion to suppress is confined to the determination of whether competent evidence supports the trial court's findings and, in turn, whether the findings support the trial court's conclusions. *See State v. Willis*, 125 N.C. App. 537, 540, 481 S.E.2d 407, 410 (1997). Although the defendant must provide a supporting affidavit with a motion to suppress, the burden of demonstrating the evidence was lawfully obtained continues to rest with the State. *See State v. Smith*, 118 N.C. App. 106, 111, 454 S.E.2d 680, 683, *rev. on other grounds*, 342 N.C. 407, 464 S.E.2d 45 (1995), *cert. denied*, 517 U.S. 1189, 134 L. Ed. 2d 779 (1996) (*citations omitted).*

Here, defendant concedes the trial court's findings are supported by competent evidence. Nonetheless, she asserts two alternative reasons as to why the seizure of the crack cocaine was unlawful: (1) the officers lacked sufficient cause to stop and search defendant and (2) the forced seizure by the officers was excessive thereby rendering the search unreasonably intrusive.

Sufficient Cause

A search and seizure " 'conducted outside the judicial process, without prior approval by judge or magistrate, [is] per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.' " *Minnesota v. Dickerson*, 508 U.S. 366, 372, 124 L. Ed. 2d 334, 343-44 (1993) (citations omitted). One such exception, recognized in *Terry v. Ohio*, holds that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," he may momentarily stop a suspected individual or individuals in order to obtain additional information. *Terry*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1967); *see also Adams v. Williams*, 407 U.S. 143, 146, 32 L. Ed. 2d 612, 617 (1972). An investigatory stop is constitutionally permissible provided the law enforcement officer is able to provide "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion." *Terry*, 392 U.S. at 21, 20 L. Ed. 2d at 906. Further, if during the course of an investigation the officer has a "reasonable fear for his own or others' safety, he is entitled . . . to conduct a carefully limited search . . . in an attempt to discover weapons. . . ." *Id.* at 30, 20 L. Ed. 2d at 911.

Thus, pursuant to *Terry*, Officers Olsen and Vesely's decision to stop defendant is justifiable if "specific and articulable facts, taken together with the rational inferences from those facts, created a reasonable suspicion of criminal activity." *State v. Harrell*, 67 N.C. App. 57, 61, 312 S.E.2d 230, 234 (1984). Additionally, their decision to search defendant is also justifiable if, during the course of their investigation, they reasonably believed defendant might be in possession of a weapon and posed a danger to their safety. *See State v. Smith*, 150 N.C. App. 317, 562 S.E.2d 899 (2002).

The record shows that, prior to the stop of the truck, the circumstances known to the officers, as relayed to them by Lt. Griffin, included: (1) a truck matching its description had just left a residence which had been in an area of prior drug activity, and (2) in front of the residence the driver of the truck had engaged in a course of conduct which was characteristic of a drug transaction. We hold that these circumstances created a reasonable suspicion of criminal activity such that Officers Olsen and Vesely were justified in conducting an investigatory stop of the truck. *See e.g. Harrell*, 67 N.C. App. at 61, 312 S.E.2d at 234; *State v. Thompson*, 296 N.C. 703, 252 S.E.2d 776, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979); *State v. Watkins*, 337 N.C. 437, 446 S.E. 2d 67 (1994).

With respect to the officers' search of defendant, the circumstances known to them prior to the search included: (1) the truck which defendant occupied was reported to have just been involved in a suspected drug transaction, (2) when the officers approached the truck, defendant's hand was hidden in a suspicious manner underneath a piece of fabric, and (3) when asked, defendant refused to open her hand. Additionally, the officers testified that, as law enforcement officers, they learned in training that a small knife or razor blade capable of inflicting injury could be concealed in a clenched fist. Consequently, until they see an open palm they have reason to believe a suspect could be armed with a weapon. Officer Vesely also testified that when defendant first raised her hand, he immediately recognized what he considered to be crack cocaine wedged in a gap between defendant's fingers. From these circumstances, we conclude the officers were justified in conducting a limited search of defendant, including forcing defendant to open her hand. *See State v. Streeter*, 17 N.C. App. 48, 50, 193 S.E.2d 347, 348 (1972), *aff'd*, 283 N.C. 203, 195 S.E.2d 502 (1973) ("If, in the conduct of the limited weapons search, contraband or evidence of a crime is of necessity exposed, the officer is not required by the Fourth Amendment to dis-

regard such contraband or evidence of crime"). Accordingly, the trial court properly concluded that the officers had sufficient cause to stop and search defendant.

Reasonable Force

[2] Defendant next maintains the crack cocaine should have been suppressed by reason that the officers used excessive force in opening her hand, thereby rendering their search unconstitutionally intrusive. We disagree.

"The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767, 16 L. Ed. 2d 908, 917 (1966). In *Schmerber*, the police arrested the defendant for driving while intoxicated while he was receiving treatment at a hospital following an automobile accident. At the direction of one of the police officers, a physician withdrew a blood sample from the defendant. A chemical analysis of the sample indicated the defendant had been intoxicated. The defendant sought to exclude the chemical analysis on grounds that the blood sample was the product of an unconstitutional search and seizure. The Supreme Court disagreed holding that the withdrawal of the defendant's blood was not unjustifiably intrusive as to render its seizure unreasonable. *Id.* at 771-72, 16 L. Ed. 2d at 920. However, the Court cautioned that its holding "in no way indicates that it permits more substantial intrusions, or intrusions under other conditions." *Id.*; *see also Winston v. Lee*, 470 U.S. 753, 84 L. Ed. 2d 662 (1985) (holding that surgical intrusion into attempted robbery suspect's left chest area to recover bullet fired by victim was unreasonable under the Fourth Amendment). Indeed, the Court put forth certain criteria for determining whether a search is unreasonably intrusive: (1) whether the police have a "clear indication" that the desired evidence will be found, (2) the presence of exigent circumstances such as the imminent destruction of evidence or a risk to individual safety, and (3) whether the methods used to obtain the evidence was performed in a reasonable manner. *Id.*; *see also Burnett v. Municipality of Anchorage*, 806 F.2d 1447 (9th Cir. 1986).

Applying the framework set forth in *Schmerber* to the conduct of Officers Olsen and Vesely, we note that prior to forcing open defendant's hand, the officers had been informed that the driver of the truck, in which defendant was a passenger, had been involved in a suspected drug transaction moments earlier. Upon approaching the

truck, both officers observed defendant hide her hand in such a manner which was clearly indicative of her having either a small weapon or drugs closed in her palm. Additionally, after being repeatedly asked to open her hand, defendant continued to resist the officers' efforts to alleviate their concern that she might be concealing a weapon. Under such circumstances, we conclude Officer Olsen's use of pressure to open defendant's hand was justifiable in view of the officers' need to ensure that defendant was not in possession of a weapon capable of inflicting injury or that she would not destroy evidence. Moreover, we find no evidence which would indicate Officer Olsen's use of pressure was overly intrusive as to render the seizure of the crack cocaine unreasonable. *See Smith*, 342 N.C. at 407, 464 S.E.2d at 45 (holding that requiring defendant to pull his pants down in the middle of an intersection so that police might search for cocaine was not intolerable in intensity and scope such that the search was unreasonably intrusive); *and State v. Watson*, 119 N.C. App. 395, 458 S.E.2d 519 (1995) (holding police officer's application of pressure to defendant's throat causing him to spit out three plastic baggies containing crack cocaine was not unreasonably intrusive in light of the risk of losing the evidence and the potential health risk to the defendant). Therefore, we overrule defendant's assignment of error.

II.

[3] Defendant next contends the trial court erred in denying her motion to dismiss. She maintains the State had "waived" the right to prosecute her for any crime arising out of the incident when it allowed Rogers on 28 January 2000 to plead guilty for possession of drug paraphernalia and voluntarily dismissed the charge of possession of cocaine against her. However, defendant fails to cite any authority which holds that the doctrine of waiver applies to situations such as the one present in this case.

Nonetheless, defendant asserts the dismissal of the charges against her was a material part of the negotiated guilty plea which Rogers entered. She contends that "due process" and "basic contract principles" require that the charges against her be dismissed.

The essential characteristic of a negotiated guilty plea is "the defendant's surrender of fundamental constitutional rights . . . in reliance upon the prosecutor's promise." *Motor Co. v. Board of Alcoholic Control*, 35 N.C. App. 536, 538, 241 S.E.2d 727, 729 (1978) (*citing Brady v. Unites States*, 397 U.S. 742, 25 L. Ed. 2d 747 (1970)).

Here, the record is devoid of any indication that defendant relinquished her constitutional rights in reliance on a promise made by the prosecutor. Indeed, the prosecutor, who dismissed the charges against defendant, testified that he made no promises to defendant and that he dismissed the charges against her because he could not locate the lab report confirming that the substances seized by Officers Olsen and Vesely were crack cocaine. Accordingly, we overrule defendant's assignment of error.

No error.

Judges McCULLOUGH and BRYANT concur.

STATE OF NORTH CAROLINA v. JIMMY RAY OXENDINE

No. COA01-1079

(Filed 18 June 2002)

1. Rape— attempted—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the two charges of attempted rape, because: (1) a reasonable jury could infer from defendant's actions with the two victims that he intended to rape them; (2) the fact that defendant ended his assault before he actually raped either victim or the reasons for the change in his stated intent to rape the women is irrelevant for purposes of attempted rape; and (3) the fact that the women apparently managed to dissuade defendant from his stated purpose does not alter defendant's initial actions towards them.

2. Kidnapping— second-degree—sufficiency of evidence—separate act

The trial court did not err in an attempted rape and kidnapping case by denying defendant's motion to dismiss the charge of first-degree and second-degree kidnapping regarding one of the victims, because defendant's act of forcing the victim to the bedroom at knifepoint in order to prevent her children from either witnessing or hindering the intended rape constituted a separate act.

3. Kidnapping— second-degree—sufficiency of evidence—failure to show separate act

The trial court erred in an attempted rape and kidnapping case by denying defendant's motion to dismiss the charge of first-degree and second-degree kidnapping regarding the second victim, because the State failed to present sufficient evidence that defendant's restraint of the victim by knifepoint was for purposes other than his stated intention to rape her.

Appeal by defendant from judgments entered 18 January 2001 by Judge Michael E. Beale in Cabarrus County Superior Court. Heard in the Court of Appeals 23 May 2002.

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

Matthew F. Ginn for defendant appellant.

TIMMONS-GOODSON, Judge.

Jimmy Ray Oxendine ("defendant") appeals from his convictions of two counts of attempted first-degree rape and two counts of second-degree kidnapping. For the reasons stated herein, we vacate in part the judgment of the trial court.

The State presented evidence at trial tending to show the following: On the afternoon of 9 June 2000, defendant appeared at the rear door of the Concord, North Carolina, residence of Melinda Arnett ("Arnett"), and requested a cup of sugar. Arnett, who was home at the time with her two young children, knew defendant as the boyfriend of her neighbor, and she had loaned defendant sugar on a previous occasion. After Arnett gave defendant the sugar, he asked her whether "[she] and [her] husband are church-goers." When Arnett replied affirmatively, defendant stated that he would "like to talk to [her] about . . . something" and entered Arnett's house. Arnett and defendant then sat down in the living room, whereupon defendant proceeded to tell Arnett about problems he was having with his girlfriend. Defendant stated that he also wanted to talk to Arnett's husband, and asked her when she expected him home. Arnett informed him that her husband would be coming home early that day.

Upon concluding their conversation, defendant requested to use Arnett's bathroom. When he returned to the living room, he indicated that he was leaving and headed towards the rear door of the resi-

dence. Before reaching the door, however, defendant turned towards Arnett and pulled out a long butcher knife from the waistband of his pants. Defendant pointed the knife at Arnett and ordered her to walk to the bedroom with him. Arnett initially complied with defendant's demand, but when she reached the door of the bedroom, she told defendant that she "couldn't do that, that my body belongs to Jesus Christ and to my husband only and I will not violate my body for somebody else." Arnett testified that she was terrified, and that her voice was "shaky and I was panicking." At that point, Arnett's older child approached them and asked his mother what was wrong. Defendant told Arnett to "[s]end him back to the living room and have him watch T.V. and he'll never know anything is going to happen because he won't see anything. We'll lock the door and let them watch T.V. and he'll never see anything." Arnett again refused and offered to give defendant money. Defendant replied that, "this is not about money; it's about sex, all I want is sex." Arnett told defendant that her son's therapist would be arriving at the house shortly and that they would not "have time for anything anyway so . . . let's go to the living room and talk." Defendant then told Arnett to perform an act of masturbation upon him, but finally agreed to return to the living room.

Shortly thereafter, Michelle Ashby ("Ashby"), an occupational therapist, arrived at the residence for her appointment with Arnett's son. Defendant remained seated in a chair in the living room with the knife concealed by his side while Ashby worked with Arnett's child. When Arnett took her older son to the bathroom, defendant whispered and gestured for Ashby to come closer to him. When Ashby moved to within two feet of defendant, he asked her whether she was married and then brandished his knife. Defendant ordered Ashby to "go to the back bedroom and quietly take [her] clothes [off] so that the kids wouldn't see what he was going to do." Ashby testified that she "started to shake" and "couldn't breathe very well." She began pleading with defendant not to hurt her and asked him why he wanted to rape her. Defendant replied, "Because I want to[.]" When Ashby told defendant that he could probably find someone willing to have sexual intercourse with him, he stated, "[N]o, I want to have sex with you[.]" Defendant stood over Ashby with his knife pointed towards her and told her to "come on," pointing towards the bedroom.

Arnett returned from the bathroom with her son and saw defendant standing over and reaching for Ashby with his knife drawn.

Both women then begged defendant not to hurt them, telling him that if he left, they would not call the police. After approximately thirty minutes, defendant agreed to leave.

The jury found defendant guilty of two counts of attempted first-degree rape and two counts of second-degree kidnapping, for which the trial court sentenced defendant to an active term of imprisonment for 189 to 236 months. From his convictions and resulting sentence, defendant appeals.

Defendant argues that the trial court erred in denying his motion to dismiss the charges against him at the close of the State's evidence. For the reasons stated herein, we vacate in part the judgment of the trial court.

When a defendant moves to dismiss the charges against him, the only issue for the trial court is "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995). In reviewing a motion to dismiss, the trial court should be concerned only with the sufficiency of the evidence, and not with its weight. *See State v. Sokolowski*, 351 N.C. 137, 143, 522 S.E.2d 65, 69 (1999). The court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference from that evidence. *See State v. Jaynes*, 342 N.C. 249, 274, 464 S.E.2d 448, 463 (1995), *cert. denied*, 518 U.S. 1024, 135 L. Ed. 2d 1080 (1996). Contradictions and discrepancies in the evidence are resolved in favor of the State. *See State v. Gibson*, 342 N.C. 142, 150, 463 S.E.2d 193, 199 (1995). Review of the sufficiency of the evidence to withstand the defendant's motion to dismiss is the same whether the evidence is direct, circumstantial, or both. *See State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981).

In the instant case, defendant was charged with attempted first-degree rape and kidnapping in the first and second degrees. To convict a defendant of attempted rape, the State must prove the following two essential elements beyond a reasonable doubt: (1) that the defendant had the specific intent to rape the victim, and (2) "that [the] defendant committed an act that goes beyond mere preparation, but falls short of the actual commission of the rape." *State v. Schultz*,

88 N.C. App. 197, 200, 362 S.E.2d 853, 855 (1987), *affirmed per curiam*, 322 N.C. 467, 368 S.E.2d 386 (1988). "The element of intent as to the offense of attempted rape is established if the evidence shows that [the] defendant, at any time during the incident, had an intent to gratify his passion upon the victim, notwithstanding any resistance on her part." *Id.* at 200, 362 S.E.2d at 855-56; *see also State v. Brayboy*, 105 N.C. App. 370, 374, 413 S.E.2d 590, 593 (1992) (defining attempt in the context of an attempted rape).

[1] Defendant contends that there was insufficient evidence of his intent to rape either Arnett or Ashby in that, once the victims presented resistance, he ceased his sexual assault. Defendant argues that, had he possessed the requisite intent to commit the act, resistance by the victims would not have stopped him. We disagree.

As stated *supra*, 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. *See Schultz*, 88 N.C. App. at 200, 362 S.E.2d at 855-56. Intent to rape may be "proved circumstantially by inference, based upon a defendant's actions, words, dress, or demeanor." *State v. Cooper*, 138 N.C. App. 495, 498, 530 S.E.2d 73, 75, *affirmed per curiam*, 353 N.C. 260, 538 S.E.2d 912 (2000). An "overt act manifesting a sexual purpose or motivation on the part of the defendant is adequate evidence of an intent to commit rape." *State v. Dunston*, 90 N.C. App. 622, 625, 369 S.E.2d 636, 638 (1988). Evidence that an attack is sexually motivated "will support a reasonable inference of an intent to engage in vaginal intercourse with the victim even though other inferences are also possible." *Id.* at 625-26, 369 S.E.2d at 638.

Considering the evidence in the light most favorable to the State, a reasonable jury could infer from defendant's actions with Arnett and Ashby that he intended to rape them. Defendant showed his intent towards Arnett by pulling out the butcher knife, ordering her to walk to the bedroom at knifepoint, and telling her he wanted to have sex with her. He also told Arnett to perform an act of masturbation upon him. These actions by defendant demonstrate that his attack was sexually motivated and provide sufficient evidence to support a reasonable inference that defendant intended to rape Arnett. Defendant's actions towards Ashby provide similar support for the attempted rape charge. Defendant pointed the knife at Ashby and demanded that she go to the bedroom and undress. He also told her that he intended to rape her. The fact that defendant ended his

assault before he actually raped either Arnett or Ashby, or the reasons for the change in his stated intent to rape the women, is irrelevant for purposes of attempted rape. The fact that the women apparently managed to dissuade defendant from his stated purpose does not alter defendant's initial actions towards them. "The jury could have reasonably inferred that, but for the victim's ingenuity and courage, she would have been subjected to attempted forcible sexual intercourse." *State v. Whitaker*, 316 N.C. 515, 519, 342 S.E.2d 514, 517 (1986). We hold there was sufficient evidence to support the jury's verdict, and the trial court therefore did nor err in denying defendant's motion to dismiss the charges of attempted rape.

[2] Defendant further contends that there was insufficient evidence of either second-degree or first-degree kidnapping. The elements of first-degree kidnapping are: (1) confining, restraining, or removing from one place to another; (2) any person sixteen years or older; (3) without such person's consent; (4) if such act was for the purposes of facilitating the commission of a felony. *See* N.C. Gen. Stat. § 14-39 (a)(2) (2001). The difference between first and second-degree kidnapping is

> [i]f the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class C felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree.

N.C. Gen. Stat. § 14-39(b) (2001).

In *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978), our Supreme Court stated that "certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim." *Id.* at 523, 243 S.E.2d at 351. "[R]estraint, which is an inherent, inevitable feature of such other felony," cannot also form the basis of a kidnapping conviction. *Id.* Nonetheless, "two or more criminal offenses may grow out of the same course of action," *id.*, and there is no barrier to convicting a defendant for kidnapping, "by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony." *Id.* at 524, 243 S.E.2d at 352. *See also State v. Silhan*, 297 N.C. 660, 673, 256 S.E.2d 702, 710 (1979) (noting

that restraint of a rape victim may constitute kidnapping if it is a separate and independent act). Moreover, "[a]sportation of a rape victim is sufficient to support a charge of kidnapping if the defendant could have perpetrated the offense when he first threatened the victim, and instead, took the victim to a more secluded area to prevent others from witnessing or hindering the rape." *State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987).

Defendant contends there was insufficient evidence to support the charge of first or second-degree kidnapping. Defendant argues that there was insufficient evidence of a sexual assault by defendant to support the essential element that the "purpose of the restraint was to facilitate a felony." Defendant further argues that, because he did not move Ashby in any manner, her restraint was not a separate and complete act independent of the crime of attempted rape. We agree in part with defendant's argument.

We have determined that there was adequate evidence to support both counts of attempted rape against defendant. There was also sufficient evidence to support the charge of first or second-degree kidnapping as to defendant's actions regarding Arnett. Defendant's act of forcing Arnett to the bedroom at knifepoint in order to prevent her children from either witnessing or hindering the intended rape constituted a separate act and properly supports the charge of first or second-degree kidnapping. Moreover, we note that the jury found defendant guilty of second-degree kidnapping, rather than first-degree kidnapping. The trial court did not err in submitting the first and second-degree kidnapping charges as to Arnett to the jury.

[3] We agree with defendant, however, that there was insufficient evidence to support the kidnapping charges as to Ashby. As stated *supra*, the restraint required for kidnapping must be an act independent of the intended felony. *See State v. Harris*, 140 N.C. App. 208, 213, 535 S.E.2d 614, 617, *disc. review denied*, 353 N.C. 271, 546 S.E.2d 122 (2000). "The test of the independence of the act is 'whether there was substantial evidence that the defendant restrained or confined the victim separate and apart from any restraint necessary to accomplish the [felony].' " *Id.* at 213, 535 S.E.2d at 618 (quoting *State v. Mebane*, 106 N.C. App. 516, 532, 418 S.E.2d 245, 255, *disc. review denied*, 332 N.C. 670, 424 S.E.2d 414 (1992)). The restraint of the victim must be a complete act, independent of the sexual offense. *See State v. Ackerman*, 144 N.C. App. 452, 457, 551 S.E.2d 139, 142 (2001). The State presented insufficient evidence in the instant case that defendant's restraint of Ashby by

knifepoint was for purposes other than his stated intention to rape her. Although defendant instructed Ashby to go to the back bedroom, Ashby remained on the floor and never moved during her encounter with defendant. As there was insufficient evidence to support the kidnapping charges as to Ashby, we conclude that the trial court erred in submitting such to the jury. We therefore vacate defendant's conviction of second-degree kidnapping regarding Ashby and remand defendant's case to the trial court for re-sentencing.

Vacated in part, no error in part.

Judges MARTIN and CAMPBELL concur.

PAULINE T. SLADE, PLAINTIFF v. JAMES A. STADLER, INDIVIDUALLY, AND, JAMES A. STADLER, D/B/A STADLER GREENHOUSES, DEFENDANTS

No. COA01-932

(Filed 18 June 2002)

Animals— domestic animal—motion for directed verdict—motion for judgment notwithstanding verdict

The trial court erred in a negligence case arising out of alleged injuries caused by defendants' dog by denying defendants' motions for a directed verdict and judgment notwithstanding the verdict, and by awarding plaintiff $20,000 in damages, because although plaintiff presented evidence that upon entering defendants' greenhouse defendants' dog jumped on her, knocked her down, and then proceeded to lick her face, plaintiff presented no evidence regarding either the dog's breed, its general habits, character or propensities, or any past similar conduct by the dog.

Judge TIMMONS-GOODSON dissenting.

Appeal by defendants from judgment filed 28 February 2001 by Judge Ronald L. Stephens in Alamance County Superior Court. Heard in the Court of Appeals 23 April 2002.

Hemric, Lambeth, Champion & Moseley, P.A., by W. Phillip Moseley, for plaintiff-appellee.

Teague, Rotenstreich & Stanaland, L.L.P., by Stephen G. Teague, for defendant-appellants.

GREENE, Judge.

James A. Stadler, individually, and James A. Stadler d/b/a Stadler Greenhouses (collectively, Defendants) appeal a judgment filed 28 February 2001 denying Defendants' motions for a directed verdict and judgment notwithstanding the verdict and awarding Pauline T. Slade (Plaintiff) $20,000.00 in damages.

On 8 October 1999, Plaintiff filed a complaint alleging Defendants were negligent in failing to restrain their dog and warn of its dangerous propensities. The complaint sought compensatory and punitive damages for injuries caused by Defendants' dog. Plaintiff stated in her complaint that upon arriving at Defendants' greenhouse to buy flowers, a "large dog" owned by Defendants "jumped onto her," knocked her down, and then "stood over Plaintiff growling at her." The evidence at trial, however, revealed that although the dog jumped on Plaintiff and knocked her down, the dog did not growl, bark, bare its teeth, or try to bite Plaintiff. Instead, it simply licked her face. While the evidence indicated the dog had white and black spots, there was no testimony regarding the dog's breed. Furthermore, the evidence was silent as to the dog's general character, habits or propensities, any prior similar conduct by the dog, the length of time it had been owned by Defendants, or whether Defendants had any reason to know that the dog posed a danger to others.

At the close of Plaintiff's evidence, Defendants moved for a directed verdict. The trial court denied this motion. Defendants presented no evidence and renewed their motion for a directed verdict at the close of all the evidence, which the trial court again denied. The issue of damages was submitted to the jury and Plaintiff was awarded $20,000.00. Defendants moved for a judgment notwithstanding the verdict, and the trial court denied their motion.

The dispositive issue is whether Plaintiff's evidence was insufficient as a matter of law to support a verdict in her favor.

In a negligence action against an owner of a domestic animal, the test for liability is whether the owner knew or should have known from the animal's past conduct, including acts evidencing a vicious propensity, or the general propensities exhibited by this type of animal "that [the animal] is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result." *Hunnicutt v. Lundberg*, 94 N.C. App. 210, 211, 379 S.E.2d

710, 711-12 (1989); *see Hill v. Williams*, 144 N.C. App. 45, 54, 547 S.E.2d 472, 478 (" 'owner of a domestic animal is chargeable with knowledge of the general propensities of certain animals and he must exercise due care to prevent injury from reasonably anticipated conduct' "), *disc. review denied*, 354 N.C. 217, 557 S.E.2d 531 (2001); *Griner v. Smith*, 43 N.C. App. 400, 406-07, 259 S.E.2d 383, 388 (1979) (discussing vicious propensity rule). In other words, the liability of the owner depends upon his negligence in failing to confine or restrain his animal or otherwise warn of its propensities. *See Hunnicutt*, 94 N.C. App. at 211, 379 S.E.2d at 712. The type, "size, nature, and habits of the [animal], known to the owner, are all circumstances to be taken into account in determining whether the owner was negligent." *Id.*

In this case, Plaintiff presented evidence that upon entering Defendants' greenhouse, Defendants' dog jumped on her, knocked her down and then proceeded to lick her face. Plaintiff, however, presented no evidence regarding either the dog's breed, its general habits, character or propensities, or any past similar conduct by the dog. Accordingly, Plaintiff's evidence was insufficient as a matter of law to support a verdict in her favor, *see Hill*, 144 N.C. App. at 54, 547 S.E.2d at 477, and a directed verdict should have been entered for Defendants. Accordingly, the judgment in favor of Plaintiff is vacated and a judgment for Defendants is entered.[1]

Reversed.

Judge HUNTER concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

Because I conclude that there was sufficient evidence in the instant case to support the jury's verdict in favor of plaintiff, I respectfully dissent.

In ruling on a motion for directed verdict under Rule 50 of the North Carolina Rules of Civil Procedure, the trial court must consider

1. We note that the dissent's analysis is based on a characterization of Defendants' dog as "an untrained puppy." There is, however, no evidence in the record that the dog was untrained. Furthermore, even if this characterization were substantiated by the evidence, it is of no legal significance.

" 'whether the evidence, when considered in the light most favorable to the plaintiff, was sufficient for submission to the jury.' " *Smith v. Wal-Mart Stores*, 128 N.C. App. 282, 285, 495 S.E.2d 149, 151 (1998) (quoting *Kelly v. Harvester Co.*, 278 N.C. 153, 157, 179 S.E.2d 396, 397 (1971)). The trial court should deny a motion for directed verdict when it finds more than a scintilla of evidence to support plaintiff's *prima facie* case. *See Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986). "Directed verdict in a negligence case is rarely proper because it is the duty of the jury to apply the test of a person using ordinary care." *Stallings v. Food Lion, Inc.*, 141 N.C. App. 135, 138, 539 S.E.2d 331, 333 (2000). "Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge." *Clark v. Bodycombe*, 289 N.C. 246, 251, 221 S.E.2d 506, 510 (1976).

In order to prevail on a claim of negligence, the plaintiff must establish that the defendant owed him a duty of reasonable care, that the defendant was negligent in this duty, and that such negligence was the proximate cause of the plaintiff's injuries. *See Beaver v. Hancock*, 72 N.C. App. 306, 311, 324 S.E.2d 294, 298 (1985). In general, property owners have "the duty to exercise reasonable care in the maintenance of their premises for the protection of lawful visitors." *Nelson v. Freeland*, 349 N.C. 615, 632, 507 S.E.2d 882, 892 (1998). A property owner "is required to exercise reasonable care to provide for the safety of all lawful visitors on his property, the same standard of care formerly required only to invitees. Whether the care provided is reasonable must be judged against the conduct of a reasonably prudent person under the circumstances." *Lorinovich v. K Mart Corp.*, 134 N.C. App. 158, 161, 516 S.E.2d 643, 646, *cert. denied*, 351 N.C. 107, 541 S.E.2d 148 (1999). This duty includes the "duty to exercise ordinary care to keep the premises in a reasonably safe condition and to warn the [visitor] of hidden perils or unsafe conditions that can be ascertained by reasonable inspection and supervision." *Byrd v. Arrowood*, 118 N.C. App. 418, 421, 455 S.E.2d 672, 674 (1995); *Goynias v. Spa Health Clubs, Inc.*, 148 N.C. App. 554, 555, 558 S.E.2d 880, 881 (2002). Accordingly, a store owner has a duty of "ordinary care to keep in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision." *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963); *Stallings*, 141 N.C. App. at 137, 539 S.E.2d at 333.

In the instant case, it is undisputed that plaintiff was a lawful visitor on defendant's premises when she was injured. Thus, defendant owed plaintiff a duty to maintain his premises in a reasonably safe condition, and to warn plaintiff of any hidden or unsafe condition. Whether or not defendant breached this duty by allowing a large, half-grown and untrained dog to roam the premises at will without posting a warning sign to visitors was a question for the jury.

The majority bases its holding on an analysis of the relevant case law concerning the duty of the owner of an animal, concluding that plaintiff failed to present sufficient evidence of the dog's dangerous propensities or past conduct. I disagree. The evidence tended to show that the dog in question, while certainly not vicious, was young and untrained. When plaintiff arrived at defendant's greenhouse, defendant's dog, appropriately named "Frisky," immediately appeared running "full blast" and "jumped right up and knocked [plaintiff] down." While plaintiff lay on the ground, Frisky remained standing on top of plaintiff, licking her face. Plaintiff testified that she was afraid of dogs, and began screaming for assistance when she first saw the animal. As a result of the fall, plaintiff, who was seventy-two years old at the time, suffered considerable injury.

Furthermore, "[t]he owner of a domestic animal is chargeable with knowledge of the general propensities of certain animals and he must exercise due care to prevent injury from reasonably anticipated conduct." *Griner v. Smith*, 43 N.C. App. 400, 407, 259 S.E.2d 383, 388 (1979). In *Williams v. Tysinger*, 328 N.C. 55, 399 S.E.2d 108 (1991), our Supreme Court held that the owners of a horse could be held liable for injuries inflicted by the animal, although the plaintiffs made no showing that the horse was dangerous and presented no evidence of any past conduct by the animal to indicate that it might harm plaintiffs. Nevertheless, the Court held that, "defendants, as the owners of the horse, are 'chargeable with knowledge of the general propensities' of the horse." *Williams*, 328 N.C. at 60, 399 S.E.2d at 111 (quoting *Griner*, 43 N.C. App. at 407, 259 S.E.2d at 388). Such knowledge "include[s] the fact that the horse might kick without warning or might inadvertently step on a person. This is just the nature of the animal, and such behavior does not necessarily indicate that the horse is vicious." *Id.*

In the instant case, the evidence tended to show that defendant's dog, although large, was only half-grown and untrained. Knowledge of the general propensities of an untrained puppy includes the fact

that such animals are easily excitable and unpredictable. Coupled with the fact that the dog was large and unrestrained, defendant could reasonably anticipate that the animal might jump up onto persons without warning, particularly persons unfamiliar to the dog and who are themselves agitated. Because defendant could reasonably anticipate that his dog might act in such a manner, it was therefore a matter for the jury to decide whether defendant failed to exercise due care for plaintiff's safety in allowing such an animal to wander the property without taking appropriate precautions for plaintiff's safety.

In conclusion, I would hold that the trial court properly denied defendant's motion for a directed verdict. Our case law puts the burden on defendant, as owner of the premises and of the dog, to exercise reasonable care towards lawful visitors to the property and to prevent such injury as might be reasonably foreseeable. Plaintiff was a lawful visitor who suffered foreseeable injuries. I would therefore affirm the trial court.

STATE OF NORTH CAROLINA v. COREY JERMAINE LOWE

No. COA01-859

(Filed 18 June 2002)

Assault— deadly weapon with intent to kill inflicting serious injury—failure to instruct on lesser-included offense of misdemeanor assault inflicting serious injury

The trial court committed plain error by failing to instruct on misdemeanor assault inflicting serious injury under N.C.G.S. § 14-33(c) as a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury, because: (1) there is sufficient evidence from which the jury could find that fists and a commode lid were not used as deadly weapons but did inflict serious injury; and (2) even though the State argues that the jury would have found defendant guilty of felonious assault inflicting serious bodily injury under N.C.G.S. § 14-32.4, felonious assault inflicting serious bodily injury is not a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury.

Appeal by defendant from judgment entered 16 May 2000 by Judge Howard R. Greeson, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 24 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Leonard G. Green, for the State.

Rudolf Maher Widenhouse & Fialko by M. Gordon Widenhouse, Jr., for defendant appellant.

McCULLOUGH, Judge.

Defendant Corey Jermaine Lowe was tried before a jury at the 15 May 2000 Criminal Session of Guilford County Superior Court. Defendant was indicted on one count of assault with a deadly weapon inflicting serious injury by superceding indictment on 20 March 2000, and as being an habitual felon by superceding indictment on 21 February 2000.

The facts showed that on 6 October 1999, Tony Gibson and two others arrived between 10:30 p.m. and 11:00 p.m. at a Greensboro night club called Club Sensation. The group was drinking and dancing during what was a crowded night at the club. After awhile, Gibson, the victim, went to the restroom. While there, someone called out from behind saying, "You're a brave motherf---er." Gibson turned to see defendant and some of his friends.

At this point, Tony Gibson had known who defendant was for several years. In 1994, Gibson was involved in an altercation with Tim Lowe, defendant's brother. Gibson had allegedly pulled his own younger brother away from a group of people that included Tim Lowe who were beating a man with a gun. Tim Lowe pointed the gun at Gibson and said he would kill him. Tim then apparently shot the man he was beating. Gibson got a shotgun from his car and fired a shot in the air. The two exchanged gunfire, and Gibson eventually shot Tim Lowe who died a year and a half later as a result of these wounds.

Defendant and Jamie Lowe found and shot Tony Gibson the day after Tim was shot. They further threatened Gibson by calling his hospital room and warning, "You got to die for killing our brother." The police guarded his hospital room.

Tony Gibson was charged with first-degree murder when Tim Lowe eventually died. He pled guilty to voluntary manslaughter and

served three years of a six-year sentence. Since this early incident, Gibson had not seen or spoken to defendant until 6 October 1999. Thus, as soon as Tony Gibson turned away from the group, they rushed him and began to beat him. Gibson testified that he was hit and "stomped" and probably beaten with the lid of the commode, although Gibson was not sure about the lid. He had noticed that the lid was not broken before the fight, and that after the fight it was broken. Gibson said that defendant had said that the fight was for his brother. According to the victim's witnesses, security guards broke up the fight and allowed defendant and his friends to leave. Testimony from the club employees disputed that claim.

Gibson was taken to the hospital after passing out at the club. He suffered from a fractured nose, loss of hearing in one ear, and a gash on his head that required staples to close. He was released the next day, but missed two weeks of work.

The jury was presented with three possible verdicts: assault with a deadly weapon with intent to kill inflicting serious injury, assault with a deadly weapon inflicting serious injury, or not guilty. They found defendant guilty of assault with a deadly weapon inflicting serious injury on 15 May 2000. Defendant then pled guilty to being an habitual felon. Defendant was determined to have a prior record level III, and was sentenced in the aggravated range to a minimum term of 120 months and a maximum term of 153 months.

Defendant brings forth the following assignments of error on appeal: The trial court erred (1) by failing to instruct the jury on misdemeanor assault inflicting serious injury as a lesser included offense of assault with a deadly weapon with intent to kill inflicting serious injury where there was evidence from which the jury could find defendant did not use a deadly weapon; (2) in overruling defendant's objection to improper opinion testimony by the victim regarding whether he was struck by the toilet seat lid as this testimony was beyond his personal knowledge and constituted an improper opinion; (3) in aggravating defendant's sentence based upon an unsupported and inaccurate observation that defendant lied about the incident which was neither an appropriate aggravating factor nor supported by the evidence; and (4) by imposing a sentence in excess of the presumptive by failing to find a statutory mitigating factor supported by uncontradicted evidence.

I.

Defendant's first contention is that the trial court erred by failing to submit to the jury the lesser included offense of misdemeanor assault inflicting serious injury. The record shows that defendant had an opportunity to object at trial but did not. Thus, we review the omission of this instruction under the plain error standard.

> The plain error rule "allows review of fundamental errors or defects in jury instructions affecting substantial rights, which were not brought to the attention of the trial court." In order to obtain relief under this doctrine, defendant must establish that the omission was error, and that, in light of the record as a whole, the error had a probable impact on the verdict.

State v. Bell, 87 N.C. App. 626, 634-35, 362 S.E.2d 288, 293 (1987) (citation omitted).

Defendant argues that he was entitled to the instruction on misdemeanor assault inflicting serious injury found in N.C. Gen. Stat. § 14-33(c)(1) (2001). This statute prohibits committing any assault or assault and battery during which the person inflicts serious injury upon another person. *Id.* Misdemeanor assault inflicting serious injury, along with simple assault, are lesser included offenses of assault with a deadly weapon with intent to kill inflicting serious injury and assault with a deadly weapon inflicting serious injury. *Bell*, 87 N.C. App. at 635, 362 S.E.2d at 293; *see also State v. Weaver*, 264 N.C. 681, 683, 142 S.E.2d 633, 635 (1965).

> The primary distinction between felonious assault under G.S. § 14-32 and misdemeanor assault under G.S. § 14-33 is that a conviction of felonious assault requires a showing that a deadly weapon was used *and* serious injury resulted, while if the evidence shows that only one of the two elements was present, i.e., that *either* a deadly weapon was used *or* serious injury resulted, the offense is punishable only as a misdemeanor.

State v. Owens, 65 N.C. App. 107, 110-11, 308 S.E.2d 494, 498 (1983). According to defendant, the testimony and evidence established that victim Tony Gibson was beaten with fists and "stomped," presumably with feet. There was also some conflicting testimony that the victim was beaten with the lid of the commode. What this evidence did not establish, at least conclusively, was that a deadly weapon was used. Thus, defendant contends that the trial court was required to give the

instruction on the lesser included offense of misdemeanor assault inflicting serious injury.

We agree. "In North Carolina, a trial judge must submit lesser included offenses as possible verdicts, even in the absence of a request by the defendant, where sufficient evidence of the lesser offense is presented at trial." *Owens*, 65 N.C. App. at 110, 308 S.E.2d at 497. There is sufficient evidence from which the jury could find that the fists and commode lid, if believed, were not used as deadly weapons but did inflict serious injury.

> A deadly weapon is "any instrument which is likely to produce death or great bodily harm, under the circumstances of its use . . . . The deadly character of the weapon depends sometimes more upon the manner of its use, and the condition of the person assaulted, than upon the intrinsic character of the weapon itself." *State v. Smith*, 187 N.C. 469, 470, 121 S.E. 737 (1924). Where there is no conflict in the evidence regarding both the nature of the weapon and the manner of its use, the applicable principles in determining its deadly character are well stated in *Smith, id.*:
>
> > "Where the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly within the foregoing definition is one of law, and the Court must take the responsibility of so declaring. . . . *But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its alleged deadly character is one of fact to be determined by the jury.*" (Citation omitted.)
>
> If there is a conflict in the evidence regarding either the nature of the weapon or the manner of its use, with some of the evidence tending to show that the weapon used or as used would not likely produce death or great bodily harm and other evidence tending to show the contrary, the jury must, of course, resolve the conflict.

State v. Palmer, 293 N.C. 633, 642-43, 239 S.E.2d 406, 412-13 (1977) (emphasis added) (footnote omitted).

This Court has dealt with a similar situation in *Bell*, 87 N.C. App. 626, 362 S.E.2d 288. *Bell* involved a plain error review of the failure of

the trial court to instruct the jury on simple assault and misdemeanor assault inflicting serious injury. There was conflicting evidence as to whether a gun was used to beat the victim. In our case the question is whether the fists and toilet seat became deadly weapons rather than was a per se deadly weapon used, but the principle is the same. This Court said, "There is simply no way to ascertain what verdict the jury might have reached had they been given an alternative which did not include the use of a deadly weapon." *Bell*, 87 N.C. App. at 635, 362 S.E.2d at 293. *Bell* held that the failure to instruct on the lesser included offense of misdemeanor assault inflicting serious injury constituted plain error. We hold the same here.

The State argues that the evidence proves and the jury would have found defendant guilty of felonious assault inflicting serious bodily injury under N.C. Gen. Stat. § 14-32.4 (2001). Because of this, an instruction on misdemeanor assault inflicting serious injury, found in N.C. Gen. Stat. § 14-33(c), would not have been proper because that statute states a person can be guilty of the misdemeanor "[u]nless the conduct is covered under some other provision of law providing greater punishment," which the felony would be. However, this Court has recently rendered the opinion of *State v. Hannah*, 149 N.C. App. 713, 563 S.E.2d 1 (2002), which holds that felonious assault inflicting serious bodily injury is not a lesser included offense of assault with a deadly weapon with intent to kill inflicting serious injury, and it is error for the trial court to submit it to the jury as such. *Id.* Thus, the State's harmless error argument fails.

Because we hold that it was plain error for the trial court not to instruct on misdemeanor assault inflicting serious injury, it is not necessary to reach defendant's other assignments of error.

Reversed.

Judges WYNN and BIGGS concur.

HARRY C. SALVAGGIO, PLAINTIFF-APPELLEE v. NEW BREED TRANSFER CORP., DEFENDANT-APPELLANT

No. COA01-1057

(Filed 18 June 2002)

1. **Contracts— employment—payment of bonus—ambiguous language**

The trial court did not err in a breach of employment agreement case by concluding as a matter of law that the language of the agreement pertaining to payment of a bonus was ambiguous, because: (1) the pertinent section of the agreement is uncertain as to the parties' agreement concerning whether plaintiff would be entitled to a $12,000 bonus if he elected to terminate his employment after working only one year; and (2) there was sufficient evidence before the trial court to support its finding that the parties intended that, at the end of one year of employment, plaintiff would have a vested right to a bonus of $12,000.

2. **Interest— prejudgment—award from date of judgment versus date of breach**

The trial court erred in a breach of employment agreement case by determining that plaintiff employee was entitled to payment of prejudgment interest under N.C.G.S. § 24-5(a) from the date of the judgment rather than from the date of defendant's breach because even though the trial court concluded that defendant had a good faith basis for disputing the plaintiff's claim, there is no appellate interpretation which holds that N.C.G.S. § 24-5(a) has a good faith exception.

Appeal by defendant and cross-appeal by plaintiff from judgment entered 26 March 2001 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 15 May 2002.

Elliot, Pishko, Gelbin & Morgan, P.A., by David C. Pishko, for plaintiff-appellee.

Kilpatrick Stockton LLP, by Leon E. Porter, Jr. and Elliot A. Fus, for defendant-appellant.

WALKER, Judge.

Plaintiff initiated this action on 17 May 1999 alleging defendant had breached the compensation provision of an employment agree-

ment negotiated between the parties. The pertinent facts are not in dispute. Defendant is a New Jersey corporation engaged in the "acquisition, movement and transfer of materials and finished products." On 6 January 1997, plaintiff began working as a Project Controller for defendant's Greensboro affiliate. On that day, the parties executed an "Employment, Confidentiality and Non-Compete Agreement" (the Agreement). Section 2 of the Agreement stated in relevant part:

> **COMPENSATION**: In consideration of the services rendered hereunder, [defendant] agrees to pay to [plaintiff] an annual salary of $68,000.00 per annum, less deductions. Also. . .[plaintiff] will accrue a bonus of $12,000.00, less deductions, at the end of the first full year of employment. An additional $12,000.00 bonus, less deductions, will accrue at the end of the second year of employment. The full $24,000.00 bonus, less deductions, will be payable upon the completion of the second year of employment.

In March 1998, plaintiff voluntarily terminated his employment with defendant. Thereafter, he sent a letter to defendant requesting payment of a $12,000.00 bonus which defendant refused.

The trial court concluded that the language in Section 2 pertaining to the payment of a bonus is ambiguous. Thereafter, based on the stipulations and evidence presented at trial, the trial court found that the parties had intended plaintiff "would have a vested right to receive a bonus of $12,000.00, and that this bonus would be payable two years from the date of hiring." It then concluded defendant had breached the agreement and therefore plaintiff should recover $12,000.00 minus deductions. However, the trial court also concluded defendant had a "good faith basis" for disputing plaintiff's claim and ordered defendant only to pay plaintiff $12,000.00 minus deductions "together with interest at the legal rate from the date of this Judgment until paid . . . ."

I.

[1] With its appeal, defendant maintains the trial court erred, as a matter of law, in concluding the language of Section 2 is ambiguous. Rather, it contends the language "plainly and unambiguously" conditions plaintiff's receipt of bonus compensation upon his completing two years of employment.

The principal objective in the interpretation of a contract's provisions is to ascertain the intent of the parties. *Holshouser v. Shaner*

Hotel Grp. Props. One, 134 N.C. App. 391, 397, 518 S.E. 2d 17, 23 (1999), *aff'd per curiam*, 351 N.C. 330, 524 S.E.2d 568 (2000). Where the language of a contract is "clear and only one reasonable interpretation exists, the courts must enforce the contract as written . . . ." *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978). However, if a contract contains language which is ambiguous, a factual question exists, which must be resolved by the trier of fact. *Crider v. Jones Island Club, Inc.*, 147 N.C. App. 262, 266-67, 554 S.E.2d 863, 866 (2001).

"The trial court's determination of whether the language of a contract is ambiguous is a question of law [and an appellate court's] review of that determination is *de novo*." *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996), *disc. rev. denied*, 346 N.C. 275, 487 S.E.2d 538 (1997) (citations omitted). An ambiguity exists where the "language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties." *Glover v. First Union National Bank*, 109 N.C. App. 451, 456, 428 S.E.2d 206, 209 (1993). Stated differently, a contract is ambiguous when the "writing leaves it uncertain as to what the agreement was . . . ." *Barrett Kays & Assoc. v. Colonial Building Co.*, 129 N.C. App. 525, 528, 500 S.E.2d 108, 111 (1998) (*quoting International Paper Co. v. Corporex Constructors, Inc.*, 96 N.C. App. 312, 317, 385 S.E.2d 553, 556 (1989)). "The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous." *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assoc., Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988); *see also Glover*, 109 N.C. App. at 456, 428 S.E.2d at 209.

Here, Section 2 provides that plaintiff "will *accrue* a bonus of $12,000.00, less deductions" at the end of his first full year of employment. It also provides that the full bonus "will be payable upon the completion of the second year of employment." The ordinary meaning of "accrue" is "[t]o come into existence as a claim that is legally enforceable." *The American Heritage College Dictionary* 9 (3d ed. 1997). Plaintiff maintains the parties use of the word "accrue" demonstrates their intention that he would be entitled to a $12,000.00 bonus upon the completion of his first year of employment. Nonetheless, he concedes that he would not receive the bonus until two years after his start date. In contrast, defendant argues the language in Section 2 demonstrates the parties' intention that plaintiff would only be entitled to a bonus if he completed the full two years of employment. To

accept either of the parties' interpretations would require us to alter the expressed language of Section 2. Thus, we conclude Section 2 is uncertain as to the parties' agreement concerning whether plaintiff would be entitled to a $12,000.00 bonus if he elected to terminate his employment after working only one year. As such, we agree with the trial court's conclusion that the language of Section 2 is ambiguous.

Additionally, the record supports the trial court's finding that the parties intended that plaintiff would be entitled to a $12,000.00 bonus, even if he voluntarily terminated his employment during his second year. Plaintiff testified that during employment negotiations, he informed defendant of his desire for an annual compensation of $80,000.00. Defendant replied that, because of its financial condition, it could meet plaintiff's requirement only if his compensation were structured as an annual salary of $68,000.00 with a $12,000.00 bonus and the parties agreed to defer paying the bonus for two years. Further, defendant's Chief Executive Officer, Louis DeJoy (Mr. DeJoy), testified that he interpreted Section 2 to mean that plaintiff would only be entitled to a $24,000.00 bonus upon his completing two years of employment. However, Mr. DeJoy conceded that if defendant had terminated plaintiff after a full year of employment, plaintiff would have been entitled to receive a $12,000.00 bonus.

Thus, there was sufficient evidence before the trial court to support its finding that the parties intended that, at the end of one year of employment, plaintiff would have a vested right to a bonus of $12,000.00. *See Barnhardt v. City of Kannapolis*, 116 N.C. App. 215, 224-25, 447 S.E.2d 471, 477, *disc. rev. denied*, 338 N.C. 514, 452 S.E.2d 807 (1994) ("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"). We affirm that portion of the trial court's order which awards plaintiff $12,000.00 minus deductions.

II.

[2] In his cross-appeal, plaintiff contends the trial court erred in its conclusion that he was entitled to interest from the date of the judgment rather than from the date of defendant's breach. Pursuant to N.C. Gen. Stat. § 24-5(a) "[i]n an action for breach of contract . . . the amount awarded on the contract bears interest from the date of breach." N.C. Gen. Stat. § 24-5(a) (2001). Although defendant agrees N.C. Gen. Stat. § 24-5(a) is applicable to this case, it maintains that,

because the trial court essentially "rewrote" Section 2 of the Agreement, a breach could not have occurred until the date the judgment was entered.

It is well established that a breach of contract occurs when a party fails to perform a contractual duty which has become absolute. *See Millis Construction Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 510, 358 S.E.2d 566, 569 (1987). Here, the trial court concluded that "plaintiff was entitled to receive a bonus in the amount of $12,000.00, less deductions, on January 6, 1999." Hence, defendant breached the agreement when it failed to pay plaintiff the bonus as of that date. Nevertheless, the trial court also concluded that "defendant had a good faith basis for disputing the plaintiff's claim, and therefore the plaintiff is not entitled to the payment of pre-judgment interest on the amount of damages awarded . . . ." We are unaware of any appellate interpretation which holds that N.C. Gen. Stat. § 24-5(a) has a "good faith" exception. Indeed, the plain language of the statute indicates otherwise. Accordingly, we conclude the trial court erred in determining that plaintiff was not entitled to payment of pre-judgment interest as of 6 January 1999.

Affirmed in part and reversed in part.

Judges McCULLOUGH and BRYANT concur.

ELLEN CAMPEN (FEATHERSTONE), PLAINTIFF v. DOUGLAS FEATHERSTONE, DEFENDANT

No. COA01-816

(Filed 18 June 2002)

Child Support, Custody, and Visitation; Contempt— temporary child custody order—willfulness

The trial court did not err by denying defendant father's motion requesting that plaintiff mother be held in civil contempt under N.C.G.S. § 5A-21(a) of a 1992 child custody order granting defendant visitation privileges because: (1) plaintiff relied on a 1993 ex parte order which is a temporary child custody order governed by N.C.G.S. § 50-13.5(d)(2) and (3), and Chapter 50 does not limit the duration of a temporary custody order to a specific length of time nor does our case law establish a definite period of

viability for temporary custody orders; (2) even assuming arguendo that the ex parte order had expired, the trial court's order declining to hold plaintiff in contempt would still be proper since plaintiff had not willfully disobeyed the 1992 order given her reliance on the 1993 order which on its face purports to be a valid order and which clearly stated that defendant's visitation rights were suspended pending further order of the court; (3) irrespective of which party should appropriately be charged with the responsibility to seek modification of the ex parte order, or where the trial court placed this burden, it remains undisputed that neither party had sought to modify, appeal, vacate, or otherwise change the ex parte order; (4) the opinion of defendant's counsel that the order had expired does not constitute a ruling by the court on the issue and would not require plaintiff to abandon her reliance on what the trial court found to be an order that purports on its face to be valid; and (5) defendant's argument that the trial court should have considered plaintiff's own alleged violation of the 1993 order by allowing defendant's oldest daughter to live with him for a period of time is meritless as evidence of plaintiff's willful defiance of the 1992 custody order.

Appeal by defendant from order entered 25 April 2001 by Judge William C. Lawton in Wake County District Court. Heard in the Court of Appeals 27 March 2002.

Howard, Stallings, From & Hutson, P.A., by Catherine C. McLamb, for plaintiff-appellee.

Manning, Fulton & Skinner, P.A., by Michael S. Harrell, for defendant-appellant.

BIGGS, Judge.

Defendant appeals from an order denying his motion requesting that plaintiff be held in contempt of a 1992 child custody order. For the reasons that follow, we affirm the trial court.

Plaintiff and defendant, formerly married, were divorced in 1991. Three daughters were born of the marriage, and in 1992 an order was entered granting plaintiff sole custody of the children and allowing defendant visitation rights. A year later, in 1993, plaintiff filed a motion to modify the custody order, seeking revocation of defendant's visitation privileges. Her motion was granted on 8 June 1993, in an *ex parte* order. The trial court found that: (1) defendant had

recently been charged with two counts of solicitation to commit murder of plaintiff and of her fiancée, and two counts of solicitation to commit burglary of plaintiff's home and of her family's home; (2) defendant would likely be released on bail; and (3) "[t]he defendant's disregard of and contempt for this Court's authority has been well documented in this cause." The trial court concluded that the welfare of plaintiff and of the children would be jeopardized and threatened if defendant were allowed visitation upon his release from custody, that circumstances justified entry of an *ex parte* order, and that the prior custody order should be modified. Accordingly, the trial court ordered that:

> The prior orders affording the defendant visitation with the parties' minor daughters [are] hereby modified, and the defendant shall have no right of visitation with the daughters pending further order of this Court.

In the fall of 1993, defendant was acquitted of the criminal charges referenced in the 1993 *ex parte* order. From 1993 to 1999, plaintiff denied defendant all visitation with the minor children. In 1999, plaintiff allowed the oldest daughter to reside with defendant during her senior year of high school; however, plaintiff informed defendant that she would continue to comply with the 1993 order that revoked defendant's visitation privileges. In December, 2000, plaintiff denied visitation between defendant and the younger two girls during their Christmas vacation, and stated that her refusal was based upon the 1993 order.

In January, 2001, defendant filed a motion to have plaintiff held in contempt of the visitation provisions in the original 1992 custody order. A show cause order was issued on 4 January 2001. On 25 April 2001, the trial court entered an order holding that plaintiff was not in contempt of the custody order of 1992. The trial court concluded that:

> . . . The Plaintiff has not willfully disobeyed the provisions of that order [1992 custody order] given her reliance upon the June 8, 1993 *ex parte* order terminating the Defendant's rights of visitation pending further orders of the Court. The June 8, 1993 Order on its face purports to be a valid Order. Furthermore, this June 8, 1993 order has never been modified, vacated, appealed or otherwise changed.

Defendant appeals from this order.

Civil contempt is the "[f]ailure to comply with an order of a court. . . ." N.C.G.S. § 5A-21(a) (2001). Proceedings for civil contempt are "initiated by motion of an aggrieved party, . . ." N.C.G.S. § 5A-23(a1) (2001), and a contempt hearing is conducted upon the "order of a judicial official directing the alleged contemnor to appear . . . and show cause why he should not be held in civil contempt." N.C.G.S. § 5A-23(a) (2001). " 'Although the statutes governing civil contempt do not expressly require willful conduct, . . . case law has interpreted the statutes to require an element of willfulness.' " To establish contempt of a court order, " 'the evidence must show that the person was guilty of 'knowledge and stubborn resistance' in order to support a finding of willful disobedience.' " *McKillop v. Onslow County*, 139 N.C. App. 53, 61-62, 532 S.E.2d 594, 600 (2000) (quoting *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 290-91 (1997)). "Willfulness [is]: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Sowers v. Toliver*, 150 N.C. App. 114, 118, — S.E.2d —, — (7 May 2002).

On appeal, "[t]he standard of review for contempt proceedings is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe*, 127 N.C. App. at 709, 493 S.E.2d at 291. Further, "the [trial] judge's findings of fact are conclusive . . . [if] supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Clark v. Clark*, 294 N.C. 554, 571, 243 S.E.2d 129, 139 (1978).

In the instant case, defendant presents three arguments in support of his contention that the trial court erred in failing to hold plaintiff in contempt: (1) the *ex parte* order upon which plaintiff relied had expired; (2) the trial court improperly placed the burden on defendant to vacate, modify or otherwise appeal the order, and; (3) plaintiff had specific notice that the 1993 order upon which she relied had expired. We disagree with defendant's contentions.

Defendant concedes that the trial court was authorized to enter the 1993 *ex parte* order revoking his visitation rights. *See* N.C.G.S. § 50-13.5(d)(2) (2001). However, defendant urges this Court to apply to the *ex parte* order the provisions of N.C.G.S. § 1A-1, Rule 65 (2001), which establish that a temporary restraining order expires automatically after ten days. We decline to do so. The 1993 *ex parte* order is not a temporary restraining order issued pursuant to Rule 65, and we conclude that Rule 65 has no application here. Rather, the

order is a temporary child custody order governed by N.C.G.S. § 50-13.5(d)(2) and (3) (2001). *See Clark*, 294 N.C. at 575-76, 243 S.E.2d at 142 ("[v]isitation privileges are but a lesser degree of custody"). Chapter 50 does not limit the duration of a temporary custody order to a specific length of time, such as ten days; nor does our case law establish a definite period of viability for temporary custody orders. *See generally, Cox v. Cox*, 133 N.C. App. 221, 515 S.E.2d 61 (1999). We conclude, therefore, that the *ex parte* order did not expire automatically upon the passage of ten days.

Moreover, even assuming, *arguendo*, that the *ex parte* order had expired, the trial court's order declining to hold plaintiff in contempt still would be proper. The trial court found that plaintiff had not willfully disobeyed the 1992 order, given that she was relying on the 8 June 1993 order which "on its face purports to be a valid order," and which clearly stated that defendant's visitation rights were suspended "pending further order of the Court." Under these circumstances, plaintiff's reliance upon the 1993 order was justified, and the mere possibility, that a reviewing court might have vacated the 1993 order if defendant had appealed it, does not render plaintiff's reliance upon the 1993 order contemptuous. This assignment of error is overruled.

Defendant next argues that the trial court incorrectly assigned to him the burden of seeking to alter the 1993 order. We conclude that this issue is not germane to the question of whether the trial court erred by declining to hold plaintiff in contempt. Irrespective of which party should appropriately be charged with the responsibility to seek modification of the *ex parte* order, or where the trial court placed this burden, it remains undisputed that neither party had sought to "modify, appeal, vacate, or otherwise change" the *ex parte* order. The order thus remained facially valid, and plaintiff's reliance upon it defensible. "A party is entitled to rely on the plain terms of a court order until such provisions are modified by the court. Even where the terms of a court order are determined to be violative of public policy and thus unenforceable, reliance on the original terms will not support a contempt action prior to a judicial adjudication of such unenforceability." *Turman v. Boleman*, 235 Ga. App. 243, 245, 510 S.E.2d 532, 534 (1998) (citations omitted). This assignment of error is overruled.

Finally, defendant argues that plaintiff's willful defiance of the trial court's 1992 custody order is demonstrated by her continued reliance upon the 1993 *ex parte* order even after she "was informed" that it was invalid. This argument is unavailing; the record establishes

that the validity of the 1993 order has never been addressed by any court, and that it was defendant's attorney who "informed" plaintiff that the order was invalid. The opinion of defendant's counsel, that the order had expired, does not constitute a ruling by the court on the issue, and would not require plaintiff to abandon her reliance on what the trial court found to be "an order that purports on its face to be valid."

We also reject as meritless defendant's argument that the trial court should have considered plaintiff's own alleged violation of the 1993 order, in allowing defendant's oldest daughter to live with him for a period of time, as evidence of her willful defiance of the 1992 custody order.

We conclude that the trial court's findings of fact are supported by the record, and that the findings support its conclusion that, by virtue of her reliance upon the 1993 *ex parte* order, plaintiff was not in contempt of the 1992 custody order. Further, although we recognize the importance of preserving a parent's right to visit with his child, in the case *sub judice*, visitation issues would more appropriately have been addressed through a motion to modify, vacate, or appeal the 1993 order. Accordingly, we affirm the trial court.

Affirmed.

Judges WYNN and McCULLOUGH concur.

LINCOLN COUNTY DEPARTMENT OF SOCIAL SERVICES, PETITIONER v. PAT HOVIS, RESPONDENT

No. COA01-952

(Filed 18 June 2002)

Administrative Law— failure to comply with procedural requirements—final decision

The trial court did not err in an employment termination case by affirming the amended order of the administrative law judge (ALJ) which reinstated respondent to her former position, and awarded her back pay, front pay, and attorney fees after petitioner Department of Social Services failed to show cause why

sanctions should not be imposed and failed to respond to respondent's discovery requests, because: (1) although petitioner contends there is no evidence of any formal discovery requests of any nature ever being made by respondent, there is substantial evidence in the record that shows petitioner had sufficient notice of the order to show cause prior to the hearing; and (2) although petitioner contends the ALJ's authority is advisory in nature and is not a final decision, an order of the ALJ issued under a written prehearing motion granting a party's requested relief for failure of the other party to comply with procedural requirements is a final decision under N.C.G.S. § 150B-36(c)(3).

Appeal by petitioner from orders entered 16 February 2001 and 12 March 2001 by Judge James Lanning in Lincoln County Superior Court. Heard in the Court of Appeals 13 May 2002.

Pendleton & Pendleton, P.A., by Jeffrey A. Taylor, for petitioner-appellant.

Thomas B. Kakassy, P.A., by Thomas B. Kakassy, for respondent-appellee.

TYSON, Judge.

Lincoln County Department of Social Services ("petitioner") appeals from the superior court's orders that affirmed the order of Administrative Law Judge Meg Scott Phipps ("ALJ Phipps").

I. Facts

Petitioner terminated Pat Hovis ("respondent") from her employment on 9 September 1998. Respondent appealed the decision and filed a petition for a contested case hearing with the Office of Administrative Hearings ("OAH") on 7 October 1998. ALJ Phipps issued a scheduling order on 12 October 1998 that set the discovery deadline for 15 February 1999, and noticed a hearing for 1 March 1999.

By letters dated 9 February and 26 February 1999, respondent requested petitioner to comply with discovery requests and with ALJ Phipps' scheduling order. Petitioner failed to respond to respondent's requests. Respondent filed a motion for sanctions against petitioner and for a continuance on 8 March 1999. On 16 March 1999, ALJ Phipps issued an order requiring petitioner to show cause why sanctions should not be imposed and to respond to respondent's discov-

ery requests no later than 2 April 1999. ALJ Phipps received no response from petitioner.

ALJ Phipps issued a final decision which reinstated respondent to her former position, awarded her back pay, front pay, and attorney's fees on 8 April 1999. Respondent then filed a request to supplement judgment with the OAH to determine damages. ALJ Phipps issued a request to petitioner for a response to respondent's motion on 24 May 1999, ordering petitioner to respond by 3 June 1999. Unbeknownst to ALJ Phipps and respondent, petitioner had filed a petition for judicial review pursuant to G.S. § 150B-46 on or about 10 May 1999.

Superior Court Judge Robert P. Johnston reviewed the record, determined it inadequate, and entered an order remanding the case to OAH for clarification. On remand ALJ Phipps was on administrative leave and Chief Administrative Law Judge Julian Mann assigned the case to Administrative Law Judge James L. Conner, II ("ALJ Conner"). On 15 June 2000, ALJ Conner conducted a hearing and signed a protective order allowing respondent to copy petitioner's files only for preparation of respondent's case. On 15 November 2000, ALJ Conner issued supplementary findings and conclusions and an amended final order upholding the decision by ALJ Phipps.

Superior Court Judge James Lanning conducted a second hearing on petitioner's original petition for judicial review on 19 January 2001. The superior court entered an order on 16 February 2001 upholding the decision of ALJ Phipps as supplemented by ALJ Conner. Judge Lanning subsequently entered a corrected and amended order on 12 March 2001. Petitioner appeals.

II. Issues

Petitioner assigns as error the trial court's denial of its requested relief and argues (1) no rational basis existed for the ALJ's amended final order and that it was an abuse of discretion, (2) the ALJ's decision was in excess of statutory authority.

A. Abuse of Discretion

To support its contention, petitioner claims that the "record contains no evidence of any formal discovery requests of any nature ever being made by [respondent]." It also claims that it never received the order to show cause.

The extensive findings of fact in this case demonstrates that a scheduling order set discovery deadlines, a telephone conference call with all parties present discussed discovery, and that respondent reminded petitioner of discovery in two separate letters prior to ALJ Phipps issuing the order to show cause.

ALJ Conner's supplementary findings found that "the certificate of service establishes that it was mailed to the same address to which all other mailings in the matter were sent. Mr. Taylor conceded at the investigatory hearing that he had received all other mailings from this Office in the matter." There is substantial evidence in the record that shows petitioner had sufficient notice of the order to show cause prior to the hearing, and failed to appear. Also, petitioner was informed of pending discovery requests on numerous prior occasions. This assignment of error is overruled.

B. Statutory Authority

Petitioner argues that the ALJ's authority derives from Chapter 126 of the North Carolina General Statutes, is advisory in nature, and is not a final decision. We disagree. The record fails to show where petitioner protested Judge Lanning's authority to review ALJ Phipps' final agency decision on the procedural grounds that petitioner now argues here.

An order of the ALJ issued pursuant to a written pre-hearing motion granting a party's requested relief for failure of the other party to comply with procedural requirements is a final decision under N.C. Gen. Stat. § 150B-36(c)(3) (2001). Petitioner is entitled to immediate judicial review pursuant to G.S. § 150B-43. N.C. Gen. Stat. § 150B-43 (2001). *See Hillis v. Winston-Salem State University*, 144 N.C. App. 441, 443, 549 S.E.2d 556, 557 (2001); *Fearrington v. University of North Carolina at Chapel Hill*, 126 N.C. App. 774, 778, 487 S.E.2d 169, 172 (1997).

The plain language of G.S. § 150B-36(c)(3) grants ALJs the statutory authority to allow a party's requested relief.

> (c) The following decisions made by administrative law judges in contested cases are final decisions appealable directly to superior court under Article 4 of this Chapter:
>
> . . . .
>
> (3) An order entered pursuant to a written prehearing motion that either dismisses the contested case for failure of the peti-

tioner to prosecute or grants the relief requested when a party does not comply with procedural requirements.

N.C. Gen. Stat. § 150B-36(c)(3).

The superior court's scope of review under G.S. § 150B-51(b) includes determining whether the decision of an ALJ contains errors of law, is supported by substantial evidence, and is neither arbitrary nor capricious. N.C. Gen. Stat. § 150B-51(b) (2001). We hold that the trial court did not err by upholding ALJ Phipps' order, as supplemented by ALJ Conner's additional findings of fact. The order of the trial court is affirmed.

Affirmed.

Chief Judge EAGLES and Judge McGEE concur.

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY LEE

No. COA01-742

(Filed 18 June 2002)

Sentencing— habitual felon—robbery with a dangerous weapon—prior record level

The trial court erred in its sentencing of a defendant on his guilty pleas to robbery with a dangerous weapon and habitual felon status as a Class C, Level III offender instead of a Class C, Level II offender, because: (1) N.C.G.S. § 14-7.6 specifically provides that in determining a defendant's prior record level, convictions used to establish a person's status as an habitual felon shall not be used; and (2) by using the five felony convictions in the habitual felon indictment even though N.C.G.S. § 14-7.1 only requires three felony convictions, the State was precluded from using the same five convictions to increase defendant's prior record level points.

Appeal by defendant from judgment entered 4 December 1996 by Judge W. Steven Allen, Sr., in Guilford County Superior Court. Heard in the Court of Appeals 13 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Tracy C. Curtner, for the State.

Richard E. Jester for defendant-appellant.

EAGLES, Chief Judge.

Michael Anthony Lee ("defendant") appeals from the trial court's judgment entered on his guilty pleas to robbery with a dangerous weapon and habitual felon status. Defendant does not challenge the validity of either of these two convictions. On appeal, defendant contends that he was incorrectly sentenced. After careful consideration of the record and briefs, we reverse and remand for resentencing.

On 12 June 1995, defendant, Greg Lee, and Donna Harrelson committed an armed robbery of the Wendover Texaco, Huffman Oil Company, located in Greensboro, North Carolina. Defendant was arrested on 30 August 1995. Defendant's case was set to be tried during the 4 December 1996 Criminal Session of Guilford County Superior Court, however, defendant pled guilty to robbery with a dangerous weapon and habitual felon status prior to trial.

After reviewing defendant's criminal record, the trial court determined that defendant had five prior record level points and was a Class C felon with a Prior Record Level III. Accordingly, the trial court correctly sentenced defendant under the Structured Sentencing Act, G.S. § 15A-1340.10 *et seq.* (applicable to all crimes committed after 1 October 1994), to seventy-five to ninety-nine months imprisonment and entered judgment. We note that the transcript reflects that the trial court "sentence[d] him in the presumptive range;" however, the judgment states that the "factors in mitigation outweigh the factors in aggravation and that a mitigated sentence is justified." On 24 May 2000, defendant filed a petition for writ of certiorari which this Court allowed.

Here, defendant contends that he "was incorrectly sentenced as a Class C, Level III[] offender, when his correctly calculated record shows only Class C, Level II." Specifically, defendant argues that his prior record level was established by using convictions necessary to adjudge him an habitual felon in violation of G.S. § 14-7.6. After careful review, we agree.

Pursuant to G.S. § 14-7.1, "[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state

court in the United States or combination thereof is declared to be an habitual felon." Here, defendant's habitual felon indictment alleged that defendant was an habitual felon and that he "was convicted of *at least three (3)* consecutive felony offenses" including:

> 1) That on or about August 8, 1978, in the Superior Court of Guilford County, the defendant . . . was convicted of the *felonies of Breaking and Entering and Larceny* against the State of North Carolina with the commission date on or about November[]24, 1977. (77CRS065262)
>
> 2) That thereafter, on or about June 3, 1980, in the Superior Court of Guilford County, the defendant . . . was convicted of the *felony offenses of Breaking and Entering and Larceny* against the State of North Carolina with the commission date on or about December 12, 1970. (79CRS015522)
>
> 3) That thereafter, on or about August 14, 1987 in the Superior Court of Guilford County, the defendant . . . was convicted of the *felony offense of Larceny* against the State of North Carolina, with the commission date on or about November 20, 1986. (86CRS-36243)

(Emphasis added). Defendant's prior record level worksheet shows that defendant had previously been convicted of (1) breaking and entering on 8 August 1978 (Class H felony), (2) larceny on 8 August 1978 (Class H felony), (3) breaking and entering on 3 June 1980 (Class H felony), (4) larceny on 3 June 1980 (Class H felony), (5) larceny on 14 August 1987 (Class H felony), (6) attempted common law robbery on 8 August 1978 (Class H felony), and (7) misdemeanor larceny on 4 January 1977.

Even though G.S. § 14-7.1 only requires three felony convictions, the first five convictions above were listed on defendant's habitual felon indictment and were used to establish defendant's status as an habitual felon. G.S. § 14-7.6 specifically provides that in determining a defendant's prior record level, "convictions used to establish a person's status as an habitual felon shall *not* be used." (Emphasis added). G.S. § 14-7.6 "recognizes that there are two independent avenues by which a defendant's sentence may be increased based on the existence of prior convictions. A defendant's prior convictions will either serve to establish a defendant's status as an habitual felon pursuant to G.S. 14-7.1 or to increase a defendant's prior record level pursuant to G.S. 15A-1340.14(b)(1)-(5). G.S. 14-7.6 establishes clearly,

however, that the existence of prior convictions may not be used to increase a defendant's sentence pursuant to both provisions at the same time." *State v. Bethea*, 122 N.C. App. 623, 626, 471 S.E.2d 430, 432 (1996). By using the five felony convictions in the habitual felon indictment, the State was precluded from using the same five convictions to increase defendant's prior record level points pursuant to G.S. § 14-7.6.

Nevertheless, defendant's convictions for Attempted Common Law Robbery on 8 August 1978, Misdemeanor Larceny on 4 January 1977, and Larceny on 3 June 1980, which was also listed on the habitual felon indictment, were used to determine that defendant had five prior record level points. Each felony was worth two points and each misdemeanor was worth one point. *See* G.S. § 15A-1340.14.

We conclude that only defendant's convictions for attempted common law robbery on 8 August 1978 and misdemeanor larceny on 4 January 1977 should have been used to determine defendant's prior record level points. Since under the Structured Sentencing Act each felony was worth two points and each misdemeanor was worth one point, defendant should have been found to have three total prior record level points and Level II status.

In sum, a close review of the record reveals that the trial court used one conviction used to establish defendant's habitual felon status to enhance defendant's sentence in violation of G.S. § 14-7.6. Accordingly, we reverse and remand for resentencing.

We note that our legislature amended the sentencing charts in G.S. § 15A-1340.17 in 1995, and the amendment was applicable to all offenses committed on or after 1 December 1995. *See* 1995 N.C. Sess. Laws ch. 507, § 19.5. Since the crimes here were committed on 12 June 1995, we order the trial court on remand to sentence defendant under the version of G.S. § 15A-1340.17 in effect on that date.

Reversed and remanded.

Judges McGEE and TYSON concur.

DUANE H. DOUGLAS D/B/A DOUGLAS CONSTRUCTION, PLAINTIFF v. MARILYN G. McVICKER AND ELLEN E. KINNEAR, DEFENDANTS

No. COA01-969

(Filed 18 June 2002)

Arbitration and Mediation— enforcement of arbitration clause—waiver

The trial court did not err in a breach of contract action arising out of the construction of defendants' house by denying defendants' motion to dismiss the complaint based on an arbitration clause contained in the contract, because defendants have impliedly waived their right to compel arbitration since: (1) defendants took advantage of and benefitted from a discovery procedure without leave of the arbitrator; and (2) plaintiff was prejudiced in time and cost spent, as well as a lack of reciprocal discovery.

Appeal by defendants from order entered 19 June 2001 by Judge Ronald K. Payne in Mitchell County Superior Court. Heard in the Court of Appeals 25 April 2002.

Ferikes & Bleynat, PLLC, by Edward L. Bleynat, Jr., for plaintiff-appellee.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by W. Perry Fisher, II and Laurie F. Lassiter, for defendants-appellants.

TYSON, Judge.

I. Facts

Marilyn G. McVicker and Ellen E. Kinnear ("defendants") entered into a contract ("Contract") with Duane H. Douglas d/b/a Douglas Construction ("plaintiff") for the construction of defendants' house on or about 31 July 1999. On or about 25 September 2000, plaintiff presented defendants with an invoice in the amount of $40,000.00. Defendants refused to pay the invoice and plaintiff temporarily suspended work pending receipt of payment. Defendants thereafter terminated the contract and directed plaintiff to perform no further work on the house.

Plaintiff filed a claim of lien on 10 October 2000 and filed a complaint against defendants on 13 February 2001 seeking enforcement

of his claim of lien and damages for breach of contract or in the alternative, compensation in *quantum meruit*. On 22 March 2001, defendants filed a motion to dismiss the complaint for lack of subject matter jurisdiction and personal jurisdiction pursuant to Rule 12(b)(1) and 12(b)(2) of the North Carolina Rules of Civil Procedure based on an arbitration clause contained in the Contract.

The trial court denied defendants' motion to dismiss. The trial court concluded that defendants waived the right to compel arbitration after engaging in formal discovery without leave of the arbitrator and that plaintiff was prejudiced. Defendants appeal.

II. Issue

The sole issue presented is whether the trial court properly denied defendants' motion to dismiss.

We note that while an order denying arbitration is interlocutory, it is subject to immediate appeal, "because it involves a substantial right which might be lost if appeal is delayed." *Martin v. Vance*, 133 N.C. App. 116, 119, 514 S.E.2d 306, 308 (1999). Therefore, this appeal is properly before us.

Defendants argue that the trial court erred in concluding that they impliedly waived their right to arbitration, and assert that they did not take action inconsistent with arbitration and that plaintiff failed to show prejudice by defendants' action. We disagree.

The parties to a contract may agree to settle any dispute arising therefrom by way of mandatory arbitration, and such an agreement "shall be valid, enforceable, and irrevocable except with the consent of all the parties[.]" N.C. Gen. Stat. § 1-567.2(a) (1999). Since arbitration is a contractual right, it may be waived. *Cyclone Roofing Co., Inc. v. David M. LaFave Co., Inc.*, 312 N.C. 224, 321 S.E.2d 872 (1984). Whether waiver has occurred is a question of fact. *Id.* at 229, 321 S.E.2d at 876. Factual findings made by the trial court are conclusive on appeal, if supported by the evidence. *Humphries v. City of Jacksonville*, 300 N.C. 186, 187, 265 S.E.2d 189, 190 (1980).

We are mindful that North Carolina has a strong public policy favoring the settlement of disputes by arbitration. "Our Supreme Court has held that where there is any doubt concerning the existence of an arbitration agreement, it should be resolved in favor of arbitration." *Martin*, 133 N.C. App. at 119, 514 S.E.2d at 309 (citing *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 91-92, 414 S.E.2d

30, 32 (1992)). Because North Carolina maintains a strong public policy in favor of arbitration, "courts must closely scrutinize any allegation of waiver of such a favored right." *Cyclone Roofing*, 312 N.C. at 229, 321 S.E.2d at 876 (citations omitted).

Our Supreme Court has also held that the party opposing arbitration must prove prejudice by its adversary's delay or by actions of the adversary which were incompatible with arbitration. *Sturm v. Schamens*, 99 N.C. App. 207, 208, 392 S.E.2d 432, 433 (1990) (citing *Servomation Corp. v. Hickory Constr. Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986); *Cyclone Roofing, supra.*). "A party may be prejudiced by his adversary's delay in seeking arbitration if (1) it is forced to bear the expense of a long trial, (2) it loses helpful evidence, (3) it takes steps in litigation to its detriment or expends significant amounts of money on the litigation, or (4) its opponent makes use of judicial discovery procedures not available in arbitration." *Servomation*, 316 N.C. at 544, 342 S.E.2d at 854.

At bar, the trial court concluded: (1) that defendants had taken advantage of judicial processes not available in arbitration, (2) that defendants benefitted from conducting discovery, (3) that plaintiff expended a significant amount of time and costs in responding to his prejudice, and (4) that defendants waived their right to compel arbitration in taking action inconsistent with their motion to dismiss based upon an arbitration clause. In support of its conclusions, the trial court found that, on or about 17 April 2001, defendants engaged in formal discovery by serving plaintiff a Request for Production of Documents. The trial court further found that pursuant to N.C. Gen. Stat. § 1-567.8 (the Uniform Arbitration Act) and the rules of the American Arbitration Association, a party may engage in discovery only by leave of the arbitrator.

Defendants had in their possession a copy of the Contract which they attached to their motion to dismiss filed 22 March 2001. Defendants' Request for Production of Documents, served 17 April 2001, did not relate to the arbitration clause in the Contract. *See Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 260-61, 401 S.E.2d 822, 826 (1991) ("plaintiff took advantage of a discovery procedure not available for arbitration to gain pre-trial access to defendants' evidence regarding his substantive claims"); *cf. Servomation*, 316 N.C. at 545, 342 S.E.2d at 854-55 (plaintiff not prejudiced in answering numerous interrogatories posed by defendant when sizeable portion of interrogatories were directed toward securing infor-

mation relating to arbitration clause in contract). The documentation requested by defendants and timely provided by plaintiff was approximately two and one-half to three inches thick.

We conclude that defendants took advantage of and benefitted from a discovery procedure without leave of the arbitrator and that plaintiff was prejudiced in time and cost spent, as well as a lack of reciprocal discovery.

III. Conclusion

We hold that the trial court's findings of fact are supported by the evidence and the conclusions of law are supported by the findings of fact. We affirm the judgment below and find that defendants have impliedly waived their right to compel arbitration.

Affirmed.

Judges MARTIN and THOMAS concur.

STEPHEN HUDSON, SR., PLAINTIFF v. WILLIAM R. McKENZIE, JR., SALLY McKENZIE, AND, WILLIAM R. McKENZIE, III, DEFENDANTS

No. COA01-1052

(Filed 18 June 2002)

Appeal and Error— appealability—partial summary judgment

A plaintiff's appeal from an order granting summary judgment in favor of all defendants on plaintiff's first claim for abuse of process, granting summary judgment in favor of one defendant on plaintiff's claim for libel per se and second claim for abuse of process, and dismissing two defendants from the action but retaining jurisdiction over the action pending final resolution of plaintiff's claim for malicious prosecution against the remaining defendant, is dismissed as an appeal from an interlocutory order, because: (1) there has been no final judgment as to all the parties or as to all of plaintiff's claims; (2) the trial court did not certify the order under N.C.G.S. § 1A-1, Rule 54(b); and (3) plaintiff presents no argument in his brief to the Court of Appeals to support acceptance of this appeal.

Appeal by plaintiff from order filed 30 May 2001 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 4 June 2002.

Cunningham Crump & Cunningham, PLLC, by R. Flint Crump, for plaintiff-appellant.

Barron & Berry, L.L.P., by Vance Barron, Jr., for defendant-appellees.

GREENE, Judge.

Stephen Hudson, Sr. (Plaintiff) appeals from an order filed 30 May 2001 granting summary judgment in favor of: William R. McKenzie, Jr. (McKenzie), Sally McKenzie, and William R. McKenzie, III on Plaintiff's first claim for abuse of process; and McKenzie on Plaintiff's claim for libel *per se* and second claim for abuse of process. After granting partial summary judgment, the trial court dismissed Sally McKenzie and William R. McKenzie, III from the action but retained jurisdiction over the action pending final resolution of Plaintiff's claim for malicious prosecution against McKenzie.

The dispositive issue is whether Plaintiff's appeal must be dismissed as interlocutory.

Although the parties have not raised the interlocutory nature of the appeal, "it is appropriately raised by this Court *sua sponte*." *Abe v. Westview Capital, L.C.*, 130 N.C. App. 332, 334, 502 S.E.2d 879, 881 (1998). An interlocutory order is one that "does not determine the entire controversy between all the parties." *Id.* Generally, a party may not immediately appeal an interlocutory order. *Id.* A party, however, may immediately appeal an interlocutory order if: (1) the trial court has entered a final order as to one or more but fewer than all of the claims or parties *and* has certified in the order, pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b), that there is no just reason to delay an appeal, *id.*; N.C.G.S. § 1A-1, Rule 54(b) (2001); or (2) the denial of an immediate appeal would affect a substantial right, *Abe*, 130 N.C. App. at 334, 502 S.E.2d at 881. In either situation, "it is the appellant's burden to present argument in his brief to this Court to support acceptance of the appeal, as it 'is not the duty of this Court to construct arguments for or find support for appellant's right to appeal from an interlocutory order.' " *Id.* (quoting *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)). Thus, if the appeal is based on a Rule 54(b) certification, the appellant must

include a statement in his brief to this Court indicating "there has been a final judgment as to one or more but fewer than all of the claims or parties and that there has been a certification by the trial court that there is no just reason for delay." N.C.R. App. P. 28(b)(4). Likewise, if the appeal is based on a substantial right, the appellant must include a statement in his brief to this Court "contain[ing] sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *Id.*

In this case, the appeal is interlocutory as there has been no final judgment as to all the parties or as to all of Plaintiff's claims. While the trial court's order does constitute a final adjudication of the claims against Sally McKenzie and William R. McKenzie, III and of some of the claims against McKenzie, the trial court did not certify the order pursuant to Rule 54(b). Plaintiff presents no argument in his brief to this Court to support acceptance of this appeal. Accordingly, Plaintiff's appeal must be dismissed.

Dismissed.

Judges HUDSON and BIGGS concur.

STATE OF NORTH CAROLINA v. KENNETH SOLOMON O'CONNOR

No. COA01-921

(Filed 18 June 2002)

Evidence— expert opinion testimony—credibility of sexual abuse victim

The trial court committed plain error in a first-degree statutory sexual offense case by distributing an exhibit to the jury which had an expert's opinion that a sexual abuse victim's disclosure to her that defendant "sodomized and performed oral sex on him was credible," because: (1) the admission constitutes impermissible expert testimony on the credibility of the minor victim's testimony; and (2) there was no physical evidence of abuse and the State's case was almost entirely dependent on the minor victim's credibility with the jury.

Appeal by defendant from judgments dated 1 February 2001 by Judge J. Marlene Hyatt in Buncombe County Superior Court. Heard in the Court of Appeals 14 May 2002.

Attorney General Roy Cooper, by Assistant Attorneys General Joyce S. Rutledge and Anne M. Middleton, for the State.

Elizabeth G. McCrodden for defendant-appellant.

GREENE, Judge.

Kenneth Solomon O'Connor (Defendant) appeals judgments dated 1 February 2001 entered consistent with jury verdicts finding him guilty of two counts of first-degree statutory sexual offenses.

The evidence at trial was in conflict. The State presented evidence that J.M., a 14-year-old young man, was on multiple occasions sexually assaulted by Defendant. J.M. testified he had been sexually assaulted by Defendant, and several others testified that J.M. had told them he had been sexually assaulted by Defendant. Although Defendant did not testify at trial, a statement he had previously given to the Buncombe County Sheriff's Department was admitted into evidence. In that statement, Defendant denied any sexual contact with J.M. Dr. Cindy Brown (Dr. Brown), an expert in the diagnosis and treatment of child abuse, testified she examined J.M. and found no physical indications he had been sexually assaulted. Dr. Brown did state J.M. told her he had been sexually assaulted on three different occasions. Her findings and conclusions were contained in a written report, marked as State's Exhibit 8 (the Exhibit), admitted into evidence without objection. The Exhibit was passed to the jury. The following was a part of the Exhibit:

> [J.M.] was referred for evaluation of alleged sexual abuse. [J.M.] was interviewed by our usual protocol. He disclosed that [Defendant] sodomized and performed oral sex on him. [J.M.] also disclosed that he performed oral sex on [Defendant]. [J.M.] says these incidents happened three times and that he was told if he told anyone, [Defendant] would kill him and his family. It is my impression that [J.M.'s] disclosure was credible.

The dispositive issue is whether it is plain error for a trial court to distribute an exhibit to the jury which has an expert's opinion that a sexual abuse victim's disclosure is credible.

An expert may not testify that a child victim of abuse "is believable, credible, or telling the truth" because this violates the teachings of N.C. Gen. Stat. § 8C-1, Rules 405 and 608(a). *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988); *State v. Aguallo*, 318 N.C. 590, 598, 350 S.E.2d 76, 81 (1986). The expert may, however, testify with respect to "the credibility of children in general." *State v. Oliver*, 85 N.C. App. 1, 12, 354 S.E.2d 527, 534, *disc. review denied*, 320 N.C. 174, 358 S.E.2d 64 (1987). An expert is permitted to testify "as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (*per curiam*). An expert may also, *if she observes physical evidence of sexual abuse*, express an opinion that the child has been sexually abused. *Id.* at 266-67, 559 S.E.2d at 789.

In this case, it was error to admit into evidence that portion of Dr. Brown's written report wherein she states J.M.'s disclosure to her that Defendant "sodomized and performed oral sex on him . . . was credible."[1] The admission of the Exhibit was error because it constitutes impermissible expert testimony on the credibility of J.M.'s testimony. Morever, because there was no physical evidence of abuse and the State's case was almost entirely dependent on J.M.'s credibility with the jury, the admission of Dr. Brown's statement was plain error. *See State v. Hannon*, 118 N.C. App. 448, 451, 455 S.E.2d 494, 496 (1995) (admission of an expert's opinion regarding a sexual abuse victim's credibility is "plain error when the State's case depends largely on the prosecuting witness's credibility"); *see also State v. Holloway*, 82 N.C. App. 586, 587-88, 347 S.E.2d 72, 74 (1986).

New trial.

Judges HUDSON and BIGGS concur.

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1. Although Dr. Brown did not testify in court concerning the credibility of J.M.'s disclosure, her opinion regarding such credibility was nonetheless in evidence as it was included as a part of an exhibit viewed by the jury. There is no reason to distinguish between an expert's opinion presented through oral testimony and an expert's opinion expressed in written form.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 4 June 2002

ADAMS v. BANK UNITED OF TX. FSB No. 01-773	Wake (00CVS21)	Affirmed
ANDREWS v. ADMINISTRATIVE OFFICE OF THE COURTS No. 01-551	Wake (00CVS850)	Affirmed
BURCH v. BURCH No. 01-873	Gaston (97CVD2108)	Dismissed
COOK v. GIURINTANO No. 01-571	Guilford (00CVD4800)	Affirmed in part; reversed and remanded in part
COOPER v. COOPER No. 01-938	Guilford (98CVD11311)	Affirmed in part, vacated in part, and remanded
COUNTY OF BUNCOMBE v. N.C. CODE OFFICIALS QUALIFICATION BD. No. 01-292	Buncombe (00CVS4773)	Affirmed
HOUSE v. STONE No. 01-533	Johnston (99CVS1591)	Reversed and remanded for additional findings consistent with this opinion
IN RE MASTERS No. 01-705	Cumberland (00J175) (00J176)	Affirmed
JONES v. DAVIS No. 01-425	Surry (99CVS311)	Reversed and remanded
KELLY v. WEYERHAEUSER CO. No. 01-947	Lee (00CVS1030)	Appeal dismissed and remanded
MOSS v. TOWN OF KERNERSVILLE No. 01-194	Forsyth (00CVS3235)	Affirmed
NORRIS v. NORRIS No. 01-1034	Duplin (97CVD1073)	Affirmed
POWELL v. QUINN No. 01-846	Wake (99CVS10539)	Affirmed
SIMPSON v. McCONNELL No. 01-115	Onslow (00CVS1443)	Affirmed in part, reversed in part and remanded

STATE v. ARMISTEAD No. 01-1137	Pender (00CRS51383) (00CRS51384)	No error
STATE v. BECTON No. 01-954	Wake (99CRS5323) (99CRS5324) (99CRS5325) (99CRS63111)	No error
STATE v. BROADNAX No. 01-1135	Rockingham (97CRS6763) (97CRS12486) (98CRS5402) (98CRS5403) (98CRS5404) (98CRS5405) (98CRS5406) (98CRS5407) (98CRS5408) (98CRS5409) (98CRS5707) (00CRS1241) (00CRS1242) (00CRS1243) (00CRS1244)	Appeal dismissed
STATE v. CAMP No. 01-1111	Lincoln (00CRS5500) (00CRS5501)	No error
STATE v. CARVER No. 01-1100	Haywood (00CRS5639) (00CRS5686) (00CRS7294)	No error
STATE v. CRAVER No. 01-1258	Davidson (00CRS135)	No error
STATE v. ELLENBERG No. 01-655	Mecklenburg (00CRS11845)	No error
STATE v. HARRELL No. 01-1144	Hertford (00CRS2886) (00CRS3636)	No error
STATE v. HARRY No. 01-165	Mecklenburg (98CRS46654) (99CRS121831) (99CRS15388) (99CRS15387)	No error

STATE v. HOBSON No. 01-974	Guilford (00CRS23679) (00CRS83048)	No error in part, vacated in part and remanded in part for resentencing
STATE v. HOLLEY No. 01-971	Washington (00CRS69)	No error
STATE v. JOHNSON No. 01-823	New Hanover (99CRS22558) (99CRS22559)	No error
STATE v. MARTINEZ No. 01-883	Catawba (00CRS6302)	Affirmed
STATE v. McCLAIN No. 01-1206	Rowan (00CRS52112)	No error
STATE v. MONTEITH No. 01-516	Mecklenburg (98CRS44944) (98CRS44945) (98CRS44946) (98CRS44953) (98CRS44954) (98CRS44955) (98CRS50660) (98CRS50661) (98CRS50662) (98CRS50663) (98CRS50664) (98CRS50665) (98CRS50666) (98CRS50667) (98CRS50668) (98CRS50669) (98CRS50670) (98CRS50677) (98CRS50678) (98CRS50679) (98CRS50680) (99CRS117653) (99CRS117654) (99CRS117655) (99CRS117656) (00CRS111117) (00CRS111122) (00CRS111126) (00CRS111129)	No error
STATE v. MURRAY No. 01-994	Buncombe (98CRS10548) (98CRS10549) (98CRS60418)	Affirmed

STATE v. NEELY No. 01-1102	Mecklenburg (00CRS100441) (00CRS100442)	No error
STATE v. NORRIS No. 01-1186	Gaston (00CRS56888)	No error
STATE v. PETERSON No. 01-1403	Cumberland (98CRS73246) (98CRS73434) (98CRS73435) (98CRS73666) (99CRS53654)	Remanded for resentencing
STATE v. POWELL No. 01-1015	Durham (99CRS70976) (00CRS3192)	No error
STATE v. RILEY No. 01-659	Durham (99CRS65167) (99CRS67965)	Reversed and remanded
STATE v. SATTERFIELD No. 01-1014	Cabarrus (00CRS8794)	Dismissed
STATE v. SHOFFNER No. 01-1099	Randolph (99CRS6015) (99CRS6016) (99CRS6213) (99CRS6214) (99CRS6215)	No error
STATE v. STEWART No. 01-858	Johnston (00CRS50731)	No error
STATE v. VICK No. 01-807	Buncombe (97CRS137) (97CRS138) (97CRS52890)	Affirmed
STATE v. WATERS No. 01-976	Gaston (00CRS5842) (00CRS51324)	Vacated
STATE v. WATSON No. 01-806	Durham (00CRS51902) (00CRS51771)	No error
STATE v. WHITAKER No. 01-1064	Alleghany (00CRS935)	No error
STATE v. WOOD No. 01-933	Johnston (99CRS51965)	No error
STATE ex rel. GRIFFIN v. BEASLEY No. 01-927	Craven (00CVS158)	Affirmed

STYLE CREST HOME PRODS. v. DEPENDABLE HOUSING, INC. No. 01-907	Person (98CVD473)	Affirmed

FILED 18 JUNE 2002

ESTATE OF SIZEMORE v. KIMBLETON No. 01-1095	Catawba (00CVS1596)	Reversed
ICARD v. ICARD No. 01-577	Scotland (99CVD46)	Affirmed
IN RE ROCHA No. 01-1039	Cumberland (98J346) (98J347)	Affirmed
JOHNSON v. JOHNSON No. 01-893	Mecklenburg (00CVS19811)	Dismissed
OLD WELL WATER, INC. v. COLLEGIATE DISTRIB., INC. No. 01-981	Mecklenburg (98CVS17238)	No error
ST. CLAIR v. ST. CLAIR No. 01-934	Iredell (99CVD1146)	Affirmed in part, vacated in part and remanded
STATE v. BAKER No. 01-710	Pender (99CRS50662)	No error
STATE v. CAULEY No. 00-1507	Dare (99CRS6049) (99CRS6050) (99CRS6051) (00CRS520) (00CRS1696)	No error
STATE v. HAYES No. 01-653	Richmond (99CRS5273)	No error
STATE v. LAYTON No. 01-329	Orange (93CRS53519)	Vacated
STATE v. MAHAN No. 01-761	Davidson (00CRS182)	Reversed and remanded for new trial
STATE v. SMITH No. 01-444	Wake (99CRS26582)	No error
STATE v. STANLY No. 01-651	Forsyth (99CRS37337) (99CRS37338) (99CRS37340) (99CRS49952) (99CRS49955)	No error

STATE v. STROUD No. 01-673	Rutherford (99CRS6412) (99CRS7367)	No error
STATE v. WILLOUGHBY No. 01-899	Union (00CRS1662) (00CRS1663) (00CRS5008)	No error
STATE v. WOODEN No. 01-896	Pitt (00CRS53354)	No error
STELL v. STELL No. 01-788	Wake (00CVD6)	Affirmed
STUBBS v. NICHOLAS HOLDINGS, L.P. No. 01-1248	New Hanover (00CVS2673)	Affirmed

APPENDIX

N.C. COURT OF APPEALS MEDIATION

N.C. COURT OF APPEALS MEDIATION

The N.C. Supreme Court has authorized the N.C. Court of Appeals to undertake a mediation program. Appellate mediation will offer participants an opportunity to voluntarily submit their appeal to the Court of Appeals for a candid evaluation by an informed, neutral person in a confidential setting. The focus will be on encouraging settlement and, thus, reaching an agreeable disposition of the appeal. All civil cases, with the exception of termination of parental rights and juvenile cases, are eligible for mediation. A case will not, however, be assigned for mediation unless all the parties to the appeal have agreed to the mediation.

If a case is eligible for mediation and the parties agree to the mediation, the parties have a choice of mediators. They may choose to use a current Court of Appeals judge, trained as a mediator, who will be selected and assigned by the Chief Judge of the Court of Appeals, or employ a mediator of their choice, including an Emergency Recalled Court of Appeals judge (Recalled Judge), trained as a mediator. If the parties elect to use a current Court of Appeals judge-mediator, that person will serve without a fee to the parties and thereafter shall not participate, in any capacity, in the hearing of the appeal. If the parties elect to employ a Recalled Judge, that person will serve for a fee of $300.00 per day and thereafter shall not participate, in any capacity, in the hearing of the appeal. If the parties elect to employ someone other than a Recalled Judge, that person's fee will be set pursuant to agreement between the parties and the mediator. The fee set for the mediation will be payable by the parties and will be due and payable upon completion of the mediation.

When the appeal in a case eligible for mediation is docketed (beginning 1 August 2002), the Clerk of the Court of Appeals shall furnish a "Consent to Appellate Mediation" form to counsel for the parties and to any party proceeding *pro se*. This form is to be executed by counsel or the party proceeding *pro se* indicating consent or lack of consent to mediate the appeal. **This form shall be served on the other parties to the appeal and filed with the Clerk of the Court of Appeals within 20 days after the appeal is docketed.** If all the parties consent to mediation and agree for the mediation to be conducted by a current judge-mediator, an early date for mediation will be set by the Court of Appeals Administrative Counsel (Administrative Counsel). If all the parties consent to mediation and all or some of the parties desire to employ a mediator, they shall agree on a mediator and that mediator shall promptly set and conduct the mediation.

The mediation process (election, assignment, and mediation) shall not delay the printing of the record on appeal and shall not mandate a suspension of the time requirements for the filing of the briefs in accordance with Rule 13 of the Rules of Appellate Procedure. Upon request of the mediator, the parties to the appeal shall each supply the mediator, at least 2 days before the scheduled mediation, with a "Mediation Statement." This brief statement, not to exceed 4 pages in length, shall include: (1) a brief recitation of the circumstances giving rise to the litigation; (2) the history of any efforts to settle the case, including any offers or demands; (3) a summary of the parties' legal positions; (4) the present posture of the appeal, including any matters pending in the lower tribunal or in any related litigation; and (5) any suggested solutions for the settlement of the appeal. This statement shall not be filed in the office of the Clerk of the Court of Appeals.

Counsel and parties must be present for the mediation unless excused by the mediator. The mediation, if conducted by a current judge-mediator, shall be held in the Court of Appeals Building in Raleigh unless the parties and their mediator otherwise agree. Privately employed mediators may use the Court of Appeals Building for the mediation, however, use of the building by a current judge-mediator will have scheduling priority. Administrative Counsel will be responsible for scheduling the use of the Court of Appeals building for mediation proceedings. Telephonic mediation may be used if agreed to by the parties and the mediator.

All mediation sessions, including the "Mediation Statement" are *confidential.* Information provided during the course of the mediation shall not be shared with anyone, including the Court of Appeals judges before whom the appeal is calendared, and shall not become part of the record on appeal. Similarly, in their briefs, during oral arguments, or in any other communication to the Court, the parties, counsel, and the mediator are prohibited from disclosing any statements, discussions, or action taken in the course of mediation except as necessary to inform the Court that mediation was successful. If the mediation is successful, the appellant must so notify the Court and move to withdraw the appeal.

NORTH CAROLINA COURT OF APPEALS
CONSENT TO APPELLATE MEDIATION FORM

Case: / Case Title:

Mailed _____

Please check one of the following:

____ I consent to mediation and request a current Court of Appeals judge-mediator be assigned to serve as the mediator.*

____ I consent to mediation and will employ an Emergency Recalled Court of Appeals Judge (Recalled Judge) who has been trained in mediation and agree to pay the costs associated with the services of that mediator. (The Court of Appeals Administrative Counsel has the names and addresses of the Recalled Judges.)*

____ I consent to mediation and will employ a private mediator and pay the costs associated with the services of that person.*

____ I do not consent to mediation.

_____
Type or print name of law firm (if applicable)

_____ _____
Print name and date Signature

____ I am a pro se party (representing myself)

_____
Telephone number and e-mail address

I certify that I have served a copy of this "Consent to Appellate Mediation Form" on all other parties to this appeal. This the ____ day of _____, 20___.

_____
Signature

For further inquiries concerning the mediation process, please contact the Court of Appeals Administrative Counsel at (919) 733-3561. Please mail completed form to:
Office of the Clerk, North Carolina Court of Appeals, P.O. Box 888, Raleigh, NC 27602
or by FAX to (919) 733-8003.

***If all the parties do not agree to the same type of mediator (i.e. Court of Appeals Judge, Recalled Judge, or Private Mediator) the case will NOT be mediated.**

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CRIMINAL LAW—Continued

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Punitive damages—underlying claims—one wrongly submitted—An award of punitive damages was set aside where the court instructed the jury that it could award punitives if the malice was related to one or both of two slanders, but one of the slanders was erroneously submitted. Moreover, even though defendant elected to recover punitives instead of tripled compensatory damages, the trial court may have determined the issue of unfair and deceptive trade practices based upon the improperly submitted statements. **Ausley v. Bishop, 56.**

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Driver's failure to answer interrogatories—sanction—negligence established—effect on employer—In an action to recover for personal injuries received in a collision between plaintiff's pickup truck and a forklift driven by the individual defendant and owned by defendant employer, the trial court did not err in sanctioning the forklift driver for failing to answer interrogatories, both as an individual and as an employee and agent of defendant employer, by ruling that the issue of the forklift driver's negligence was established in accordance with plaintiff's claim, thus preventing the issue of defendant employer's negligence to be submitted to the jury, where defendant employer admitted in its answer that the forklift driver was its employee and was operating the forklift in the course of his employment, and the driver's negligence was thus imputed to defendant employer. **Edwards v. Cero, 551.**

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EVIDENCE—Continued

SCHOOLS AND EDUCATION—Continued

board may consider hearsay which provides background information helpful to understanding the matter before the board. **Smith v. Richmond Cty. Bd. of Educ., 291.**

Principal dismissal—continuance denied—The Richmond Cty. Board of Education did not err by denying a motion to continue a hearing on whether a principal would be dismissed where petitioner had over two months to obtain evidence; he was represented by at least four attorneys during this time; he chose to request a hearing before the Board; his first continuance was granted; his next motion for a continuance did not identify particular evidence he was unable to obtain or provide any explanation for not being able to obtain the evidence; petitioner's acknowledgement that a particular affidavit could have been obtained quickly undermines his argument; and petitioner submitted other affidavits to the same effect. **Smith v. Richmond Cty. Bd. of Educ., 291.**

Principal dismissal—evidence submitted before hearing—A principal dismissed by the Richmond Cty. School Board failed to show how the Board was biased by exposure to the superintendent's documentary evidence prior to the hearing where the superintendent sent the evidence to each member of the Board 14 days before the hearing; the same evidence was ultimately presented to the Board; the Board admitted and considered all of petitioner's documentary evidence even though it had not been provided to the superintendent three days before the hearing, as required by statute; there was no indication that the individual members of the Board entered the hearing with a commitment to decide the case against petitioner; and there was no reason to presume that the members of the Board would be unable to refrain from reaching a conclusion merely because of lapse of time between exposure to the superintendent's evidence and petitioner's evidence. **Smith v. Richmond Cty. Bd. of Educ., 291.**

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Principal dismissal—request for Board hearing—case manager waived—A school board did not err by denying a principal's motion to have his case heard by a case manager where the principal had requested a hearing before the board, as he was permitted to do by N.C.G.S. § 115C-325(h). By the same statute, a request for a hearing before the board forfeits the right to a hearing by a case manager. **Smith v. Richmond Cty. Bd. of Educ., 291.**

Principal dismissal—superintendent's opinion—admission not improper—The submission of a school superintendent's personal beliefs about whether a principal should be dismissed did not amount to the admission or consideration of improper evidence where the superintendent's beliefs were implied in his recommendation of dismissal. **Smith v. Richmond Cty. Bd. of Educ., 291.**

SEARCH AND SEIZURE

Entry into residence—simultaneous announcement of identity and purpose—The trial court did not err in a narcotics prosecution by denying defendant's motion to suppress evidence seized in a search of his residence where an officer announced his identity and purpose as he entered an unlocked door. The

SEARCH AND SEIZURE—Continued

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Trafficking in marijuana—possession with intent to sell and deliver marijuana—motion to suppress—warrantless search—The trial court did not err in a trafficking in marijuana and possession with intent to sell and deliver marijuana case by denying defendant's motion to suppress even though defendant contends he was subjected to a warrantless search in violation of his Fourth Amendment rights because the officers had probable cause to believe that defendant and his accomplice were committing a felony in their presence based on an informant's information and the officers' independent verification of that information. **State v. Martinez, 364.**

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Habitual felon—robbery with a dangerous weapon—prior record level—The trial court erred in its sentencing of a defendant on his guilty pleas to robbery with a dangerous weapon and habitual felon status as a Class C, Level III offender instead of a Class C, Level II offender. **State v. Lee, 701.**

Social services documents—not provided to defendant—no abuse of discretion—The trial court did not abuse its discretion when sentencing defendant for first-degree statutory rape, incest, and other crimes by considering DSS records which were not provided to the defense where defendant had filed a motion for production of confidential records that required that the court review confidential DSS documents in camera, the court disclosed any arguably exculpatory evidence to both parties, and defendant requested at sentencing a mitigating factor which was rebutted by the records. Defendant was given ample opportunity to present his evidence, including any that showed error in the

TRIALS

Judge's expression of opinion—trial without jury—Although plaintiff contends the trial court erred by entering the child support order in its entirety when the trial judge's comments at the beginning and end of the evidence allegedly demonstrated bias and prejudice against plaintiff and resulted in an unfair hearing, there was no jury present to be influenced and the judge merely reacted to the evidence. **Sowers v. Toliver, 114.**

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Verdict—average of four valuations—evidence of compromise insufficient—The trial court did not err by denying defendant's motion for a new trial where plaintiff alleged that the jury reached a compromise or quotient verdict, but the only indication of an unlawful verdict was that the jury's dollar amount approximated the average of the valuations presented by the four experts. **Piedmont Triad Reg'l Water Auth. v. Lamb, 594.**

UNFAIR TRADE PRACTICES

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UNFAIR TRADE PRACTICES—Continued

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Insurance policy—unfair claims settlement practices in insurance industry—An insurer may violate N.C.G.S. § 75-1.1 separate and apart from a violation of Chapter 58 and a plaintiff need not prove a violation of Chapter 58 in order to recover for unfair and deceptive trade practices. **Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co., 231.**

Insurer misconduct—aggravating circumstance—The trial court did not err by concluding that plaintiff insured established misconduct on the part of defendant insurance company or an aggravating circumstance necessary to support an unfair and deceptive trade practices claim where the jury's verdict that defendant improperly determined it would deny coverage, misrepresented the nature of its investigation to plaintiff, and improperly cited an exclusion as its basis to send a reservation of rights letter supports a conclusion that defendant's acts were unethical and involved an unfair assertion of its power. **Country Club of Johnston Cty., Inc. v. U.S. Fidelity & Guar. Co., 231.**

Payment of commercial real estate commission—evidence of contract, not unfair practice—Defendants' motion for a directed verdict was properly granted on an unfair and deceptive trade practices claim which arose from a dispute over payment of a commercial real estate commission for a transaction which closed after plaintiff left defendant's employment. The actions of defendants, if true, amount to a breach of contract instead of an unfair or deceptive trade practice. **Horack v. Southern Real Estate Co., 305.**

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Local hospital authority—multi-county system—inherently local—Venue was properly changed from Robeson to Cumberland County in a medical malpractice action against the Cumberland County Hospital System because nonprofit hospital authorities created under N.C.G.S. § 131E-20 are closely connected with local government, and actions against public officers are required by N.C.G.S. § 1-77 to be tried in the county where the cause arose. Although plaintiff contends that defendant is not an inherently public agency under N.C.G.S. § 1-77(2) because it operates in multiple counties, there are no territorial limitations applicable to municipal hospitals under the Municipal Hospital Act and, under *Coats v. Hospital*, 264 N.C. 332, municipal or quasi-municipal corporations

WORKERS' COMPENSATION—Continued

dorsal column stimulator to control plaintiff's pain, the Industrial Commission did not abuse its discretion. **Bryson v. Phil Cline Trucking, 653.**

Back injury—date treatment sought—orthopaedic clinic rather than triage area—typographical error—The Industrial Commission did not err in focusing on the date that plaintiff was seen in the orthopaedic clinic of a hospital for a back injury rather than the date on which plaintiff was seen in the triage area of the hospital, and the Commission's use of the incorrect year was a typographical error which was not a ground for reversal. **Sheehan v. Perry M. Alexander Constr. Co., 506.**

Back injury—new vending machine route—same duties, greater work load—It was noted that the Industrial Commission in a workers' compensation action could have concluded that plaintiff suffered an injury by accident which arose out of and in the course of employment where she injured her back on a new vending machine route which did not alter her duties but which included longer hours and increased lifting and straining. Even though the new requirements may have been part of plaintiff's normal job description, plaintiff was not merely carrying out her duties in the usual way. **Ruffin v. Compass Grp. USA, 480.**

Back injury—symptoms in neck and shoulder—There was competent evidence in a workers' compensation action to support the Industrial Commission's findings that plaintiff suffered a compensable back injury where the symptoms were apparent in the neck and shoulder but the injury was to spinal discs, which are indisputably the "back." **Ruffin v. Compass Grp. USA, 480.**

Consideration of evidence—determination of credibility—The Industrial Commission in a workers' compensation action on remand from the Court of Appeals considered the evidence appropriately where the Commission determined that plaintiff's account of his injury was not credible and decided not to rely on the portion of the medical evidence based on plaintiff's account. The Commission may not discount or disregard evidence, but may choose not to believe evidence after considering it. **Sheehan v. Perry M. Alexander Constr. Co., 506.**

Credibility—deputy commissioner's determination—reversed by full Commission—The Industrial Commission did not err in a workers' compensation action by reversing a deputy commissioner's credibility determination without making specific findings of fact about why it was reversing the determination. The full Commission is the sole judge of the weight and credibility of the evidence; appellate courts are limited to reviewing whether any competent evidence supports the Commission's findings and whether the findings support the conclusions. **Arp v. Parkdale Mills, Inc., 266.**

Credibility—doctor's testimony—history given by plaintiff—The Industrial Commission did not act arbitrarily or contrary to reason in concluding that plaintiff failed to carry his burden of proving that his back injury is compensable where the only record evidence of how plaintiff injured his back consists of the account given by plaintiff and the statements of others, including doctors, that are based on plaintiff's account. Once the Commission determined that plaintiff's account of his injury was not credible, it acted within its authority in refusing to give much weight to a doctor's history which was based upon the history sup-

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