

NORTH CAROLINA
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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

PHILIP A. R. STATON, ET AL., PLAINTIFFS V. JERRI RUSSELL, F/K/A JERRI RUSSELL
BRAME, ET AL., DEFENDANTS, CROSS-CLAIMANTS, AND THIRD-PARTY DEFENDANTS

PHILIP A. R. STATON, ET AL., PLAINTIFFS V. CENTURA BANK, ET AL., DEFENDANTS AND
THIRD-PARTY DEFENDANTS

PIEDMONT INSTITUTE OF PAIN MANAGEMENT, ET AL., PLAINTIFFS V. CENTURA
BANK, ET AL., DEFENDANTS AND THIRD-PARTY DEFENDANTS

INGEBORG STATON, MERCEDES STATON, ET AL., PLAINTIFFS V. CENTURA BANK, ET
AL., DEFENDANTS

INGEBORG STATON, MERCEDES STATON, ET AL., PLAINTIFFS V. THE PIEDMONT
INSTITUTE OF PAIN MANAGEMENT, DEFENDANTS

No. COA 00-1253

(Filed 18 June 2002)

1. Injunction—antisuit—jurisdiction—out-of-state residents

The trial court did not err in a complex action involving trusts, a stock sale, and money held in North Carolina by issuing an antisuit injunction prohibiting the prosecution of a Florida declaratory judgment claim in the same matter. Although a court of one state may not restrain an action in another state by an order directed to a court of that state, it may enjoin the parties from proceeding in another state if it has acquired jurisdiction. The appellants in this case subjected themselves to the North Carolina judicial system when they chose North Carolina as the forum for their actions.

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2. Injunction—antisuit—sufficiency of grounds

Sufficient equitable grounds existed for an antisuit injunction where a Florida action was filed which was duplicative of North Carolina cases; the Florida action was vexatious and harassing; and appellants' continued prosecution of the Florida action threatened the North Carolina court's jurisdiction over issues that affect the rights of parties not represented in the North Carolina system.

3. Injunction—antisuit—Florida declaratory judgment action—specific property in North Carolina

The trial court possessed the equitable power to enjoin appellants from pursuing a declaratory judgment action in Florida where appellants sought to define the validity of documents and trusts and the right to money held in those trusts in North Carolina. When a suit deals with specific property, a court is authorized to enjoin a party from bringing a new action in another court where the other action has the potential to delay or interfere with adjudication of rights affecting the property.

4. Injunction—antisuit—findings—form and substance

The trial court's findings succinctly stated the reasons for the issuance of an antisuit injunction as required by Rules 65 and 52 of the North Carolina Rules of Civil Procedure, and the findings were sufficient to invoke the court's power to issue the order under Rule 65 and N.C.G.S. § 1-485.

5. Injunction—antisuit—security—not required

The trial court did not err by issuing an antisuit injunction without requiring that security be posted where appellants failed to seek any security deposit as a condition precedent to entry of the antisuit injunction; appellants failed to make any showing of how they would be harmed by issuance of the injunction; and it was implicit from the trial court's findings that one purpose of the antisuit injunction was to preserve the court's jurisdiction over the interpretation of documents involved in the cases.

6. Injunction—antisuit—findings—sufficiency

The trial court did not abuse its discretion in its findings when issuing an antisuit injunction where sufficient evidence was adduced to support each of the findings and the findings supported the conclusions.

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Appeal by Ingeborg Staton, Mercedes Staton, the 1991 Revocable Living Trust of Ingeborg Staton, and the 1983 Revocable Living Trust of Mercedes Staton from order entered 18 July 2000 by Judge Thomas W. Seay, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 18 February 2002.

Davis & Harwell, P.A., by Fred R. Harwell, Jr., for plaintiff-appellants.

Bell, Davis & Pitt, P.A., by William K. Davis, James R. Fox, Kevin G. Williams, and Stephen M. Russell, for plaintiff-appellee, Philip Staton.

EAGLES, Chief Judge.

Appellants, Ingeborg Staton, Mercedes Staton, the 1991 Revocable Living Trust of Ingeborg Staton, and the 1983 Revocable Living Trust of Mercedes Staton, and appellee, Philip Staton, are parties in three of five complex litigation actions arising from a dispute that began in March of 1996. All five North Carolina lawsuits have been consolidated for discovery and other pretrial proceedings (the North Carolina cases or consolidated cases). Appellants and appellee are not adverse parties in any of the North Carolina cases. Philip Staton is a citizen of the United States of America and maintains a residence, among other places, in Annandale, Virginia. Ingeborg Staton is a resident citizen of Colombia, South America, and a non-resident citizen of the United States of America. Mercedes Staton is a resident citizen of Columbia, South America. The revocable trust appellants are Florida trusts but are connected with North Carolina because the trust assets were deposited into a North Carolina bank by wire transfer from a Florida bank.

In 1987, appellants and appellee (collectively, the Statons) gained control of a significant block of Panamco stock that had been held in trust for their benefit. Tom Brame, Jerri Brame, and the accounting firm of Hirsh, Berney & Company assisted in the management of these assets. In December 1988, the Statons, the Brames, and attorney Archibald Scales entered into a memorandum of understanding giving the Brames and Hirsh a de facto power of attorney to advise and act on behalf of the Statons. In 1991, appellee signed an appointment of agent and power of attorney to the Brames and T&J Ventures for himself. Appellee also signed an appointment of agent to the Brames and T&J Ventures for himself in his capacity as co-trustee of the Ingeborg Staton Revocable Living Trust. In March 1992, Mercedes and Ingeborg

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Staton each gave appellee a general power of attorney. In September 1992, in their capacities as trustees of revocable trusts, Mercedes and Ingeborg Staton both signed general powers of attorney naming appellee as attorney-in-fact. Appellee was appointed co-trustee of the Revocable Living Trust of Ingeborg Staton and the Revocable Living Trust of Mercedes Staton.

In 1993, the Statons agreed to sell the Panamco stock. In June 1993, an irrevocable appointment of sellers' agency was executed that granted to appellee the authority to act on behalf of Ingeborg and Mercedes Staton and their trusts in matters relating to the sale of the Panamco stock and the proceeds. The proceeds of the sale were deposited into an account at Centura Bank in Winston-Salem, North Carolina. In his affidavit dated 10 January 2000, Philip Staton alleged that the Brames engaged in a scheme whereby the funds were wrongfully put into an account over which the Brames had ownership so that the Brames could convert and defraud the Statons of their assets.

In early November 1993, the Brames and Centura Bank established the Staton Foundation with \$2 million from the stock sale proceeds. Thereafter, Tom Brame asked appellee to sign three identical durable powers of attorney for Ingeborg, Mercedes, and appellee. Brame claimed that Centura Bank needed this authority to be able to continue managing the Statons' money. On 24 November 1993, appellee, as attorney-in-fact for Ingeborg and Mercedes, signed these powers of attorney. Subsequently, using stock sale proceeds, Tom Brame established four charitable lead unitrusts (CLUTS) having a combined total value of \$18 million.

In March 1996, after learning about these trusts and the Staton Foundation, appellee filed suit against the Brames in Forsyth County Superior Court in Winston-Salem and obtained an injunction preventing the Brames from further dissipating the Statons' assets. Other suits were subsequently filed in Forsyth County. Appellee and appellants claimed that creation of the CLUTS and the Staton Foundation was not authorized and was the fruit of fraud and/or mistake. At issue in these cases is the validity and interpretation of documents used or relied upon to create the CLUTS and the Staton Foundation.

On 22 October 1999, appellants filed a civil action against appellee in the Circuit Court of Hillsborough County, Florida. In this Florida action, appellants sought a declaratory judgment with respect to certain powers of attorney, trust indentures, and other documents

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executed in Florida between 1988 and 1992. On 10 January 2000, appellee moved in the Circuit Court of Hillsborough County, Florida, to dismiss the Florida declaratory judgment action. The Florida trial court denied appellee's motion on 3 April 2000.

On 5 June 2000, appellee moved in the Superior Court of Forsyth County, North Carolina, to enjoin appellants from prosecuting appellants' Florida declaratory judgment action. The Honorable Thomas W. Seay, Jr., granted appellee's motion for an injunction (anti-suit injunction) on 18 July 2000. The trial court ordered:

[Respondents] are hereby enjoined from any further pursuit of, or participation whatsoever in, the declaratory judgment action filed by the Respondents as Plaintiffs against the Petitioner as Defendant, in the Circuit Court of the Thirteenth Judicial Circuit of the State of Florida, Hillsboro County, and captioned Mercedes Staton, et al. v. Philip A. R. Staton, Case Number 99-8556, Division C (the "Florida Action"), save and except, the Respondents may take the appropriate steps necessary to dismiss the Florida Action without being in violation of this Order.

In support of its order, Judge Seay made the following findings:

1. This Court has jurisdiction over Respondents. While Respondents are not residents of North Carolina, they are also not residents of any other state of the United States, but are residents of Columbia, South America. They have filed Complaints and sought relief from the Superior Court of Forsyth County, North Carolina, have consented to its jurisdiction over them and have availed themselves of its processes and procedures for over four (4) years. They are willing participants in these Consolidated Cases and have thereby submitted themselves to the jurisdiction of this Court;

2. The Florida Action was filed in October, 1999, over three (3) years after the Respondents filed Complaints in and consented to the jurisdiction of the Superior Courts of the State of North Carolina. Respondents reaffirmed their choice of North Carolina courts [sic] jurisdiction as late as March 25, 1999, when they filed an additional cause of action against Piedmont Institute of Pain Management, et al.;

3. Depositions have been taken in the Consolidated Cases of approximately fifty-five (55) individuals, generating over one hundred (100) volumes of testimony and over eight hundred (800)

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exhibits. Over 1,500 pleadings, motions, or other filings have been made in the Consolidated Cases;

4. The Florida Action is duplicative of and serves no useful purpose not already being served in the Consolidated Cases, inasmuch as the issues pending in the Florida Action are also issues before this Court in the Consolidated Cases, in which all parties appear. The Florida Action multiplies litigation, duplicates issues of fact and law and results in an unnecessary and wasteful use of Court resources and litigant resources. The continued prosecution of the Florida Action threatens to additionally delay the orderly disposition of the Consolidated Cases;

5. Equity demands that the Respondents be enjoined from further prosecuting the Florida Action, and it is within the inherent power of this Court to enter this Order to protect the rights and interests of all of the parties involved in the Consolidated Cases, many of whom are not parties in the Florida Action and whose rights will not be represented in the Florida Action;

6. Equity demands the issuance of this Order. The Order is consistent with the law of the State of North Carolina and necessary to avoid the unnecessary expenditure of time, resources, and costs resulting from the simultaneous maintenance of the Consolidated Cases and the Florida Action;

7. The issuance of this Order seeks to prevent any further depletion of this Court's or any other court's time and resources;

8. This Order not only provides the relief sought by the Petitioner and other moving parties, but also serves the best interests of the Respondents by ensuring that their assets are not being further expended in the unnecessary and duplicative Florida Action;

9. Based upon the foregoing findings, the Court further finds that this Order is justified under the inherent power of the Court, N.C. Gen. Stat. § 1-485 and N.C. Gen. Stat. § 1A-1, Rule 65, in that there is a reasonable apprehension of irreparable loss of time and financial resources unless injunctive relief is granted and such relief is necessary to protect the rights of all parties to the Consolidated Cases.

In this appeal, appellants contend that the Superior Court erred by enjoining appellants from pursuing their declaratory judgment

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lawsuit in Florida. Appellee contends that the appeal should be dismissed because (1) the trial court refused appellants' request for certification under Rule 54(b) of the North Carolina Rules of Civil Procedure and (2) appellants have failed to show that the trial court's order affects a substantial right that would be lost without immediate interlocutory review.

While we agree with appellee's contention that appellants have failed to show that the trial court's antisuit injunction affects a substantial right that would be lost without immediate interlocutory review, it is our view that the administration of justice will be best served by treating the appeal as a writ of certiorari pursuant to our discretionary authority under Rule 21(a) of the North Carolina Rules of Appellate Procedure. *See* N.C.G.S. § 7A-32(c); *Bailey v. Gooding*, 301 N.C. 205, 210-11, 270 S.E.2d 431, 434 (1980) (recognized "the discretionary authority of the Court of Appeals to treat a purported appeal as a petition for writ of certiorari and to issue its writ in order to consider the appeal"); *Bumgarner v. Tomblin*, 63 N.C. App. 636, 640, 306 S.E.2d 178, 182 (1983). Accordingly, we turn to the substantive issues raised by appellants.

In support of their contention that the trial court's injunction was entered in error, appellants argue: (1) the trial court erred by issuing an antisuit injunction against appellants because appellants are not residents of North Carolina; (2) the trial court erred because the grounds upon which the injunction was based are not sufficient as a matter of law to justify enjoining even North Carolina residents from prosecuting similar or identical litigation simultaneously in other states; (3) the trial court erred by issuing an antisuit injunction against appellants because the Supreme Court of the United States has held that the simultaneous prosecution of the same case in two different jurisdictions is proper and does not affect jurisdiction of either court to hear the matter; (4) the Superior Court's antisuit injunction violates the requirements of Rules 52, 58, and 65 of the North Carolina Rules of Civil Procedure; (5) the trial court erred under Rule 65 of the North Carolina Rules of Civil Procedure because the trial court did not consider whether security should be required; and (6) the Superior Court abused its discretion by failing to make adequate findings of fact as required by Rule 52 of the North Carolina Rules of Civil Procedure and by failing to state conclusions of law.

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I.

[1] Appellants first argue that the trial court erred by entering the antisuit injunction because appellants are not residents of North Carolina. Appellants rely on *Wierse v. Thomas*, 145 N.C. 261, 59 S.E. 58 (1907), as support for the contention that in North Carolina an antisuit injunction will not lie unless the party against whom the injunction is issued is a North Carolina resident. In *Wierse* our Supreme Court held that:

[T]he courts of the resident creditor have power in proper cases to issue an injunction, not in restraint of the action of the court of another State, but operating *in personam* on the creditor and compelling him to obey the laws of his own Commonwealth. . . . In exercising this authority, courts proceed, not upon any claim of right to control or stay proceedings in the courts of another State or country, but upon the ground that the person on whom the restraining order is made resides within the jurisdiction and in the power of the court issuing it.

Id. at 264-65, 59 S.E. at 58-59 (citation omitted) (internal quotations omitted).

Appellee cogently notes that *Wierse* and the other cases relied upon by appellants predate the modern concept of personal jurisdiction that was articulated by the Supreme Court in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 90 L. Ed. 95 (1945). In *International Shoe*, the Supreme Court stated that “due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Id.* at 316, 90 L. Ed. at 102 (internal quotations omitted).

North Carolina cases decided in the post *International Shoe* era do not support appellants’ argument for a residency-based requirement for an antisuit injunction. In *Childress v. Johnson Motor Lines, Inc.*, 235 N.C. 522, 531, 70 S.E.2d 558, 564 (1952), our Supreme Court stated that “[i]t is fundamental that a court of one state may not restrain the prosecution of an action in a court of another state by order or decree directed to the court or any of its officers.” The Court then recited the “well established” rule regarding antisuit injunctions:

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[A] court . . . which has acquired jurisdiction of the parties, has power, on proper cause shown, to enjoin them from proceeding with an action in another state, . . . , particularly where such parties are citizens or residents of the state, or with respect to a controversy between the same parties of which it obtained jurisdiction prior to the foreign court.

Id. (citation omitted) (internal quotations omitted). In *Amos v. Southern Ry. Co.*, 237 N.C. 714, 719, 75 S.E.2d 908, 912 (1953), the Court, citing *Childress*, stated that “when a resident or nonresident invokes the jurisdiction of our courts by instituting an action therein, the court may prescribe the terms upon which [the party] may be allowed to prosecute such an action.” Furthermore, in *Wallace Butts Ins. Agency, Inc. v. Runge*, 68 N.C. App. 196, 201-02, 314 S.E.2d 293, 297 (1997), this Court held that:

The law of North Carolina provides that an injunction may issue against a litigant when an attempt is made to subsequently prosecute an identical action in an effort to subvert the rulings of the courts of this State and subject the defendant to unreasonable and vexatious burdens.

Here, though appellants are not residents of North Carolina, they availed themselves of the jurisdiction of our courts when they filed their claims. Appellants chose the courts of North Carolina as the forum in which to pursue their claims. Upon choosing North Carolina as the forum for their actions, appellants subjected themselves to both the benefits and burdens of our judicial system. Accordingly, we hold that the trial court here had the jurisdictional power to issue an antisuit injunction against appellants.

II.

[2] Appellants next argue that the grounds upon which the antisuit injunction was based are not sufficient as a matter of law to support enjoining even North Carolina residents from prosecuting similar or identical litigation simultaneously in other states. Appellants argue that the injunction issued by Judge Seay is similar to the injunction reversed by our Supreme Court in *Evans v. Morrow*, 234 N.C. 600, 68 S.E.2d 258 (1951). In *Evans*, the Court noted that “[a] court of equity will not restrain a citizen from invoking the aid of the courts in another state simply because it may be somewhat more convenient or somewhat less expensive to his adversary to compel him to carry on his litigation at home.” *Id.* at 605, 68 S.E.2d at 261. The *Evans* Court

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also rejected differing rules of practice and procedure and distrust of the competency of the foreign court as grounds for the issuance of an antisuit injunction. *Id.*, 68 S.E.2d at 262.

Here, Judge Seay found additional reasons, not seen in *Evans*, that demanded the equitable remedy of issuance of an antisuit injunction. In finding number four, Judge Seay found that:

The Florida Action is duplicative of and serves no useful purpose not already being served in the Consolidated Cases, inasmuch as the issues pending in the Florida Action are also issues before this Court in the Consolidated Cases, in which all parties appear. The Florida Action multiplies litigation, duplicates issues of fact and law and results in an unnecessary and wasteful use of Court resources and litigant resources. The continued prosecution of the Florida Action threatens to additionally delay the orderly disposition of the Consolidated Cases.

In finding of fact number five, Judge Seay found that equity demanded the issuance of the antisuit injunction in order to “protect the rights and interests of all of the parties involved in the Consolidated Cases, many of whom are not parties in the Florida Action and whose rights will not be represented in the Florida Action.”

In Texas, antisuit injunctions have been recognized as appropriate “(1) to address a threat to the court’s jurisdiction; (2) to prevent the evasion of important public policy; (3) to prevent a multiplicity of suits; or (4) to protect a party from vexatious or harassing litigation.” *Golden Rule Ins. Co v. Harper*, 925 S.W.2d 649, 651 (Tex. 1996). In *Harper*, the Texas Supreme Court also noted that “[t]he party seeking the injunction must show that a clear equity demands the injunction.” *Id.*

From Judge Seay’s order, it is apparent that the trial court found: (1) the Florida action was duplicative of the North Carolina cases; (2) the Florida action was vexatious and harassing in that it “results in an unnecessary and wasteful use of Court resources and litigant resources;” and (3) appellants’ continued prosecution of the Florida action threatened our trial court’s jurisdiction over issues that affect the rights of parties not represented in the Florida action. Based on these and other findings in Judge Seay’s order, we hold that sufficient equitable grounds existed to support the trial court’s antisuit injunction.

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III.

[3] Appellants next argue that simultaneous prosecution of the same case in two different jurisdictions is proper and does not affect the jurisdiction of either court to hear the matter. Appellants point to *Kline v. Burke Constr. Co.*, 260 U.S. 226, 67 L. Ed. 226 (1922). In *Kline*, the Supreme Court of the United States distinguished *in rem* cases, where antisuit injunctions are necessary to protect the court's jurisdiction over "the thing," from *in personam* cases where antisuit injunctions are not needed to protect the court's jurisdiction over a controversy. The Court explained that:

[A] controversy is not a thing, and a controversy over a mere question of personal liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending.

Id. at 230, 67 L. Ed. at 230.

Unlike the situation in *Kline*, appellants here seek declaratory judgments defining the validity of documents and trusts and the right to property, i.e. the money held in those trusts in North Carolina. When a suit deals with specific property, a court is authorized to enjoin a party from bringing a new action in another court where that other action has the potential to delay or interfere with adjudication of rights affecting such property. *See Kline*, 260 U.S. 226, 67 L. Ed. 226. Accordingly, for these reasons and the reasons stated in Section II of this opinion, we hold that the trial court possessed the equitable power to enjoin appellants from pursuing the declaratory judgment action in Florida.

IV.

[4] Appellants argue that the antisuit injunction violates the requirements of Rules 52, 58, and 65 of the North Carolina Rules of Civil Procedure. Rule 65(d) requires that an injunction "shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts enjoined or restrained" N.C. R. Civ. P. 65(d). Rule 52(a)(2) states that "findings of fact and conclusions of law are necessary on the granting or denying of a preliminary injunction or any other provisional remedy only when required by statute expressly relating to such remedy or requested by a party." N.C. R. Civ. P. 52(a)(2).

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Appellants summarily argue that the trial court's injunction does not comply in form or substance with the requirements of Rules 52 and 65. Appellants assert that because of this noncompliance, the injunction is not a proper judgment under Rule 58 of the Rules of Civil Procedure. *See generally* N.C. R. Civ. P. 58.

After review of the form and substance of the injunctive order, we conclude that the order adequately set forth findings that succinctly stated the reasons for the issuance of the injunction as required by Rules 65 and 52 of the North Carolina Rules of Civil Procedure. In addition, the order made findings sufficient to invoke the court's power to issue the order under Rule 65 and N.C.G.S. § 1-485. Accordingly, we hold that this assignment of error fails.

V.

[5] Appellants contend that the trial court erred by issuing its injunction without considering whether appellee must post any security. The injunction was issued without requiring that any security be posted.

To preserve an issue for review, North Carolina Rule of Appellate Procedure 10(b)(1) states:

In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

North Carolina Rule of Civil Procedure 65(c) states:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

In *Keith v. Day*, 60 N.C. App. 559, 561, 299 S.E.2d 296, 297 (1983), we noted that "it is well-settled that no security is required when a preliminary injunction is issued to preserve the trial court's jurisdiction over the subject matter involved." The *Keith* Court concluded that the "as the court deems proper" language of Rule 65(c) "means that there are some instances when it is proper for no security to be required of a party seeking injunctive relief." *Id.* at 562, 299 S.E.2d at

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298. In *Keith*, this Court settled the rule for the requirement of security as follows:

[T]he [trial court] has power not only to set the amount of security but to dispense with any security requirement whatsoever where the restraint will do the defendant “no material damage,” [citations omitted] where there “has been no proof of likelihood of harm,” [citations omitted] and where the applicant for equitable relief has “considerable assets and [is] . . . able to respond in damages if [defendant] does suffer damages by reason of [a wrongful] injunction” [citations omitted].

Id. (quoting *Federal Prescription Services, Inc. v. American Pharmaceutical Assoc.*, 636 F.2d 755, 759 (D.C. Cir. 1980).

In *Huff v. Huff*, 69 N.C. App. 447, 317 S.E.2d 65 (1984), this Court considered the propriety of an injunction prohibiting a husband from pursuing an absolute divorce action in Florida during the pendency of the action for divorce from bed and board brought by the wife in Haywood County, North Carolina. In affirming the trial court’s *ex parte* order enjoining the husband from pursuing the Florida action, Judge (later Justice) Whichard wrote, “[i]t is at least implicit in the findings and conclusions that one purpose of the restraining order was to preserve the court’s jurisdiction over the subject matter involved.” *Id.* at 454, 317 S.E.2d at 69.

After careful review of the trial court’s order, the record, and the parties’ briefs, we conclude that: (1) in the court below, appellants failed to seek any security deposit as a condition precedent to entry of the antisuit injunction; (2) appellants failed to make any showing regarding how appellants would be harmed by the issuance of the injunction; and (3) it is implicit from the trial court’s findings that one purpose of the antisuit injunction is to preserve the court’s jurisdiction over the interpretation of documents involved in the consolidated cases.

Accordingly, we conclude that the assignment of error based upon the trial court issuing the antisuit injunction without requiring appellee to provide security fails.

VI.

[6] Appellants’ final argument is that the trial court abused its discretion by failing to make adequate findings of fact and failing to state

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conclusions of law as required by Rule 52 of the North Carolina Rules of Civil Procedure.

Appellants first argue that the trial court erred by finding in paragraph one that appellants had “consented to [the Superior Court’s] jurisdiction over them and have availed themselves of its processes and procedures for over four (4) years.” Appellants next argue that the trial court erred by finding in paragraph four that the Florida lawsuit “is duplicative of and serves no useful purpose not already being served in the Consolidated Cases, inasmuch as the issues pending in the Florida Action are also issues before this Court in the Consolidated Cases, in which all parties appear.” Appellants also argue that the trial court erred by finding in paragraph five that “[e]quity demands that the Respondents [appellants] be enjoined from further prosecuting the Florida Action, and it is within the inherent power of this Court to enter this Order to protect the rights and interests of all of the parties involved in the Consolidated Cases, many of whom are not parties in the Florida Action.” Finally, appellants argue that the trial court’s findings in paragraphs six, seven, and eight also constitute reversible error.

After careful review of the record, we conclude that the trial court did not abuse its discretion in making the findings that appellants now challenge on appeal. Sufficient evidence was adduced to support each of the trial court’s findings of fact. The factual findings made by the trial court support the trial court’s conclusions of law. The trial court’s conclusions are consistent with the law of North Carolina. Accordingly, we hold that entry of the antisuit injunction was proper. Appellants’ final argument fails.

For the foregoing reasons we conclude that the trial court did not err by enjoining appellants from pursuing their declaratory judgment action in Florida. The trial court acted within its jurisdiction and inherent authority to (1) protect its jurisdiction over subject matter before it; (2) prevent the prosecution of a duplicative action; (3) protect the rights of those parties not represented in the Florida action; and (4) prevent appellants from prosecuting a vexatious and harassing action that would result in the unnecessary and wasteful use of court and litigant resources. Accordingly, we affirm.

Affirmed.

Judges McCULLOUGH and BIGGS concur.

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NELLY LEATHERWOOD, INDIVIDUALLY, NELLY LEATHERWOOD AND JAMES DAVID COOPER, GUARDIAN AD LITEMS FOR AMELIA JANENE COOPER, AND NELLY LEATHERWOOD AND JAMES DAVID COOPER, INDIVIDUALLY, PLAINTIFFS V. THOMAS M. EHLINGER, M.D., DEFENDANT

No. COA01-728

(Filed 18 June 2002)

1. Medical Malpractice— standard of care—injury during birth—directed verdict

The trial court erred by granting a directed verdict for defendant in a medical malpractice action arising from a birth on the ground that plaintiffs had been unable to establish breach of the applicable standard of care where plaintiffs' expert concluded that defendant had not properly performed the procedures utilized in resolving this emergency and that defendant had used excessive traction. Although the expert was unable to articulate precisely the amount of lateral traction he considered excessive, the record shows that he visually demonstrated his testimony with models and illustrated the amount of pressure to be applied.

2. Medical Malpractice— standard of care—obstetrics—familiarity of expert

Defendant was not entitled to a directed verdict in a medical malpractice action on the ground that plaintiffs failed to establish the applicable standard of care in Asheville where plaintiffs' expert specifically testified that he had knowledge of the standards of practice among obstetricians with similar training and experience in Asheville and similar communities; he had attended rounds as a medical student in the hospital in which this delivery occurred; he had practiced in communities similar in size to Asheville; and he specifically testified that Asheville and other communities of that size practice the same national standards with respect to this condition.

3. Medical Malpractice— injury during birth—proximate cause—sufficiency of evidence

The plaintiffs in a medical malpractice action arising from an injury during birth presented sufficient evidence as to proximate cause to overcome a motion for directed verdict where defendant contended that the testimony of plaintiffs' expert was not supported by the relevant medical literature, but the record shows

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that the expert reviewed the medical records and deposition testimony and based his opinion as to the cause of the injury on his training and extensive experience with these injuries. His testimony clearly demonstrates that his opinion was based on more than speculation and was sufficiently reliable to be submitted to the jury.

4. Medical Malpractice—obstetrician—qualified as expert

The trial court did not err in a medical malpractice action arising from a birth by denying defendant's motion to strike the testimony of plaintiffs' expert on the ground that plaintiffs' expert was not of the same or similar specialty as defendant and did not actively practice as an obstetrician in the year prior to the delivery in question. The record shows that both doctors belong to the American College of Obstetrics and Gynecology; the expert, a perinatologist, testified that all perinatologists are first obstetrician gynecologists; that perinatology, like obstetrics, includes the management of this injury; and that he continued to practice as an obstetrician gynecologist with the majority of his time in the year preceding this birth being devoted to the clinical practice of obstetrics and gynecology.

Appeal by plaintiffs from judgment entered 22 December 2000 by Judge James R. Vosburgh in Swain County Superior Court. Heard in the Court of Appeals 13 March 2002.

Long, Parker, Warren & Jones, P.A., by Steve Warren, for plaintiffs-appellants.

Dean & Gibson, L.L.P., by Rodney A. Dean and John W. Ong, for defendant-appellee.

WALKER, Judge.

Plaintiffs Nelly Leatherwood (Ms. Leatherwood) and James David Cooper (Mr. Cooper), individually and as guardian ad litem for Amelia Janene Cooper (Amelia), filed this action on 18 May 1998 alleging defendant was negligent in the medical care and treatment he provided during the delivery of Amelia. Defendant denied liability and a trial commenced on 27 November 2000. At the end of plaintiffs' evidence, defendant moved to strike the testimony of plaintiffs' medical expert, Dr. Stephen Jones (Dr. Jones), and for a directed verdict. The trial court denied both of these motions. At the close of all the evidence, defendant again moved to strike Dr. Jones' testimony and for

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a directed verdict. The trial court denied the motion to strike but granted defendant a directed verdict on 22 December 2000.

The pertinent facts viewed in a light favorable to plaintiffs are summarized as follows: Defendant is a physician practicing as an obstetrician gynecologist at the Asheville Women's Medical Center (AWMC). In February 1992, Ms. Leatherwood became pregnant with Amelia and began prenatal treatment with AWMC under the care of Drs. Hill and Callahan. During this time, Ms. Leatherwood was diagnosed with gestational diabetes. Additionally, thirty-six weeks into pregnancy, her baby's fetal weight was estimated at eight and one-half pounds.

On the morning of 12 October 1992, Ms. Leatherwood experienced preliminary stages of labor and was admitted to a birthing room at Memorial Mission Hospital in Asheville. With her were her mother, Merceidith Bacon (Ms. Bacon), and Mr. Cooper. The nurse present, Janet McKendrick (Nurse McKendrick), took Ms. Leatherwood's vital signs and attached a fetal monitor across her stomach.

After her labor began to intensify, defendant entered the birthing room and informed Ms. Leatherwood that Dr. Hill was unavailable and that he would be delivering her baby. This was the first contact Ms. Leatherwood had with defendant. According to Ms. Leatherwood and Ms. Bacon, at no time did defendant make any effort to estimate the baby's fetal weight. Ms. Leatherwood then started to push but experienced difficulty with the delivery. To assist her, defendant instructed Ms. Bacon to insert mineral oil inside Ms. Leatherwood's vagina. When this failed to produce Amelia's head, defendant directed Ms. Bacon and Nurse McKendrick to stand on either side of Ms. Leatherwood "pulling [her] knees back against her chest." This maneuver also proved unsuccessful so defendant used a vacuum extractor to deliver Amelia's head.

Although Amelia's head had been produced, Ms. Leatherwood was unable at this point to deliver the rest of Amelia's body. Defendant determined that this was due to shoulder dystocia; a condition in which the baby's shoulder is impacted behind the mother's pubic bone thereby preventing delivery of the rest of the body. To correct the problem, defendant first applied "lateral traction" on Amelia's head attempting to roll her shoulder. According to Ms. Bacon's testimony, defendant pulled "the baby's head downward toward the floor in a left to right . . . motion . . . several times . . .

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tugging very hard.” He next pulled “the baby’s head which [was] facing [Ms. Leatherwood’s] left interior thigh . . . away from that thigh in a backwards motion, with the head going back towards the interior right thigh.” Finally, as recounted by Ms. Bacon, defendant grasped Amelia’s head “[bringing it] toward the pubic bone in a right to left motion . . . twisting it upward.”

Despite these efforts, Ms. Leatherwood still was unable to deliver the rest of Amelia’s body. Nurse McKendrick then straddled Ms. Leatherwood and placed her hands on the upper portion of Ms. Leatherwood’s stomach. Defendant next made an incision in Ms. Leatherwood’s vaginal opening. Thereafter, with each ensuing contraction Nurse McKendrick applied pressure to Ms. Leatherwood’s pelvic area while defendant continued to manipulate the baby’s head. Following two or three contractions, the rest of Amelia’s body was delivered.

The hospital’s medical records noted that Amelia weighed nine pounds, fifteen ounces and that she had limited function in her left arm. Subsequent medical examinations and exploratory surgery determined that she had a complete tear of the C8-T1 nerve root in her left brachial plexus—a nerve structure located in the neck and armpit. Amelia was diagnosed as having Erb’s Palsy—a condition whereby she cannot elevate her left arm at her shoulder and is unable to externally rotate her left arm. She has difficulty performing routine tasks at home and school without assistance.

I.

Plaintiffs first contend the trial court erred in granting defendant’s motion for a directed verdict. A motion for a directed verdict requires the trial court to determine whether the evidence, when considered in the light most favorable to the non-movant, was sufficient for submission to the jury. *Smith v. Wal-Mart Stores, Inc.*, 128 N.C. App. 282, 285, 495 S.E.2d 149, 151 (1998) (quoting *Kelly v. International Harvester Co.*, 278 N.C. 153, 157, 179 S.E.2d 396, 398 (1971)). “The grounds for the motion must be specifically stated . . . and an appellate court will not consider grounds other than those stated to the trial court in reviewing the trial court’s ruling on the motion.” *Stacy v. Jedco Const., Inc.*, 119 N.C. App. 115, 123, 457 S.E.2d 875, 881, *disc. rev. denied*, 341 N.C. 421, 461 S.E.2d 761 (1995) (citing *La Grenade v. Gordon*, 60 N.C. App. 650, 299 S.E.2d 809 (1983) and *Feibus & Co. v. Godley Construction Co.*, 301 N.C. 294, 271 S.E.2d 385 (1980)). All evidentiary conflicts are resolved in favor

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of the non-movant. See *Merrick v. Peterson*, 143 N.C. App. 656, 661, 548 S.E.2d 171, 175, *disc. rev. denied*, 354 N.C. 364, 556 S.E.2d 572 (2001).

In negligence cases, a directed verdict is seldom appropriate in view of the fact that the issue of whether a defendant breached the applicable standard of care is normally a factual question which the jury must answer. See *Barber v. Presbyterian Hosp.*, 147 N.C. App. 86, 88, 555 S.E.2d 303, 305 (2001). As our Supreme Court has aptly stated, "Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury." *Manganello v. Permastone, Inc.*, 291 N.C. 666, 669-70, 231 S.E.2d 678, 680 (1977). Nevertheless, where there is an absence of evidence indicating that a defendant's failure to conform with the applicable standard of care proximately caused a plaintiff's injury, a directed verdict is proper. See *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998) (*citing Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E.2d 566, 570, *disc. rev. denied*, 303 N.C. 711 (1981) (outlining the elements a plaintiff must show in a medical malpractice action)).

With these principles in mind, we turn to plaintiffs' contention that they presented sufficient evidence to withstand defendant's motion for a directed verdict. Although the trial court did not specify the grounds upon which it granted defendant's motion, our review of the record reveals defendant's argument centered on the following: (1) plaintiffs' failure to establish the applicable standard of care in Asheville or similar communities at the time of Amelia's injury and that defendant had breached said standard, and (2) the lack of a causal link between defendant's care and Amelia's injury.

A. Defendant's Breach of the Applicable Standard of Care

[1] The guidelines for establishing the applicable standard of care in a medical malpractice action are set forth in N.C. Gen. Stat. § 90-21.12, which provides in pertinent part:

The defendant shall not be liable for the payment of damages unless the trier of facts is satisfied by the greater weight of the evidence that the care of such health care provider was not in accordance with the standards of practice among members of the same health care profession with similar training and experience

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situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

N.C. Gen. Stat. § 90-21.12 (2001). Ordinarily, because the practice of medicine involves a specialized knowledge beyond that of the average person, the applicable standard of care must be established through expert testimony. *See Mazza v. Huffaker*, 61 N.C. App. 170, 175, 300 S.E.2d 833, 837, *disc. rev. denied*, 309 N.C. 192, 305 S.E.2d 734 (1983) (*quoting Jackson v. Sanitarium*, 234 N.C. 222, 226-27, 67 S.E.2d 57, 61 (1951)).

Here, plaintiffs sought to establish the applicable standard of care through the testimony of Dr. Jones, an obstetrician gynecologist with a subspecialty in perinatology and licensed to practice in South Carolina and Alabama. The record shows that Dr. Jones initially testified that a baby with a large fetal weight and whose mother has developed gestational diabetes, has a “20 to 50 percent risk” of being born “having shoulder dystocia.” He then testified as to the procedures an obstetrician employs to identify a shoulder dystocia emergency. According to Dr. Jones, after a baby’s head is produced and the rest of the body fails to follow, the obstetrician should apply “gentle traction down on the baby’s head” to confirm that shoulder dystocia exists. To illustrate for the jury what he meant by “gentle traction,” Dr. Jones used an anatomical model which depicted the anatomy of a pregnant female and a model baby. He placed one hand under the model baby’s head and his other hand on top. He then applied pressure in a downward direction in reference to the female model’s bottom and in a lateral direction in reference to the baby model’s shoulders. Dr. Jones stated, “I can’t tell you the exact pressure, but I can tell you from my training and the other people that are trained, we know when to stop and when you pull too hard.”

Dr. Jones further testified that once shoulder dystocia is evident, the obstetrician employs a series of drills designed to resolve the problem including: the “McRobert’s procedure” in which the mother’s legs are pulled up to her chest thereby allowing a greater angle for the baby’s shoulders to be delivered; “supra pubic pressure” which involves the application of pressure on the lower portion of the mother’s stomach in an effort to push the baby’s shoulder down and disengage the pubic bone; the “Wood screw maneuver” in which the obstetrician reaches into the mother’s vagina and pushes upward on the baby’s shoulder; a “posterior arm delivery” where the obstetrician again reaches inside the mother’s vagina and applies pressure to the

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baby's posterior arm in an effort to sweep it over the baby's head; and, as a last resort, the "Zavenelli Maneuver" in which the obstetrician pushes the baby's head back inside and proceeds with a cesarean delivery.

Based on his review of the medical records and the deposition testimony, Dr. Jones concluded that defendant failed to identify in Ms. Leatherwood the risk factors associated with shoulder dystocia and to properly utilize the procedures to be used in resolving a shoulder dystocia emergency. Specifically, he noted defendant did not take into account that Ms. Leatherwood had been diagnosed with gestational diabetes or that Amelia was likely to have a large fetal weight. Additionally, Dr. Jones stated the medical records and deposition testimony showed that the "McRobert's procedure" was applied before and not after Amelia's head had been produced and that pressure had been applied to the upper rather than lower portion of Ms. Leatherwood's stomach. Ultimately, Dr. Jones opined that defendant had applied excessive lateral traction during Amelia's birth, which caused a tear of the C8-T1 nerve root in her left brachial plexus and resulted in her Erb's Palsy condition.

Defendant initially argues that plaintiffs failed to meet their required burden of establishing that he had breached the applicable standard of care by reason that Dr. Jones could not articulate the precise amount of lateral traction an obstetrician in Asheville or a similar community would have used when faced with a shoulder dystocia emergency.¹ However, the record reveals that, after reviewing all of the medical records and deposition testimony, Dr. Jones concluded that defendant had not properly performed the procedures utilized in resolving a shoulder dystocia emergency. In his opinion, defendant had used excessive lateral traction beyond that which was the applicable standard of practice among obstetricians who practiced in Asheville and similar communities. Although Dr. Jones was unable to articulate precisely what amount of lateral traction he considered to be excessive, the record shows he visually demonstrated his testimony through the use of the anatomical models in which he illustrated for the jury the amount of pressure to be applied. When considered in

1. Defendant also argued that Dr. Jones was not qualified under Rule 702(b) to provide expert testimony concerning the applicable standard of care. However, the trial court's denial of defendant's motion to strike Dr. Jones' testimony makes it unlikely that it granted defendant a directed verdict on these grounds. We address defendant's cross-assignment of error related to this issue in Section II of the opinion.

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the light most favorable to plaintiffs, we conclude Dr. Jones' testimony established an issue of fact to be resolved by the jury.

[2] Defendant also argues that plaintiffs failed to establish the applicable standard in that Dr. Jones was unfamiliar with the standard of care in Asheville or similar communities at the time of Amelia's injury. He maintains that, as a result, Dr. Jones' testimony related only to a national standard of care which is not permitted under N.C. Gen. Stat. § 90-21.12.

In support of this argument, defendant cites *Henry v. Southeastern OB-GYN Assoc., P.A.*, 145 N.C. App. 208, 550 S.E.2d 245, *aff'd*, 354 N.C. 570, 557 S.E.2d 530 (2001). Like the case before us, *Henry* involved a medical malpractice claim concerning the delivery of a baby involving a shoulder dystocia emergency. The plaintiffs offered the testimony of an expert obstetrician gynecologist with a practice in Spartanburg, South Carolina, against a defendant who practiced in Wilmington. However, at trial the plaintiffs' expert failed to testify that he was familiar with the standard of care in Wilmington or like communities and, in fact, stated in a pretrial deposition that he did not know anything about Wilmington. Nevertheless, the plaintiffs maintained that their expert was familiar with the standard of care in Spartanburg and that the standard was the same as that applied at Duke Hospital in Durham and UNC-Hospital in Chapel Hill. Therefore, they argued, the expert could testify as to the applicable standard of care in Wilmington. *Id.* at 208-09, 543 S.E.2d at 912. This Court disagreed and held the expert did not satisfy the requirements set forth in N.C. Gen. Stat. § 90-21.12. *Id.* at 213-14, 543 S.E.2d at 914.

We find the facts in *Henry* notably distinguishable from those in this case. In contrast with the expert in *Henry*, Dr. Jones specifically testified that he had "knowledge of the standards of practice among obstetricians with similar training and experience as that of [defendant] in Asheville and similar communities [at the time of Amelia's injury] with regard to the appropriate management of shoulder dystocia in delivering children." Additionally, he testified that, as a medical student, he attended rounds at the hospital in which Amelia was delivered. Further, the record shows that Dr. Jones practices in Greenville, South Carolina and has practiced in communities in Alabama and Mississippi, which are similar in size to Asheville. Finally, he specifically testified that "Asheville and other communities that size practice in the same national standards" with respect to the management of shoulder dystocia. *See Baynor v. Cook*, 125 N.C.

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App. 274, 278, 480 S.E.2d 419, 421, *disc. rev. denied*, 346 N.C. 275, 487 S.E.2d 537 (1997) (noting that the “similar community” requirement of N.C. Gen. Stat. § 90-21.12 is not confined to North Carolina but would apply to adjoining and nearby communities “within or without our State”). As such, Dr. Jones made “the statutorily required connection to the community in which the alleged malpractice took place or to a similarly situated community” which this Court found was lacking in *Henry*. See *Henry*, 145 N.C. App. at 210, 543 S.E.2d at 913 (quoting *Tucker v. Meis*, 127 N.C. App. 197, 198, 487 S.E.2d 827, 829 (1997)); see also *Dickens v. Everhart*, 284 N.C. 95, 199 S.E.2d 440 (1973); *Haney v. Alexander*, 71 N.C. App. 731, 323 S.E.2d 430 (1984), *cert. denied*, 313 N.C. 329, 327 S.E.2d 889 (1985); *Howard v. Piver*, 53 N.C. App. 46, 279 S.E.2d 876 (1981).

We conclude plaintiffs provided sufficient evidence with respect to the applicable standard of care and defendant’s breach of that standard to raise an issue of fact for the jury. Therefore, defendant was not entitled to a directed verdict on these grounds.

B. Proximate Causation

[3] Additionally, defendant argues a directed verdict was proper in that plaintiffs failed to provide sufficient evidence showing a causal link between his care and Amelia’s injury. Specifically, he maintains Dr. Jones’ conclusion that excessive lateral traction can cause a tearing of the C8-T1 nerve root in the brachial plexus is not supported by the relevant “medical literature.”

At its core, defendant’s argument raises the question of whether Dr. Jones’ causation opinion was sufficiently reliable to be presented to the jury. It is a well established principle that unless an expert’s testimony on the issue of medical causation is sufficiently reliable, it is not considered competent evidence and therefore should not be presented to the jury. See *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000). “[A]n expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.” *Id.* (citations omitted). Whether scientific opinion evidence is sufficiently reliable and relevant is a matter entrusted to the sound discretion of the trial court. *State v. Spencer*, 119 N.C. App. 662, 664, 459 S.E.2d 812, 814, *disc. rev. denied*, 341 N.C. 655, 462 S.E.2d 524 (1995) (citations omitted).

Implicit in the rules governing the admissibility of an expert’s opinion is a precondition that the matters or data upon which the

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expert bases his opinion be recognized as sufficiently reliable and relevant by the scientific community. *Id.* (citing *Daubert v. Merrell Dow*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993); *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984) and N.C. Gen. Stat. § 8C-1, Rule 703 (1992)). Further, our Supreme Court has identified several indices of reliability including: “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.” *State v. Pennington*, 327 N.C. 89, 98, 393 S.E.2d 847, 852-53 (1990); see also *State v. Berry*, 143 N.C. App. 187, 203-04, 546 S.E.2d 145, 157, *disc. rev. denied*, 353 N.C. 729, 551 S.E.2d 439 (2001).

Again, the record shows that Dr. Jones reviewed the medical records and deposition testimony. He based his opinion with respect to the cause of Amelia’s injury on his training as an obstetrician gynecologist and his extensive experience with shoulder dystocia emergencies and brachial plexus injuries. He testified that birth simulated studies using manikin and cadaver models support his conclusion that, if during delivery an obstetrician applies a downward level of traction involving excessive pressure, an injury to the C8-T1 area of the baby’s brachial plexus could result. This testimony clearly demonstrates his opinion that Amelia’s injury was causally linked to defendant’s care, was based on more than mere speculation, and was sufficiently reliable to be submitted to the jury.

Moreover, “[c]ausation is an inference of fact to be drawn from other facts and circumstances.” *Turner v. Duke University*, 325 N.C. 152, 162, 381 S.E.2d 706, 712 (1989) (citing *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E.2d 559 (1984)). Accordingly, proximate cause is normally a question best answered by the jury. *Id.*; see also *Felts v. Liberty Emergency Service, P.A.*, 97 N.C. App. 381, 390, 388 S.E.2d 619, 624 (1990). Thus, we conclude plaintiffs presented sufficient evidence as to the proximate cause of Amelia’s injury to overcome defendant’s motion for a direct verdict.

For the reasons set forth above, we conclude that plaintiffs presented sufficient evidence to establish the applicable standard of care, a breach of the standard of care and proximate causation. Therefore, we hold the trial court improperly granted defendant’s motion for a directed verdict. We reverse and remand the case for a new trial.

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II.

[4] In view of the likelihood that defendant will again seek to exclude Dr. Jones' testimony, we address defendant's contention that Dr. Jones is not properly qualified to give expert testimony. Rule 702(b) controls the admissibility of expert testimony on behalf of or against a medical "specialist." See *FormyDuval v. Bunn*, 138 N.C. App. 381, 383-84, 530 S.E.2d 96, 98-99, *disc. rev. denied*, 353 N.C. 262, 546 S.E.2d 93 (2000). To qualify as an expert, the witness must be a licensed health care provider in this or another state and meet the following two criteria:

(1) If the party against whom or on whose behalf the testimony is offered is a specialist, the expert witness must:

- a. Specialize in the same specialty as the party against whom or on whose behalf the testimony is offered; or
- b. Specialize in a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients.

(2) During the year immediately preceding the date of the occurrence that is the basis for the action, the expert witness must have devoted a majority of his or her professional time to either or both of the following:

- a. The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, the active clinical practice of the same specialty or a similar specialty which includes within its specialty the performance of the procedure that is the subject of the complaint and have prior experience treating similar patients; or
- b. The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered, and if that party is a specialist, an accredited health professional school or accredited residency or clinical research program in the same specialty.

N.C. Gen. Stat. § 8C-1, Rule 702(b). Defendant maintains plaintiffs failed to qualify Dr. Jones pursuant to either of the criteria set forth

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in Rule 702(b) in that Dr. Jones is not of the same or similar specialty as defendant and that he did not actively practice as an obstetrician in the year prior to Amelia's injury.

With respect to whether Dr. Jones is of the same or similar specialty as defendant, this Court recently addressed a similar issue in *Edwards v. Wall*, 142 N.C. App. 111, 542 S.E.2d 258 (2001). In *Edwards*, the plaintiffs sought to establish the applicable standard of care through the testimony of an expert certified as a pediatrician with a subspecialty in pediatric gastroenterology. However, the defendant was certified as a pediatrician. This Court held that the expert's certification as a pediatric gastroenterologist, nevertheless, satisfied the criteria of Rule 702(b)(1). *Edwards*, 142 N.C. at 116, 542 S.E.2d at 263.

Defendant contends *Edwards* is distinguishable from this case arguing that, unlike the expert in *Edwards*, Dr. Jones' subspecialty training "heightened the standard of care" against which the jury was to judge defendant's performance. We disagree.

The record shows that both Dr. Jones and defendant belong to the American College of Obstetrics and Gynecology. Dr. Jones testified that "[a]ll perinatologists are first obstetrician gynecologists" and that perinatology, like obstetrics, includes "the performance in management of shoulder dystocia." He also testified that even though he is considered a perinatologist, he continues to practice as an obstetrician gynecologist. Thus, we conclude Dr. Jones is of the same or similar specialty as defendant such that he meets the criteria set forth in Rule 702(b)(1).

Additionally, Dr. Jones testified that, in the year preceding Amelia's birth, he devoted a majority of his time "to the clinical practice of obstetrics and gynecology" including "the performance of management of shoulder dystocia." Hence, we also conclude Dr. Jones satisfied the criteria set forth in Rule 702(b)(2). Therefore, the trial court did not err in denying defendant's motion to strike Dr. Jones' testimony.

III.

Lastly, we note that plaintiffs have assigned as error the sequestration of Dr. Jones. The record shows that, upon defendant's motion, the trial court sequestered all witnesses called by the parties. Plaintiffs then requested that Dr. Jones be allowed to be present so that he might "hear the lay witness testimony from our clients" as

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“not all the questions that need[ed] to be asked in their depositions were asked.” Defendant objected citing his concern that Dr. Jones would be forming new opinions based on new testimony. The trial court then denied plaintiffs’ request.

The sequestration of witnesses rest within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *See State v. Stanley*, 310 N.C. 353, 357, 312 S.E.2d 482, 485 (1984) and *Stanback v. Stanback*, 31 N.C. App. 174, 179, 229 S.E.2d 693, 696 (1976), *disc. rev. denied*, 291 N.C. 712, 232 S.E.2d 205 (1977). While the sequestering of witnesses in civil cases of this nature is ordinarily not raised as an issue, we note the record here is unclear as to why the trial court ordered the sequestering of all witnesses. However, we decline to address the issue as it is likely not to arise on remand.

In sum, the trial court did not err in denying defendant’s motion to strike Dr. Jones’ testimony. The trial court’s granting of a directed verdict for defendant is reversed.

New trial.

Judge HUNTER and BRYANT concur.

IN THE MATTER OF: MICHAEL CHARLES HAYES, RESPONDENT

No. COA01-717

(Filed 18 June 2002)

1. Appeal and Error— insanity recommitment—reviewed as commitment order

A recommitment order for a respondent who had been found not guilty of murder and assault by reason of insanity was reviewed on appeal as a commitment order; thus, there is a determination of whether there is competent evidence to support the trial court’s findings and whether the findings support the conclusion that respondent still has a mental illness and is dangerous to others.

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2. Mental Illness— 1989 insanity acquittal—current mental illness and danger to others—findings

Findings that a defendant who was found not guilty of murder and assault by reason of insanity in 1989 currently suffers from mental illness and presents a danger to others were supported by competent evidence.

3. Mental Illness— insanity acquittal—recommitment—dangerous to others

The statutory definition of “dangerous to others” does not make it impossible for a person who has been acquitted of homicide by reason of insanity to prove that he is no longer dangerous to others in a recommitment hearing. Such a person will be presumed dangerous to others and has the burden of rebutting that presumption, but the court may find that he is no longer dangerous to others if that burden is carried.

Appeal by respondent from judgment entered 10 January 2001 by Judge Steve Balog in Forsyth County Superior Court. Heard in the Court of Appeals 14 March 2002.

Attorney General Roy Cooper, by Assistant Attorney General Diane Martin Pomper, for the State.

Karl E. Knudsen, for respondent-appellant.

HUDSON, Judge.

Michael Charles Hayes (“respondent”) appeals from an order of recommitment. For the reasons given below, we affirm.

In 1988, respondent was indicted on four counts of first degree murder, five counts of felonious assault with a deadly weapon, and two counts of assault on a law officer. In 1989, a jury found him not guilty on all counts by reason of insanity, and respondent was committed to a state mental health facility.

Since the time of his original commitment, respondent has been recommitted at each hearing on the matter. Respondent has appealed several of the recommitment orders, resulting in two published opinions from this Court. *See In re Hayes*, 139 N.C. App. 114, 532 S.E.2d 553 (2000); *In re Hayes*, 111 N.C. App. 384, 432 S.E.2d 862, *appeal dismissed*, 335 N.C. 173, 436 S.E.2d 376 (1993). The most recent hearing occurred on 8 January through 10 January 2001. The relevant tes-

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timony is reviewed below. Following the hearing, the superior court ordered that respondent's commitment be extended by an additional 365 days. Respondent appeals.

By statute, when a defendant has been involuntarily committed to a mental institution pursuant to N.C. Gen. Stat. § 15A-1321(b) following an acquittal by reason of insanity, the court is required to hold a hearing fifteen days before the end of any commitment period. *See* N.C. Gen. Stat. § 122C-276.1(a) (1999). At this hearing,

[t]he respondent shall bear the burden to prove by a preponderance of the evidence that he (i) no longer has a mental illness as defined in G.S. 122C-3(21), or (ii) is no longer dangerous to others as defined in G.S. 122C-3(11)b. If the court is so satisfied, then the court shall order the respondent discharged and released. If the court finds that the respondent has not met his burden of proof, then the court shall order inpatient commitment be continued The court shall make a written record of the facts that support its findings.

N.C. Gen. Stat. § 122C-276.1(c) (1999). "Mental illness" is defined as "an illness which so lessens the capacity of the individual to use self-control, judgment, and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care, supervision, guidance, or control." N.C. Gen. Stat. § 122C-3(21)(i) (1999). "Dangerous to others"

means that within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property; and that there is a reasonable probability that this conduct will be repeated. Previous episodes of dangerousness to others, when applicable, may be considered when determining reasonable probability of future dangerous conduct. Clear, cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.

N.C. Gen. Stat. § 122C-3(11)(b) (1999).

[1] We see no reason to distinguish the standard of review of a recommitment order from that of a commitment order, and hence, we review this order as we would a commitment order. Thus, we must determine whether there is competent evidence to support the trial

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court's factual findings and whether these findings support the court's ultimate conclusion that respondent still has a mental illness and is dangerous to others. *Cf. In re Lowery*, 110 N.C. App. 67, 71, 428 S.E.2d 861, 863 (1993) (standard of review for commitment order pursuant to N.C.G.S. § 122C-268).

Respondent argues that the following facts found by the trial court are not supported by "the greater weight of the evidence."

3. At the time of the killings and felonious assaults committed by the respondent on July 17, 1988, the respondent suffered from an acute psychotic episode which lasted approximately 3 to 4 months in duration from the week before the killings on July 17, 1988, up to and including the time period in which he was being treated and observed at Dorothea Dix Hospital in October 1988. This psychotic episode evidences either a schizophreniform disorder, or a psychotic disorder, NOS (not otherwise specified). These illnesses are recognized as Axis I mental disorders by DSM-IV (Diagnostic and Statistical Manual of the American Psychiatric Association). Although the psychotic phase of this illness has apparently not recurred since his admission to Dorothea Dix Hospital in 1989, it is unclear whether this particular mental disorder will recur in the future should the respondent be released from his current controlled environment at Dorothea Dix Hospital. The respondent is currently given a diagnosis of and meets criteria in the DSM-IV of:
 - a. Axis I, History of schizophreniform disorder; or history of psychotic disorder, NOS (not otherwise specified), and Rule out History of Substance-induced Psychotic Disorder with delusions and hallucinations, with onset during withdrawal;
 - b. Axis I, Alcohol Dependence, in remission, in a controlled environment; Axis I, Cannabis dependence, in remission, in a controlled environment; and,
 - c. Axis II, Personality Disorder NOS, with antisocial and narcissistic traits;
4. The diagnoses set out in items b. and c. above are mental illnesses which are currently being treated, have not been cured, and are likely to continue in the future;

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5. The Axis I and Axis II mental disorders described in items b. and c. above, either existed or are related to the mental conditions that existed at the time of the commitment of the homicides by the respondent in 1988, and were probably causative factors in or related to the psychotic disorder evident during those homicides, described in item a. above; and, taken together and separately these mental disorders so lessen the capacity of Michael Hayes to use self-control, judgment and discretion in the conduct of his affairs and social relations as to make it necessary or advisable for him to be under treatment, care supervision, guidance, or control, and, thus, they constitute mental illnesses as defined by G.S. 122C-3(21).

. . . .

7. The four homicides and seven felonious assaults committed by the respondent on July 17, 1988, are episodes of dangerousness to others in the relevant past which in combination with his past and present mental condition, his multiple mental illnesses, and his conduct since admission to Dorothea Dix Hospital since 1989, and up to and including his conduct in the hospital during the previous year indicates there is a reasonable probability that the respondent's seriously violent conduct will be repeated and that he will be dangerous to others in the future if unconditionally released with no supervision at this time. That there is a reasonable probability that if the respondent were released today it is likely that he may relapse into his previous pattern of multi-substance abuse/dependence, and relapse into a situation repeating his exposure to the same ordinary life stressors at least as serious as those which were present in 1988 at the time of the killings. It is likely that, should these kinds of relapses occur, the respondent will run the risk of future violent behavior;
8. The respondent is dangerous to others as defined by G.S. 122C-3(11)b; he suffers from multiple mental illnesses as previously described by the Court; and that continued hospitalization is advisable to ensure the safety of others and to alleviate, treat, or cure his mental illnesses.

Contrary to the standard articulated by respondent—that we should review “the greater weight of the evidence”—we are bound to uphold these findings if there is any competent evidence to support them. It is for the trial court, not this Court, to determine the weight that

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should be given to evidence and, ultimately, “whether the competent evidence offered in a particular case met the burden of proof.” *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980); see *In re Underwood*, 38 N.C. App. 344, 347-48, 247 S.E.2d 778, 780-81 (1978).

[2] Respondent particularly objects to the findings quoted above insofar as the court determined that respondent currently suffers from mental illness and presents a danger to others. Having carefully reviewed the record, we hold that these findings are supported by competent evidence.

With regard to the question of mental illness, Dr. Jonathan Weiner, who was qualified as an expert in the field of forensic psychiatry and was appointed as an expert to assist the court in determining whether respondent met the criteria for release, diagnosed respondent as follows:

I gave [respondent] a primary psychiatric diagnosis on Axis I of alcohol dependence, sustained full remission in a controlled environment, and cannabis dependence, which is marijuana, sustained full remission in a controlled environment. I gave him the additional diagnosis of Axis II, history of a personality disorder not otherwise specified with antisocial and narcissistic traits, and on Axis I, history of a schizophrenic form disorder and also on Axis I, rule out a history of substance-induced psychotic disorder with delusions and hallucinations with onset during withdrawal.

Dr. Jim Bellard, who was qualified as an expert in forensic psychiatry, testified that he gave respondent a diagnosis under Axis I of history of psychotic disorder, not otherwise specified. Dr. Robert S. Brown, Jr., who was qualified as an expert in the field of forensic psychiatry and was appointed to assist the State as an expert in reviewing the case, testified that he gave respondent a diagnosis of personality disorder NOS, Not Otherwise Specified, with “aspects of antisocial traits and aspects of narcissistic traits that relate directly to the personality disorder NOS.” Dr. Brown testified that “without a doubt [respondent] has ongoing—he has an ongoing mental illness diagnosis of a personality disorder.” This evidence supports the trial court’s Finding of Fact No. 3, regarding respondent’s diagnoses.

Dr. Weiner testified that “alcohol dependence, sustained full remission is a mental illness. It meets the statutory require-

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ments . . .” Both Dr. Weiner and Dr. Brown testified to the opinion that respondent is not cured or recovered from alcohol dependence or cannabis dependence. Dr. Brown testified that “without a doubt [respondent] has ongoing—he has an ongoing mental illness diagnosis of a personality disorder.” Dr. Mark Hazelrigg, who is the program director for the forensic treatment program at Dorothea Dix Hospital and was qualified as an expert in the field of forensic psychology, acknowledged that “it’s unusual for a person to be cured of a personality disorder completely.” Dr. Brown explained the difference between his opinion and that expressed by those who testified that respondent is no longer mentally ill as follows:

I think that some of my colleagues may have forgotten something; and that is, it’s axiomatic, that if a patient has a personality disorder, that ten years from now, whether they’re terribly misbehaving or not, as an axiom, they still have a personality disorder. It’s just less evident. They’re just expressing it less for whatever reason. Maybe the stress is minimized, maybe they’re in a controlled environment, maybe the—the external goal of getting out of the mental hospital is so strong, they’re careful what they say to whom.

Dr. Hazelrigg acknowledged under cross-examination that, in the year prior to the hearing, respondent had been involved in several incidents that evinced behavior consistent with a personality disorder. Edwin Munt, a psychologist who provided individual therapy to respondent, agreed on cross-examination that these “behaviors could be personality characteristics that are reflective of some problems that he had in the past with—in terms of personality disorders.”

For example, respondent’s medical records indicated that he had been involved in “several instances of power struggles with Dorothea Dix Hospital police.” Additionally, respondent became angry when the door to the Alcoholics Anonymous (“AA”) meeting room was not opened; Dr. Hazelrigg acknowledged that respondent “indicate[d] anger, hostility” during the incident. On another occasion, respondent hit a vending machine with his shoulder, shattering the glass, after his snack got caught in the machine. On 30 September 2000, there was an entry from a nurse reading: “Although [respondent] continues to be somewhat manipulative and/or exploitive of staff, he has this month been generally pleasant and nonproblematic.” An entry on 12 October indicated that staff had reported that respondent had been “arrogant,” which is consistent with a narcissistic trait.

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Respondent had conflicts with his girlfriend and with other patients.[Tr.I, 120-24] His medical records indicated an “ongoing conflict with another patient,” which, according to Dr. Hazelrigg, involved a disagreement over how to run the AA and Narcotics Anonymous meetings. This conflict lasted “for a couple of weeks.” One patient who worked with respondent wanted to quit his job because respondent repeatedly kicked him. An inmate from the women’s prison who worked with respondent complained that respondent used inappropriate language with her. Dr. Brown, who later interviewed her, testified that “she reported essentially a three-week period of time where [respondent] remained angry with her, hostile toward her, and was verbally abusive to her.”

Dr. Brown testified that he asked respondent about the incidents between respondent and his co-workers, and respondent “basically said that he didn’t do any of those things.” Respondent acted “shocked” when Dr. Brown discussed the accusations of respondent’s co-workers with him, and Dr. Brown testified that respondent “thought that perhaps there was something going on regarding a conspiracy to damage his attempts at—to being released.”

Dr. Hazelrigg testified to respondent’s current treatment program as follows:

[T]he treatment has been focused on issues of substance abuse and recover [sic] from addiction. To that extent, most of the treatment modalities are substance abuse related. He attends AA groups, both in the hospital and in the community, with staff supervision. He participates in daily work assignments and he has individual sessions with a psychotherapist, and at one point he had family therapy sessions with another therapist.

When asked about the prominent traits of respondent’s personality disorder, Dr. Hazelrigg answered:

In the past, the specific types of personality disorder features that he showed were antisocial features, which would be manipulating other people, aggression, and the other set of features were narcissistic features which involved having a self-centered view of things, feeling he’s entitled to special treatment and special privileges and favors.

Dr. Hazelrigg testified that respondent’s psychotherapy sessions involved issues of anger control, and agreed that anger control is “an issue that has arisen from [respondent’s] personality disorder diag-

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noses.” Dr. Hazelrigg acknowledged that “follow[ing] [a] structured schedule and abid[ing] by rules without being manipulative or exploitative” was a short-term goal identified in an entry on respondent’s hospital chart dated 3 October 2000. Dr. Brown testified to his opinion that the treatment respondent is receiving at Dorothea Dix “is appropriate for the mental health problems” from which Dr. Brown believes respondent suffers.

This evidence supports Finding of Fact No. 4, that the diagnoses in parts b. and c. of Finding of Fact No. 3 are “mental illnesses which are currently being treated, have not been cured, and are likely to continue in the future.”

Dr. Brown testified that, in his opinion, respondent has suffered since adolescence from, and continues to suffer from, a personality disorder, which means he “had a history, an enduring pattern of inner experience . . . and behaviors that deviate markedly from the expectations of [his] culture.” This enduring pattern “leads to clinically significant distress or impairment socially, occupationally, or other areas, important areas of function.” And respondent’s substance abuse problems “were, in part, the result of the personality disorder.” Dr. Weiner testified to his opinion that “the alcohol dependence and the cannabis dependence were related to events that perhaps led to [respondent’s] psychotic break.” He agreed that respondent’s abuse of alcohol and his abuse of cannabis were “probably causative factors in the events that led to [the] homicides.” This evidence supports the trial court’s factual finding that respondent’s mental disorders “either existed or are related to the mental conditions that existed at the time of the commitment of the homicides . . . in 1988, and were probably causative factors in or related to the psychotic disorder evident during those homicides.”

Dr. Brown testified that it was his opinion, based on his diagnoses, that respondent continues to be mentally ill as defined in N.C.G.S. § 122C-3(21). This, together with the evidence reviewed above, constitutes evidence in support of the trial court’s finding to that effect in Finding of Fact No. 5.

There is competent evidence in the record to support the findings of fact relating to mental illness made by the trial court. Accordingly, the court did not err in its findings numbered three through five.

With regard to whether respondent is dangerous to others, Dr. Weiner agreed that respondent’s “violent history . . . is behavior that

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has occurred in the relevant past that is appropriate for the Court to consider in assessing future dangerousness.” Dr. Brown also opined that the homicides and other violent felonies committed by respondent are relevant in assessing future dangerousness; he responded to questioning in this regard as follows:

Q. Do you consider the four—evidence of four homicides and five or more felony assaults which occurred in July of 1988 to be relevant in your clinical determination of the probability of [respondent’s] future violent behavior?

A. Yes, I believe they’re relevant. They’re relevant because history of violence in the past is the best predictor of violence in the future.

Of relevance to respondent’s mental condition is Dr. Brown’s testimony regarding psychological testing performed by Dr. John F. Warren. In particular, Dr. Warren had administered the Minnesota Multiphasic Personality Inventory II test (the “MMPI-II”) to respondent on 18 September 2000. Dr. Brown quoted from Dr. Warren’s results as follows:

“He is characterized as angry, belligerent, rebellious, resentful of rules and regulations, and hostile toward authority figures. He is likely to be impulsive, unreliable, egocentric, and irresponsible. He often has little regard for social standards. He often shows poor judgment and seems to have difficulty planning ahead and benefiting [sic] from his previous experiences. He makes a good first impression, but long-term relationships tend to be rather superficial and unsatisfied.

....

He may be described as exhibiting excessive control as hostile impulses, but also is exhibiting periodic, angry outbursts. He is socially alienated and is reluctant to admit any form of a psychological symptom. He is seen as rigid and not displaying anxiety overtly.”

Dr. Brown testified that

the overall significance of the issue of overcontrolled hostility is that in life we—we come upon frustrating and irritating things; and if we don’t address them because of the use of denial and repression and things like that, the amount of the inner tension can build up and it will erupt into a significant angry outburst.

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Dr. Brown confirmed that such an “angry outburst” could be violent.

Dr. Weiner explained his diagnosis of alcohol and cannabis dependence, sustained full remission in a controlled environment, as it relates to the possibility that respondent could relapse into substance abuse, as follows:

[W]hat happens in life is you get out into the world and you have all kinds of different stressors impact upon you. So, do you have the strengths and the coping skills to deal with that without relapsing again or lapsing into alcohol use? So, it has to do with motivation, it has to do with stressful events, it has to do with his cognitive behavioral changes that have gone on. So, it's a difficult clinical question. There's always a possibility that he would relapse. Is it probable? It's less probable now than it was two years ago, but it's possible. Of course, it's possible.

While, according to Dr. Weiner, respondent would have a small chance of relapsing into substance abuse if he stayed in AA, there is a ninety percent chance of relapse for those who drop out of treatment; this might occur as a result of “some unforeseen things that happen in people's [sic] lives, stressful things that happen in people's [sic] lives: Loss, deaths.”

Dr. Hazelrigg testified that if respondent “started abusing drugs and he developed the personal [sic] disorders again, then there would be a high probability of violent behaviors.” Mr. Munt confirmed that if respondent “were exposed to severe social, family, economic stressors upon release, that he may have some susceptibility to redevelop a psychosis,” and that a person who has demonstrated extreme violence while psychotic is at a greater risk for violence if he becomes psychotic again.

Dr. Brown testified that, in his opinion, respondent is at an “unacceptably high risk” for relapse into substance abuse if he was released because of his “personality and his low frustration tolerance for certain forms of stress.” Dr. Brown further testified that he viewed respondent “as an individual, because he's had one episode of drug-induced psychosis, as being vulnerable to having another episode of psychosis with substance abuse.” Regarding the risk of future dangerousness, Dr. Brown testified as follows:

Q. And have you considered various types of factors in assessing his risk for future violent behavior?

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A. Yes. You know, forensic psychiatrists deal with not the prediction of risk, but the assessment of risk, the assessment of risk. And by and large we do this in two categories. As the category of—of dynamic factors, things which can be addressed through treatment, for instance, if someone is psychotic, one of the dynamic—that may be a dynamic factor relating to future violence and you can treat that with medication. But there are other factors having to do with static things, things that are primarily historical in nature and refer back to the past.

Now, some of those things carry with them a risk of future violence, and everything from some—some history of juvenile delinquency, a history of being suspended from school, a history of witnessing or being abused in your childhood. If your mother was abused and you saw it or if you were abused as a child. A history of substance abuse, a history of engaging in illegal occupations, a history of cruelty to animals, and all of those things which we really can't change today but are still important today with regard to the future prediction of others.

Q. And have you seen some of those risk factors present in [respondent's] history?

A. All of them.

Q. And do you consider those to be significant in predicting future probability of dangerousness or violence?

A. They're significant today—even today concerning the assessment of the risk of future violence.

Dr. Brown testified that, in his opinion, respondent continues to pose a risk of danger to others, as defined in N.C.G.S. § 122C-3(11).

The evidence reviewed above, together with the evidence supporting the trial court's findings regarding respondent's mental illness, supports the court's Findings of Fact No. 7 and No. 8. Accordingly, the court did not err in making these findings.

[3] Respondent argues that the statutory definition of “dangerous to others” makes it impossible for a respondent who has been acquitted of homicide by reason of insanity to prove that he is no longer dangerous to others when the trial court finds that the homicide was committed in the “relevant” past. The statute provides that “[c]lear,

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cogent, and convincing evidence that an individual has committed a homicide in the relevant past is prima facie evidence of dangerousness to others.” N.C.G.S. § 122C-3(11)(b).

Respondent’s argument is based on the assertion that “a person who has been acquitted of a homicide by reason of insanity and is involuntarily committed due to his or her mental illness, will always be considered dangerous to others as long as the court finds that the homicide occurred in the ‘relevant past.’” A person who has been acquitted by reason of insanity of a homicide that the court has found to have occurred in the relevant past will not “always be considered” dangerous to others, as respondent asserts; rather, pursuant to the statute, such a person will be presumed dangerous to others. The respondent has the burden of rebutting that presumption. If the respondent successfully carries his burden, the trial court may find that he is no longer dangerous to others. While we agree that the General Assembly has set a high hurdle for the respondent to overcome in these circumstances, a difficult burden is justified. We find respondent’s fear that the burden can never be met unwarranted and his argument to be without merit.

We have already rejected respondent’s argument that he has been denied due process because the statute does not define “relevant past.” See *Hayes*, 139 N.C. App. at 122, 532 S.E.2d at 559. Respondent contends that he has “proven by a preponderance of the evidence that he has not exhibited behavior which would be indicative of dangerousness since 1988,” and that he has “fully recovered from the mental illness which rendered him dangerous in 1988.” Thus, he argues, “the prior homicides cannot reasonably be considered as being within the ‘relevant’ past so as to justify a finding of present dangerousness.” As we have noted above, however, there is competent evidence in the record to support the trial court’s finding that respondent committed the homicides in the relevant past, a determination that the legislature placed in the sound discretion of the trial court. We also held that there is competent evidence to support the finding that respondent continues to be dangerous to others. Therefore, we can ascribe no error to the court’s conclusion that respondent failed to meet his burden to rebut the presumption, imposed by statute, that he is dangerous to others. See *Collins*, 49 N.C. App. at 246, 271 S.E.2d at 74 (trial court determines “whether the competent evidence offered in a particular case met the burden of proof”).

Respondent next argues that the trial court’s legal conclusion that respondent failed to bear his burden of proving that he meets the cri-

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teria for release is error. We disagree. We held above that the court's findings of fact are supported by competent evidence. We also hold that these findings support the conclusion that respondent continues to suffer from a mental illness and is dangerous to others.

Foucha v. Louisiana, 504 U.S. 71, 118 L. Ed. 2d 437 (1992), does not help respondent. At issue in *Foucha* was a Louisiana statute that allowed "the indefinite detention of insanity acquittees who are not mentally ill but who do not prove they would not be dangerous to others." *Id.* at 83, 118 L. Ed. 2d at 450. In *Foucha*, the Supreme Court noted its earlier holding that an "acquittee may be held as long as he is both mentally ill and dangerous, but no longer." *Id.* at 77, 118 L. Ed. 2d at 446. The State of Louisiana did not "contend that Foucha was mentally ill at the time of the trial court's hearing. Thus, the basis for holding Foucha in a psychiatric facility as an insanity acquittee [had] disappeared, and the State [was] no longer entitled to hold him on that basis." *Id.* at 78, 118 L. Ed. 2d at 447. Here, the trial court has found both that respondent is mentally ill and that he has failed to prove he is not dangerous to others. Thus, *Foucha* is distinguishable. See *Hayes*, 139 N.C. App. at 120-21, 532 S.E.2d at 558.

Because respondent has shown no error in the trial court's findings of fact and conclusions of law, we hold that the court properly extended his commitment for another year. See N.C. Gen. Stat. § 122C-276.1(d) (1999). Accordingly, we affirm the judgment of the trial court.

Affirmed.

Judges MARTIN and THOMAS concur.

KAREN M. HARLLEE, PLAINTIFF v. FREDERICK E. HARLLEE, III, DEFENDANT

No. COA01-357

(Filed 18 June 2002)

1. Marriage—premarital agreement—condition precedent

The trial court erred by concluding as a matter of law that defendant's obligation to pay plaintiff \$10,000 on the day of the marriage was a condition precedent to the effectiveness of the

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parties' premarital agreement. Absent clear and plain language, provisions of a contract will ordinarily not be construed as conditions precedent.

2. Marriage— premarital agreements—consideration

Defendant's failure to pay plaintiff \$10,000 upon their marriage did not render their premarital agreement ineffective for lack of consideration. Marriage itself is sufficient consideration for a premarital agreement; the additional consideration recited in the agreement, including the payment of \$10,000, constituted a promise to render some performance in the future and the failure to perform that promise did not invalidate the agreement.

3. Appeal and Error— cross-assignment of error—required

Arguments which would have provided an alternative basis for upholding a premarital agreement were not preserved for appellate review where plaintiff did not cross-assign error pursuant to Rule 10(d) to the trial court's failure to enter judgment on these alternative grounds. Moreover, this is not a case in which suspending the appellate rules would prevent manifest injustice or benefit the public interest.

Appeal by defendant from order entered 2 April 1997 by Judge Thomas G. Foster, Jr., and order and judgment entered 11 July 2000 by Judge Joseph E. Turner in Guilford County District Court. Heard in the Court of Appeals 22 January 2002.

Hill, Evans, Duncan, Jordan & Davis, PLLC, by Charles W. Coltrane and Joseph P. Gram, for plaintiff-appellee.

Anderson Korzen & Associates, P.C., by John J. Korzen, and Douglas, Ravenel, Hardy, Carihfield & Hoyle, L.L.P., by G.S. Carihfield, for defendant-appellant.

CAMPBELL, Judge.

Defendant husband appeals from an order declaring the parties' premarital agreement invalid and unenforceable. Defendant also appeals from the trial court's subsequent equitable distribution of the parties' marital property. Defendant and plaintiff wife were married on 2 March 1984 and separated on 30 September 1991. A judgment of absolute divorce was entered on 10 January 1994.

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On 3 February 1984, one month prior to their marriage, defendant and plaintiff entered into a purported premarital agreement. The premarital agreement, in pertinent part, states:

WHEREAS, the Parties to this Agreement intend to marry one another and are making this Agreement in contemplation of becoming husband and wife; and

WHEREAS, both parties are individually possessed of certain Separate Property, and both acknowledge that they played no role in the accumulation of the other's Separate Property; and

WHEREAS, Husband has previously been married to another; and

WHEREAS, the Wife has never been previously married; and

WHEREAS, the parties desire to contract with each other concerning matters of financial management during the term of their marriage; and

WHEREAS, the parties are aware of the laws concerning the disposition of marital and separate property under conditions of togetherness of [sic] apartness, life or death; and

WHEREAS, the parties desire to govern said dispositions by their own agreement and not by the laws of any state or country;

THEY, NOW, THEREFORE, for valuable consideration, and with the express intention on the part of both parties that this Agreement be legally binding, they hereby stipulate and agree as follows:

The sole consideration for this Agreement shall be as follows:

- (1) The contemplated marriage between the parties; and
- (2) The mutual promises and covenants contained in this Agreement; and
- (3) The sum of TEN THOUSAND DOLLARS (\$10,000.00), to be paid by husband to wife in the manner following: On the day of the marriage.

....

Each party agrees that the property described hereafter shall remain the Separate Property of the other:

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(a) All property, whether real or personal, belonging to the other party at the commencement of their marriage; and

(b) All property at any time acquired by the other party by gift, devise, bequest or inheritance, including gifts from one party to the other; and

(c) All interest, dividends, rents, profits or other income at any time acquired from the aforesaid Separate Property, or at any time acquired from property purchased with Separate Property, or any property substituted or exchanged for Separate Property; and

(d) All appreciation in value of the aforesaid Separate Property, whether attributable to market conditions or to the skills and efforts of the owner thereof; and

(e) All property acquired by the other party in his/her separate name while living together outside the marital relationship; and

(f) A recovery or claim for pain and suffering arising from a personal injury suffered by the other party; and

....

EARNINGS DURING MARRIAGE—SEPARATE PROPERTY

The parties agree that all earnings and accumulations resulting from personal services, skills, efforts and work, together with all property acquired and income derived therefrom, shall be the Separate Property of the Party to whom the earnings and income are attributable.

....

On 29 January 1992, plaintiff filed the instant action seeking, *inter alia*, a divorce from bed and board, temporary and permanent alimony, and an equitable distribution of marital property. Defendant was granted two extensions of time in which to file an answer to plaintiff's complaint. The second extension was up to and including 14 May 1992. According to the record on appeal, no further action was taken in this case until on or about 10 August 1994, when defendant filed a motion for summary judgment on plaintiff's equitable distribution claim based on the aforementioned premarital agreement. In this motion, defendant asserted that "[t]he Pre-Marital Agreement conclusively disposes of any property acquired by either party prior to the

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marriage, during the marriage, or subsequent to the separation of the two parties.” On 15 September 1994, defendant filed an answer to plaintiff’s complaint denying the essential allegations thereof and asserting the premarital agreement as an affirmative defense to plaintiff’s claims. Approximately forty minutes after the filing of defendant’s answer, plaintiff filed a response to defendant’s motion for summary judgment. Plaintiff contended that defendant had failed to plead the premarital agreement as an affirmative defense in an answer as required by Rule 8 of the North Carolina Rules of Civil Procedure, that defendant had failed to file an answer, and that the time for filing an answer had expired. Based on these contentions, plaintiff asked the trial court to deny defendant’s motion for summary judgment and rule that defendant could not rely on the premarital agreement as an affirmative defense to plaintiff’s claims.

On 30 May 1996, based on its review of the record, the trial court found a genuine issue of material fact as to the validity of the premarital agreement, concluded that defendant was not entitled to judgment as a matter of law, and denied defendant’s motion for summary judgment.

On 18 November 1996, the trial court held another hearing “to determine whether Defendant [could] assert as an affirmative defense [the] purported premarital agreement executed by the parties, and if so, whether such document [was] a valid and enforceable contract.” On 2 April 1997, the trial court entered an order containing the following findings of fact:

1. The parties executed a paper writing entitled “PRE-MARITAL AGREEMENT” on February 3, 1984 (hereinafter referred to as the “paper writing”), which provided that the sole consideration for the paper writing was (1) the contemplated marriage between the parties; (2) the mutual promises and covenants contained in this paper writing; and (3) the sum of ten thousand dollars to be paid by Defendant to Plaintiff on the day of the marriage.
2. As admitted by Defendant, Defendant did not pay to Plaintiff the aforesaid ten thousand dollars on or before the date of the marriage.
3. Although Defendant paid sums of money to Plaintiff after the date of marriage, such sums of money were not toward the ten thousand dollars due under the paper writing, as such payments of money were neither designated as payment toward such ten

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thousand dollar amount due nor accepted as payment toward such ten thousand dollar amount due.

4. Plaintiff at no time waived Defendant's obligation to perform under the paper writing, such obligation being to pay Plaintiff the ten thousand dollar amount due on the day of the marriage.

5. At the close of Defendant's evidence, Plaintiff moved for a dismissal on the ground that upon the facts and law Defendant had shown no right to relief.

Based on its findings of fact, the trial court made the following pertinent conclusions of law:

2. Defendant's obligation to pay Plaintiff ten thousand dollars on the date of the marriage constitutes a condition precedent which did not occur and which was not met by Defendant; therefore, Plaintiff does not have to perform under the paper writing, and no remedies are available to Defendant under the paper writing.

3. Because Defendant did not pay Plaintiff the ten thousand dollars on the day of the marriage, either before or after the marriage ceremony, the paper writing fails for lack of adequate consideration and is unenforceable as no contract was formed.

4. Plaintiff at no time waived Defendant's obligation to perform under the paper writing, such obligation being, *inter alia*, to pay Plaintiff the ten thousand dollar amount due on the day of the marriage.

....

6. The parties' execution of the paper writing is ineffective as an affirmative defense in this action and does not constitute a bar to any of Plaintiff's claims in this action.

Based on its findings and conclusions, the trial court ordered that judgment be rendered for plaintiff as follows:

1. The paper writing entitled "PRE-MARITAL AGREEMENT" executed by the parties on February 3, 1984, is invalid and is not an enforceable contract; and

2. The parties' execution of the paper writing entitled "PRE-MARITAL AGREEMENT" on February 3, 1984, is ineffective as an affirmative defense in this action and does not constitute a bar to any of Plaintiff's claims in this action.

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Plaintiff's equitable distribution claim was heard on 9-10 June 1999. On 14 July 2000, the trial court entered a judgment and order of equitable distribution awarding plaintiff, *inter alia*, a distributive award in the amount of \$248,584.00. Defendant has appealed from the trial court's determination that the parties' premarital agreement is invalid and unenforceable and from the trial court's subsequent equitable distribution of the marital property. On appeal, defendant contends that the trial court erred (1) in concluding that the payment of \$10,000.00 from defendant to plaintiff was a condition precedent to the validity and enforceability of the premarital agreement, and (2) in concluding that the premarital agreement failed for lack of adequate consideration. The dispositive issue is what effect should be given to defendant's obligation to pay plaintiff \$10,000.00.

We begin by reviewing some general principles concerning the validity of premarital agreements. "It is well settled in this jurisdiction that a man and woman contemplating marriage may enter into a valid contract with respect to the property and property rights of each after the marriage, and such contracts will be enforced as written." *In re Estate of Loftin*, 285 N.C. 717, 720, 208 S.E.2d 670, 673 (1974); *see also* N.C. Gen. Stat. § 52-10 (2001). Pursuant to N.C.G.S. § 52-10, the parties to such premarital agreements may "release and quitclaim such rights which they might respectively acquire . . . by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estate so released." N.C.G.S. § 52-10. Since 1965, N.C.G.S. § 52-10 has made it clear that such premarital agreements are valid "with or without a valuable consideration." N.C.G.S. § 52-10. Prior to the passage of N.C.G.S. § 52-10, the law in this State recognized that the marriage itself was sufficient consideration for a premarital agreement, and the law enforced the agreement so long as the marriage took place. 1 Suzanne Reynolds, *Lee's North Carolina Family Law* § 1.12(B), at 35-36 (5th ed. 1993).

Although the Uniform Premarital Agreement Act ("the Act") is inapplicable here, we note that it explicitly dispenses with the need for consideration as a prerequisite for the enforcement of premarital agreements entered into on or after the Act's effective date, 1 July 1987. N.C. Gen. Stat. § 52B-3 (2001).

The principles of construction applicable to contracts also apply to premarital agreements, *see Turner v. Turner*, 242 N.C. 533, 539, 89 S.E.2d 245, 249 (1955); *Howell v. Landry*, 96 N.C. App. 516, 525, 386 S.E.2d 610, 615 (1989), and premarital agreements "are to be con-

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strued liberally so as to secure the protection of those interests which from the very nature of the instrument it must be presumed were thereby intended to be secured.” *Stewart v. Stewart*, 222 N.C. 387, 392, 23 S.E.2d 306, 309 (1942). These principles of construction guide our review of defendant’s assignments of error.

[1] Defendant first contends that the trial court erred in concluding as a matter of law that the defendant’s obligation to pay plaintiff \$10,000.00 was a condition precedent to the effectiveness of the parties’ premarital agreement.

In *Cargill, Inc. v. Credit Assoc., Inc.*, 26 N.C. App. 720, 217 S.E.2d 105 (1975), this Court defined “conditions precedent” as

‘those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.’ 3A Corbin, Contracts § 628 at 16 (1960). On the other hand, one who makes a promise expresses an intention that some future performance will be rendered and gives the promisee assurance of its rendition.

Id. at 722-23, 217 S.E.2d at 107-08; *see also Craftique, Inc. v. Stevens and Co., Inc.*, 321 N.C. 564, 566, 364 S.E.2d 129, 131 (1988). Conditions precedent are not favored by the law, *Jones v. Palace Realty Co.*, 226 N.C. 303, 305-06, 37 S.E.2d 906, 907-08 (1946), and “when such operative words can be construed as either a promise or a condition, the presumption is in favor of a promise.” *Craftique*, 321 N.C. at 567, 364 S.E.2d at 131. Absent clear and plain language, provisions of a contract will ordinarily not be construed as conditions precedent. *Construction Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 118, 123 S.E.2d 590, 596 (1962); *Stewart v. Maranville*, 58 N.C. App. 205, 206, 292 S.E.2d 781, 782 (1982). However, the use of language such as “when,” “after,” and “as soon as” clearly indicates that a promise will not be performed except upon the happening of a stated event, i.e., a condition precedent. *Craftique*, 321 N.C. at 567, 364 S.E.2d at 131 (citing *Jones*, 226 N.C. at 306, 37 S.E.2d at 908).

In the instant case, the premarital agreement does not contain any language plainly and clearly indicating that the payment of \$10,000.00 from defendant to plaintiff was a condition precedent to the effectiveness of the agreement. Rather, defendant’s obligation to pay plaintiff \$10,000.00 is listed as the third of three items that pur-

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portedly make up the “sole consideration” for the premarital agreement. The other items of consideration are (1) the contemplated marriage of the parties, and (2) the mutual promises and covenants contained in the agreement. We reiterate that the only consideration necessary to support the premarital agreement was the marriage of the parties. *See* 1 Reynolds, *supra* at 35-36.

In determining whether defendant’s obligation to pay plaintiff \$10,000.00 is a condition or a promise, we keep in mind that premarital agreements are to be construed liberally so as to protect the interests the parties intended to be protected by the very nature of the instrument itself. *Stewart*, 222 N.C. at 392, 23 S.E.2d at 309. Here, the premarital agreement states that “both parties are individually possessed of certain Separate Property, and both acknowledge that they played no role in the accumulation of the other’s Separate Property,” that “the parties are aware of the laws concerning the disposition of marital and separate property under conditions of togetherness of [sic] apartness, life or death,” and that “the parties desire to govern said dispositions by their own agreement and not by the laws of any state or country.” The premarital agreement further states that it is entered into “with the express intention on the part of both parties that this Agreement be legally binding.” These statements exhibit a clear intention on the part of the parties to dispose of their property upon dissolution of their marriage through the provisions of their premarital agreement rather than through equitable distribution. Premarital agreements having this effect are expressly allowed by N.C. Gen. Stat. § 50-20(d) (2001). Indeed, the ability to control the disposition of property upon the dissolution of a marriage appears to be the primary purpose of most, if not all, premarital agreements.

In the instant case, the intent of the parties to dispose of their property through the premarital agreement was frustrated by the trial court’s conclusion that defendant’s obligation to pay plaintiff \$10,000.00 was a condition precedent to the effectiveness of the premarital agreement. In light of the presumption in favor of promises over conditions, *see Craftique*, 321 N.C. at 567, 364 S.E.2d at 131, and the absence of language clearly establishing that defendant’s obligation to pay plaintiff was a condition precedent to the effectiveness of the premarital agreement, *see Stewart*, 58 N.C. App. at 206, 292 S.E.2d at 782, we hold that the trial court erred in its determination. We conclude that defendant’s obligation to pay plaintiff \$10,000.00 on the day of marriage was simply a promise, and not a condition precedent to the effectiveness of the premarital agreement.

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[2] The trial court having provided multiple grounds to support its determination that the premarital agreement was not enforceable, we must address defendant's second assignment of error. Defendant contends that the trial court also erred in concluding that the premarital agreement failed for lack of adequate consideration.

As earlier noted, premarital agreements are effective with or without valuable consideration, and the marriage itself is sufficient consideration to support a premarital agreement. *See* N.C. G.S. § 52-10; 1 Reynolds, *supra* at 35-36. Nonetheless, the trial court concluded that defendant's failure to pay plaintiff the \$10,000.00 amounted to a failure of adequate consideration. We disagree with this conclusion.

Plaintiff cannot claim a total failure of consideration because she and defendant were married, and the marriage itself is sufficient consideration for the premarital agreement. *See* 1 Reynolds, *supra* at 35-36. Therefore, this case presents a partial failure of consideration. However, inadequate consideration, as opposed to the lack of consideration, is not sufficient grounds to invalidate a contract. *Delp v. Delp*, 53 N.C. App. 72, 76, 280 S.E.2d 27, 30 (1981). In order to defeat a contract for failure of consideration, the failure of consideration must be complete and total. *Id.* (citing *Weyerhaeuser Co. v. Light Co.*, 257 N.C. 717, 722, 127 S.E.2d 539, 543 (1962)). Here, the marriage of the parties was sufficient consideration to support the premarital agreement. The additional consideration recited in the premarital agreement, including defendant's obligation to pay plaintiff \$10,000.00 on the day of the marriage, constituted a promise on defendant's part to render some performance in the future. Defendant's failure to perform said promise did not invalidate and render ineffective the premarital agreement. Therefore, we find merit in defendant's second assignment of error.

In conclusion, we hold that defendant's obligation to pay plaintiff \$10,000.00 was a promise, the breach of which subjected defendant to liability for breach of contract. However, the failure of defendant to pay plaintiff the \$10,000.00 did not operate to invalidate the premarital agreement entered into between the parties.

[3] In plaintiff-appellee's brief, she attempts to argue that the trial court's order declaring the premarital agreement invalid and unenforceable can be affirmed on either of two alternative grounds: (1) that defendant did not timely assert the premarital agreement as an affirmative defense and/or (2) that two provisions of the premarital

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agreement violate public policy. However, the only conclusions of law set forth by the trial court to support its order declaring the premarital agreement invalid and unenforceable were that defendant's obligation to pay plaintiff \$10,000.00 was a condition precedent which had not occurred, and that the premarital agreement failed for a lack of adequate consideration.

The scope of this Court's review on appeal is limited to a consideration of those assignments of error set out in the record on appeal in accordance with Rule 10 of the Rules of Appellate Procedure. N.C. R. App. P. 10(a) (2002). In the instant case, the only assignments of error set out in the record on appeal are those brought forward and argued in defendant-appellant's brief concerning the trial court's conclusions that defendant's obligation to pay plaintiff \$10,000.00 was a condition precedent and that the premarital agreement failed for a lack of adequate consideration. However, appellees, such as plaintiff in the instant case, are not prevented by the Rules of Appellate Procedure from presenting issues for this Court's review in addition to those properly set out in the appellant's assignments of error.

N.C. R. App. P. 10 (d) (2002) provides, in pertinent part:

(d) *Cross-assignments of error by appellee.* Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for supporting the judgment, order, or other determination from which appeal has been taken.

In *Carawan v. Tate*, 304 N.C. 696, 286 S.E.2d 99 (1982), the Supreme Court explained the purpose of Rule 10(d) as follows:

Rule 10(d) provides protection for appellees who have been deprived in the trial court of an alternative basis in law on which their favorable judgment could be supported, and who face the possibility that on appeal prejudicial error will be found in the ground on which their judgment was actually based.

Id. at 701, 286 S.E.2d at 102; *accord Stevenson v. Dept. of Insurance*, 45 N.C. App. 53, 56-57, 262 S.E.2d 378, 380 (1980).

N.C. R. App. P. 28(c) operates in conjunction with Rule 10(d) by allowing an appellee, without having taken appeal, to "present for review, by stating them in his brief, any questions raised by cross-assignments of error under Rule 10(d)." N.C. R. App. P. 28(c) (2002).

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In addition to cross-assignments of error pursuant to Rule 10(d), another tool by which an appellee may present additional issues for this Court's review is the filing of a cross-appeal. However, there is an important distinction between a cross-assignment of error and a cross-appeal. Whereas cross-assignments of error under Rule 10(d) are the proper procedure for presenting for review any action or omission of the trial court which deprives the appellee of an *alternative* basis in law for *supporting* the judgment, order, or other determination from which appeal has been taken; the proper procedure for presenting alleged errors that purport to show that the judgment was erroneously entered and that an altogether different kind of judgment should have been entered is a cross-appeal. *St. Clair v. Rakestraw*, 67 N.C. App. 602, 607, 313 S.E.2d 228, 231-32 (1984), *rev'd in part on other grounds*, 313 N.C. 171, 326 S.E.2d 19 (1985); *see also Mann Contr'rs, Inc. v. Flair With Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 775-76, 522 S.E.2d 118, 121 (1999); *Cox v. Robert C. Rhein Interest, Inc.*, 100 N.C. App. 584, 397 S.E.2d 358 (1990); *Stanback v. Westchester Fire Ins. Co.*, 68 N.C. App. 107, 314 S.E.2d 775 (1984).

In the instant case, the additional arguments raised in plaintiff-appellee's brief, if sustained, would provide an *alternative* basis for upholding the trial court's determination that the premarital agreement is invalid and unenforceable. However, plaintiff failed to cross-assign error pursuant to Rule 10(d) to the trial court's failure to render judgment on these alternative grounds. Therefore, plaintiff has not properly preserved for appellate review these alternative grounds. *See Howard v. Oakwood Homes Corp.*, 134 N.C. App. 116, 122, 516 S.E.2d 879, 883 (1999); N.C. R. App. P. 10(a) ("the scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal in accordance with this Rule 10.")

Finally, we are aware of this Court's power pursuant to Rule 2 to suspend or vary the requirements or provisions of our Rules of Appellate Procedure, including Rule 10. However, the instant case does not present a situation where doing so would "prevent manifest injustice to a party," or benefit "the public interest." N.C. R. App. P. 2 (2002). Therefore, we do not address the additional arguments raised in plaintiff-appellee's brief.

As we have determined that the trial court erred in invalidating the premarital agreement for the reasons stated herein, we reverse both the trial court's order entered 2 April 1997 and its subsequent

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equitable distribution of the parties' marital property, and remand the cause for distribution pursuant to the Equitable Distribution Act to the extent any properties the parties may own are not covered by the premarital agreement. *See Howell*, 96 N.C. App. at 532, 386 S.E.2d at 620.

Reversed and remanded.

Chief Judge EAGLES and Judge McCULLOUGH concur.

BNT COMPANY, A NORTH CAROLINA GENERAL PARTNERSHIP COMPOSED OF VASSILIOS A. SAFFO, NICHOLAS A. SAFFO AND ANTHONY A. SAFFO; MARK A. GILSON; ZION KAPACH AND WIFE, DORIT KAPACH AND HAROLD E. ROSEMAN AND WIFE, ELOISE T. ROSEMAN, PLAINTIFFS/APPELLEES v. BAKER PRECYTHE DEVELOPMENT COMPANY, A NORTH CAROLINA CORPORATION, DEFENDANT/THIRD PARTY PLAINTIFF/APPELLANT v. A.V. (DOKEY) SAFFO, JACK STOCKS AND UNIVERSITY GROUP, INC., THIRD PARTY DEFENDANTS/APPELLEES

No. COA01-596

(Filed 18 June 2002)

1. Nuisance— closing drainage ditch—flooding—lay opinion—sufficiency of evidence

The trial court did not err by denying defendant's motions for a directed verdict and a judgment n.o.v. in a nuisance action which arose from the closing of a drainage ditch where there was sufficient evidence from which a layperson could form an opinion about whether the flooding was caused by closing the ditch.

2. Nuisance— closing drainage ditch—contributory negligence instruction—not applicable

The court did not err in a nuisance action arising from the closing of a drainage ditch by not giving defendant's requested instruction on plaintiffs' acquiescence in a third party defendant's alleged illegal extension of the ditch. The requested instruction was tantamount to a contributory negligence instruction, but neither the allegations nor the evidence supported a negligence theory of liability. The case was tried on violation of the reasonable use doctrine.

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3. Nuisance— closing drainage ditch—damages

The trial court did not err in a nuisance action which arose from the closing of a drainage ditch by denying defendant's motion for a judgment n.o.v. for insufficient evidence of damages.

4. Nuisance— damages—gross rentals

The plaintiff was not limited to recovery of net rentals in a nuisance action which arose from the closing of a drainage ditch where plaintiff continued to accrue and pay expenses after it was unable to rent its houses as a result of defendant's act.

5. Corporations— defunct—liability of shareholders

The trial court did not err in a nuisance action arising from the closing of a drainage ditch by granting summary judgment for the third party defendants where the defendants were the principals in a defunct corporation. Except under circumstances not applicable here, shareholders are not personally liable for the acts of the corporation.

6. Statute of Limitations— trespass—flooding from blocked drainage ditch

Even if the shareholders of a defunct corporation could be held personally liable for the acts of the corporation in an action arising from the closing of a drainage ditch, that claim is barred by the statute of limitations. The acts of trespass occurred no later than the early 1980s and the statute of limitations is three years from the original trespass. Even if the flooding is an intermittent trespass, the party charged with liability must have had control over the conditions causing the trespass within three years preceding the injury.

Appeal by defendant/third party plaintiff from judgment entered 23 August 2000 and order entered 6 October 2000 by Judge Gary E. Trawick, and also from order entered 8 February 2002 by Judge W. Allen Cobb, Jr., in New Hanover County Superior Court. Heard in the Court of Appeals 14 February 2002.

Hogue Hill Jones Nash & Lynch, L.L.P., by David A. Nash, for plaintiff-appellees.

Murchison, Taylor & Gibson, L.L.P., by Michael Murchison, for defendant/third party plaintiff-appellant.

Johnson & Lambeth, by Robert W. Johnson and Anna Johnson Averitt, for third party defendant-appellees.

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MARTIN, Judge.

Plaintiffs brought this action seeking monetary damages and injunctive relief upon allegations that defendant Baker Precythe Development Corporation (Baker) had created a private nuisance by filling in a drainage ditch, resulting in damage to their property. Defendant Baker denied that any action on its part had damaged plaintiffs, counterclaimed against plaintiffs Roseman for trespass, and filed a third party complaint against third party defendants A.V. Saffo and Jack Stocks seeking indemnity for any liability defendant might have to plaintiffs. Defendant also filed a third party complaint against University Group, Inc., which it subsequently dismissed. Defendant Baker appeals (1) from an order granting summary judgment in favor of third party defendants Saffo and Stocks, (2) from a judgment, entered upon a jury verdict, awarding plaintiffs damages for defendant's obstruction of a drainage ditch and ordering that defendant abate the nuisance by piping water from the ditch across defendant's property, and (3) from the order entered denying defendant's motion for judgment notwithstanding the verdict. For the reasons which follow, we affirm summary judgment in favor of the third party defendants Saffo and Stocks, and find no error in the trial of plaintiffs' claim against defendant Baker.

Briefly summarized, the evidence at trial tended to show that defendant purchased a 17.472 acre tract (the Baker tract) of land in New Hanover County in June 1997 from B & D Development Corporation. The Baker tract was located immediately north of a 12 acre tract belonging to plaintiffs Harold and Eloise Roseman, upon which was located the Rosemans' residence and a small mobile home park. Adjacent to, and south of, the Rosemans' property was the Hidden Valley subdivision, which had been developed in the 1980s by Hidden Valley Corporation. Hidden Valley Corporation has been liquidated; its primary shareholders were A.V. (Dokey) Saffo and Jack Stocks. Plaintiff BNT Company (BNT) is a partnership composed of Vassilios A. Saffo, Nicholas A. Saffo, and Anthony A. Saffo. BNT owns two lots in Hidden Valley subdivision, located at 340 Hidden Valley Road and 400 Hidden Valley Road. At all times relevant to this action, plaintiff Mark Gilson was the lessee of the premises at 340 Hidden Valley Road and plaintiffs Zion and Dorit Kapach were the lessees of the premises located at 400 Hidden Valley Road.

A drainage ditch crossed the Roseman property from south to north, which provided drainage from the Hidden Valley subdivision across the Roseman property into a wetlands area north of the

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Roseman property. In the early 1990s, B & D purchased the tract north of the Roseman property, which included the Baker tract, and developed the Crosswinds subdivision. In 1997, B & D conveyed the Baker tract to defendant. The drainage ditch in question crossed the Baker tract.

In 1998, defendant Baker began development of a subdivision known as Masonboro Village. On 26 June 1998, Baker closed the ditch on its property. The ditch closing alleviated flooding problems on the Baker tract, as well as flooding of the Crosswinds subdivision, which was adjacent to Baker's tract and north of plaintiffs' property. However, plaintiffs alleged that since the closing of the ditch, the properties south of the Masonboro Village Subdivision experienced repeated flooding resulting in substantial property damage.

Harold Roseman testified that he never experienced flooding on his tract of land prior to the closing of the ditch. After defendant closed the ditch, Roseman stated that his property flooded "every time it rains." Roseman testified that he incurred damages to a mobile home, dogwood trees, azaleas and other plants. He also lost fish from his fish pond. Bill Saffo, a one-third interest partner in plaintiff BNT Company, testified that the partnership rented houses on its lots to plaintiffs Marc Gilson and the Kapachs. Saffo testified that the lots did not flood following Hurricane Bertha in July 1996, nor did they flood following Hurricane Fran in September 1996. Following the closing of the ditch, however, the lots and homes began experiencing flooding "on numerous occasions." Saffo stated that he had not been able to rent the houses since September 1998 because they "continuously flood." Saffo stated that a general contractor estimated repairs totaling \$35,000 to the home previously occupied by Gilson and \$14,000 for the home rented by the Kapachs. In addition, at the time of trial BNT had lost two years' worth of rental income.

Defendant contended, however, that A.V. Saffo and Jack Stocks had illegally excavated the ditch across a ridge on the Baker tract in the 1970s or 1980s in an effort to drain the low lying areas of the Hidden Valley subdivision. Also, defendant's expert, Everette Knight, a civil engineer, testified that defendant's "closing of the ditch had an insignificant effect on [the Saffos'] property during the major storm events" He testified that the Rosemans' property flooded due to low elevation; according to Knight, the ditch was also clogged with debris which increased the risk of flooding. Knight further testified that, based on measurements of the elevations of the tracts, the water at one time flowed from north to south, rather than the current south

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to north flow. According to Knight, this change in water flow would have to have been caused by the digging of a ditch so as to “penetrate the ridge.” Knight concluded that one of BNT’s rental houses was in a low-lying depression which was the cause of the damage to the home from flood waters; in a major storm event such as a hurricane, “the water level is going to get above the finished floor elevation of this house.” Knight admitted that he was not aware of any flooding occurring on the Rosemans’ property or the BNT lots during Hurricanes Fran and Bertha, storm events which occurred before defendant filled in the ditch in June 1998. Although Knight testified that from the photographs he observed “what looks to be a ditch that was built in the 1980s,” he also testified that he saw a feature in a 1938 photograph of the area that could have been a drainage ditch with a similar configuration as the drainage ditch observed in the 1984 photograph. Shawn Maxwell, a photogrammatist and expert witness for plaintiffs, testified that from an analysis of three photographs from the relevant area, he observed a drainage ditch present in the same location as far back as 1938.

I.

[1] Defendant first contends the trial court erred by denying defendant’s motions for directed verdict, made at the close of all the evidence, and for judgment notwithstanding the verdict on the issue of causation. A motion for directed verdict pursuant to G.S. § 1A-1, Rule 50(a) tests the sufficiency of the evidence to support a verdict for the non-moving party. *Stanfield v. Tilghman*, 342 N.C. 389, 464 S.E.2d 294 (1995). A motion for judgment notwithstanding the verdict pursuant to G.S. § 1A-1, Rule 50(b) is, in essence, a renewal of an earlier motion for directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974). The same test is applied when ruling on either motion. *Bryant v. Nationwide Mutual Fire Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985). On a defendant’s motion for a directed verdict or judgment notwithstanding the verdict, the plaintiff’s evidence must be taken as true and in a light most favorable to him, and the motion should be denied only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *Dickinson*, 284 N.C. 576, 201 S.E.2d 897.

In considering any motion for directed verdict, the trial court must view all the evidence that supports the non-movant’s claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the

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benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

Bryant at 369, 329 S.E.2d at 337-38 (citation omitted).

Defendant specifically argues that plaintiffs failed to present necessary expert testimony establishing that the actions of defendant caused the flooding on plaintiffs' property. Defendant cites *Davis v. City of Mebane*, 132 N.C. App. 500, 512 S.E.2d 450 (1999) for the rule that expert testimony is required to establish proximate causation of flooding. In *Davis*, a hydroelectric dam allegedly caused atypical downstream flooding. Due to the complexity of the situation, the Court of Appeals held that "expert testimony is necessary to prove causation *in this case*." *Id.* at 504, 512 S.E.2d at 453 (emphasis added).

There are many instances in in [sic] which the facts in evidence are such that any layman of average intelligence and experience would know what caused the injuries complained of . . . Where, however, the subject matter . . . is "so far removed from the usual and ordinary experience of the average man that expert knowledge is essential to the formation of an intelligent opinion, only an expert can competently give opinion evidence as to the cause of . . . [the] condition."

Id. (quoting *Gillikin v. Burbage*, 263 N.C. 317, 325, 139 S.E.2d 753, 760 (1965) (citations omitted)).

Unlike the unusual circumstances in *Davis*, the facts of the instant case are such that a layperson could form an intelligent opinion about whether the flooding was caused by the closing of the ditch. Plaintiffs presented specific testimony on causation similar to that accepted by the North Carolina Supreme Court in the case of *Cogdill v. Highway Comm. and Westfeldt v. Highway Comm.*, 279 N.C. 313, 182 S.E.2d 373 (1971). Harold Roseman, who has owned his portion of the affected property since 1962, testified that he had never experienced flooding on his property prior to June 1998, when defendant closed the ditch. Once the ditch was closed, according to Roseman, his land flooded every time it rained. He also stated that when the ditch was not closed, the water flowed from south to north onto Baker's property. Bill Saffo, a partner in BNT Company, testified that the BNT properties did not flood during Hurricanes Bertha and Fran in 1996, but following the closing of the ditch in June 1998, those

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properties flooded on several occasions. Since September 1998, plaintiff BNT has been unable to rent the houses on its lots due to repeated flooding.

In addition, Dan Dawson, an independent engineer whose firm was employed by the county and who conducted a comprehensive drainage study in the Crosswinds/Hidden Valley area, testified that the closing of the ditch “interrupted the drainage flow in that area,” which could result in flooding “[i]f the water could not escape in some alternate manner.” Finally, John Baker, a 50 percent shareholder in defendant company, testified that he realized, when he filled in the ditch, that he “would be stopping water that would probably flood [the Rosemans’] ditches.” We hold that plaintiffs presented sufficient evidence to support the jury’s verdict as to causation, and the trial court did not err in denying defendant’s motions for a directed verdict and for judgment notwithstanding the verdict. Defendant’s assignments of error to the contrary are overruled.

II.

[2] Defendant next contends the trial court erred by failing to include defendant’s written request for a specific instruction related to nuisance. Defendant requested that the jury be instructed to consider, as one of the factors relevant to the nuisance charge, “plaintiffs’ fault or lack of care in creating the harm sustained.” This request stems from defendant’s contention that plaintiffs acquiesced in the third party defendants’ allegedly illegal extension of the ditch onto defendant’s property. Pursuant to N.C.R. Civ. P. 51(b), “when a party aptly tenders a written request for a specific instruction *which is correct in itself* and supported by the evidence, it is error for the court to fail to give the instruction at least in substance.” *Williams v. Randolph*, 94 N.C. App. 413, 425, 380 S.E.2d 553, 561, *disc. review denied*, 325 N.C. 437, 384 S.E.2d 547 (1989) (emphasis added) (citing *Bass v. Hocutt*, 221 N.C. 218, 19 S.E.2d 871 (1942)). The instruction requested by defendant regarding “plaintiffs’ fault or lack of care” is tantamount to a contributory negligence instruction. The defense of contributory negligence may, in certain circumstances, be available in a private nuisance action arising from defendant’s alleged negligence in creating the nuisance. *Boldridge v. Crowder Const. Co.*, 250 N.C. 199, 203, 108 S.E.2d 215, 218 (1959) (“whenever a nuisance has its origin in negligence, one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance.”) (citation omitted).

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Neither the allegations of the complaint nor the evidence at trial supported a negligence theory of liability in this case. The complaint alleged defendant's actions were "intentional, unreasonable, reckless and in total disregard to the health and safety of the plaintiffs." The evidence showed that defendant intentionally closed the ditch; defendant contended through the testimony of its expert witness that the flooding was due to causes other than the ditch closure. Thus, the theory of liability upon which the case was tried was whether defendant violated the "reasonable use" doctrine, articulated in *Pendergrast v. Aiken*, 293 N.C. 201, 236 S.E.2d 787 (1977), and the trial court correctly refused to give the requested instruction. See *Youmans v. City of Hendersonville*, 175 N.C. 574, 96 S.E. 45 (1918) (refusing to apply contributory negligence rule where alleged injuries were in the nature of nuisance or trespass).

III.

[3] Defendant also assigns error to the denial of its motion for judgment notwithstanding the verdict and to the entry of judgment on the verdict on the grounds the evidence was insufficient to support the jury's damage award. We disagree.

Plaintiffs presented substantial evidence of the losses incurred as a result of defendant's closing of the ditch. Harold Roseman testified that he incurred damages to a mobile home, damage to personal property, damage to his truck as a result of having to drive over rough terrain because his driveway was flooded, as well as damage to landscaping on his property. The Rosemans also lost rental income from their rental mobile homes. Dorit Kapach testified as to damages to various items of personal property, the value of frozen food lost when the Kapachs were unable to turn their electricity on because their rental house was flooded, and lost wages due to their inability to go to work due to the flooding. Bill Saffo testified that BNT Company incurred extensive damage to its rental homes, as well as the loss of rental income for two years. Defendant has not brought forward any assignment of error with respect to the admission of such evidence. Plaintiffs are entitled to recover all pecuniary losses shown with reasonable certainty by the evidence to have resulted from defendant's wrongful act. *Huff v. Thornton*, 287 N.C. 1, 213 S.E.2d 198 (1975). "The determination of such damages is left to the sound judgment and discretion of the trier of fact." *Hanna v. Brady*, 73 N.C. App. 521, 527, 327 S.E.2d 22, 25, *disc. review denied*, 313 N.C. 600, 332 S.E.2d 179 (1985) (citations omitted).

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[4] Defendant also contends BNT was impermissibly awarded damages for lost rentals because its evidence included only evidence of gross rentals lost during the period, and did not take into account costs associated with renting the properties. Defendant contends that BNT is entitled to recover only its net rental loss. We reject this argument as well.

Bill Saffo testified, without objection, as to monthly rentals of each of the properties damaged by the flooding. He was cross-examined extensively by defendant's counsel concerning those amounts. Mr. Saffo testified that BNT was required to continue paying the mortgages, taxes, insurance, utilities, and other expenses associated with the properties during the time when they could not be rented due to the damage caused by defendant's blockage of the ditch. He testified that the only expense BNT was not required to pay was the rental management fee. The trial court instructed the jury that damages could include "any loss of income, including rental income, . . . as a result of the defendant's blocking of the ditch." Although defendant assigned error to the trial court's jury instructions regarding damages, the assignment of error was not brought forward in defendant's brief and is, therefore, abandoned and not before us. N.C.R. App. P. 28(b)(5).

Our Supreme Court has held that damages in a tort action include compensation "for all pecuniary losses sustained . . . which are the natural and probable result of the wrongful act and which . . . are shown with reasonable certainty by the evidence." *Champs Convenience Stores v. United Chem. Co.*, 329 N.C. 446, 462, 406 S.E.2d 856, 865 (1991) (quoting *Huff v. Thornton*, 287 N.C. 1, 8, 213 S.E.2d 198, 204 (1975)). Pointing out that the scope of recovery in a tort action, i.e., whether the damages were the natural and probable consequence of the wrong, is more liberal than in a contract action, where the recovery is based upon whether the damages were within the legal contemplation of the parties, the Court held that a plaintiff was entitled to recover not only lost profits but also reasonable overhead expenses incurred during the period when the plaintiff was unable to operate the business. *Id.* The same principle is applicable here. As a result of defendant's act, BNT was unable to rent the houses, losing rentals, but continued to accrue and pay expenses such as mortgage payments, taxes, utilities, and insurance. Thus, BNT was not limited to recovery of the net rentals. Defendant's assignments of error regarding the sufficiency of the evidence to support the damage awards are overruled.

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IV.

[5] Finally, defendant Baker, as third party plaintiff, contends the trial court erred by granting the motion of the third party defendants Saffo and Stocks for summary judgment, and dismissing its claim against them for indemnity. We disagree.

The burden is on the party moving for summary judgment to show the absence of any genuine issue of material fact and that party's entitlement to judgment as a matter of law. *Lyles v. City of Charlotte*, 120 N.C. App. 96, 461 S.E.2d 347 (1995). That burden may be met by showing that an essential element of the opposing party's claim is either nonexistent or that evidence is not available to support it; the burden may also be met by showing that the opposing party cannot overcome an affirmative defense raised in bar of its claim. *Id.*

In its third party complaint, defendant Baker alleged that A.V. Saffo and Jack Stocks were the principals in Hidden Valley Corporation, "a defunct corporation," which was the developer of Hidden Valley subdivision. As to those third party defendants, Baker alleged

4. In the late 1970' [sic] or early 1980's, third party defendants Saffo and Stocks improperly ordered the enlargement of and excavation of a ditch extending from the northerly boundary of the Hidden Valley subdivision across property of plaintiff Roseman into property currently being developed by third party plaintiff Baker Precythe Development Company as the Masonboro Village subdivision, without first procuring the consent of the then owner of the property.

5. To the extent defendant/third party plaintiff Baker Precythe Development Company is liable to plaintiffs in conjunction with the closure of the aforesaid ditch, which liability is expressly denied, third party defendants Saffo and Stocks are liable to defendant/third party plaintiff Baker Precythe Development Company for all or part of plaintiffs' claim against it by reason of the aforesaid actions.

Defendant, as third party plaintiff, sought as relief:

judgment against the third party defendants A.V. (Dokey) Saffo, Jack Stocks . . . for all sums that may be adjudged against defendant Baker Precythe Development Company in favor of plaintiffs.

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Third party defendant Saffo testified that he, third party defendant Stocks, and A. L. McCarley were equal shareholders in Hidden Valley Corporation, which developed Hidden Valley subdivision. He testified that in the early 1980s the corporation, which is no longer in existence, contracted with Phil Jernigan, a contractor, to clean out the ditch, but that Mr. Jernigan did not widen or deepen the ditch. Defendant/third party plaintiff made no showing to the contrary. Except under circumstances not shown by the evidence to be applicable here, *see*, for example, G.S. § 55-14-08, shareholders are not personally liable for the acts of the corporation. N.C. Gen. Stat. § 55-6-22(b). Thus, third party defendants Saffo and Stocks can have no personal liability and are entitled to judgment as a matter of law.

[6] In addition, even if Saffo and Stocks could be personally liable for the acts of the corporation as alleged in the third party complaint, the claim is barred by the statute of limitations. To the extent the allegations of the third party complaint can be construed to allege a trespass by reason of the enlargement of the ditch, the act occurred, according to the allegation of the third party complaint and the testimony of A.V. Saffo, no later than the early 1980s. The statute of limitations for trespass is three years from the date of the original trespass. N.C. Gen. Stat. § 1-52(3). Though defendant Baker argues that the flooding resulting from the excavation and diversion of the water is an intermittent trespass, its assertions are of no avail. Even if we were to agree, the party charged with liability for trespass must have had control over the conditions causing the trespass within three years preceding the injury. *Hooper v. Lumber Co.*, 215 N.C. 308, 311, 1 S.E.2d 818, 820 (1939) (“in order to repel the bar of the statute of limitations it must affirmatively appear from the evidence that these conditions were under control of the defendant, and the breach of duty with reference thereto had taken place sometime within the period of three years preceding the injury.”). Summary judgment in favor of third party defendants Saffo and Stocks is affirmed.

Trial of plaintiffs’ claim against defendant—No Error.

Summary judgment dismissing the third party action—Affirmed.

Judges HUDSON and CAMPBELL concur.

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TONJA RUSSELL, EMPLOYEE, PLAINTIFF v. LABORATORY CORPORATION OF AMERICA, EMPLOYER AND CONTINENTAL CASUALTY COMPANY, CARRIER, DEFENDANTS

No. COA01-1044

(Filed 18 June 2002)

1. Workers' Compensation— introduction of medical records—doctors not deposed

The Industrial Commission did not err in a workers' compensation action by sustaining defendant's objections to the introduction of medical records from doctors plaintiff saw after she moved to Florida where plaintiff offered the records during the deposition of the doctor who first saw plaintiff in the emergency room. Defendants had informed plaintiff that they would not stipulate to the introduction of the records, but would agree to depose the Florida doctors. The Commission determined that it was plaintiff's burden to schedule depositions of the doctors if she wanted to introduce their medical records, and noted that the emergency room doctor was not authorized to authenticate the records because he did not review or rely upon them in forming his opinions or testimony, and that he did not refer plaintiff to either doctor. There is evidence to support the Commission's ruling.

2. Workers' Compensation— compensable brain injury—evidence not sufficient

The Industrial Commission did not err in a workers' compensation action by concluding that the evidence did not show a compensable brain injury where the Commission found that all of the physical examinations and testing showed no physical damage to the brain and made further findings pertaining to plaintiff's physically active lifestyle, her enrollment in college, and her articulate, alert demeanor at the hearing. It cannot be concluded that the decision to deny compensation was wholly arbitrary or manifestly unsupported by reason, although there may have been evidence to the contrary.

3. Workers' Compensation— disfigurement of teeth—evidence not sufficient

The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff was not entitled to compensation for disfigurement to her teeth where the teeth were

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restored with composite resin and a root canal and the Commission held defendant responsible for that treatment. Plaintiff did not need extractions or crowns and it does not appear from the record that plaintiff presented evidence that the injury was so marring that she would suffer diminution of her future earning capacity. The injury did not rise to the level of a serious disfigurement warranting compensation under N.C.G.S. § 97-31(21).

4. Workers' Compensation— attorney fees—limited—appeal procedure not followed

The Court of Appeals did not have jurisdiction in a workers' compensation action to consider whether the Industrial Commission erred by limiting plaintiff's attorney fees where plaintiff did not follow statutory procedures for appealing the Commission's failure to approve plaintiff's fee agreement.

Appeal by plaintiff from an opinion and award entered 21 May 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 May 2002.

Charles N. Stedman for plaintiff-appellant.

Smith Helms Mulliss & Moore, L.L.P., by Jeri L. Whitfield and Shannon J. Adcock, for defendant-appellees.

HUNTER, Judge.

Tonja Russell ("plaintiff") appeals an opinion and award of the North Carolina Industrial Commission awarding her medical expenses and temporary total disability compensation but denying compensation for permanent partial impairment and disfigurement. We affirm.

On 29 May 1996, plaintiff was employed by defendant Laboratory Corporation of America, which was insured by Continental Casualty Company (collectively "defendants"). On that date, plaintiff fell when her foot became entangled in a stool at her workstation, causing her to strike her head on a counter top. Plaintiff was examined that day by emergency room doctor Charles Stewart, who conducted various tests on plaintiff. X-rays of plaintiff's cervical, lumbosacral spine and nasal passages showed no fractures, and an MRI, CT scan, and EEG of plaintiff's head revealed normal brain function. Dr. Stewart determined that plaintiff had suffered a concussion and scheduled her for

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a follow-up visit. Plaintiff's fall also caused a tooth abscess and several chipped teeth, which teeth were restored with composite resin, and a root canal was performed.

Plaintiff returned to Dr. Stewart on 3 June 1996. Plaintiff exhibited minor symptoms of concussion but had normal mental status, and Dr. Stewart did not anticipate further visits unless plaintiff continued to experience symptoms. On 4 October 1996, plaintiff returned to Dr. Stewart complaining of headaches and fainting spells. Dr. Stewart ordered an MRI be performed, the result of which was normal. Dr. Stewart continued to treat plaintiff for headaches throughout 1996, 1997 and part of 1998.

Plaintiff resigned from her employment with defendants on 26 August 1997. Plaintiff held various other jobs following her resignation, and at the time of the hearing was taking college classes to become a physician's assistant. In 1998, plaintiff relocated to Florida where she sought treatment from Dr. Beena Stanley, a neurologist, and Dr. Rama Nathan, an ear, nose, and throat specialist.

In 1999, plaintiff underwent an independent medical examination by Dr. William Greenberg which confirmed that her MRI results were normal and that she exhibited normal mental status and speech function. Dr. Greenberg noted that plaintiff was very physically active, and that she played on a semi-professional softball team. Dr. Greenberg opined that plaintiff had reached maximum medical improvement, but that she would need to visit a physician approximately four times a year until her headaches were under control.

The Commission found as fact that plaintiff's headaches and tooth injuries were caused by her fall on 29 May 1996. Accordingly, it ordered defendants to pay all reasonable necessary medical expenses incurred by plaintiff for the treatment of her injuries. In addition, defendants were ordered to pay plaintiff temporary total disability for various periods of work which plaintiff missed as a result of her injuries. However, the Commission declined to award plaintiff for permanent partial impairment resulting from damage to an internal organ under N.C. Gen. Stat. § 97-31(24) (2001), and for serious facial or head disfigurement resulting from the damage to her teeth under N.C. Gen. Stat. § 97-31(21). Plaintiff appeals.

"The standard of appellate review of an opinion and award of the Industrial Commission is limited to a determination of (1) whether the Commission's findings of fact are supported by any competent

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evidence in the record; and (2) whether the Commission's findings justify its legal conclusions." *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 25, 514 S.E.2d 517, 520 (1999). The Commission's findings are conclusive on appeal if there is any competent evidence to support them; however, its conclusions of law are reviewable *de novo*. *Id.* at 26, 514 S.E.2d at 520.

[1] Plaintiff first argues that the Commission erred in sustaining defendants' objection to the introduction of the medical records of Drs. Stanley and Nathan which plaintiff offered into evidence during the deposition of Dr. Stewart. On 3 September 1999, prior to Dr. Stewart's deposition, defendants informed plaintiff by letter that they would not stipulate to the introduction of the medical records of Drs. Stanley and Nathan. Defendants informed plaintiff that they would agree to depose those doctors, which would have allowed for plaintiff to introduce the medical records, but plaintiff did not initiate those depositions. The Commission determined that it was plaintiff's burden to have scheduled the depositions of Drs. Stanley and Nathan if she had wanted to introduce their medical records.

The Commission upheld defendants' objection to the records' introduction, which objection came after Dr. Stewart's deposition.¹ In so ruling, the Commission noted that Dr. Stewart was not authorized to authenticate the records because he did not review or rely upon them in forming his opinions or testimony, and did not refer plaintiff to either Dr. Stanley or Dr. Nathan. There is evidence to support the Commission's ruling, as Dr. Stewart's deposition reveals that he did not refer plaintiff to either doctor, and that he only reviewed the medical records upon receiving them from plaintiff's attorney approximately one week prior to his deposition, and therefore did not rely upon them in diagnosing plaintiff. This argument is overruled.

[2] Plaintiff next argues that the Commission erred in concluding that the evidence failed to show that she sustained a compensable injury to her brain. The Commission made conclusions of law that as a result of her fall, plaintiff developed migraine headaches which caused her to be unable to work for particular periods of time, for which periods defendants were required to compensate plaintiff for temporary total disability. However, the Commission concluded that there was no evidence that plaintiff had sustained a brain injury that

1. The Commission determined that defendants had not waived their objection by failing to object during Dr. Stewart's deposition because the deposition stipulations' boilerplate language provided that objections would be preserved except those pertaining to the form of a question.

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would entitle her to permanent partial impairment compensation for damage to an internal organ under N.C. Gen. Stat. § 97-31(24).

Under N.C. Gen. Stat. § 97-31(24), “[i]n case of the loss of or permanent injury to any important external or internal organ or part of the body for which no compensation is payable under any other subdivision of this section, the Industrial Commission may award proper and equitable compensation.” *Id.* “By employing the word ‘may’ in N.C.G.S. § 97-31(24) the legislature intended to give the Industrial Commission discretion whether to award compensation under that section.” *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986). Thus, the Commission has discretion as to whether an award under N.C. Gen. Stat. § 97-31(24) is warranted, and its decision will not be overturned on appeal unless it “ ‘is manifestly unsupported by reason,’ ” or “ ‘so arbitrary that it could not have been the result of a reasoned decision.’ ” *Id.* (citations omitted).

Here, the Commission made relevant findings of fact that on the date of the accident, 29 May 1996, x-rays, a CT head scan, and brain MRI and EEG tests were performed and all results indicated plaintiff had normal brain function; that an additional MRI was performed in October 1996 which indicated plaintiff had normal brain function; and that in June 1999 plaintiff underwent an independent medical examination wherein the results of her latest MRI were confirmed to be normal, her mental testing status and speech function were both normal, and the doctor observed that plaintiff was very physically active and had reached maximum medical improvement. The Commission found, in sum, that “[a]ll physical examinations and testing, such as the MRI’s of the brain, show no physical damage to the brain.” The Commission also made findings of fact pertaining to plaintiff’s physically active lifestyle, her enrollment in college, and her articulate and alert demeanor at the hearing.

Plaintiff does not dispute that these findings were supported by the evidence, and that none of her medical tests, including her MRI’s, x-rays, EEG, and CT scan, revealed anything but normal brain function. In light of these findings, we cannot conclude that the decision to deny compensation for a permanent brain injury under N.C. Gen. Stat. § 97-31(24) was wholly arbitrary or manifestly unsupported by reason, though there may have been evidence to the contrary.

[3] Plaintiff further argues that the Commission erred in concluding that she was not entitled to compensation for the “disfigurement” to her teeth because the damage did not require any extractions or

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crowns. The Commission found as fact that plaintiff's fall caused her to chip her teeth and created one tooth abscess. Plaintiff's dentist restored the chipped teeth with composite resin and performed a root canal. The Commission made a conclusion of law that as a result of her compensable injury, plaintiff sustained damage to her teeth which required dental treatment and repair, for which treatment defendant was responsible. However, the Commission also concluded that plaintiff's dental work did not require any extractions or crowns, and that she was not entitled to compensation for "disfigurement" under N.C. Gen. Stat. § 97-31(21).

Under N.C. Gen. Stat. § 97-31(21), "[i]n case of serious facial or head disfigurement, the Industrial Commission shall award proper and equitable compensation not to exceed twenty thousand dollars (\$20,000)." *Id.* Plaintiff does not dispute that she was not required to undergo extractions or have crowns placed on her teeth, but argues that the injury to her teeth already, or will in the future, constitute "serious facial or head disfigurement."

The issue of whether an employee has suffered "serious facial or head disfigurement" is a question of fact to be resolved by the Commission. *Davis v. Construction Co.*, 247 N.C. 332, 337, 101 S.E.2d 40, 44 (1957). In *Davis*, our Supreme Court expounded on the concept of serious disfigurement:

Under our decisions, there is a serious disfigurement in law only when there is a serious disfigurement in fact. A serious disfigurement in fact is a disfigurement that mars and hence adversely affects the appearance of the injured employee to such extent that it may be reasonably presumed to lessen his opportunities for remunerative employment and so reduce his future earning power. True, no present loss of wages need be established; but to be serious, the disfigurement must be of such nature that it may be fairly presumed that the injured employee has suffered a diminution of his future earning power.

Id. at 336, 101 S.E.2d at 43 (emphasis omitted).

In this case, plaintiff did not lose any teeth and it does not appear from the record that she presented any evidence tending to show that the injury to her teeth was of such a marring nature that she would suffer diminution in her future earning capacity. Moreover, as noted in the section of the Commission's Ratings Guide pertaining to disfigurement of teeth, compensation for disfigurement is paid where teeth

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have been extracted due to accidental injury, and where teeth are crowned, fifty percent of the value of the tooth will be awarded. However, the Ratings Guide provides that “[i]f the tooth is merely chipped and a cap-type repair is done, then, of course, no compensation would be paid for disfigurement.” We agree with the Commission that the injury to plaintiff’s teeth did not rise to the level of a serious disfigurement warranting compensation under N.C. Gen. Stat. § 97-31(21). This argument is overruled.

[4] Finally, plaintiff argues that the Commission erred in limiting plaintiff’s attorney’s fees to twenty-five percent of the net compensation awarded plaintiff. Plaintiff states in her brief that her attorney submitted to the deputy commissioner a copy of an agreement between the attorney and plaintiff establishing counsel would be entitled to a thirty-three and one-third percent contingent fee. Both the deputy commissioner and the Full Commission ordered that plaintiff’s counsel would receive twenty-five percent of the net compensation awarded plaintiff, and that this percentage was a reasonable attorney’s fee.

Plaintiff argues that the Commission’s failure to cite reasons why it did not approve a fee of thirty-three and one third percent was erroneous, and requires that we direct the Commission to order that this amount be provided to plaintiff’s counsel. In support of this argument, plaintiff cites N.C. Gen. Stat. § 97-90(c) (2001) which provides:

(c) If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed.

N.C. Gen. Stat. § 97-90(c). However, the statute further provides:

If within five days after receipt of notice of such fee allowance, the attorney shall file notice of appeal to the full Commission, the full Commission shall hear the matter and determine whether or not the attorney’s agreement as to a fee or the fee allowed is unreasonable. If the full Commission is of the opinion that such

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agreement or fee allowance is unreasonable and so finds, then the attorney may, by filing written notice of appeal within 10 days after receipt of such action by the full Commission, appeal to the senior resident judge of the superior court in the county in which the cause of action arose or in which the claimant resides; and upon such appeal said judge shall consider the matter and determine in his discretion the reasonableness of said agreement or fix the fee and direct an order to the Commission following his determination therein.

N.C. Gen. Stat. § 97-90(c).

In *Creel v. Town of Dover*, 126 N.C. App. 547, 486 S.E.2d 478 (1997), we held that the plaintiff's failure to comply with the appeal procedures set forth in N.C. Gen. Stat. § 97-90(c) required dismissal of his argument that the Commission failed to properly address the issue of fees as required by N.C. Gen. Stat. § 97-90. *Id.* at 552, 486 S.E.2d at 480. We rejected the plaintiff's argument that because the Commission failed to address the issue of fees, he was not required to comply with the statutory appeal procedures. *Id.* We noted:

Had [plaintiff] or his attorney brought the matter to the superior court in the manner set out in G.S. § 97-90, the Commission would thereby have been compelled to explain its failure to award counsel fees. Perhaps, as plaintiff claims, the Commission neglected to do so because of mere oversight. Whatever the explanation for the Commission's omission, however, neither plaintiff nor his attorney complied with G.S. § 97-90.

Id.

Similarly, in *Davis v. Trus Joist MacMillan*, 148 N.C. App. 248, 558 S.E.2d 210, *disc. review denied*, 355 N.C. 490, 563 S.E.2d 564 (2002), we recently observed that N.C. Gen. Stat. § 97-90(c) requires that after the Full Commission renders a decision, the matter "must" be appealed to the senior resident judge of the superior court in the county in which the cause of action arose or in which the plaintiff resides. *Id.* at 255, 558 S.E.2d at 215. Thus, where the plaintiff failed to appeal the dispute over attorney's fees according to the procedures set out in section 97-90(c), we determined that "we are without jurisdiction to hear the issue and must dismiss the appeal." *Id.*

In the present case, assuming that plaintiff's attorney duly provided a copy of the agreement to the hearing officer or Commission

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prior to the conclusion of the hearing,² the record fails to establish that plaintiff followed the procedures outlined in the statute for appealing the Commission's failure to approve the agreement. The record contains no indication that plaintiff appealed this matter to the senior resident judge of the superior court in the county in which the cause of action arose or in which plaintiff resides. Accordingly, we do not have jurisdiction over this issue.

For the reasons stated herein, the opinion and award of the Full Commission is affirmed.

Affirmed.

Judges WYNN and THOMAS concur.

STATE OF NORTH CAROLINA v. ANTHONY LEON BROTHERS

No. COA01-867

(Filed 18 June 2002)

1. Appeal and Error— preservation of issues—failure to renew motion

The trial court did not err in a prosecution for first-degree statutory rape and other sexual offenses against a six-year-old girl by denying defendant's motion to introduce evidence of prior sexual activity by the victim. The court denied the motion with leave to renew, but defendant did not do so and the issue was not preserved for appeal.

2. Evidence— other offenses—identity, pattern, common plan

The trial court did not err in a prosecution for first-degree statutory rape and other sexual offenses against a six-year-old girl by admitting testimony from her sister as to other sexual acts committed by defendant. The prior acts showed identity, pattern, and a common plan or scheme.

2. The record on appeal fails to contain plaintiff's fee agreement, nor any indication (other than plaintiff's assertion) that it was duly filed prior to the conclusion of the hearing in accordance with N.C. Gen. Stat. § 97-90(c). "Appellate review is based 'solely upon the record on appeal,' N.C.R. App. P. 9(a); it is the duty of the appellants to see that the record is complete." *Collins v. Talley*, 146 N.C. App. 600, 603, 553 S.E.2d 101, 102 (2001).

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3. Evidence— medical testimony—basis

The trial court did not err by admitting medical testimony to establish that a six-year-old victim had been sexually abused where defendant alleged that the testimony was based solely on the victim's history, but the doctor explicitly stated that her conclusion was based in part on the physical evidence of sexual abuse.

4. Evidence— hearsay—medical diagnosis exception—double hearsay—child sexual abuse victim

There was no prejudicial error in a prosecution for first-degree statutory rape and other sexual offenses against a six-year-old victim where the court admitted as substantive evidence a doctor's testimony regarding statements made by the victim's mother and a social worker that related statements by the victim. The question as to whether out-of-court statements of a parent recounting out-of-court statements of a child victim may be admitted pursuant to the medical diagnosis exception to the hearsay rule has not been addressed in North Carolina, and was not addressed here because defendant did not show prejudice.

5. Sexual Offenses— short form indictment—constitutional

The short form indictment for sexual offense and indecent liberties was constitutional.

6. Sexual Offenses— bill of particulars—non-unanimous verdict

The trial court did not err in a prosecution for sexual offenses committed against a six-year old child by refusing defendant's motion to require the jury to convict him on the specific acts set out in the bill of particulars. The threat of a non-unanimous verdict does not arise in indecent liberties cases because the indecent liberties statute does not list discrete criminal acts in the disjunctive. A defendant may be convicted of first-degree sexual offense even if the trial court instructs the jury that more than one sexual act may comprise an element of the offense.

7. Sexual Offenses— instructions—penetration

The trial court did not err when instructing the jury on first-degree sexual offense by defining a sexual act as any penetration, however slight, by an object into the genital opening of a person's body.

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8. Indecent Liberties— instructions—touching

The trial court did not err in an indecent liberties prosecution by making explicit that a conviction required that the jury find that defendant touched the victim in an improper or indecent way, induced the victim to touch him in an indecent way, or attempted to commit a lewd or lascivious act upon the child.

9. Criminal Law— bill of particulars—evidence not inconsistent

There was no error in a prosecution for first-degree rape where defendant contended that he was denied a fair trial because the bill of particulars and the evidence at trial did not precisely establish the date and time of the alleged rape. The purpose of a bill of particulars is to inform defendant of specific occurrences intended to be investigated at trial and to limit the course of the evidence to a particular scope of inquiry; the testimony in this case was not inconsistent with the bill of particulars.

10. Criminal Law— instructions—rape and sexual offenses— unanimity—no federal constitutional violation

The trial court's instructions in a prosecution for first-degree statutory rape and sexual offense did not violate federal constitutional law; *Richardson v. United States*, 526 U.S. 813, is limited to federal prosecutions for continuing criminal enterprises and does not apply to this case.

Appeal by defendant from judgments entered 5 October 2000 by Judge Jerry R. Tillett in Pasquotank County Superior Court. Heard in the Court of Appeals 25 April 2002.

Attorney General Roy Cooper, by Assistant Attorney General Celia Grasty Lata, for the State.

Miles and Montgomery, by Lisa Miles, for defendant-appellant.

MARTIN, Judge.

Defendant was charged with first degree statutory rape of a female child under thirteen, statutory sexual offense of a female child under thirteen, and three counts of taking indecent liberties with a child. Following a jury trial, defendant was convicted on all counts. The trial court arrested judgment on one count of taking indecent liberties with a child, and entered judgments on the remaining verdicts imposing active terms of imprisonment. Defendant appeals.

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The State's evidence tended to show that the alleged victim, "E.S.," was eight years old at the time of the trial. E.S. testified that on one occasion of the sexual abuse, defendant, her stepfather, asked her to "sit on daddy's lap," at which point he pulled out his penis. On another occasion, E.S. testified that defendant woke her and "put his finger up in my private." On a third occasion defendant allegedly asked E.S. if she wanted to see "daddy's milk." She then indicated that defendant had his hand on his penis and ejaculated. On yet another occasion, defendant compelled E.S. to wash his penis. Finally, E.S. testified that defendant put Vaseline on his penis and put his "private part" into her "private part." According to E.S., defendant instructed E.S. not to tell anyone about the sexual acts.

Midge Hudyma, a child protective services investigator, testified for the State. Ms. Hudyma stated that after getting a report of possible sexual abuse from the police department and from the victim's mother, Ms. Hudyma interviewed E.S. at her elementary school. E.S., who was six years old at the time of the alleged acts, told Ms. Hudyma that her stepfather had touched her "kitty," which she indicated was her vagina. E.S. told Ms. Hudyma that defendant penetrated her with his fingers, and that defendant asked her to sit on his lap while his penis was exposed. E.S. also told Ms. Hudyma that defendant inserted his penis into her vagina. The trial court permitted this testimony for the limited purpose of corroborating the victim's prior testimony.

Dr. Rebecca Coker, a pediatrician certified as an expert in the diagnoses of sexually abused children, testified that E.S. was referred to her by the department of social services, and Dr. Coker conducted a complete physical examination of E.S. on 10 June 1999. Dr. Coker discovered scar tissue in the victim's vagina. Dr. Coker testified that she was concerned by a "very distorted fossa navicularis" inside the vagina and by "two bands of suspicious scar tissue." Dr. Coker concluded that "the patient had experienced trauma and based on the medical history, it was consistent with sexual abuse."

The victim's sister, "S.S.," was also permitted to testify pursuant to G.S. § 8C-1, Rule 404(b). S.S. stated that on one occasion she was sitting on a recliner watching television and defendant came up behind her and "started rubbing on my boobs." On another occasion S.S. was sleeping on the couch and woke up in the middle of the night and noticed the television was on, "so I turned around to watch TV and when I turned around [defendant] was standing in front of me with his thing out of his boxers again." S.S. stated that he was "jack-

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ing off.” On yet another occasion defendant woke S.S. while she slept and asked her to kiss him, but she would not. On other occasions S.S. testified that defendant felt her vagina and her breasts. S.S. was twelve years old when these incidents occurred.

Defendant did not present any evidence.

Defendant brings forward six assignments of error. Defendant has not presented arguments in support of the remaining twenty-six assignments of error contained in the record on appeal and they are deemed abandoned. N.C.R. App. P. 28(b)(5).

I.

[1] Defendant first argues the trial court erred by denying defendant’s motion to introduce evidence of prior sexual activity of the complaining witness. Defendant filed a pre-trial motion to “introduce prior sexual activity of complaining witness” on the ground that the victim had explicit sexual knowledge based on incidents which allegedly occurred between her and a male cousin, and that cross examination on this point was necessary to provide an alternative explanation for the victim’s sexual knowledge. The trial court denied defendant’s motion, “with leave to be remade at some—if there is some—some reason something comes up that makes it at issue.” Defendant never renewed his motion to cross examine E.S. as to her prior sexual experiences as a means of establishing an alternate explanation for the physical evidence of sexual abuse, even after the State presented the testimony of Dr. Rebecca Coker, who testified that a physical examination of the victim’s genitalia revealed scar tissue consistent with sexual penetration. As a result, this assignment of error was not properly preserved for appeal. *See* N.C.R. App. P. 10(b)(1) (“In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party’s request, objection or motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.”).

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II.

[2] Defendant next contends the trial court erred in admitting into evidence the testimony of S.S. as to sexual acts committed by defendant. Evidence of other crimes or acts is not admissible for the purpose of showing the character of the accused or for showing his propensity to act in conformity with a prior act. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001). However, such evidence may be admissible for other purposes, such as “proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment, or accident.” *Id.* The North Carolina Supreme Court has held that Rule 404(b) is a rule of inclusion. *State v. Golphin*, 352 N.C. 364, 533 S.E.2d 168 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Indeed, North Carolina’s appellate courts have been “markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b).” *State v. Scott*, 318 N.C. 237, 247, 347 S.E.2d 414, 419-20 (1986) (citations omitted). Two constraints limit the use of evidence under Rule 404(b): “similarity and temporal proximity.” *State v. Artis*, 325 N.C. 278, 299, 384 S.E.2d 470, 481 (1989), *vacated on other grounds*, 494 U.S. 1023, 108 L. Ed. 2d 604 (1990).

When the features of the earlier act are dissimilar from those of the offense with which the defendant is currently charged, such evidence lacks probative value. When otherwise similar offenses are distanced by significant stretches of time, commonalities become less striking, and the probative value of the analogy attaches less to the acts than to the character of the actor.

Id. The similarities between the crime charged and the prior acts admitted under Rule 404(b) need not “ ‘rise to the level of the unique or bizarre’ ” in order to be admissible. *State v. Stager*, 329 N.C. 278, 304, 406 S.E.2d 876, 891 (1991) (citation omitted).

In the present case, the trial court admitted evidence of the prior acts on the grounds that it showed identity, a pattern of opportunity, and a common plan or scheme to commit sexual offenses against the victim and her sister, S.S. Defendant was the stepfather to both girls, and stayed at home while his wife, the girls’ mother, was at work. Both girls were under the age of thirteen at the time of the sexual abuse and the incidents with respect to both girls occurred when they were alone with him. Both girls testified that defendant exposed and fondled himself in their presence, touched their genitalia on repeated

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occasions, and masturbated in their presence. The trial court did not err in permitting the testimony of S.S. pursuant to Rule 404(b) to show identity, a pattern of opportunity, and a common plan or scheme to commit sexual abuses against his stepdaughters.

III.

[3] Defendant next contends the trial court erred in admitting the opinion testimony of Dr. Coker that the victim had been sexually abused based solely on her history. Defendant takes the testimony of Dr. Coker out of context to advance the argument that Dr. Coker based her medical diagnosis solely on the victim's history, which mischaracterizes the State's evidence. Defendant's assignment of error is overruled.

North Carolina Rule of Evidence 702(a) provides that 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.

In *State v. Grover*, 142 N.C. App. 411, 543 S.E.2d 179 (2001), this Court held that opinion testimony of a clinical social worker that the victim had been sexually abused should not have been admitted because it was based entirely on the victim's statements and did not include physical evidence of sexual abuse. In addition, the North Carolina Supreme Court recently held that,

[i]n a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility.

State v. Stancil, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (citations omitted). In *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987), the Supreme Court held that the testimony of the physician in a rape and sexual abuse case was inadmissible because the State did not lay a proper foundation for the testimony. The physician made reference to a physical exam conducted four years after the date of the alleged offenses which revealed that the victim's hymen was not intact. However, the exam showed no "lesions, tears, abrasions, bleeding or otherwise abnormal conditions." *Id.* at 613, 359 S.E.2d at 465. In fact,

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the testifying physician stated that the physical condition of the hymen alone “would not support a diagnosis of sexual abuse, but only a conclusion that the victim had been sexually active.” *Id.* at 614, 359 S.E.2d at 466. The Supreme Court held that the expert was in no better position to testify as to whether the victim had been sexually abused years earlier than the members of the jury, and that his testimony was inadmissible pursuant to Rule of Evidence 702. *Id.*

In the present case, however, substantial *physical* evidence was presented by Dr. Coker to support her opinion that E.S. was sexually abused. Dr. Coker, a pediatrician who was permitted to testify as an expert in the diagnoses and treatment of sexually abused children, stated that she performed a complete physical examination of E.S. on 10 June 1999, when the victim was seven years old. Dr. Coker discovered scar tissue inside the victim’s vagina. She testified that she noticed bands of tissue which distorted the “fossa navicularis” inside the vagina. She also referred to “suspicious scar tissue,” which is not “a common or normal finding.” Dr. Coker concluded that “*the patient had experienced trauma* and based on the medical history, it was consistent with sexual abuse” (emphasis added). The State’s expert in this case explicitly stated that her conclusion was based in part on the physical evidence of sexual abuse. Because the State’s expert based her conclusions on both the physical evidence and the medical history obtained from Midge Hudyma, a child protective services investigator, as well as the victim’s mother, her expert opinion testimony was properly admitted under N.C.R. Evid. 702.

IV.

[4] Defendant next argues the trial court erred in admitting as substantive evidence hearsay testimony from Dr. Coker regarding statements made by the victim’s mother, Gloria Brothers, and the social worker, Ms. Hudyma. As one of the exceptions to the general prohibition against the introduction of hearsay testimony, statements which are made for the purpose of medical diagnosis or treatment may be introduced as substantive evidence. N.C. Gen. Stat. § 8C-1, Rule 803(4). In this case, however, the statements of Ms. Brothers and Ms. Hudyma, as related through the testimony of Dr. Coker, revealed statements originally made by E.S.; accordingly, portions of Dr. Coker’s testimony could be characterized as double hearsay.

E.S. testified in detail regarding several instances of sexual abuse by defendant, including one instance of vaginal intercourse. Defendant was permitted to cross examine E.S. regarding all of these

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allegations. As part of Dr. Coker's examination of E.S., she received information from the victim's mother and from Midge Hudyma, a social worker investigating the allegations of sexual abuse. Dr. Coker recounted two statements attributed to E.S.'s mother: (1) that the mother walked in on one occasion while E.S. sat on defendant's lap with defendant's penis exposed, and (2) that E.S. later explained to her mother that defendant had inserted his "middle part" in her "middle part" in the past. This testimony is entirely consistent with the testimony of E.S., which defendant had ample opportunity to cross examine. The appellate courts of this State have not addressed the specific question of whether a treating physician may testify regarding out-of-court statements made by a parent recounting out-of-court statements made by a child victim pursuant to the medical diagnosis exception to the rule against hearsay. However, because in this case defendant has not shown prejudice, we do not reach the question. N.C. Gen. Stat. § 15A-1443(a) (2001) ("A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States 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. The burden of showing such prejudice under this subsection is upon the defendant."). On this record defendant has not shown prejudice, and his assignment of error to the contrary is overruled.

V.

[5] Defendant contends the trial court erred by not dismissing the indictments against him for sexual offense and indecent liberties because the "short-form" indictments did not specify the *actus reus* of each of the sexual crimes, thereby violating his due process rights. However, the short-form indictment, as defendant concedes, has been upheld as constitutional by our Supreme Court in *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001). This assignment of error is overruled.

VI.

[6] Finally, defendant argues the trial court erred in denying his motion to require the jury to convict him on the specific acts set out in the bill of particulars.

The North Carolina Constitution requires that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in

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open court.” Art. 1, § 24. However, our Supreme Court has held that the threat of a non-unanimous verdict does not arise in cases of indecent liberties because the statute, G.S. § 14-202.2, does not list, as elements of the offense, discrete criminal acts in the disjunctive. *State v. Hartness*, 326 N.C. 561, 391 S.E.2d 177 (1990). A person is guilty of taking indecent liberties with a child if that person engages in “any immoral, improper, or indecent liberties.” N.C. Gen. Stat. § 14-202.1. Thus, “[e]ven if we assume that some jurors found that one type of sexual conduct occurred and others found that another transpired, the fact remains that the jury as a whole would unanimously find that there occurred sexual conduct within the ambit of ‘any immoral, improper, or indecent liberties.’” *Hartness*, 326 N.C. at 565, 391 S.E.2d at 179. See also *State v. Foust*, 311 N.C. 351, 317 S.E.2d 385 (1984). A defendant may be convicted of first degree sexual offense even if the trial court instructs the jury that more than one sexual act may comprise an element of the offense. *Id.*

[7] In the present case, the trial court set forth the elements for first degree sexual offense, defining a sexual act as “*any* penetration, however slight, by *an object* into the genital opening of a person’s body” (emphasis added). In order to find defendant guilty of first degree sexual offense, therefore, the jury was required to find that defendant inserted any object into the genital opening of the child. This instruction comports with G.S. § 14-27.1, which defines a sexual act as “penetration, however slight, by any object into the genital or anal opening of another person’s body.”

[8] With regard to the charge of taking an indecent liberty with a child, the trial court defined an indecent liberty as

an immoral, improper, or indecent touching or act by the Defendant upon the child or inducement by the Defendant of an immoral, or indecent touching by the child, or that the Defendant committed or attempted to commit a lewd or lascivious act upon a child.

The trial court thus made explicit in its instructions that the jury must find that defendant touched E.S. in an improper or indecent way or induced E.S. to touch him in an indecent way, or that defendant attempted to commit a lewd or lascivious act upon the child in order to convict. The trial court committed no error in its instruction to the jury concerning the charges of indecent liberties with a child and first degree sexual offense.

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[9] In addition, the North Carolina Supreme Court has rejected the argument that a defendant was denied a fair trial because the bill of particulars and the evidence presented at trial did not precisely establish the date and time of the alleged rape. *State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983).

[A] child's uncertainty as to the time or particular day the offense charged was committed goes to the weight of the testimony rather than its admissibility, and nonsuit may not be allowed on the ground that the State's evidence fails to fix any definite time when the offense was committed where there is sufficient evidence that the defendant committed each essential act of the offense.

Id. at 749, 309 S.E.2d at 207 (citing *State v. King*, 256 N.C. 236, 123 S.E.2d 486 (1962)). The purpose of a bill of particulars is "to inform defendant of specific occurrences intended to be investigated at trial and to limit the course of the evidence to a particular scope of inquiry." *State v. Jacobs*, 128 N.C. App. 559, 565, 495 S.E.2d 757, 762, *disc. review denied*, 348 N.C. 506, 510 S.E.2d 665 (1998) (citation omitted). In this case the testimony was not inconsistent with the State's bill of particulars.

[10] Finally, defendant argues that even if the trial court's instructions comport with North Carolina case law, the instructions do not comply with federal constitutional law. In *Richardson v. United States*, 526 U.S. 813, 143 L. Ed. 2d 985 (1999), the defendant was charged with violating a federal criminal statute, 21 U.S.C. § 848, which forbids any person from engaging in a "continuing criminal enterprise." The criminal enterprise is defined as the violation of federal drug laws. *Id.* Based on the language of the federal statute, the United States Supreme Court held that a jury must unanimously agree on each of the violations making up the "continuing series of violations." *Id.* at 815, 143 L. Ed. 2d at 991. Nevertheless, the Court recognized that a jury in other cases "need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *Id.* at 817, 143 L. Ed. 2d at 992 (citations omitted). The holding in *Richardson* is therefore limited to federal prosecutions under 21 U.S.C. § 848, and does not apply to the instant case. Defendant's assignment of error is overruled.

Defendant received a fair trial, free from prejudicial error.

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No error.

Judges TYSON and THOMAS concur.

ANGELA SHAW, PLAINTIFF-APPELLANT v. WILLIAM J. MINTZ, DEFENDANT-APPELLEE

No. COA01-561

(Filed 18 June 2002)

Estates— statute of limitations—claim against deceased—no personal representative appointed

The trial court did not err by dismissing a negligence claim which arose from an automobile collision where plaintiff was not aware that defendant had died, plaintiff filed a complaint against defendant, and the trial court concluded both that the correct party was the estate and that any action against the estate was barred by the statute of limitations. Although N.C.G.S. § 1-22 allows for a suspension of the statute of limitations between the period from the death of the decedent to the appointment of an administrator, no suspension can occur until a personal representative is appointed.

Judge GREENE dissenting.

Appeal by plaintiff from an order filed 13 February 2001 by Judge Gregory A. Weeks in Superior Court, Cumberland County. Heard in the Court of Appeals 12 March 2002.

Marshall B. Pitts, Jr. for plaintiff-appellant.

Walker, Clark, Allen, Herrin & Morano, L.L.P., by Scott T. Stroud, for defendant-appellee.

McGEE, Judge.

Angela Shaw (plaintiff) appeals an order filed 13 February 2001 dismissing her claim against William J. Mintz (defendant) and barring any action she may seek to file against the estate of defendant (the Estate), based on the statute of limitations.

An automobile collision occurred on 3 November 1997 between the vehicle driven by defendant and a vehicle in which plaintiff was a

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passenger. Unbeknownst to plaintiff, defendant died on 2 July 1998. Plaintiff filed a complaint against defendant on 5 August 1999, alleging she suffered injuries in the 3 November 1997 incident as a proximate result of defendant's negligence. Plaintiff's complaint was served by certified mail at defendant's last known address with restricted delivery and return receipt requested. The return receipt shows plaintiff's complaint was received on 16 August 1999 at 4789 Mint Hill Drive, Liberty, North Carolina. Plaintiff filed an affidavit and proof of service by registered or certified mail on 29 June 2000, stating she had served defendant at the above address and the summons and complaint had been received by defendant.

Allstate Insurance Company (Allstate) filed a motion to intervene on 4 December 2000, stating it had provided defendant with liability insurance coverage on his vehicle and due to defendant's death and unavailability, it was necessary that Allstate intervene. In its answer and motion to dismiss, Allstate alleged plaintiff's claim was "barred by the applicable statute or statutes of limitation[.]"

In its order granting Allstate's motion to intervene and motion to dismiss, the trial court found as fact that:

7. The correct party to be sued in this case was the Estate
8. In that no lawsuit was filed naming the Estate . . . as a defendant in this action, . . . any action against the Estate . . . is now barred by the statute of limitations.

Consistent with its findings of fact, the trial court concluded that any action against the Estate would be barred by the three-year statute of limitations and dismissed the action against defendant.

The dispositive issue in this case is whether a personal representative must be appointed to administer the estate of a negligent decedent before a plaintiff is entitled to the N.C. Gen. Stat. § 1-22 suspension of the three-year statute of limitations in her claim against the estate.

N.C. Gen. Stat. § 1-22 (1999) states:

If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative or collector after the expiration of that time; provided, the action is brought or notice

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of the claim upon which the action is based is presented to the personal representative or collector within the time specified for the presentation of claims in G.S. 28A-19-3.

Although N.C.G.S. § 1-22 allows for a suspension of the statute of limitations between the period from the death of the decedent and the appointment of an administrator, N.C.G.S. § 1-22 is not applicable to the case before us. Our Supreme Court stated in *Ragan v. Hill*, 337 N.C. 667, 447 S.E.2d 371 (1994), that “our statutory scheme for handling claims against decedents’ estates presumes the appointment of a personal representative or collector to receive those claims. We do not believe that the legislature intended the non-claim statute to operate where no personal representative or collector has been appointed.” *Id.* at 673, 447 S.E.2d at 375. In *Ragan*, our Supreme Court focused on N.C. Gen. Stat. § 28A-19-3 and did not specifically refer to N.C.G.S. § 1-22. However, N.C.G.S. § 1-22 also presumes an administrator has been appointed. The title of N.C.G.S. § 1-22 reads “Death before limitation expires; action by or against personal representative or collector[,]” in part indicating the General Assembly intended the statute to apply only when a personal representative has been appointed. N.C.G.S. § 1-22 also requires that an action be brought in compliance with the time specified for the presentation of claims in N.C. Gen. Stat. § 28A-19-3 (1999).

Given these provisions, we hold that no suspension of the statute of limitations can occur until a personal representative is appointed to administer an estate. If such an appointment occurs before the expiration of the statute of limitations, N.C.G.S. § 1-22 allows the time limit within which to file an action against an estate to be extended according to N.C.G.S. § 28A-19-3. However, if a personal representative is not appointed, these two statutes are not activated, and the claim is subject to the traditional statute of limitations that applies to the particular cause of action.

Ragan anticipated such a set of facts. Our Supreme Court stressed that a “cause of action may be barred by either or both [N.C. Gen. Stat. § 28A-19-3 or N.C. Gen. Stat. § 1-52(5)].” *Ragan*, 337 N.C. at 671, 447 S.E.2d at 374. Our Supreme Court also noted “that claimants who, like plaintiffs, find no personal representative to whom they may present their claims are not without some time limitations on actions to recover on their claims. As noted above, any action filed in a court of law will be subject to the applicable statute of limitations.” *Ragan* at 673, 447 S.E.2d at 375.

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The dissent relies on *Prentzas v. Prentzas*, 260 N.C. 101, 131 S.E.2d 678 (1963), and *Lassiter v. Faison*, 111 N.C. App. 206, 432 S.E.2d 373, *disc. review denied*, 335 N.C. 176, 436 S.E.2d 381 (1993), for the proposition that “[i]f no representative or collector is appointed and thus no notice given for the presentation of claims against the estate, the time for the filing of the claim against the estate of the negligent decedent remains suspended.” We note, however, that *Prentzas* and *Lassiter* can be distinguished from the present case. In both *Prentzas* and *Lassiter*, an administrator of the estate was appointed before the applicable statute of limitations expired, thus activating N.C.G.S. § 1-22 and the corresponding statute dealing with the administration of estates. (N.C.G.S. § 28A replaced former N.C.G.S. § 28 in 1973; therefore, *Prentzas* was decided under former Chapter 28, while *Lassiter* was decided under current Chapter 28A.).

Furthermore, we do not read *Prentzas* or *Lassiter* as supporting the proposition that the applicable statute of limitations is suspended by the death of the decedent *indefinitely* until an administrator is appointed. The better practice, and the practice articulated in *Ragan*, is to allow the statute of limitations to be suspended between the death of the decedent and the appointment of an administrator, provided an administrator is appointed within the original applicable statute of limitations. Otherwise, a person wishing to bring a cause of action against a decedent must still be concerned with the statute of limitations applicable to his or her cause of action. This holding is in agreement with both *Prentzas* and *Lassiter*, as well as previously decided cases. See *Benson v. Bennett*, 112 N.C. 505, 17 S.E. 432 (1893); *Hodge v. Perry*, 255 N.C. 695, 122 S.E.2d 677 (1961); *Ingram v. Smith*, 16 N.C. App. 147, 191 S.E.2d 390, *cert. denied*, 282 N.C. 304, 192 S.E.2d 195 (1972). *Benson*, *Hodge*, and *Ingram* relied on N.C.G.S. § 1-22, but an administrator was appointed before the applicable statute of limitations had expired in those cases.

In the case before us, plaintiff’s cause of action accrued on 3 November 1997. Defendant died on 2 July 1998. Plaintiff filed a lawsuit on 5 August 1999 against defendant, but not against defendant’s estate. Plaintiff has failed to provide any evidence in the record that an administrator was ever appointed in the estate of defendant, or that an action was filed against decedent’s estate. As a result, the applicable statute of limitations expired 3 November 2000 and was at no time suspended upon the appointment of an administrator. Therefore, the trial court did not err in dismissing plaintiff’s claim, and we affirm the order of the trial court.

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Affirmed.

Judge CAMPBELL concurs.

Judge GREENE dissents with a separate opinion.

GREENE, Judge, dissenting.

I do not believe N.C. Gen. Stat. §§ 1-22 and 28A-19-3 require a personal representative to be appointed before a plaintiff is entitled to a section 1-22 suspension of the statute of limitations in her claim against an estate. I, therefore, dissent.

An injured party's right to proceed with a claim against a person she claims to have negligently caused her injuries is not abated by the death of the party alleged to have been negligent, as the action survives against the personal representative or collector of the decedent's estate. N.C.G.S. § 28A-18-1 (2001). If the death occurs "before the expiration" of the applicable statute of limitations, the "action may be commenced against [the] personal representative or collector after the expiration" of that time period; this is so "provided[] the action is brought . . . within the time specified for the presentation of claims in G.S. 28A-19-3." N.C.G.S. § 1-22 (2001). A claim is timely presented, within the meaning of section 28A-19-3(a),¹ if an action is filed in the courts within a specified period of time after the personal representative or collector provides notice pursuant to section 28A-14-1. N.C.G.S. § 28A-19-1(b) (2001). If no representative or collector is appointed and thus no notice given for the presentation of claims against the estate, the time for the filing of the claim against the estate of the negligent decedent remains suspended. *Prentzas v. Prentzas*, 260 N.C. 101, 103, 131 S.E.2d 678, 680 (1963) ("death suspended the running of the statute [of limitations] until the qualification of an administratrix"); *Lassiter v. Faison*, 111 N.C. App. 206, 211, 432 S.E.2d 373, 375-76 (a plaintiff is entitled to the benefit of the statute of limitations extension where no notice of claims was published by personal representative pursuant to section 28A-14-1), *disc. review denied*, 335 N.C. 176, 436 S.E.2d 381 (1993); *see Ragan v. Hill*, 337 N.C. 667, 673, 447 S.E.2d 371, 375 (1994) (section 28A-19-3 does not "operate where no personal representative or collector has been appointed"); *see also Mabry v. Huneycutt*, 149 N.C. App. 630, 634, 562

1. North Carolina General Statutes § 28A-19-3(a) is the applicable section in this case because the negligent act supporting the claim at issue "arose before the death of the decedent." *See* N.C.G.S. § 28A-19.3(a) (2001).

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S.E.2d 292, 294 (2002) (an administrator's "failure to establish in the record that she complied with the requirements of N.C. Gen. Stat. § 28A-18-3(a) regarding general notice to creditors precludes [a] defendant from relying upon the statute of limitations as a bar").²

In this case, the pleadings reveal plaintiff's negligence action accrued on 3 November 1997 and defendant died on 2 July 1998. At the time of defendant's death, the applicable three-year statute of limitations had not expired. See N.C.G.S. § 1-52(16) (2001). Plaintiff filed an action against defendant and has not filed an action against the Estate. The pleadings do not reveal whether a personal representative or collector has been appointed for the Estate or, if so, whether there have been section 28A-14-1 notifications to those having claims against the Estate.³ This record, therefore, cannot support the trial court's order that any future action by plaintiff against the Estate arising out of the accident occurring on 3 November 1997 is necessarily barred by the statute of limitations.⁴

2. I agree with the majority that "*Prentzas or Lassiter* [do not support] the proposition that the applicable statute of limitations is suspended by the death of the decedent *indefinitely* until an administrator is appointed." The statute of limitations is not suspended indefinitely because it cannot extend beyond three years after the death of the decedent, N.C.G.S. § 28A-19-3(f) (2001), unless the claim falls within the scope of section 28A-19-3(i), in which event there is no limit on the length of the suspension, N.C.G.S. § 28A-19-3(i) (2001). If a personal representative or collector has not been appointed prior to the time bar in section 28A-19-3(f), a plaintiff can "apply to have entitled persons adjudged to have renounced [their right to administer the estate] and to then have letters of administration issued to some other person" under section 28A-4-1(b)(4) or section 28A-12-4. *Ragan*, 337 N.C. at 673, 447 S.E.2d at 375; N.C.G.S. § 28A-5-2(b)(1) (2001).

3. Furthermore, the fact that Allstate has chosen to intervene in this case suggests that plaintiff's claim may fall within the scope of section 28A-19-3(i), which provides that a plaintiff's claim against a decedent's estate is not barred "to the extent that the decedent . . . is protected by insurance coverage with respect to such claim." N.C.G.S. § 28A-19-3(i).

4. I am aware that once a defendant pleads the statute of limitations, the burden is on the plaintiff to show her action was instituted within the prescribed period. *Little v. Rose*, 285 N.C. 724, 727, 208 S.E.2d 666, 668 (1974). In this case, however, the statute of limitations was pled by Allstate only in response to plaintiff's complaint against defendant, and plaintiff does not contest the dismissal of that complaint. The statute of limitations as a basis for dismissing a future claim against the Estate by plaintiff was not pled by Allstate and indeed would have been premature. The trial court, nonetheless, addressed the issue and under these circumstances, I do not believe the burden was on plaintiff to show the statute of limitations had not expired.

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THOMAS & HOWARD COMPANY, INC., PLAINTIFF v. TRIMARK CATASTROPHE SERVICES, INC., MINTZ, FLORA & HIGHSMITH, INC., AND UNIQUE EXPRESSIONS CARPET & INTERIORS, INC., DEFENDANTS

No. COA01-433

(Filed 18 June 2002)

Process and Service— foreign corporation—motion to dismiss—sufficiency of service of process—personal jurisdiction—estoppel

The trial court did not err in a negligence and breach of contract case by granting defendant foreign corporation's motion to dismiss based on insufficient service of process and resulting lack of personal jurisdiction even though plaintiff served defendant's agent in Texas, because: (1) plaintiff improperly served defendant by mailing a copy of the summons and complaint by regular mail, rather than certified mail; (2) the mailing of the summons and complaint occurred before the documents had been filed or signed by the clerk of court; (3) no additional action was taken to effectively serve defendant, even after an administrative order was issued discontinuing the case; (4) there is no evidence that service was ever effectuated upon the registered agent for North Carolina as required by N.C.G.S. § 1A-1, Rule 4(j)(6); and (5) defendant's request for extensions of time did not estop defendant from later asserting jurisdictional defenses.

Appeal by plaintiff from judgment entered 4 December 2000 by Judge B. Craig Ellis in Cumberland County Superior Court. Heard in the Court of Appeals 24 January 2002.

Brown, Crump, Vanore & Tierney, L.L.P., by Michael W. Washburn, for plaintiff-appellant.

Smith Debnam Narron Wyche Story & Myers, L.L.P., by Connie E. Carrigan, for defendant-appellee.

TIMMONS-GOODSON, Judge.

Thomas & Howard Company, Inc. ("plaintiff") appeals from an order granting Trimark Catastrophe Services' ("defendant") motion to dismiss for insufficient service of process and resulting lack of personal jurisdiction. For the reasons stated herein, we affirm the ruling of the trial court.

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Defendant is a Texas corporation authorized to conduct business in North Carolina with a registered office located in Mooresville, North Carolina and a designated registered agent for service, Bill Highsmith. In September of 1996, defendant entered into a contract with plaintiff, a food distribution business, in order to assist in the completion of repairs in the wake of Hurricane Fran. These repairs included the replacement of vinyl flooring in the facility owned and operated by plaintiff. The defendant subsequently retained Mintz, Flora & Highsmith, Inc. ("Mintz") to oversee the floor repairs. Mintz subsequently entered into a subcontract with Unique Expressions Carpet & Interiors, Inc. ("Unique") for installation of the floor.

On or around 1 January 1997, the flooring adhesive which held the tiles together began to seep onto the finished surface, creating an "unsightly" appearance and causing the tiles to loosen. Plaintiff subsequently contacted the Harleysville Insurance Group who filed a claim on behalf of plaintiff against defendant for the alleged deficiencies.

On 30 December 1999, plaintiff filed a complaint against defendant claiming negligence and breach of contract for damages sustained as a result of the deficiencies in the vinyl flooring. The summons and complaint were mailed to Vince Marshall, a registered agent of defendant located in Wylie, Texas. Defendant received a copy of plaintiff's complaint through first-class mail in January of 2000. Defendant then contacted counsel for plaintiff in order to discuss pending claims. In September of 2000, the parties reached an impasse in the negotiations, whereupon Vince Marshall then retained the services of Smith Debnam Narron Wyche Story & Myers, L.L.P., to represent Trimark's interest in this North Carolina lawsuit. Upon obtaining an extension of time to file an answer, counsel for defendant reviewed the court file and discovered that none of the defendants, including Mintz and Unique, had been served in any manner authorized by law. The court file also contained an administrative order entered 10 August 2000 discontinuing the action pursuant to Rule 4(e) of the North Carolina Rules of Civil Procedure due to insufficient service of process.

Defendant filed a motion to dismiss plaintiff's complaint, asserting insufficient service of process. On 4 December 2000, an order granting defendant's motion to dismiss was entered. Plaintiff appeals from this order.

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The issue presented by this appeal is whether the trial court obtained personal jurisdiction over defendant. Plaintiff concedes that its method of service on defendant of the summons and complaint was “technically defective.” However, plaintiff contends that defendant was estopped from asserting jurisdictional defenses as grounds for dismissal of the complaint. For the following reasons, we disagree.

At the outset, we note that the trial court entered the order dismissing plaintiff’s action without making any findings of fact. “[O]n a motion to dismiss for insufficiency of process where the trial court enter[s] an order without making findings of fact,” our review is limited to determining whether, as a matter of law, the manner of service of process was correct. *Winter v. Williams*, 108 N.C. App. 739, 741, 425 S.E.2d 458, 459, *disc. review denied*, 333 N.C. 578, 429 S.E.2d 578 (1993).

In order for a court to exercise personal jurisdiction over a defendant, the issuance of summons and service of process must comply with one of the statutorily specified methods. *See* N.C. Gen. Stat. § 1A-1, Rule 4 (2001). Rule 4 of the North Carolina Rules of Civil Procedure provides the methods by which a summons and complaint must be served in order to obtain personal jurisdiction. Pursuant to Rule 4(j)(6), service of process on a corporation may be effectuated by one of the following methods:

- a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office; or
- b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
- c. By mailing a copy of the summons and of the complaint registered or certified mail, return receipt requested, addressed to the officer, director or agent to be served as specified in paragraphs a and b.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(6) (2001).

N.C. Gen. Stat. § 55-15-10 (1999) sets forth the procedure for service of process on foreign corporations. Section 55-15-10 provides

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that service on the registered agent is the typical method of service of process on a qualified foreign corporation authorized to transact business in this state. However, if the corporation does not have a registered agent, or if the agent cannot, with due diligence, be found at the registered office, section 55-15-10(b) authorizes service upon the Secretary of State. N.C. Gen. Stat. § 55-15-10 (b) (1999) (repealed 2001).

“Generally, where a statute specifically prescribes the method by which to notify a party against whom a proceeding is commenced, service of the summons and complaint must be accomplished in that manner.” *Fulton v. Mickle*, 134 N.C. App. 620, 623, 518 S.E.2d 518, 520-21 (1999). While a defective service of process may give the defending party sufficient and actual notice of the proceedings, such “actual notice does not give the court jurisdiction over the party.” *Id.* at 624, 518 S.E.2d at 521 (quoting *Johnson v. City of Raleigh*, 98 N.C. App. 147, 149, 389 S.E.2d 849, 851, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 176 (1990). “Absent valid service of process, a court does not acquire personal jurisdiction over the defendant and the action must be dismissed.” *Glover v. Farmer*, 127 N.C. App. 488, 490, 490 S.E.2d 576, 577 (1997), *disc. review denied*, 347 N.C. 575, 502 S.E.2d 590 (1998).

Our examination of the record in the instant case reveals that service was not sufficient to give the trial court personal jurisdiction over defendant. First, the facts reveal plaintiff served defendant by mailing a copy of the summons and complaint by regular mail, rather than certified mail. Further, the mailing of the summons and complaint occurred before the documents had been filed or signed by the Clerk of Court. No additional action was taken to effectively serve defendant, even after an administrative order was issued discontinuing the case. Second, there is no evidence in the record that service was ever effectuated upon the registered agent for North Carolina, Bill Highsmith. N.C. Gen. Stat. § 1A-1, Rule 4(j)(6) provides the manner upon which service is to be made upon foreign corporations having registered offices and registered agents in the state of North Carolina. While service of process upon a registered agent in Texas may have given defendant actual notice of the lawsuit, it did not confer jurisdiction over defendant.

In the face of such abundant evidence supporting defective service of process, and a concession that service was technically defective, plaintiff contends that defendant was estopped from asserting jurisdictional defenses.

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“The doctrine of [equitable] estoppel is a means of preventing a party from asserting a defense which is inconsistent with his prior conduct.” *Purser v. Heatherlin Properties*, 137 N.C. App. 332, 337, 527 S.E.2d 689, 692, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 428 (2000). The essential elements of equitable estoppel are:

(1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

Parker v. Thompson-Arthur Paving Co., 100 N.C. App. 367, 370, 396 S.E.2d 626, 628-29 (1990).

In the instant case, plaintiff alleges that defendant agreed not to assert any jurisdictional defenses in order to secure an extension of time upon which to file an answer. Plaintiff contends that due to defendant’s conduct in securing extensions of time, defendant is now estopped from asserting any jurisdictional defenses. We disagree.

Although not specifically addressing the estoppel issue, we find *Fulton v. Mickle*, 134 N.C. App. 620, 518 S.E.2d 518 (1999), instructive on this matter. In *Fulton*, plaintiff served defendant insurance company by mailing a copy of the summons and complaint to defendant’s claim examiner by regular mail. This Court held that under 4(j)(6)(c) of the North Carolina Rules of Civil Procedure, this method failed for the following reasons: (1) process was not sent by certified or regular mail and (2) “process was not addressed to an officer, director, or agent authorized to receive service of process.” *Id.* at 624, 518 S.E.2d at 521. Plaintiff’s failure “to strictly adhere to the statutory requirements of service by mail” rendered service on defendant invalid. *Id.* This Court further held that “the record does not show a mistake in delivery of the summons and complaint that was beyond plaintiff’s control. . . . Indeed the record reveals that plaintiff had ample opportunity to cure the defect in service prior to the expiration of the statute of limitations.” *Id.* at 625, 518 S.E.2d at 522. Therefore, without specifically addressing the estoppel issue, the Court reached this holding even though defendant had requested several extensions of time to file a responsive pleading. Clearly, in *Fulton*, the defendant’s

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request for extensions of time did not estop defendant from later asserting jurisdictional defenses.

Similarly in the present case, the record reveals no evidence of plaintiff properly locating or serving defendant's registered agent in this state, or any other manner of service as authorized by our Rules of Civil Procedure. Plaintiff had ample opportunity to cure the defect even after an administrative order had been entered discontinuing the case. Further, there is no indication that defendant represented to plaintiff that all service and jurisdictional defenses would be waived upon the granting of an extension of time. Instead, the record indicates that defendant's agreement not to dispute the sufficiency of service was contingent upon the fact that service was, in fact, valid. However, upon review of the court file, defendant discovered that no defendants in this action were properly served. We therefore conclude that defendant was not estopped from arguing for dismissal based upon lack of service of process because service upon defendant's agent in Texas was improper. This assignment of error is therefore overruled.

Plaintiff next contends that defendant's motion pursuant to 12(b)(6) of the North Carolina Rules of Civil Procedure should not serve as a basis for dismissal of the case. However, plaintiff has cited no authority nor any argument in his brief to support this contention. Accordingly, this argument is deemed abandoned. *See* N.C.R. App. P. 28(b)(5) (2002).

Accordingly, because plaintiff failed to properly serve the complaint and summons upon defendant, we affirm the ruling of the trial court.

Affirmed.

Judges MARTIN and BRYANT concur.

IN RE ANDERSON

[151 N.C. App. 94 (2002)]

IN RE: MERCEDES LAURNETTA ANDERSON AND CRYSTAL SHANELLE CLEO ANDERSON, MINORS

No. COA01-885

(Filed 18 June 2002)

1. Termination of Parental Rights— second hearing—no evidence presented—prior ruling unchanged

The trial court did not err in a termination of parental rights proceeding by requiring the father to present evidence where an initial order had terminated parental rights and the parties had agreed in a consent order to set aside the first order and to hold a new dispositional hearing. Since the consent order states that the reason for setting aside the prior disposition was to allow the parties to present additional evidence, the second hearing was in effect a continuation hearing and it was not error for the trial court to decide that the prior ruling should be left unchanged because no new evidence was presented.

2. Termination of Parental Rights— findings—mere allegations

An order terminating parental rights was reversed where the court's findings were mere recitations of allegations. Moreover, the findings were insufficient in that they did not adequately address respondent's ability to pay, the children's reasonable needs, willfulness, or lack of reasonable progress under the circumstances following the removal of the children.

Appeal by respondent father from judgments entered 31 July 2000 and 27 December 2000 by Judge John L. Whitley in Wilson County District Court. Heard in the Court of Appeals 14 March 2002.

Stanley G. Abrams for respondent-appellant.

Beaman and King, P.A., by Charlene B. King, for petitioner-appellee.

THOMAS, Judge.

This is an appeal by Cleveland Anderson, respondent, from orders terminating his parental rights to Mercedes Lournetta Anderson and Crystal Shanelle Cleo Anderson.

By three assignments of error, Anderson contends the trial court erred: (1) in requiring him to put on additional evidence to change a prior order of termination that had been set aside; (2) in concluding

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that grounds exist to terminate his parental rights; and (3) in determining that termination of his parental rights is in the children's best interest. For the reasons herein, we reverse the orders of the trial court and remand for further proceedings consistent with this opinion.

In August of 1998, the Wilson County Department of Social Services (DSS) filed petitions alleging that Mercedes and Crystal were neglected and dependent. At the time, the juveniles resided with their biological mother, Joann Grant. Anderson was not living with them.

The trial court found that Grant stipulated and agreed to an adjudication of neglect and dependency based on the allegations in the petition that the juveniles did not receive proper care, supervision, or discipline from their parents; were not provided necessary medical care; and lived in an environment injurious to their welfare. It further found that Anderson "had recently expressed a desire to take his children into his home [but] has stated he is not able to provide proper care, at this time." Thereafter, DSS obtained custody of Mercedes, then two years old, and Crystal, then six months old.

Shortly after that hearing, social workers met with both parents to develop a plan for reunification and to establish a visitation schedule. Anderson told them he was not interested in obtaining custody and was not capable of meeting the children's needs or caring for them by himself. Consequently, the reunification part of the service plan only involved Grant with Anderson included in the visitation schedule. He did attend some of the visitations but usually stayed for less than the allotted time. Although notified, he did not attend a later meeting on 1 September 1999 to discuss the reunification plan with DSS.

Anderson was employed on a part-time basis while the children were in the custody of DSS. He sporadically paid child support and was \$2,627.70 in arrears by the time of the termination hearing.

In September of 1999, the service plan for the children was changed from reunification to adoption. DSS filed petitions in October alleging that grounds exist to terminate parental rights under N.C. Gen. Stat. § 7B-1111(2) and 7B-1111(3) and, by order entered 31 July 2000, Anderson's and Grant's parental rights were terminated.

The parties, however, agreed by consent order filed 13 September 2000 that the earlier order of *disposition* should be set aside with a

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further dispositional hearing scheduled. The trial court held the additional hearing in October and concluded in its order filed 27 December 2000 that it was in the best interests of the children that the parental rights be terminated. Anderson appeals.

[1] By his first assignment of error, Anderson contends the trial court required him to present additional evidence to change the first order of disposition terminating his parental rights. This occurred, he argues, even though that disposition had been set aside by consent order and a new dispositional hearing ordered. We disagree.

The consent order provides:

2. The parties agree that the Order on Disposition should be set aside and that a further hearing on disposition should be set before The Honorable John L. Whitley to allow the parties to present additional evidence on disposition.

Since the consent order states that the reason for setting aside the prior disposition was to allow the parties to present “additional evidence on disposition,” the second dispositional hearing was, in effect, a continuation hearing rather than a hearing *de novo*. Therefore, it was not error for the trial court to decide that, because no new evidence was presented, the prior ruling should be left unchanged. There is no burden of proof on the parties at disposition. None was placed on Anderson here. The trial court correctly interpreted the consent order and we thus reject Anderson’s first assignment of error.

[2] By his second assignment of error, Anderson contends the trial court erred in concluding that statutory grounds exist to terminate his parental rights. We agree. The trial court’s findings of fact, in large part, amount to mere recitations of allegations and provide little support for the conclusions of law.

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

N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2001). Rule 52(a) requires three separate and distinct acts by the trial court: (1) find the facts specially; (2) state separately the conclusions of law resulting from the facts so found; and (3) direct the entry of the appropriate judgment. *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982). Thus,

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the trial court's factual findings must be more than a recitation of allegations. They must be the "specific ultimate facts . . . sufficient for the appellate court to determine that the judgment is adequately supported by competent evidence." *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977). "Ultimate facts are the final resulting effect reached by processes of logical reasoning from the evidentiary facts." *Appalachian Poster Advertising Co. v. Harrington*, 89 N.C. App. 476, 479, 366 S.E.2d 705, 707 (1988).

In summary, while Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Quick, 305 N.C. at 452, 290 S.E.2d at 658.

Here, the order of adjudication, filed 31 July 2000, contains only three findings of fact. Two merely recite that DSS filed a petition and that service was proper on Anderson and Grant. The third factual finding reads:

(3) The grounds *alleged* for terminating the parental rights are as follows:

[The order then lists in subsections a combination of grounds and case history.]

(Emphasis added). As indicated by the word "alleged," the findings are not the "ultimate facts" required by Rule 52(a) to support the trial court's conclusions of law, but rather are mere recitations of allegations. As a result, we are unable to conduct a proper review of the findings.

Even if the factual findings here did not merely recite allegations, they remain insufficient to support the conclusions of law that grounds exist for termination. A termination of parental rights proceeding consists of two phases. *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). In the adjudicatory stage, the petitioner has the burden of establishing by clear and convincing evidence that at least one of the statutory grounds listed in N.C. Gen. Stat. § 7B-1111 exists. *Id.* We review whether the trial court's findings of fact are supported by clear and convincing evidence and whether the findings of fact support the conclusions of law. *In re Huff*, 140

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N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 374, 547 S.E.2d 9 (2001).

If the trial court determines that grounds for termination exist, it proceeds to the dispositional stage, and must consider whether terminating parental rights is in the best interests of the child. *Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. The court is required to issue an order terminating the parental rights unless it finds that the best interests of the child indicate that the family should not be dissolved. N.C. Gen. Stat. § 7B-1110(a) (2001); *Blackburn*, 142 N.C. App. at 613, 543 S.E.2d at 910. “While there is no requirement at this dispositional stage for the court to make findings of fact upon the issuance of an order to terminate parental rights, such findings and conclusions must be made upon any determination that the best interests of the child require that rights *not* be terminated.” *Id.* We review the trial court’s decision to terminate parental rights for abuse of discretion. *In re Mitchell M.*, 148 N.C. App. 483, 490, 559 S.E.2d 237, 242, *temporary stay allowed*, 355 N.C. 349, 561 S.E.2d 891 (2002), *reversed on other grounds*, 356 N.C. 288, 570 S.E.2d 212 (2002).

Here, the trial court listed two statutory grounds for termination. The first ground comports with N.C. Gen. Stat. § 7B-1111(a)(2) (2001):

Cleveland Anderson . . . willfully left the child[ren] in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the Court that reasonable progress under the circumstances has been made within 12 months in correcting those conditions which led to the removal of the child[ren].

The second comports with section 7B-1111(a)(3) (2001):

The child[ren] ha[ve] been placed in the custody of a county department of social services, a licensed child-placing agency, or a child-caring institution and the parents, for a continuous period of six months next preceding the filing of the petition and have failed to pay a reasonable portion of the cost of care for the child[ren] although physically and financially able to do so.

Although Anderson does not raise the issue, we note initially that the trial court did not recite what standard of proof it applied at adjudication. Petitioner has the burden of proving by “clear and convincing evidence” that grounds for termination exist. Failure to state that

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findings establishing those grounds were made by clear and convincing evidence constitutes error. *In re Lambert Stowers*, 146 N.C. App. 438, 441, 552 S.E.2d 278, 280-81 (2001). We nevertheless address the findings for each alleged ground here.

Under section 7B-1111(a)(3), the trial court is required to make findings of fact concerning the parent's ability to pay and the amount of the child's reasonable needs. *In re Phifer*, 67 N.C. App. 16, 27, 312 S.E.2d 684, 690 (1984). Here, the trial court merely listed as an allegation that:

d. Cleveland Anderson was ordered to pay child support and has done so sporadically. His arrears balance is \$2,627.70. He is employed on a part-time basis earning \$7.00 per hour.

Even if this were a proper finding of ultimate fact rather than an allegation, it does not adequately address Anderson's ability to pay or the children's reasonable needs. Therefore, it would be insufficient to establish a ground for termination.

The trial court also failed to find facts necessary to support its conclusions under section 7B-1111(a)(2). The order contains only one finding as to Anderson, again a mere allegation:

f. Cleveland Anderson was not involved in the facts included in the allegations of neglect. However, he informed the social worker at the time the children were removed that he was unable to care for the children at that time.

The finding does not address any showing of "willfulness" or lack of "reasonable progress under the circumstances," following the initial removal of the children. N.C. Gen. Stat. § 7B-1111(a)(2). It only states Anderson claimed to be unable "at that time," in September of 1998, to take custody of the children. While the statement is some evidence going to establish this ground, it is not determinative. The finding, even if it were not merely an allegation, is therefore insufficient to support the conclusion that under section 7B-1111(a)(2), parental rights may be terminated.

We note that the additional factual findings in the trial court's second and final order of disposition, which are not entirely mere recitations of evidence or allegations, do not cure the deficiencies in the trial court's adjudicatory order. *See Lambert*, 146 N.C. App. at 441-42, 552 S.E.2d at 281. The first order of disposition was set aside, not the adjudication. We therefore hold Anderson's second assignment of error to be meritorious. Accordingly, we do not review

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Anderson's last assignment of error. It addresses the trial court's conclusion that termination is in the best interests of the children.

Based on the foregoing, we reverse the trial court's order terminating Anderson's parental rights and remand for proceedings consistent with this opinion. The trial court shall determine whether it is appropriate to allow additional evidence prior to making findings and conclusions.

REVERSED AND REMANDED.

Judges MARTIN and HUDSON concur.

STATE OF NORTH CAROLINA v. ANTONIO NORMAN

No. COA01-975

(Filed 18 June 2002)

1. Sentencing— weighing aggravating and mitigating factors—each aggravating factor outweighing all mitigating factors

The trial court did not err when sentencing defendant for the conspiracy to commit burglary, first-degree burglary, and attempted second-degree rape by finding that each aggravating factor was sufficient in and of itself to outweigh all mitigating factors. As the court's discretion includes the power to find that one aggravating factor outweighs several mitigating factors, the court may also properly determine that each of several aggravating factors is by itself sufficient to outweigh all mitigating factors. Furthermore, the court eliminated the need for remand if there was error in finding an aggravating factor.

2. Sentencing— aggravating factors—sleep—victim more vulnerable

The trial court properly aggravated sentences for first-degree burglary, attempted second-degree rape, and conspiracy to commit burglary on the grounds that the victims were asleep and thus more vulnerable. Sleep will constitute a proper basis for an aggravating factor if it impaired the victim's ability to flee, fend off an attack, or otherwise avoid being victimized.

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3. Sentencing— mitigating factor—accepting responsibility for conduct—apology not sufficient

The trial court did not err when sentencing defendant for first-degree burglary, attempted second-degree rape, and conspiracy to commit burglary by not finding as a mitigating factor that he accepted responsibility for his criminal conduct based on his apology at the sentencing hearing. Defendant was remorseful, but his statement does not lead to the sole inference that he accepted that he was responsible for the result of his criminal conduct.

4. Sentencing— mitigating factor—child support—evidence insufficient

The trial court did not err when sentencing defendant for first-degree burglary, attempted second-degree rape, and conspiracy to commit burglary by not finding as a mitigating factor that he supports his family where comments were made by his attorney at the hearing about defendant providing child support, but no specific evidence was offered.

On writ of certiorari from judgments dated 1 August 2000 by Judge Jerry R. Tillett in Dare County Superior Court. Heard in the Court of Appeals 21 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Christine M. Ryan, for the State.

Paul Pooley for defendant-appellant.

GREENE, Judge.

Antonio Norman (Defendant), by writ of certiorari, appeals judgments dated 1 August 2000 entered pursuant to a plea agreement under which he pled guilty to attempted second-degree rape, first-degree burglary, and conspiracy to commit first-degree burglary.

On 13 December 1999, Defendant was indicted for first-degree burglary and attempted first-degree rape of both Lessie H. Payne (Payne) and Helen Scarborough (Scarborough). Defendant pled guilty to first-degree burglary and attempted second-degree rape as to Payne and conspiracy to commit first-degree burglary in respect to Scarborough. Testimony of the investigating officers submitted by the State to establish the factual basis for entry of the plea agreement revealed that, on the night of 14 November 1997, Defendant, a black male, broke into Payne's residence and entered the bedroom where

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Payne was sleeping. When Payne awoke and noticed a presence in the room, Defendant covered her head with a pillow. As Payne struggled with Defendant, they rolled off the bed, at which point Defendant attempted to pull down Payne's underwear. While Payne did not believe Defendant had penetrated her with his penis, she thought he may have ejaculated on her leg prior to running from the room. As a result of the attack, Payne suffered a fractured wrist and hand, swelling, dark bruising, lacerations, and abrasions. During a subsequent medical examination of Payne, a single pubic hair was found that contained traces of semen which were later matched to Defendant. At the time of the attack, Payne was seventy-eight years old.

On the night of 25 June 1998, Defendant went to Scarborough's residence. Scarborough was sleeping in her bedroom but awoke when she felt someone's hand around her neck. When she realized it was a man trying to hold her down, she began to struggle with him. Scarborough thought the man was trying to rape her, so she told him about her broken hip. The struggle continued for fifteen to twenty-five minutes until the man ran from the residence. Scarborough described her attacker as a white male between twenty and thirty years of age. While Scarborough had preexisting bruises on her legs prior to the attack, the struggle had worsened those bruises to such an extent that she required plastic surgery on both legs. According to her daughter, Scarborough's general health deteriorated considerably after the attack and she was never the same person. At the time of the attack, Scarborough, who died prior to the sentencing hearing, was ninety-two years old.

Defendant confessed to having broken into Payne's residence. Although he first admitted having entered Scarborough's residence, Defendant later recanted and told the investigating officers that an accomplice, a white male, had actually entered Scarborough's residence and attacked her. During the course of Defendant's discussions with law enforcement, he stated he was sorry for what he had done to Payne and Scarborough. At the sentencing hearing, Defendant addressed Scarborough's daughter and made the following statement:

I just want to apologize for my wrongdoing and whatever. I understand how you feel and I know your mom will never be back with you and I kind of feel the same way, that I will never be with my one[-]year-old son again because of the actions that I

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took part in[,] and I just wanted—just wanted to let you know that I am sorry for the part that I took in it and I hope that you will forgive me.

And for the rest of the things that I have been included in, I apologize for that, too.

Defendant requested the trial court to consider as mitigating factors Defendant's acceptance of responsibility at the sentencing hearing as well as his support obligation to his child. No evidence was submitted to corroborate Defendant's support obligations.

In accordance with the plea agreement, the trial court entered a judgment for felony conspiracy in the Scarborough case and a separate judgment for first-degree burglary and attempted second-degree rape in the Payne case. The trial court found the same aggravating and mitigating factors for both the Scarborough and the Payne case. Among the several aggravating factors, the trial court found that the victims were asleep, which made their condition "more vulnerable and susceptible to injury or victimization."¹ As mitigating factors, the trial court found that: (1) Defendant suffered from a mental condition that significantly reduced his culpability for the offenses; (2) Defendant's mental capacity was limited at the time the offenses were committed; (3) Defendant voluntarily acknowledged wrongdoing at an early stage in the criminal process; (4) Defendant has a support system in the community; and (5) Defendant has a positive employment history or is gainfully employed. The trial court further found that "each and every aggravating factor outweigh[ed] all mitigating factors" and therefore "each aggravating factor [was] in and of itself a sufficient basis for the imposition of a sentence in the aggravated range."

The issues are whether the trial court erred in: (I) finding that each aggravating factor standing alone outweighed all mitigating factors combined; (II) finding as an aggravating factor that the victims were asleep; and (III) rejecting as mitigating factors that Defendant accepted responsibility for his criminal conduct and that Defendant supported his family.

1. The trial court further found as aggravating factors that: (1) the victims were very old; (2) Defendant engaged in a pattern of conduct causing or indicating serious danger to society; (3) Defendant set a course of criminal conduct in motion by his actions; (4) Defendant committed actions that could have been but were not the basis for joinable criminal convictions; and (5) the crimes were planned and/or premeditated and/or deliberated.

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I

[1] Defendant argues the trial court committed error by finding that each aggravating factor was sufficient in and of itself to outweigh all mitigating factors. Defendant contends that the trial court, in doing so, attempted to insulate itself from the rule requiring remand for resentencing where an aggravating factor was improperly found. *See State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983); *State v. Taylor*, 74 N.C. App. 326, 328, 328 S.E.2d 27, 29, *disc. review denied*, 314 N.C. 547, 335 S.E.2d 319 (1985). While this may be true, we find nothing in the case law or statutes that would prohibit this form of balancing.

Section 15A-1340.16(b) of the North Carolina General Statutes provides that “[i]f the [trial] court finds that aggravating factors are present and are sufficient to outweigh any mitigating factors that are present, it may impose a sentence that is permitted by the aggravated range.” N.C.G.S. § 15A-1340.16(b) (2001). The weighing of aggravating and mitigating factors is within the sound discretion of the trial court. *State v. Davis*, 58 N.C. App. 330, 333, 293 S.E.2d 658, 661, *disc. review denied*, 306 N.C. 745, 295 S.E.2d 482 (1982). Thus, “[a] sentencing judge properly may determine in appropriate cases that one factor in aggravation outweighs more than one factor in mitigation and vice versa.” *State v. Parker*, 315 N.C. 249, 258, 337 S.E.2d 497, 502 (1985). Furthermore, the trial court “need not justify the weight [it] attaches to any factor.” *Ahearn*, 307 N.C. at 597, 300 S.E.2d at 697. On the other hand, this Court has recommended restraint on the part of trial courts in finding non-statutory aggravating factors after having found statutory factors and noted that only one error in finding an aggravating factor requires remand. *See State v. Baucom*, 66 N.C. App. 298, 301-02, 311 S.E.2d 73, 75 (1984). The need for remand is based on an appellate court’s inability to determine the respective weights assigned by a trial court to each factor when such weight distributions are normally not specified in the record on appeal.

As the trial court’s discretion includes the power to find that one aggravating factor outweighs several mitigating factors, the trial court may also properly determine that each of several aggravating factors is in and of itself sufficient to outweigh all mitigating factors. Furthermore, because the trial court in this case specifically noted its weight distribution by stating that each aggravating factor, standing on its own, was sufficient to outweigh all the mitigating factors, it eliminated the need for remand if this Court were to determine that the trial court had erred in finding an aggravating factor.

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II

[2] Because the trial court could properly find that each aggravating factor in and of itself was sufficient to outweigh all mitigating factors, we must only determine whether the evidence supported one of the aggravating factors found by the trial court.

Defendant argues the trial court erred in aggravating his sentence based upon a finding that the victims were asleep and thus more vulnerable and susceptible to injury or victimization. This non-statutory factor is analogous to the statutory factor allowing a trial court to aggravate a defendant's sentence based on the victim's age. *State v. Davy*, 100 N.C. App. 551, 558, 397 S.E.2d 634, 638, *appeal dismissed and disc. review denied*, 327 N.C. 638, 398 S.E.2d 871 (1990); N.C.G.S. § 15A-1340.16(d)(11) (2001). The concern addressed by this aggravating factor is vulnerability. See *Ahearn*, 307 N.C. at 603, 300 S.E.2d at 701. Accordingly, the State has the burden of showing that: (1) the victim was in fact vulnerable because of conditions at the time of the offense and (2) she was targeted either because of these conditions or the defendant took advantage of them while committing the offense. *State v. Drayton*, 321 N.C. 512, 514, 364 S.E.2d 121, 122 (1988). Sleep will therefore constitute a proper basis for an aggravating factor if it impaired the victim's ability to flee, fend off an attack, or otherwise avoid being victimized. *Id.* Furthermore, this Court has stated that "being asleep would surely render a rape victim [more] vulnerable to attack." *Davy*, 100 N.C. App. at 559, 397 S.E.2d at 638.

In this case, both victims were asleep, and thus in a vulnerable state, when a man entered their respective bedrooms. This vulnerable state was taken advantage of when the victims, still lying in their beds, were subsequently attacked. Thus, the trial court properly aggravated Defendant's sentences on the grounds the victims were asleep, thus making them more vulnerable and susceptible to injury or victimization.

III

[3] Defendant further argues the trial court committed error in failing to find legally and factually supported mitigating factors.

A defendant has the burden of proving by a preponderance of the evidence the existence of mitigating factors. N.C.G.S. § 15A-1340.16(a) (2001). "A trial judge is given 'wide latitude in deter-

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mining the existence of . . . mitigating factors,' and the trial court's failure to find a mitigating factor is error only when 'no other reasonable inferences can be drawn from the evidence.'" *State v. Godley*, 140 N.C. App. 15, 27, 535 S.E.2d 566, 575 (2000) (quoting *State v. Canty*, 321 N.C. 520, 524, 364 S.E.2d 410, 413 (1988)), *disc. review denied*, 353 N.C. 387, 547 S.E.2d 25, *cert. denied*, 532 U.S. 964, 149 L. Ed. 2d 384 (2001).

Defendant first contends the trial court should have found as a mitigating factor, based on his apology at the sentencing hearing, that Defendant accepted responsibility for his criminal conduct. We disagree.

A defendant accepts responsibility for his criminal conduct by accepting that he is answerable for the result of his criminal conduct. *Godley*, 140 N.C. App. at 28, 535 S.E.2d at 576. While Defendant in this case was remorseful at the sentencing hearing and apologized for the "part" that he had played in the crimes committed against Payne and Scarborough, his statement does not lead to the sole inference that he accepted he was answerable for the result of his criminal conduct. Thus, the trial court did not err in failing to find as a mitigating factor that Defendant accepted responsibility for his criminal conduct.

[4] Defendant also argues the trial court erred in failing to find as a mitigating factor that Defendant supports his family. Although comments were made by Defendant's attorney at the sentencing hearing about Defendant's provision of child support for his son, no specific evidence was offered to substantiate this allegation. Accordingly, the trial court did not err in rejecting this proposed mitigating factor as well.

Affirmed.

Judges HUDSON and BIGGS concur.

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[151 N.C. App. 107 (2002)]

STATE OF NORTH CAROLINA v. GUIJUL SIRIGUANICO

No. COA01-7

(Filed 18 June 2002)

1. Drugs— cocaine trafficking by possession—sufficiency of evidence

There was sufficient evidence that defendant possessed cocaine and was guilty of trafficking by possession where defendant was aware of and present during all conversations related to the purchase, he rode in a car from Goldsboro to Wilmington knowing that the cocaine was in the car, he accompanied the informant into an apartment in Wilmington and remained inside while the informant returned to the car for the cocaine, watched as the informant opened the package and placed the cocaine on the scales, and actively assisted the informant in weighing the cocaine on the scales.

2. Evidence— informant's statements—other evidence to same effect

There was no plain error in a cocaine trafficking prosecution where the trial court admitted statements from an informant who did not testify at trial. The essential evidence regarding defendant's knowledge and participation in the drug deal came from witnesses who testified at trial and not from the statements of the informant.

Appeal by defendant from judgments entered 17 August 2000 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 27 November 2001.

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

Jeffrey Evan Noecker, for defendant-appellant.

CAMPBELL, Judge.

Defendant appeals from convictions of cocaine possession and trafficking in cocaine by possession. We find no error.

Evidence for the State tended to show that law enforcement officers were working with an informant named Tony Rodriguez ("the informant") to arrange a cocaine transaction in the Goldsboro, North

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Carolina area. The informant met with co-defendant Ventura Medrano (also known as “Chico”) on 10 September 1999 seeking to purchase cocaine. Defendant was also present at this meeting. That night, Chico and defendant rode with the informant in his vehicle, a Ford Bronco (“Bronco”), over to Mariano Medrano’s (“Medrano”) house (Chico’s cousin who was also a co-defendant) to arrange the cocaine purchase for the following morning.

On the morning of 11 September 1999, Chico, the informant, defendant and Daniel Romero (“Romero”), a third co-defendant, picked up a package of cocaine from Medrano on their way to Wilmington, North Carolina (“Wilmington”) for a fishing trip. However, additional testimony revealed that another purpose of the Wilmington trip was to “deal.” The package was placed under the seat of the informant’s Bronco. Testimony indicated that the men, fearing they might be stopped and arrested by law enforcement officers for cocaine possession, talked for approximately thirty minutes about who would ride in the Bronco with the informant. Ultimately, defendant rode with the informant. The co-defendants followed in a van.

Upon arriving in Wilmington, the informant and defendant exited the Bronco, and entered an apartment that had been wired to transmit video and audio signals to law enforcement officers waiting outside. The apartment contained a small set of scales (such as would be used for weighing drugs), plastic bags, tape and other items used for the sale and distribution of drugs. No one else was present in the apartment. The van carrying the other three men drove past the apartment and stopped at a nearby gas station.

After entering the apartment, the informant returned to the Bronco to obtain the package of cocaine and carried it into the apartment wrapped in a blanket. Defendant was present as the informant unwrapped the package and placed the cocaine on the scales. While defendant never held the cocaine, he helped the informant adjust the weights while the cocaine was on the scales. Moments later when defendant went into the restroom, the law enforcement officers entered the apartment and arrested defendant.

Defendant was charged with trafficking in cocaine by possession, trafficking in cocaine by transportation, trafficking in cocaine by delivery, conspiracy to traffick in cocaine, conspiracy to sell and deliver cocaine, and possession of cocaine with intent to sell and deliver cocaine. Defendant was arraigned and entered pleas of not guilty to all charges.

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Prior to trial, defendant filed a motion to dismiss the charges against him. The motion was heard by the trial court before the jury was empaneled. After hearing arguments of counsel, the court took the motion under advisement until the close of the State's evidence.

At the close of the State's evidence, defendant renewed his motion to dismiss all of the charges. After hearing arguments of counsel, the trial court granted the motion with respect to the indictments for trafficking in cocaine by delivery, conspiracy to traffick in cocaine, and conspiracy to sell or deliver cocaine. The motion was denied with respect to the remaining charges.

Defendant did not testify on his own behalf or present any evidence at trial. Thereafter, at the close of all the evidence, defendant again moved to dismiss all remaining charges against him. This motion was denied.

After the trial, the jury deliberated and returned verdicts of guilty of possession of cocaine and trafficking in cocaine by possession. On 17 August 2000, Judge Ernest B. Fullwood sentenced defendant to a term of 175 months to 219 months in the North Carolina Department of Corrections on the trafficking charge and also fined him \$250,000.00. Judgment was arrested in respect to the cocaine possession charge. Defendant appeals these judgments.

By defendant's first assignment of error he argues that the trial court erred in failing to grant his motion to dismiss all the charges against him because there was insufficient evidence as to each charge. We disagree.

When ruling on a defendant's motion to dismiss a criminal action, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982) (citing *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971)). 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, 433 (1956). 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). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the

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commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed.” *Earnhardt*, 307 N.C. at 66, 296 S.E.2d at 652 (citing *State v. Cutler*, 271 N.C. 379, 383, 156 S.E.2d 679, 682 (1967)).

[1] Defendant’s first assignment of error presents this Court with the issue of whether there was sufficient evidence to prove defendant was in possession of cocaine so that reasonable minds might conclude that he was guilty of cocaine possession and trafficking in cocaine by possession. We find that there was sufficient evidence.

Our statutes provide that a person who possesses twenty-eight grams or more of cocaine¹ shall be guilty of the felony known as “trafficking in cocaine.” N.C. Gen. Stat. § 90-95(h)(3) (2001). The possession element of this felony can be proven by showing either actual possession or constructive possession. In determining whether possession is constructive, this Court has recognized that:

‘Where such materials are found on the premises under the control of an accused, this fact, in and of itself, gives rise to an inference of knowledge and possession which may be sufficient to carry the case to the jury on a charge of unlawful possession.’ It is not necessary to show that an accused has exclusive control of the premises where [drugs and/or drug] paraphernalia are found, but ‘where possession . . . is nonexclusive, constructive possession . . . may not be inferred without other incriminating circumstances.’

State v. McLaurin, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987) (citations omitted).

In the case *sub judice*, there was substantial evidence of other incriminating circumstances to establish that defendant was in nonexclusive, constructive possession of 990 grams of cocaine. Defendant was aware of and present during all conversations related to the cocaine purchase. Defendant, knowing that cocaine was in the Bronco, rode in the Bronco with the informant to transport the cocaine to Wilmington. Once in Wilmington, defendant accompanied the informant inside the apartment and remained inside while the informant returned to the Bronco to retrieve the package of cocaine. After the informant returned with the cocaine, defendant watched as

1. Both parties agreed that the package of cocaine in question contained more than twenty-eight grams of cocaine. A chemist for the State testified that the package actually contained 990 grams of cocaine.

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the informant opened the cocaine package in his presence and placed the cocaine on the scales. Finally, although he never touched the cocaine, defendant actively assisted the informant in weighing the cocaine on the scales. All of this substantial evidence of other incriminating circumstances was sufficient to support the trial court's denial of defendant's motion to dismiss the charges against him.

[2] By defendant's second assignment of error he argues that the trial court committed plain error in admitting statements made by the informant even though he did not testify at trial. We disagree.

"This Court has held many times that an objection to, or motion to strike, an offer of evidence must be made as soon as the party objecting has an opportunity to discover the objectionable nature thereof; and unless objection is made, the opposing party will be held to have waived it." *State v. Black*, 308 N.C. 736, 739, 303 S.E.2d 804, 805-06 (1983). However, to prevent the potential harshness of a rigid application of this rule, our State adopted the "plain error" rule that is recognized by our federal courts. *Id.* at 740, 303 S.E.2d at 806. The "plain error" rule:

[I]s always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' or where the error is such as to 'seriously affect the fairness, integrity or public reputation of judicial proceedings' or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'

Id. at 740-41, 303 S.E.2d at 806-07 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. N.C.), cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

During defendant's trial, evidence concerning statements made by the informant was admitted without objection from defendant's counsel. However, after reviewing the record and the transcript, we find no plain error. The essential evidence regarding defendant's knowledge and participation in the drug deal came from witnesses who did testify at the trial and not from the statements of the informant. The co-defendants involved in this case provided testimony

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establishing defendant's knowledge of the cocaine and their plans to transport it to Wilmington. Those same co-defendants, as well as several law enforcement officers, testified regarding defendant's presence in the informant's Bronco with the cocaine while en route to Wilmington. Finally, the law enforcement officers that videotaped defendant inside the Wilmington apartment testified that defendant participated in weighing the cocaine on the scales. Therefore, any statements made by the informant and admitted during the trial were not so prejudicial as to result in the denial of a fair trial to defendant.

For the aforementioned reasons, we find that defendant's convictions of cocaine possession and trafficking in cocaine by possession should be upheld.

No error.

Judges GREENE and McCULLOUGH concur.

IN RE: JAMES OLIVER PITTMAN, A MINOR CHILD, DOB: 10-02-00

No. COA01-991

(Filed 18 June 2002)

Judges— oral adjudication while in office—written order after leaving—void

An order adjudicating a child to be a neglected juvenile and ordering disposition of custody was vacated and remanded where the judge entered an oral adjudication at the conclusion of the hearing on 2 November 2000, she was subsequently defeated in an election, her replacement was sworn in on 4 December 2000, and she signed the order on 16 January 2001. She was no longer a judicial official when she signed the order and it is absolutely void. The duties of judges who are not able to perform their duties after a hearing or trial may be performed by the chief judge of the district or by any judge appointed by the Director of the Administrative Office of the Courts if the chief judge is disabled, and the substitute judge may grant a new trial or hearing in his or her discretion.

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[151 N.C. App. 112 (2002)]

Appeal by respondents from order entered 16 January 2001 by Judge Sarah P. Bailey in Nash County District Court. Heard in the Court of Appeals 13 May 2002.

Nash County Department of Social Services, by Jayne B. Norwood, and Guardian Ad Litem Program, by Attorney Advocate Judith L. Kornegay, for petitioner-appellees.

Etheridge, Sykes, Britt & Hamlett, L.L.P., by J. Richard Hamlett, II, and Massengill & Bricio, P.L.L.C., by Francisco J. Bricio, for respondent-appellants.

EAGLES, Chief Judge.

James Pittman (“the father”) and Lekeshia Harris (“the mother”) appeal from the trial court’s order adjudicating their son, James Oliver Pittman, to be a neglected juvenile and ordering disposition of the custody of the child. The sole issue on appeal is whether an order signed by a judge after her term had expired is a valid order. After careful consideration of the record and briefs, we vacate the order and remand to the trial court for entry of an order or exercise of its discretion consistent with Rule 63.

The evidence tends to show the following. The father and the mother had two children together: Jakel Pittman (“Jakel”), born on 3 October 1999, and James Oliver Pittman (“James”), born on 2 October 2000. On 7 January 2000, Jakel was admitted to Pitt County Memorial Hospital with serious injuries to the head, legs, and spine. Doctors determined that the injuries were non-accidental, and possibly the result of severe shaking, jamming, pushing, pulling, and jabbing. Based on the seriousness of Jakel’s injuries, the Nash County Department of Social Services (“DSS”) and the Sharpsburg Police Department investigated the matter.

During the investigation, the mother provided a statement to police admitting that she intentionally injured Jakel by “rock[ing] and bounc[ing] him to[o] hard.” After an adjudicatory hearing in Nash County District Court on 8 and 16 June 2000, Judge Robert Evans entered an order on 5 September 2000 adjudicating Jakel an abused and neglected juvenile as to both parents. This Court recently held that the mother’s statement to the police was admissible and affirmed the adjudication of Jakel as abused and neglected. *See In re Pittman*, 149 N.C. App. 756, 561 S.E.2d 560 (2002).

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On 2 October 2000, the mother gave birth to James. Due to the severity of Jakel's injuries, DSS initiated an investigation of James. Thereafter, on 16 October 2000, DSS filed a juvenile petition alleging that James was neglected based upon the adjudication in Jakel's case. On 2 November 2000, a hearing was held in Nash County District Court, the Honorable Sarah Bailey presiding. At the conclusion of the hearing, Judge Bailey orally adjudicated James to be a neglected juvenile and vested physical custody of James in DSS. Subsequently, on 16 January 2001, Judge Bailey signed a written order consistent with her verbal judgment concluding that James was neglected in that he "reside[d] in a home where his sibling was adjudged to have been abused by his mother and that his father knew or should have known that the abuse was occurring. Due to the seriousness of the injuries sustained by the child's sibling, the child reside[d] in an environment injurious to his welfare." The father and the mother appeal.

In their first assignment of error, the parents contend that "[t]he adjudication and disposition order signed by Judge Bailey is void as she was no longer a *de jure* nor a *de facto* District Court Judge at the time she signed the order." After carefully considering the issue, we agree.

"[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." G.S. § 1A-1, Rule 58. Here, Judge Bailey orally adjudicated James to be a neglected juvenile and vested physical custody of James in DSS at the conclusion of the hearing on 2 November 2000. However, Judge Bailey did not reduce her judgment to writing at that time.

"The announcement of judgment in open court is the mere rendering of judgment, not the entry of judgment. The entry of judgment is the event which vests this Court with jurisdiction." *Worsham v. Richbourg's Sales and Rentals*, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996) (citation omitted); *see also In re Bullabough*, 89 N.C. App. 171, 180, 365 S.E.2d 642, 647 (1988) (a judge may make an oral entry of a juvenile order provided the order is subsequently reduced to written form).

Here, the parties stipulated that Judge Bailey

was defeated in a judicial election in November of 2000, by William G. Stewart, and that as of January [16], 2001, the date the adjudication and disposition order was signed by [Judge Bailey], she was no longer an elected judicial official. As of January [16],

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2001 the Honorable William G. Stewart had been sworn into office as a District Court Judge and officially held the position of District Court Judge formerly held by Sarah P. Bailey.

Significantly, Judge Bailey signed the written order on 16 January 2001—approximately one and a half months *after* her term had expired. On appeal, the parents contend that Judge Bailey is an usurper and that the judicial acts she performed after her term had expired are void.

Where the validity of an act of a person acting in a judicial office is challenged “in a collateral proceeding before another court on the theory that [the person] had no right to the office, the court may inquire into [the person’s] title to the judicial office far enough to determine whether [the person] was a judge *de jure*, or a judge *de facto*, or a mere usurper at the time [the person] performed the act in question.” *In re Wingler*, 231 N.C. 560, 564, 58 S.E.2d 372, 375 (1950). A judge *de jure* “is one who is regularly and lawfully elected or appointed and inducted into office and exercises the duties as his right. All his necessary official acts are valid, and he cannot be ousted.” *Norfleet v. Staton*, 73 N.C. 546, 550 (1875).

A judge *de facto* “is one who goes in under *color* of authority . . . or who exercises the duties of the office so long or under such circumstances as to raise a presumption of his right; in which cases his necessary official acts are valid as to the public and third persons; but he may be ousted by a direct proceeding.” *Id.* Finally, “[a] usurper is one who undertakes to act officially without any actual or apparent authority. Since he is not an officer at all or for any purpose, his acts are absolutely void, and can be impeached at any time in any proceeding.” *In re Wingler*, 231 N.C. at 564, 58 S.E.2d at 375.

As noted above, Judge Bailey was defeated in the November 2000 general elections by William Stewart. Judge Stewart was sworn in as a judge to serve in former Judge Bailey’s District Court Judge seat on 4 December 2000. Consequently, when she signed the adjudication and disposition order on 16 January 2001, Judge Bailey was no longer an elected judicial official. Judge Bailey, having suffered defeat in the general election for office of District Court Judge and having vacated and surrendered office to another candidate receiving a majority of votes without contesting his right to office, had no rights under statute or case law to reassume office. *See Duncan v. Beach*, 294 N.C. 713, 721, 242 S.E.2d 796, 801 (1978).

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We conclude that Judge Bailey is an usurper here. Since Judge Bailey was no longer a judicial officer after her term expired, the adjudication and disposition order entered on 16 January 2001 is absolutely void. "Since entry of judgment is jurisdictional this Court is without authority to entertain an appeal where there has been no entry of judgment." *Searles v. Searles*, 100 N.C. App. 723, 725, 398 S.E.2d 55, 56 (1990). Having no effective judgment for purposes of this appeal, we conclude that this action has been pending since the filing of the juvenile petition on 16 October 2000.

Pursuant to the currently effective version of Rule 63, applicable to actions pending on or after 18 August 2001,

[i]f by reason of death, sickness or other disability, resignation, retirement, *expiration of term*, removal from office, or other reason, a judge before whom an action has been tried or a hearing has been held is unable to perform the duties to be performed by the court under these rules after a verdict is returned or a trial or hearing is otherwise concluded, then those duties, *including entry of judgment*, may be performed:

. . . .

(2) In actions in the district court, by the chief judge of the district, or if the chief judge is disabled, by any judge of the district court designated by the Director of the Administrative Office of the Courts.

If the substituted judge is satisfied that he or she cannot perform those duties because the judge did not preside at the trial or hearing or for any other reason, the judge may, in the judge's discretion, grant a new trial or hearing.

G.S. § 1A-1, Rule 63 (emphasis added); *see also* 2001 N.C. Sess. Laws ch. 379, §§ 7, 9. Accordingly, we remand to the trial court to enter an order or exercise its discretion in this matter consistent with Rule 63.

In sum, we vacate the adjudication and disposition order of 16 January 2001 and remand to the trial court for either entry of an order or exercise of its discretion consistent with Rule 63.

Vacated and remanded.

Judges McGEE and TYSON concur.

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IN THE MATTER OF: ERIC EDWIN POPE, JUVENILE

No. COA01-426

(Filed 18 June 2002)

1. Appeal and Error— preservation of issues—no objection at trial—plain error—not raised in assignments of error

The issue of whether the trial court erred by ruling a juvenile capable to proceed in a delinquency proceeding was not preserved for appeal where there was no objection to the ruling at the hearing and no assignment of error alleging plain error.

2. Appeal and Error— preservation of issues—constitutional-ity of statute—motion to dismiss—no objection

The issue of whether N.C.G.S. § 15A-1001 was unconstitutional as applied to a juvenile was not preserved for appellate review where the trial judge denied the juvenile's motion to dismiss on these grounds and no objection was raised.

3. Juveniles— assault on government official—delinquency

The trial court did not err by not finding that a juvenile acted in self-defense where a middle school principal carried the juvenile to the office to keep him from leaving the building, with the student grabbing a doorframe and scratching the principal in the process. The juvenile engaged in and continued a difficulty with the principal when he refused to heed warnings not to leave the building; the principal was required to undertake reasonable force to protect the juvenile's safety and to prevent him from leaving school premises.

Appeal by juvenile from order entered 27 November 2000 by Judge Craig Croom in Wake County District Court. Heard in the Court of Appeals 13 February 2002.

Attorney General Roy A. Cooper, by Assistant Attorney General Diane W. Stevens, for the State.

Victor N. Meir for juvenile-appellant.

TIMMONS-GOODSON, Judge.

Juvenile appeals an order adjudicating him delinquent and placing him on supervised probation. For the reasons discussed herein, we affirm the delinquency adjudication.

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The evidence presented at trial by the State tended to show the following: Juvenile was a nine-year-old student at Lead Mine Elementary School in Wake County. On 21 December 2000, Dr. Gregory Decker (“Principal Decker”), the principal of Lead Mine Elementary, received information from juvenile’s teacher that juvenile was missing from the classroom. Principal Decker located juvenile in the corridor near the main office. He asked juvenile to accompany him to the office. Juvenile turned away and began walking down the corridor, towards the exit door. As juvenile began to walk through the door, Principal Decker again, asked juvenile to accompany him to the office. Principal Decker then informed juvenile that if juvenile continued to walk through the exit door, he would have to physically carry him to the office. Juvenile continued through the door, at which time Principal Decker lifted juvenile, “cradled” him, and carried him to the office. While carrying juvenile to the office, juvenile struck Principal Decker with his fists on the back four times. As Principal Decker reached the office doorway, juvenile grabbed the door post to prevent Principal Decker from entering. He then scratched Principal Decker’s hand with his fingernails. After this incident occurred, Principal Decker notified juvenile’s parents.

On 18 February 2000, the State filed a juvenile petition alleging that juvenile committed the offense of assault on a government employee in violation of N.C. Gen. Stat. § 14-33(c)(4). On 7 March 2000, counsel for juvenile filed a motion pursuant to N.C. Gen. Stat. § 15A-1001 alleging that juvenile was incapable of proceeding to trial due to his general “lack of maturity” and inability to grasp court matters. Pursuant to the motion, the court ordered an evaluation of juvenile at Dorothea Dix Hospital to determine whether juvenile possessed the requisite capacity to proceed to trial. According to the evaluation by Dr. Manuel Versola, juvenile was found incapable of proceeding to trial. Pursuant to this report by Dorothea Dix Hospital, the State moved on 12 July 2000 for a competency hearing. On 20 September 2000, Judge Robert B. Rader found juvenile competent to stand trial. Juvenile then moved to dismiss the petition on the grounds that N.C. Gen. Stat. § 15A-1001 as applied to juvenile was unconstitutional. In an order entered 14 November 2000, the court denied the motion and the case proceeded to trial.

On 27 November 2000, the trial court adjudicated juvenile delinquent for assault on a government employee. Following the adjudication, a dispositional order was entered placing juvenile on supervised probation for six months. Juvenile appeals.

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In his first two assignments of error, juvenile contends that (1) there was insufficient evidence to support the trial court's conclusion that juvenile was capable of proceeding to trial; (2) the trial court erred by failing to conclude that the competency statutes, as applied to juvenile, violate the United States and North Carolina Constitutions.

[1] As to juvenile's first assignment of error, the record reflects that on 7 March 2000, counsel for juvenile filed a motion alleging incapacity to proceed and an affidavit in support of the motion. After a hearing on 20 September 2000, Judge Rader found juvenile competent to proceed to trial. There is nothing in the record or transcript to suggest that juvenile, at any time, made any objections to the rulings of the trial court regarding juvenile's capacity to proceed at the 20 September 2000 hearing or the adjudication hearing on 20 November 2000. Thus juvenile has waived this argument for appeal. Because the competency issue was not preserved for appeal, we may review it only for plain error. *See State v. Flippen*, 349 N.C. 264, 276, 506 S.E.2d 702, 709 (1998), *cert. denied*, 526 U.S. 1135, 143 L. Ed. 2d 1015 (1999). However, juvenile has also waived plain error review by "failing to allege in his assignment of error that the trial court committed plain error." *Id.*; *see also* N.C.R. App. P. 10(c)(4) (2002). Accordingly, we do not address juvenile's first assignment of error.

[2] Similarly, as to juvenile's second assignment of error, the procedural history reveals that on 13 November 2000, counsel for juvenile moved to dismiss the delinquency petition on the grounds that N.C. Gen. Stat. § 15A-1001 was unconstitutional as applied to juvenile. On 14 November 2000, the trial court denied the motion. Again, the record does not reflect that objections were raised and therefore, this assignment of error is not preserved for appellate review. Due to juvenile's failure to properly preserve his constitutional arguments, we do not address juvenile's assignment of error. *See* N.C.R. App. P. Rule 10(c)(4) (2002).

[3] In his last assignment of error, juvenile contends that the trial court erred by not "considering" the issue of self-defense. While juvenile did not contest at trial the sufficiency of the evidence, he now asserts that the trial court should have found from the evidence that he acted in self-defense. We disagree.

"The theory of self-defense entitles an individual to use 'such force as is necessary or apparently necessary to save himself from

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death or great bodily harm . . . A person may exercise such force if he believes it to be necessary and has reasonable grounds for such belief.’” *State v. Moore*, 111 N.C. App. 649, 653, 432 S.E.2d 887, 889 (1993) (quoting *State v. Marsh*, 293 N.C. 353, 354, 237 S.E.2d 745, 747 (1977)). Self-defense further excuses a defendant’s assault of another, “‘even though he is not . . . put in actual or apparent danger of death or great bodily harm.’” *State v. Hayes*, 130 N.C. App. 154, 179, 502 S.E.2d 853, 870 (1998) (quoting *State v. Anderson*, 230 N.C. 54, 56, 51 S.E.2d 895, 897 (1949)), *affirmed in part, dismissed in part*, 350 N.C. 79, 511 S.E.2d 302 (1999). Thus,

“If one is without fault in provoking, engaging in, or continuing a difficulty with another, he is privileged by the law of self-defense to use such force against the other as is actually or reasonably necessary under the circumstances to protect himself from bodily injury or offensive physical contact at the hands of the other”

Id. (quoting *Anderson*, 230 N.C. at 56, 51 S.E.2d at 897). Therefore, to prevail on a self-defense claim, juvenile must show that he was without fault in “provoking, engaging in, or continuing a difficulty with another.”

In the instant case, the evidence tends to show that at the time Principal Decker apprehended juvenile, juvenile was exiting the school premises. Principal Decker warned him at least twice that he was not to exit the building. N.C. Gen. Stat. § 115C-288(e) (2001), which outlines the duties and responsibilities of a principal, provides that “[t]he principal shall have [the] authority to exercise discipline over the [students] of the school [and] shall use reasonable force to discipline students[.]” In the unique school environment, “officials *must* be able to ‘move quickly when dealing with immediate threats to a school’s proper educational environment and student safety.’” *In Re D.D.*, 146 N.C. App. 309, 316, 554 S.E.2d 346, 351, *disc. review denied*, 354 N.C. 572, 558 S.E.2d 867 (2001) (citations omitted) (alteration in original). Clearly, the juvenile in failing to heed Principal Decker’s warnings not to exit the building, “engaged in and continued a difficulty” with Principal Decker that required the principal to undertake some reasonable force to protect juvenile’s safety and to prevent juvenile from leaving the school premises. Therefore, under the facts of this case, juvenile’s self-defense claim must fail.

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Affirmed.

Judges WYNN and TYSON concur.

DOROTHY M. WRIGHT, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN WRIGHT, JR., PLAINTIFF-APPELLANT V. MARION SMITH, ADMINISTRATOR OF THE ESTATE OF JOHN EDWARD WRIGHT, SR., AND MARION SMITH, ADMINISTRATOR OF THE ESTATE OF JENNIE BRYANT WRIGHT, AND MARY SUE BURLESON, DEFENDANT-APPELLEES V. WILLIAM WRIGHT, UNMARRIED; TERRY DOLAN WRIGHT & RHONDA WRIGHT; BOBBY & JOANN B. WRIGHT; WILLA MAE SUMMEY, WIDOW; PAULENE CAMPBELL, UNMARRIED; AND GERALINE MERRILL, UNMARRIED, THIRD PARTY DEFENDANTS

No. COA01-530

(Filed 18 June 2002)

Estates— administration—statute of limitations

The three-year statute of limitations for contract actions bars an action seeking specific performance of a contract by Wright, Sr. to convey land at his death to Wright, Jr. where Wright, Sr. died intestate in 1978; Wright, Jr. died intestate in 1989; Wright, Sr.'s wife conveyed the disputed tract to her daughter, defendant Burleson, in 1991; an administrator was appointed for Wright, Sr.'s estate in 1998; and plaintiff brought this action in 1998. Although plaintiff contended that the statute of limitations did not begin to run until an administrator was appointed, the title to the land passed to the heir immediately upon death and the administrator never had possession. Moreover, while N.C.G.S. § 1-22 will allow the time limit for filing an action to be extended when a personal representative is appointed before the statute of limitations lapses, the claim is subject to the traditional statute of limitations if a personal representative is not appointed within that time.

Appeal by plaintiff from order dated 12 February 2001 by Judge Melzer A. Morgan, Jr. in Superior Court, Randolph County. Heard in the Court of Appeals 30 January 2002.

Stephen E. Lawing for plaintiff-appellant.

Wyatt Early Harris Wheeler, L.L.P., by William E. Wheeler, for defendant-appellee Marion Smith, Administrator of the Estate

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of John Edward Wright, Sr., and Marion Smith, Administrator of the Estate of Jennie Bryant Wright.

Megerian & Wells, by Franklin E. Wells, Jr., for defendant-appellee Mary Sue Burleson.

McGEE, Judge.

Plaintiff filed a complaint dated 2 December 1998 alleging John Edward Wright, Sr. (Wright, Sr.) contracted in 1977 to devise certain property at his death to John Wright, Jr. (Wright, Jr.). Plaintiff, as administrator of Wright, Jr.'s estate, sought specific performance of the contract against defendant Marion Smith, as administrator of the estates of Wright, Sr. and Wright, Sr.'s wife, Jennie Bryant Wright (Jennie Wright). Mary Sue Burleson (defendant Burleson) filed a motion to dismiss dated 10 February 1999 and a motion for summary judgment on 2 November 2000. Plaintiff filed a motion for summary judgment on 3 November 2000. A hearing was held on the motions on 18 January 2001. The trial court granted summary judgment in favor of defendant Burleson and dismissed plaintiff's claims in an order dated 12 February 2001. Plaintiff appeals.

Wright, Sr. conveyed a tract of land to Wright, Jr. on 18 May 1977. A message was typed on a map of the conveyed tract of land which stated:

To whom it may concern: Jr. and Dorothy Wright has paid \$1000. for this 4 acre tract. And at my death the remainder of my estate goes to my son, John Wright, Jr. for the love and care he has taken of me and Mom.

The paper was signed, "J. E. Wright". Wright, Sr. died intestate on 7 January 1978. Wright, Jr. died intestate on 18 August 1989. Jennie Wright conveyed a tract of land consisting of about five acres to her daughter, defendant Burleson, on 17 July 1991. Plaintiff contends this property was part of the estate that Wright, Sr. contracted to give to Wright, Jr. in 1977. Jennie Wright died intestate 30 April 1995.

Plaintiff first argues the trial court erred in granting defendant Burleson's motion for summary judgment because the action was not barred by any statute of limitations. Plaintiff contends the statute of limitations in this matter did not begin to run until an administrator was appointed for Wright, Sr.'s estate, which did not occur until 10 November 1998. In support of plaintiff's argument, plaintiff relies on

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Pearson v. Pearson, 227 N.C. 31, 40 S.E.2d 477 (1946). In *Pearson*, our Supreme Court stated, “[t]he administrator is a trustee and so, in the absence of demand and refusal, any statute of limitations which bars an action by the legatee or distributee to recover his share of the estate does not begin to run until the administrator completes and closes the administration.” *Id.*, 227 N.C. at 33, 40 S.E.2d at 479. Plaintiff contends since she filed suit on 4 December 1998, she is well within any statute of limitations period to file a claim for specific performance of the contract.

However, Wright Sr.’s administrator does not have, nor has he ever had, possession of or title to this tract of land. “When a property owner dies intestate, the title to his real property vests immediately in his heirs.” *Swindell v. Lewis*, 82 N.C. App. 423, 426, 346 S.E.2d 237, 239 (1986); N.C. Gen. Stat. § 28A-15-2(b) (1999) (“The title to real property of a decedent is vested in his heirs as of the time of his death[.]”). While a personal administrator has certain procedures by which the administrator may recover the real property to pay debts, the title to the real property does not automatically vest with the personal administrator upon the administrator’s appointment in the same manner that title to personal property vests automatically with the administrator. *See* N.C. Gen. Stat. § 28A-15-2(a) (1999). While *Pearson* dealt with real property and our Supreme Court held the plaintiffs’ action was not barred by the statute of limitations, *Pearson* can be distinguished from the case before us. In *Pearson*, the administrator had obtained actual title to the real property. The title “had been sequestered by the court and placed in the hands of the administrator. He was in actual possession.” *Pearson*, 227 N.C. at 33, 40 S.E.2d at 479. However, in the case before us, title to the disputed real property passed to and vested in Wright, Sr.’s wife, Jennie Wright, immediately upon the death of Wright, Sr. in 1978. The administrator of Wright, Sr.’s estate never possessed title to the disputed real property.

Furthermore, any complaint plaintiff may have for damages for breach of contract is now void because the statute of limitations has passed. N.C. Gen. Stat. § 1-22 (1999) states:

If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative or collector after the expiration of that time; provided, the action is brought or notice of the

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claim upon which the action is based is presented to the personal representative or collector within the time specified for the presentation of claims in G.S. 28A-19-3.

While N.C.G.S. § 1-22 allows for a suspension of the statute of limitations between the period from the death of the decedent and the appointment of an administrator, N.C.G.S. § 1-22 is not applicable to the case before us. Our Supreme Court stated in *Ragan v. Hill*, 337 N.C. 667, 447 S.E.2d 371 (1994) that “our statutory scheme for handling claims against decedents’ estates presumes the appointment of a personal representative or collector to receive those claims. We do not believe that the legislature intended the non-claim statute to operate where no personal representative or collector has been appointed.” *Id.* at 673, 447 S.E.2d at 375. In *Ragan*, our Supreme Court focused on N.C. Gen. Stat. § 28A-19-3 and did not specifically mention N.C.G.S. § 1-22. However, N.C.G.S. § 1-22 also presumes an administrator has been appointed. The title of N.C.G.S. § 1-22 reads “Death before limitation expires; action by or against personal representative or collector[.]” in part indicating the legislature intended the statute to apply only when a personal representative has been appointed. N.C.G.S. § 1-22 also requires that an action be brought in compliance with the time specified for the presentation of claims in N.C.G.S. § 28A-19-3.

Given these provisions, we hold no suspension of the statute of limitations can occur until a personal representative is appointed to administer the estate. If such an appointment occurs before the statute of limitations lapses, N.C.G.S. § 1-22 will allow the time limit within which to file an action against the estate to be extended according to N.C.G.S. § 28A-19-3. However, if a personal representative is not appointed, these two statutes are not activated, and the claim is subject to the traditional statute of limitations that apply to the particular cause of action.

Ragan anticipated such a set of facts. Our Supreme Court stresses that a “cause of action may be barred by either or both [N.C. Gen. Stat. § 28A-19-3 or N.C. Gen. Stat. § 1-52(5)].” *Ragan*, 337 N.C. at 671, 447 S.E.2d at 374. Our Supreme Court also notes “that claimants who, like plaintiffs, find no personal representative to whom they may present their claims are not without some time limitations on actions to recover on their claims. As noted above, any action filed in a court of law will be subject to the applicable statute of limitations[.]” *Ragan* at 673, 447 S.E.2d at 375.

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Plaintiff failed to file an action against Jennie Wright on the alleged contract within three years of Wright, Sr.'s death; as a result, the three year statute of limitations for contracts bars any such action. *See* N.C. Gen. Stat. § 1-52(1) (1999). We dismiss this assignment of error.

We have reviewed plaintiff's remaining assignments of error and find them to be without merit; they are therefore dismissed.

The judgment of the trial court is affirmed.

Affirmed.

Judges WALKER and BIGGS concur.



ACTION COMMUNITY TELEVISION BROADCASTING NETWORK, INC. AND
HERBERT GREENBERG, PLAINTIFF-APPELLEES v. RAY LIVESAY, DEFENDANT-
APPELLANT

No. COA01-450

(Filed 18 June 2002)

1. Corporations— dissolution—right to request

A defendant in an action to determine the status of the individual parties as to their positions in a corporation was entitled to bring a request for dissolution and have that request evaluated by the trial court regardless of whether defendant has voting power or whether there is actual deadlock among the managing shareholders. North Carolina courts have determined that a minority shareholder can bring a request for dissolution or other equitable relief if the reasonable equitable expectations of the shareholder have been frustrated.

2. Appeal and Error— partial summary judgment—declaration of positions in corporation—no immediate appeal

An appeal was dismissed as interlocutory where plaintiffs were seeking a declaration of the status of the individual parties as to their positions in a small corporation, the trial court granted plaintiffs' motion for partial summary judgment, and the court then entered an order of certification of immediate appeal. Based

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on the facts in the case, no substantial right was affected; while a shareholder's ability to manage a closely held corporation is significant, that right in this case will not be potentially injured before a final ruling, and defendant has available remedies such as dissolution and the appointment of a receiver.

Appeal by defendant from order entered 9 January 2001 by Judge Frank R. Brown in Superior Court, Nash County. Heard in the Court of Appeals 30 January 2002.

Bridgers, Horton, Rountree & Boyette, by Charles S. Rountree, for plaintiff-appellee Action Community Television Broadcasting Network, Inc.

Etheridge, Sykes, Britt & Hamlett, LLP, by William D. Etheridge, for plaintiff-appellee Herbert Greenberg.

Adams, Portnoy & Berggren, PLLC, by Douglas E. Portnoy, for defendant-appellant.

McGEE, Judge.

Herbert Greenberg (Greenberg) and Ray Livesay (defendant) are each fifty percent shareholders in Action Community Television Broadcasting Network, Inc. (Action, Inc.), which was formed in November 1995. An organizational meeting of the shareholders was held on 8 May 1996. Greenberg and defendant were elected officers at this meeting, and each was given an equal shareholder interest in the corporation. Greenberg and defendant issued a *de facto* one share of stock to Grover Prevatte Hopkins (Hopkins) in order that Hopkins could be called upon to vote and resolve any impasse that might develop between Greenberg and defendant.

Greenberg, in his capacity as president of Action, Inc., sent a "Notice of Annual Meeting of Shareholders" on 8 May 1998 announcing a meeting to be held on 20 May 1998. At the meeting, which defendant did not attend, Greenberg and Hopkins voted to remove defendant as a director and voted to replace defendant with Hopkins as a director. However, defendant and Greenberg continued to work together at Action, Inc.

In August 2000, a dispute arose between Greenberg and defendant, and Greenberg organized an emergency meeting in which he and Hopkins voted to remove defendant from managerial control and authorized filing of a lawsuit. Action, Inc. and Greenberg (collectively

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plaintiffs) filed a complaint dated 22 August 2000. In one of the claims for relief in the complaint, plaintiffs asked the trial court to declare the legal status of Greenberg and defendant with respect to their positions in the corporation based on the minutes of the corporation. Plaintiffs filed a motion dated 22 November 2000 for partial summary judgment as to this issue. The trial court granted plaintiffs' motion for partial summary judgment in an order entered 9 January 2001. The trial court entered an order of certification of immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54 on 9 February 2001. Defendant appeals from the trial court's 9 January 2001 order.

We note that a Rule 54(b) certification is reviewable by this Court on appeal because a "trial court's denomination of its decree [as] 'a final . . . judgment does not make it so,' if it is not such a judgment." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (citation omitted). The trial court's determination that there is no just reason for delay of an appeal is accorded great deference, but it does not bind our appellate courts because "ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court." *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984).

Defendant has asked this Court to review his appeal of an interlocutory order pursuant to N.C. Gen. Stat. § 1-277 which states

[a]n appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

N.C. Gen. Stat. § 1-277(a) (1999). Defendant contends the trial court's decision effectively disposes of all of plaintiffs' claims because all of those claims were based on a determination of whether plaintiffs properly removed defendant from managerial control of the corporation. Defendant also contends the trial court's order affects a substantial right.

All of plaintiffs' claims, however, have not been determined by the trial court. Remaining before the trial court are claims asking for a declaration of debt obligation, appointment of a receiver, and corporate dissolution. Defendant's counterclaims that have not been

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determined are a request for an accounting, a declaration of the corporate debt owed to defendant, and also a request for corporate dissolution. Defendant contends the request for dissolution is moot because he will not be able to vote and cause a deadlock among the directors, a prerequisite defendant believes is necessary before bringing a request for dissolution.

[1] However, defendant incorrectly concludes deadlock is a prerequisite to a request for dissolution. As in *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551 (1983), we “note at the outset that the enterprise[] with which we are dealing [is a] close corporation[], not [a] publicly held corporation[.]” *Id.*, 309 N.C. at 288, 307 S.E.2d at 557.

[M]any close corporations are companies based on personal relationships that give rise to certain “reasonable expectations” on the part of those acquiring an interest in the close corporation. Those “reasonable expectations” include, for example, the parties’ expectation that they will participate in the management of the business or be employed by the company.

Id., 309 N.C. at 289, 307 S.E.2d at 558 (quoting F. O’Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 Bus. Law 873, 885 (1978)). Because of this peculiarity not found in larger publicly traded corporations,

when personal relations among the participants in a close corporation break down, the “reasonable expectations” the participants had, for example, an expectation that their employment would be secure, or that they would enjoy meaningful participation in the management of the business—become difficult if not impossible to fulfill. In other words, when the personal relationships among the participants break down, the majority shareholder, because of his greater voting power, is in a position to terminate the minority shareholder’s employment and to exclude him from participation in management decisions.

Meiselman, 309 N.C. at 290, 307 S.E.2d at 558. As a result of the above unique situations, North Carolina courts have determined a minority shareholder can bring a request for dissolution, or other equitable relief, if the “reasonable expectations” of the shareholder have been frustrated. *See Meiselman*, 309 N.C. at 301, 307 S.E.2d at 564. We note that in the case before us, the two shareholders are equal fifty percent

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shareholders. However, because of the shareholder meetings in which defendant was divested of his role as director, defendant is essentially a minority shareholder in terms of voting power and control of Action, Inc.

Based on these principles, defendant is entitled to bring a request for dissolution and have that request evaluated by the trial court regardless of whether or not defendant has voting power or whether there is actual deadlock among the managing shareholders.

[2] Defendant also contends that even though the order is interlocutory, the appeal should be heard because a substantial right has been affected. The “ ‘substantial right’ test for appealability . . . is more easily stated than applied. It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered.” *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978). In determining whether a substantial right has been affected in such a manner warranting immediate appeal, “[e]ssentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment.” *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990).

Based on the particular facts before us, we hold defendant’s argument fails the substantial right test. While we recognize a shareholder’s ability to manage his or her own closely held corporation is significant, we do not see how this right in this case will be potentially injured before a final ruling is made. As noted above, defendant has remedies available to him to protect those rights, remedies such as dissolution and the appointment of a receiver that have already been asked for by the parties involved. We therefore dismiss defendant’s appeal.

Dismissed.

Judges WALKER and BIGGS concur.

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[151 N.C. App. 130 (2002)]

JACK V. SMITH, PLAINTIFF v. LINDA SUE SMITH, DEFENDANT

No. COA01-601

(Filed 18 June 2002)

Divorce— living separate and apart—knowledge of parties

The trial court did not err by entering a decree of absolute divorce under N.C.G.S. § 50-6 based on plaintiff husband's intent to separate from defendant on 21 January 1999 even though defendant wife contends she had no knowledge of plaintiff's intention to live separate and apart and ultimately end their marriage until September 1999, because: (1) N.C.G.S. § 50-6 states that at least one of the parties must have the intent to cease the matrimonial cohabitation, and our courts have never required that the remaining party must also have knowledge of the other party's intent to cease cohabitation; (2) the parties physically separated on 21 January 1999 when plaintiff moved to North Carolina, it was plaintiff's intention to cease cohabitation with defendant at that time, and the parties did not resume cohabitation when defendant and the parties' minor child eventually relocated to North Carolina; (3) the parties did not engage in a sexual relationship after October 1998; and (4) both plaintiff's minor child and his niece were aware of his intention to cease cohabitation with defendant when he moved to North Carolina.

Appeal by defendant from judgment entered 16 October 2000 by Judge Peter L. Roda in Buncombe County District Court. Heard in the Court of Appeals 21 February 2002.

Pitts, Hay & Hugenschmidt, P.A., by James J. Hugenschmidt, for plaintiff-appellee.

Robert E. Riddle, P.A., by Diane K. McDonald, for defendant-appellant.

CAMPBELL, Judge.

Defendant appeals a judgment granting plaintiff a decree of absolute divorce. We affirm.

Plaintiff and defendant were married to each other on 3 May 1986. From this marriage one minor child, Kelley Regina Smith, was born on 23 November 1986.

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While living in Florida in 1996, the parties began having marital difficulties. These difficulties continued through October of 1998, at which time the parties ended their sexual relationship. Eventually, in early December of 1998, plaintiff told defendant that he was unhappy in the marriage and moved from the master bedroom to the guest bedroom at the other end of the marital home.

On 21 January 1999, business reasons prompted plaintiff to move from the parties' Florida residence to Buncombe County, North Carolina. Defendant initially remained in Florida so that the minor child could finish the sixth grade and the parties could sell the marital home. Although the whole family planned to relocate to North Carolina by the summer of 1999, plaintiff told the minor child that he would not be living with them when she and defendant relocated. The minor child never discussed this conversation with defendant.

Plaintiff began living with his niece when he moved to North Carolina. By February of 1999, plaintiff's niece became aware of his intention to separate from defendant. Plaintiff also told his niece that he had not informed defendant of his intention to divorce her.

Defendant made at least two trips to Buncombe County in early 1999 to look for a house to purchase with plaintiff. Defendant stayed in a hotel during these trips, but plaintiff did not stay with her. (Plaintiff also returned to Florida twice during the Spring of 1999, but stayed in the marital home's guest bedroom.) The parties eventually purchased a house, which was deeded to them as tenants by the entirety. Defendant and the minor child took up residence in the new home in July of 1999. Plaintiff did not move in with them. Instead, plaintiff remained with his niece because he claimed she was afraid of her neighbors. Plaintiff never spent a night in the new home nor did he resume a marital relationship with defendant after she relocated to North Carolina.

Defendant learned of plaintiff's intention to end their marriage in September of 1999. On 7 April 2000, plaintiff filed a complaint for absolute divorce pursuant to Section 50-6 of the North Carolina General Statutes. In the complaint, plaintiff alleged that he and defendant "separated January 21, 1999, and have lived continuously separate and apart since that date." After being granted an extension of time, defendant filed an answer on 16 May 2000 that included a Rule 12(b)(6) motion to dismiss plaintiff's claim for failure to state a claim upon which relief can be granted. Additionally, defendant counterclaimed alleging that their separation did not occur until 25

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September 1999 and requesting that plaintiff's action therefore be dismissed. Plaintiff timely replied and denied defendant's allegation.

The trial for absolute divorce was heard before Judge Peter L. Roda on 28 August 2000. Prior to the entry of judgment, defendant amended her answer on 24 September 2000 and asked to resume her maiden name. On 16 October 2000, the court entered a judgment concluding that although "the Plaintiff moved from the marital home in January 1999 with the intent to obtain a divorce from the Defendant [and] that the Defendant did not know of the Plaintiff's intent to separate until September 1999[,]" plaintiff was entitled to an absolute divorce from defendant. Furthermore, the court concluded that defendant could resume the use of her maiden name. Defendant appeals this judgment.

The sole issue before this Court is whether one party's intent to cease cohabitation without his spouse's knowledge, but for the statutory time period under Section 50-6, is sufficient to grant that party a decree of absolute divorce. We hold that it is sufficient.

Section 50-6 of our statutes addresses the right of either spouse to apply for dissolution of marriage after a one-year separation. It states, in pertinent part, that:

Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, *if and when the husband and wife have lived separate and apart for one year*, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. . . .

Whether there has been a resumption of marital relations during the period of separation shall be determined pursuant to G.S. 52-10.2. Isolated incidents of sexual intercourse between the parties shall not toll the statutory period required for divorce predicated on separation of one year.

N.C. Gen. Stat. § 50-6 (2001) (emphasis added).

In the case *sub judice*, defendant argues that the trial court's judgment should be reversed because she had no knowledge of plaintiff's intention to live "separate and apart" and ultimately end their marriage until September of 1999. In addressing whether a husband and wife have lived "separate and apart," this Court has repeatedly held that these words require "both a physical separation and an intention on the part of at least one of the parties to cease the

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matrimonial cohabitation." *Earles v. Earles*, 29 N.C. App. 348, 349, 224 S.E.2d 284, 286 (1976). See also *Myers v. Myers*, 62 N.C. App. 291, 294, 302 S.E.2d 476, 479 (1983); *Daniel v. Daniel*, 132 N.C. App. 217, 219, 510 S.E.2d 689, 690 (1999). Our courts have never required that the remaining party must also have knowledge of the other party's intent to cease cohabitation; therefore, we decline to do so now, especially when there is overwhelming evidence that all the requirements of Section 50-6 were met. Here, the parties physically separated on 21 January 1999 when plaintiff moved to North Carolina. As found by the trial court, it was plaintiff's intention to cease cohabitation with defendant at that time, and the parties did not resume cohabitation when defendant and the minor child eventually relocated to North Carolina. Also, the parties did not engage in a sexual relationship after October of 1998. Finally, both plaintiff's minor child and his niece were aware of his intention to cease cohabitation with defendant when he moved to North Carolina. Thus, plaintiff met all of the necessary requirements to dissolve his marriage to defendant under Section 50-6.

In conclusion, we hold that the trial court did not err when it entered a decree of absolute divorce based on plaintiff's intent to separate from defendant on 21 January 1999.

Affirmed.

Judges MARTIN and HUDSON concur.

ORTHODONTIC CENTERS OF AMERICA, INC. AND ORTHODONTIC CENTERS OF
NORTH CAROLINA, INC., PLAINTIFFS V. FARID HANACHI AND FARID HANACHI
D.D.S., P.A., DEFENDANTS

No. COA01-486

(Filed 18 June 2002)

**Contracts; Appeal and Error—legality—burden of proof—
instructions—prejudice—court unable to determine**

The trial court erred in an action on a partnership agreement for orthodontic services by erroneously instructing the jury that plaintiffs had the burden of proving that the contract they sought to enforce was legal. The contract was presumed to be legal; ille-

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gality was an affirmative defense which defendants had the burden of proving. It is likely that the instruction misled the jury; in any event, the plaintiff is entitled to a new trial if the appellate court is unable to determine whether an erroneous instruction prejudiced a plaintiff.

Appeal by plaintiffs from judgment filed 8 June 2000 by Judge Timothy S. Kincaid in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 March 2002.

Glover & Petersen, P.A., by James R. Glover, for plaintiff-appellants.

James, McElroy & Diehl, P.A., by Gary S. Hemric, John R. Buric, and Preston O. Odom, III, for Defendant-appellees.

GREENE, Judge.

Orthodontic Centers of America, Inc. (OCA) and Orthodontic Centers of North Carolina, Inc. (collectively, Plaintiffs) appeal a judgment filed 8 June 2000 ordering Farid Hanachi (Hanachi) and Farid Hanachi D.D.S., P.A. (collectively, Defendants) to pay Plaintiffs the sum of \$247,000.00.

In June 1994, Hanachi entered into a partnership agreement with Orthodontic Centers Software Systems, Inc. (OCSS)¹ whereby OCSS would provide a bundle of services to Defendants. OCA's partnership with Hanachi dissolved in October 1994 due to a restructuring of OCA's relationship with their orthodontists. OCA, however, continued to provide services to Hanachi until he notified OCA, in a letter dated 2 April 1998, that effective 31 March 1998, he wished to terminate all services provided by Plaintiffs. On 5 June 1998, Plaintiffs filed a complaint against Defendants alleging, in pertinent part, breach of an oral seven-year contract and *quantum meruit*. In their answer and counterclaim, Defendants denied the allegations in Plaintiffs' complaint and counterclaimed for an accounting of the relationship between the parties and any credits due Defendants.

A jury trial was held on Plaintiffs' causes of action and Defendants' counterclaim. After the close of the evidence, the trial court conducted a charge conference in which it noted that at Defendants' request, it intended to give an instruction on the le-

1. OCA was formed in October 1994 and is the successor corporation to OCSS.

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gality of the alleged contract. Plaintiffs objected to the trial court's proposed instruction. The trial court indicated that consistent with the North Carolina Pattern Jury Instructions for Civil Cases (N.C.P.I.), it would instruct the jury on the issue of legality over Plaintiffs' objection.

The trial court instructed the jury that Plaintiffs had the burden of proving all the elements of a contract, including mutual assent, sufficient consideration, legal capacity, and the legality of the transaction.² The jury returned a verdict finding: there was no oral seven-year contract between Plaintiffs and Defendants; Defendants received goods and services from Plaintiffs under circumstances for which Defendants should be required to pay; Plaintiffs are entitled to recover \$247,000.00 in damages from Defendants; and Defendants are not entitled to any credits, offsets, or recovery from Plaintiffs.

The dispositive issue is whether the burden of proving that a contract is legal rests on the person seeking to enforce the contract.

Generally, a party seeking to enforce a contract has the burden of proving the essential elements of a valid contract, *Neugent v. Beroth Oil Co.*, 149 N.C. App. 38, 45, 560 S.E.2d 829, 834 (2002), i.e., that there was a binding agreement involving mutual assent, legal capacity, consideration, and a legal bargain, *Creech v. Melnik*, 147 N.C. App. 471, 477, 556 S.E.2d 587, 591 (2001). A contract is, however, presumed to be legal, 17B C.J.S. *Contracts* § 706 (1999), and its illegality is an affirmative defense, N.C.G.S. § 1A-1, Rule 8(c) (1999), with "the burden of proving it . . . on the one that asserts it," *Collins v. Davis*, 68 N.C. App. 588, 592, 315 S.E.2d 759, 762, *aff'd per curiam*, 312 N.C. 324, 321 S.E.2d 892 (1984); *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 652, 194 S.E.2d 521, 528 (1973).³

In this case, the trial court instructed the jury that Plaintiffs had the burden of proving the contract they sought to enforce was legal. That instruction was erroneous as the contract was presumed to be legal and the illegality of the contract was an affirmative defense, which Defendants had the burden of proving. The trial court's error only requires a new trial, however, if it is a prejudicial error, which

2. We note the record contains Defendants' request for a special jury instruction on illegality in which they state "[t]he burden upon this issue rests with Defendants to convince [the jury] by the greater weight of the evidence that this contractual relationship was in violation of North Carolina law."

3. The same principles apply to the defense of a lack of consideration. N.C.G.S. § 1A-1, Rule 8(c).

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likely misled the jury.⁴ *Powell v. Omlil*, 110 N.C. App. 336, 346, 429 S.E.2d 774, 778, *disc. review denied*, 334 N.C. 621, 435 S.E.2d 338 (1993); *see also Barber*, 130 N.C. App. at 389, 502 S.E.2d at 918 (trial court's instruction must properly guide the jury). Because the trial court unequivocally placed the burden on Plaintiffs to prove the contract was legal, it is likely the instruction misled the jury. In any event, even if we were unable to determine whether the jury instruction prejudiced Plaintiffs, they would nevertheless be entitled to a new trial. *See Word v. Jones*, 350 N.C. 557, 565, 516 S.E.2d 144, 149 (1999) (if an appellate court is unable to determine whether an erroneous instruction prejudiced a plaintiff, the plaintiff is entitled to a new trial).

New trial.⁵

Judges MCGEE and CAMPBELL concur.

STATE OF NORTH CAROLINA v. KENNETH MAST DICKSON

No. COA01-890

(Filed 18 June 2002)

Appeal and Error— appealability—judgment entered consistent with guilty plea—writ of certiorari

A defendant's appeal from a judgment dated 2 April 2001 entered consistent with his plea of guilty to impaired driving and from an order filed 4 June 2001 denying his motion to dismiss is dismissed, because defendant does not have a right to appeal and the Court of Appeals is without authority to grant a writ of certiorari since: (1) N.C.G.S. § 15A-1444(e) states that defendant has

4. We note the trial court instructed the jury consistent with North Carolina Pattern Jury Instructions providing that a party seeking to enforce a contract has the burden of proving all the elements of a valid contract. N.C.P.I., Civ. 501.15. Although "[t]his Court has held the use of N.C.P.I. to be 'the preferred method of jury instruction[.]' . . . a new trial may be necessary if a pattern instruction misstates the law." *Barber v. Constien*, 130 N.C. App. 380, 385, 502 S.E.2d 912, 915 (quoting *Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 13 (1994), *disc. review denied*, 339 N.C. 610, 454 S.E.2d 247 (1995)), *disc. review denied*, 349 N.C. 227, 515 S.E.2d 699 (1998).

5. Because we have determined Plaintiffs are entitled to a new trial, we do not address their remaining assignments of error as we deem them unlikely to arise at a new trial.

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no right to appeal the judgment entered consistent with his guilty plea; and (2) defendant has not failed to take timely action, is not attempting to appeal from an interlocutory order, and is not seeking review under N.C.G.S. § 15A-1422(c)(3).

Appeal by defendant from judgment dated 2 April 2001 and from order filed 4 June 2001 by Judge Ronald K. Payne in Watauga County Superior Court. Heard in the Court of Appeals 4 June 2002.

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

Wilson, Palmer, Lackey & Rohr, P.A., by Timothy J. Rohr, for defendant-appellant.

GREENE, Judge.

Kenneth Mast Dickson (Defendant) purports to appeal from a judgment dated 2 April 2001 entered consistent with his plea of guilty to impaired driving and from an order filed 4 June 2001 denying his motion to dismiss. In the alternative, Defendant petitions this Court for writ of certiorari.

On 7 March 2001, Defendant filed a motion to dismiss the charge of impaired driving. Defendant's motion was denied both in open court on 2 April 2001 and in an order filed 4 June 2001. Subsequently, Defendant pled guilty to impaired driving. Defendant assigns as error the trial court's denial of his motion to dismiss the charge against him.

The dispositive issue is whether this Court has the authority to review the trial court's judgment entered consistent with Defendant's plea of guilty.

Unless appealing sentencing issues or the denial of a motion to suppress, a defendant "is not entitled to appellate review as a matter of right when he has entered a plea of guilty . . . to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari." N.C.G.S. § 15A-1444(e) (2001). While N.C. Gen. Stat. § 15A-1444(e) allows a defendant to petition for writ of certiorari, this Court is limited to issuing a writ of certiorari

in appropriate circumstances . . . to permit review of the judgments and orders of trial tribunals when the right to prosecute an

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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). The North Carolina Constitution “gives exclusive authority to [our] Supreme Court to make rules of practice and procedure for the appellate division,” thus, where, as here, “the North Carolina General Statutes conflict with Rules of Appellate Procedure, the Rules of Appellate Procedure will prevail.” *Neasham v. Day*, 34 N.C. App. 53, 55-56, 237 S.E.2d 287, 289 (1977).

In this case, under N.C. Gen. Stat. § 15A-1444(e), Defendant has no right to appeal the judgment entered consistent with his guilty plea. In addition, Defendant 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. Accordingly, because Defendant does not have a right to appeal and this Court is without authority to grant a writ of certiorari, Defendant’s appeal is dismissed.

Dismissed.

Judges HUDSON and BIGGS concur.

ESTATE OF HENDRICKSON v. GENESIS HEALTH VENTURE, INC.

[151 N.C. App. 139 (2002)]

THE ESTATE OF DORIS B. HENDRICKSON BY LARRY W. HENDRICKSON, ADMINISTRATOR, LARRY W. HENDRICKSON, LORETTA T. MILLER AND ANGELA T. MILLER, PLAINTIFFS V. GENESIS HEALTH VENTURE, INC., MERIDIAN HEALTH, INC., GENESIS ELDERCARE NETWORK SERVICES, INC., AND GENESIS ELDERCARE REHABILITATION SERVICES, INC., DEFENDANTS

No. COA01-604

(Filed 2 July 2002)

1. Wrongful Death— nursing home operator—directed verdict—judgment notwithstanding verdict—sufficiency of evidence

The trial court did not err by denying defendant nursing home operator's motion for directed verdict and motion for judgment notwithstanding the verdict with respect to the claim of plaintiff administrator for decedent's wrongful death from accidental strangulation when she got caught between the mattress and side rails on her bed at a nursing home, because viewed in the light most favorable to plaintiff administrator, there was evidence tending to show that: (1) nursing assistants employed by defendant were aware that decedent, on several occasions before her death, had slid to the edge of her bed and had become caught between the edge of the mattress and the bed rail; (2) there was a known risk of patients in the same or similar condition as decedent being caught between a bed rail and mattress; (3) no restraint assessment form had been completed for decedent regarding use of the side rails as defendant's restraint policy mandated, and decedent's medical records contained no nursing notes documenting the use of less restrictive measures than the bed rails; and (4) while the evidence was conflicting as to whether the bed rails were used as a restraint or as a safety measure, plaintiff offered evidence that the rails should have been considered a restraint in connection with decedent's care.

2. Wrongful Death— directed verdict—judgment notwithstanding verdict—sufficiency of evidence

The trial court erred by denying defendant rehabilitative service's motion for directed verdict and motion for judgment notwithstanding the verdict with respect to the claim of plaintiff administrator for decedent's wrongful death from accidental strangulation when she got caught between the mattress and side rails on her bed at a nursing home because, even viewed in the light most favorable to plaintiffs, the evidence does not disclose

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that decedent's death was proximately caused by any breach of a duty owed to her by defendant while a patient at the nursing home.

3. Evidence— expert testimony—nursing homes—standard of care—safety measures

The trial court did not abuse its discretion in a wrongful death case by allowing the testimony of an expert witness in the field of registered nursing that defendant nursing home operator's care and treatment did not meet the applicable standard of care and her opinion that defendant's failure to provide an alternative mechanism for decedent's safety increased the risk of decedent's strangling to death, and by allowing an expert with respect to the proper care in nursing to testify that there were other safety measures that could have been used such as bed alarms, because: (1) both witnesses were amply qualified by training, experience, and knowledge to assist the jury in understanding the evidence with respect to nursing procedures and the applicable standard of care required by defendant; and (2) the testimony did not have the potential to confuse or mislead the jury so as to outweigh its probative value.

4. Wrongful Death— jury instructions—negligence—standard of care

The trial court did not err in a wrongful death case by giving its jury instructions on three issues including negligence, the standard of care, and defendant nursing home operator's failure to follow its own policies with regard to the use of restraints, because: (1) although defendants contend the trial court erred by failing to submit separate issues as to their alleged negligence, this issue has become moot in view of the Court of Appeals' determination that defendant rehabilitation services should have been granted a directed verdict; (2) with respect to the standard of care required by defendant nursing home operator, there was expert testimony that devices other than those employed by the nursing center should have been used for decedent's safety and testimony that such devices were in use in similarly situated nursing homes in the community is not required where the alleged breach of duty does not involve the provision of medical services requiring special skills; and (3) even though defendant nursing home operator asserts the evidence showed that decedent could not get out of bed by herself and therefore her restraints were for safety and positioning, there was other evidence from which the

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jury could find that the side rails on decedent's bed at the nursing home were restraints.

5. Wrongful Death— jury instructions—damages recoverable by estate—pain and suffering—loss of society and companionship

The trial court did not err in a wrongful death case by its jury instructions regarding the issue of damages recoverable by decedent's estate for pain and suffering and loss of society and companionship, because: (1) it can be reasonably inferred from the testimony of a doctor that decedent was in pain and that she suffered before her death by strangulation; and (2) evidence of the possibility that decedent could have recovered from her stroke to the point of being able to feed herself and sit in a wheelchair was sufficient to permit recovery for loss of society, companionship, comfort, guidance, kindly offices and advice of decedent to her next of kin.

6. Wrongful Death— jury instructions—damages recoverable by estate—loss of net income

The trial court erred in a wrongful death case by its jury instructions regarding the issue of damages recoverable by decedent's estate for loss of decedent's net income, because: (1) no evidence was offered showing that decedent was potentially capable of earning money in excess of that which would be required for her support; and (2) the jury's award as to these damages would necessarily be based on speculation and not supported by the evidence.

7. Emotional Distress— negligent infliction—directed verdict—judgment notwithstanding verdict

The trial court erred by denying defendant nursing home operator's motions for directed verdict and judgment notwithstanding the verdict as to plaintiff individuals' claims for negligent infliction of emotional distress arising from decedent's accidental strangulation at a nursing home when decedent got caught between the mattress and side rails on her bed, because: (1) plaintiffs neither witnessed the injuries sustained by decedent nor did they see her in the position in which she was found; (2) plaintiffs presented insufficient evidence to support a finding that defendant's negligent conduct did in fact cause them emotional distress; and (3) plaintiffs failed to present evidence that such distress was severe.

ESTATE OF HENDRICKSON v. GENESIS HEALTH VENTURE, INC.

[151 N.C. App. 139 (2002)]

Appeal by defendants Genesis ElderCare Network Services, Inc., and Genesis ElderCare Rehabilitation Services, Inc., from judgment and order entered 5 January 2000 by Judge Larry G. Ford in Rowan County Superior Court. Heard in the Court of Appeals 21 February 2002.

Kluttz, Reamer, Blankenship, Hayes & Randolph, L.L.P., by Roman C. Pibl, for plaintiff-appellees.

Golding, Holden, Pope & Baker, L.L.P., by John G. Golding; and Smith, Helms, Mulliss & Moore, L.L.P., by James G. Middlebrooks, for defendant-appellants.

MARTIN, Judge.

Plaintiffs filed their complaint in this action asserting claims for negligence, breach of contract, and negligent infliction of emotional distress against Genesis Health Venture, Inc., Meridian Health, Inc., Genesis ElderCare Network Services, Inc., Genesis ElderCare Rehabilitation Services, Inc., and Meridian Healthcare, Inc. The claims arise out of the death of Doris Hendrickson on 30 October 1996 while she was a resident at the Salisbury Center, a nursing home facility in Rowan County. Plaintiffs sought actual and punitive damages. Defendants filed an answer in which they denied the material allegations of the complaint. Prior to trial, the trial court granted defendants' motion for a bifurcated trial and ordered that the issues with respect to defendants' liability, if any, for compensatory damages be tried separately from the issue of defendants' liability, if any, for punitive damages.

The evidence at trial tended to show that Doris Hendrickson suffered a massive stroke while she was a patient at Rowan Regional Medical Center in the summer of 1996. The stroke left her totally dependent on others for her daily care. After Mrs. Hendrickson was discharged from the hospital, she was admitted to Salisbury Center, a nursing home, which was operated by defendant Genesis ElderCare Network Services, Inc. Mrs. Hendrickson remained in the nursing home from 8 August 1996 to 11 August 1996, when she was hospitalized again, and she returned to the nursing home on 30 August 1996 and remained there until her death on 30 October 1996.

While Mrs. Hendrickson was a patient in the Salisbury Center, her husband, Larry Hendrickson, and her two daughters, Angela and Loretta Miller each visited her daily. Dr. Yuthapong Sukkasem was

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Mrs. Hendrickson's treating physician while she was at the Salisbury Center. Dr. Sukkasem ordered that Mrs. Hendrickson's bed be equipped with "side rails times two for positioning and safety." He testified that he did not consider the side rails on Mrs. Hendrickson's bed to be restraints, explaining that side rails are restraints if they inhibit a patient from doing what the patient wants to do. Since Mrs. Hendrickson could not get out of bed by herself, the side rails were not obstructing her and therefore, he did not consider them to be restraints.

During their numerous visits, none of the plaintiffs noticed any hazardous or unsafe condition with respect to the side rails on Mrs. Hendrickson's bed, nor were there any indications that she could move herself sufficiently to injure herself in connection with them. In fact, both Mr. Hendrickson and Loretta Miller testified that when they found a side rail down on Mrs. Hendrickson's bed, they would either pull the rail up or advise the staff and have them pull the rail up. When Loretta Miller was asked if the side rails on her mother's bed were restraints, she stated "I feel like she needed that. I didn't want her to fall out of bed." She indicated that the side rails were for her mother's safety.

The evidence conflicted with respect to Mrs. Hendrickson's ability to move on her bed while in the nursing home. Mrs. Hendrickson's stroke left her paralyzed on the right side so she was unable to move her right arm and leg. Angela Miller testified that occasionally her mother would hold onto the nearest side rail with her left hand. Angela Miller saw her mother "wiggle" some and move her left leg and arm some but never saw her move from side to side on the bed. Mr. Hendrickson and Loretta Miller agreed with Angela that while in their presence, Mrs. Hendrickson never moved on her own to any significant degree. However, other evidence showed that Mrs. Hendrickson often slid to the left side of the bed, and would get caught between the side rail and the bed, so that the nursing assistants would have to reposition her. According to Dr. Sukkasem, Mrs. Hendrickson could move her left hand and left leg. He testified that Mrs. Hendrickson could hold on to something with her left hand and pull herself toward a side of the bed, and he presumed that Mrs. Hendrickson could slide some in her bed since he saw her in different positions when he examined her. However, Dr. Sukkasem testified that he had never actually seen Mrs. Hendrickson move around in her bed.

While at the Salisbury Center, Mrs. Hendrickson never progressed to the point of being able to talk but she was able to make whispering

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sounds. Because she was unable to swallow, she had to be fed by a feeding tube. Additionally, the entire time Mrs. Hendrickson was in the nursing home, she remained incontinent of bowel and bladder. When questioned about the prospects for Mrs. Hendrickson's improvement considering her age and medical problems, Dr. Sukkasem stated that had she lived, she could have possibly been able to feed herself and sit in a wheelchair, but would be incontinent of her bladder, still unable to move on one side, and would require total care for everything else.

Due to their dissatisfaction with the quality of care Mrs. Hendrickson was receiving at the Salisbury Center, her husband and daughter had planned to remove her from the nursing home to their home on 2 November 1996, and to provide care for her themselves. On the evening of 29 October 1996, Mr. Hendrickson visited his wife and stayed with her until she went to sleep. When he left, Mrs. Hendrickson was in the middle of the bed, with pillows on each side of her. Mr. Hendrickson testified that he thought his wife was in a safe position. At 12:00 or 12:15 a.m. on 30 October 1996, Ginger Ferguson, a CNA, was in Mrs. Hendrickson's room, trying to calm her roommate down. Ms. Ferguson observed that Mrs. Hendrickson was resting on her left side with her eyes closed and with pillows propped up against her back to help support her at a 35 to 40 degree angle with her head raised so that she would not aspirate fluids with the feeding tube in her stomach. Ms. Ferguson further testified that Mrs. Hendrickson's mattress appeared to be evenly spaced and normal.

Between 1:00 and 1:15 a.m., Ms. Ferguson went into Mrs. Hendrickson's room again while making rounds and found that although Mrs. Hendrickson's body was still on the mattress, her head was wedged between the mattress and the adjacent bed rail. Ms. Ferguson observed that the mattress was pushed up against the bed rail on the opposite side of the bed. Ms. Ferguson immediately called for assistance, and Mrs. Hendrickson was removed from the position in which she had been found. Mrs. Hendrickson had no vital signs. CPR was not initiated because Mr. Hendrickson and two physicians had signed a "Do Not Resuscitate" form.

Mrs. Hendrickson's family was notified of the death and went to the nursing home. When Angela Miller saw her mother, "she was cleaned up. She had on a gown. She was positioned up in the bed. She was like she was asleep . . ." Angela also noticed a substance that she thought was saliva on the floor directly below where her mother's

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head had been. There was a large bruise on Mrs. Hendrickson's neck. Since the family had questions concerning the manner in which Mrs. Hendrickson had died, Dr. Sukkasem attempted to re-create what he thought had occurred by actually getting in the bed and placing his left arm and head in the gap between the mattress and the bed rail. After conversing with Dr. Sukkasem, the family decided not to have an autopsy performed on Mrs. Hendrickson's body. The police report indicated that Mrs. Hendrickson died of accidental strangulation.

At trial, a portion of "Genesis ElderCare Centers' Administration Manual" was admitted for purposes of showing the nursing home's policy regarding restraints. According to the nursing home's policy,

Genesis ElderCare residents have the right to be free from any physical or chemical restraint. Under no circumstances will restraints be applied to control resident behavior for the convenience of the staff.

Physical Restraints will be considered any manual method or physical or mechanical device, material or equipment attached or adjacent to the resident's body that:

1. The individual cannot remove easily; and
2. Restricts freedom of movements or normal access to one's body

In the policy, side rails were listed as an example of physical restraints. The policy described the following process required in using restraints on patients:

1. A physician order is required for a restraint.
2. All residents who require the use of restraints will be assessed using the Restraint Assessment Form then referred to the Restraint Alternative Team/Committee.
3. In all cases, less restrictive measures such as pillows, self-releasing belts, pads, removable lap trays, behavioral management and appropriate exercises will be utilized before any restraining device.
4. Nursing will document the effectiveness of less restrictive measures. If the resident still appears to require a restrictive device, consultation with an appropriate professional, such as Occupational or Physical Therapist may be obtained.

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5. A physical order is required for a restraint. No routine or standing orders for restraints or “protective devices” will be accepted on admission, re-admission, or during the stay.

Vivian Brown, who was qualified as an expert witness in the proper care in nursing homes, testified that the Salisbury Center had failed to follow Genesis’ process for using the side rails as restraints on Mrs. Hendrickson’s bed. Ms. Brown testified that she found no Restraint Assessment Form regarding the side rails used for Mrs. Hendrickson nor did she find any nurses’ notes documenting the effectiveness of less restrictive measures. Ms. Brown testified that the nursing home’s failure to fill out a restraint evaluation for the side rails violated the applicable standard of care. Ms. Brown also testified that there were other measures that could have been used to ensure Mrs. Hendrickson’s safety such as padded side rails, half side rails, and bed alarms.

At the close of plaintiffs’ evidence, directed verdicts were granted in favor of all defendants except Genesis ElderCare Network Services, Inc., and Genesis ElderCare Rehabilitation Service, Inc.; motions for directed verdicts by those defendants at the close of plaintiffs’ evidence and at the close of all the evidence were denied. A jury found that Mrs. Hendrickson’s death was caused by the negligence of defendants Genesis ElderCare Network Services, Inc., (“GENS”) and Genesis ElderCare Rehabilitation Service, Inc., (“GERS”) and awarded damages to her estate in the amount of \$125,000. In addition, the jury found that Larry Hendrickson, Loretta Miller, and Angela Miller had each suffered severe emotional distress as a proximate result of defendants’ negligence. The jury awarded Larry Hendrickson damages for emotional distress in the amount of \$900,000 and awarded Loretta Miller and Angela Miller damages for emotional distress in the amount of \$225,000 each. The trial court granted defendants’ motion to dismiss plaintiffs’ claims for punitive damages, but denied both defendants’ motions for judgment notwithstanding the verdict. Both defendants appeal from the judgment entered upon the verdict.

I.

By their first argument, each defendant contends the trial court erred by denying its motion for directed verdict and motion for judgment notwithstanding the verdict with respect to the claim of plaintiff administrator for Mrs. Hendrickson’s wrongful death. Both

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defendants contend the evidence was insufficient to show that her death was proximately caused by their negligence.

In order to establish a claim for negligence, a plaintiff must introduce evidence tending to establish that,

(1) defendant failed to exercise proper care in the performance of a duty owed to 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 as they existed.

Rose v. Steen Cleaning, Inc., 104 N.C. App. 539, 541, 410 S.E.2d 221, 222 (1991).

A defendant's motion for directed verdict made pursuant to G.S. § 1A-1, Rule 50(a) tests the legal sufficiency of the evidence to support a verdict for the plaintiff. *Whaley v. White Consolidated Industries, Inc.*, 144 N.C. App. 88, 92, 548 S.E.2d 177 180, *disc. review denied*, 354 N.C. 229, 555 S.E.2d 277 (2001) (citing *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977)). A motion for judgment notwithstanding the verdict pursuant to G.S. § 1A-1, Rule 50(b) is a renewal of an earlier motion for directed verdict. *Id.*, (citing *Bryant v. Nationwide Mut. Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985)). Therefore, the standard of review for both motions is the same, and the question presented is whether the evidence was sufficient to go to the jury. *Id.* All conflicts in the evidence must be resolved in favor of the plaintiff and the plaintiff must be given the benefit of all reasonable inferences that may be drawn from the evidence, and the motion should be allowed only where the evidence is legally insufficient to sustain a verdict in favor of the plaintiff. *Id.* It has been said that the motion should be denied if there is more than a scintilla of evidence supporting each element of the plaintiff's case. *Little v. Matthewson*, 114 N.C. App. 562, 442 S.E.2d 567 (1994), *affirmed*, 340 N.C. 102, 455 S.E.2d 160 (1995). "Issues arising in negligence cases are ordinarily not susceptible of summary adjudication because application of the prudent man test, or any other applicable standard of care, is generally for the jury." *Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987).

A.

Genesis ElderCare Network Services, Inc.

[1] Defendant Genesis ElderCare Network Services, Inc., ("GENS") argues the evidence was deficient in several respects as to any negli-

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gence on its part or that the incident which led to Mrs. Hendrickson's death was reasonably foreseeable. First, GENS contends plaintiff administrator failed to show that it knew or should have known of the risk of injury to Mrs. Hendrickson from the side rails. We disagree. Viewed in the light most favorable to plaintiff administrator, there was evidence tending to show that nursing assistants employed by GENS were aware that Mrs. Hendrickson, on several occasions before her death on 30 October 1996, had slid to the edge of the bed and had become caught between the edge of the mattress and the bed rail. In addition, plaintiffs offered evidence through the testimony of their expert witness, Vivian Brown, as to the known risk of patients in the same or similar condition as Mrs. Hendrickson being caught between a bed rail and mattress.

Plaintiffs also offered evidence tending to show that GENS had in effect, at the time of Mrs. Hendrickson's stay at the Salisbury Center, a restraint policy which mandated an assessment, utilizing a "Restraint Assessment Form," of any resident for whom the use of restraints was required, and the nursing staff was required to document the effectiveness of less restrictive measures. The assessment was required to be reviewed by a "Restraint Alternative Team/Committee." Plaintiffs offered evidence that no Restraint Assessment Form had been completed for Mrs. Hendrickson and her medical records contained no nursing notes documenting the use of less restrictive measures than the bed rails. Defendant argues, however, the bed rails were required for positioning and safety and were not restraints, so that no restraint assessment was required. While the evidence was conflicting as to whether the bed rails were used as a restraint or as a safety measure, plaintiffs offered evidence that the rails should have been considered a restraint in connection with Mrs. Hendrickson's care. As noted above, the trial court is required to resolve such conflicts in the plaintiff's favor when ruling on a defense motion for directed verdict. Taken in the light most favorable to plaintiffs, there was sufficient evidence to show that GENS violated its own policies and the applicable standard of care in failing to undertake a restraint assessment for the side rails.

For the foregoing reasons, we conclude that plaintiffs offered sufficient evidence to sustain a finding by the jury that defendant GENS was negligent in failing to conform to applicable standards of care and its own policies with respect to the use of physical restraints and that such negligence was a proximate cause of Mrs. Hendrickson's death. The motions by defendant GENS for directed verdict and judgment notwithstanding the verdict were properly denied.B.

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Genesis ElderCare Rehabilitation Services, Inc.

[2] We reach a different result, however, with respect to defendant Genesis ElderCare Rehabilitation Services, Inc., (“GERS”). The evidence in this case, even viewed in the light most favorable to plaintiffs, does not disclose that Mrs. Hendrickson’s death was proximately caused by any breach of a duty owed her by GERS, while a patient at the Salisbury Center. Therefore, the trial court erred in denying the motion for directed verdict by defendant GERS and the judgment entered in favor of the Estate of Doris Hendrickson against that defendant is reversed.

II.

[3] By a single assignment of error, defendant GENS next argues that the trial court erred in three evidentiary rulings by: (1) allowing Angela Miller’s testimony that defendant’s care and treatment did not meet the applicable standard of care; (2) allowing Angela Miller’s opinion that after Mrs. Hendrickson had demonstrated that she would not use a regular call bell or a paddle type device which had been provided, “there should have been something else provided . . .” and that defendant’s failure to provide another mechanism for her safety increased the risk of Mrs. Hendrickson strangling to death; and (3) allowing expert Vivian Brown’s testimony that there were other safety measures that could have been used such as bed alarms. Defendant GENS argues that such testimony was prejudicial to it in the jury’s consideration of proximate cause and entitles it to a new trial. We are unpersuaded.

Angela Miller was accepted by the trial court as an expert witness in the field of registered nursing and Vivian Brown was accepted by the trial court as an expert witness with respect to the proper care in a nursing home. The testimony of expert witnesses is governed by G.S. § 8C-1, Rule 702, which provides as follows:

(a) 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.

In applying Rule 702, the trial court is afforded wide discretion and will be reversed only for an abuse of that discretion. *State v. Evangelista*, 319 N.C. 152, 353 S.E.2d 375 (1987). Further, under Rule 403 even relevant evidence may properly be excluded by the trial

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court if its probative value is outweighed by the danger that it would confuse the issues or mislead the jury. *State v. Mason*, 315 N.C. 724, 340 S.E.2d 430 (1986). Whether to exclude expert testimony for this reason also rests within the sound discretion of the trial court. *Id.*

Having reviewed the testimony of both witnesses, we discern no abuse of discretion in the rulings complained of by defendant GENS. Both witnesses were amply qualified by training, experience and knowledge to assist the jury in understanding the evidence with respect to nursing procedures and the applicable standard of care required of GENS. Nor do we believe the testimony had such potential to confuse or mislead the jury so as to outweigh its probative value. This assignment of error is overruled.

III.

[4] By three assignments of error joined in a single argument, defendant GENS contends the court erred in its instructions to the jury (1) by failing to submit separate issues as to the alleged negligence of GENS and GERS, (2) by giving contentions not supported by admissible evidence, and (3) by giving instructions not supported by any evidence. We reject these contentions.

With respect to the first contention, GENS and GERS argue, in their joint brief, that the failure of the trial court to submit separate issues as to the negligence of each defendant was prejudicial to GERS, since there was no evidence that any conduct on the part of GERS had proximately caused Mrs. Hendrickson's death. In view of our determination that GERS should have been granted a directed verdict and our reversal of the judgment against that defendant, the assignment of error has become moot and we need not consider the issue.

Defendant GENS argues that the trial court erred by instructing the jury that the failure of GENS to provide other safety or emergency call devices when it knew Mrs. Hendrickson could not, or would not, use the emergency call bell could be negligence. GENS argues there was no evidence that alternative devices such as those described by Angela Miller or Vivian Brown were in general use in facilities similar to the Salisbury Center in October of 1996 or that such devices "would probably have gone off under the circumstances in which Mrs. Hendrickson was found."

This Court is required to consider and review jury instructions in their entirety. *Robinson v. Seaboard System R.R., Inc.*, 87 N.C. App.

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512, 361 S.E.2d 909 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). Under the applicable standard of review, the appealing party must show not only that error occurred in the jury instructions but also that such error was likely, in light of the entire charge, to mislead the jury. *Id.*

Bearing these principles in mind, we find no error in the trial court's instructions to the jury with respect to the standard of care required of GENS. There was expert testimony that devices other than those employed by the Salisbury Center should have been used for Mrs. Hendrickson's safety. Testimony that such devices were in use in similarly situated nursing homes in the community is not required where the alleged breach of duty does not involve the provision of medical services requiring special skills; in such cases, the standard of care of the reasonable, prudent person is the standard courts have generally applied. *Burns v. Forsyth County Hosp. Authority, Inc.*, 81 N.C. App. 556, 344 S.E.2d 839 (1986); *Norris v. Rowan Memorial Hospital, Inc.*, 21 N.C. App. 623, 205 S.E.2d 345 (1974).

GENS also asserts there was no evidence to support the court's instruction that it could be found liable for the failure of GENS to follow its own policies with regard to the use of restraints, because the evidence showed that Mrs. Hendrickson could not get out of bed by herself and the bed rails were, therefore, for safety and positioning rather than restraint. As noted previously, however, there was other evidence from which the jury could find that the side rails were restraints. These assignments of error are overruled.

IV.

[5] GENS next contends the trial court erred in its jury instructions with respect to the issue of damages recoverable by Mrs. Hendrickson's estate for her wrongful death. Defendants specifically argue that the court improperly instructed the jury that it was required to consider the pain and suffering of decedent after injury and before death; net income of the deceased; and society, companionship, comfort, guidance, kindly offices and advice of the deceased to her next of kin. Defendants claim that there was no evidence supporting these factors and therefore, the jury should not have been instructed to consider them.

When charging a jury in a civil case, "the trial court has the duty to explain the law and apply it to the evidence on the substantial

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issues of the action.” *Wooten v. Warren*, 117 N.C. App. 350, 358, 451 S.E.2d 342, 347 (1994). The trial court is permitted to instruct a jury on a claim or defense only “if the evidence, when viewed in the light most favorable to the proponent, supports a reasonable inference of such claim or defense.” *Id.* Thus, “[t]o instruct on an element of damages, absent evidence thereof, is error.” *Goble v. Helms*, 64 N.C. App. 439, 447, 307 S.E.2d 807, 813 (1983), *disc. review denied*, 310 N.C. 625, 315 S.E.2d 690 (1984). Damages in a wrongful death action, “must be proved to a reasonable level of certainty, and may not be based on pure conjecture.” *DiDonato v. Wortman*, 320 N.C. 423, 431, 358 S.E.2d 489, 493 (1987). We are mindful that by necessity, some speculation is necessary in determining damages under our wrongful death statute. *Beck v. Carolina Power and Light Co.*, 57 N.C. App. 373, 291 S.E.2d 897, *affirmed*, 307 N.C. 267, 297 S.E.2d 397 (1982). However, a damage award may not be based on sheer speculation. *Id.*

Defendant GENS argues that the trial court erred in charging the jury on pain and suffering since there was no evidence that Mrs. Hendrickson was conscious between the time her head became lodged between the bed rail and the edge of the mattress, and her death. We conclude, however, that it can be reasonably inferred from the testimony of Dr. Sukkasem that Mrs. Hendrickson was in pain and suffered before her death by strangulation. The trial court did not err in instructing the jury that plaintiffs could recover damages for decedent’s pain and suffering.

GENS also argues that the jury should not have been permitted to consider the loss of society, companionship, comfort, guidance, kindly offices and advice of the deceased to her next of kin in awarding damages to plaintiffs. We disagree. Though the evidence tended to show that, as a result of her stroke, Mrs. Hendrickson was totally disabled and was unable to communicate verbally prior to her death, Dr. Sukkasem testified as to the possibility that she could have recovered to the point of being able to feed herself and sit in a wheelchair. We conclude this evidence was sufficient to permit recovery for the loss of Mrs. Hendrickson’s society, companionship, comfort, guidance, kindly offices and advice of the deceased to her next of kin.

[6] Finally, GENS argues that the jury should not have been allowed to award damages for the loss of Mrs. Hendrickson’s net income because there was no evidence that she had income in excess of living expenses. This argument has merit.

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Dr. Ward Brian Zimmerman, who was permitted to testify as “an expert in economic loss and wrongful death cases,” testified that based on Mrs. Hendrickson’s Social Security benefits that she received from 1992 to 1996 and assuming a life expectancy of 84 years, income loss to Mrs. Hendrickson’s estate was \$80,131. Dr. Zimmerman acknowledged, however, that he had not estimated Mrs. Hendrickson’s medical, food, or clothing expenses.

In order to recover damages for loss of net income of the decedent, a plaintiff must offer evidence demonstrating that the decedent “was potentially capable of earning money in excess of that which would be required for her support.” *Greene v. Nichols*, 274 N.C. 18, 29, 161 S.E.2d 521, 528 (1968). Though *Greene* was decided under former G.S. § 28-174, before our wrongful death statute was amended in 1969, see *DiDonato*, 320 N.C. at 429, 358 S.E.2d at 492, our current wrongful death statute also requires proof of income in excess of expenses in order to recover damages for the loss of the net income of a decedent. N.C. Gen. Stat. § 28A-18-2(b)(4) (compensation for loss of reasonably expected net income). In the instant case, no evidence was offered showing that the decedent was potentially capable of earning money in excess of that which would be required for her support. Therefore, the jury’s award as to these damages would necessarily be based on speculation and not supported by evidence. Consequently, the trial court erred in instructing the jury that it could award damages for loss of Mrs. Hendrickson’s net income. The error requires that we award defendant a new trial as to the issue of damages for Mrs. Hendrickson’s wrongful death.

V.

[7] Defendant GENS next assigns error to the trial court’s denial of its motion for directed verdict and judgment notwithstanding the verdict as to the claims of the individual plaintiffs, Larry Hendrickson, Angela Miller, and Loretta Miller, for negligent infliction of emotional distress.

The elements of a claim for negligent infliction of emotional distress are:

- (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress.

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Johnson v. Ruark Obstetrics and Gynecology Associates, P.A., 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). GENS contends the evidence was insufficient to support a verdict that it was reasonably foreseeable that defendant's conduct would cause plaintiffs severe emotional distress or that plaintiffs did, in fact, suffer severe emotional distress.

Factors to be considered in determining whether it was reasonably foreseeable that a defendant's conduct would cause a plaintiff severe emotional distress include:

the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare that plaintiff is concerned, and whether the plaintiff personally observed the negligent act.

Id. at 305, 395 S.E.2d at 98. In the instant case, plaintiffs were not present at the time of Mrs. Hendrickson's death. Mr. Hendrickson had been the last of plaintiffs to visit Mrs. Hendrickson before her death. He stayed with Mrs. Hendrickson on the evening of 29 October 1996 until she had fallen asleep. When Mr. Hendrickson left, his wife was in the middle of the bed, with pillows on both sides of her and was in what Mr. Hendrickson believed to be a safe position.

Before any of the family members arrived at the nursing home after Mrs. Hendrickson's death, Mrs. Hendrickson had been removed from the position in which she had been found, and she was in the middle of the bed. Angela Miller testified that when she saw her mother, "she was cleaned up. She had on a gown. She was positioned up in the bed. She was like she was asleep. . . ." The family noticed a large bruise on Mrs. Hendrickson's neck and Angela Miller observed a substance on the floor directly below where her mother's head had been that she presumed was saliva. Since plaintiffs were not present to observe the alleged negligent conduct which caused Mrs. Hendrickson's death and did not observe her being injured or in an injured condition, their evidence was insufficient to support the necessary element that it was reasonably foreseeable that defendant's negligent conduct would cause plaintiffs severe emotional distress.

Several cases support our conclusion. In *Hickman v. McKoin*, 337 N.C. 460, 446 S.E.2d 80 (1994), our Supreme Court held that the trial court properly granted the defendant's motion to dismiss the plaintiffs' claim for negligent infliction of emotional distress. The

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plaintiffs claimed that they suffered from severe emotional distress caused by their mother's injury resulting from an automobile accident involving the defendant. The plaintiffs were at home at the time of the accident but saw their mother briefly in the intensive care unit. The plaintiffs also witnessed their mother in pain and observed her undergo operations and treatment for several years after the accident. The Court concluded that the plaintiffs were unable to establish the necessary element of reasonable foreseeability.

Similarly, in *Gardner v. Gardner*, 334 N.C. 662, 435 S.E.2d 324 (1993), our Supreme Court held that the trial court properly granted summary judgment in favor of defendant upon the plaintiff's claim for negligent infliction of emotional distress. In *Gardner*, it was stipulated that the plaintiff mother "suffered severe emotional distress upon seeing her son in the emergency room undergoing resuscitative efforts a period of time after the [automobile] accident, and upon learning subsequently of his death." *Id.* at 667, 435 S.E.2d at 328. The plaintiff was several miles away at the time of the accident and was informed of the accident by telephone. The Court concluded that the parent-child relationship was not sufficient to compensate for the plaintiff's lack of close proximity to the negligent act and lack of observation of the negligent act. Therefore, the Court held that the plaintiff failed to establish the element of reasonable foreseeability.

Conversely, in *Fox-Kirk v. Hannon*, 142 N.C. App. 267, 542 S.E.2d 346, *disc. review denied*, 353 N.C. 725, 551 S.E.2d 437 (2001), where this Court affirmed the trial court's denial of the defendant's motion for directed verdict, the plaintiff mother was present in the car, personally observed the defendant's negligent act, and immediately perceived the injuries suffered by her daughter. In the present case, as in *Hickman* and *Gardner*, but unlike *Fox-Kirk*, plaintiffs neither witnessed the injuries sustained by Mrs. Hendrickson nor did they see her in the position in which she was found.

We also conclude that plaintiffs presented insufficient evidence to support a finding that defendant's negligent conduct did in fact cause them severe emotional distress. Our Supreme Court has defined "severe emotional distress" as

any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

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Johnson, 327 N.C. at 304, 395 S.E.2d at 97. “[M]ere temporary fright, disappointment or regret will not suffice” to satisfy the element of severe emotional distress. *Id.*

The evidence at trial tended to show that after Mrs. Hendrickson’s death, plaintiff Angela Miller had trouble sleeping and eating and had nightmares. Angela Miller saw a counselor at Tri-County Mental Health and told her that she was feeling a lot of guilt for not having taken her mother home and taken care of her. She scheduled another tentative appointment with the counselor for January 1997 but missed that appointment because her son was in the hospital after having a seizure. She testified that she saw a total of three counselors. She continued in her employment after her mother’s death and there was no evidence that she took time off from work due to emotional problems.

Loretta Miller testified that when she found out what had happened to her mother she was “emotionally distraught” and “in shock.” Loretta Miller took a week off from work after her mother’s death. In November or December of 1996, she went to a doctor and was prescribed an antidepressant and she saw a psychiatrist for several months. She was hospitalized for emotional problems on two occasions subsequent to her mother’s death. The first hospitalization occurred approximately a week after she had broken up with the man with whom she had been living; she was admitted on a Sunday and released the following Monday. She was again admitted to the hospital the following week and stayed approximately eight days. No healthcare provider offered testimony to show a causal relationship between the effect of her mother’s death and Loretta Miller’s treatment or to show that her emotional distress was not caused by problems preceding the death or stresses after the death. Indeed, there was evidence showing that Loretta Miller had seen a physician for nervousness, upset stomach and digestive problems due to nerves prior to her mother’s stroke.

Mr. Hendrickson testified that when he arrived at the nursing home after his wife’s death, he was met at the front of the facility by Connie Morgan, who as Mr. Hendrickson stated, “wanted to warn me that Doris was going to have a bruise across her neck and that she, you know, kind of prepared me” Mr. Hendrickson stated that after his wife’s death, he saw a counselor provided by his employer on at least two occasions and that he went once or twice to Tri-Mental Health. His first appointment with a counselor was 3 December 1996. Mr. Hendrickson was out of work for approximately two weeks after

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his wife's death. The evidence also showed that Mr. Hendrickson went to a physician prior to his wife's death and was given a prescription for an anti-depressant medication. Between her death in 1996 and the time of trial, in October 1999, he had the prescription filled only twice and still had some pills left at the time of trial. Mr. Hendrickson returned to the same physician, Dr. McNeil, the month following his wife's death and was given a gastro-intestinal examination and received a referral for a CT scan on his lungs.

We hold that this evidence is insufficient to show severe emotional distress. Although there was evidence that plaintiffs were emotionally distressed due to Mrs. Hendrickson's death, plaintiffs failed to present evidence, even viewed in the light most favorable to them, that such distress was severe. The trial court erred in denying defendant GENS' motion for directed verdict as to plaintiffs' claims for the negligent infliction of emotional distress.

In summary, as to defendant Genesis Eldercare Rehabilitation Services, Inc., the judgment is reversed. As to defendant Genesis Eldercare Network Services, Inc., we find no error with respect to the jury's verdict finding that Doris Hendrickson's death was caused by the negligence of that defendant. For the reason stated in Part IV of this opinion, however, we award defendant Genesis ElderCare Network Services, Inc., a new trial on the issue of damages to which the Estate of Doris Hendrickson is entitled for her wrongful death. The judgment awarding damages to Larry W. Hendrickson, Loretta T. Miller, and Angela T. Miller for negligent infliction of emotional distress is reversed.

No error in part, reversed in part, remanded in part for a new trial.

Judges HUDSON and CAMPBELL concur.

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DINAH WYATT, GARY WYATT AND HUNTER WYATT, PLAINTIFFS v. WALT DISNEY WORLD, CO., LAKE BUENA VISTA COMMUNITIES, INC. D/B/A DISNEY'S DIXIE LANDINGS RESORT, CLAIM VERIFICATION, INC. (CVI) AND DANIEL KEYS, PRIVATE INVESTIGATOR, DEFENDANTS

No. COA01-882

(Filed 2 July 2002)

1. Appeal and Error— appealability—jurisdiction

An interested party shall have the right of immediate appeal from an adverse ruling as to jurisdiction over the person or property.

2. Jurisdiction— personal—process of challenge

Upon a defendant's personal jurisdiction challenge, the plaintiff has the burden of proving prima facie that a statutory basis for jurisdiction exists. Where unverified allegations in the plaintiff's complaint meet plaintiff's initial burden and defendant does not contradict plaintiff's allegations, such allegations are accepted as true. However, when a defendant supplements its motion with affidavits or other supporting evidence, plaintiff cannot rest on the allegations of the complaint and must respond by setting forth specific facts showing that the court has jurisdiction. If the trial court's findings of fact resolving the defendant's jurisdictional challenge are not assigned as error, the court's findings are presumed to be correct.

3. Jurisdiction— Florida accident—firm hired to investigate in North Carolina— independent contractor

The trial court did not err by granting defendants' motion to dismiss a negligence action for lack of personal jurisdiction where plaintiffs maintained that the Florida defendants had engaged in acts in North Carolina giving rise to jurisdiction through the actions of a firm hired by defendants to investigate the accident, but the firm acted as an independent contractor and its actions are not attributable to defendants.

4. Jurisdiction— Disney—separate companies—advertising in North Carolina—not sufficient for jurisdiction

The trial court's findings of fact support its conclusion that Walt Disney World Company (WDWCO) and Walt Disney World Hospitality and Recreation Corporation (HRC) did not maintain such continuous and systematic contacts with North Carolina as

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to satisfy general jurisdiction requirements. There were uncontradicted affidavits that WDWCO, HRC, and the Disney Store are separate entities and that WDWCO and HRC do not advertise or otherwise conduct business in North Carolina. While travel agents, retail stores, and advertisers might attempt to capitalize on the popularity of Disney World, these enterprises are entirely separate from WDWCO and HRC. Moreover, plaintiffs' claims of tens of thousands of fliers advertising vacations at WDWCO do not, absent more, subject WDWCO to jurisdiction in North Carolina.

5. Jurisdiction— traditional notions of fair play and substantial justice—action in North Carolina against Disney

The "traditional notions of fair play and substantial justice" test of *International Shoe Company v. Washington* did not dictate that personal jurisdiction should be exercised in North Carolina where plaintiff was injured at Disney World.

6. Jurisdiction— action against Disney—burden of litigation

Plaintiffs' assertions were not supported by competent evidence where plaintiffs contended that their burden of litigation in Florida would be severe while the burden on Walt Disney World and others to contest the suit in North Carolina would be marginal.

7. Statute of Limitations— 1994 Disney World accident—1997 action—Florida statute of limitations

Although plaintiffs in a negligence action against Disney and others contended that the Florida statute of limitations may have precluded filing the suit in Florida, the applicability of the Florida statute was not a valid consideration in light of the 1994 occurrence of the accident and the initiation of litigation in 1997.

8. Jurisdiction— minimum contacts—Disney advertising

Three federal district court decisions from Pennsylvania did not support plaintiffs' minimum contacts arguments in a suit against Walt Disney Company and others where those cases were in stark contrast to numerous rulings by state and federal courts in other jurisdictions.

Appeal by plaintiff-appellants from order entered 12 February 2001 by Judge Peter M. McHugh in Wilkes County Superior Court. Heard in the Court of Appeals 24 April 2002.

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Comerford & Britt, L.L.P., by W. Thompson Comerford, Jr. and Willardson & Lipscomb, L.L.P., by John S. Willardson, for plaintiff-appellants.

Smith & Moore, L.L.P., by J. Donald Cowan, Jr., and Richard A. Coughlin, for defendant-appellees.

JOHN, Judge.

Plaintiffs Dinah Wyatt (Mrs. Wyatt), Gary Wyatt, and Hunter Wyatt (plaintiffs) appeal the trial court's 12 February 2001 order granting the N.C.G.S. § 1A-1, Rule 12 (b)(2) (2000), motion of defendants Disney World Co. (WDWCO) and Walt Disney World Hospitality & Recreation Corporation (HRC) (defendants) to dismiss plaintiffs' claims for lack of personal jurisdiction (defendants' motion to dismiss). For the reasons stated herein, we affirm the trial court.

Relevant factual and procedural information includes the following: In August 1994, plaintiffs, residents of Wilkes County, traveled to Walt Disney World Resort (the Resort) in Lake Buena Vista, Florida. Plaintiffs secured lodging at Dixie Landings, a hotel located at the Resort and owned at the time by Lake Buena Vista Communities, Inc., to which interest HRC subsequently succeeded. Shortly after plaintiffs' arrival at Dixie Landings, Mrs. Wyatt was injured in an accident involving the tram used by Dixie Landings to transport hotel customers from the registration desk to their rooms.

On 10 June 1997, plaintiffs filed the instant action against defendants in Wilkes County Superior Court alleging negligence and loss of consortium. Based upon the alleged conduct of defendants Claims Verifications, Inc. (CVI) and Daniel Keys (Keys) following CVI's retention by defendants to investigate the accident, plaintiffs also asserted claims of negligent and intentional infliction of emotional distress. Plaintiffs sought compensatory and punitive damages as well as counsel fees. The present appeal involves only WDWCO and HRC.

Defendants' motion to dismiss was filed 18 August 1999, and heard 22 January 2001. The trial court granted the motion in a 12 February 2001 order which recited, *inter alia*, the following findings of fact:

1. WDWCO is a Florida corporation qualified to do business and doing business in the State of Florida. Its principal business activities consist of ownership and operation of . . . an entertainment complex located in Orange County, Florida known as the WALT

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DISNEY WORLD Resort. . . . It does not own or operate Dixie Landings Resort . . . which is the hotel at which plaintiff Dinah Wyatt allegedly sustained her injury.

2. WDWCO is not qualified to do business in the State of North Carolina, . . . has no office or place of business in North Carolina and has no officers, agents or employees in the State of North Carolina. . . . WDWCO . . . [owns no] real property in North Carolina. It has no assets in North Carolina. All advertising for the WALT DISNEY WORLD Resort outside of Florida is purchased and placed on a regional or national basis, by entities other than WDWCO or HRC, and is not targeted to North Carolina. . . .

3. HRC is a Florida Corporation qualified to do business and doing business in the State of Florida . . . [which operates] a facility known as the Disney's Dixie Landings Resort located in Orange County, Florida. . . . HRC is not qualified to do business in the State of North Carolina. . . . has no office or place of business in North Carolina and has no officers, agents or employees in the State of North Carolina. . . . HRC . . . [does not] own any real property in North Carolina. It has no assets in North Carolina. . . . HRC does not advertise or market itself outside the State of Florida. All advertising for the Disney's Dixie Landings Resort is acquired and placed on a regional or national basis, by entities other than HRC, and is not targeted to North Carolina. . . .

4. HRC and WDWCO are separate and independent companies, and neither has an ownership interest in the other. . . . Furthermore, neither WDWCO nor HRC owns, operates or has any interest in The Disney Store, Inc., or any store operated by The Disney Store, Inc. In North Carolina. . . .

5. All advertising for the various properties within the WALT DISNEY WORLD Resort outside of Florida is created on a regional or national basis and is not targeted specifically to North Carolina. . . .

. . . .

9. Pursuant to a services agreement, WDWCO hired CVI . . . in Florida. CVI was hired to investigate plaintiffs personal injury claims that arose out of an incident that occurred in Florida.

10. CVI was an independent contractor retained by WDWCO. Keys was an employee of CVI. Neither WDWCO nor HRC

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instructed either CVI or Keys as to the manner or method by which CVI or Keys was to perform the investigation. Keys investigation involved only conducting surveillance of plaintiff Dinah Wyatt in public.

....

12. All alleged conduct of defendants WDWCO and HRC allegedly giving rise to plaintiffs' claims occurred in Florida.

13. Neither WDWCO nor HRC has maintained continuous and systematic contacts with North Carolina.

14. Neither WDWCO nor HRC purposefully directed its activities toward North Carolina or availed itself of the privilege of conducting activities within North Carolina, thus invoking the benefits and protection of its laws.

15. Neither WDWCO nor HRC could foresee being hailed into court in North Carolina for the claims set forth in plaintiffs' Complaint based on the evidence before the Court.

16. Any other contact of WDWCO or HRC with North Carolina alleged by plaintiffs [is] unsupported by competent evidence or, based on the competent evidence before the Court, are not attributable to either WDWCO or HRC.

Based upon its findings of fact, the trial court concluded as a matter of law that neither WDWCO nor HRC were subject to personal jurisdiction in North Carolina in the instant case. All plaintiffs' claims against WDWCO and HRC were thereupon dismissed for lack of personal jurisdiction. Plaintiffs appeal.

[1] We observe initially that

[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant[.]

N.C.G.S. § 1-277(b) (2000). Plaintiffs' appeal is thus properly before this Court.

[2] Upon a defendant's personal jurisdiction challenge, the plaintiff has "the burden of proving *prima facie* that a statutory basis for jurisdiction exists." *Godwin v. Walls*, 118 N.C. App. 341, 347, 455 S.E.2d 473, 479, *disc. review allowed*, 341 N.C. 419, 461 S.E.2d 757 (1995)

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(citation omitted). Where unverified allegations in the plaintiff's complaint meet plaintiff's

initial burden of proving the existence of jurisdiction . . . and defendant . . . [does] not contradict plaintiff's allegations in [its] sworn affidavit,

Bush v. BASF Wyandotte Corp., 64 N.C. App. 41, 45, 306 S.E.2d 562, 565 (1983), such allegations are accepted as true and deemed controlling, *id.* However, when a defendant supplements its motion with affidavits or other supporting evidence, the allegations of the plaintiff's complaint "can no longer be taken as true or controlling and plaintiff[] cannot rest on the allegations of the complaint," *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 615-16, 532 S.E.2d 215, 218, *disc. review denied*, 353 N.C. 261, 546 S.E.2d 90 (2000) (citation omitted), but must respond "by affidavit or otherwise . . . set[ting] forth specific facts showing that the court has jurisdiction." *Id.*

Further,

[t]he determination of whether jurisdiction is statutorily and constitutionally permissible due to contact with the forum is a question of fact. The standard of [appellate] review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court.

Replacements, Ltd. v. MidweSterling, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999) (citing *Chadbourn, Inc. v. Katz*, 285 N.C. 700, 208 S.E.2d 676 (1974)). Moreover, if the trial court's findings of fact resolving the defendant's jurisdictional challenge "are not assigned as error, the court's findings are 'presumed to be correct,' " *Inspirational Network, Inc. v. Combs*, 131 N.C. App. 231, 235, 506 S.E.2d 754, 758 (1998) (citation omitted); *see also Okwara v. Dillard Dep't Stores, Inc.*, 136 N.C. App. 587, 591, 525 S.E.2d 481, 484 (2000) ("contested finding of fact must be separately assigned as error, and the failure to do so results in a waiver of the right to challenge the sufficiency of the evidence to support the finding" on appeal).

In the instant case, plaintiffs introduced no evidence or affidavits at the hearing on defendants' motion nor have plaintiffs assigned error to any of the trial court's findings of fact.

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In their single assignment of error, plaintiffs essentially assert the presence of federal due process requirements for assumption of personal jurisdiction, *cf. Styleco, Inc. v. Stoutco, Inc.* 62 N.C. App. 525, 526, 302 S.E.2d 888, 889, *disc. review denied*, 309 N.C. 825, 310 S.E.2d 358 (1983) (appeal of adverse ruling on issue of personal jurisdiction properly directed at determination of whether North Carolina statutes permit our courts “to entertain this action against defendant[s], and, *if so*, whether this exercise of jurisdiction violates due process” (emphasis added)), and only cursorily address the applicability of North Carolina statutory authority, commonly referred to as our “long-arm statute,” *Dillon v. Funding Corp.*, 291 N.C. 674, 676, 231 S.E.2d 629, 630 (1977). Defendants have responded in kind, and we therefore likewise confine our discussion to this issue. *See* N.C.R. App. P. 10(a) (Court’s review “confined to a consideration of those assignments of error set out in the record on appeal”), N.C.R. App. P. 28(b)(5) (“Assignments of error . . . [for] which no reason or argument is stated or authority cited, will be taken as abandoned.”), and *Sonek v. Sonek*, 105 N.C. App. 247, 251, 412 S.E.2d 917, 920, *disc. review allowed*, 331 N.C. 287, 417 S.E.2d 255 (1992) (where “issue . . . not raised by either of the parties on appeal,” appellate court is “without jurisdiction to address [issue]”).

Plaintiffs maintain the trial court erred by granting defendants’ motion to dismiss in that

defendants-appellees have continuous and systematic contacts with North Carolina and the cause of action directly relates to one of defendants-appellees significant contacts with North Carolina.

Plaintiffs’ argument is unfounded.

Under our ‘long arm’ statute, North Carolina courts may obtain personal jurisdiction over a non-resident defendant to the full extent permitted by the Due Process Clause of the United States Constitution.”

Saxon v. Smith, 125 N.C. App. 163, 173, 479 S.E.2d 788, 794 (1997) (citations omitted). Years ago, the United States Supreme Court articulated a two part federal due process test for personal jurisdiction as follows:

[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such

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that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

International Shoe Company v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945) (citations omitted). *International Shoe* remains the leading authority on personal jurisdiction and decisions of our Courts have adhered to its principles. See, e.g., *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 541 S.E.2d 733 (2001) (applying *International Shoe* standard to issue of personal jurisdiction).

In addition,

[t]he United States Supreme Court has noted two types of long-arm jurisdiction: "specific jurisdiction," where the controversy arises out of the defendant's contacts with the forum state, and "general jurisdiction," where the controversy is unrelated to the defendant's activities within the forum, but there are "sufficient contacts" between the forum and the defendant.

Replacements, Ltd. v. MidweSterling, 133 N.C. App. 139, 143, 515 S.E.2d 46, 49-50 (1999) (quoting *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 411 (1984)).

Specific jurisdiction exists if the defendant has purposely directed its activities toward the resident of the forum and the cause of action relates to such activities. This inquiry focuses on whether the defendant "purposefully availed itself of the privilege of conducting activities in-state, thereby invoking the benefits and protections of the forum state's laws," and jurisdiction may be proper even if the defendant has never set foot in the forum state. General jurisdiction exists where the defendant has continuous and systematic contacts with the forum state, even though those contacts do not relate to the cause of action.

Frisella v. Transoceanic Cable Ship Co., 181 F. Supp.2d 644, 647 (E.D.La. 2002).

[3] Plaintiffs herein assert the presence of both general and specific jurisdiction. Regarding the latter, plaintiffs maintain North Carolina has specific jurisdiction because

the tortious acts that form the basis for Plaintiffs' emotional distress claims were committed in North Carolina by Daniel Keys, a private investigator working on behalf of WDWCO and HRC.

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“By retaining Keys,” plaintiffs continue, defendants risked liability for his actions and thereby “should have reasonably expected that they could be haled into court in North Carolina.” According to plaintiffs, therefore, defendants, through CVI and its employee Keys, engaged in acts within North Carolina that gave rise to the instant action, thereby establishing specific jurisdiction.

However, plaintiffs’ argument assumes that the alleged actions of CVI and Keys in North Carolina may be imputed to defendants. In this regard, the trial court’s findings of fact nine, ten and twelve, unchallenged by plaintiffs and thus presumed to be correct, *see Inspirational Network, Inc. v. Combs*, 131 N.C. App. at 235, 506 S.E.2d at 758, establish that CVI, a Florida company, was employed by defendants in Florida, that Keys was solely the employee of CVI, that neither WDWCO nor HRC instructed or supervised CVI and Keys as to the manner in which their investigation was to be conducted, that defendants did not engage in activities outside the state of Florida and that CVI, and thus its employee Keys, acted as an independent contractor rather than as an agent of defendants.

Actions of an independent contractor are not attributable to the party hiring it, and thus do not, without more, establish jurisdiction. *Miller v. Piedmont Steam Co.*, 137 N.C. App. 520, 528 S.E.2d 923, *disc. review denied*, 352 N.C. 590, 544 S.E.2d 782 (2000) (no agency relationship between franchiser and independent contractor/franchisee where franchiser did not have any control over franchisee’s day to day operations).

The critical element of an agency relationship is the right of control, and the principal must have the right to control both the means and the details of the process by which the agent is to accomplish his task in order for an agency relationship to exist. Absent proof of the right to control, only an independent contractor relationship is established. The actions of an independent contractor by themselves are not sufficient to subject a nonresident corporation to the jurisdiction of a forum.

Williamson v. Petrosakh Joint Stock Co., 952 F.Supp. 495, 498 (S.D.Tex. 1997); *see also Stover v. O’Connell Associates, Inc.*, 84 F.3d 132 (4th Cir. 1996), *cert. denied*, 519 U.S. 983, 136 L. Ed. 2d 334 (1996) (New York defendant’s hiring of Maryland investigator insufficient to create personal jurisdiction in Maryland where defendant did not direct activities of investigator).

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Plaintiffs direct our attention to nothing in the instant record which raises an issue of fact regarding defendants' retention of control over the manner in which CVI and Keys investigated the accident at issue. Notwithstanding, plaintiffs point to the case of *Calder v. Jones*, 465 U.S. 783, 79 L. Ed. 2d 804 (1984) as supportive. We conclude that plaintiff's reliance upon *Calder* is unavailing.

In *Calder*, a Florida newspaper was held subject to suit in California. *Id.* at 791, 79 L. Ed.2d at 813. The newspaper published approximately six hundred thousand copies of an allegedly defamatory article, researched from California sources, about a California resident. *Id.* The Court held

jurisdiction over petitioners in California [wa]s proper because of their intentional conduct in Florida calculated to cause injury to respondent in California.

Id. By contrast, WDWCO and HRC herein are Florida companies which hired a Florida investigation firm to investigate a personal injury claim arising out of an accident in the state of Florida.

Interestingly, we note the plaintiffs in *Stover* similarly relied upon *Calder*. *See Stover*, 84 F.3d at 135. The Fourth Circuit ruled *Calder* was inapplicable and that the Maryland court had no personal jurisdiction over a New York investigation firm which telephoned from New York to hire a Maryland company to investigate a Maryland resident, but exercised no control over the investigation. *Id.* at 135. Indeed, the instant facts involving a hiring in Florida to investigate a Florida accident are further removed from the circumstances in *Calder* than the facts in *Stover*.

Moreover,

[d]ecisions by the federal courts as to the construction and effect of the due process clause of the United States Constitution are binding on this Court[.]

McNeill v. Harnett County, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990). The Fourth Circuit's opinion in *Stover* is directly on point, and its reasoning is applicable to the present case.

In short, the trial court's findings of fact support its conclusion that specific personal jurisdiction could not be exercised over defendants either based upon their hiring of CVI or upon the activities of Keys in North Carolina on behalf of CVI. Plaintiffs' arguments to the contrary are therefore unavailing.

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[4] Plaintiffs also maintain that assumption of general personal jurisdiction over defendants might properly be exercised by the North Carolina court. Again, we disagree.

General jurisdiction over a party is proper when that party has engaged in “continuous and systematic contacts” with the forum state. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. at 415, 80 L. Ed. 2d at 411. Plaintiffs assert a general relationship among various commercial enterprises with some connection to WDWCO, including television and print advertising, employee recruitment, sales of Disney related products, travel agencies, etc. In effect, plaintiffs invite this Court to treat the entire “Disney empire,” and all who profit from the existence of WDWCO, as one entity for purposes of personal jurisdiction.

However, we may not do so absent proof that the businesses are parts of the same whole. *See Sigros v. Walt Disney World Co.*, 129 F. Supp.2d 56, 70 (D. Mass. 2001) (“Jurisdiction over HRC will lie, then, only if the activities of HRC are confusingly intermingled with those of Disney so as to warrant imputing the established contacts between Disney/WDA and Massachusetts to HRC itself.”); *Ash v. Burnham Corp.*, 80 N.C. App. 459, 462, 343 S.E.2d 2, 4, *aff’d*, 318 N.C. 504, 349 S.E.2d 579 (1986) (where “subsidiary’s presence in [N.C.] is primarily for . . . its own business and the subsidiary has preserved some semblance of independence from [defendant], jurisdiction over [defendant] may not be acquired on the basis of the local activities of the subsidiary”); and *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 619, 532 S.E.2d 215, 220 (2000) (where there is “no evidence of a legal relationship between [the two defendants], plaintiffs may not rely upon [one defendant’s] activities within this State to establish the requisite minimum contacts”).

In the trial court, defendants introduced uncontradicted affidavits from vice presidents of HRC and WDWCO as well as from the president of “The Disney Store” generally establishing that the three are separate entities and that WDWCO and HRC do not advertise or otherwise conduct business in North Carolina. *See Bruggeman, id.* at 615-16, 532 S.E.2d at 218 (when defendant supplements motion challenging personal jurisdiction with affidavits or other evidence, the allegations in the complaint “can no longer be taken as true or controlling and plaintiff[] cannot rest” upon those allegations).

In addition, the trial court’s findings of fact number two, three, four, thirteen, fourteen, fifteen and sixteen, supported by the above-

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mentioned evidence, *see Replacements, Ltd. v. MidweSterling*, 133 N.C. App. at 140-41, 515 S.E.2d at 48 (on appeal of order determining personal jurisdiction, “this Court must affirm the order of the trial court” if trial court’s findings of fact are supported by competent evidence), and unchallenged by plaintiffs, *see Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. at 615-16, 532 S.E.2d at 218, establish that, although various travel agents, retail stores, and advertisers, *et. al.*, might attempt to capitalize on the popularity of “Disney World,” these enterprises are entirely separate from WDWCO and HRC. Moreover, plaintiffs’ claims of “tens of thousands of fliers” advertising vacations at WDWCO do not, absent more, subject WDWCO to jurisdiction in North Carolina. *See CEM Corp. v. Personal Chemistry AB*, 192 F. Supp.2d 438, 441 (W.D.N.C. 2002) (“advertisements and solicitations not targeted to the forum, but . . . that subsequently find their way into the forum, are entirely insufficient to support a finding of general jurisdiction, even when coupled with *de minimus* sales in the forum”); and *Schenck v. Walt Disney Co.*, 742 F.Supp. 838, 841 (S.D.N.Y. 1990) (although WDW solicits business “through advertising and brochures,” engages “athletes at major sporting events . . . to advertise for Walt Disney World,” and “recruits students from New York Colleges and Universities,” these activities “do not amount to anything more than mere solicitation by WDW”).

The trial court’s findings of fact in turn support its conclusion that WDWCO and HRC did not maintain such “continuous and systematic” contacts with North Carolina as to satisfy general personal jurisdiction requirements. We therefore reject plaintiffs’ second argument.

[5] Finally, plaintiffs assert that the second part of the *International Shoe* test, *i.e.*, that “traditional notions of fair play and substantial justice,” *International Shoe Company v. Washington*, 326 U.S. at 316, 90 L. Ed. 2d at 102, dictate that personal jurisdiction should be exercised in North Carolina, was satisfied here. Although our resolution of the “minimum contacts” issue against plaintiffs is dispositive, *see id.* (in order for a defendant to be subjected to personal jurisdiction, due process requires that it have certain “minimum contacts” with the forum state), we also find plaintiffs’ concluding contention unconvincing.

[6] Plaintiffs complain that the burden of litigation upon them in Florida would be severe, while the burden upon defendants to contest plaintiffs’ suit in North Carolina would be “marginal.” However,

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these assertions are unsupported by competent evidence in the record. In addition, plaintiffs have failed to assign error to the trial court's determination that the exercise of personal jurisdiction over WDWCO and HRC for the claims set forth in plaintiffs' complaint would be unfair. *See Inspirational Network v. Combs*, 131 N.C. App. at 235, 506 S.E.2d at 758.

[7] Plaintiffs further argue that the applicable Florida statute of limitations may have elapsed, thereby precluding their filing of suit in that jurisdiction. In light of the 1994 occurrence date of the accident at issue and the initiation of litigation in 1997, we conclude that potential applicability of the Florida statute of limitations does not constitute a valid consideration. *See Trexler v. Pollock*, 135 N.C. App. 601, 607, 522 S.E.2d 84, 88 (1999), *cert. denied*, 351 N.C. 480, 543 S.E.2d 509 (2000) ("With the passage of time, memories fade or fail altogether, witnesses die or move away, evidence is lost or destroyed; and it is for these reasons, and others, that statutes of limitations are inflexible and unyielding and operate without regard to the merits of a cause of action.") (citation omitted).

[8] Plaintiffs cite three federal district court decisions from Pennsylvania as sustaining their position. *See Weintraub v. Walt Disney World Co.*, 825 F. Supp. 717, 722 (E.D. Pa. 1993); *Cresswell v. Walt Disney Productions*, 677 F. Supp. 284, 285 (M.D. Pa. 1987); *Gavigan v. Walt Disney World Co.*, 630 F. Supp. 148, 152, *on reconsideration*, 646 F. Supp. 786 (E.D. Pa. 1986). However, even in 1993, when the last of the cited cases was decided,

[t]hree [other] recent Pennsylvania District Court decisions [had] held that advertisements by Disney World targeted at the Pennsylvania market were not 'continuous and systematic' contacts, and [that] to rely on that evidence to support general jurisdiction would be an affront to Due Process.

Capizanno v. Walt Disney World Co., 826 F.Supp. 53, 56 (D.R.I.1993) (referring to the decisions in *Jennings v. Walt Disney World, Inc.*, Civ. A. No. 92-2764, 1992 WL 188374 (E.D.Pa. Jul 27, 1992), *Schulman v. Walt Disney World Co.*, Civ. A. No. 91-5259, 1992 WL 38390 (E.D.Pa. Feb 25, 1992), and *Cunningham v. Walt Disney World Co.*, Civ. A. No. 90-6164, 1991 WL 22062 (E.D.Pa. Feb 19, 1991)); *see also Whalen v. Walt Disney World Co.*, 274 Pa.Super. 246, 252, 418 A.2d 389, 392 (1980) (Pennsylvania courts lack personal jurisdiction over WDWCO "because Disney's business activities in Pennsylvania are too indirect to be considered "continuous and substantial").

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Moreover, the Pennsylvania cases cited by plaintiff stand in stark contrast to contrary rulings by numerous state and federal courts in other jurisdictions. *See, e.g., Capizanno v. Walt Disney World Co.*, 826 F.Supp. 53, 55 (D.R.I.1993) (“merely having substantial contacts with a forum cannot provide a basis for general jurisdiction consistent with Due Process”); *Giangola v. Walt Disney World Co.*, 753 F.Supp. 148, 156 (D.N.J.1990) (personal jurisdiction not proper notwithstanding plaintiff’s reliance upon advertisements placed by defendant in local newspapers); *Schenk v. Walt Disney Company*, 742 F.Supp. 838 (S.D.N.Y.1990); *Grill v. Walt Disney Co.*, 683 F. Supp. 66, 69 (S.D.N.Y. 1988) (“Disney World Co. [does not] engage[] in activities in New York beyond the ‘mere solicitation’ of business”); *Disney Enterprises, Inc. v. Esprit Finance, Inc.*, 981 S.W.2d 25, 30 (Tex.App.-San Antonio 1998) (“[Plaintiff’s] contention that Disney is amenable to suit in Texas under an agency theory of vicarious liability does not find support in the record”).

In sum, for the reasons discussed above, the trial court did not err in granting defendants’ motion to dismiss for lack of personal jurisdiction, and the order of the trial court is therefore affirmed.

Affirmed.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

DANIEL POMEROY, EMPLOYEE, PLAINTIFF v. TANNER MASONRY, EMPLOYER, USF&G INSURANCE, CARRIER; DEFENDANTS

No. COA01-505

(Filed 2 July 2002)

1. Workers’ Compensation— change in condition—additional medical compensation—notice—Form 18

Even though a plaintiff in a workers’ compensation action did not specifically allege a change in condition under N.C.G.S. § 97-47 or specifically state a claim for additional medical compensation under N.C.G.S. § 97-25, plaintiff’s filing of a Form 18 was sufficient to give the Industrial Commission the requisite written notice.

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2. Workers' Compensation— return to work—pre-injury wages

The Industrial Commission did not err in a workers' compensation action by finding that plaintiff had returned to work at his pre-injury wages and concluding that the Form 21 presumption of disability had been rebutted. There is no indication in the record that plaintiff returned to work at wages less than he was receiving prior to the accident; although the Form 28B does not indicate the weekly wage at which plaintiff returned to work, the record does not show that plaintiff objected to the Form 28B or otherwise asserted that he had returned to work at wages less than he was receiving prior to the accident.

3. Workers' Compensation— alleged deteriorated physical condition—additional compensation denied

The Industrial Commission did not err by denying plaintiff's claim for additional compensation in a workers' compensation action where plaintiff claimed that his physical condition had deteriorated since he returned to work and that he is now incapable of earning wages, but there was competent evidence to support the Commission's findings that plaintiff was working prior to being unemployed and that plaintiff certified when applying for unemployment benefits that he did not have any medical condition that would hinder his return to work. Although there was testimony which may have supported a contrary finding, the Commission and not the court weighs evidence and assesses its credibility.

4. Workers' Compensation— findings—reasonably necessary medical treatment

A workers' compensation action was remanded for further findings where the Industrial Commission found that plaintiff was entitled to compensation for reasonably necessary medical treatment under N.C.G.S. § 97-25 as it then existed but left unresolved plaintiff's claim for specific medical treatment.

Appeal by plaintiff and defendants from Opinion and Award entered 19 December 2000 by the North Carolina Industrial Commission and appeal by plaintiff from Opinion and Award entered 19 February 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 February 2002.

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Bollinger & Piemonte, PLLC, by George C. Piemonte, for plaintiff-appellee/cross-appellant.

Morris York Williams Surlles & Barringer, LLP, by John F. Morris and Keith B. Nichols, for defendant-appellants/cross-appellees.

CAMPBELL, Judge.

Tanner Masonry (Employer) and USF&G Insurance (collectively, Defendants) appeal from a 19 December 2000 opinion and award of the North Carolina Industrial Commission (the Commission). Specifically, Defendants contend the Commission erred in concluding that Daniel Pomeroy (Plaintiff) is “entitled to reasonably necessary medical treatment related to his compensable injury by accident for so long as such treatment tends to effect a cure, provide relief or lessen the period of disability.” Plaintiff likewise appeals from the Commission’s 19 December 2000 opinion and award, contending the Commission erred in finding and concluding that “Plaintiff’s current lack of employment or inability to work, if any, is not causally related to his injury of June 14, 1994 and plaintiff has not undergone a substantial change of condition related to his injury by accident.” Plaintiff also appeals from a 19 February 2001 opinion and award in which the Commission concluded that it did not have jurisdiction to rule on Plaintiff’s motion for reconsideration.

On 14 June 1994, Plaintiff, while working as a mason foreman for Employer, was injured when he fell six to eight feet from a scaffold and landed on a bolt, which penetrated his lower back. Plaintiff was taken to Lake Norman Regional Medical Center, where Dr. Marcus Wever, a board-certified general surgeon, performed surgery on Plaintiff’s back, during which the puncture wound to Plaintiff’s back was fully explored, irrigated, cleaned of debris and closed. Following surgery, Plaintiff remained in the hospital for a few days. On 15 June 1994, Dr. William A. Kutner, an orthopaedic surgeon, examined Plaintiff and found no obvious fractures associated with Plaintiff’s injuries. Plaintiff was discharged from the hospital on 18 June 1994.

Following his discharge from the hospital, Plaintiff was examined by Dr. Wever in the outpatient clinic on several occasions. On 17 August 1994, after Plaintiff’s final follow-up appointment, Dr. Wever released him to return to work the following week with no restrictions or permanent partial impairment indicated. Dr. Wever opined

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that Plaintiff had reached maximum medical improvement consistent with his injury and indicated that Plaintiff would “be seen in follow-up on an as-needed basis.” Following his injury, Plaintiff also received physical therapy for his back. On 26 August 1994, Plaintiff’s physical therapist instructed him to return to work the following Monday (29 August 1994) with no restrictions or permanent partial impairment indicated.

On 27 June 1994, Plaintiff and Defendants entered into an Industrial Commission Form 21 Agreement for Compensation for Disability (Form 21 Agreement) stating that Plaintiff “sustained an injury by accident arising out of and in the course of [his] employment [with Employer]” on 14 June 1994, and that the accident resulted in a “back injury.” The Form 21 Agreement was approved by the Commission on 5 August 1994. Under the terms of the Form 21 Agreement, Defendants paid Plaintiff compensation at the rate of \$346.68 per week for temporary total disability from 14 June 1994 to 28 August 1994. Defendants also paid for Plaintiff’s medical treatment in the total amount of \$9,055.10.

On 29 August 1994, Plaintiff returned to work for Employer at full duty without restrictions. Plaintiff’s return to work was noted on an Industrial Commission Form 28B executed and filed by Defendants on 29 August 1994. The Form 28B also noted that Plaintiff’s final compensation check was forwarded to him on 29 August 1994. The Form 28B did not indicate the weekly wage at which Plaintiff had returned to work. By its terms, this Form 28B did not purport to close Plaintiff’s case, for it appears that additional medical expenses were yet to be paid by Defendants.

On 24 October 1994, Defendants filed a second Form 28B notifying Plaintiff that his case was closed and that he had two years from the date of receipt of his final compensation check in which to notify the Commission, in writing, that he claimed further benefits. *See* N.C. Gen. Stat. § 97-47 (2001). This second Form 28B also did not indicate the weekly wage at which Plaintiff had returned to work.

In December 1994, Plaintiff stopped working for Employer and moved to New York. Plaintiff returned to work in New York two or three weeks later as a mason for H & R Masonry, where he worked for approximately one year. While working for H & R Masonry, Plaintiff earned lower wages than he had earned while working for Employer. Plaintiff attributed his lower wages to the economic recession affecting New York at the time. According to Plaintiff’s testimony, he

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stopped working for H & R Masonry because he could not perform as expected due to continuing problems with his back.

Plaintiff was also employed in New York by Yancey Conant Masonry (Yancey), where he worked as a mason for four or five months. While working for Yancey, Plaintiff earned wages equal to those he had earned while working for Employer prior to moving to New York. Plaintiff stopped working for Yancey in December of 1995. According to Plaintiff, he had to stop working for Yancey due to back problems. Plaintiff was unemployed from December 1995 until this case was heard by the Deputy Commissioner on 28 January 1998.

On 10 January 1996, Plaintiff was examined in New York by Dr. Jalal Sadrieh, an orthopaedic surgeon. Dr. Sadrieh ordered an x-ray of Plaintiff's lumbar spine, which showed no evidence of foreign material and that Plaintiff's bony structures and disc spaces were normal. Dr. Sadrieh was given an oral history of Plaintiff's back problems, but did not review any records from Plaintiff's treatment for his compensable back injury in North Carolina. Dr. Sadrieh diagnosed Plaintiff with "acute and subacute low back sprain with sciatica and possible disc herniation." Dr. Sadrieh referred Plaintiff to physical therapy and recommended that he undergo an MRI. On 19 February 1996, Plaintiff returned to Dr. Sadrieh. Plaintiff had not been to physical therapy, nor had plaintiff undergone an MRI, because Defendants had refused to authorize insurance coverage for such medical treatment. Plaintiff was last examined by Dr. Sadrieh on 19 February 1996.

On 21 February 1996, Plaintiff was examined by Dr. Vincent Sportelli, a chiropractor. Plaintiff remained under the care of Dr. Sportelli until 4 October 1996. During this time, Plaintiff was seen by Dr. Sportelli on a total of forty-two occasions. In his deposition testimony, Dr. Sportelli opined that Plaintiff had a sixty-five percent (65%) permanent partial disability to the pelvic girdle causally related to the injury suffered by Plaintiff on 14 June 1994. However, the record shows that Dr. Sportelli's opinion was based solely on the history provided by Plaintiff and the Plaintiff's condition at the time Dr. Sportelli examined him. Dr. Sportelli had no access to the records from Plaintiff's 14 June 1994 back injury and subsequent treatment in North Carolina. As a result, Dr. Sportelli was under the impression that Plaintiff's earlier back injury was caused by a fifteen to twenty foot fall, while the records from North Carolina make it clear that Plaintiff only fell six to eight feet. Defendants refused to authorize insurance coverage for Plaintiff's treatment by Dr. Sportelli.

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[1] On 22 February 1996, Plaintiff filed an Industrial Commission Form 18 Notice of Accident to Employer alleging injury to his back resulting from the 14 June 1994 accident. Plaintiff did not specifically allege a change in condition or specifically state a claim for additional medical compensation under N.C. Gen. Stat. § 97-25. Nevertheless, we hold that Plaintiff's act of filing the Form 18 was sufficient to give the Commission the requisite written notice of Plaintiff's claims for further compensation due to change in condition under N.C.G.S. § 97-47 and additional medical compensation under N.C.G.S. § 97-25. *See Apple v. Guilford County*, 321 N.C. 98, 101, 361 S.E.2d 588, 591 (1987); *Chisholm v. Diamond Condominium Constr. Co.*, 83 N.C. App. 14, 17, 348 S.E.2d 596, 599 (1986).

On 1 April 1996, Defendants filed an Industrial Commission Form 61 denying Plaintiff's claim for additional benefits on the grounds that his current condition was not the result of the 14 June 1994 compensable back injury. On 26 November 1996, Plaintiff requested a hearing on his claim for additional disability compensation and further medical treatment.

Plaintiff's claim was heard before Deputy Commissioner Haigh on 28 January 1998. Following Deputy Commissioner Haigh's departure from the Commission, Plaintiff's claim was transferred to Deputy Commissioner Taylor for decision. On 4 February 2000, Deputy Commissioner Taylor entered an opinion and award denying Plaintiff's claim. Deputy Commissioner Taylor found as fact and concluded as a matter of law that "Plaintiff's current condition is not causally related to his June 14, 1994 accident." Plaintiff appealed to the Full Commission.

On 19 December 2000, the Full Commission entered an opinion and award finding as fact that "[p]laintiff's current lack of employment or inability to work, if any, is not causally related to his June 14, 1994 accident."

The Full Commission also entered the following pertinent conclusions of law:

4. Plaintiff's current lack of employment or in ability [sic] to work, if any, is not causally related to his injury of June 14, 1994 and plaintiff has not undergone a substantial change of condition related to his injury by accident.

5. However, since plaintiff was injured prior to July 5, 1994, plaintiff's claim for additional medical compensation is not

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barred by N.C.G.S. § 97-47 or because defendants rebutted the presumption of disability. Plaintiff is therefore entitled to reasonably necessary medical treatment related to his compensable injury by accident for so long as such treatment tends to effect a cure, provide relief or lessen the period of disability.

Based on its findings of fact and conclusions of law, the Full Commission denied Plaintiff's claim for additional disability compensation under N.C.G.S. § 97-47. However, the Commission ordered that "Defendants shall pay for plaintiff's reasonably necessary medical treatment related to his compensable injury by accident for so long as such treatment tends to effect a cure, provide relief or lessen the period of disability." The Commission's opinion and award did not order Defendants to pay for any specific medical treatment that Plaintiff had received.

On 9 January 2001, Plaintiff filed a motion for reconsideration with the Commission requesting an order directing Defendants to pay for the medical treatment provided to Plaintiff in New York by Dr. Sadrieh and Dr. Sportelli. Plaintiff also requested an award of attorney's fees pursuant to N.C. Gen. Stat. § 97-88.1. On 26 January 2001, Defendants filed notice of appeal from the Commission's 19 December 2000 opinion and award. On 19 February 2001, the Commission entered an opinion and award concluding that it no longer had jurisdiction to rule on Plaintiff's motion for reconsideration due to Defendants having already filed notice of appeal in this Court. On 21 February 2001, Plaintiff filed notice of appeal from both the 19 December 2000 opinion and award and the 19 February 2001 opinion and award.

The standard of review of appellate courts on appeal from an opinion and award of the Industrial Commission is limited to determining whether there is *any* competent evidence to support the Commission's findings of fact and whether such findings of fact support the Commission's conclusions of law. *McLean v. Roadway Express*, 307 N.C. 99, 102, 296 S.E.2d 456, 458 (1982); *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 652, 508 S.E.2d 831, 834 (1998). On appeal, this Court does not weigh the evidence and decide the issue on the basis of its weight; rather our duty goes no further than to determine whether the record contains any evidence tending to support the Commission's findings of fact, even when there is evidence to support a contrary finding of fact. *Timmons v. N.C. Dep't of Transp.*, 351 N.C. 177, 181, 522 S.E.2d 62, 64 (1999) (citing *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998)).

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“Furthermore, the Commission is the sole judge of the credibility of the witnesses as well as how much weight their testimony should be given.” *Bailey*, 131 N.C. App. at 653, 508 S.E.2d at 834. Additionally, although the Commission “is not required . . . to find facts as to all credible evidence . . . 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), and 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).

Additional Compensation Under N.C.G.S. § 97-47

[2] We first address Plaintiff’s assignments of error to the Commission’s denial of his claim for additional compensation on the grounds of a change in condition under N.C.G.S. § 97-47.

Plaintiff first contends that the Commission erred in finding that he had returned to work at his pre-injury wages and concluding that the From 21 presumption of disability had been rebutted by Defendants. We disagree.

Plaintiff sustained an injury by accident arising out of and in the course of his employment with Employer on 14 June 1994. Defendants admitted liability and entered into a Form 21 Agreement with Plaintiff for compensation, under which Plaintiff received \$346.68 per week until 29 August 1994, when he returned to work. The Form 21 Agreement was approved by the Commission and became an award of the Commission enforceable, if necessary, by court decree. *Chisholm*, 83 N.C. App. at 17, 348 S.E.2d at 598 (citing *Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 75 S.E.2d 777 (1953)). Upon approval by the Commission, the Form 21 Agreement raised the presumption that Plaintiff was disabled under the Worker’s Compensation Act. *Watkins v. Motor Lines*, 279 N.C. 132, 138, 181 S.E.2d 588, 592 (1971). The Form 21 presumption of disability ends when the employee regains his or her pre-injury capacity to earn wages. *Kisiah v. W.R. Kisiah Plumbing*, 124 N.C. App. 72, 81, 476 S.E.2d 434, 439 (1996).

Here, Plaintiff returned to work for Employer at full duty without restrictions on 29 August 1994. There is no indication in the record that Plaintiff returned to work at wages less than those he was receiving prior to his compensable back injury. On 29 August 1994, Plaintiff’s final weekly compensation payment was forwarded to him

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for the period during which he was disabled. On 24 October 1994, Employer filed a Form 28B with the Commission informing Plaintiff that his case was closed as of 29 August 1994. The Form 28B does not indicate the weekly wage at which Plaintiff returned to work, but the record does not show that Plaintiff objected to the Form 28B or otherwise asserted that he had returned to work at wages less than those he was receiving prior to the 14 June 1994 accident. The filing of the Form 28B presumptively ended Plaintiff's claim for disability benefits as of 29 August 1994. *See Watkins*, 279 N.C. at 137, 181 S.E.2d at 592. The evidence of record supports the Commission's finding that Plaintiff had returned to work at his pre-injury wages and the conclusion that Plaintiff had regained his pre-injury earning capacity. Thus, the Commission did not err in concluding that Plaintiff's Form 21 presumption of disability had been effectively rebutted by Defendants.

[3] Once an award of the Commission becomes final, the Commission may, "upon its own motion or upon application of any party in interest on the grounds of a change in condition," review such award and "on such review may make an award ending, diminishing, or increasing the compensation previously awarded." N.C.G.S. § 97-47. Our case law defines a "change in condition" under N.C.G.S. § 97-47 as a condition occurring after a final award of compensation that is "different from those existent when the award was made[.]" *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 247, 354 S.E.2d 477, 480 (1987), and results in a substantial change in the physical capacity to earn wages. *Bailey*, 131 N.C. App. at 654, 508 S.E.2d at 835 (citing *Pratt v. Central Upholstery Co., Inc.*, 252 N.C. 716, 722, 115 S.E.2d 27, 33-34 (1960)). This "change in condition" can consist of either

[1] a change in the claimant's physical condition that impacts his earning capacity, [2] a change in the claimant's earning capacity even though claimant's physical condition remains unchanged, or [3] a change in the degree of disability even though claimant's physical condition remains unchanged.

Blair v. American Television & Communications Corp., 124 N.C. App. 420, 423, 477 S.E.2d 190, 192 (1996) (internal citations omitted). In all instances, the party seeking modification of an award due to a "change in condition" has the burden to prove that the new condition is directly related to the original compensable injury that is the basis of the award the party seeks to modify. *Id.*

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In this case, Plaintiff claims that his physical condition has deteriorated since he returned to work on 29 August 1994 to the point that he is physically incapable of earning any wages. In support of his claim, Plaintiff testified that he continued to suffer from back pain after his return to work for Employer, that the condition of his back progressively worsened during his two stints of employment in New York, and that his back eventually deteriorated to the point that he was unable to work. Plaintiff also offered the testimony of Dr. Sadrieh and Dr. Sportelli. Dr. Sadrieh examined Plaintiff approximately nineteen months after his 14 June 1994 compensable back injury. Based on the oral history given by Plaintiff, and the fact that Plaintiff denied having suffered any other injuries to his back, Dr. Sadrieh opined that the 14 June 1994 compensable injury was the cause of Plaintiff's condition at the time Dr. Sadrieh examined him in early 1996.

Dr. Sportelli did not examine Plaintiff for the first time until approximately 20 months after the 14 June 1994 injury. Dr. Sportelli's diagnosis was also based solely on the oral history provided by Plaintiff and Plaintiff's condition at the time. Dr. Sportelli opined that Plaintiff's condition was directly and causally related to his compensable injury on 14 June 1994. Dr. Sportelli further opined that Plaintiff had a sixty-five percent (65%) permanent partial disability to his pelvic girdle.

Despite the testimony of Plaintiff, Dr. Sadrieh and Dr. Sportelli, the Commission found that "[p]laintiff's current lack of employment or inability to work, if any, is not causally related to his June 14, 1994 accident." Plaintiff assigned error to this finding of fact. The question for this Court is whether the record contains *any* competent evidence to support this finding of fact, even if there is evidence to support a contrary finding of fact. *See Timmons*, 351 N.C. at 181, 522 S.E.2d at 64.

Based on competent evidence in the record, the Commission found as fact (in Findings Nos. 10, 11 and 12) that Plaintiff returned to work for Employer at full duty without restrictions on 29 August 1994 and remained there for approximately three months, that Plaintiff worked for H&R Masonry in New York for approximately one year, and that Plaintiff also was employed by Yancey for four or five months in 1995. The record further shows that Plaintiff received more than \$200.00 per week in unemployment benefits for three or four months after he left his job in New York with Yancey in December 1995. Plaintiff testified that he was obligated to look for work while he was receiving unemployment benefits, but that he did not do so

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because the condition of his back would not allow him to find a job in his field. However, in order to receive unemployment benefits under New York law, Plaintiff was required to certify that he was physically able to work.¹ Thus, there is competent evidence to support the following finding of fact entered by the Commission:

17. Plaintiff received weekly unemployment benefits, in the amount of \$200.00 per week, for approximately three to four months. To apply for unemployment benefits, plaintiff certified that he did not have any medical condition that would hinder his return to work, and that he was actively seeking employment.

Further, the Commission's Findings Nos. 10, 11 and 12 indicate that prior to drawing unemployment benefits, Plaintiff was in fact physically able to work and was actually working. These findings of fact and the evidence on which they are based provide competent evidence to support the Commission's finding that Plaintiff's lack of employment or inability to work was not causally related to the 14 June 1994 accident. While the testimony of Plaintiff, coupled with that of Dr. Sadrieh and Dr. Sportelli, may have been competent evidence to support a finding that Plaintiff's inability to work at the time of the hearing was causally related to the 14 June 1994 compensable injury, the Commission made a contrary finding. It is the duty of the Commission, not this Court, to weigh the evidence and to assess its credibility, and when conflicting evidence is presented, the Commission's finding of causal connection between the accident and the disability is conclusive. *Bailey*, 131 N.C. App. at 655, 508 S.E.2d at 835 (citing *Anderson v. Lincoln Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 275 (1965)). There is competent evidence to support the Commission's findings and conclusions to the effect that Plaintiff failed to establish that his lack of employment was causally related to his 14 June 1994 accident and that he had undergone a "change in condition" related to the 14 June 1994 accident. Therefore, we affirm the Commission's denial of Plaintiff's claim for additional compensation under N.C.G.S. § 97-47.

Compensation for Medical Treatment Under N.C.G.S. § 97-25

[4] Defendants contend that the Commission erred in ordering them to pay for "[P]laintiff's reasonably necessary medical treatment

1. New York Labor Law § 591(2) (2002) provides:

"no [unemployment] benefits shall be payable to any claimant who is not capable of work or who is not ready, willing and able to work in his usual employment or in any other for which he is reasonably fitted by training and experience."

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related to his compensable injury by accident for so long as such treatment tends to effect a cure, provide relief or lessen the period of disability[.]” under N.C.G.S. § 97-25.²

Subsequent to the establishment of a compensable injury under the Workers’ Compensation Act, an employee may seek compensation under N.C.G.S. § 97-25 for additional medical treatment when such treatment lessens the period of disability, effects a cure, or gives relief. *Hylar v. GTE Products Co.*, 333 N.C. 258, 261, 425 S.E.2d 698, 700 (1993) (citing *Little v. Penn Ventilator Co.*, 317 N.C. 206, 211, 345 S.E.2d 204, 208 (1986)); see also N.C. Gen. Stat. § 97-2(19) (2001). An injured employee has the right to select, even in the absence of an emergency, a physician of his own choosing to provide the medical treatment covered by N.C.G.S. § 97-25, subject to the approval of the Commission. *Schofield v. Tea Co.*, 299 N.C. 582, 590-91, 264 S.E.2d 56, 62 (1980). In order to be compensable under N.C.G.S. § 97-25, “the medical treatment sought must be ‘directly related to the original compensable injury.’” *Reininger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 259, 523 S.E.2d 720, 723 (1999) (quoting *Pittman v. Thomas & Howard*, 122 N.C. App. 124, 130, 468 S.E.2d 283, 286 (1996)). When additional medical treatment is required, there is a rebuttable presumption that it is directly related to the original compensable injury and the employer has the burden of producing evidence showing the treatment is not directly related to the compensable injury. *Id.* In order to receive compensation for additional medical treatment under N.C.G.S. § 97-25, an injured employee is not required to make any showing of a change in his condition or in available medical treatments. *Hylar*, 333 N.C. at 267, 425 S.E.2d at 704. However, an injured employee is required to seek and obtain approval of the Commission within a reasonable time after he has selected a physician and/or medical treatment of his own choosing. *Schofield*, 299 N.C. at 593, 264 S.E.2d at 63.

Here, the Commission concluded that Plaintiff was entitled to “reasonably necessary medical treatment related to his compensable

2. In 1994, the General Assembly added N.C. Gen. Stat. § 97-25.1, which provides that an injured employee’s “right to medical compensation shall terminate two years after the employer’s last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation.” N.C. Gen. Stat. § 97-25.1 (2001). This section applies only to injuries occurring on or after 5 July 1994 and thus does not apply to Plaintiff’s claim in the instant case.

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injury by accident for so long as such treatment tends to effect a cure, provide relief or lessen the period of disability.” However, the Commission did not order Defendants to pay for any specific medical treatment received by Plaintiff. As a result, Plaintiff filed a motion for reconsideration with the Commission requesting that it amend its opinion and award and order Defendants to pay for the medical treatment rendered by Dr. Sadrieh and Dr. Sportelli.³ Before the Commission could rule on Plaintiff’s motion for reconsideration, Defendants filed notice of appeal from the Commission’s 19 December 2000 opinion and award. Thereafter, the Commission entered an opinion and award concluding that it lacked jurisdiction to rule on Plaintiff’s motion for reconsideration due to Defendants’ appeal to this Court. Plaintiff contends that the Commission erred in concluding that it lacked jurisdiction to rule on Plaintiff’s motion for reconsideration. We need not address this issue in detail, for assuming, *arguendo*, that the Commission was correct in its determination that it lacked jurisdiction to rule on Plaintiff’s motion for reconsideration, we nonetheless are constrained to remand the case to the Commission for further findings on the issue of Plaintiff’s entitlement to additional medical compensation under N.C.G.S. § 97-25.

Under N.C.G.S. § 97-25, as it existed when Plaintiff suffered his compensable injury by accident, an employee is entitled to compensation for reasonably necessary medical treatment when such treatment lessens the period of disability, effects a cure, or gives relief. *Hyley*, 333 N.C. at 261, 425 S.E.2d at 700. Thus, the Commission’s conclusion on this issue was a correct general statement of the law on the subject. However, the Commission did not fully apply the law to the facts before it and order Defendants to pay for any specific medical treatment received by Plaintiff. The Commission left unresolved Plaintiff’s claim for payment of the medical treatment provided by Dr. Sadrieh and Dr. Sportelli. As earlier noted, “the Commission must find those facts which are necessary to support its conclusions of law[.]” *Peagler*, 138 N.C. App. at 602, 532 S.E.2d at 213, and the Commission must “make specific findings with respect to crucial facts upon which the question of plaintiff’s right to compensation depends.” *Gaines*, 33 N.C. App. at 579, 235 S.E.2d at 859. Further, when the Commission’s findings of fact are insufficient to determine the rights of the parties upon a claim for compensation, the proper procedure on appeal is to remand the case to the Commission. *Mills v. Fieldcrest Mills*, 68 N.C.

3. Plaintiff also requested in his motion for reconsideration an assessment of attorney’s fees against Defendants pursuant to N.C.G.S. § 97-88.1.

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App. 151, 158, 314 S.E.2d 833, 838 (1984). It is not the duty of this Court to make the findings of fact necessary to support an award of compensation. Therefore, we are constrained to remand for further findings.

On remand, the Commission must make findings based upon competent evidence relative to whether the treatment provided and prescribed by Dr. Sadrieh and Dr. Sportelli was required to effect a cure or give relief from the 14 June 1994 compensable injury or tended to lessen the period of disability caused by said compensable injury. *See Schofield*, 299 N.C. at 595, 264 S.E.2d at 65. The Commission must also make findings of fact relative to whether the condition treated by Dr. Sadrieh and Dr. Sportelli was directly related to the 14 June 1994 compensable injury. *See Reinninger*, 136 N.C. App. at 259, 523 S.E.2d at 723. In so doing, the Commission must give Plaintiff the benefit of the rebuttable presumption that additional medical treatment is related to the original compensable injury. *See id.* In addition, the Commission must make findings of fact relative to whether Plaintiff sought approval of the Commission within a reasonable time after he received the treatment from Dr. Sadrieh and Dr. Sportelli. *See Schofield*, 299 N.C. at 594, 264 S.E.2d at 64. In making these required findings of fact, the Commission is to consider the record evidence as well as any additional evidence the Commission finds it necessary to take. Finally, on remand, the Commission is to rule on Plaintiff's motion for attorney's fees pursuant to N.C.G.S. § 97-88.1.

For the reasons stated herein, the Commission's denial of Plaintiff's claim for additional disability compensation under N.C.G.S. § 97-47 is affirmed, and the case is remanded to the Commission for further proceedings consistent with this opinion as to Plaintiff's claim for additional medical compensation under N.C.G.S. § 97-25 and Plaintiff's motion for attorney's fees under N.C.G.S. § 97-88.1.

Affirmed in part and remanded in part.

Judges MARTIN and HUDSON concur.

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STATE OF NORTH CAROLINA v. EDWIN PHILLIPS

No. COA01-656

(Filed 2 July 2002)

1. Search and Seizure— warrantless search—plain view doctrine

The trial court did not err in a first-degree murder case by allowing the admission of evidence seized by law enforcement officers during their warrantless search of the residence where decedent wife remained with her three daughters after the couple separated, because: (1) the only evidence seized was evidence observed in plain view during the police officers' protective sweep of the house after the discovery of decedent's body in the doorway of the residence; (2) the officers secured the residence by covering the door and roping off the area with yellow tape; (3) the subsequent entry by a detective and a lab technician did not constitute a separate search; and (4) the search and seizure was not unreasonable under the circumstances.

2. Homicide— first-degree murder—short-form indictment—constitutionality

The short-form indictment used to charge defendant with first-degree murder did not violate defendant's Fourth Amendment Due Process rights even though it failed to allege any aggravating circumstances.

Appeal by defendant from judgment entered 2 September 2000 by Judge Howard R. Greeson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 27 March 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General H. Alan Pell, for the State.

Wyatt, Early, Harris & Wheeler, L.L.P., by John Bryson, for defendant.

BIGGS, Judge.

Edwin Phillips (defendant) appeals his conviction of first-degree murder. For the reasons herein, we find no error.

The evidence tended to show the following: that defendant and Sharon Little Phillips (Phillips) were married and lived together

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at 1706 Waverly Street, until 6 June 1999, when defendant moved out. Phillips, however, remained in the residence with her three daughters.

On 28 August 1999, at 11:48 p.m., a dispatcher with the High Point Police Department received a 911 call from the 1706 Waverly Street residence. She could hear screaming in the background and a male voice saying "stop it" or "drop it". While the first dispatcher was taking the call, a second dispatcher received a call from "Waverly", from a neighbor of Phillips indicating that Phillips had been stabbed, the victim's daughter was with the caller, and the caller had seen the victim's husband running down the street.

Officers Calvin Carter and Christopher Cole responded to the residence, arriving at approximately 11:54 p.m., to discover Phillips' body lying in the doorway. Phillips, who was unresponsive and lying on her back, had a laceration on the left side of her face, her shoulder and her throat had been cut. With Officer Cole in the lead and Officer Carter as the cover, the officers entered the house with their guns drawn and conducted a protective sweep. They observed blood on the carpet, a trail of blood leading toward the hallway and a large amount of blood in the back bedroom. Neither officer removed any of the evidence they observed. The sweep took approximately two minutes. When Officers Cole and Carter returned to the living room, they observed emergency personnel around the victim administering aid, but Phillips was pronounced dead at 12:03 a.m. To secure the crime scene, the police officers placed yellow tape around the residence, and covered the door so no one could "see in or get in".

Jane Aswell, a technician from the High Point crime lab, arrived between 12:20 a.m. and 12:31 a.m. to process the scene. Her job was to photograph and videotape the scene and to collect evidence. Within five minutes of Aswell's arrival, the officers, including Aswell, walked through the house. During their walk-through, the officers pointed at evidence they had observed during their initial sweep. Aswell made a fifteen minute videotape of the interior of the residence. While she was videotaping, Aswell was in the house alone. After she finished the videotape, however, Aswell went back into the house with Officer Cole and made 35 mm photographs of the evidence Officer Cole and Officer Carter observed during their initial sweep. In addition, the officers found identifying paper work on the dresser.

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Lead Detective Michael Bye, of the High Point Police Department, arrived at the scene at approximately 1:01 a.m. He, along with Officers Cole, Carter and Aswell, again entered the house following a trail of blood which led to a back bedroom where a large amount of blood was observed on the bed. During their walk through, the officers pointed to the areas they observed during their initial sweep. At this time, Detective Bye instructed the lab technician to collect blood samples from the carpet, the walls, the bed and the bedspread.

Earlier that morning, shortly after midnight, a police officer had received information that defendant was at the High Point Hospital emergency room receiving medical treatment for injuries to his neck, leg and finger. The officer arrived at the emergency room at approximately 12:40 a.m. and talked to the defendant about the incident that had occurred at 1706 Waverly Street. The police officer at no time obtained defendant's consent to search the house. Following their investigation, defendant was charged with and convicted of first-degree murder in violation N.C.G.S. § 14-17. From his conviction, defendant appeals.

I.

[1] Defendant contends first, that the trial court erred in allowing the admission of evidence seized by the law enforcement officers during their warrantless search of 1706 Waverly Street. We disagree.

In response to this assignment, the State argues that defendant lacked standing to challenge the search of the residence. Upon review of the record, we conclude that the State has waived its right to contest standing by expressly abandoning it during the suppression hearing below.

At the hearing, the State made the following statement:

[T]he State at this time, in open court, abandons its standing argument in light of the defendant's apparent, to whatever extent he had some ownership interest in the house, . . . so we abandon that position.

The United States Supreme Court in *Steagald v. United States*, 451 U.S. 204, 68 L. Ed. 2d 38 (1981), has held that the State may lose its right to raise the issue of standing on appeal when it has made contrary assertions in the court below, when it has acquiesced in contrary findings by the trial court, or when it has failed to raise such

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questions in a timely fashion during the litigation. *See also, State v. Cooke*, 54 N.C. App. 33, 41, 282 S.E.2d 800, 806 (1981) (Held that “[i]f the State does not properly raise and preserve issues, it waives them.”).

In the present case, though the State did raise the issue of standing below, following argument, the State opted to expressly waive it. Based on this waiver, the trial court made no findings or conclusions on the issue and proceeded to the merits of the motion to suppress. We therefore, conclude that the State has precluded appellate review of this issue and likewise move forward to examine the merits of defendant’s arguments on the motion to suppress.

In his motion, defendant does not contest the initial entry by Officers Carter and Cole upon their arrival on the scene. He concedes that the officers upon the discovery of Phillips’ body were permitted to do a protective sweep to discern whether there were other victims or suspects on the premises. Defendant, however, contends that the subsequent entry into the house by the lab technician and Detective Bye for the purpose of gathering evidence was in violation of his constitutional rights.

When a defendant in a criminal prosecution makes a motion to suppress evidence obtained by means of a warrantless search, the State has the burden of showing, at the suppression hearing, “how the [warrantless search] was exempted from the general constitutional demand for a warrant.” *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982). In reviewing a trial court’s ruling on a motion to suppress, the trial court’s findings of fact “‘are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.’” *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165, 148 L. Ed. 2d 992 (2001)) (citation omitted).

In the case *sub judice*, the trial court, following the suppression hearing, made the following pertinent findings:

.....

4. The officers found a black female lying on the floor just inside the front door of 1706 Waverly Drive and observed blood around the front door area.

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5. They entered the residence to check on the victim and proceeded to conduct a protective search of the premises looking for any suspects, other victims or weapons.

6. They observed a lot of blood around the victim, blood down the hallway and in one of the bedrooms.

....

8. After the officers completed their search, they secured the crime scene with evidence tape and controlled access to it. Neither of these initial officers seized any evidence that they had observed in plain view during their protective search. In fact, they seized no evidence at all.

9. Jane [Aswell], a lab technician with the High Point Police Department Crime Lab, arrived around 12:20 a.m.

....

11. Officers Cole and Carter were still present upon Mrs. [Aswell]'s arrival waiting outside the residence; the High Point Police Department had maintained continuous control of the premises from the time of their initial arrival and search.

12. High Point Police detective Mike Bye arrived on the scene at 1:01 a.m. He discussed the situation with Jane [Aswell] and asked her to process the scene. They entered the residence at approximately 1:20 a.m. At the time they entered, the front storm door of the residence had been covered.

13. When Detective Bye and Mrs. [Aswell] entered the residence, the victim's body was still in the front door area.

14. Mrs. [Aswell] began by videotaping the outside and inside of 1706 Waverly Drive.

15. She next made 35mm photos of the crime scene including the interior. She photographed the scene and items of evidence there before anything was seized.

16. Detective Bye had her make photographs of the victim's body illustrating its location and injuries.

17. She also made photographs of the blood around the front door and down the hallway into a bedroom.

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18. Both the videotape and still photos were of items in plain view.

19. At no time were drawers opened or any containers opened and searched. All things that were observed and seized (including photographs) were in plain view. These were the items were [sic] initially observed by Officers Cole and Carter during their emergency search.

20. Mrs. [Aswell] then began to collect items of evidence that were observed in plain view. In addition to the photographic evidence, Mrs. [Aswell] collected the following:

- a. A note written on a white piece of paper that was attached to a bedroom door and in plain view.
- b. Several blood samples from the interior of the residence that were all in plain view.

Defendant argues specifically, that there is no evidence to support the trial court's Finding of Fact number nine in that the lab technician did not arrive around 12:20 a.m. Rather, he argues that the evidence supports a finding that she actually arrived at 12:31 a.m. Although there was testimony at trial that Aswell arrived at the crime scene at 12:31 a.m., the testimony of Officer Bye at the Suppression hearing was that Aswell arrived at 12:19 a.m. We conclude that the trial court's Finding of Fact number nine is supported by competent evidence in the record even though there is evidence in the record to support a contrary finding. Accordingly, we are bound by the trial court's Finding of Fact number nine.

In addition, though defendant in his Assignment of Error number three states generally that the findings of fact are not supported by the evidence, this broad challenge is not sufficient to preserve appellate review of all the court's findings. *Lumsden v. Lawing*, 107 N.C. App. 493, 499, 421 S.E.2d 594, 597-98 (1992) (quoting, *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985)) (“[a] single assignment generally challenging the sufficiency of the evidence to support numerous findings of fact, as here, is broadside and ineffective.”). Nor does defendant specifically argue in his brief that any other finding except number nine is unsupported by the evidence. “Where no exceptions have been taken to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal.” *State v. Pendleton*, 339 N.C. 379, 451 S.E.2d 274 (1994), (quoting *Schloss v.*

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Jamison, 258 N.C. 271, 275, 128 S.E.2d 590, 593 (1962)), *cert. denied*, 515 U.S. 1121, 132 L. Ed. 2d 280 1995. We therefore, conclude that this Court is bound by the findings of the trial court. *Id.*; *accord State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

We turn next to whether these findings support the trial court's conclusion that:

9. . . . Mrs. [Aswell]'s and Detective Bye's entry into the residence did not constitute a separate search within the purview of the Fourth Amendment but instead constituted, at most, a "second look". The plain view doctrine, therefore, controls the present case and the search and seizure that occurred was not unreasonable and did not violate the Defendant's Fourth Amendment rights.

Defendant contends that the trial court, in concluding that the search and seizure were not in violation of the Fourth Amendment, misapplied both the doctrines of "second look" and "plain view".

The Fourth Amendment grants individuals the right to be secure against unreasonable searches and seizures. *Mincey v. Arizona*, 437 U.S. 385, 57 L. Ed. 2d 290 (1978). Generally, a warrant supported by probable cause is required before a search is considered reasonable. *State v. Woods*, 136 N.C. App. 386, 524 S.E.2d 363, *disc. review denied*, 351 N.C. 370, 543 S.E.2d 147 (2000). The warrant requirement "is a principal protection against unreasonable intrusions into private dwellings." *Woods*, 136 N.C. App. at 390, 524 S.E.2d at 365. This requirement is "subject only to a few specifically established and well delineated exceptions." *Id.*

One exception is the exigent circumstances exception. *Woods*, 136 N.C. App. at 390, 524 S.E.2d at 366. This exception may apply where law enforcement officers are responding to an emergency, and where there is a compelling need for official action and no time to secure a warrant. *U.S. v. Moss*, 963 F.2d 673 (4th Circuit 1992); *see also, Woods*, 136 N.C. App. at 391, 524 S.E.2d at 366. Where, for example, officers believe that persons are on the premises in need of immediate aid, or where there is a need "to protect or preserve life or avoid serious injury", the Supreme Court has held that a warrantless search does not violate the Fourth Amendment. *Mincey*, 437 U.S. at 392, 57 L. Ed. 2d at 300 (quoting *Wayne v. United States*, 115 U.S. App. D.C. 234, 241, 318 F.2d 205, 212 (1963)). To justify a warrantless entry of a residence, "there must be probable cause and exigent cir-

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cumstances which would warrant an exception to the warrant requirement.” *State v. Wallace*, 111 N.C. App. 581, 586, 433 S.E.2d 238, 241, *disc. review denied*, 335 N.C. 242, 439 S.E.2d 161 (1993). The burden generally rests on the State to prove the existence of exigent circumstances. *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685 (1969).

Moreover, it is well settled that where the officers’ search is conducted during the course of “legitimate emergency activities”, they may seize evidence of a crime that is “in plain view”. The U.S. Supreme Court in *Mincey*, 437 U.S. at 392-93, 57 L. Ed. 2d at 300, stated:

We do not question the right of police to respond to emergency situations. . . . [T]he Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. Similarly, when the police come upon the scene of a homicide they may make a prompt warrantless search of the area to see if there are other victims or if a killer is still on the premises. . . . And the police may seize any evidence that is in plain view during the course of their legitimate emergency activities.

(citations omitted).

In addition, our Supreme Court in *State v. Jolley*, 312 N.C. 296, 321 S.E.2d 883 (1984), has held that

when a law enforcement officer enters private premises in response to a call for help and thereby comes upon what reasonably appears to be the scene of a crime, and secures the crime scene from persons other than law enforcement officers by appropriate means, all property within the crime scene in plain view which the officer has probable cause to associate with criminal activity is thereby lawfully seized within the meaning of the fourth amendment. Officers arriving at the crime scene thereafter and while it is still secured can examine and remove property in plain view without a search warrant.

Jolley, 312 N.C. at 300-01, 321 S.E.2d at 886.

We find *Jolley* controlling in the instant case. The facts in *Jolley* are as follows: the defendant immediately called the operator and asked for help following the shooting death of her husband at their

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home with a .22 semi-automatic rifle. Members of the rescue squad first responded to the home, followed by a deputy from the sheriff's department who was the first law enforcement officer to arrive at the crime scene. Upon entry into the house, the deputy observed the victim's body in the den-kitchen area of the house, a .22 semi-automatic rifle, and defendant kneeling in the kitchen sobbing. The deputy walked the defendant outside of the house and escorted her to his patrol vehicle where she sat in the front seat. After the emergency personnel left with the victim, the deputy "secured a rope and crime scene poster . . . and roped off the residence. . . ." *Id.* at 297, 321 S.E.2d at 884. Fifteen minutes later, a detective arrived, went into the house and stayed for six hours, after which time he took the rifle and the cartridges, which the deputy had earlier observed in plain view, to the county jail. The Court of Appeals held that the detectives had conducted a warrantless search that was not justified by the exigent circumstances exception. The Supreme Court reversed stating that this Court erred in failing to focus upon the issue: At what point was the rifle in question seized within the meaning of the Fourth Amendment? The Supreme Court reasoned that by roping off the residence and posting signs, the deputy lawfully seized the rifle; and further, "[b]ecause the rifle was lawfully seized, it was properly admitted into evidence." *Id.* at 303, 321 S.E.2d at 888. The Court further ruled that the detective, who later arrived at the scene as a result of defendant's call for help, "had every right to enter the area secured by [the deputy]" and "[o]nce lawfully inside . . . he then properly [removed] the rifle which was in plain view and which had been seized by the securing of the crime scene." *Id.*

In the case *sub judice*, it is uncontested that Officers Cole and Carter lawfully entered the residence at 1706 Waverly Drive in response to a call for help. When the officers entered the house, they observed the victim's body and, upon conducting a protective sweep, observed varying amounts of blood throughout the house including the wall, the hallway, the carpet and a large amount of blood in the back bedroom on the bedspread. Thereupon, the officers secured the residence by covering the door and roping off the residence with yellow tape. The lab technician arrived approximately thirty minutes after the original entry by Officers Cole and Carter. Approximately thirty minutes after the arrival of the lab technician, Detective Bye arrived at the scene. According to the trial court's findings, the lab technician and Detective Bye entered the residence at which time a videotape and photographs were taken of the interior of the house. In addition, blood and evidence was seized. The trial court further found

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that all of the evidence seized was in plain view and the entry by Detective Bye did not constitute a new search. We conclude that Detective Bye had been called to the scene, just as the detectives in *Jolley*. He had every right to enter the area secured by Officers Cole and Carter and remove evidence observed in plain view, which had been seized by the securing of the crime scene. *State v. Mickey*, 347 N.C. 508, 516, 495 S.E.2d 669, 674 (“[A] seizure is lawful under the plain view exception when the officer was in a place where he had the right to be when the evidence was discovered. . . .”), *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998).

Moreover, we reject defendant’s argument that the facts of this case are virtually identical to the those in *Thompson v. Louisiana*, 469 U.S. 17, 83 L. Ed. 2d 246 (1984). The critical distinction is that, in *Thompson*, the evidence at issue was not *discovered* in plain view and was not discovered during the victim or suspect search. In *Thompson*, the defendant sought to suppress evidence discovered during a “general exploratory search” which included a pistol found inside a chest of drawers, a torn up note found in a wastepaper basket and another letter found folded up inside an envelope. *Id.* at 19, 83 L. Ed. 2d 249. In the present case, the trial court found that the only evidence seized was evidence observed in plain view during the police officers’ protective sweep of the house. At no time during the search did the officers open drawers or closed containers.

Nor do we find this inconsistent with *Mincey v. Arizona*. Like *Thompson*, and unlike the present case, the officers in *Mincey* conducted an exhaustive search. They opened drawers, closets and cupboards, emptied clothing pockets and pulled up sections of the carpet. They did not, as in the case before us, confine their search and seizure to items discovered in plain view during the emergency search.

We hold that the trial court’s findings support the court’s conclusion that the subsequent entry by Detective Bye did not constitute a separate search. We further hold that the search and seizure were not unreasonable under the circumstances and that such conclusion is consistent with the law. We decline to examine the “second look” doctrine relied on by the trial court in that we do not find it dispositive of the issues presented here. Accordingly, we overrule this assignment of error.

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II.

[2] Defendant next argues that the short-form murder indictment violated his constitutional rights in that it failed to allege aggravating circumstances. He concedes that the indictment complies with N.C.G.S. § 15-144 (2001). He further concedes that this Court is bound by our Supreme Court decisions rejecting constitutional challenge to N.C.G.S. § 15-144 and the short form indictment. Rather, defendant argues that our Supreme Court's position is erroneous and should be disregarded. We disagree and find defendant's argument without merit.

N.C.G.S. § 15-144 reads in pertinent part,

[i]n indictments for murder . . . , it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), . . . and any bill of indictment containing the averments and allegations herein named shall be good and sufficient in law as an indictment for murder or manslaughter. . . .

In the case *sub judice*, the indictment against defendant for murder contained the following language:

The jurors for the State upon their oath present that on or about the [28 August 1999] and in [Guilford County] the defendant . . . unlawfully, willfully and feloniously and of malice forethought kill and murder Sharon Little Phillips.

We conclude that this indictment herein complies with the requirements of N.C.G.S. § 15-144, for a short-form murder indictment. N.C.G.S. § 15-144. An indictment that complies with these statutory requirements will support a conviction of both first-degree and second-degree murder. *See State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984). Furthermore, our Supreme Court has previously held that a short-form indictment complying with N.C.G.S. § 15-144 satisfies the North Carolina Constitution. *See, e.g. State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

Defendant relies on *Jones v. United States*, 526 U.S. 227, 143 L. Ed.2d 311 (1999) for the proposition that "any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 243 n.6, 143 L. Ed. 2d at 326. The U.S. Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d

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435 (2000), reaffirmed this proposition by applying it to state criminal proceedings. Here, defendant argues that the short-form murder indictment is not sufficient to charge capital first-degree murder under the rule set forth in *Jones* and *Apprendi*. We disagree.

Our Supreme Court in *State v. Braxton*, 352 N.C. 158, 531 S.E.2d 428 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001), reviewed a short-form murder indictment in light of *Apprendi* and held that the short-form indictment is sufficient to allege first-degree murder under the United States Constitution:

The crime of first-degree murder and the accompanying maximum penalty of death, as set forth in N.C.G.S. § 14-17 and North Carolina's capital sentencing statute, are encompassed within the language of the short-form indictment. We, therefore, conclude that premeditation and deliberation need not be separately alleged in the short-form indictment. Further, the punishment to which defendant was sentenced, namely, the death penalty, is the prescribed statutory maximum punishment for first-degree murder in North Carolina. Thus, no additional facts needed to be charged in the indictment. Given the foregoing, defendant had notice that he was charged with first-degree murder and that the maximum penalty to which he could be subjected was death.

Id. at 175, 531 S.E.2d at 437-38.

We conclude that defendant's argument that the short-form murder indictment violates his Fourteenth Amendment Due Process rights is without merit. Thus, the trial court did not err in denying defendant's motion to dismiss the indictment. Accordingly, this assignment of error is overruled.

We hold, for the reasons stated herein, that defendant received a trial free of any error.

No error.

Judges WYNN and McCULLOUGH concur.

SINGLETON v. HAYWOOD ELEC. MEMBERSHIP CORP.

[151 N.C. App. 197 (2002)]

STEVE SINGLETON, PLAINTIFF-APPELLEE v. HAYWOOD ELECTRIC MEMBERSHIP CORPORATION, DEFENDANT-APPELLANT

No. COA01-467

(Filed 2 July 2002)

1. Utilities— installation of new lines and poles—trespass

The trial court did not err by granting partial summary judgment for plaintiff (with the issue of damages tried later) in an action for trespass which arose when an electric cooperative repaired a downed power line with new power poles and new lines, cutting apple trees in the process. There is no evidence of an express easement for placement of the poles or utility lines; although the Rules and Regulations governing membership in the cooperative state that necessary easements or rights of way are to be provided, the record does not include an express easement; and there is no prescriptive easement through the utility lines which were being replaced because there is no evidence that this was anything more than mere use. In order to overcome the presumption of permissive use, there must be some evidence that the use is hostile.

2. Appeal and Error— assignment of error—required

An argument not set out as an assignment of error was not preserved for appellate review.

Judge WALKER dissenting.

Appeal by defendant from judgment filed 19 October 2000 by Judge Loto G. Caviness in Superior Court, Haywood County. Heard in the Court of Appeals 30 January 2002.

Smathers & Norwood, by Patrick U. Smathers, for plaintiff-appellee.

Parker Poe Adams & Bernstein L.L.P., by David N. Allen, Jack L. Cozort and Mitchell P. Johnson, for defendant-appellant.

McGEE, Judge.

Haywood Electric Membership Corporation (HEMC) is a rural electric cooperative enterprise that is owned by its consumer members. Steve Singleton (plaintiff) first became a member of HEMC in August 1966 when he signed a membership application in which he

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agreed to be bound by the rules and regulations (Rules and Regulations) governing membership in HEMC. This application, by its own terms, was only in effect for one year.

Plaintiff signed another application for membership in HEMC in November 1976 in which he agreed to purchase from HEMC "all central station electric power and energy used on any and all premises to which the Cooperative furnishes electric service pursuant to my membership for so long as such premises are owned or directly occupied or used by me." By signing the application, plaintiff also agreed to be bound by the Rules and Regulations which read in part:

V. SECTION V-CONDITIONS OF SERVICE

A. General Conditions:

The Cooperative will supply electrical service to the Member after all of the following conditions are met:

...

2. The Member agrees to furnish without cost to the Cooperative all necessary easements and rights-of-way.

...

4. The Member agrees that the Cooperative will have right of access to member's premises at all times for the purpose of reading meters, testing, repairing, removing, maintaining or exchanging any or all equipment and facilities which are the property of the Cooperative, or when on any other business between the Cooperative and the Member. . . .

...

8. The Member agrees to be responsible for any additional facilities, protective devices, or corrective equipment necessary to provide adequate service or prevent interference with service to the Cooperative's other members. Such loads include, but are not limited to, those requiring excessive capacity because of large momentary current demands or requiring close voltage regulation, such as welders, X-ray machines, shovel loads, or motors starting across the line.

...

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D. Right-of-Way Maintenance:

The Member will grant to the Cooperative, and the Cooperative will maintain right-of-way according to its specifications with the right to cut, trim, and control the growth of trees and shrubbery located within the right-of-way or that may interfere with or threaten to endanger the operation or maintenance of the Cooperative's line or system. . . .

. . .

VIII. SECTION VIII-COOPERATIVE AND MEMBER OBLIGATIONS

. . .

B. Responsibility of Member and Cooperative:

. . . The Cooperative will not be liable for loss or damage to any . . . property, . . . resulting directly or indirectly from the use, misuse, or presence of the said electric service . . . or for the inspection or repair of the wires or equipment of the Member.

It is understood and agreed that the Cooperative is merely a supplier of electric service, and the Cooperative will not be responsible for any damage or injury to the buildings . . . or other property of the Member due to lighting, defects in wiring or other electrical installations, defective equipment or other cause not due to the negligence of the Cooperative. . . .

In maintaining the right-of-way, the Cooperative will not be liable for damage to trees, shrubs, lawns, fences, sidewalks or other obstructions incident to the installation, maintenance or replacement of facilities, unless caused by its own negligence.

Plaintiff purchased the real property at issue in this appeal in September 1995. Plaintiff testified that at the time of purchase, only a "short service pole" was located on the property. He also stated that "two small black [power] lines" ran across the property that were "about three-eighths of an inch" in size. Plaintiff described these lines as being approximately three hundred feet above the ground. At the time he purchased the property, HEMC provided and continues to provide electrical service to the property.

Following an ice storm on or about 21 February 1998, plaintiff noticed that a power line was down on the property and he called HEMC to report the downed line. Three days later, he again tele-

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phoned HEMC to come and repair the downed line. Plaintiff met with Gary Best, an HEMC employee, and requested repairs be performed and that no vehicles enter onto his property in making the repairs. Following this conversation, an employee of HEMC entered the property and exchanged the utility lines, placed new poles on the property and cut limbs from approximately twelve trees on plaintiff's property. Plaintiff testified that when he went back to the property he saw that "apple trees [had been] cut in half, three poles [had been] set on [his] property that had [] never been there before." Additionally, he stated that four lines were added that were approximately thirty feet from the ground and these lines were "at least twice as large as the others, maybe three or four times" larger.

Plaintiff filed a complaint against HEMC on 17 November 1999, alleging HEMC was liable for damages based upon theories of trespass, inverse condemnation and conversion. Plaintiff later voluntarily dismissed his claims of inverse condemnation and conversion. Plaintiff filed a motion for partial summary judgment on the issue of trespass liability on 14 September 2000. At a hearing on 2 October 2000, HEMC also orally moved for summary judgment. The trial court granted plaintiff's motion for partial summary judgment in an order which stated in part

that there are no factual disputes and that [HEMC] does not have an express or prescriptive easement for placing utility lines, poles, or other electrical transmission equipment upon Plaintiff's real property, and that the actions of [HEMC] constitutes trespass and a continuing trespass, and that [HEMC] is liable to Plaintiff for damages and such other relief as by law provided.

This order was entered on 6 October 2000.

The issue of damages was tried before a jury on 9 October 2000. The jury determined that plaintiff was entitled to recover the amount of \$700.00 per month for rental from HEMC. The trial court entered judgment on 19 October 2000, stating in part

1. That summary judgment was previously granted to Plaintiff wherein it was determined that [HEMC] does not have an express or prescriptive easement for the placing of power poles, transmission lines, or other electrical equipment upon Plaintiff's real property.

2. That Plaintiff took a voluntary dismissal without prejudice on the claims of inverse condemnation and conversion of

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Plaintiff's real property, leaving the claims for trespass and injunctive relief for determination.

The trial court then concluded as a matter of law

1. That Plaintiff is entitled to recover of [HEMC] the sum of \$700.00 per month from February 21, 1998 through October 10, 2000.

2. That Plaintiff is entitled to have the poles, electrical lines, and other miscellaneous transmission equipment removed from Plaintiff's real property to terminate the continuous trespass.

3. That [HEMC] is liable for any additional rent or other damages sustained from October 10, 2000 until such time as [HEMC] ceases to trespass upon Plaintiff's property.

4. That Plaintiff is entitled to recover costs incurred in this matter.

5. That Plaintiff is entitled to recover of [HEMC] interest on the sum awarded by the Jury from the date of filing (November 17, 1999) until paid, pursuant to G.S. 24-5 (b).

The trial court awarded plaintiff a total of \$22,125.80 as rental, ordered HEMC to remove all utility lines, poles and other equipment from plaintiff's property and be liable for rental sums until the lines, poles and equipment were removed, and awarded plaintiff \$1,591.72 in interest, and \$411.87 in costs. From this judgment, HEMC appeals.

HEMC raises three assignments of error on appeal; however, argues only two assignments of error in its brief. Therefore, the remaining assignment of error is deemed abandoned. N.C.R. App. P. 28(a); *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 593-94 (1975) ("[I]t is well recognized that assignments of error not set out in appellant's brief, and in support of which no arguments are stated or authority cited, will be deemed abandoned.").

[1] HEMC contends on appeal that the trial court erred in granting plaintiff's motion for partial summary judgment because no genuine issues of material fact exist and HEMC was entitled to judgment as a matter of law.

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

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material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56 (c) (1999). By entering summary judgment, the trial court rules only on questions of law; summary judgment is therefore fully reviewable on appeal. *Va. Electric and Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986).

HEMC argues that the placement of the power poles and utility lines on plaintiff’s property does not constitute trespass because the placement was authorized by the Rules and Regulations which plaintiff agreed to be bound by; therefore, no wrongful entry on plaintiff’s property occurred.

Plaintiff does not dispute that he agreed to abide by the Rules and Regulations, but contends that the scope of the Rules and Regulations does not extend to the placement of the new poles and utility lines.

The Rules and Regulations state that HEMC will supply electrical service to a member after the member agrees to furnish all necessary easements and rights-of-way. However, the trial court found that no express or prescriptive easements existed on plaintiff’s property for the placement of the power poles, utility lines or other electrical transmission and their placement on plaintiff’s property therefore constituted a trespass.

“A trespass is a wrongful invasion of the possession of another.” 28 Strong’s N.C. Index 4th *Trespass* § 1 (1994). *See also Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952). Our Supreme Court has stated that the term “continuing trespass” includes “wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some quasi-public franchise.” *Oakley v. Texas Co.*, 236 N.C. 751, 753, 73 S.E.2d 898, 898 (1953) (citing *Sample v. Lumber Co.*, 150 N.C. 161, 165-66, 63 S.E. 731, 732 (1909)). We must determine whether the trial court correctly concluded that HEMC’s placement of the power poles and utility lines was wrongful and therefore constitutes a trespass.

There is no evidence in the record in this case that an express easement exists for the placement of poles or the utility lines on plaintiff’s property. An express easement must be in writing pursuant to the Statute of Frauds and be sufficiently certain to permit the identification and location of the easement with reasonable certainty. *Prentice v. Roberts*, 32 N.C. App. 379, 383, 232 S.E.2d 286, 288, *disc.*

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review denied, 292 N.C. 730, 235 S.E.2d 784 (1977). “The burden of proving that a sufficient writing exists [of] the conveyance of [an] easement is on the party claiming its existence.” *Tedder v. Alford*, 128 N.C. App. 27, 31, 493 S.E.2d 487, 490 (1997), *disc. review denied*, 348 N.C. 290, 501 S.E.2d 917 (1998). There is no evidence in the record of any document signed by plaintiff describing an express easement granted to HEMC. In fact, HEMC concedes in its brief to our Court that no recorded easement exists when it states that “[HEMC] electric lines have crossed the property now owned by [plaintiff] for more than fifty years without recorded easement or right-of-way.” Therefore, no express easement permitted HEMC to enter plaintiff’s property to place the new power poles or utility lines.

Although the Rules and Regulations state that necessary easements and/or rights-of-way are to be provided by HEMC members, this provision does not give HEMC the right to create an easement if one does not already exist, but at most gives HEMC the power to require its members to create an easement for the benefit of HEMC. Even if HEMC did intend to create an easement, the burden is on HEMC to show an express easement has been created and the record does not include such an express easement.

Also, the record does not show that HEMC has a prescriptive easement which would permit placement of the power poles and new utility lines on the property.

To establish a prescriptive easement, a party must prove by a preponderance of the evidence: “(1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.”

Pitcock v. Fox, 119 N.C. App. 307, 309, 458 S.E.2d 264, 266 (1995) (quoting *Potts v. Burnette*, 301 N.C. 663, 666, 273 S.E.2d 285, 287-88 (1981)).

“In establishing the prescriptive easement, the party must overcome the presumption that the party is on the true owner’s land with the owner’s permission.” *Pitcock*, 119 N.C. App. at 309, 458 S.E.2d at 266 (citing *Johnson v. Stanley*, 96 N.C. App. 72, 74, 384 S.E.2d 577, 579 (1989) and *Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900 (1974)). In order to overcome this presumption, “[t]here

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must be some evidence accompanying the user which tends to show that the use is hostile in character and tends to repel the inference that it is permissive and with the owner's consent." *Dickinson*, 284 N.C. at 581, 201 S.E.2d at 900. A party's "[e]ntitlement to an easement by prescription is restricted because a landowner's "'mere neighborly act'" of allowing someone to pass over his property may ultimately operate to deprive the owner of his land." *Johnson v. Stanley*, 96 N.C. App. 72, 74, 384 S.E.2d 577, 579 (1989) (quoting *Potts v. Burnette*, 301 N.C. 663, 667, 273 S.E.2d 285, 288 (1981) (citation omitted)). Therefore, "mere use alone is presumed to be permissive, and, unless . . . rebutted . . . will not ripen into a prescriptive easement." *Johnson*, 96 N.C. App. at 74, 384 S.E.2d at 579 (citing *Dickinson v. Pake*, 284 N.C. 576, 580-81, 201 S.E.2d 897, 900 (1974)).

In this case, although the utility lines had run across plaintiff's property for more than fifty years, there is no evidence in the record to show that this use by HEMC of plaintiff's land constituted anything more than mere use. The record fails to show that HEMC had a prescriptive easement upon which to place either utility lines over plaintiff's property or new power poles on plaintiff's property where none previously existed.

[2] HEMC additionally argues that plaintiff should be estopped from asserting that HEMC has trespassed because plaintiff's action for trespass is an attempt to enjoy the benefits of membership in HEMC without accepting the terms and qualifications of membership. However, HEMC failed to set out this argument as an assignment of error in the record on appeal. Therefore, pursuant to the N.C. Rules of Appellate Procedure, defendant has failed to properly preserve this question for appellate review. N.C.R. App. P. 10 (a) ("[T]he scope of review on appeal is confined to a consideration of those assignments of error set out in the record on appeal.").

The trial court did not err in determining there are no genuine issues of material fact and that plaintiff is entitled to judgment as a matter of law. The trial court's judgment is affirmed.

Affirmed.

Judge BIGGS concurs.

Judge WALKER dissents with a separate opinion.

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WALKER, Judge, dissenting.

I respectfully dissent from the majority opinion which affirms the granting of summary judgment in favor of plaintiff on the issue of trespass and I would reverse the order and judgment of the trial court.

In this case, plaintiff has been a member of HEMC since 1966. The property in question is owned by plaintiff and serviced by HEMC. As the majority notes, plaintiff and this property were subject to the Service Rules and Regulations through a written contract which plaintiff signed. In pertinent part, the contract provides:

V. SECTION V—CONDITIONS OF SERVICE

A. General Conditions:

...

4. The Member agrees that the Cooperative will have right of access to member's premises at all times for the purpose of . . . *repairing, removing, maintaining or exchanging any or all equipment and facilities* which are the property of the Cooperative

...

D. Right-of-Way Maintenance:

The Member will grant to the Cooperative, and the Cooperative will maintain right-of-way according to its specifications with the right to cut, trim, and control the growth of trees and shrubbery located within the right-of-way *or that may interfere with or threaten to endanger the operation or maintenance of the Cooperative's line or system*

(emphasis added).

After an ice storm in February of 1998, plaintiff contacted HEMC and requested it to come onto his property because one of HEMC's electrical wires had broken and fallen onto plaintiff's garage. The affidavit of Ronnie Allen, an employee of HEMC, stated the following in part:

2. During February of 1998, I went to Mr. Steve Singleton's property to put back up electrical lines that had come down as a result of an ice storm. Our records reveal that the transmission line at issue has been in place for over fifty years. In February of 1998

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there were 178 meters on that line past the property of the Plaintiff. On the date in question those customers were without power.

3. It was obvious to me that the existing copper wire and supporting poles were not adequate since they had failed. We therefore determined to replace the old copper wire with aluminum which is stronger. We further determined that safety concerns dictated that the pole on the top of the ridge just outside the fence to Mr. Singleton's property needed to be replaced with a stronger pole. Two additional poles were also needed to be installed to provide additional support between the ridges. We placed one between U.S. Highway 276 and the Pigeon River and the other about halfway up the ridge going toward the back of Mr. Singleton's property. To the best of my knowledge, we only placed two poles on Mr. Singleton's property.

While repairing and exchanging the wires, HEMC cut about a dozen apple trees which were in the path of the new wire.

“A trespasser is a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise.” *Smith v. VonCannon*, 283 N.C. 656, 660, 197 S.E.2d 524, 528 (1973) (citations omitted). “One who enters upon the land of another with the consent of the possessor” is not liable in trespass unless he commits a “wrongful act in excess or abuse of his authority to enter.” *Id.* Consent may be actual, through written contract or an oral agreement, or it can be implied from the circumstances. *See Smith*, 283 N.C. at 661-62, 197 S.E.2d at 529; *Rawls & Assoc. v. Hurst*, 144 N.C. App. 286, 292, 550 S.E.2d 219, 224, *disc. rev. denied*, 354 N.C. 574, 559 S.E.2d 183 (2001) (“Consent may be implied and an apparent consent may be sufficient if it is brought about by the acts of the person in possession of the land. There does not have to be an invitation to enter the land[;] it is sufficient that the possessor's conduct indicates that he consents to the entry”).

Here, the contract granted a right of access to HEMC to enter the property in question to repair, remove, maintain, or exchange the equipment owned by HEMC. The contract further granted HEMC the right to cut and trim trees and shrubbery which “may interfere with or threaten to endanger the operation or maintenance of the Cooperative's line or system.” When the line fell, plaintiff requested HEMC to come onto his property to repair the line.

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In its judgment, the trial court ordered HEMC, among other things, to “remove all power lines.” A significant fact, which seems to have been overlooked here, is that for over fifty years, pursuant to the agreement, a copper utility wire has been located across plaintiff’s property. Only after an ice storm, whereby the wire was broken, did HEMC undertake to replace the copper wire with a stronger aluminum wire and provide further stability by lowering the wire and installing three additional poles to which the new wire was attached.

Regardless of whether there was an easement granted, HEMC had the express permission of plaintiff, both through the contract and from the plaintiff himself, to enter the property to repair and exchange the lines which had fallen. In doing so, HEMC was required, for safety reasons, to place new wire and poles on the property in exchange for the old wire which broke under the ice. For there to be trespass, there must be a determination of whether this action on the part of HEMC was a “wrongful act in excess or abuse of [its] authority.”

The majority upholds the trial court’s granting of summary judgment in favor of plaintiff on the issue of trespass on the basis that “Defendant does not have an express or prescriptive easement for placing utility lines, poles, or other electrical transmission equipment upon Plaintiff’s real property.” I strongly disagree that an act of trespass has been established, as a matter of law, on the basis determined by the trial court and upheld by this Court. I would remand the case to the trial court for a determination of whether HEMC committed an act in excess of the authority granted under the service rules and regulations.

I also note that the majority holds that HEMC failed to preserve the issue of estoppel for review on appeal. HEMC took exception to the granting of summary judgment in favor of plaintiff which I deem would include the grounds of estoppel. I find this issue should be allowed to be asserted on remand.

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STATE OF NORTH CAROLINA v. BRIAN WENDALL RHODES

No. COA01-621

(Filed 2 July 2002)

1. Search and Seizure— trash can—warrantless search apart from collection

The trial court erred by denying defendant's motion to suppress marijuana seized without a warrant from his trash can where the contents were not placed there for collection in the usual and routine manner and the trash can was within the curtilage of defendant's home. Defendant maintained an objectively reasonable expectation of privacy.

2. Search and Seizure; Confessions and Incriminating Statements— drug dog alerting—defendant's statement

The trial court did not err in a marijuana prosecution by admitting defendant's statements and evidence that a drug dog alerted to the dresser in defendant's bedroom (in which no marijuana was found) where an informant signaled that he had completed a transaction involving marijuana left in defendant's trash can, officers seized the marijuana, knocked on defendant's door, and told defendant that they knew about the transaction, defendant invited them in, confessed, and told officers that they could search his house, and the drug dog was brought in. Defendant consented to the search and voluntarily confessed.

3. Evidence— other offenses—details of conviction

The trial court did not abuse its discretion in a marijuana prosecution by excluding the details of an informant's prior conviction for assault on a female after evidence of the conviction was allowed.

4. Search and Seizure— improper search of trash can—no prejudicial error

There was no prejudicial error in the denial of a motion to suppress marijuana seized in an improper search of a trash can where there was overwhelming evidence of defendant's guilt.

Appeal by defendant from judgment entered 14 December 2000 by Judge Henry E. Frye, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 15 April 2002.

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Attorney General Roy Cooper, by Assistant Attorney General Melissa L. Trippe, for the State.

C. Orville Light, for defendant-appellant.

EAGLES, Chief Judge.

On 12 June 2000, defendant was indicted for possession with intent to manufacture, sell, and deliver marijuana and felony possession of marijuana. On 15 August 2000, defendant filed a motion to suppress evidence. After a hearing on 13 September 2000, the Honorable Peter M. McHugh denied defendant's motion. On 14 December 2000, a jury found defendant guilty of possession with intent to manufacture, sell, and deliver marijuana and felony possession of marijuana. The Honorable Henry E. Frye, Jr., sentenced defendant to a term of six to eight months incarceration for possession of marijuana and a consecutive sentence of six to eight months for possession with intent to manufacture, sell, and deliver marijuana. Defendant appeals.

At the suppression hearing, the evidence tended to show that on 13 January 2000, Ricky Lee Shelton was working as a paid informant for the Rockingham County Sheriff's Department. At approximately 4:30 p.m., Shelton called Detective F. K. Woods of the Rockingham County Sheriff's Department. Shelton informed Detective Woods about a possible drug transaction involving defendant. At approximately 6:00 p.m., Shelton met Detective Woods at Woods' office. From the office, Shelton paged defendant numerous times. Defendant called Shelton's cell phone. Detective Woods listened in on the conversation between defendant and Shelton. Defendant told Shelton that the marijuana would be in a detergent box inside the trash can outside defendant's home. Defendant instructed Shelton to take the marijuana from the trash can and in payment leave \$1,150 in cash. After hearing this conversation, Detective Woods "got together with some other officers, and [the officers] set up a little plan."

During cross examination of Detective Woods at the suppression hearing, defense counsel established that "the plan" did not include procuring a search warrant:

Q: And do you have the capability within the detective's division to prepare a search warrant?

A: Yes, sir.

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Q: Okay. And would it be fair to say that you have those on computer?

A: I have a format on computer. Yes.

Q: Basically, you would just type in the information and print it out?

A: Yes, sir.

Q: Now, the magistrate's office, obviously, is less than a block away?

A: Correct.

Q: And the magistrate is usually on duty 24 hours a day?

A: Yes.

Q: But you didn't attempt to get a search warrant on that occasion, did you?

A: Due to Mr. Shelton telling me he was on his way, there was no time for a search warrant.

Q: But you knew you were arranging this deal as early as four-thirty.

A: I spoke about the deal. I had not heard the conversation until early that afternoon, and it would not give me any time to do a search warrant before the deal.

Q: How long would it take you to type in some information for a search warrant?

A: I'm not a good typer. It takes me awhile.

Q: The rest of your fellow officers are not good typers, also?

A: No, sir.

Q: And you basically have a format that basically you would just put in your probable cause; is that right?

A: Yes, sir.

Q: And put in the name and address; is that right?

A: Yes, sir.

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Q: And basically everything else in there is already formatted; is that right?

A: We have to list the defendant and his house several times in the search warrant. I mean, it's full of pages that you have to go through. It's not as easy as it seems.

Q: How long do you think it would take you to prepare a search warrant?

A: Me personally? To type it up and get it signed, probably about 40 to 50 minutes.

Q: And, of course, there was no timeframe given over the telephone about any kind of deal, was there?

A: Mr. Shelton said he was on his way, and he knew where Mr. Shelton lived.

Q: And it doesn't take 40 to 50 minutes to get from where Mr. Shelton lives to where Mr. Rhodes lives, and you didn't immediately run out the door. You took some time to set up the operation?

A: Yes, sir, around five to 10 minutes.

After formulating the "take down" plan and deciding not to procure the warrant, Detective Woods and other officers followed Shelton to defendant's house. At the suppression hearing, Detective Woods' testified about what occurred once Shelton and the officers arrived at defendant's residence:

A: [Shelton] pulled up to the residence where Mr. Rhodes lives. It was a matter of fifteen seconds. [Shelton] went to the trash can. The trash can lid came up. The flash light came on, and [Shelton] flashed about four times, and myself and other officers moved in. Mr. Shelton, at that time left the area. I went to the trash can, opened the lid and confirmed it was marijuana by the smelled [sic] and sealed it up in my truck.

Q: Did you ever not see Mr. Shelton from the time he arrived there to Mr. Rhodes' house when he drove up to the time he left?

A: That's correct, never lost eye contact with him.

Q: Where was the trash can located in reference to Mr. Rhodes' house?

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A: It was on the side of the house. You pull up in his driveway, the side door is here to your right and the trash can is sitting right there at the right there at the side of the door.

Q: How far does the house sit off the roadway?

A: Fifty feet maybe.

Q: And once you saw the flashlight flash about four times, you said you went onto the property?

A: I went onto the property. Like I said, I confirmed it was marijuana in the trash can, and then I took it out of the trash can and locked it up in my truck.

After hearing testimony from Detective Woods and argument from both the prosecutor and defense counsel, Judge HcHugh denied defendant's motion to suppress the marijuana.

At trial, the evidence tended to show that after Detective Woods seized the marijuana from the trash can and secured it in his truck, Detective Woods and Deputy Fowler went to defendant's door and knocked. When defendant opened the door, Detective Woods explained to defendant that he had overheard the phone conversation between defendant and Shelton. Defendant invited the two officers into the kitchen. Detective Woods then "let [defendant] again know what [was] found in the trash can." Detective Woods then advised defendant of his *Miranda* rights. According to Detective Woods' testimony, defendant, after being advised of his *Miranda* rights,

stated this to the reporting officer, that he put the marijuana in the trash can and that it was all he had and there was no more marijuana at the residence or in his vehicle. The suspect stated "Y'all can search the house." Then he stated that the reason he had the marijuana [was because] he was trying to do a guy a favor.

After being told by defendant that the officers could search the house, the officers did so. A trained drug dog indicated that there was a controlled substance in defendant's bedroom dresser. Despite the dog's indication, no controlled substance was discovered. From the officers' search of the house, no evidence was seized.

On appeal, defendant contends that the trial court erred by: (1) denying defendant's motion to suppress evidence seized without a search warrant at defendant's home; (2) admitting out of court state-

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ments made by defendant; (3) admitting evidence of the indication by the drug dog on the dresser in defendant's house; and (4) restricting defense counsel's cross examination of the State's witness, Ricky Lee Shelton.

I.

[1] Defendant first assigns error to the trial court's denial of defendant's pre-trial motion to suppress the marijuana that was seized by Detective Woods. Without a warrant, Detective Woods seized marijuana from the outside trash can located beside the steps that led to the side-entry door to defendant's house.

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." *See also* N.C. Const. Art. I, § 19. "Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' for the Constitution requires that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . ." *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed. 2d 576, 585 (1967) (citations omitted). "[S]earches 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." *Id.* *See also State v. Williams*, 299 N.C. 529, 531, 263 S.E.2d 571, 572 (1980).

In *California v. Greenwood*, 486 U.S. 35, 100 L. Ed. 2d 30 (1988), the United States Supreme Court identified one such exception. The Court held that police were not required to obtain a warrant before searching the contents of garbage bags left for regular curbside collection. The Court's decision in *Greenwood* turned on whether respondents "manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable." *Id.* at 39, 100 L. Ed. 2d at 36. In its analysis, the Court noted that "plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public." *Id.* at 40, 100 L. Ed. 2d at 36-37. The Court concluded "that society would not accept as reasonable respondents' claim to an expectation of privacy in trash left for collection in an area accessible to the public." *Id.* at 41, 100 L. Ed. 2d at 37.

In *State v. Hauser*, 342 N.C. 382, 464 S.E.2d 443 (1995), the North Carolina Supreme Court considered whether the Fourth Amendment

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prohibited the warrantless search and seizure of garbage, left within the curtilage of defendant's home, after it had been collected by the garbage collector and subsequently given to the police. In its analysis of the issue, the *Hauser* Court noted that "a reasonable expectation of privacy is not retained in garbage simply by virtue of its location within the curtilage of a defendant's home." *Id.* at 386, 464 S.E.2d at 446. In reaching its conclusion, the *Hauser* Court focused on three factors in determining whether defendant possessed a reasonable expectation of privacy in his garbage: (1) the location of the garbage; (2) the extent to which the garbage was exposed to the public or out of the public's view; and (3) "whether the garbage was placed for pickup by a collection service and actually picked up by the collection service before being turned over to the police." *Id.* After considering these factors, the *Hauser* Court held that "the defendant retained no legitimate expectation of privacy in his garbage once it left his yard *in the usual manner*" and that accordingly, defendant was not entitled to the protection afforded by the Fourth Amendment. *Id.* at 388, 464 S.E.2d at 447 (emphasis added).

"The curtilage concept originated at common law to extend to the area immediately surrounding a dwelling house the same protection under the law of burglary as was afforded the house itself." *United States v. Dunn*, 480 U.S. 294, 300, 94 L. Ed. 2d 326, 334 (1987). "[T]he curtilage is the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life,' and therefore has been considered part of the home itself for Fourth Amendment purposes." *Oliver v. United States*, 466 U.S. 170, 180, 80 L. Ed. 2d 214, 225 (1984) (citation omitted). In North Carolina, "curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955).

While prevailing case law makes clear that trash is not entitled to Fourth Amendment protection when it (1) has been left for collection *in the usual manner* and (2) has been collected *in the usual manner*, no court has held that police may enter upon a private citizen's property without a warrant and search through that citizen's trash can. To the contrary, the law of North Carolina provides "that the constitutional guaranties of freedom from unreasonable search and seizure, applicable to one's home, refer to his dwelling and other buildings within the curtilage but do not apply to open fields, orchards, or other lands not an immediate part of the dwelling site."

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State v. Harrison, 239 N.C. 659, 662, 80 S.E.2d 481, 484 (1954). Accordingly, our resolution of whether the warrantless search of defendant's trash can and the seizure of the marijuana discovered there turns on whether the trash can was within the curtilage of defendant's home and whether defendant manifested an expectation of privacy in the contents of his trash can that society would objectively accept as reasonable.

The facts here are markedly different from those seen in *Greenwood* and *Hauser*. In both *Greenwood* and *Hauser*, without a warrant, police obtained garbage from a sanitation worker after the sanitation worker collected the garbage in the usual manner from the usual location. In *Greenwood* and *Hauser* the respondents in both cases left their garbage for routine pickup. Accordingly, no reasonable expectation of privacy was retained in the respondents' respective garbage. Here, on the evening of the warrantless search of defendant's trash can, the trash can was situated immediately beside the steps that led to the side-entry door of defendant's house. The trash can was approximately fifty feet from the road and was viewable from the road. Unlike the situations in *Greenwood* and *Hauser*, the police in this case did not obtain the contents of defendant's trash can from a sanitation worker who had obtained the trash "in the usual manner." Here, the police trespassed on defendant's property and searched defendant's trash can after informant Ricky Lee Shelton indicated to police, by flashing a flashlight, that marijuana was present in the trash can.

On these facts, we conclude that defendant's trash can was within the curtilage of defendant's residence. In addition, because the trash can was within the curtilage of defendant's home and because the contents of the trash can were not placed there for collection in the usual and routine manner, defendant maintained an objectively reasonable expectation of privacy in the contents of his trash can. *Cf. Hauser*, 342 N.C. at 388, 464 S.E.2d at 447 (no legitimate expectation of privacy in garbage when it left respondent's yard in the usual manner). Accordingly, we hold that Detective Woods violated defendant's Fourth Amendment protections when he, without a search warrant, invaded the curtilage of defendant's residence, searched defendant's trash can, and seized the marijuana discovered therein. The trial court erred by denying defendant's motion to suppress the marijuana.

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II.

[2] Defendant next contends that the trial court erred by (1) admitting out of court statements made by defendant and (2) admitting evidence of the indication by the drug dog on the dresser in defendant's house. Defendant argues that both the out of court statements and the indication by the drug dog resulted from Detective Woods' warrantless search of defendant's trash can and therefore was tainted as the fruit of the poisonous tree. We disagree.

After Detective Woods secured the marijuana in his truck, Detective Woods and Deputy Fowler knocked on defendant's door. When defendant answered, Detective Woods explained to defendant that the officers were investigating drug activity and that the officers knew about the drug transaction between defendant and Shelton. Detective Woods also told defendant that the marijuana in the trash can had been discovered and seized. Defendant then invited the officers into his home. After Detective Woods informed defendant of his *Miranda* rights, defendant confessed to putting the marijuana in the trash can and stated that "he was trying to do a guy a favor." Defendant then told the officers that he had no other drugs and that the officers could search his house. During the search, a drug dog indicated that he smelled a controlled substance in a dresser. Upon further search of the dresser, no controlled substance was discovered.

Here, the State's evidence, even excluding the evidence relating to the warrantless search and seizure, shows that the police officers had probable cause to believe that defendant was engaged in criminal activity. Acting on this probable cause, Detective Woods and Deputy Fowler knocked on the door of defendant's residence in order to discuss with defendant the events that had just transpired. In the course of the officer's discussion with defendant, defendant told the officers that they could search his residence and defendant voluntarily confessed to his participation in the drug transaction after having been read his *Miranda* rights. "Consent . . . has long been recognized as a special situation excepted from the warrant requirement, and a search is not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given." *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997). In addition, "the objective of *Miranda* is to protect against coerced confessions, not to suppress voluntary confessions, which 'are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.'" *State v. Buchanan*, 353 N.C. 332, 342, 543 S.E.2d 823,

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829 (2001) (citation omitted). Based on these well established principles, we hold that defendant's contentions that the trial court erred by admitting evidence of the drug dog's indication and evidence of statements made by defendant are without merit. Defendant consented to, indeed invited, the search of his home and voluntarily confessed to his involvement in the drug transaction. Accordingly, these assignments of error fail.

III.

[3] As his last assignment of error, defendant contends that the trial court erred by restricting the cross examination of paid informant Ricky Lee Shelton. At trial, the court allowed as evidence the fact that Shelton had been previously convicted of assault on a female. On appeal, defendant argues that the trial court erred by excluding evidence detailing the specifics of that assault conviction.

"For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter." N.C. R. Evid. 609(a). Rule 608(b) of the North Carolina Rules of Evidence provides:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Here, the trial court properly allowed evidence of Shelton's prior conviction. In its discretion, however, the trial court excluded the details of Shelton's conviction. Our review of the record reveals that the trial court's exclusion of the details relating to Shelton's conviction was proper and consistent with our rules of evidence. Accordingly, this assignment of error fails.

IV.

[4] Finally, we revisit the warrantless search of defendant's trash can and the seizure of the marijuana in order to consider whether the trial

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court's erroneous denial of defendant's motion to suppress and subsequent admittance of the marijuana evidence at trial was prejudicial error. N.C.G.S. § 15A-1443(b) provides: "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."

After careful review of the record and in light of our other holdings in this opinion, we conclude that the State presented overwhelming evidence of defendant's guilt. Detective Woods overheard the telephone conversation between defendant and confidential paid informant Ricky Lee Shelton during which the drug transaction was organized. Detective Woods watched Shelton as he opened defendant's trash can and signaled to the officers by flashing a flashlight approximately four times thereby indicating the presence of marijuana. Finally, defendant confessed to the investigating officers that defendant had put the marijuana in the trash can and that defendant "was trying to do a guy a favor." "Overwhelming evidence of [a] defendant's guilt of the crimes charged may . . . render a constitutional error harmless." *State v. Autry*, 321 N.C. 392, 403, 364 S.E.2d 341, 348 (1988). In light of this principle and the evidence presented in this case, we hold that while Detective Woods' warrantless search and seizure violated defendant's constitutional protections, the overwhelming evidence of defendant's guilt rendered harmless beyond a reasonable doubt the trial court's denial of defendant's motion to suppress the marijuana.

Accordingly, we hold that defendant's conviction was free from prejudicial error.

No prejudicial error.

Judges HUDSON and BRYANT concur.

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STATE OF NORTH CAROLINA v. CORNELL GLENDELL WILSON

No. COA01-396

(Filed 2 July 2002)

1. Appeal and Error; Juveniles— transfer hearing—failure to preserve right to appeal transfer order

Although defendant juvenile appeals from the validity of evidence received at a transfer hearing and the ensuing transfer order to superior court in an assault with a deadly weapon with intent to kill inflicting serious injury case, defendant failed to preserve the right to appeal the transfer order, because: (1) in order to properly preserve the issue of transfer for review by the Court of Appeals, defendant was required under N.C.G.S. § 7B-2603 to appeal the transfer order and issues arising from it to the superior court, which he failed to do; (2) suspension of the appellate rules under N.C. R. App. P. 2 is not permitted for jurisdictional concerns; and (3) appropriate circumstances are not present in this case to permit the Court of Appeals to issue a writ of certiorari under N.C. R. App. P. 21.

2. Evidence— victim’s statement—previous shooting—opening the door to testimony

The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury case by admitting into evidence a statement by the victim regarding a previous shooting of the victim by defendant’s brother, because: (1) defendant opened the door to the testimony at issue by asking the victim an open-ended question about the length of the victim’s high school education, and the victim responded that he stopped in tenth grade since he was shot by defendant’s brother; and (2) defendant has failed to show that even if admission of the victim’s testimony was error, defendant was prejudiced by its admission.

3. Evidence— hearsay—out-of-court statement—failure to object

The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury case by admitting into evidence an out-of-court statement by defendant’s brother telling bystanders that they might want to leave the park since he was about to “light the place up,” because: (1) defense counsel waived the right to assign error to admission of this testimony since defense counsel failed to object to prior testimony that was vir-

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tually identical to this testimony; and (2) even if this testimony would have been excluded, the same facts were testified to by another witness and would have still been before the jury.

Appeal by defendant from judgment dated 5 October 2000 by Judge William C. Gore, Jr. in Superior Court, Brunswick County. Heard in the Court of Appeals 30 January 2002.

Attorney General Roy Cooper, by David N. Kirkman, Assistant Attorney General, for the State.

Nicole M. Molin and Bruce A. Mason for defendant-appellant.

McGEE, Judge.

Two juvenile petitions were filed in District Court, Brunswick County on 22 November 1999 alleging that Cornell Glendell Wilson (defendant) was a delinquent juvenile as defined by N.C. Gen. Stat. § 7A-517(12) (now N.C. Gen. Stat. § 7B-1501(7)). The petitions charged defendant with conspiracy to commit murder and assault with a deadly weapon with intent to kill inflicting serious injury. Following a probable cause hearing, the court found probable cause for the charge of assault with a deadly weapon with intent to kill inflicting serious injury in an order dated 26 January 2000. The court did not find probable cause for the charge of conspiracy to commit murder. The court transferred defendant's case to superior court in an order dated 26 January 2000. Defendant was indicted in a true bill on 14 February 2000 for assault with a deadly weapon with intent to kill inflicting serious injury.

The State's evidence at trial tended to show that Calvin Mosley (Mosley) and a group of friends went to a park in Supply, North Carolina the afternoon of 21 November 1999 to play basketball. When they arrived, defendant and several other people were already at the park. Mosley and his friends played basketball with defendant and the others.

After the game, defendant's brother, Winston Stothart (Winston), walked to the basketball court with a "little machete" in his hand. Two years earlier, Winston and Mosley had a disagreement and Winston shot Mosley. Mosley testified that on 21 November 1999, as he was sitting down, Winston walked towards him shouting, "Where is he? Where is he? . . . I'm going to kill you, m.f." Mosley said he stood up with a towel in his hand. Winston told Gary Fullwood (Fullwood)

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and Gregory Gilbert (Gilbert), who were near the basketball court, that they might want to leave because he was going to “light this place up.” Winston then got into his car and left. Defendant also left in his truck. On his way out of the park, defendant hit a tree and several people on the basketball court laughed.

Defendant and his brother Shawn Stothart (Shawn) returned in defendant’s truck about five minutes later. Defendant climbed out of the back of the truck and cocked the .12 gauge shotgun he was carrying. A shell ejected and defendant reloaded it into the shotgun. Shawn asked who ran his brother off the road. Witnesses for the State testified that Shawn said “shoot him” or “somebody need[s] to shoot him.” Witnesses testified Shawn pulled out a handgun and Mosley began to run. They testified defendant and his brother fired at Mosley as he ran away. Defendant fired three to five shotgun blasts and Shawn used up all his ammunition firing at Mosley.

Mosley testified he did not own a gun and did not have one with him at the park. Witnesses for the State testified they never saw Mosely with a firearm the day of the shooting. Mosley was struck with shotgun pellets in his back, shoulder, ear, stomach, hands and head. He was taken to the hospital where he stayed for a week. Mosley testified he still had 157 pellets in his body at the time of trial.

Defendant and three defense witnesses testified that at the park Mosley pulled a gun from under his towel while defendant and Mosley were talking. Defendant also said Mosley jumped up from behind a light pole and pointed a gun at Shawn and defendant. Defendant testified he went into shock from seeing Mosley’s gun and fired his shotgun at Mosley. Defendant testified he only shot in the direction of Mosley because Mosley pulled a gun on him. He said he fired after Shawn shot his pistol and he only fired to give himself enough time to run to save his life.

Two defense witnesses testified that Mosley pulled a gun from his towel, shoved it in Shawn’s face, and pulled the trigger twice but the gun just clicked. Shawn then pulled out his gun and began firing at Mosley.

The jury found defendant guilty of felonious assault with a deadly weapon with intent to kill inflicting serious injury. Defendant was sentenced to seventy-three to ninety-seven months imprisonment in a facility suitable for his age. From this judgment, defendant appeals.

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I.

[1] Defendant's first three assignments of error contest the validity of evidence received at the transfer hearing and the ensuing transfer order to superior court. Before reaching the merits of defendant's assignments of error, however, we must first determine if these issues are properly before our Court. The State contends that "defendant failed to preserve the right to appeal the transfer order by failing to appeal the District Court's order to the Superior Court." We agree.

N.C. Gen. Stat. § 7B-2603 (1999), entitled "Right to appeal transfer decision," states in part that

(a) [A]ny order transferring jurisdiction of the district court in a juvenile matter to the superior court may be appealed to the superior court for a hearing on the record. Notice of the appeal must be given in open court or in writing within 10 days after entry of the order of transfer in district court. . . .

. . .

(c) If an appeal of the transfer order is taken, the superior court shall enter an order either (i) remanding the case to the juvenile court for adjudication or (ii) upholding the transfer order. . . .

(d) The superior court order shall be an interlocutory order, and the issue of transfer may be appealed to the Court of Appeals only after the juvenile has been convicted in superior court.

Pursuant to this statute, issues arising from a transfer order from the juvenile court to the superior court must be appealed to the superior court. The statute does not provide a procedure for appeal directly to our Court. Following appeal of the transfer order to superior court, if the transfer order is upheld by the superior court and the juvenile is thereafter convicted in superior court, then an appeal of the transfer order is to our Court.

This current version of N.C. Gen. Stat. § 7B-2603 differs significantly from earlier versions of the statute. Prior to the 1998 recodification of the juvenile code in Chapter 7B of our General Statutes, an order transferring a juvenile case to superior court was a final order and immediately appealable directly to our Court. *State v. T.D.R.*, 347 N.C. 489, 495-96, 495 S.E.2d 700, 703 (1998) (discussing N.C. Gen. Stat. § 7A-666 (1995) which was repealed by Session Laws 1998-202, s. 5, effective July 1, 1999, and replaced by N.C. Gen. Stat. § 7B-2603).

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Upon recodification in 1998, N.C. Gen. Stat. § 7B-2603(a) provided that appeal of a transfer order was to the superior court, but included the language that “a juvenile who fails to appeal the transfer order to the superior court waives the right to raise the issue of transfer before the Court of Appeals until final disposition of the matter in superior court.” N.C. Gen. Stat. § 7B-2603(a) (1998). The language of the 1998 version of N.C. Gen. Stat. § 7B-2603 also tended to indicate that the issue of transfer could be raised for the first time on appeal to this Court following final disposition in superior court.

The General Assembly deleted the above-quoted sentence from the current version of N.C. Gen. Stat. § 7B-2603, which became effective on 1 July 1999 (Session Laws 1999-423, s. 2 effective July 1, 1999). As the State correctly contends in its brief to this Court, by removing this sentence, the General Assembly “removed from the statute any indication that a juvenile could simply skip an appeal in superior court, but still challenge the transfer order after losing a trial in superior court.” *See also In re J.L.W.*, 136 N.C. App. 596, 599, n.2, 525 S.E.2d 500, 502, n.2 (2000) (“Effective 1 July 1999, transfer orders are not appealable to the Court of Appeals and may be appealed to the Superior Court.”). In order to properly preserve the issue of transfer for review by our Court, defendant was required to appeal the transfer order and issues arising from it, to superior court, which he failed to do. This is in accord with N.C. Gen. Stat. § 7B-2603 (1999) and the general principle of appellate review that appeals in criminal matters lie from the district court to the superior court and not directly to the Court of Appeals. N.C. Gen. Stat. § 7A-271(b) (1999). Therefore, defendant’s first three assignments of error are not properly before this Court.

Nevertheless, defendant seeks review of the juvenile court transfer order by requesting that this court exercise its discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure to hear defendant’s appeal on these issues. Alternatively, defendant requests this Court grant a writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure to review the transfer order. However, by either avenue, we are unable to address the issues arising out of defendant’s appeal of the transfer order.

Rule 2 of our Appellate Rules states that

[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, sus-

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pend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C.R. App. P. 2. “[S]uspension of the appellate rules under Rule 2 is not permitted for jurisdictional concerns.” *Bailey v. State*, 353 N.C. 142, 157, 540 S.E.2d 313, 323 (2000) (citations omitted). *See also* N.C.R. App. 1(b) (stating that the Appellate Rules “shall not be construed to extend or limit the jurisdiction of the courts of the appellate division as that is established by law”); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (adopting the United States Supreme Court’s holding that appellate courts “‘may not waive the jurisdictional requirements . . . , even for “good cause shown” under Rule 2’ ”) (quoting *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 101 L. Ed. 2d 285, 291 (1988))). We are therefore without authority to suspend our Appellate Rules pursuant to Rule 2 in order to entertain defendant’s appeal that is not properly before this Court.

Although defendant did not file a petition for writ of certiorari, we elect to treat defendant’s argument on this issue which was propounded at oral argument, as a petition for a writ of certiorari. *State v. Jarman*, 140 N.C. App. 198, 201, 535 S.E.2d 875, 878 (2000).

Our General Statutes provide that

(c) The Court of Appeals has jurisdiction, exercisable by one judge or by such number of judges as the Supreme Court may by rule provide, to issue the prerogative writs, including . . . certiorari, . . . in aid of its own jurisdiction, or to supervise and control the proceedings of any of the trial courts of the General Court of Justice The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law.

N.C. Gen. Stat. § 7A-32(c) (1999).

Our Supreme Court has set forth the “practice and procedure” for the issuance of a writ of certiorari in Rule 21 of the N.C. Rules of Appellate Procedure, which states that

[t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judg-

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ments 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.

Such appropriate circumstances are not present in this case that would permit the Court to issue a writ of certiorari pursuant to Rule 21; therefore, we dismiss defendant's first three assignments of error.

II.

[2] By his fourth assignment of error, defendant argues the trial court erred in admitting into evidence a statement by the victim, Mosley, regarding a previous shooting.

On direct examination, the State asked Mosley if he knew defendant's brother, Winston. Mosley replied, "Yes, ma'am. We was—well, we was friends at one time until he shot—[.]" At this point, defense counsel objected to Mosley's statement and the trial court sustained the objection. Mosley then continued by saying, "Until he shot me—[.]" to which defense counsel again objected. The trial court instructed Mosley, "No, don't say that" and instructed the jury to "strike the witness' last utterance; do not consider it."

On cross-examination, defense counsel asked Mosley what grade he completed in high school, to which Mosley answered, "Well, it was about tenth grade and that was when the incident—when I got shot the first time." Defense counsel objected to this statement and the trial court overruled his objection.

On redirect examination, the State asked Mosley why he did not finish the tenth grade. Mosley responded that it was "[b]ecause [I got] shot back in '98." The State asked Mosley who shot him in 1998 and defense counsel objected. The trial court overruled the objection and Mosley answered that he was shot by defendant's brother, Winston, and that this shooting halted his education.

Defendant argues that Mosley's testimony was irrelevant and should have been excluded pursuant to N.C. Gen. Stat. § 8C-1, Rules 401 and 402. Further, defendant argues that the probative value of the evidence is substantially outweighed by its unfair prejudice to defendant and it should have been excluded under N.C. Gen.

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Stat. § 8C-1, Rule 403. Defendant also argues that he did not open the door to this line of questioning because questioning Mosley about how far he went in school “was simply an information gathering question.”

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” N.C. Gen. Stat. § 8C-1, Rule 401 (1999). Relevant evidence is generally admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (1999). However, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” N.C. Gen. Stat. § 8C-1, Rule 403 (1999).

“The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission.” *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) (citing *State v. Agnew*, 294 N.C. 382, 241 S.E.2d 684, cert. denied, 439 U.S. 830, 58 L. Ed.2d 124 (1978)). Defendant must therefore show that admission of Mosley’s statement regarding the prior shooting was error and that defendant was prejudiced by the statement.

Because defendant opened the door to the testimony at issue, we need not address defendant’s argument that the testimony was inadmissible because it was irrelevant or overly prejudicial. “The law has long been that, even where ‘th[e] type of testimony is not allowed[,] . . . when a party first raises an issue, it opens the door to questions in response to that issue and cannot later object to testimony regarding the subject raised.’ ” *State v. Belfield*, 144 N.C. App. 320, 324, 548 S.E.2d 549, 551 (2001) (quoting *Middleton v. Russell Group, Ltd.*, 126 N.C. App. 1, 23-24, 483 S.E.2d 727, 740, disc. review denied, 346 N.C. 548, 488 S.E.2d 805 (1997) (internal citations omitted)). In this case, because defense counsel opened the door to questions regarding the earlier shooting of Mosley by asking Mosley an open-ended question about the length of his high school education, we hold that defendant cannot effectively argue that the trial court erred in allowing Mosley’s response and explanation and the State’s subsequent questions on redirect.

Further, “[t]he admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded.” *Gappins*, 320 N.C. at 68, 357 S.E.2d at 657 (citing *State v.*

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Billups, 301 N.C. 607, 272 S.E.2d 842 (1981); *State v. Cross*, 293 N.C. 296, 302, 237 S.E.2d 734, 739 (1977); N.C.G.S. § 15A-1443(a) (1983)). Defendant has failed to show that even if admission of Mosley's testimony was in error, defendant was prejudiced by its admission. Overwhelming evidence was presented at trial from which a jury could find defendant guilty of assault with a deadly weapon with intent to kill inflicting serious bodily injury. At least seven witnesses testified that as Mosley ran away, defendant fired a shotgun at Mosley, striking him with shotgun pellets. Further, defendant admitted to firing two shotgun blasts at Mosley. Defendant's fourth assignment of error is overruled.

III.

[3] By his fifth assignment of error, defendant contends the trial court erred in admitting evidence of an out-of-court statement by Winston, that was offered for the truth of the matter asserted.

Fullwood, testifying for the State, was asked what happened when Winston arrived at the park on 21 November 1999. Fullwood answered, "Well, he came to the park—he came over there to where me and Greg was standing and he said, 'Y'all might want to leave because there might be some trouble and we're going [to] light the place up.'" Defense counsel objected to this statement and the trial court sustained the objection. The trial court instructed the jury that

Mr. Fullwood is about to testify as to statements allegedly made to him by someone else. You may not consider—if you find that the statements were in fact made by this other person, you may not consider the statement for the truth of the matter asserted in the statement. You may, however, consider it to show why this person acted as he did, and for no other purpose.

The State then asked Fullwood what Winston said to him when he arrived at the park. Fullwood answered that Winston "said that y'all might want to leave because I'm about to light this place up."

Gilbert also testified for the State about what Winston told him when Winston arrived at the park on 21 November 1999. Gilbert stated that, "He told me if I—if I wanted to leave, I better go ahead and leave because he was about to light the m.f. up." Defendant did not object to this testimony.

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Because defense counsel failed to object to Gilbert's testimony, which was virtually identical to Fullwood's testimony, defendant waived his right to assign as error the trial court's admission of Fullwood's testimony. " 'Where evidence is admitted without objection, the benefit of a prior objection to the same or similar evidence is lost, and the defendant is deemed to have waived his right to assign as error the prior admission of the evidence.' " *State v. Jolly*, 332 N.C. 351, 361, 420 S.E.2d 661, 667 (1992) (quoting *State v. Wilson*, 313 N.C. 516, 532, 330 S.E.2d 450, 461 (1985)). Even if Fullwood's testimony had been excluded, the same facts were testified to by Gilbert and would have still been before the jury. This assignment of error is overruled.

No error.

Judge WALKER concurs.

Judge BIGGS concurs in the result only.

BRYCE D. NEIER, ET AL., PLAINTIFF V. STATE OF NORTH CAROLINA, NORTH CAROLINA STATE BOARD OF ELECTIONS, CUMBERLAND COUNTY BOARD OF ELECTIONS, MICHAEL C. BOOSE, JOHN W. DICKSON, AND ADMINISTRATIVE OFFICE OF THE COURTS OF STATE OF NORTH CAROLINA, DEFENDANTS

No. COA01-652

(Filed 2 July 2002)

Elections— restricting vote in primary—nonpartisan elections of district court judges—motion to dismiss

The trial court did not err by dismissing appellants' complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) in a declaratory judgment action seeking to have N.C.G.S. § 163-59 declared unconstitutional as applied to primary elections of district court judges and seeking a declaration that district court judges should be elected in nonpartisan elections based on the fact that plaintiff registered Republican was prevented from voting in the Democratic primary while registered Democrats and unaffiliated voters were allowed to vote since the Democratic party was the only party fielding candidates for the district court in the election at issue, because:

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(1) contrary to appellants' contention, the trial court did not shift the burden of proof to plaintiff from defendants by inviting the nonmovant to submit case law in support of the legal sufficiency of the claim; (2) the fact that there was only one candidate on the ballot for the general election was not the result of any action of the State, but rather the failure of parties other than the Democratic party to field any candidates; (3) N.C.G.S. § 163-123 provides for write-in candidates in partisan elections; (4) the fact that North Carolina, subject to the parties' authorization, allows unaffiliated voters to vote in primaries does not change the nature of the constitutional issues asserted; and (5) although plaintiff contends the trial court was not fair and impartial at the hearing on the motions to dismiss, any alleged lack of impartiality on the trial court is irrelevant based on the Court of Appeals' affirmance of the trial court's ruling after a de novo review.

Appeal by plaintiff and one defendant from order entered 3 August 2000 by Judge Knox Jenkins in Cumberland County Superior Court. Heard in the Court of Appeals 25 March 2002.

Bryce D. Neier, plaintiff-appellant, pro se.

Michael C. Boose, defendant-appellant, pro se.

Attorney General Roy Cooper, by Special Deputy Attorney General Alexander McC. Peters, for defendant-appellees State of North Carolina, North Carolina State Board of Elections, and Administrative Office of the Courts of State of North Carolina.

Cumberland County Attorney's Office, by Douglas E. Candors, for defendant-appellee Cumberland County Board of Elections.

HUDSON, Judge.

Plaintiff Bryce D. Neier and Defendant Michael C. Boose (collectively, "appellants") appeal from an order of the superior court dismissing Neier's complaint pursuant to N.C.R. Civ. P. 12(b)(6). For the reasons given below, we affirm.

First, we briefly summarize the facts alleged by plaintiff, which we take as true for the purpose of reviewing the trial court's grant of defendants' motions to dismiss pursuant to N.C.R. Civ. P. 12(b)(6), see *Fuller v. Easley*, 145 N.C. App. 391, 398, 553 S.E.2d 43, 48 (2001). Plaintiff is a citizen and resident of Fayetteville, North Carolina, reg-

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istered to vote in the Twelfth Judicial District in Cumberland County. Plaintiff is registered as affiliated with the Republican Party.

Plaintiff's complaint involves the Democratic primary election for district court judge that was held in the Twelfth Judicial District on 2 May 2000. Defendant John W. Dickson, registered as a Democrat, was appointed in 1997 to the position of district court judge in the Twelfth Judicial District and was seeking election to that position at the time of the primary. Defendant Michael Boose, also a registered Democrat, opposed Defendant Dickson in that primary. There were no other candidates running for the position in either the primary or the general election. Thus, the winner of the Democratic primary would automatically win the general election.

As a registered Republican, plaintiff was prohibited by statute from participating in the Democratic primary. The statute provides in relevant part as follows:

No person shall be entitled to vote or otherwise participate in the primary election of any political party unless he

- (1) Is a registered voter, and
- (2) Has declared and has had recorded on the registration book or record the fact that he affiliates with the political party in whose primary he proposes to vote or participate, and
- (3) Is in good faith a member of that party.

Notwithstanding the previous paragraph, any unaffiliated voter who is authorized under G.S. 163-119 may also vote in the primary if the voter is otherwise eligible to vote in that primary except for subdivisions (2) and (3) of the previous paragraph. . . .

N.C. Gen. Stat. § 163-59 (2001). Unaffiliated voters may vote in a partisan primary if the State Executive Committee of the political party so authorizes. *See* N.C. Gen. Stat. § 163-119 (2001).

On 22 March 2000, plaintiff filed a declaratory judgment action seeking to have N.C.G.S. § 163-59 declared unconstitutional as applied to primary elections of district court judges, and seeking a declaration that district court judges should be elected in nonpartisan elections. Plaintiff requested that his action be certified as a

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class action. Additionally, he requested that the court enjoin the 2 May 2000 primary “as it pertains to the District Court Judge election or in the alternative enjoin either Defendant Michael Boose or Defendant John W. Dickson from taking office pending a final resolution of these matters.” On 27 April 2000, after a hearing, the court denied the injunction.

On 22 May 2000, Defendant John W. Dickson; Defendant Cumberland County Board of Elections; and Defendants State of North Carolina, North Carolina State Board of Elections, and Administrative Office of the Courts of State of North Carolina (hereinafter “State Defendants”), each filed motions to dismiss, alleging, *inter alia*, failure to state a claim upon which relief can be granted. On 7 July 2000, plaintiff filed a motion to amend his complaint, accompanied by a proposed amended complaint. The amended complaint added a First Amendment claim. On 3 August 2000, after a hearing on the motions to dismiss, the court dismissed the action. Although the court never explicitly ruled on the motion to amend, the court stated at the beginning of the hearing, “the court has read an amended complaint filed by the plaintiff.” None of the defendants objected to the court’s consideration of the amended complaint, and consequently, we hold that the court impliedly granted the motion to amend.

Plaintiff Neier noticed his appeal of the order dismissing his complaint on 31 August 2000. Defendant Boose noticed his appeal on 1 September 2000. Neier assigned one error to the trial court’s order that Boose did not assign, but otherwise, their assignments of error were the same.

Initially, we note our disagreement with the State’s contention that this appeal is moot. The State argues that because the General Assembly has enacted a law providing for nonpartisan elections of district court judges, plaintiff has obtained the relief he seeks.

The State Defendants’ attempt at distinguishing *Comer v. Ammons*, 135 N.C. App. 531, 522 S.E.2d 77 (1999), notwithstanding, we find *Comer* to be directly on point, and under *Comer*, this appeal is not moot. The plaintiff in *Comer* filed a declaratory judgment action seeking to have the court declare unconstitutional statutes that allowed a judicial candidate for superior court to simultaneously run for a district court judgeship. *See* 135 N.C. App. at 535, 522 S.E.2d at 79-80. The superior court granted summary judgment in favor of

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the defendants, and the plaintiff appealed. Before this Court heard the appeal, the General Assembly amended the statutes at issue to prohibit a superior court candidate from running for another office during the same election. *See id.*, 522 S.E.2d at 80.

We applied the two-pronged test set forth by the United States Supreme Court in *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 649 (1979), pursuant to which a case is rendered moot “when (1) the alleged violation has ceased, and there is no reasonable expectation that it will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *Comer*, 135 N.C. App. at 536, 522 S.E.2d at 80. We held that “if the statutes in question were in violation of the North Carolina Constitution, then [the judges elected under those statutes] are holding office unlawfully. If that is the case, then this violation has not ceased and there has been no eradication of the effects of the alleged violation.” *Id.* Thus, we held that the appeal was not moot.

Similarly, in the appeal now before us, if appellants are correct that Judge Dickson was elected pursuant to an unconstitutional statute, then he holds his office unlawfully, and the violation continues. Hence, under *Comer*, this appeal is not moot.

We review *de novo* the grant of a motion to dismiss. *See McCarn v. Beach*, 128 N.C. App. 435, 437, 496 S.E.2d 402, 404, *disc. review denied*, 348 N.C. 73, 505 S.E.2d 874 (1998).

A motion to dismiss made pursuant to G.S. 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint. In order to withstand such a motion, the complaint must provide sufficient notice of the events and circumstances from which the claim arises, and must state allegations sufficient to satisfy the substantive elements of at least some recognized claim. The question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. In general, a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. Such a lack of merit may consist of the disclosure of facts which will necessarily defeat the claim as well as where there is an absence of law or fact necessary to support a claim.

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Harris v. NCB Nat. Bank of North Carolina, 85 N.C. App. 669, 670-71, 355 S.E.2d 838, 840-41 (1987) (citations, emphasis, and internal quotation marks omitted).

Appellants first argue that the trial court erred in “shifting the burden of proof to plaintiff from defendants.” In particular, appellants state in their brief that “the Court failed to have the moving parties put on any evidence justifying their Rule 12(b)(6) motions and improperly shifted the burden to Plaintiff and ordered Plaintiff to produce caselaw supporting the allegations contained in the complaint.” Legal argument, including the citation of case law, is not evidence. Neither party has any evidentiary burden at this stage; plaintiff’s factual allegations must be taken as true. While it is often stated that the movant has the burden of demonstrating that the action should be dismissed, the court has not shifted that burden by inviting the non-movant to submit case law in support of the legal sufficiency of his claim. We find this assignment of error to be without merit.

Appellants next argue that N.C.G.S. § 163-59 is unconstitutional as applied to district court elections. Although plaintiff articulated several theories in his amended complaint in support of this contention, appellants argue in their brief only that the application of this statute violated plaintiff’s right to equal protection afforded under the state and federal constitutions and the First Amendment of the U.S. Constitution. Additionally, appellants cite authority in support only of these two theories. Therefore, we deem the other theories abandoned. See N.C.R. App. P. 28(a); *Everts v. Parkinson*, 147 N.C. App. 315, 332-33, 555 S.E.2d 667, 678 (2001).

Appellants argue, in essence, that Plaintiff Neier’s equal protection rights have been violated because, as a Republican, he has been prevented from voting in the Democratic primary, while registered Democrats and unaffiliated voters were allowed to vote. Because the Democratic party was the only party fielding candidates for the district court in the election at issue, plaintiff contends that he was effectively denied the right to vote in that election, since the winner of the Democratic primary was the *de facto* winner of the general election. Appellants’ First Amendment argument appears to be that the only way plaintiff could have participated in the election was by registering as a Democrat so that he could vote in the primary, and thus, his right to freedom of association was violated.

To the extent appellants argue that plaintiff was prevented from voting for district judge, this argument is without merit. Plaintiff was

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not prevented from voting in the general election. The fact that there was only one candidate on the ballot for the general election was not the result of any action of the State, but rather the failure of parties other than the Democratic party to field any candidates. Furthermore, N.C. Gen. Stat. § 163-123 (2001) provides for write-in candidates in partisan elections. The issue before us, then, is whether restricting the vote in primary elections to party members and unaffiliated voters is unconstitutional.

This issue was decided in *Nader v. Schaffer*, 417 F. Supp. 837 (D. Conn.), *aff'd*, 429 U.S. 989, 50 L. Ed. 2d 602 (1976), by a three-judge court in the U.S. District Court for the District of Connecticut, and the judgment of that court was summarily affirmed by the U.S. Supreme Court. *See also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 215 n.6, 93 L. Ed. 2d 514, 524 n.6 (1986) (citing *Nader* with approval). At issue in *Nader* was a state statute providing that only voters who had enrolled in a political party could vote in that party's primary. *See Nader*, 417 F. Supp. at 840. The plaintiffs brought several challenges to the statute, including claims that the state:

(1) by denying them the right to vote in primary elections while extending this right to enrolled party members, deprives plaintiffs of their Fourteenth Amendment right to equal protection of the law; (2) by compelling them either to enroll in a political party or forego a right to vote in a primary election impermissibly forces plaintiffs to choose between a right to vote, on the one hand, and the right freely to associate for the advancement of political ideas, on the other; the latter includes the right to associate with a particular candidate regardless of the candidate's party affiliation

Id. After providing an extensive discussion of the issues, the *Nader* court rejected both these claims. *See id.* at 842-44, 848-49. Other courts, following *Nader*, rejected similar challenges. *See Ziskis v. Symington*, 47 F.3d 1004, 1006 (9th Cir. 1995) (“[G]iven the state’s interest in protecting the associational rights of party members and in preserving the integrity of the electoral process, the state may legitimately allow political parties to close their primaries to nonmembers.”); *Smith v. Penta*, 405 A.2d 350, 356-57 (N.J.), *appeal dismissed*, 444 U.S. 986, 62 L. Ed. 2d 416 (1979); *In re Barkman*, 726 A.2d 440, 443-44 (Pa. Commw. Ct.), *appeal denied*, 740 A.2d 1149 (Pa.), *cert. denied*, 528 U.S. 1005, 145 L. Ed. 2d 385 (1999). The fact that North Carolina, subject to the party’s authorization, allows unaffiliated vot-

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ers to vote in primaries does not change the nature of the constitutional issues asserted, and thus, does not change the analysis. Therefore, we follow *Nader* and hold that plaintiff's rights here were not violated by his exclusion from the Democratic primary.

Appellants cite *Republican Party of North Carolina v. Martin*, 980 F.2d 943 (4th Cir. 1992), cert. denied sub nom. *Hunt v. Republican Party of North Carolina*, 510 U.S. 828, 126 L. Ed. 2d 60 (1993), in support of their contention that plaintiff's complaint stated a claim of an equal protection violation sufficient to withstand a Rule 12(b)(6) motion. *Martin* is inapposite here, however. The equal protection claim at issue in *Martin* was a vote dilution claim based on an allegation of political gerrymandering. See *Martin*, 980 F.2d at 952. Thus, *Martin* sheds no light on whether the State violates equal protection by restricting the right to vote in political primaries.

Additionally, appellants cite *California Democratic Party v. Jones*, 530 U.S. 567, 147 L. Ed. 2d 502 (2000), but that case does not advance appellants' position. At issue in *Jones* was a California law imposing a "blanket" primary, pursuant to which all otherwise eligible voters, regardless of party affiliation or lack thereof, were entitled to vote in primary elections. See 530 U.S. at 570, 147 L. Ed. 2d at 507. Four political parties that had rules forbidding non-party members from voting in party primaries challenged the law, claiming, *inter alia*, that the law violated their First Amendment rights of association. See *id.* at 571, 147 L. Ed. 2d at 507. The Supreme Court held that the law implicated the First Amendment, observing that the law

forces [the parties] to adulterate their candidate-selection process—the basic function of a political party—by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome—indeed, in this case the *intended* outcome—of changing the parties' message. We can think of no heavier burden on a political party's associational freedom.

Id. at 581-82, 147 L. Ed. 2d at 514 (internal quotation marks and citation omitted). The Court observed that the blanket primary "forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival." *Id.* at 577, 147 L. Ed. 2d at 511. *Jones* does not recognize a First Amendment claim such as that advanced by appellants; on the contrary, the Court distinguished the blanket primary it was considering from the "closed" primary in which only party members are allowed

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to vote. *See id.* In fact, the Court stated that “[i]n no area is the political association’s right to exclude more important than in the process of selecting its nominee.” *Id.* at 575, 147 L. Ed. 2d at 510.

Finally, Plaintiff Neier contends that the trial court was not fair and impartial at the hearing on the motions to dismiss, and thus, the court’s ruling should be reversed. This assignment of error is without merit. The ruling on appeal does not involve any factual issues, but raises solely a question of law. *See McCarn*, 128 N.C. App. at 437, 496 S.E.2d at 404 (“The standard of review on a motion to dismiss involves a determination of whether, as a matter of law, the complaint, treating its allegations as true, is sufficient to state a claim upon which relief may be granted.”). Because we have reviewed the trial court’s ruling *de novo* and affirmed that ruling, any alleged lack of impartiality on the part of the trial court is irrelevant. Accordingly, we overrule this assignment of error.

Affirmed.

Chief Judge EAGLES and Judge BRYANT concur.

STATE OF NORTH CAROLINA v. JOHN WALKER McDONALD

No. COA01-888

(Filed 2 July 2002)

1. Evidence; Motor Vehicles— driving while impaired—blood test—motion in limine—motion to suppress

The trial court did not abuse its discretion in a second-degree murder, assault with a deadly weapon inflicting serious injury, driving while impaired, failure to stop at a stop sign, driving left of center, and consumption of alcohol by an individual less than twenty-one years of age case by denying defendant’s motion in limine and motion to suppress the results of a blood test even though defendant’s blood sample was left in a box in an officer’s patrol car for three days before being tested, because: (1) the accuracy of the analysis is what is at issue as opposed to the status of the blood sample itself; (2) the evidence presented at trial showed the State followed the guidelines set forth in N.C.G.S. § 20-139.1; (3) there was no question of a mistake or an

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incorrect administration of the blood testing of the sample of defendant's blood; (4) there was evidence that the effect of the blood being left in the car for three days, if any, was that the alcohol content would evaporate and actually lower the alcohol concentration, which would be to defendant's benefit; and (5) the uncertainty regarding the effect of leaving the samples in the patrol car for three days goes to the weight of the evidence.

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

The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder at the close of all evidence based on alleged insufficient evidence of malice, because there was substantial evidence of malice by driving in such a reckless manner including: (1) defendant had previously been convicted of consuming alcohol while under the age of twenty-one; (2) defendant knew his conduct at the time of the accident was illegal; (3) defendant was driving without looking at the road in order to pick up a lit cigarette he had dropped; (4) defendant's truck literally flew across the intersection; (5) defendant's blood-alcohol level was almost twice the legal limit; and (6) although defendant was not cited for speeding, defendant drove at 55 mph without looking at the road.

3. Motor Vehicles—driving while impaired—appreciable impairment—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired at the close of all the evidence based on alleged insufficient evidence that defendant was appreciably impaired, because: (1) impaired driving can be proved by either showing appreciable impairment or showing an alcohol concentration of 0.08 or more; and (2) defendant's alcohol concentration at a relevant time after driving was 0.156.

Appeal by defendant from judgment entered 9 April 2001 by Judge Knox V. Jenkins, Jr. in Lee County Superior Court. Heard in the Court of Appeals 25 April 2002.

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

R. Allen Lytch, PA, by Marshall L. Miller for defendant-appellant.

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THOMAS, Judge.

Defendant, John Walker McDonald, appeals from convictions of second-degree murder, assault with a deadly weapon inflicting serious injury, driving while impaired, failure to stop at a duly erected stop sign, driving left of center, and consumption of alcohol by an individual less than twenty-one years of age.

Among the assignments of error, he argues blood test results should be suppressed because the blood sample was left in a patrol car for three days prior to analysis. For the reasons discussed herein, we find no error.

The facts are as follows: On 14 September 2000, defendant was operating a Nissan pickup truck in Sanford, North Carolina. He had earlier consumed four to five beers and stopped at a convenience store to purchase cigarettes. As he resumed driving, he dropped a lit cigarette on the floor, bent down to retrieve it, and ran a stop sign. His truck then struck a vehicle operated by Zelma Rose Collins. She was instantly killed and her ten year-old son, Samuel, sustained a laceration on his leg.

Defendant and Samuel were rushed to the hospital while Trooper L.R. Barrett of the North Carolina Highway Patrol examined the scene of the accident. He noted there were no skid marks on the road. Barrett found considerable debris in and around the defendant's pickup truck, including beer cans.

Barrett and another trooper, Tim Bolduc, went to the hospital to continue the investigation. Noticing that defendant had glassy eyes and an odor of alcohol, Bolduc read defendant his *Miranda* rights. Barrett then asked defendant if he would agree to give a blood sample. Defendant agreed and signed a consent form. The drawn blood was given to Barrett, who placed it in a box in his patrol car. He left it there for three days.

The blood sample was eventually logged in six days after the collision at the State Bureau of Investigation laboratory. It was analyzed on 28 September 2000 and revealed an alcohol concentration of 0.156.

Defendant was indicted for second-degree murder, assault with a deadly weapon inflicting serious injury, driving while impaired, driving after consuming while under the age of twenty-one, failure to stop at a stop sign, and driving left of center. His motion to suppress the

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results of the blood test was denied. Defendant was subsequently found guilty of all the offenses and was sentenced to a consolidated term of 125 to 159 months with an additional 12 months for the DWI conviction to run concurrently. Defendant appeals.

[1] By defendant's first assignment of error, he contends the trial court erred in denying his motion *in limine* and motion to suppress the results of the blood test because they were irrelevant, too prejudicial, and unreliable. We disagree.

The scope of appellate review of an order suppressing evidence is strictly limited. *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982). This Court must determine whether the trial judge's findings of fact are supported by competent evidence. *Id.* Factual findings which are supported by competent evidence are deemed binding on appeal. *Id.* "While the trial court's factual findings are binding if sustained by the evidence, the court's conclusions based thereon are reviewable *de novo* on appeal." *State v. Parker*, 137 N.C. App. 590, 594, 530 S.E.2d 297, 300 (2000).

In the instant case, the trial judge found, *inter alia*, that: (1) Barrett read defendant his rights concerning a blood sample; (2) defendant voluntarily agreed to submit a blood sample; (3) a registered nurse drew blood from defendant while he was on a stretcher at the hospital; (4) Barrett left the sample in his patrol car for three days, although Highway Patrol regulations require that blood samples not be left in a car for more than one hour; (5) the blood sample was registered at the SBI lab six days after it was drawn; (6) a test done on the sample revealed an alcohol concentration of 0.156; (7) the lab technician testing the blood testified that he could not give an opinion of what effect leaving the blood in the patrol car would have on the results of the test; (8) there is no evidence that the SBI tests were done improperly; and (9) the results of the blood test when the blood was left in the patrol car for that amount of time goes to the weight of the evidence, rather than to its admissibility. The trial court concluded that the motion to suppress should be denied.

Blood test evidence is admissible if the following can be shown: (1) compliance with conditions as to relevancy in point of time; (2) tracing and identification of the specimen; (3) accuracy of the analysis; and (4) qualification of the witness as an expert in the field. *Robinson v. Life & Casualty Ins. Co. of Tenn.*, 255 N.C. 669, 672, 122 S.E.2d 801, 803 (1961). See also *Bare v. Barrington*, 97 N.C. App. 282, 388 S.E.2d 166, *rev. denied*, 326 N.C. 594, 393 S.E.2d

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873 (1990). Evidence which is not relevant is inadmissible. N.C. R. Evid. 402.

Defendant contends the issue here is whether the specimen is viable. That, he says, is a prerequisite for the analysis to be accurate as to the alcohol content. He argues the State failed to lay a proper foundation for the admissibility of the blood test results because it did not show that the condition of defendant's blood had not changed before it was tested. The State, however, asserts the issue is whether the sample was accurately analyzed. The State contends it only had to comply with statutory guidelines for blood tests set forth in N.C. Gen. Stat. § 20-139.1, which provides:

(a) **Chemical Analysis Admissible.**—In any implied-consent offense under G.S. 20-16.2, a person's alcohol concentration or the presence of any other impairing substance in the person's body as shown by a chemical analysis is admissible in evidence. . . .

(b) A chemical analysis, to be valid, shall be performed in accordance with the provisions of this section. The chemical analysis shall be performed according to methods approved by the Commission for Health Services by an individual possessing a current permit issued by the Department of Health and Human Services for that type of chemical analysis. . . .

(c) **Withdrawal of Blood for Chemical Analysis.**—When a blood test is specified as the type of chemical analysis by the charging officer, only a physician, registered nurse, or other qualified person may withdraw the blood sample. . . .

(e) **Recording Results of Chemical Analysis of Breath.**—The chemical analyst who administers a test of a person's breath shall record the following information after making any chemical analysis:

(1) The alcohol concentration or concentrations revealed by the chemical analysis.

(2) The time of the collection of the breath sample or samples used in the chemical analysis.

A copy of the record of this information shall be furnished to the person submitting to the chemical analysis, or to his attorney, before any trial or proceeding in which the results of the chemical analysis may be used.

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N.C. Gen. Stat. § 20-139.1 (2001). In fact, the accuracy of the analysis is what is at issue as opposed to the status of the blood sample itself. See *Robinson v. Life & Casualty Ins. Co. of Tenn.*, 255 N.C. 669, 672, 122 S.E.2d 801, 803 (1961).

The evidence presented at trial showed the State followed the guidelines set forth in section 20-139.1, which is titled: "Procedures governing chemical analyses; admissibility; evidentiary provisions; controlled-drinking programs." Further, there was no question of a mistake or an incorrect administration of the blood testing of the sample of defendant's blood. Defendant offered no evidence that the blood had been tainted, not drawn by a professional, or incorrectly labeled. Additionally, there was evidence that the effect of the blood being left in the car for three days, if any, was that the alcohol content would evaporate and actually lower the alcohol concentration, to defendant's benefit. The burden to show improper admission of evidence is on the party claiming it; he must show both error and prejudice. *State v. Gappins*, 320 N.C. 64, 357 S.E.2d 654 (1987). Moreover, our review of the trial court's admission of totally unreliable evidence is abuse of discretion. *State v. Cardwell*, 133 N.C. App. 496, 516 S.E.2d 388 (1999).

In *State v. Bundridge*, 294 N.C. 45, 58, 239 S.E.2d 811, 820 (1978), our Supreme Court held that the absence of a chemical analysis of bloodstains found on clothing goes to weight of the evidence rather than its admissibility. More recently, this Court held that:

An experiment must be made under substantially similar circumstances to those existing at the time of the occurrence with which the action is concerned, and the results of the experiment must have a logical tendency to prove or disprove an issue arising out of that occurrence. . . . However, substantial similarity is sufficient, and a lack of complete similarity goes to the weight, not the admissibility, of the testimony. . . . If differences of condition are such as will not cause confusion and can be explained in such a way that the trier of fact may reasonably evaluate their effect, then the trial court may, in its discretion, properly allow the evidence.

Robinson v. Seaboard System R.R., Inc., 87 N.C. App. 512, 529-30, 361 S.E.2d 909, 920 (1987), *rev. denied*, 321 N.C. 474, 34 S.E.2d 294 (1988) (citations omitted). Here, all the evidence pointed to an uncertainty regarding the effect of leaving the samples in the patrol car for three days. That uncertainty goes to the weight of the evidence.

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In fact, most discrepancies regarding blood testing under the *Robinson* factors go to the weight of the evidence, not to its admissibility. *State v. Miller*, 80 N.C. App. 425, 342 S.E.2d 553, *dismissal all'd, rev. denied*, 317 N.C. 711, 347 S.E.2d 448 (1986); *State v. George*, 77 N.C. App. 470, 336 S.E.2d 93 (1985), *dismissal all'd, rev. denied*, 316 N.C. 197, 341 S.E.2d 581 (1986). In *State v. George*, this Court held that as to relevancy in point of time, one of the *Robinson* factors, the fact that three hours passed from the time defendant operated the motor vehicle until the Breathalyzer test for alcohol content was given goes to the *weight* to be given the results of the test, rather than to its admissibility, despite the argument that the test was not given at a relevant time after driving, citing N.C. Gen. Stat. § 20-139.1(b). *See generally, Swanson v. State*, 545 S.E.2d 713 (Ga. App. 2001); *People v. Hoffman*, 725 N.Y.S.2d 494 (N.Y.A.D. 2001); *Durrett v. State*, 36 S.W.3d 205 (Tex. App. 2001); *Dansby v. State*, 1 S.W.3d 403 (Ark. 1999).

The State has the burden of proving the admissibility of the blood test under the *Robinson* factors. Defendant has the burden of proving the trial court erred in admitting the blood test by showing prejudice and error under *Gappins*. Given facts and the evidence before the court, we cannot say defendant carried his burden and that the facts were not supported by competent evidence. Because factual findings supported by competent evidence are binding on appeal, we reject defendant's argument and hold that the trial court did not err in denying defendant's motion *in limine* and motion to suppress.

[2] By defendant's second assignment of error, he argues the trial court erred by denying his motion to dismiss the charge of second-degree murder at the close of all the evidence because the State failed to present substantial evidence of malice. We disagree.

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

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The elements of second-degree murder are: (a) an unlawful killing; (b) of a human being; (c) with malice, but without premeditation and deliberation. *State v. Miller*, 142 N.C. App. 435, 543 S.E.2d 201 (2001). Defendant contends the State did not show substantial evidence of malice.

Our Supreme Court has defined “malice” in the following manner:

[Malice] “does not necessarily mean an actual intent to take human life; it may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life.” In such a situation “the law regards the circumstances of the act as so harmful that the law punishes the act as though malice did in fact exist.”

State v. Wilkerson, 295 N.C. 559, 578-79, 247 S.E.2d 905, 916 (1978) (citations omitted). In *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000), our Supreme Court held that the State, in order to prove malice, needed only to prove that defendant had the intent to drive in a reckless manner which would reflect the knowledge that injury or death would likely occur, evidencing a depravity of mind.

In the instant case, the State showed that defendant admitted that: (a) he had previously been convicted of consuming alcohol while under the age of twenty-one; (b) he knew his conduct at the time of the accident was illegal; (c) he was driving without looking at the road in order to pick up a lit cigarette he had dropped; and (4) his truck literally flew across the intersection. Defendant’s blood-alcohol level was almost twice the legal limit. Although he was not cited for speeding, defendant drove at 55 mph without looking at the road. Thus, there was substantial evidence of malice by driving in such a reckless manner. Accordingly, we reject defendant’s argument.

[3] By defendant’s final assignment of error, he argues the trial court erred by denying his motion to dismiss the charge of driving while impaired at the close of all the evidence because the State failed to present any evidence that defendant was appreciably impaired. We disagree.

Again, a motion to dismiss is properly denied if “there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense.” *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Defendant contends the element of “appreciable impairment” was not proven.

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In *State v. Coker*, 312 N.C. 432, 440, 323 S.E.2d 343, 349 (1984), our Supreme Court noted that there are two ways to prove the single offense of impaired driving: (1) showing appreciable impairment; or (2) showing an alcohol concentration of 0.08 or more. *See* N.C. Gen. Stat. § 20-138.1 (1999). Here, the clear evidence is that defendant's alcohol concentration at a relevant time after driving was 0.156. The trial court did not err in denying defendant's motion to dismiss. We therefore find no error.

NO ERROR.

Judges MARTIN and TYSON concur.

WILLIS EDWARD BRANCH, PLAINTIFF v. HIGH ROCK REALTY, INC. AND FRANKIE BYRD, INDIVIDUALLY AND AS AGENT OF HIGH ROCK REALTY, INC., DEFENDANTS

No. COA01-715

(Filed 2 July 2002)

1. Contracts— acquisition of real estate—apparent authority of realtor

The trial court properly granted defendants' motion for judgment notwithstanding the verdict as to plaintiff's claim for breach of contract in an action arising from an attempt to buy real estate where a realtor with defendant High Rock orally agreed to attempt to facilitate plaintiff's purchase of certain property; the realtor was acting within the scope of his apparent authority when he did so and the principal's liability is determined by the authority which a person exercising reasonable care would believe had been conferred on the agent; plaintiff knew or should have known that the realtor could no longer act for High Rock after he left to form his own agency; and there was no evidence that plaintiff ever entered into any agreement with another High Rock realtor who eventually sold the property to a third-party.

2. Fiduciary Relationships— breach of fiduciary duty—acquisition of real estate—insufficient evidence

The trial court properly granted defendants' motion for judgment notwithstanding the verdict on a breach of fiduciary duty claim arising from an alleged agreement with a realtor for the

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acquisition of real estate where there was no evidence of a fiduciary relationship between plaintiff and defendants.

Appeal by plaintiff from order entered 29 January 2001 by Judge Catherine C. Eagles in Surry County Superior Court. Heard in the Court of Appeals 14 March 2002.

Max D. Ballinger for plaintiff-appellant.

Karl N. Hill, Jr., for defendant-appellees.

MARTIN, Judge.

Plaintiff brought this action against High Rock Realty, Inc., (hereinafter "High Rock") and Frankie Byrd, alleging claims for breach of contract, breach of fiduciary duty, unfair and deceptive practices, fraud, constructive fraud, negligence, gross negligence, and punitive damages. Defendants answered, denying wrongdoing and asserting counterclaims for libel.

Evidence at trial tended to show that over the course of several years, plaintiff, Willis Edward Branch, had acquired several adjoining tracts of land on High Rock Lake in Davidson County, North Carolina. Plaintiff also desired to acquire Joan Craven's property (hereinafter "Craven property") which adjoined the tracts of land that he already owned. In August of 1998, plaintiff learned from a neighbor that Ms. Craven was planning to sell her property on High Rock Lake after the first of January, 1999. Shortly thereafter, Frank Fry, a real estate agent with defendant High Rock, contacted plaintiff in order to inform him that he had listed property belonging to Dr. Wilkins, which also adjoined plaintiff's property. Plaintiff bought the Wilkins property and in that transaction, Mr. Fry acted as agent for the seller.

While plaintiff and Mr. Fry were in contact regarding the Wilkins property, plaintiff employed defendant High Rock, and its agent, Mr. Fry, to find a renter for a house plaintiff owned at High Rock Lake. A renter was found and plaintiff paid defendant High Rock for its services.

On 12 October 1998, the day of the closing on the Wilkins property, plaintiff advised Mr. Fry that he had heard that the Craven property was going to be for sale and that he was interested in purchasing the property. According to both plaintiff and Mr. Fry, they entered into an oral agreement pursuant to which defendant High Rock would attempt to secure the Craven property for plaintiff to purchase. In

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return, defendant High Rock was to receive a sales commission either from Ms. Craven or from plaintiff, depending on whether High Rock acted as the seller's sub-agent or as agent for the plaintiff, as buyer. Mr. Fry advised plaintiff that he would ask defendant Frankie Byrd, another real estate agent with defendant High Rock, to assist in the matter, since he believed that Ms. Byrd knew Ms. Craven and may have previously worked with her on other matters.

On 13 October 1998, the day after the closing on the Wilkins property, Ms. Byrd agreed with Mr. Fry that she would contact Ms. Craven and ask her whether she was interested in selling her property. After talking to Ms. Craven, Ms. Byrd told Mr. Fry that Ms. Craven was not ready to sell the property at that time but would be ready to sell after the first of the year. Mr. Fry called plaintiff and informed him that Ms. Byrd had checked on the Craven property for him and confirmed that it would be for sale after the first of the year.

Subsequent to the 12 October 1998 agreement between plaintiff and Mr. Fry, plaintiff would periodically contact Mr. Fry; Mr. Fry would check with Ms. Byrd regarding the status of the property, and then Mr. Fry would report back to plaintiff. Mr. Fry and plaintiff had numerous conversations regarding the Craven property. Among the documented calls from plaintiff to Mr. Fry were the following: 21 October 1998; 30 October 1998; 14 November 1998; 27 December 1998; 15 January 1999; 28 January 1999; 31 January 1999; 2 February 1999; 3 March 1999; 20 March 1999; 29 March 1999; and 19 April 1999. Additionally, plaintiff testified that he spoke to Mr. Fry in person regarding the Craven property on 24 October 1998; 27 October 1998; and 12 December 1998. Mr. Fry called plaintiff to discuss the status of the Craven property on the following dates: 1 September 1998; 1 January 1999; 28 January 1999; 10 March 1999; 2 April 1999; and 19 April 1999. From 12 October 1998 through mid-April 1999, Ms. Byrd advised Mr. Fry that Ms. Craven was not yet ready to sell the property.

On 8 January 1999, Mr. Fry left employment with defendant High Rock and opened his own real estate company, Fox Creek Realty, Inc., (hereinafter "Fox Creek"). Mr. Fry testified that Ms. Byrd indicated that she would continue to attempt to secure the Craven property for plaintiff after Mr. Fry left the company. However, Ms. Byrd testified that she and Mr. Fry made no agreement that she would assist plaintiff in acquiring the Craven property. According to Ms. Byrd, at the time Mr. Fry left the agency, she told him that if she heard

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anything about the Craven property, she would let him know. Ms. Byrd testified that she merely returned Mr. Fry's calls and kept him informed about the Craven property as a courtesy to a fellow realtor.

On 1 February 1999, plaintiff signed a buyer agency agreement with Fox Creek which provided that Fox Creek was plaintiff's exclusive agent to assist plaintiff in the acquisition of real property in Davidson County, North Carolina, where the Craven property was located.

On 13 April 1999, Ms. Byrd and Olive Stutts, another agent for defendant High Rock, met Ms. Craven at the Craven property, at which time Ms. Craven signed an agreement to list her property for sale with defendant High Rock. At the request of Ms. Craven, the listing agreement was dated 19 April 1999 because Ms. Craven needed a few days to get some yard work and cleaning done before the property was shown. The listing agreement included the asking price.

On 17 April 1999, Ms. Byrd advised Mr. Fry by phone that Ms. Craven would be coming in on Sunday, 18 April 1999 or Monday, 19 April 1999 to list the property. Ms. Byrd informed Mr. Fry that she did not yet know the price Ms. Craven would be asking for the property and that the property could not be shown before Monday.

On the evening of Saturday, 17 April 1999, Ms. Byrd informed Randy and Susan Thomason that she would have a new listing at the lake on Monday. On Sunday, 18 April 1999, Ms. Byrd made an appointment with the Thomasons to show them the Craven property on Monday, 19 April 1999, at 8:00 a.m. On 19 April 1999, around 9:10 a.m., plaintiff called Mr. Fry to ask whether the property had become available. Mr. Fry told plaintiff that he did not know the status of the property since he had been unable to reach Ms. Byrd by phone that morning. Ms. Byrd returned Mr. Fry's call between 9:00 and 9:15 a.m. on 19 April 1999 and told him that the Craven property was available and that the asking price was \$219,500. Mr. Fry immediately called plaintiff with that information. Plaintiff told Mr. Fry that he could go that day to look at the property but that it would be more convenient for him to go on Tuesday. Mr. Fry called Ms. Byrd and set up an appointment for plaintiff to look at the property at 9:00 a.m. on 20 April 1999.

Between 12:30 and 1:30 p.m. on 19 April 1999, Mr. Fry called Ms. Byrd to discuss another piece of property. Mr. Fry testified that dur-

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ing this conversation, Ms. Byrd told him that she had accepted a full price cash offer on the Craven property. Ms. Byrd, however, testified that she did not have an accepted offer by the Thomasons until between 3:30 and 4:00 p.m. on 19 April 1999. By negotiating the sale of the Craven property to the Thomasons, Ms. Byrd received the entire commission. If plaintiff had bought the property, Ms. Byrd would have been required to share the commission with Mr. Fry.

After Mr. Fry learned that there was an accepted offer on the Craven property, he notified plaintiff. On 20 April 1999, plaintiff met with Ms. Stutts to express his concern that the agency had not properly handled the sale of the Craven property. Ms. Stutts advised plaintiff that the Craven property had been sold and that there was nothing plaintiff could do about it.

On 23 April 1999, plaintiff went to Ms. Craven's home to deliver a letter that he had written explaining his efforts in attempting to purchase the Craven property and requesting that Ms. Craven refuse to sell her property to another purchaser. Plaintiff expressed to Ms. Craven that he felt the real estate agents had mishandled the sale of the property. Ms. Craven told plaintiff that she felt Ms. Byrd had handled the sale efficiently, ethically, and within the rules and guidelines of a licensed broker. Ms. Craven told plaintiff that he could make a backup offer. Plaintiff's backup offer contained certain conditions, including requirements for an inspection, an appraisal, and approval for a loan.

After the Thomasons acquired the property, plaintiff attempted to purchase the property from them. The Thomasons' asking price was \$250,000. On 15 June 1999, the Thomasons received an offer from Mr. Fry acting on plaintiff's behalf for a lesser amount than the asking price. The Thomasons later sold the property to another party for \$237,500 and plaintiff bought the property from that party for \$248,000, which was \$28,500 more than Ms. Craven's asking price.

There was never a written agreement between plaintiff and defendants regarding this matter. Ms. Stutts testified that it was the policy of defendant High Rock that all agency agreements be in writing. In addition, the company's policy required, when an agent left the company as Mr. Fry did, that all agreements that the leaving agent had with buyers or potential buyers of property became null and void, unless the agent had an offer in progress which was proceeding to a closing.

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At the conclusion of plaintiff's evidence and at the conclusion of all the evidence, defendants moved for a directed verdict pursuant to G.S. § 1A-1, Rule 50 on the grounds there was insufficient evidence to send plaintiff's claims to the jury. Defendants contended there was no evidence that a contract existed between plaintiff and defendant High Rock or between plaintiff and Ms. Byrd to act as buyer's agent for plaintiff. The trial court granted defendants' motion for directed verdict as to plaintiff's claims of fraud, negligence, gross negligence, and punitive damages, but denied the motion with respect to plaintiff's remaining claims. Plaintiff's motion for directed verdict as to defendants' counterclaims was also denied. A jury concluded that a contract existed between plaintiff and defendant High Rock pursuant to which defendant High Rock had agreed to act as plaintiff's agent to purchase the Craven property, that the agreement was in existence in April 1999, that defendant High Rock had breached the agency contract, and that plaintiff was entitled to recover \$28,500 for breach of contract. The jury also found that defendant High Rock had breached its fiduciary duty to plaintiff and awarded him \$28,500 for this claim. Finally, the jury answered the issues with respect to defendants' counterclaims for libel in favor of plaintiff.

After the verdict, plaintiff moved that the court enter judgment upon the jury's verdict, that damages be trebled pursuant to Chapter 75 of the North Carolina General Statutes, and that reasonable attorney's fees be awarded plaintiff. Defendants moved for judgment notwithstanding the verdict pursuant to G.S. § 1A-1, Rule 50 or, in the alternative, for a new trial pursuant to G.S. § 1A-1, Rule 59. The trial court denied plaintiff's motion and granted defendants' motion for judgment notwithstanding the verdict, and conditionally granted a new trial upon plaintiff's claims in the event the grant of judgment notwithstanding the verdict is vacated or reversed on appeal. Plaintiff appeals.

Plaintiff contends the trial court erred in granting defendants' motion for judgment notwithstanding the verdict and setting aside the jury's verdict.

A motion for judgment notwithstanding the verdict pursuant to G.S. § 1A-1, Rule 50(b) is, in essence, a renewal of an earlier motion for directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974). The standard of review of a ruling entered upon a motion for judgment notwithstanding the verdict is

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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.

Fulk v. Piedmont Music Center, 138 N.C. App. 425, 429, 531 S.E.2d 476, 479 (2000). Such a “motion should be denied if there is more than a scintilla of evidence supporting each element of the non-movant’s claim.” *Norman Owen Trucking, Inc. v. Morkoski*, 131 N.C. App. 168, 172, 506 S.E.2d 267, 270 (1998).

[1] We first address plaintiff’s contention that the trial court erred in granting defendants’ motion for judgment notwithstanding the verdict on plaintiff’s breach of contract claim. “The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of that contract.” *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000). Further, a principal is liable upon a contract made by its agent with a third person when that agent acts within the scope of his or her actual authority; when an unauthorized contract has been ratified; or when the agent acts within the scope of his or her apparent authority, unless the third person has notice that the agent is exceeding actual authority. *Olvera v. Charles Z. Flack Agency, Inc.*, 106 N.C. App. 193, 415 S.E.2d 760 (1992).

In the present case, the evidence shows that Frank Fry, while a real estate agent with defendant High Rock, orally agreed with plaintiff that he and defendant High Rock would attempt to facilitate plaintiff’s purchase of the Craven property. In making this agreement, Mr. Fry was acting within the scope of his apparent authority since he had no actual authority from defendant High Rock to enter into such oral agency agreements with buyers or prospective buyers. Apparent authority “is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possesses.” *Zimmerman v. Hogg & Allen*, 286 N.C. 24, 31, 209 S.E.2d 795, 799 (1974). Pursuant to the doctrine of apparent authority, the principal’s liability is to be determined by what authority a person in the exercise of reasonable care was justified in believing the principal conferred upon his agent. *Heath v. Craighill, Rendleman, Ingle & Blythe, P.A.*, 97 N.C. App. 236, 388 S.E.2d 178, *disc. review denied*, 327 N.C. 428, 395 S.E.2d 678 (1990). We note that “[a]ny apparent authority that might otherwise exist vanishes in the presence of the third person’s knowledge, actual or constructive, of what the agent is, and what he is not, empowered to do for his principal.” *Rollins v.*

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Junior Miller Roofing Co., 55 N.C. App. 158, 161, 284 S.E.2d 697, 700 (1981) (citation omitted).

When Mr. Fry left defendant High Rock to establish his own real estate agency, Fox Creek, plaintiff knew or should have known that Mr. Fry could no longer act on behalf of defendant High Rock in assisting plaintiff with the acquisition of the Craven property. Evidencing such knowledge by plaintiff that defendant High Rock was no longer acting as his agent to acquire the Craven property, plaintiff entered into an exclusive buyer agency agreement with Fox Creek, providing that Fox Creek was his exclusive agent to assist him in the acquisition of real property in Davidson County, North Carolina, where the Craven property is located. In addition, there is no evidence that plaintiff ever entered into any agreement with Ms. Byrd; indeed, plaintiff never directly contacted Ms. Byrd regarding the Craven property. Ms. Byrd testified that she never agreed to attempt to secure the Craven property for plaintiff and that she communicated with Mr. Fry concerning the property during the several months prior to the sale as a mere courtesy and not because of the existence of any agreement.

We conclude the evidence, when viewed in the light most favorable to plaintiff, is insufficient to show the existence of any valid contract between plaintiff and defendants Byrd and High Rock to act as plaintiff's agent for the purpose of acquiring the Craven property. Therefore, the trial court properly granted defendants' motion for judgment notwithstanding the verdict as to plaintiff's claim for breach of contract.

[2] With respect to defendants' motion for judgment notwithstanding the verdict as to plaintiff's claim for breach of fiduciary duty, it is fundamental that a fiduciary relationship must exist between the parties in order for a breach of fiduciary duty to occur. *Dalton v. Camp*, 353 N.C. 647, 548 S.E.2d 704 (2001). A fiduciary relationship

“exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence.”

Stone v. McClam, 42 N.C. App. 393, 401, 257 S.E.2d 78, 83, *disc. review denied*, 298 N.C. 572, 261 S.E.2d 128 (1979) (citation omitted). There is no evidence of such a relationship between plaintiff and defendants in the instant case. Ms. Byrd testified that she had never

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been given any confidential information by Mr. Fry or plaintiff concerning the Craven property. In fact, as stated earlier, plaintiff was never in direct contact with Ms. Byrd. Ms. Byrd knew only that plaintiff was interested in buying the Craven property. Since there was insufficient evidence to show the existence of a fiduciary duty between plaintiff and defendants, the trial court properly granted defendants' motion for judgment notwithstanding the verdict as to plaintiff's claim for breach of fiduciary duty.

Since we affirm the trial court's order granting defendants' motion for judgment notwithstanding the verdict, it is unnecessary for us to address plaintiff's arguments regarding the trial court's conditional grant of a new trial.

Affirmed.

Judges HUDSON and THOMAS concur

CECIL S. ABERNATHY, ADMINISTRATRIX OF THE ESTATE OF BAILEY L. ABERNATHY,
PLAINTIFF V. SANDOZ CHEMICALS/CLARIANT CORPORATION, EMPLOYER, AND
THE TRAVELERS INSURANCE COMPANY, AND LIBERTY MUTUAL INSURANCE
COMPANY, CARRIERS, DEFENDANTS

No. COA01-834

(Filed 2 July 2002)

1. Workers' Compensation—retired employee—occupational disease—asbestosis—entitlement to compensation

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff retired employee is entitled to 104 weeks of compensation under N.C.G.S. § 97-61.5 for asbestosis that was diagnosed after he was no longer employed, and the case is remanded to the Industrial Commission for a determination as to whether plaintiff is entitled to compensation under N.C.G.S. § 97-64.

2. Workers' Compensation—retired employee—average weekly wage

The Industrial Commission erred in a workers' compensation case by its calculation of plaintiff retired employee's average weekly wage based on the parties' alleged stipulation when the

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parties did not in fact stipulate to an amount, and the Industrial Commission must determine the average weekly wage in accordance with the second full paragraph of N.C.G.S. § 97-2(5) if on remand plaintiff establishes his disablement from asbestosis and his entitlement to compensation under N.C.G.S. § 97-64.

3. Workers' Compensation— occupational disease—asbestosis—insurance carrier at time of risk

The Industrial Commission did not err in a workers' compensation case by its determination that the proper insurance carrier on the risk at the time of plaintiff retired employee's last injurious exposure to asbestos was the defendant carrier for defendant employer from 31 October 1991 until plaintiff's retirement on 30 June 1993, and on remand the previous company carrier for defendant employer from 31 October 1980 until 31 October 1991 shall be dismissed as a party to this action.

Appeal by defendants Clariant Corporation and The Travelers Insurance Company from opinion and award entered 22 February 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 March 2002.

Wallace and Graham, P.A., by Richard L. Huffman, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Neil P. Andrews, Angelina M. Maletto and Hatcher B. Kincheloe, for defendant-appellants Clariant Corporation and The Travelers Insurance Company.

Alala Mullen Holland & Cooper, P.A., by H. Randolph Sumner and Jesse V. Bone, Jr., for defendant-appellee Liberty Mutual Insurance Company.

MARTIN, Judge.

Plaintiff was employed by defendant Clariant Corporation (formerly Sandoz Chemicals Corporation) as a pipe fitter and insulator from 24 June 1968 until 30 June 1993. On 16 February 1996, plaintiff filed a claim alleging that he was suffering from asbestosis as a result of his exposure to asbestos in connection with his employment. Defendants denied the claim.

Briefly summarized, the evidence tended to show that plaintiff testified he was exposed to asbestos while working in pipefitting,

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insulation, construction and maintenance work for defendant employer. Plaintiff testified that defendant employer used twenty different asbestos materials while he was employed there, and that he was exposed to asbestos “someway or other” up until the day he quit. Plaintiff testified that he retired in 1993, at the age of 63, in part because he “wasn’t up to par” and that he “couldn’t keep up.” Although Bobby Cleveland, plaintiff’s supervisor for many years, testified that from 1990 until 1993, he had no knowledge that plaintiff was exposed to asbestos fibers, John Evans, a co-worker of plaintiff during the period, testified that he worked in defendant’s salvage yard between 1991 and 1993, and that plaintiff often worked in the yard tearing off insulation and disposing of it in hazardous waste dumpsters. Evans stated that the conditions were very dusty.

After a chest x-ray in early 1995, and a subsequent CT scan, which showed abnormalities, plaintiff was examined by Dr. Douglas G. Kelling, Jr., on 25 August 1995. Dr. Kelling diagnosed plaintiff as suffering with asbestosis. Defendant Liberty Mutual was the workers’ compensation insurance carrier for defendant employer from 31 October 1980 until 31 October 1991; defendant Travelers Insurance Company was the carrier from 31 October 1991 until plaintiff’s retirement on 30 June 1993.

A deputy commissioner determined that plaintiff was injuriously exposed to the hazards of asbestos during his employment with defendant employer and that plaintiff has asbestosis. The deputy commissioner awarded plaintiff 104 weeks of compensation pursuant to G.S. § 97-61.5. The deputy commissioner further determined that defendant Travelers was on the risk at the time of plaintiff’s last injurious exposure and is, therefore, liable for payment of the compensation.

Defendants Clariant and Travelers appealed to the Full Commission. The Full Commission entered its opinion and award affirming the deputy commissioner. Defendants Clariant and Travelers appeal to this Court.

I.

[1] Defendants Clariant and Travelers assign error to the Commission’s determination that plaintiff is entitled to 104 weeks of compensation pursuant to G.S. § 97-61.5 because plaintiff had already retired at the time he was diagnosed with asbestosis and, therefore, was not “removed” from the occupation giving rise to the hazard. At

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oral argument, the parties agreed that the issue has been settled by the decision of the North Carolina Supreme Court in *Austin v. Continental General Tire*, 354 N.C. 344, 553 S.E.2d 680 (2001), and that plaintiff does not qualify for benefits under the statutory scheme of G.S. § 97-61.5. In *Austin*, a majority of a divided panel of this Court held that the plaintiff was entitled to compensation under G.S. § 97-61.5, despite the fact that the plaintiff had already retired from the company prior to being diagnosed with asbestosis. *Austin v. Continental General Tire*, 141 N.C. App. 397, 540 S.E.2d 824 (2000). The majority held that it was not necessary for the plaintiff to be removed from his employment in order to qualify for 104 weeks of compensation under the statute. Judge Greene dissented, stating:

The unambiguous language of section 97-61.5(b) requires an employee to be “removed” from his employment as a prerequisite to receiving the 104 weeks of compensation provided for in the statute An employee who is no longer employed at the time he is diagnosed with asbestosis, therefore, may not, under the plain language of section 97-61.5(b), proceed with a workers’ compensation claim under this statute.

Id. at 415, 540 S.E.2d at 835. Judge Greene stated that G.S. § 97-64 provides the sole remedy for the plaintiff’s asbestos related illness. In a *per curiam* opinion, the Supreme Court adopted Judge Greene’s dissent and reversed, remanding the case to this Court for further remand to the Industrial Commission for proceedings consistent with the dissent. *Austin v. Continental General Tire*, 354 N.C. 344, 553 S.E.2d 680 (2001). Under G.S. § 97-64, “the legislature established the general rule that an employee becoming disabled by asbestosis or silicosis within the terms of the specific definition embodied in G.S. § 97-54 should be entitled to ordinary compensation measured by the general provisions of the Workmen’s Compensation Act.” *Young v. Whitehall Co.*, 229 N.C. 360, 366, 49 S.E.2d 797, 801 (1948). Thus, we must reverse the Commission’s award of compensation pursuant to G.S. § 97-61.5 and remand this case to the Industrial Commission for a determination as to whether plaintiff is entitled to compensation under G.S. § 97-64.

II.

[2] Defendants Clariant and Travelers next contend the Industrial Commission erred in calculating plaintiff’s average weekly wage. The deputy commissioner recited, in her opinion and award, the following

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stipulation: “4. Plaintiff’s average weekly wage was \$611.49, yielding a compensation rate of \$470.66.” Defendants contend they did not stipulate to the average weekly wage and direct us to the pre-trial agreement, which states: “The plaintiff contends the average weekly wage was \$611.49 which provides a compensation rate of \$470.66.” Plaintiff responds that defendants did not properly preserve the deputy commissioner’s allegedly erroneous recitation for review by the Full Commission, thereby waiving their right to a review of the issue. Therefore, plaintiff contends, the issue is not properly before this Court for review.

Industrial Commission Rule 701(2) states:

After receipt of notice of appeal, the Industrial Commission will supply to the appellant a Form 44 Application for Review upon which appellant must state the grounds for the appeal. The grounds must be stated in particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and, when applicable, the pages in the transcript on which the alleged errors are recorded. Failure to state with particularity the grounds for appeal shall result in abandonment of such grounds

However, in *Tucker v. Workable Company*, 129 N.C. App. 695, 701, 501 S.E.2d 360, 365 (1998) (citations omitted), this Court held that “[a]lthough Rule 701 provides that appellant must state with particularity the grounds for appeal,”

[t]his Court has held that when the matter is “appealed” to the full Commission pursuant to G.S. 97-85, it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties.

Id. (citing *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 374 S.E.2d 610 (1988)).

In the present case, although defendants did not state with particularity, in their Form 44 application for review by the Full Commission, their contention that the deputy commissioner’s recitation of the stipulation was error, defendant did state: “Deputy Commissioner Taylor erred in using Plaintiff’s last full year of employment to calculate his average weekly wage.” We hold the language was sufficient to preserve the issue of the proper calculation of plaintiff’s average weekly wage for review.

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As we have held in Section I of this opinion, though plaintiff does not qualify for compensation pursuant to G.S. § 97-61.5, he is nevertheless entitled to pursue a claim for compensation pursuant to G.S. § 97-64. That statute provides: “[e]xcept as herein otherwise provided, in case of disablement or death from silicosis and/or asbestosis, compensation shall be payable in accordance with the provisions of the North Carolina Workers’ Compensation Act.” Disablement from asbestosis is defined as “the event of becoming actually incapacitated because of asbestosis . . . to earn, in the same or any other employment, the wages which the employee was receiving at the time of his last injurious exposure to asbestosis” N.C. Gen. Stat. § 97-54.

If, on remand, plaintiff establishes his disablement from asbestosis, and his entitlement to compensation pursuant to G.S. § 97-64, the Commission must determine his average weekly wage. This Court, in *Moore v. Standard Mineral Company*, 122 N.C. App. 375, 469 S.E.2d 594 (1996), held that the proper date for determining the average weekly wage of a plaintiff for the purpose of determining benefits under G.S. § 97-61.5 was as of the time of injury, which was deemed to be the date of diagnosis of silicosis or asbestosis. In *Moore*, however, the plaintiff was still earning a wage when he was diagnosed, albeit in other employment. The Court noted that, “[i]n so holding,”

we emphasize that the situation of a claimant **no longer employed in any capacity at the time of diagnosis** is not before us, and that legislative action to address such an instance may well be required to fulfill completely the intended purpose of compensating workers who have contracted occupational diseases.

Id. at 380, 469 S.E.2d at 598 (emphasis added). Indeed, Judge Greene acknowledged, in his dissent in *Austin*,

the “removal” requirement of section 97-61.5(b) raises concerns regarding whether an employee who chooses to remove himself from employment prior to a diagnosis of asbestosis should be precluded from receiving 104 weeks of compensation under section 97-61.5(b). For example, this statute may encourage employees who are exposed to asbestos to remain in their employment until they receive a diagnosis of asbestosis. These concerns, however, should not be resolved by this Court; rather, the proper forum for addressing these concerns is in the Legislature.

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Austin, 141 N.C. App. at 416, 540 S.E.2d at 836 (citing *Moore*, *supra*). Thus, the holding in *Moore*, that the average weekly wage is computed as of the date of diagnosis, is not applicable to the case before us since plaintiff in the present case was no longer employed in any capacity at the time he was diagnosed with asbestosis.

Under the general provisions of the Workers' Compensation Act, G.S. § 97-2(5) "provides a hierarchy" of five methods for computing average weekly wages. *McAninch v. Buncombe County Schools*, 347 N.C. 126, 130, 489 S.E.2d 375, 378 (1997). The final method, contained in the second full paragraph of G.S. § 97-2(5) provides:

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

N.C. Gen. Stat. § 97-2(5). This final method "may not be used unless there has been a finding that unjust results would occur by using the previously enumerated methods." *McAninch*, 347 N.C. at 130, 489 S.E.2d at 378 (citation omitted).

In the present case, it would be obviously unfair to calculate plaintiff's benefits based on his income upon the date of diagnosis because he was no longer employed and was not earning an income. And, since the General Assembly has made no specific provision for determining compensation pursuant to G.S. § 97-64 when a former employee is diagnosed with asbestosis some time after his removal from the employment, the only statutory provision which may in fairness be used is the method recited above. Plaintiff testified that he retired from defendant company in 1993 because he "wasn't up to par" and "couldn't keep up" in his job duties. He also stated he would have liked to keep working until he was 65 but his "health wasn't that good." Because plaintiff contracted asbestosis by working around asbestos for 25 years at defendant employer, the only fair method for determining his average weekly wage is using his latest full year of employment with defendant company, which appears to be the same figure the deputy commissioner and the Full Commission used in their calculations of plaintiff's average weekly wage. Accordingly, in remanding this case to the Industrial Commission for a determination of plaintiff's entitlement to compensation pursuant to G.S. § 97-64, we also instruct the Commission, if it determines plaintiff is entitled to compensation, to calculate plaintiff's average weekly wage in accord-

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ance with the method prescribed by the second full paragraph of G.S. § 97-2(5).

III.

[3] Defendants Clariant and Travelers also assign error to the Commission's determination that Travelers was the carrier on the risk at the time of plaintiff's last injurious exposure. In our review of an opinion and award of the Industrial Commission, findings of fact "are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary." *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965).

G.S. § 97-57 provides:

In any case where compensation is payable for an occupational disease, *the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable.*

For the purpose of this section when *an employee has been exposed to the hazards of asbestosis or silicosis for as much as 30 working days, or parts thereof, within seven consecutive calendar months, such exposure shall be deemed injurious* but any less exposure shall not be deemed injurious . . . (emphasis added).

As defendants conceded during oral argument, sufficient "competent evidence" was presented in the hearing to warrant the Commission's finding. Plaintiff stated that he worked around asbestos in one way or another up until the day he retired, and that he worked directly with asbestos approximately four days a week from 1991 to 1993. Another employee, John Evans, testified that plaintiff would be down at the salvage yard two or three times a week, "taking down pipe" which contained asbestos, and doing other work. The salvage yard was very dusty with levels of asbestos present. Scientific evidence is not required to prove the causal connection between exposure to asbestos and the contracting of asbestosis. *Clark v. ITT Grinnell Ind. Piping, Inc.*, 141 N.C. App. 417, 539 S.E.2d 369 (2000), *remanded for reconsideration on other grounds*, 354 N.C. 572, 558 S.E.2d 867 (2001); *See also Gay v. J.P. Stevens & Co.*, 79 N.C. App. 324, 339 S.E.2d 490 (1986); *McCuiston v. Addressograph-Multigraph Corp.*,

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308 N.C. 665, 303 S.E.2d 795 (1983). Defendants' assignments of error related to these arguments are overruled, and the Commission's determination that Travelers "was on the risk at the time of plaintiff's last injurious exposure" is affirmed. Therefore, upon remand, defendant Liberty Mutual Insurance Company shall be dismissed as a party to this action.

Affirmed in part, reversed in part, and remanded.

Judges TYSON and THOMAS concur.

IN THE MATTER OF WENDELL WILLIAMSON, RESPONDENT

No. COA01-638

(Filed 2 July 2002)

1. Mental Illness— not guilty by reason of insanity—unsupervised passes within hospital

The trial court had jurisdiction to decide whether a respondent who had been found not guilty of murder by reason of insanity should be granted unsupervised passes on the premises of Dorothea Dix Hospital. N.C.G.S. § 122C-62(b) requires a court order expressly authorizing visits "outside the custody of the facility" for respondents found not guilty by reason of insanity; in a case of first impression, the Court of Appeals finds that visits "outside the custody of the facility" includes unsupervised passes or visits on the hospital premises in addition to off-campus visits.

2. Mental Illness— due process—unsupervised passes within hospital grounds—no protected interest

Respondent's right to due process was not violated where he was found not guilty of murder by reason of insanity and committed to Dorothea Dix Hospital; there was testimony at respondent's annual review that he remained mentally ill but had improved and that his treatment plan for the upcoming year included unsupervised passes within the premises of the hospital; and the court denied the passes. Respondent does not have a protected liberty interest in obtaining unsupervised passes.

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3. Mental Illness— equal protection—patients not guilty by reason of insanity and others involuntarily committed—rational basis for distinction

The trial court's exercise of jurisdiction in determining whether a respondent found not guilty of murder by reason of insanity should have unsupervised passes on the premises of Dorothea Dix Hospital did not violate equal protection. The statutory distinction between patients found not guilty by reason of insanity and other classes of involuntarily committed patients is not a suspect classification, nor does it involve a fundamental right subject to strict scrutiny, and respondent has not shown the lack of a rational basis for the distinction. There is a need to keep the public safe from individuals who have committed violent, dangerous, or other criminal acts resulting in their involuntary commitment.

4. Mental Illness— separation of powers—approval of therapeutic treatments by courts

The trial court did not violate separation of powers in determining whether a respondent who had been found not guilty of murder by reason of insanity should have unsupervised passes on the premises of Dorothea Dix Hospital.

Appeal by respondent from order entered 14 December 2000 by Judge Robert H. Hobgood in Orange County Superior Court. Heard in the Court of Appeals 13 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Angel E. Gray, for the State.

Martin & Martin, P.A., by J. Matthew Martin and Harry C. Martin, for the respondent.

BRYANT, Judge.

On 26 January 1995, respondent Wendell Williamson randomly fired an M-1 rifle at unarmed pedestrians in the downtown area of Chapel Hill, North Carolina. Two pedestrians were killed as a result of the shooting. Respondent was charged with two counts of first degree murder, and was found not guilty by reason of insanity following a jury trial in Orange County Superior Court. Respondent was thereafter involuntarily committed to Dorothea Dix Hospital pursuant to N.C.G.S. § 15A-1321.

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Respondent was transferred to Broughton Hospital by order entered on 26 January 1998. On 17 December 1998, respondent was transferred again to Dorothea Dix Hospital pursuant to court order. Since then, respondent has continuously resided within the forensic treatment program at Dorothea Dix Hospital.

Pursuant to N.C.G.S. § 122C-276.1, an annual review of respondent's involuntary commitment came before the 11 December 2000 term of Orange County Superior Court with the Honorable Robert H. Hobgood presiding. At the hearing, the trial court heard testimony from respondent's two expert witnesses, Dr. Mark Hazelrigg (the director of the forensic treatment program at Dorothea Dix Hospital) and from Laura Dale (a clinical social worker at the Dorothea Dix Hospital).

Dr. Hazelrigg testified that respondent remained mentally ill with a diagnosis of paranoid schizophrenia. Dr. Hazelrigg further described respondent's illness as a psychiatric disorder characterized by delusions and hallucinations including harboring beliefs that people were trying to harm him. Dr. Hazelrigg testified that the severe psychiatric symptoms of respondent's mental illness were currently kept under control through use of a medicine regimen. In addition, Dr. Hazelrigg testified that, in his opinion, respondent remained a danger to others and that he "cannot assure that [respondent] would be safe if he were released to the community at this point."

According to Dr. Hazelrigg, the medicine regimen was only part of respondent's treatment plan. Respondent was also involved in group activities and group therapies on his ward and attended individual therapy sessions on a regular basis. Dr. Hazelrigg testified that the goals of this treatment plan were to keep respondent's psychosis symptoms in remission, to improve respondent's insight into his illness and the need for treatment, and to improve respondent's overall functioning.

Dr. Hazelrigg testified that following this treatment plan, during the past year, respondent had improved his insight into his illness, and had gained a better understanding of past events. In Dr. Hazelrigg's opinion, respondent's symptoms of depression were not as prevalent as compared to previous years.

According to Dr. Hazelrigg, respondent was on level 3 of privileges as of the date of the hearing, which meant respondent was allowed to have a job on the ward and to attend therapy groups and

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sessions on the ward. With level 3 privileges, respondent could attend classes and other off-ward groups and activities with one-to-one staff supervision. In addition, respondent was allowed to leave the ward to attend leisure activities with one-to-one staff supervision and to have visitors on the ward.

Dr. Hazelrigg then discussed the treatment team's plans for the upcoming year of commitment and its recommendation that the respondent be given unsupervised passes on the premises of Dorothea Dix Hospital. These passes would start out at 5 to 10 minute increments with the unsupervised time gradually increasing as respondent established responsibility. Respondent would be allowed to obtain an off-ward work assignment and/or to enroll in courses and engage in other off-ward activities. Dr. Hazelrigg testified that respondent could not achieve further therapeutic gains until such passes were authorized, and that the passes could be safely administered in the discretion of the treatment team. However, evidence was introduced that the campus of Dorothea Dix Hospital was not surrounded by a fence, and other patients who have been given unsupervised pass privileges have escaped from the hospital in the past.

Laura Dale, a clinical social worker on the forensic treatment unit and a member of respondent's treatment team, testified that respondent had gained more insight into his illness and had begun to accept responsibility for his past actions. Dale testified that respondent had been attending AA, NA and other group functions on his unit. However, Dale testified that at times, respondent attended group meetings on an inconsistent basis and had not fully participated in some other ward activities. Notwithstanding respondent's inconsistent attendance and lack of full participation, Dale testified that she was in support of the treatment team's recommendation that respondent be allowed to have unsupervised passes on the grounds of Dorothea Dix Hospital.

Following Dr. Hazelrigg and Dale's testimony, the trial court voiced its concern regarding the "potential danger to the public . . . should the Respondent be allowed unsupervised passes and escape from Dorothea Dix Hospital." The trial court found that "any benefit of the unsupervised passes is outweighed by the danger to the public of the Respondent having unsupervised passes." On 14 December 2000, the trial court denied the treatment team's recommendation of any unsupervised passes for the respondent. To this denial of unsupervised passes, respondent gave notice of appeal on 22 December 2000. Respondent presents three issues on appeal.

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I.

[1] The first issue involved in this case is whether the trial court had jurisdiction pursuant to N.C.G.S. § 122C-62(b) to decide whether the respondent should be granted unsupervised passes on the premises of Dorothea Dix Hospital. It appears that prior case law has not addressed this issue; therefore, it is the responsibility of this Court to determine the legislative intent in drafting this statute and to interpret the statute accordingly.

Section 122C-62(b) of the North Carolina General Statutes reads in pertinent part:

(b) Except as provided in subsections (e) and (h) of this section, each adult client who is receiving treatment or habilitation in a 24-hour facility at all times keeps the right to:

...

(4) Make visits outside the custody of the facility unless:

a. Commitment proceedings were initiated as the result of the client's being charged with a violent crime, including a crime involving an assault with a deadly weapon, and the respondent was found not guilty by reason of insanity or incapable of proceeding;

...

A court order may expressly authorize visits otherwise prohibited by the existence of the conditions prescribed by this subdivision. . . .

N.C.G.S. § 122C-62(b) (2001)¹.

In interpreting N.C.G.S. § 122C-62(b), we must determine what the legislature intended by requiring a court order to expressly authorize visits “outside the custody of the facility” for respondents found not guilty of a crime by reason of insanity (NGRI). At the outset, we note that it is “an accepted rule of statutory construction that ordinarily words of a statute will be given their natural, approved, and recognized meaning,” unless the statute provides a definition of a term. *City of Greensboro v. Smith*, 241 N.C. 363, 366, 85 S.E.2d 292,

1. As the statute clearly states that a court order may expressly authorize visits otherwise prohibited, it logically follows that absent express authorization granted via court order, a NGRI patient such as respondent has no right to visits outside the custody of the facility.

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294 (1955). Because the statute does not define the phrase “outside the custody of the facility,” we must construe this phrase in accordance with its plain meaning to determine the legislative intent. See *Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991).

Respondent contends that the term “outside the custody of the facility” as used in N.C.G.S. § 122C-62(b)(4) refers to visits off the hospital premises versus unsupervised visits while remaining on the premises. Specifically, respondent argues that technically you remain in the custody of the department even when taking unsupervised visits on the hospital premises. Therefore, respondent asks this Court to construe “outside the custody of the facility” very narrowly to encompass only off-campus visits. We, find respondent’s argument unpersuasive.

Black’s Law Dictionary 267 (Abridged 6th ed. 1991) defines custody as:

The care and control of a thing or person. The keeping, guarding, care, watch, inspection, preservation or security of a thing carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected. Immediate charge and control, and not the final, absolute control of ownership, implying responsibility for the protection and preservation of the thing in custody. Also the detainer of a man’s person by virtue of lawful process or authority.

The term is very elastic and may mean actual imprisonment or physical detention or mere power, legal or physical, of imprisoning or of taking manual possession. . . . Accordingly, persons on probation or parole or released on bail or on own recognizance have been held to be “in custody”

See also, *The American Heritage College Dictionary* 341 (3rd ed. 1997); *Webster’s New World College Dictionary* 357 (4th ed. 1999). It is clear from the definition of custody provided above, the term custody encompasses both the physical supervision of a person in addition to having constructive supervision (i.e., legal authority) over a person. We do not accept that our legislators meant for the term custody as referenced pursuant to N.C.G.S. § 122C-62(b) to be defined as narrowly as respondent argues. We find that the plain language of the statute requires a court order prior to NGRI

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patients, such as respondent, being granted visits outside the custody of the facility. Further, we find that visits outside the custody of the facility include unsupervised passes or visits on the hospital premises in addition to off-campus visits. Therefore, we overrule this assignment of error.

II.

Second, respondent argues that the trial court's exercise of jurisdiction in determining whether respondent should have unsupervised passes on the premises of Dorothea Dix Hospital violated his right to due process and equal protection under the law. We disagree.

a. Due Process

[2] Due process restricts the government from taking actions that would unjustly deprive an individual of his liberty or property interest within the meaning of the due process clause of the Fifth Amendment as applied to the States by the Fourteenth Amendment. *Peace v. Employment Sec. Comm'n of N.C.*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998). Therefore, our first inquiry into whether respondent has received due process under the law, is to determine whether respondent has a protected liberty interest in obtaining unsupervised passes.

This Court is of the opinion that respondent does not have a protected liberty interest in obtaining unsupervised passes. As previously stated, N.C.G.S. § 122C-62(b) requires court approval via a court order for a NGRI patient such as respondent to obtain visits outside the custody of the facility. Having determined that visits outside the custody of the facility include unsupervised passes on the hospital premises in addition to visits off the premises, we find that it is solely within the trial court's determination whether respondent is entitled to unsupervised passes. Respondent does not have a protected liberty interest in obtaining passes for unsupervised visits on the hospital premises, therefore, we overrule this assignment of error.

b. Equal Protection

[3] In addition, respondent argues that the distinction in the treatment of NGRI patients and other classes of involuntarily committed patients violates the Equal Protection Clause of the United States Constitution and the parallel provisions of the "Law of the Land Clause" of the North Carolina Constitution. We disagree.

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This Court stated in *Dept. of Transp. v. Rowe*, 138 N.C. App. 329, 343, 531 S.E.2d 836, 845 (2000), *rev'd on other grounds*, 353 N.C. 671, 549 S.E.2d 203 (2001), *cert. denied*, 534 U.S. 1130, 151 L. Ed. 2d 972 (2002) (internal citations omitted):

In addressing a claim that the Equal Protection Clause has been violated, the courts employ a two-tiered analysis.

The upper tier is employed [w]hen a governmental act classifies persons in terms of their ability to exercise a fundamental right . . . or when a governmental classification distinguishes between persons in terms of any right, upon some 'suspect' basis. . . .

This tier, calling for strict scrutiny, "requires the government to demonstrate that the classification is necessary to promote a compelling governmental interest."

The lower tier is employed "[w]hen an equal protection claim does not involve a 'suspect class' or a fundamental right. . . ." "This mode of analysis merely requires that distinctions which are drawn by a challenged statute or action bear some rational relationship to a conceivable legitimate governmental interest."

The distinction between NGRI and other involuntarily committed patients is not a suspect classification. *See, e.g., In re Declaratory Ruling by N.C. Comm'r of Ins.*, 134 N.C. App. 22, 36, 517 S.E.2d 134, 144 (1999) ("[T]o evoke a greater level of scrutiny under the equal protection clause, the discrimination at issue must invoke a suspect class such as race or national origin."); *Smith v. Keator*, 21 N.C. App. 102, 108, 203 S.E.2d 411, 416 (1974) (stating that among the suspect criteria subjecting a statute to strict scrutiny are race, alienage and national origin). Nor does the distinction involve a fundamental right that is subject to strict scrutiny review—a fact alluded to by respondent in his appellate brief. *See, e.g., In re Johnson*, 45 N.C. App. 649, 652, 263 S.E.2d 805, 808 (1980) ("Procreation, together with marriage and marital privacy, are recognized as fundamental civil rights protected by the due process and equal protection clauses of the Fourteenth Amendment"). Thus, as long as the statutory classification at issue bears some rational relationship to a legitimate governmental interest, the statute will survive constitutional scrutiny. *See Abbott v. Town of Highlands*, 52 N.C. App. 69, 75-76, 277 S.E.2d 820,

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825 (1981). The burden is on the party arguing against the statute to demonstrate its unconstitutionality. *Currituck County v. Willey*, 46 N.C. App. 835, 836, 266 S.E.2d 52, 53 (1980).

NGRI patients are patients that have been involved in criminal proceedings and have been acquitted based on their mental state at the time they committed the criminal act. In the case at bar, respondent randomly fired a rifle at unarmed pedestrians resulting in two deaths, but was acquitted at trial based on his mental state. There exists a need to monitor and keep the public safe from individuals (such as respondent) that often times have committed violent, dangerous or other criminal acts resulting in their involuntary commitment. We find that respondent has not shown that a rational basis does not exist for the distinction in classification. Therefore, we overrule this assignment of error.

III.

[4] Last, respondent argues that the trial court's exercise of jurisdiction determining whether respondent should have unsupervised passes on the premises of Dorothea Dix Hospital violated the separation of powers. Specifically, respondent argues that the judiciary has not been delegated with the duty to determine what therapeutic treatments should be afforded to NGRI patients (including whether they should receive unsupervised passes). For the reasons stated in section I, we overrule this assignment of error.

AFFIRMED².

Judges WALKER and HUNTER concur.

2. We note that at oral argument, respondent's counsel stated that at respondent's annual review pursuant to N.C.G.S. § 122C-276.1, held on 10 December 2001, Judge Howard E. Manning, Jr., granted respondent transfer passes. According to respondent's counsel, the terms specified by the trial court were that the transfer passes are to be no more than ten minutes in duration; the passes may only be used to attend certain staff supervised activities; and the transfer process is to be initiated and confirmed with telephone correspondence. During the transfer process, respondent is allowed to walk unescorted from one location to his final destination.

CLANCY v. ONSLOW CTY.

[151 N.C. App. 269 (2002)]

KERRY P. CLANCY, PLAINTIFF v. ONSLOW COUNTY, ONSLOW COUNTY DEPARTMENT OF SOCIAL SERVICES, AND ONSLOW COUNTY BEHAVIORAL HEALTHCARE SERVICES, DEFENDANTS

No. COA01-977

(Filed 2 July 2002)

1. Collateral Estoppel and Res Judicata— res judicata— motion to dismiss—sufficiency of evidence

The trial court erred in a negligence case by denying a motion by defendant county and defendant department of social services to dismiss the pleadings based on res judicata, because plaintiff brought an identical negligence claim as well as a slander claim against the same two defendants in the present case, and a dismissal of that claim under N.C.G.S. § 1A-1, Rule 12(b)(6) operated as an adjudication on the merits since the court did not specify that the dismissal was without prejudice.

2. Immunity— governmental—motion to dismiss—sufficiency of evidence

The trial court erred in a negligence case by denying defendant mental health area authority's motion to dismiss the pleadings based on governmental immunity, because: (1) plaintiff's allegation that defendant county waived its immunity from suit by the purchase of liability insurance is insufficient to constitute a waiver of immunity by defendant area authority; and (2) in the absence of an allegation in the complaint in a tort action against a governmental unit to the effect that such unit had waived its immunity by the procurement of liability insurance to cover such alleged negligence or tort, or that such unit has waived its immunity, such complaint does not state a cause of action.

Appeal by defendants from order entered 22 May 2001 by Judge James E. Ragan, III in Onslow County Superior Court. Heard in the Court of Appeals 27 March 2002.

John W. Ceruzzi and Andrew Kent Wigmore, for plaintiff-appellee.

Cranfill, Sumner & Hartzog, L.L.P., by J. Gregory W. Brown and M. Regan Summerrin, for defendant-appellant Onslow County Behavioral Health Services.

CLANCY v. ONSLOW CTY.

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Womble, Carlyle, Sandridge & Rice, P.L.L.C., by Mark A. Davis, for defendant-appellants Onslow County and Onslow County Department of Social Services.

CAMPBELL, Judge.

Kerry P. Clancy (“plaintiff”) contracted with Onslow County Behavioral Healthcare Services (“BHS”), the mental health area authority for Onslow County, for plaintiff to provide treatment and care to disabled clients in his home. On or about 26 April 2000, Onslow County Department of Social Services (“DSS”) received a complaint that one of plaintiff’s clients, Lewis Simmons (“Simmons”), had an injury on the left side of his face. When DSS asked how he had been injured, Simmons indicated that plaintiff had struck him. DSS immediately demanded that Simmons be removed from plaintiff’s care and an investigation be initiated to determine if there was a case against plaintiff for abuse or neglect. DSS also recommended that BHS remove the one client remaining in plaintiff’s home to another facility.

DSS’ investigation substantiated that a problem existed with respect to plaintiff’s care of Simmons. Based on this investigation, BHS revoked plaintiff’s provider status and refused to place any more clients in his home. However, instead of appealing to BHS for reversal of its decision or initiating an administrative proceeding under North Carolina’s Administrative Procedure Act, plaintiff filed a negligence action in Onslow County Superior Court on 18 July 2000 bearing case number 00 CVS 2295 (hereinafter, “*Clancy I*”). In his complaint, plaintiff named Onslow County (“OC”) and DSS as defendants. On 11 August 2000, both defendants filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

A hearing on the motion to dismiss was held on 21 August 2000 before Judge Steve A. Balog (“Judge Balog”), during which defendants’ counsel argued that defendants owed no duty to individuals such as plaintiff who operate a health care facility for monetary gain. Counsel also argued that plaintiff’s “remedy” was actually with BHS and not with either of the defendants. At the conclusion of the hearing, Judge Balog granted defendants’ motion and signed an order previously prepared by defendants’ counsel, but struck through the “with prejudice” language present in the order at the request of plaintiff’s counsel. However, despite striking through this language, Judge Balog declined to rule specifically on whether plaintiff’s action was

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dismissed with or without prejudice electing, instead, to let the parties “fight about that at a later date.”

On 8 November 2000, plaintiff filed the complaint in the instant action naming OC, DSS, and BHS as defendants (hereinafter, “*Clancy II*”). This complaint was identical to plaintiff’s previous negligence action in *Clancy I*, with the addition of BHS as a named defendant. The complaint in *Clancy II* also included an additional claim for slander. On or about 24 April 2001, defendants filed motions for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure with OC and DSS filing a joint motion and BHS filing a separate motion. On 7 May 2001, another hearing was held in the Onslow County Superior Court, this time before Judge James E. Ragan, III. On 22 May 2001, the court entered an order denying both motions for judgment on the pleadings. All three defendants appeal.

By their appeal, defendants raise issues involving *res judicata* and governmental immunity. A motion for judgment on the pleadings grounded on governmental immunity or based on *res judicata* affects a substantial right and is immediately appealable. See *Mabrey v. Smith*, 144 N.C. App. 119, 121, 548 S.E.2d 183, 185, *disc. review denied*, 354 N.C. 486, 428 S.E.2d 340 (2001); *Wilson v. Watson*, 136 N.C. App. 500, 501, 524 S.E.2d 812, 813 (2000). Therefore, this Court may properly consider the two issues raised by defendants in this case. For the following reasons, we reverse the trial court’s denial of defendants’ motions.

I.

[1] OC and DSS raise the first issue presented to this Court, which is whether the trial court erred in denying their motion for judgment on the pleadings based on the doctrine of *res judicata*. We find the court’s denial was in error.

The doctrine of *res judicata* was developed by the courts to protect “litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation.” *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). Under this doctrine, “a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them.” *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986). The doctrine of *res judicata* also applies to those “issues

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which could have been raised in the prior action but were not. Thus, the doctrine is intended to force parties to join all matters which might or should have been pleaded in one action.” *Chrisalis Properties, Inc. v. Separate Quarters, Inc.*, 101 N.C. App. 81, 84, 398 S.E.2d 628, 631 (1990) (citations omitted).

Here, after having his claim for negligence against OC and DSS dismissed in *Clancy I* under Rule 12(b)(6), plaintiff brought an identical negligence claim, as well as a slander claim against the same two defendants in the present case. OC and DSS subsequently filed a motion for judgment on the pleadings arguing that plaintiff’s suit against them was barred by the doctrine of *res judicata*. Plaintiff would have us believe that since the trial judge struck out the “with prejudice” language in the *Clancy I* order, we should assume defendants’ motion was granted “without prejudice.” However, it is well settled in this State that “[a] dismissal under Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice.” *Hoots v. Pryor*, 106 N.C. App. 397, 404, 417 S.E.2d 269, 274 (1992). *See also* N.C. Gen. Stat. § 1A-1, Rule 41(b) (2001). Since the court’s order dismissing plaintiff’s negligence claim in *Clancy I* did not specifically indicate that the dismissal was “without prejudice,” we are compelled to conclude that the court’s dismissal was “with prejudice.” Thus, the trial court in *Clancy II* erred in denying defendants’ motion for judgment on the pleadings because the court’s dismissal of plaintiff’s claim in *Clancy I* operated as an adjudication upon the merits of plaintiff’s negligence claim in the instant action against these same defendants. Additionally, since plaintiff’s slander claim was based on the same set of facts giving rise to the negligence claim in *Clancy I* and could have been raised in that action, it is barred by *res judicata* as well.

II.

[2] The second issue presented to this Court is raised by BHS and requires us to determine whether the trial court erred in denying BHS’ motion for judgment on the pleadings based on governmental immunity. Specifically, BHS argues that since OC and BHS are governmental units whose actions are covered under separate statutory provisions, the allegation in plaintiff’s complaint that OC had waived its governmental immunity was not a sufficient allegation that BHS had also waived its governmental immunity. We agree.

“As a general rule, the doctrine of governmental, or sovereign, immunity bars actions against, *inter alia*, the state, its counties, and

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its public officials sued in their official capacity.” *Messick v. Catawba County*, 110 N.C. App. 707, 714, 431 S.E.2d 489, 493 (1993) (citations omitted). Nevertheless, governmental immunity may be waived by the purchase of liability insurance, but only to the extent the governmental unit is “indemnified by the insurance contract from liability for the acts alleged. If a plaintiff does not allege a waiver of immunity by the purchase of insurance, the plaintiff has failed to state a claim against the governmental unit[.]” *Mullins v. Friend*, 116 N.C. App. 676, 681, 449 S.E.2d 227, 230 (1994) (citations omitted).

Pursuant to our statutes, a county in North Carolina (such as OC) may waive its governmental immunity by:

[Contracting] to insure itself and any of its officers, agents, or employees against liability for wrongful death or negligent or intentional damage to person or property or against absolute liability for damage to person or property caused by an act or omission of the county or any of its agents, or employees when acting within the scope of their authority and the course of their employment. . . .

N.C. Gen. Stat. § 153A-435(a) (2001). In the case *sub judice*, plaintiff’s complaint stated:

2. That the defendant, [OC], is a municipal corporation chartered under the laws and constitution of the State of North Carolina. [OC] is responsible for the policies and practices carried out by their agents, servants and employees. Said defendant . . . maintains and administers a department of mental health services known as [BHS].
3. That defendant, [OC], has waived its immunity from suit by the purchase of liability insurance.

These allegations sufficiently pled a claim against OC by alleging that OC had waived its governmental immunity. However, BHS contends that since it is a mental health area authority (an assertion made by BHS that plaintiff never disputed in his brief to this Court), plaintiff was also required to allege BHS’ waiver of governmental immunity because an area authority is covered under statutory provisions separate from those applicable to a county.

Chapter 122C of the General Statutes of North Carolina (The Mental Health, Developmental Disabilities, and Substance Abuse Act

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of 1985) contains provisions pertinent to mental health and substance abuse area authorities. It provides:

Within the public system of mental health, developmental disabilities, and substance abuse services, there are both area and State facilities. An area authority is the locus of coordination among public services for clients of its catchment area. To assure the most appropriate and efficient care of clients within the publicly supported service system, area authorities are encouraged to develop and secure approval for a single portal of entry and exit policy for their catchment areas for mental health and substance abuse authorities. . . .

§ 122C-101 (Effective until July 1, 2002). Chapter 122C further defines these types of area authorities as “local political subdivision[s] of the State except that a single county area authority is considered a department of the county in which it is located for purposes of [local government finance].” § 122C-116(a).

Here, this Court agrees with BHS’ assertion that it is a mental health area authority. As such, pursuant to Chapter 122C, BHS is a department of OC only for the purposes of local government finance. *See id.* Additionally, the parties do not dispute that the actions taken by BHS were governmental in nature, thus entitling it to governmental immunity. Chapter 122C provides a statutory provision that allows an area authority (like BHS) to:

[W]aive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent, employee, or board member of the area authority when acting within the scope of his authority or within the course of his duties or employment.

§ 122C-152(a). “Under the statute, it is the Area Authority, not the County, that is indemnified by a decision to purchase insurance.” *Cross v. Residential Support Services*, 123 N.C. App. 616, 619, 473 S.E.2d 676, 678 (1996), *aff’d in part and vacated in part*, 129 N.C. App. 374, 499 S.E.2d 771 (1998) (citation omitted).

Given these statutory distinctions between counties and area authorities and the waiver provisions of sections 122C-152(a) and 153A-435(a), plaintiff’s allegation that OC has waived its immunity from suit by the purchase of liability insurance is insufficient to constitute a waiver of immunity by BHS. *See id.* (holding that, in light of

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these statutory distinctions and waiver provisions, an area authority's purchase of insurance does not result in a waiver of governmental immunity by a county . . . the reverse of the factual situation in the present case). "Therefore, in the absence of an allegation in the complaint in a tort action against [a governmental unit], to the effect that such [unit] had waived its immunity by the procurement of liability insurance to cover such alleged negligence or tort, or that such [unit] has waived its immunity . . . , such complaint does not state a cause of action." *Fields v. Board of Education*, 251 N.C. 699, 701, 111 S.E.2d 910, 912 (1960). The trial court should have granted BHS' motion for judgment on the pleadings on the basis of governmental immunity because plaintiff's complaint failed to state a claim against this defendant.

Accordingly, for the aforementioned reasons, we reverse the trial court's denial of (I) OC's and DSS' motion for judgment on the pleadings based on *res judicata* and (II) BHS' motion for judgment on the pleadings based on governmental immunity.

Reversed.

Judges WALKER and MCGEE concur.

J.C. HATCHER, PLAINTIFF V. HARRAH'S NC CASINO COMPANY, L.L.C., DEFENDANT

No. COA01-712

(Filed 2 July 2002)

I. Indians— gaming on Cherokee lands—failure to pay jackpot—non-Indian management company—state court jurisdiction—no preemption by federal act

The Indian Gaming Regulatory Act did not preempt state court jurisdiction of an action brought by a non-Indian against a management company operating a gaming facility on Cherokee Indian lands for fraud and unfair trade practices arising from defendant's refusal to pay a jackpot that plaintiff allegedly won from a gaming machine in the facility because plaintiff's claims neither affect the Cherokee Tribe's internal governmental decisions nor directly relate to the regulation of gaming.

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2. Indians— gaming on Cherokee lands—failure to pay jackpot—non-Indian management company—infringement on Cherokee self-governance—remand for determination

An action instituted by a non-Indian against a non-tribal management company operating a gaming facility on Cherokee Indian lands which arose from defendant's refusal to pay a jackpot that plaintiff allegedly won from a gaming machine in the facility must be remanded for the trial court to determine, pursuant to the criteria set forth in *Jackson County v. Swaney*, 319 N.C. 52, whether the exercise of state court jurisdiction would unduly infringe on the self-governance of the Eastern Band of Cherokee Indians. In particular, the trial court should determine the nature of the activities in which plaintiff engaged and whether those activities are consistent with the public policy of this State.

Appeal by plaintiff from order entered 13 March 2001 by Judge Danny E. Davis in Jackson County District Court. Heard in the Court of Appeals 14 March 2002.

McLean Law Firm, P.A., by Russell L. McLean, III, for plaintiff-appellant.

Coward, Hicks & Siler, P.A., by Monty C. Beck, for defendant-appellee.

HUDSON, Judge.

Plaintiff appeals from an order granting defendant's motion to dismiss based on lack of subject matter jurisdiction. For the reasons given below, we reverse in part and remand to the district court for further proceedings.

The Indian Gaming Regulatory Act (the "IGRA") provides a statutory framework for the regulation of gaming activities on Indian lands. *See* 25 U.S.C.A. §§ 2701-2721 (West 2001). The parties here do not dispute that the gaming at issue is "Class III gaming." *See* 25 U.S.C.A. § 2703 (defining gaming classes). Class III gaming activities may be conducted on Indian lands pursuant to a Tribal-State compact, provided that, *inter alia*, the Indian tribe has authorized the activities, and the activities are permitted in the state in which the Indian lands are located. *See* 25 U.S.C.A. § 2710(d) (regulating Class III gaming).

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In this case, the Eastern Band of Cherokee Indians (the "Tribe") and the State of North Carolina have entered into a Tribal-State compact. The compact authorizes the Tribe to operate certain specified types of Class III gaming on the reservation. The Tribe entered into a management agreement with defendant, pursuant to which defendant has "the exclusive right and obligation to develop, manage, operate and maintain" the Tribe's gaming facility.

Plaintiff operated a machine at the facility managed by defendant. Plaintiff alleges that the machine registered plaintiff a winner of \$11,428.22, but that it did not pay out. Plaintiff informed employees of defendant that he had won but that he did not receive a pay-out. The manager refused to pay plaintiff. Plaintiff participated in a dispute resolution process before the Cherokee Tribal Gaming Commission. After the Cherokee Tribal Gaming Commission ruled against him, plaintiff filed this action in the state District Court in Jackson County, alleging that defendant refused to pay a jackpot he won from a gaming machine, and alleging that defendant had engaged in an unfair and deceptive trade practice and fraud. Defendant filed a motion to dismiss for lack of subject matter jurisdiction. *See* N.C.R. Civ. P. 12(b)(1).

[1] The district court ruled that its jurisdiction was preempted by the IGRA. Finding that it was without subject matter jurisdiction, the court granted defendant's motion to dismiss. We review *de novo* an order granting a motion to dismiss for lack of subject matter jurisdiction. *See Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

The analysis we must employ in this case was articulated by our Supreme Court in *Jackson County v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (1987), as a two-prong inquiry. The issue before the Court in *Swayney* was whether our state courts had jurisdiction to hear a paternity suit in which the mother, child, and putative father were all members of the Eastern Band of Cherokee Indians living on the Indian reservation, and the plaintiff agency was located off the reservation. The Court first considered whether federal law preempted state-court jurisdiction. *See id.* at 56, 352 S.E.2d at 415. Having found no preemption, the Court next considered whether the exercise of state-court jurisdiction "unduly infringe[d] on the self-governance of the Eastern Band of Cherokee Indians." *Id.* at 58, 352 S.E.2d at 417 (footnote omitted) (citing *Williams v. Lee*, 358 U.S. 217, 220, 3 L. Ed. 2d 251, 254 (1959)).

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Federal preemption occurs when the federal government's regulation in an area is "comprehensive." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145, 65 L. Ed. 2d 665, 674 (1980). "State action may be barred upon a showing of congressional intent to 'occupy the field' and prohibit parallel state action." *Swayney*, 319 N.C. at 56, 352 S.E.2d at 415-16 (quoting *Wildcatt v. Smith*, 69 N.C. App. 1, 6, 316 S.E.2d 870, 874 (1984)). We hold that state-court jurisdiction is not preempted by federal law in this case.

Defendant cites *Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536 (8th Cir. 1996), in support of its contention that the IGRA preempts state-court jurisdiction. The Eighth Circuit held in *Gaming Corp.* that the IGRA "completely preempts state laws regulating gaming on Indian lands." *Id.* at 543 (emphasis added). While we agree that the IGRA preempts state laws regulating gaming, plaintiff here seeks state-court adjudication of a dispute between a non-Indian individual and a non-tribal management corporation, which is not the equivalent of "regulating" gaming activities.

The Eighth Circuit subsequently distinguished *Gaming Corp.* in a case involving a dispute between two companies that had attempted to negotiate a gaming management contract with the Potawatomi Indian Nation. See *Casino Res. Corp. v. Harrah's Entm't, Inc.*, 243 F.3d 435 (8th Cir. 2001). The Eighth Circuit observed that "*Gaming Corp.* dealt with the regulation of tribal gaming. In contrast, the instant case presents the issue of whether IGRA preempts state law claims by one non-tribal entity against another, when resolution requires some review of a contract terminating a gaming management arrangement between one of the parties and a tribal entity." *Id.* at 438 (citation omitted). The court further observed that while *Gaming Corp.* involved "the outcome of an Indian nation's internal governmental decisions, here the challenge is merely to the decisions of a management company." *Id.*

We find the Eighth Circuit's analysis instructive. Thus, although the IGRA does have some preemptive effect, we hold that it does not prevent our state courts from hearing claims such as the ones at issue here. Plaintiff's claims alleging unfair and deceptive trade practices and fraud are state-law claims that neither affect the Tribe's internal governmental decisions, nor directly relate to the regulation of gaming. Cf. *Saratoga County Chamber of Commerce Inc. v. Pataki*, 275 A.D.2d 145, 157, 712 N.Y.S.2d 687, 695-96 (2000) (determining that an action contesting the validity of a tribal-state compact was not pre-

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empted because the “IGRA says nothing specific about how we determine whether a state and tribe have entered into a valid compact,” and “[s]tate law must determine whether a state has validly bound itself to a compact” (internal quotation marks omitted).

Furthermore, Congress has expressly left certain questions of jurisdiction to be decided by the tribe and the state. The IGRA provides that a Tribal-State compact

may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations

25 U.S.C.A. § 2710(d)(3)(C). It cannot be said that Congress intended to “preempt the field” when it expressly ceded the decision regarding who would have jurisdiction over laws and regulations related to gaming activities to the tribe and state.

Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission, 588 F.2d 75 (4th Cir. 1978), also cited by defendant, is distinguishable. The issue in that case was whether North Carolina could enforce its fishing licensing laws on the reservation against non-members of the Tribe. *See* 588 F.2d at 77. The Fourth Circuit held that “the strong federal policy supporting the [Tribe’s] fishing program and the significant federal efforts sustaining it demonstrate an intention to preclude state regulation of non-member fishing on the [Tribe’s] reservation.” *Id.* at 78. We agree with defendant that there is a strong federal policy in this case supporting the Tribe’s authority to regulate gaming. However, plaintiff’s claim is at most incidental to the regulation of gaming.

[2] We turn next to the question of whether jurisdiction in state court would “unduly infringe[] on the self-governance of the Eastern Band of Cherokee Indians.” *Swayney*, 319 N.C. at 58, 352 S.E.2d at 417 (footnote omitted). The *Swayney* Court identified three criteria that are “instructive on the issue of infringement.” *Id.* at 59, 352 S.E.2d at 418. These criteria are “(1) whether the parties are Indians or non-Indians, (2) whether the cause of action arose within the Indian reser-

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vation, and (3) the nature of the interest to be protected.” *Id.* at 59, 352 S.E.2d at 417 (citing *New Mexico ex rel. Dept. of Human Services v. Jojola*, 99 N.M. 500, 660 P.2d 590, *cert. denied*, 464 U.S. 803, 78 L. Ed. 2d 69 (1983)).

Full consideration of the third factor identified in *Swayney* requires remand to the district court for further proceedings. Specifically, defendant contended at oral argument that plaintiff claims defendant breached a contract that would have been illegal but for the IGRA. Neither party discussed this issue in their briefs, and the complaint did not allege breach of contract. If defendant is correct, the interest at stake here—enforcement of an illegal gambling obligation—is not one that our State, as a matter of public policy, protects. *See* N.C. Gen. Stat. § 14-292 (2001) (making gambling a Class 2 misdemeanor); N.C. Gen. Stat. § 16-1 (2001) (“Gaming and betting contracts void.”); *Cole v. Hughes*, 114 N.C. App. 424, 428-29, 442 S.E.2d 86, 89 (stating that “North Carolina public policy is against gambling and lotteries,” and affirming dismissal of a claim that “sought to enforce a contract or joint venture which is illegal and against the public policy of North Carolina”), *disc. review denied*, 336 N.C. 778, 447 S.E.2d 418 (1994). Thus, if plaintiff seeks to recover gambling proceeds, the State of North Carolina would have no interest in protecting plaintiff’s right to enforce his contract, although the Tribe may.

On the record before us, we have no evidence to review and nothing more than the unverified allegations of the complaint. Accordingly, we are unable to determine whether plaintiff’s activities fall within the definitions of N.C.G.S. § 14-292 or N.C.G.S. § 16-1. *See, e.g., State v. Crabtree*, 126 N.C. App. 729, 738-40, 487 S.E.2d 575, 580-81 (1997) (interpreting N.C.G.S. § 14-306); *Collins Coin Music Co. v. N.C. Alcoholic Beverage Control Comm.*, 117 N.C. App. 405, 451 S.E.2d 306 (1994) (same), *disc. review denied*, 340 N.C. 110, 456 S.E.2d 312 (1995).

Thus, we remand to the district court for further proceedings. On remand, the district court should determine whether state-court jurisdiction would “unduly infringe[] on the self-governance of the Eastern Band of Cherokee Indians,” by applying the factors identified in *Swayney*. In particular, the district court should determine the nature of the activities in which plaintiff engaged and whether those activities are inconsistent with the public policy of this State. If so, the third *Swayney* factor counsels against a finding of subject matter jurisdiction.

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In sum, we reverse the trial court's conclusion that the IGRA pre-empts state-court jurisdiction over a dispute of this nature. We remand to the trial court for further consideration, in light of evidence and arguments presented before it, of the issue of subject matter jurisdiction based on the *Swayney* factors.

Reversed in part and remanded.

Judges MARTIN and THOMAS concur.

JEFFREY ALLEN BRAY, PLAINTIFF V. NORTH CAROLINA DEPARTMENT OF CRIME
CONTROL AND PUBLIC SAFETY, DEFENDANT

No. COA01-660

(Filed 2 July 2002)

Police Officers— negligence—collision during chase

The Industrial Commission did not err in a Tort Claims action by determining that a Highway Patrol trooper was not grossly negligent and did not show reckless disregard for the safety of others while in pursuit of another vehicle. Plaintiff's distinctions from earlier cases did not justify reversal of the Commission's conclusion.

Appeal by plaintiff from decision and order entered 30 January 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 April 2002.

Stanley G. Abrams, for plaintiff-appellant.

Attorney General Roy Cooper, by Associate Attorney General Dahr Joseph Tanoury, for defendant-appellee.

HUDSON, Judge.

Jeffrey Allen Bray ("plaintiff") appeals from a decision and order of the North Carolina Industrial Commission ("the Commission") denying his claim for damages. We affirm.

The facts, on the basis of stipulated evidence, are as follows. Plaintiff was injured on 23 February 1995 when the vehicle he was

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driving was hit by a patrol car driven by State Highway Patrolman Kevin Patrick Woods. Prior to the accident, Trooper Woods and Trooper H.L. Cox were parked on the shoulder of the road when they observed a black Camaro operating with no mufflers. They began to pursue the Camaro, which then turned and accelerated to a high rate of speed. The troopers activated their lights and sirens. The Camaro failed to stop. Trooper Cox had positioned himself as the primary chase vehicle, and Trooper Woods was positioned as the secondary chase vehicle. During the course of the chase, the vehicles entered a curve. As he entered the curve, Trooper Woods lost control of his vehicle. Plaintiff's vehicle was entering the curve from the opposite direction, and Trooper Woods' vehicle collided with plaintiff's.

Plaintiff filed a claim for damages under the North Carolina Tort Claims Act. *See* N.C. Gen. Stat. § 143-291 (2001). Deputy Commissioner W. Bain Jones, Jr., denied plaintiff's claim in a decision and order filed on 13 June 2000. Plaintiff appealed to the Full Commission, which affirmed the decision and order of the deputy commissioner. Plaintiff now appeals the decision and order of the Full Commission.

Plaintiff challenges the Commission's determination that Trooper Woods was not grossly negligent. "Under the Tort Claims Act, 'when considering an appeal from the Commission, our Court is limited to two questions: (1) whether competent evidence exists to support the Commission's findings of fact, and (2) whether the Commission's findings of fact justify its conclusions of law and decision.'" *Fennel v. N.C. Dep't of Crime Control & Pub. Safety*, 145 N.C. App. 584, 589, 551 S.E.2d 486, 490 (2001) (quoting *Simmons v. N.C. Dept. of Transportation*, 128 N.C. App. 402, 405-06, 496 S.E.2d 790, 793 (1998)), *cert. denied*, 355 N.C. 285, 560 S.E.2d 800 (2002). "Negligence and contributory negligence are mixed questions of law and fact and, upon appeal, the reviewing court must determine whether facts found by the Commission support its conclusion of . . . negligence." *Barney v. Highway Comm.*, 282 N.C. 278, 284, 192 S.E.2d 273, 277 (1972).

The Commission's findings of fact are as follows:

1. On February 23, 1995 at approximately 6:50 p.m., plaintiff was traveling in his 1980 Ford automobile north on Rural Paved Road 1131 in Wilson County, North Carolina near Sims, North Carolina.

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2. At the same time and place, State Highway Patrolman Kevin Patrick Woods was traveling south on Rural Paved Road 1131 pursuing another vehicle.

3. As Trooper Woods approached a curve on Rural Paved Road 1131, Trooper Woods met Mr. Bray's vehicle traveling in the opposite direction.

4. The speed limit on Rural Paved Road 1131 at the location of the accident was fifty-five (55) miles per hour. Trooper Woods' vehicle was traveling at approximately sixty-five (65) miles per hour when it collided with Mr. Bray's vehicle. Trooper Woods' vehicle had entered the curve at a higher speed. Trooper Woods' vehicle left tire impressions of 236 feet before striking Mr. Bray's vehicle and traveled an additional 254 feet after striking Mr. Bray's vehicle.

5. Rural Paved Road 1131 is a two-lane road and there were no unusual circumstances related to the weather or otherwise on February 23, 1995.

6. Trooper M.R. Johnson investigated the accident and indicated Trooper Woods was exceeding a safe speed and driving his vehicle left of the center lane.

7. Trooper Woods was not grossly negligent in carrying out his duties as Highway Patrolman in pursuit of another vehicle. The evidence does not support that Trooper Woods recklessly disregarded the safety of others in carrying out responsibilities of his duties as a State Highway Patrolman. Trooper Woods had sounded his siren and turned on flashing lights as he was in pursuit of the other vehicle.

The Commission's relevant conclusion of law is that "State Trooper Kevin Patrick Woods was not grossly negligent nor did he show reckless disregard for the safety of others while in pursuit of another vehicle on Rural Paved Road 1131 on February 23, 1995 when he struck the vehicle operated by Jeffrey A. Bray."

In *Parish v. Hill*, 350 N.C. 231, 238, 513 S.E.2d 547, 551 (1999), our Supreme Court held that "in *any* civil action resulting from the vehicular pursuit of a law violator, the gross negligence standard applies in determining the officer's liability." Thus, the Commission properly determined that plaintiff's claim should be denied unless he established that Trooper Woods was grossly negligent.

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Our Supreme Court has defined “gross negligence” as “wanton conduct done with conscious or reckless disregard for the rights and safety of others.” *Bullins v. Schmidt*, 322 N.C. 580, 583, 369 S.E.2d 601, 603 (1988). An act “is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others.” *Parish*, 350 N.C. at 239, 513 S.E.2d at 551-52 (internal quotation marks omitted).

The Court applied the gross negligence standard in *Young v. Woodall*, 343 N.C. 459, 471 S.E.2d 357 (1996), upon which the Commission relied in its decision and order. In *Young*, a police officer for the City of Winston-Salem saw a Chevrolet Camaro with only one headlight on and began to follow the vehicle. The officer did not immediately activate his blue light or siren because he was concerned the driver would attempt to elude him. He intended to activate his light and siren once he was closer. The officer entered an intersection with a flashing light at a high rate of speed and collided with the plaintiff, who was making a left turn at the intersection. *Id.* at 460, 471 S.E.2d at 358. The Court held that the trial court should have granted summary judgment for the police officer, because the officer’s “following the Camaro without activating the blue light or siren, his entering the intersection while the caution light was flashing, and his exceeding the speed limit were acts of discretion on his part which may have been negligent but were not grossly negligent.” *Id.* at 463, 471 S.E.2d at 360.

Plaintiff’s attempt to distinguish *Young* is unavailing. Plaintiff argues that in this case, unlike *Young*, Trooper Woods crossed the center line in addition to exceeding a safe speed. Also, Trooper Woods was traveling at a speed of at least eighty miles per hour, at dusk, on a curving, rural road. Finally, Trooper Woods lost control of his car resulting in the collision with plaintiff. Plaintiff contends that the actions of Trooper Woods in this case were “more severe and serious” than those of the officer in *Young*. None of these distinctions, however, would justify this Court in reversing the Commission’s conclusion that Trooper Woods did not engage in “wanton conduct done with conscious or reckless disregard for the rights and safety of others.” *Bullins*, 322 N.C. at 583, 369 S.E.2d at 603.

Plaintiff argues that the public policy rationale articulated in *Parish* in support of the gross negligence standard does not apply here because Trooper Woods was not in pursuit. The Court observed in *Parish* that “[p]olitical society must consider . . . the fact that if

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police are forbidden to pursue, then many more suspects will flee—and successful flights not only reduce the number of crimes solved but also create their own risks for passengers and bystanders.” *Parish*, 350 N.C. at 245, 513 S.E.2d at 555 (internal quotation marks omitted). Plaintiff contends that Trooper Woods, driving the secondary chase vehicle, was not pursuing or trying to overtake the Camaro.

Plaintiff observes that Trooper Woods had been driving a vehicle with a strobe light instead of a blue system on top, and highway patrol regulations do not allow such a vehicle to be the lead chase vehicle. As the officer in the secondary vehicle, Trooper Woods’ duties were to handle radio communications and provide back-up to Trooper Cox. We disagree with plaintiff’s characterization that, in the secondary position, Trooper Woods was not pursuing the Camaro. To perform his duties, Trooper Woods needed to stay close to Trooper Cox, who was pursuing the Camaro. Moreover, Trooper Woods testified that should he be the only vehicle in pursuit of the violator, policy would allow him to be the primary chase vehicle. Therefore, we believe the evidence supports the Commission’s findings, which support its conclusion that Trooper Woods was also pursuing the Camaro.

Finally, plaintiff asks this Court to reject the gross negligence standard in favor of an ordinary negligence standard. However, we are bound by Supreme Court precedent stating unequivocally that the standard is gross negligence for an officer in pursuit. *See Parish*, 350 N.C. at 238, 513 S.E.2d at 551; *Kinlaw v. Long Mfg.*, 40 N.C. App. 641, 643, 253 S.E.2d 629, 630 (“[I]t is not our prerogative to overrule or ignore clearly written decisions of our Supreme Court.”), *rev’d on other grounds*, 298 N.C. 494, 259 S.E.2d 552 (1979).

The Commission’s finding of fact and conclusion of law that Trooper Woods was not grossly negligent is supported by the evidence and consistent with the law. Therefore, the Commission did not err in denying plaintiff’s claim. Accordingly, we affirm the Commission’s decision and order.

Affirmed.

Chief Judge EAGLES and Judge BRYANT concur.

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[151 N.C. App. 286 (2002)]

IN RE: LEHONNA SOISSETTE' CLARK, A MINOR CHILD

No. COA01-1287

(Filed 2 July 2002)

Termination of Parental Rights— incarcerated parent—failure to pay support—ability to care for child

The trial court erred by terminating the parental rights of an incarcerated parent based upon conclusions that he had willfully failed to pay a reasonable portion of child care and was incapable of providing for his daughter's care where there was no clear and convincing evidence that respondent had any ability to pay any amount and no clear and convincing evidence that respondent was incapable of arranging for appropriate supervision for the child, although he may be temporarily incapable of personally caring for the child due to his present incarceration.

Appeal by respondent from order entered 29 May 2001 by Judge Robert A. Evans in Wilson County District Court. Heard in the Court of Appeals 16 May 2002.

Stanley G. Abrams for respondent appellant.

Beaman and King, P.A., by Charlene Boykin King, for the Wilson County Department of Social Services, petitioner appellee.

Womble Carlyle Sandridge & Rice, by Karen Ousley Hogan, Attorney for the Best Interest of the Child, By and Through Guardian ad Litem, appellee.

TIMMONS-GOODSON, Judge.

Anthony Clark ("respondent") appeals from an order terminating his parental rights. For the reasons stated herein, we reverse the order of the trial court.

Respondent is the natural father of Lehonna Soisette' Clark ("Lehonna"), born 9 December 1999. On 26 April 2000, the trial court adjudicated Lehonna to be a dependent and neglected child based on evidence that respondent was incarcerated and that Lehonna's mother had a substance abuse problem which rendered her incapable of properly caring for the child. Lehonna was removed from her mother's care and placed into the legal custody of the Wilson County

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Department of Social Services (“DSS”), which in turn placed Lehonna in the physical custody of a maternal cousin.

On 5 December 2000, DSS filed a petition to terminate respondent’s parental rights. The trial court heard the matter on 9 May 2001 and made the following two findings of fact concerning respondent:

10. . . . Anthony Clark has been incarcerated since the child was removed from the mother. He has been unable to provide care for the child. He has not written the child, sent birthday cards, made phone calls to the child or visited with or seen the child since he was incarcerated January 16, 2001. She has never visited him in prison. He sent some letters to DSS and DSS contacted members of his family after the child’s removal regarding the child’s custody and care. His mother was unable to provide care for the child. His grandmother once asked for visitation, but did not follow through on the request.

11. Anthony Clark testified. He was involved with the mother and child after the birth on December 9, 1999, but he was incarcerated January 16, 2000, and has been since that time. He did see the child on several occasions between her birth on December 9, 2000 and his incarceration on January 16, 2000, and was present at birth. He expects to be released October 9, 2002. He has written the child’s caretaker and has attempted to communicate with the child. He did not know where the child was most of the time after his incarceration, but he did know of the Department of Social Services’ involvement. He was visited by the Guardian Ad Litem once in prison. He has not paid any child support, and there is no order for him to do so. He was also in prison before, and between 1989 and 1998, he was mostly in prison or jail on various charges.

Based on these findings, the trial court concluded that respondent had “failed to pay a reasonable portion of the cost of care for the child although physically and financially able to do so” and was “incapable of providing for the proper care and supervision of the child” and that “such inability [would] continue for the foreseeable future.” The trial court thereafter determined that it was in Lehonna’s best interests that respondent’s parental rights be terminated and entered an order accordingly. From this order, respondent appeals.

Respondent argues that the trial court erred in concluding that sufficient grounds existed to terminate his parental rights.

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Section 7B-1111 of the North Carolina General Statutes authorizes a court to terminate parental rights on nine different grounds, and a finding of any one of these grounds is sufficient to support the termination of parental rights. *See* N.C. Gen. Stat. § 7B-1111 (2001). Such findings must be based, however, on “clear, cogent, and convincing evidence.” N.C. Gen. Stat. §§ 7B-1109(f), 7B-1111(b). The court here concluded that two grounds for termination existed. These were under subsections (a)(3) and (a)(6), which provide that parental rights over a child may be terminated where:

(3) The juvenile has been placed in the custody of a county department of social services . . . and the parent, for a continuous period of six months next preceding the filing of the petition . . . has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so.

. . . .

(6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that such incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition.

N.C. Gen. Stat. § 7B-1111 (a)(3), (a)(6). A dependent juvenile is one “in need of assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile’s care or supervision or whose parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement.” N.C. Gen. Stat. § 7B-101(9) (2001).

Respondent contends that there was insufficient evidence to support the trial court’s conclusion that he failed to pay a reasonable portion of the cost of Lehonna’s care or that he was incapable of caring for his child. Respondent’s argument has merit.

In determining what constitutes a “reasonable portion” of the cost of care for a child, the parent’s ability to pay is the controlling characteristic. *See In re Clark*, 303 N.C. 592, 604, 281 S.E.2d 47, 55 (1981).

A parent is required to pay that portion of the cost of foster care for the child that is fair, just and equitable based upon the parent’s

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ability or means to pay. What is within a parent's "ability" to pay or what is within the "means" of a parent to pay is a difficult standard which requires great flexibility in its application.

Id. It is undisputed that respondent here paid nothing to DSS for Lehonna's care. Nevertheless, nonpayment constitutes a failure to pay a reasonable portion "if and only if respondent [is] able to pay some amount greater than zero." *In re Bradley*, 57 N.C. App. 475, 479, 291 S.E.2d 800, 802 (1982). The trial court here made no findings of fact regarding respondent's ability to pay any amount greater than zero, nor was any evidence presented indicating that respondent was capable of earning income. In fact, respondent verified that, although he was taking classes in small business administration, he was not yet in "any kind of release program where you're earning money." He further stated, and the trial court found, that respondent had never been ordered to pay any type of child support. Because there was no clear and convincing evidence that respondent had any ability to pay an amount greater than zero, the trial court erred in concluding that respondent failed to pay a reasonable portion of the cost of his child's care. *See In re Garner*, 75 N.C. App. 137, 141-42, 330 S.E.2d 33, 36 (1985) (holding that, where the respondent mother was incarcerated, the trial court erred in terminating her parental rights where it failed to make adequate findings regarding her ability to pay some portion of foster care).

The trial court also determined that respondent was incapable of providing for Lehonna's care. The trial court failed to make findings, however, regarding this ground, except for the fact that respondent was incarcerated and that "[h]is mother was unable to provide care for the child." Incapability under section 7B-1111(a)(6) "may be the result of substance abuse, mental retardation, mental illness, organic brain syndrome, or any other similar cause or condition." N.C. Gen. Stat. § 7B-1111(a)(6). There was no evidence at trial to suggest that respondent suffered from any physical or mental illness or disability that would prevent him from providing proper care and supervision for Lehonna, nor did the trial court make any findings of fact regarding such a condition. Respondent testified that his anticipated release date from prison was 9 October 2002. Although respondent may be temporarily incapable, due to his present incarceration, to personally provide such care to the child, there was no clear and convincing evidence to suggest that respondent was incapable of arranging for appropriate supervision for the child. Respondent testified that he gave to DSS the names of several close relatives, including his sister

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and niece, who might be willing and able to care for Lehonna until his release from prison, but that DSS had never contacted these persons. *Compare In re Williams*, — N.C. App. —, —, — S.E.2d —, — (May 7, 2002) (COA01-964) (holding that where clear and convincing evidence showed that the father was incarcerated and had no means of arranging alternative care, termination of parental rights was appropriate). The trial court therefore erred in concluding that respondent was incapable of providing for his daughter's care.

In summary, we hold that the trial court erred in concluding that respondent willfully failed to pay for a reasonable portion of child care and that respondent was incapable of providing for his daughter's care. The trial court therefore erred in terminating respondent's parental rights, and we accordingly reverse the judgment of the court.

Reversed.

Judges MARTIN and CAMPBELL concur.

BERNARD MARVIN LAVALLEY, PLAINTIFF v. WAYNIE FELARCA LAVALLEY,
DEFENDANT

No. COA01-965; COA01-1184

(Filed 2 July 2002)

Child Support, Custody, and Visitation— custody—modification—final order—substantial change of circumstances test

The trial court erred in a child custody and child support case by applying a best interests analysis rather than the substantial change of circumstances test to the issue of modification of custody, because although inclusion of the language “without prejudice” in the custody order is sufficient to support a determination that the order was temporary, it was converted into a final order when neither party requested the calendaring of the matter for a hearing within a reasonable time after the entry of the order.

Appeals by plaintiff from orders filed 21 December 2000 and 27 July 2001 by Judge Kenneth F. Crow in Carteret County District Court. Heard in the Court of Appeals 21 May 2002.

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The issues in these cases were tried in the same hearing but appealed separately due to a delay in the trial court's entry of its second order. Accordingly, the two cases have nearly identical facts and records. Both appeals were heard before the Court of Appeals on the same date, and pursuant to Rule 40 of the N.C. Rules of Appellate Procedure, we have consolidated these cases into one opinion.

Rebekah W. Davis for plaintiff appellant.

No briefs filed for defendant appellee.

GREENE, Judge.

Bernard Marvin LaValley (Plaintiff) appeals a custody order filed 21 December 2000 (COA01-965) and a child support order filed 27 July 2001 (COA01-1184).

On 27 June 1997, Plaintiff filed a complaint against his wife Wayne Felarca LaValley (Defendant), from whom he was separated, for custody of his daughter Jesselyn Felarca LaValley (Jesselyn) and child support for Jesselyn. On 6 August 1997, the parties entered into a "Memorandum of Order" (the Order) wherein they agreed to "shared custody" of Jesselyn and child support. The Order was signed by the parties, their attorneys, and a district court judge, "entered into the minutes of th[e] [trial] court," and filed in the clerk's office. The Order was "entered w[ith]o[ut] prejudice to either party" and stated "a more formal order" would be entered at a later date.¹

On 9 July 1999, Plaintiff filed a "Motion in the Cause" (the Motion) seeking modification of the Order. The Motion was heard on 19 July 1999, and the trial court entered a "temporary" order granting the parties the "joint care, custody and control" of Jesselyn, with Plaintiff having primary custody. This order, which was also "entered without prejudice of either party," set "a trial on the merits" for "the August 16, 1999 term of Carteret County District Court." The hearing on the merits of the Motion was conducted at the "3 October 2000 non-jury term of the Carteret County District Court." In an order filed 21 December 2000, the trial court, applying a best interests test, concluded the parties would "share joint custody," with primary custody placed in Defendant. On 27 July 2001, the trial court filed a separate

1. This Court has recognized that orders of this type are valid and enforceable. See *Buckingham v. Buckingham*, 134 N.C. App. 82, 516 S.E.2d 869 (1999) (determining a memorandum of consent judgment signed by the parties and the trial court to be a final judgment).

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order in which it concluded Defendant was entitled to child support in the amount of \$439.29 per month and a child support arrearage of \$3,953.61.

The dispositive issue is whether the Order is a final order requiring the trial court to first apply a substantial change of circumstances test in deciding the issue of custody raised by the Motion.²

If a child custody order³ is final, a party moving for its modification must first show a substantial change of circumstances. *See Cole v. Cole*, 149 N.C. App. 427, 433, 562 S.E.2d 11, 14 (2002) (citing *Sikes v. Sikes*, 330 N.C. 595, 599, 411 S.E.2d 588, 590 (1992)). If a child custody order is temporary in nature and the matter is again set for hearing, the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change of circumstances. *See id.* There is no absolute test for determining whether a custody order is temporary or final. An order entered without prejudice⁴ to either party and/or the setting of the matter for hearing within a reasonable time are indicative of a temporary order. *See id.* (order entered without prejudice); *Cox v. Cox*, 133 N.C. App. 221, 233, 515 S.E.2d 61, 69 (1999) (order that did not state a “clear and specific reconvening time” determined to be permanent).

In this case, the Order was entered “w[ith]o[ut] prejudice to either party.” It did not set any date for a court hearing on the custody issue, and the matter was not set before the trial court until almost two years later when the Motion was filed. The inclusion of the language “without prejudice” is sufficient to support a determination the Order was temporary. It was, however, converted into a final order⁵

2. While this issue was not raised on appeal, we exercise our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure and suspend the Rules in order to decide this issue. *See* N.C.R. App. P. 2.

3. A determination of child custody is most properly classified as an order, rather than a judgment, because it is always subject to modification. *See Black's Law Dictionary* 846, 1123 (7th ed. 1999) (defining the terms “judgment” and “order”).

4. When a temporary order is entered without prejudice in a custody proceeding, the trial court is required to ascertain the child's best interests at a subsequent hearing based only on the state of events that existed prior to the date of the temporary order. *See Black's Law Dictionary* 1603 (6th ed. 1990) (defining “without prejudice”). This serves to facilitate the entry of temporary custody orders between parties, as the parties will know that neither party will be advantaged by events occurring between the date of the temporary order and the hearing on the merits.

5. A temporary order is not designed to remain in effect for extensive periods of time or indefinitely, *see Cox*, 133 N.C. App. at 233, 515 S.E.2d at 69 (temporary orders

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when neither party requested the calendaring of the matter for a hearing within a reasonable time after the entry of the Order.⁶

Accordingly, the trial court, in determining the issue of custody, was required to review the Motion under a substantial change of circumstances test. As it simply applied a best interests analysis, the 21 December 2000 custody order must be reversed. Furthermore, because the issue of custody must necessarily be decided before an award of child support can be entered, the 27 July 2001 support order must also be reversed.

Reversed and remanded.

Judges HUDSON and BIGGS concur.

STATE OF NORTH CAROLINA v. ERIC EARL GUICE

No. COA99-1261-2

(Filed 2 July 2002)

Sentencing—firearms enhancement—indictment

On remand, a 60 month firearm enhancement penalty was vacated and remanded where the indictment failed to allege that defendant used, displayed, or threatened to use or display a firearm at the time of the felony and this factor was not submitted to the jury. The prior opinion in this matter, *State v. Guice*, 141 N.C. App. 177 (2000), is modified.

On Order of the Chief Judge of the Court of Appeals dated 13 May 2002, reconvening this panel based on an order of the Supreme Court filed 19 July 2001, *State v. Guice* (No. 33P01), 353

are limited to reasonably brief intervals), and must necessarily convert into a final order if a hearing is not set within a reasonable time. We are careful to use the words “set for hearing” rather than “heard” because we are aware of the crowded court calendars in many of the counties of this State. A party should not lose the benefit of a temporary order if she is making every effort to have the case tried but cannot get it heard because of the case backlog.

6. Whether a request for the calendaring of the matter is done within a reasonable period of time must be addressed on a case-by-case basis. In this case, we simply hold that twenty-three months is not reasonable.

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N.C. 731, 551 S.E.2d 112 (2001), remanding the unanimous decision of the Court of Appeals, *State v. Guice* (COA99-1261, filed 29 December 2000), 141 N.C. App. 177, 541 S.E.2d 474 (2000), for reconsideration following the Supreme Court's opinion in *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001). Appeal by defendant from judgment entered 22 June 1999 by Judge Loto G. Caviness in Superior Court, Mecklenburg County. Originally heard in the Court of Appeals 20 September 2000.

Attorney General Michael F. Easley, by Special Deputy Attorney General James P. Longest, Jr., for the State.

Rudolf Maher Widenhouse & Fialko, by Christopher C. Fialko, for the defendant-appellant.

WYNN, Judge.

On remand from our Supreme Court for reconsideration in light of *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), we modify our prior published opinion in this matter, *State v. Guice*, 141 N.C. App. 177, 541 S.E.2d 474 (2000) ("*Guice I*"), as follows.

In *Lucas*, our Supreme Court considered the constitutionality of N.C. Gen. Stat. § 15A-1340.16A (2001) in light of recent holdings by the United States Supreme Court in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 ((2000), stating:

According to our analysis of the process used to determine the statutory maximum sentence for any given offense, the addition of sixty months to the longest minimum sentence results in the addition of at least sixty months to the corresponding statutory maximum sentence, a process which results in an enhanced maximum exceeding that set out in the sentencing charts for a defendant in the highest criminal history category convicted of an aggravated offense [footnote omitted]. This result is forbidden by *Jones* and *Apprendi* unless the use of a firearm under the [firearm enhancement] statute is charged in the indictment, proven beyond a reasonable doubt, and submitted to the jury. Accordingly, we hold that in every instance where the State seeks an enhanced sentence pursuant to N.C.G.S. § 15A-1340.16A, it must allege the statutory factors supporting the enhancement in an indictment, which may be the same indictment that charges the underlying offense, and submit those factors to the jury. If the

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jury returns a guilty verdict that includes these factors, the trial judge shall make the finding set out in the statute and impose an enhanced sentence.

353 N.C. at 597-98, 548 S.E.2d at 731. Thus, our Supreme Court's holding in *Lucas*:

does not declare N.C.G.S. § 15A-1340.16A unconstitutional [on its face], but instead requires that the State meet the requirements set out in *Jones* and *Apprendi* in order to apply the enhancement provisions of the statute.

Id. at 598, 548 S.E.2d at 732.

However, in *Guice I*, this Court did address at length the fact that the plain language of G.S. § 15A-1340.16A explicitly removes from the jury the requisite factual determination for imposing the 60-month enhancement. Indeed, the statute mandates that “the court shall increase” the defendant’s minimum term of imprisonment by 60 months if “the court finds that the [defendant] used, displayed, or threatened to use or display a firearm at the time of the felony[.]” (Emphasis added.) Nonetheless, our Supreme Court in *Lucas* interpreted G.S. § 15A-1340.16A to permit the State to meet the *Jones* and *Apprendi* requirements by charging the use (or display, or threatened use or display) of a firearm in the indictment, proving said use beyond a reasonable doubt, and submitting this element to the jury for its determination. Thus, while we noted in *Guice I* that the firearm enhancement statute, on its face, does not impose such requirements, we are bound by our Supreme Court’s holding in *Lucas* which addressed an issue identical to the one in this case without considering whether the firearm enhancement statute, G.S. § 15A-1340.16A (2001) was facially unconstitutional. Accordingly, that part of our opinion in *Guice I* addressing and holding the firearm enhancement statute facially unconstitutional is withdrawn.

Applying *Lucas* to the instant case, as noted in our opinion in *Guice I*, the State does not contest that the indictment failed to allege that defendant “used, displayed, or threatened to use or display a firearm at the time of the felony,” G.S. § 15A-1340.16A, or that this statutory factor was not submitted to the jury. Accordingly, the trial court’s imposition of the 60-month firearm enhancement penalty to defendant’s sentence in this case is vacated and the case is remanded to the trial court for resentencing

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consistent with our Supreme Court's decision in *Lucas*. To the extent this Court's opinion in *Guice I* is not specifically modified by this opinion, it remains unchanged.

Modified and affirmed.

Judges GREENE and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 2 JULY 2002

CUMMINGS v. GLIDDEN CO. No. 01-1183	Forsyth (00CVS4110)	Reversed in part, affirmed in part, and remanded
HAYES v. HAYES No. 01-416	New Hanover (97CVD4238)	Reversed and remanded
HUNTER v. N.C. DEP'T OF TRANSP. No. 01-1068	Ind. Comm (I.C. 847355)	Affirmed
IN RE SMITH No. 01-1166	Wake (01J67)	Dismissed
JONES v. JIM WALTER HOMES No. 01-605	Ind. Comm. (I.C. 841967)	Affirmed
NORTHFIELD DEV. CO. v. CITY OF BURLINGTON No. 01-1043	Alamance (97CVS2122)	Affirmed in part; dismissed in part; and vacated and remanded in part
SMITH v. HARE PIPELINE CONSTR. CO. No. 01-117	Ind. Comm. (I.C. 744427)	Affirmed
STATE v. ANGE No. 01-1030	Beaufort (00CRS4663)	Affirmed
STATE v. CROOKS No. 01-1061	Catawba (96CRS10339)	No error
STATE v. DAVIS No. 01-495	Rowan (95CRS1319) (95CRS1320) (95CRS1322) (95CRS1734)	No error
STATE v. HOWELL No. 01-184	Buncombe (96CRS52437) (96CRS52437A) (96CRS2980) (99CRS7249)	No error
STATE v. PISCIOTTA No. 01-1035	Lincoln (01CRS11) (51&52)	No error
STATE v. QUARTERMAN No. 01-986	Cumberland (94CRS5010) (52&53)	No error

STATE v. STEPHENS
No. 01-556

Alexander
(00CRS4161)
(00CRS4162)

Affirmed

STATE ex rel. UTILS.
COMM'N v. ROOT
No. 01-1175

Utils. Comm.
(E-7, SUB 669)

Appeal dismissed

N.C. STATE BAR v. GILBERT

[151 N.C. App. 299 (2002)]

THE NORTH CAROLINA STATE BAR, PLAINTIFF V. WILLIE D. GILBERT,
ATTORNEY, DEFENDANT

No. COA01-769

(Filed 16 July 2002)

1. Attorneys— Disciplinary Hearing Commission—jurisdiction—violation of Industrial Commission order—attorney fees

Even though defendant attorney contends the North Carolina State Bar Disciplinary Hearing Commission (DHC) lacked jurisdiction to decide whether defendant violated an order of the North Carolina Industrial Commission, DHC did not err by denying defendant's motion to dismiss the State Bar's claim alleging that defendant violated the Revised Rules of Professional Conduct by retaining \$45,000 of the \$60,000 lump settlement in his client's workers' compensation case in violation of the 14 October 1998 order of the North Carolina Industrial Commission where a deputy commissioner had only authorized defendant to receive \$15,000 from the lump sum award, because the question of whether defendant violated the Commission's order does not arise under N.C.G.S. § 97-91 since defendant's alleged violation of the Commission's order authorizing attorney fees is unrelated to the issue of whether defendant's client is entitled to compensation for her husband's death.

2. Evidence— tax records—credibility—impeachment

The North Carolina State Bar Disciplinary Hearing Commission (DHC) did not abuse its discretion by failing to order defendant attorney's client to produce certain personal income tax records from the 1980's in order for defendant to impeach the client's credibility and to show the lengths to which the client would allegedly go to obtain money, because: (1) the client's tax records would not have been admissible under N.C.G.S. § 8C-1, Rule 608(b) since no criminal conviction resulted from the client's alleged tax fraud; and (2) the records sought do not appear reasonably calculated to lead to the discovery of admissible evidence.

3. Evidence— wife did not know where husband buried—credibility—impeachment

The North Carolina State Bar Disciplinary Hearing Commission (DHC) did not err by refusing to permit defendant attorney

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[151 N.C. App. 299 (2002)]

to introduce evidence that allegedly would show defendant's client did not know where her husband was buried in an effort to impeach the client's credibility by showing that the client hid the fact that she and her husband had been estranged while defendant was pursuing the client's workers' compensation and wrongful death claims, because whether the client knew where her husband was buried was not probative of the client's credibility, nor was it relevant to any of the issues before the DHC.

4. Attorneys— malpractice—conflict of interest—grievance not filed by clients

The North Carolina State Bar Disciplinary Hearing Commission (DHC) did not err by failing to dismiss the State Bar's claim alleging that defendant violated Rules 1.7(b) and 8.4(g) of the Revised Rules of Professional Conduct by engaging in a conflict of interest by his representation of two of his clients even though those clients had not filed a grievance, because: (1) the State Bar is free to investigate and prosecute an attorney regardless of whether the client or other member of the public filed a grievance; and (2) the State Bar's amended complaint, which included this claim, was signed by the Chair of the State Bar's grievance committee indicating the committee's approval of the complaint.

5. Appeal and Error— preservation of issues—failure to support with reason or legal argument

The North Carolina State Bar Disciplinary Hearing Commission (DHC) did not err by entering an order of discipline containing what defendant attorney characterizes as erroneous and grossly misleading findings of fact, because: (1) defendant has failed to direct the Court of Appeals to those findings which he claims are not supported by evidence and has not provided an argument supporting his contentions; and (2) assignments of error which are not supported by reason or legal argument in the appellant's brief are deemed abandoned.

6. Attorneys— malpractice—disciplinary hearing—findings of fact—conclusions of law

The whole record test reveals that the North Carolina State Bar Disciplinary Hearing Commission (DHC) did not err by entering an order of discipline containing several conclusions of law that were allegedly not supported by findings of fact or clear, cogent, and convincing evidence, because: (1) the evidence

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shows that at various times defendant gave varying explanations for retaining additional money from his client's lump sum award, and the determination of the credibility of the witness is the function of the DHC and is not subject to review on appeal; (2) there was no evidence supporting defendant's claim that he had a good faith belief that he was entitled to use a client's February annuity check to reimburse himself for costs which defendant incurred in the wrongful death case, and there was substantial evidence supporting the DHC's conclusion that defendant's failure to pay funds to his client prior to 23 February 1999 violated the Revised Rules of Professional Conduct; and (3) substantial evidence supports the DHC's findings and legal conclusion that defendant engaged in a conflict to the prejudice of his clients by charging them for three CD-ROMs which defendant retained in his law office library, without obtaining the clients' approval.

7. Attorneys— malpractice—disciplinary hearing—aggravating factors—mitigating factors

A review of the whole record reveals that the North Carolina State Bar Disciplinary Hearing Commission (DHC) did not err by finding the aggravating factors that defendant attorney was motivated by a dishonest or selfish motive, defendant engaged in a pattern of misconduct, defendant engaged in multiple violations of the Revised Rules of Professional Conduct, and by failing to find the mitigating factors of absence of a dishonest or selfish motive, timely good faith efforts at restitution, full and free disclosure, and remorse, because: (1) the Court of Appeals does not have authority to modify or change DHC's punishment as long as the punishment is within the limits allowed by N.C.G.S. § 84-28, and defendant was disciplined within the range authorized by the statute; (2) DHC has broad discretion in determining aggravating and mitigating factors and the appropriate weight to be given to each since these factors play a role in DHC's formulation of appropriate disciplinary measures; (3) there is ample evidence supporting all of the aggravating factors; and (4) the mitigating factors were based on defendant's credibility, and the determination of the credibility of the witnesses is the function of the DHC and will not be reviewed on appeal.

Judge TYSON concurring in part and dissenting in part.

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Appeal by defendant from order entered 1 November 2000 by the North Carolina State Bar Disciplinary Hearing Commission. Heard in the Court of Appeals 18 April 2002.

The North Carolina State Bar, by Carolin Bakewell, for plaintiff-appellee.

Michaux & Michaux, P.A., by Eric C. Michaux, and Willie D. Gilbert, II, pro se, for defendant-appellant.

MARTIN, Judge.

Defendant appeals from an order of discipline issued by the Disciplinary Hearing Commission (hereinafter "DHC") of the North Carolina State Bar (hereinafter "State Bar"). In its order filed 1 November 2000, the DHC found defendant guilty of violating the following rules of the North Carolina Revised Rules of Professional Conduct: 1.5 (collecting an illegal or excessive fee); 1.7 (engaging in a conflict of interest); 8.4(b) (engaging in criminal conduct that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer); 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); 8.4(d) (engaging in conduct prejudicial to the administration of justice); 8.4(g) (intentionally prejudicing his clients); and 1.15-2(h) (failing to disburse funds as directed by client).

The DHC issued an order of discipline suspending defendant's license for five years with the last three years to be stayed provided defendant does not violate any local, state, or federal laws and does not violate any provisions of the Revised Rules of Professional Conduct or the rules and regulations of the State Bar. Prior to seeking reinstatement of his law license at the end of his two year active suspension, defendant is required to: (1) reimburse the Client Security Fund for any amounts disbursed from the Fund as a result of defendant's misconduct; (2) complete twenty hours of continuing legal education (C.L.E.) in the subjects of law office management and trust account requirements in addition to the mandatory C.L.E. requirements regularly imposed by the State Bar; and (3) pay the costs of the disciplinary proceeding.

The State Bar's evidence tended to show that in January 1997, defendant agreed to represent Celeste Pologruto in both a workers' compensation case and a wrongful death claim arising out of her husband's job-related death. Both claims were to be handled on a contingent fee basis.

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On 14 October 1998, a settlement agreement was approved in the workers' compensation case. Ms. Pologruto was awarded a \$60,000 lump sum payment and monthly payments of \$1,455 for 60 months commencing 1 November 1998. Defendant requested the Industrial Commission to approve his retaining \$45,000 in attorney's fees from the \$60,000 lump sum payment. The Industrial Commission instead approved defendant's retaining \$15,000 of the lump sum payment and awarded defendant every fourth monthly payment of \$1,455 that Ms. Pologruto would otherwise receive.

On or about 23 October 1998, defendant received two checks in the amounts of \$45,000 and \$15,000, which represented the \$60,000 lump sum settlement in the workers' compensation case. The \$15,000 check was made payable to defendant for attorney's fees and the \$45,000 check was made payable to Celeste Pologruto, in care of defendant. Defendant never sent the \$45,000 check to Ms. Pologruto but instead he or a staff member endorsed her name to the check and retained it. Defendant told Ms. Pologruto that he was retaining \$45,000 of the \$60,000 lump sum settlement and that she would receive \$15,000 and all the monthly annuity payments. Defendant testified that Ms. Pologruto had agreed to pay him the additional \$30,000 above his approved fee of \$15,000 in order to cover fees and expenses incurred in the pending wrongful death suit. As part of this same agreement, defendant was to forward his every fourth month check of \$1,455 on to Ms. Pologruto.

Ms. Pologruto testified that defendant told her that he was retaining \$45,000 of the \$60,000 lump sum settlement, but he did not send her a copy of the Industrial Commission order which awarded him a lump sum fee of only \$15,000 and every fourth month annuity check. According to Ms. Pologruto, defendant told her that he was going to receive all of his fees up front since that is the way it is done and explained that attorneys would never accept workers' compensation cases if they had to wait to collect their fees. Because defendant was collecting his fees up front, Ms. Pologruto testified that he told her he would forward all of the monthly checks for \$1,455 to her, including those which the Industrial Commission ordered to be paid to him as a part of the fee award.

On 2 February 1999, defendant received a check for \$1,455 representing the first periodic payment of attorney's fees pursuant to the settlement of Ms. Pologruto's workers' compensation claim. As stated earlier, defendant testified that he had agreed to forward every fourth check to Ms. Pologruto. Defendant deposited the check in his attor-

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ney trust account and between 4 February 1999 and 23 February 1999, spent \$920.22 of the \$1,455 by disbursing trust account checks for personal expenses. Defendant did not obtain Ms. Pologruto's permission to use the February annuity check proceeds for his own use and benefit. Prior to 23 February, Ms. Pologruto had called defendant's office inquiring about her check for \$1,455. On 23 February, defendant deposited \$2,665 of his personal funds into his trust account and issued Ms. Pologruto a check for \$1,455. In a letter accompanying the check, defendant communicated that he had "originally intended to deduct approximately \$524" from the check for expenses related to the wrongful death suit; he did not disclose that he had actually used \$920.22 for his personal expenses.

In June of 1999, after having spoken to several attorneys who advised her that, in their opinion, the monetary value of the wrongful death case was not substantial, Ms. Pologruto discharged defendant. Ms. Pologruto's wrongful death suit was ultimately dismissed with prejudice for failure to prosecute.

In 1996, defendant undertook representation of Michelle and Sanjay Munavalli (hereinafter "Munavallis") in a personal injury suit. Defendant settled the case for \$65,000 in April 1998. While representing the Munavallis, defendant purchased three CD-ROMs for a total price of \$4,627.43. These CD-ROMs, which were set to expire one year from the date of purchase, contained a medical encyclopedia, various forms, briefs, and statutes. Defendant testified that he needed the CD-ROMs to prosecute the Munavallis' case because he had never previously handled a personal injury suit. Defendant did not consult with the Munavallis before purchasing the CD-ROMs. On 28 April 1998, defendant sent the Munavallis an itemized statement of fees and expenses that included the full price of the CD-ROMs. The Munavallis disputed the bill but eventually paid defendant \$6,800 in costs, including \$4,627.43 for the CD-ROMS.

Between 13 May 1999 and 26 May 1999, defendant issued five checks from his attorney trust account totaling \$260. Defendant used the cash proceeds of all five checks for his personal benefit. Due to lack of sufficient personal funds in the trust account to cover the amount of these checks, defendant used a portion of funds belonging to a client named Waller, without the client's knowledge or permission.

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I.

[1] Defendant first contends the DHC erred in denying his motion to dismiss the first claim for relief of the State Bar's amended complaint. In its first claim for relief, the State Bar alleged that defendant violated the Revised Rules of Professional Conduct by retaining \$45,000 of the \$60,000 lump settlement in Ms. Pologruto's workers' compensation case in violation of the 14 October 1998 order of the North Carolina Industrial Commission, in which a deputy commissioner had only authorized defendant to receive \$15,000 from the lump sum award. Defendant argues the DHC lacked jurisdiction to decide whether he violated the order. Defendant relies on G.S. § 97-91 to support his argument, which provides:

All questions arising under this Article if not settled by agreements of the parties interested therein, with the approval of the Commission, shall be determined by the Commission

We conclude that defendant's reading of G.S. § 97-91 is overly broad. The phrase "questions arising under this Article" refers primarily to questions relating to the rights asserted by or on behalf of an injured employee or the employee's dependents. *Clark v. Ice Cream Co.*, 261 N.C. 234, 240-41, 134 S.E.2d 354, 360 (1964). Defendant's alleged violation of the Commission's order authorizing attorney's fees is unrelated to the issue of whether Ms. Pologruto is entitled to compensation for her husband's death. Moreover, our courts have not read G.S. § 97-91 to give the Commission exclusive jurisdiction over every conceivable issue that may arise from a workers' compensation case. For instance, this Court concluded that there was no statutory authority that would extend the Commission's jurisdiction to cover a dispute between the plaintiff's attorneys over the division of attorney's fees. *Eller v. J & S Truck Services, Inc.*, 100 N.C. App. 545, 397 S.E.2d 242 (1990), *disc. review denied*, 328 N.C. 271, 400 S.E.2d 451 (1991). In the instant case, whether defendant violated the Commission's order does not "arise under" the workers' compensation Article and thus, does not require determination by the Commission. Therefore, the DHC did not err in refusing to grant defendant's motion to dismiss the State Bar's first claim for relief.

II.

[2] Defendant also argues that the DHC erred by failing to order Ms. Pologruto to produce certain personal income tax records from the 1980s. Defendant alleges that these documents would show that Ms.

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Pologruto fraudulently sought and obtained a federal tax refund. Defendant wished to use this information at the hearing to impeach Ms. Pologruto's credibility and to show the lengths to which she would go to obtain money.

Initially, we note that motions for orders compelling the production of documents are committed to the trial court's sound discretion and will not be reversed absent an abuse of discretion. *Wagoner v. Elkin City Schools' Bd. of Ed.*, 113 N.C. App. 579, 440 S.E.2d 119, *disc. review denied*, 336 N.C. 615, 447 S.E.2d 414 (1994). "An abuse of discretion occurs only when a court makes a patently arbitrary decision, manifestly unsupported by reason." *Buford v. General Motors Corp.*, 339 N.C. 396, 406, 451 S.E.2d 293, 298 (1994).

We note that Ms. Pologruto's tax records would not have been admissible under Rule 608(b) of the North Carolina Rules of Evidence. Rule 608(b) states that apart from criminal convictions governed by Rule 609, specific instances of the conduct of a witness that are introduced to attack the witness's credibility may not be proved by extrinsic evidence. Since no criminal conviction resulted from Ms. Pologruto's alleged tax fraud, no extrinsic evidence, such as her tax records, would have been admissible. Defendant would have been limited to the admissions of tax fraud that he could have gained from Ms. Pologruto on cross-examination. Since Ms. Pologruto's tax records would have been inadmissible for impeachment purposes and the records sought do not appear reasonably calculated to lead to the discovery of admissible evidence, the DHC did not abuse its discretion by denying defendant's motion to compel. *See* N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (2001).

III.

[3] Defendant argues that the DHC erred by refusing to permit him to introduce evidence that, according to defendant, would show that Ms. Pologruto did not know where her husband was buried. Defendant contends that excluding this evidence denied him an opportunity to impeach Ms. Pologruto's credibility by showing that she hid the fact that she and her husband had been estranged while defendant was pursuing her workers' compensation and wrongful death claims.

Evidence is admissible if it is relevant and its probative value is not substantially outweighed by, among other things, the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rules 402 and 403 (2001). Relevant evidence is defined as:

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evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

N.C. Gen. Stat. § 8C-1, Rule 401 (2001). Trial tribunals' rulings regarding the admission or exclusion of evidence based on relevancy are given great deference by our appellate courts. *State v. Mitchell*, 135 N.C. App. 617, 522 S.E.2d 94 (1999).

With that standard in mind, we review defendant's contentions and conclude that whether Ms. Pologruto knew where her husband was buried was not probative of her credibility, nor was it relevant to any of the issues before the DHC. Therefore, we hold that the DHC properly excluded the evidence concerning whether Ms. Pologruto knew where her husband was buried.

IV.

[4] Defendant next contends that the DHC erred by failing to dismiss the third claim for relief contained in the State Bar's amended complaint, in which the State Bar alleged that defendant had engaged in a conflict of interest in violation of Rules 1.7(b) and 8.4(g) of the Revised Rules of Professional Conduct during the course of representing Michelle and Sanjay Munavalli. Defendant asserts that the filing of a complaint concerning his representation of the Munavallis could not have been properly authorized by the grievance committee of the State Bar since the Munavallis had not filed a grievance. Therefore, according to defendant, the DHC had no authority to hear the matters contained in the third claim for relief.

Our Supreme Court has held that the State Bar is free to investigate and prosecute an attorney regardless of whether the client or other member of the public files a grievance. *State Bar v. Frazier*, 269 N.C. 625, 153 S.E.2d 367, *cert. denied*, 389 U.S. 826, 19 L. Ed. 2d 81 (1967). Thus, the fact that neither the Munavallis nor anyone else on behalf of the Munavallis filed a grievance with the grievance committee does not prohibit the State Bar from filing a claim against defendant relating to his representation of the Munavallis. Moreover, the State Bar's amended complaint, which included the third claim for relief, was signed by the Chair of the State Bar's grievance committee indicating the committee's approval of the complaint. Therefore, we conclude that the DHC did not err in refusing to dismiss the third claim for relief of the State Bar's amended complaint.

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V.

[5] Defendant asserts that the DHC erred by entering an order of discipline containing what he characterizes as erroneous and grossly misleading findings of fact. However, defendant has failed to direct us to those findings which he claims are not supported by evidence and has not provided an argument supporting his contentions. Assignments of error which are not supported by reason or legal argument in the appellant's brief are deemed abandoned. N.C.R. App. P. 28(b)(6) [formerly N.C.R. App. P. 28(b)(5)]; *Talley v. Talley*, 133 N.C. App. 87, 513 S.E.2d 838, *disc. review denied*, 350 N.C. 599, 537 S.E.2d 495 (1999). Therefore, this issue is deemed abandoned.

VI.

[6] Defendant argues that the DHC erred by entering an order of discipline containing several conclusions of law that are not supported by the findings of fact or by clear, cogent and convincing evidence.

The whole record test is the appropriate standard for judicial review of a disciplinary hearing. *State Bar v. Frazier*, 62 N.C. App. 172, 302 S.E.2d 648, *disc. review denied*, 308 N.C. 677, 303 S.E.2d 546 (1983). In applying this standard, the reviewing court is required to consider the evidence which supports the administrative findings and must also take into account contradictory evidence. *N.C. State Bar v. DuMont*, 304 N.C. 627, 286 S.E.2d 89 (1982). Under the whole record test, the DHC's ruling should be affirmed if the findings, conclusions, and result are supported by substantial evidence. *Id.* at 643, 286 S.E.2d at 98-99. "The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion." *Id.*

A.

Defendant specifically argues that the DHC erred in concluding that defendant violated the Revised Rules of Professional Conduct by retaining \$45,000 of the \$60,000 lump sum settlement in the Pologruto workers' compensation case. Defendant argues that the Industrial Commission's order was satisfied since it only required the insurance carrier to deliver the \$45,000 check for Ms. Pologruto to defendant which was done. This argument is meritless. It is clear that the intent of the order was to award \$45,000 of the \$60,000 lump sum settlement to Ms. Pologruto. Thus, under the order, defendant was required to ensure that Ms. Pologruto received the \$45,000. Additionally, Deputy

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Commissioner Hoag indicated that defendant had in fact violated her order.

Defendant also contends that he did not violate the Industrial Commission's order because only \$15,000 of the \$45,000 that he retained represented his fee for the workers' compensation case, which had been approved by the Commission. Defendant claims that the remaining \$30,000 constituted his fee in the wrongful death case he was handling for Ms. Pologruto. However, Ms. Pologruto testified that she never agreed to allow defendant to retain \$30,000 from her lump sum award as a fee in the wrongful death case. Additionally, defendant testified that he had originally agreed to handle the wrongful death case on a contingent fee basis in early 1997. The evidence showed that defendant did not obtain any recovery in the wrongful death case, therefore under a contingent fee agreement, he was not entitled to a fee. Defendant did not produce any written agreement modifying the original contingent fee agreement and authorizing him to retain \$30,000 of the workers' compensation award as a fee in the wrongful death case. The evidence shows that, at various times, defendant gave varying explanations for retaining the additional \$30,000 from Ms. Pologruto's lump sum award. The determination of the credibility of the witnesses is the function of the DHC and is not subject to review on appeal. *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 326 S.E.2d 320, *cert. denied*, 314 N.C. 117, 332 S.E.2d 482, *cert. denied*, 474 U.S. 981, 88 L. Ed. 2d 338 (1985).

Defendant also contends the DHC erred in concluding that he acted dishonestly in retaining \$30,000 of Ms. Pologruto's workers' compensation award since he testified that he planned to reimburse Ms. Pologruto \$21,825 over 60 months and allow her a credit of \$8,125 toward his fee in the wrongful death case. His testimony with respect to his intentions, however, is also subject to the DHC's determination of his credibility, which we will not review.

B.

Defendant also takes issue with the DHC's conclusion of law that defendant violated the Revised Rules of Professional Conduct by temporarily misappropriating a portion of the \$1,455 February 1999 annuity payment without Ms. Pologruto's knowledge or consent. Defendant first contends that the February 1999 annuity check was his property and therefore, he could not have misappropriated his own money. However, defendant conceded at the hearing that he had agreed to forward all of the annuity checks to Ms. Pologruto.

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Additionally, Ms. Pologruto testified that defendant told her that he would forward the fourth month annuity checks, which were supposed to go to defendant under the structured settlement, to her since he was collecting his fees up front. Therefore, there is substantial evidence supporting the DHC's finding that the proceeds of the \$1,455 February annuity check were the property of Ms. Pologruto.

Defendant also argues that even if the February check for \$1,455 was the property of Ms. Pologruto, she was not entitled to receive the check on a particular date and therefore he did not violate the Revised Rules of Professional Conduct because he sent her a replacement check for \$1,455 on 23 February 1999. However, defendant used the funds between 4 February 1999 and 23 February 1999 without Ms. Pologruto's consent.

Defendant further argues that he had a good faith belief that he was entitled to use the February annuity check to reimburse himself for costs which he incurred in the wrongful death case and therefore, he asserts that his failure to pay the funds to Ms. Pologruto prior to 23 February 1999 was not a dishonest, deceitful or fraudulent act, nor was it a criminal act. However, there is no evidence that defendant in good faith believed he was entitled to use the February check for expenses associated with the wrongful death suit. First, no written agreement existed to that effect. Second, defendant never submitted any itemized bill of alleged expenses to Ms. Pologruto before appropriating \$920.20 of the check. This conduct violated defendant's own office policy that clients be billed before being asked to pay reimbursements. Finally, even though defendant claimed the entire \$920.20 was for reimbursement of his expenses related to the wrongful death suit, his 23 February letter to Ms. Pologruto stated that, as of the date of the letter, he had only incurred \$524 in expenses. There was no evidence supporting defendant's claim that he had a good faith belief that he was entitled to use the February annuity check to reimburse himself for costs which he incurred in the wrongful death case, and we conclude that there was substantial evidence supporting the DHC's conclusion that defendant's failure to pay the funds to Ms. Pologruto prior to 23 February 1999 violated the Revised Rules of Professional Conduct.

C.

Defendant contends the DHC erred by concluding that he had engaged in a conflict of interest and had prejudiced the Munavallis by charging them \$4,627.43 for three CD-ROMs, which he retained in his

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law office library, without first obtaining his clients' approval for the expense. The CD-ROMs contained a medical encyclopedia, various forms, and sample legal briefs and citations. The DHC found that defendant had not obtained the Munavallis' consent prior to his purchasing the CD-ROMS, which he contended were necessary because he had never previously handled a personal injury case. At the conclusion of the matter, defendant sought to charge the Munavallis, by way of an itemized statement of costs and expenses, for the full cost of the CD-ROMs in addition to the contingent fee which they had originally agreed to pay. Though the DHC found that defendant's fee contract with the Munavallis did not provide for their payment for such things as the CD-ROMS, defendant argues to this Court that the Munavallis "freely and voluntarily" agreed to pay for the CD-ROMs as a part of a "global settlement" of the fees for their case. Therefore, according to defendant, the Munavallis' payment for the CD-ROMs was the result of an arms-length agreement and thus beyond the scope of the DHC's regulatory power. We disagree with defendant that the Munavallis' payment for the CD-ROMs was the result of an arms-length transaction. Attorneys owe a fiduciary duty to their clients and attorney-client negotiations are closely scrutinized. Our courts have applied the following rule to fee contracts, both fixed and contingent:

a contract made between an attorney and his client, during the existence of the relationship, concerning the fee to be charged for the attorney's services, will be upheld if, but only if, it is shown to be reasonable and to have been fairly and freely made, *with full knowledge by the client of its effect and of all the material circumstances relating to the reasonableness of the fee*. The burden of proof is upon the attorney to show the reasonableness and the fairness of the contract, not upon the client to show the contrary (emphasis added).

Randolph v. Schuyler, 284 N.C. 496, 504, 201 S.E.2d 833, 837-38 (1974). Such close scrutiny is applied to attorney-client negotiations since "[c]lients are very vulnerable to lawyer over-reaching because of their trust in their lawyers and because of their lawyers' superior knowledge and skills." Charles W. Wolfram, *Modern Legal Ethics*, § 8.11.3, at 481-82 (1986).

The evidence showed that at the outset of defendant's representation, the Munavallis agreed to pay, in addition to a contingent fee, for certain costs of litigation such as photocopies and computer

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research, but the agreement did not extend to basic reference materials, such as books, statutes and encyclopedias which might reasonably be expected to be contained in an attorney's library or other library accessible to the attorney. After the attorney-client relationship was formed, and without prior disclosure or approval, defendant sought to charge the Munavallis for the entire cost of the CD-ROMs. Defendant made no showing that these materials were reasonably required for the successful resolution of the Munavallis' case. Moreover, there was no showing that it was reasonable and fair for the Munavallis to bear the entire cost of the materials which were available for defendant's use in representing other clients in personal injury cases. Though the Munavallis ultimately agreed to settle the fee and cost dispute by paying an amount which included the cost of the CD-ROMS, well after the fact of purchase, they were not, even then, made aware that the amount which they had agreed to pay included \$1,751.65 in charges for on-line research incurred for other clients.

Though the conduct is related to fees, the conduct for which defendant was disciplined was not the fee dispute with the Munavallis, which would have been a proper subject for resolution through the procedures contained in Subchapter D, Section .0700 of the Rules and Regulations of the North Carolina State Bar. *See* 27 NCAC 1D.0700 *et seq.* Rather, the conduct for which defendant was disciplined related to his breach of the fiduciary duty of full disclosure to, and fair dealing with, his clients by failing to disclose material facts to them resulting in a benefit to himself at his clients' expense. Indeed, the evidence showed that though defendant collected the cost of the CD-ROMs and on-line research from the Munavallis, he diverted those funds to his personal expenses and had not, as of the time of the hearing, paid for either the CD-ROMs or the computer research.

Substantial evidence in the whole record supports the findings of the DHC, which, in turn, support its legal conclusion that defendant engaged in a conflict to the prejudice of the Munavallis by charging them \$4,627.43 for three CD-ROMs which he retained in his law office library, without first obtaining the clients' approval.

VII.

[7] Defendant finally argues that the DHC erred by finding certain aggravating factors and failing to find certain mitigating factors. Defendant specifically argues that the DHC erred in finding the fol-

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lowing aggravating factors: defendant was motivated by a dishonest or selfish motive; defendant engaged in a pattern of misconduct; and defendant engaged in multiple violations of the Revised Rules of Professional Conduct. Additionally, defendant contends the DHC erred in failing to find the following mitigating factors: absence of a dishonest or selfish motive; timely good faith efforts at restitution; full and free disclosure; and remorse.

This Court has previously stated that “so long as the punishment imposed is within the limits allowed by [G.S. § 84-28] this Court does not have the authority to modify or change it.” *N.C. State Bar v. Wilson*, 74 N.C. App. 777, 784, 330 S.E.2d 280, 284 (1985). Therefore, since mitigating and aggravating factors play a role in the DHC’s formulation of appropriate disciplinary measures, the DHC has broad discretion in determining aggravating and mitigating factors and the appropriate weight of each. In the instant case, defendant was suspended for five years with the last three years of the suspension stayed under certain terms and conditions. This discipline falls within the range authorized by statute. *See* N.C. Gen. Stat. § 84-28(b)(2), (c)(2) (2001). Moreover, a review of the whole record shows that there is ample evidence supporting all of the aggravating factors.

Likewise, we conclude the DHC did not err in failing to find the mitigating factors contended for by defendant. The mitigating factors for which defendant argues are all partly, if not wholly, based on defendant’s credibility, i.e., whether he had a dishonest or selfish motive; whether he had made timely good faith efforts at restitution; whether he had been forthcoming; and whether he was truly remorseful. As stated earlier, the determination of the credibility of the witnesses is the function of the DHC and will not be reviewed on appeal. *Sheffield*, 73 N.C. App. 349, 326 S.E.2d 320. Therefore, we conclude that the DHC did not err in failing to find these particular mitigating factors.

The order of discipline is affirmed.

Affirmed.

Judge THOMAS concurs.

Judge TYSON concurs in part and dissents in part.

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

I concur with parts I, II, III, IV, V, and VII of the majority's opinion. I respectfully dissent from part VI for two reasons: (1) the Disciplinary Hearing Commission's ("DHC") conclusions are inconsistent regarding simultaneous violations of the Industrial Commission's order, and (2) the DHC's findings of fact and conclusions of law regarding defendant's use of CD-ROMs are not supported by the evidence.

The practice of law is a property right requiring due process of law before it may be impaired. *In re Burton*, 257 N.C. 534, 126 S.E.2d 581 (1962); *Sonek v. Sonek*, 105 N.C. App. 247, 255, 412 S.E.2d 917, 922 (1992); *North Carolina State Bar v. DuMont*, 52 N.C. App. 1, 15, 277 S.E.2d 827, 836 (1981); *In re Bonding Co.*, 16 N.C. App. 272, 192 S.E.2d 33 (1972).

I. Pologruto Fee Agreement

The DHC order concluded that defendant violated the Revised Rules of Professional Conduct ("Rules") "[b]y retaining \$30,000 of the \$60,000 lump settlement in the Pologruto case for his own use and benefit . . . [and by failing] to disburse funds as directed by the client."

The DHC's conclusions are inconsistent. The DHC could not have logically and simultaneously concluded that defendant violated both of the above. On 14 October 1998, the Industrial Commission issued an order awarding defendant \$15,000 of the lump sum award of \$60,000. The remaining \$45,000 was issued for Pologruto's care of defendant. The order also provided that defendant would receive every fourth monthly annuity check in the amount of \$1,455 as an additional attorney fee for sixty months.

Presuming that defendant violated the Industrial Commission's order by retaining the \$30,000 and that defendant wrongfully entered into an agreement with Pologruto whereby defendant would forgo every fourth check and give all annuity checks to Pologruto, it was error for the DHC to also conclude that defendant violated the Rules by failing to disburse the February 1999 annuity check as directed by Pologruto.

The only basis for Pologruto to lay claim to the fourth check that belonged to defendant pursuant to the Industrial Commission's order was for Pologruto to have agreed for defendant to retain the \$30,000.

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DHC cannot find that it was a violation of the Rules for defendant to retain \$30,000 and also subject him to discipline for failing to deliver the fourth check.

As the majority opinion correctly states, the February annuity check was a “fourth” check. The Industrial Commission’s order expressly provided that every fourth check belonged to defendant. Defendant’s retention of the fourth check was pursuant to the Industrial Commission’s order. Defendant cannot logically be disciplined for retaining the \$30,000 check in violation of the Industrial Commission’s order, entering a wrongful agreement to disburse every fourth check in violation of the Industrial Commission’s order, and then be disciplined for retaining every fourth check pursuant to the Industrial Commission’s order. I would vacate this portion of the DHC’s order and remand.

The majority’s opinion upholds the DHC’s conclusion that defendant wrongfully retained the \$30,000. Nothing prevents an attorney and client from entering into a new fee arrangement for another case after the Industrial Commission’s case is concluded. The better practice would have been for defendant to disburse \$45,000 to Pologruto and have her write him a check for \$30,000, if such a retainer fee agreement was reached pursuant to another matter.

Furthermore, presuming that defendant and Pologruto entered into an agreement for defendant to disburse his fourth check to her, a nineteen day delay, standing alone, is insufficient to support the DHC’s conclusion that defendant “failed to disburse funds as directed by the client.” I concur with that portion of the majority’s opinion that defendant “misappropriated a portion of the \$1,455 February check” by using those trust funds for personal and or business purposes.

II. Munavallis’ Computer Research Agreement

I disagree with the majority’s characterization that defendant was not disciplined for a fee dispute, but for conduct “related to his breach of fiduciary duty of full disclosure to, and fair dealing with, his clients by failing to disclose material facts to them resulting in a benefit to himself at his clients’ expense.”

The DHC’s order concluded that:

By charging the Munavallis for three CD-ROMs which he retained in his law office library, without first obtaining his clients’ approval for the expense, Gilbert engaged in a conflict of interest

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in violation of Rule 1.7(b) and prejudiced his clients, in violation of Rule 8.4(g). . . .

Defendant represented Munavallis in a medical malpractice case in which defendant obtained a settlement of \$65,000. Defendant's agreement was a twenty-eight (28) percent contingency, based upon recovery, with Munavallis remaining responsible for costs and "computer research." The uncontested evidence at the hearing showed that defendant normally charged a contingent fee of thirty-three and a third (33 $\frac{1}{3}$) percent of recovery. Defendant reduced his normal contingent fee upon Munavallis' request.

The DHC's order found as fact that:

27. Gilbert testified that he needed the CD-ROMs to prosecute the Munavallis case, as he had never handled a personal injury action prior to undertaking the Munavallis' matter.

. . . .

29. Gilbert did not consult with the Munavallis before incurring the \$4,627.43 expense for the CD-ROMs.

30. The fee contract which Gilbert entered into with the Munavallis did not state that the Munavallis would be responsible for the cost of purchasing CD-ROMs.

31. Although the Munavallis disputed the amount of the bill which Gilbert sent to them on April 20, 1998, they ultimately paid to him \$6,800 in costs, which included the full price of the CD-ROMs.

The undisputed evidence at the hearing showed that: (1) defendant had not previously represented a client with a medical malpractice claim, (2) defendant needed to become competent in medical malpractice litigation in order to properly represent Munavallis, (3) defendant purchased CD-ROMs to aid in his representation of Munavallis, (4) the CD-ROMs purchased and used by defendant were solely for Munavallis's case, (5) the CD-ROMs were consumables that expired in one year, (6) Munavallis agreed to be responsible for costs associated with computer research, (7) Munavallis knew that defendant used Westlaw research, (8) Munavallis did not know how much Westlaw research defendant would perform, and she did not authorize each use, (9) no evidence existed that defendant used the CD-ROMs for any work other than for Munavallis' medical malpractice case, (10) initially Munavallis complained to defendant about the

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amount of the “costs” defendant had billed her, (11) defendant and Munavallis reached a subsequent agreement regarding the proper amount of costs, (12) Munavallis testified that she was satisfied with the agreement that she reached with defendant, (13) Munavallis did not complain to the North Carolina State Bar about her bill for costs and expenses, and (14) there is no evidence that defendant benefited himself at the expense of Munavallis.

I would hold that the written agreement, which expressly provided for “computerized research,” between defendant and Munavallis sufficiently informed Munavallis about the CD-ROM research, and that there was no evidence presented at the hearing that showed that defendant did not use the CD-ROMs on Munavallis’ case or that he used them on other client’s cases to benefit himself. Any dispute over the proper amount of costs, although not contested by Munavallis now, is better suited for resolution through the procedures set forth in Subchapter D, Section .0700 of the Rules. NCAC 1 D.0700 *et seq.* If any wrongdoing had been disclosed during arbitration, it could have been a basis for an order of discipline. I would vacate the order of the DHC and remand for a redetermination of discipline. I concur in part and respectfully dissent in part.

STATE OF NORTH CAROLINA v. WILLIS ANDRE JONES

No. COA01-464

(Filed 16 July 2002)

1. Jury— selection—excusal for cause

The trial court did not err in a prosecution for breaking and entering and other offenses by excusing for cause *ex mero motu* a juror who had indicated in another trial that she would not follow the law if it did not align with the Bible. The trial court did not rely on answers given by the juror at another session of court, but properly established the grounds for excusal in the record in this case. Defendant made no showing that further questioning would produce different answers.

2. Discovery— violation—no sanctions

The trial court did not abuse its discretion in a prosecution for breaking and entering and other offenses by not imposing

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sanctions for the State's violation of a discovery order in its production of photographs.

3. Appeal and Error— prayer for judgment continued—not a final judgment—assignment of error not addressed

An issue involving amendment of an indictment for felonious larceny was not considered where defendant was convicted of felonious breaking and entering, felonious larceny, and felonious possession of stolen goods, and prayer for judgment continued was granted on the felonious larceny conviction. No final judgment was entered as to felonious larceny and the Court of Appeals could not address the assignment of error.

4. Possession of Stolen Property— indictment—ownership of property—not an essential element

The trial court did not err by denying defendant's motion to dismiss the charge of felonious possession of stolen goods where Salvador Santos initially told officers that the items recovered belonged to "us"; Santos later clarified that the property belonged to his 17 year old stepson, Ever Antonio Hernandez; and the court allowed the State to amend the indictment accordingly. The name of the person from whom the goods were stolen is not an essential element of the indictment and a variance between the allegations of ownership and proof is not fatal.

5. Burglary and Unlawful Breaking or Entering— breaking and entering—sufficiency of evidence—lack of authority to enter

The trial court did not err by denying defendant's motion to dismiss a charge of breaking and entering where defendant contended that there was nothing in the evidence inconsistent with the owner giving defendant permission to come and borrow the property, but, viewed in the light most favorable to the State, the evidence at trial was sufficient to support an inference that defendant had no legal authority to enter the apartment.

6. Sentencing— habitual offender—no contest plea

The trial court did not err by accepting defendant's no contest plea to being an habitual felon. A conviction within the context of N.C.G.S. § 14-7.6 includes a judgment entered upon a no contest plea, as long as the statutory procedures in N.C.G.S. § 15A-1022 are followed.

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**7. Sentencing— possessing stolen goods—felonious larceny—
prayer for judgment continued on larceny**

The trial court did not err by not arresting judgment on a larceny charge upon entering judgment to the charge of possession of stolen goods where prayer for judgment continued was granted on the larceny charge. Defendant was not punished for both convictions.

Appeal by defendant from judgment entered 5 October 2000 by Judge J.B. Allen, Jr. in Superior Court, Durham County. Heard in the Court of Appeals 12 February 2002.

Attorney General Roy Cooper, by John F. Maddrey, Assistant Attorney General, for the State.

Daniel Shatz for defendant-appellant.

McGEE, Judge.

Willis Andre Jones (defendant) was indicted on 20 March 2000 in a true bill charging him with felonious breaking and entering a residence occupied by Salvador Santos, felonious larceny of personal property of Salvador Santos, and felonious possession of stolen goods belonging to Salvador Santos. Defendant was indicted in a second indictment on 20 March 2000 charging him as an habitual felon.

The State's evidence at trial tended to show that Esther Maya testified she saw a man opening a window at a neighbor's residence with a screwdriver in early November 1999. She called 911. Officer T.D. Douglass, Jr. (Officer Douglass) of the Durham Police Department responded to a report of a breaking and entering in progress at 420 Macon Street in Durham, North Carolina on 2 November 1999, at about 8:30 a.m. Officer Douglass testified that when he arrived, a neighbor pointed towards a window in the apartment, and the officer saw "obvious pry marks" indicating to him that a break-in had occurred through the window. Officer Douglass heard noises from inside the apartment building and he saw a man leaving the building with what appeared to be a full knapsack over his shoulder and a crowbar in his hand. Officer Douglass ordered the man to lie on the ground, and then placed him in custody. The officer identified defendant as the man he saw coming from the apartment building. He testified that what he thought was a knapsack was actually a nylon jacket folded around a VCR, a portable compact disc player, and a plastic

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case containing compact discs. Durham Police Officer D.W. Smith (Officer Smith) corroborated the testimony of Officer Douglass.

Thelma Jimenez testified she lived at 420 Macon Street and that she saw a man in her bedroom on 2 November 1999. She stated that the man the police took into custody looked like the same man who had been in her bedroom.

Salvador Santos testified he rented an apartment located at 420 Macon Street and that on the morning of 2 November 1999 he was asleep in his bedroom when he heard his doorknob being rattled. He ran outside and saw the man the police had in custody and he testified he did not give the man permission to enter his residence. The officers showed Santos the items recovered and he initially stated that the property "belonged to us." Santos later clarified that the items of property belonged to Ever Antonio Hernandez, the seventeen-year-old son of Santos' wife, who lived with Santos.

The State moved to amend the indictment to change the name of the owner of the personal property in the indictment from Salvador Santos to Ever Antonio Hernandez, which the trial court allowed. At the close of the State's evidence, defendant moved to dismiss the charges against him. The trial court denied defendant's motion. Defendant presented no evidence. At the close of all the evidence, defendant again moved to dismiss the charges against him, which the trial court denied.

The jury convicted defendant of felonious breaking or entering, felonious larceny and felonious possession of stolen goods. Defendant pled no contest to being an habitual felon. The trial court sentenced defendant as an habitual felon to 121 months to 155 months in prison on the charges of felonious breaking or entering and felonious possession of stolen goods. The trial court granted defendant prayer for judgment continued on the felonious larceny conviction. Defendant appeals.

On appeal, defendant has failed to argue all assignments of error set out in the record on appeal; therefore, the assignments of error not argued are deemed abandoned. N.C.R. App. P. 28(a); *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 593-94 (1975) ("[I]t is well recognized that assignments of error not set out in an appellant's brief, and in support of which no arguments are stated or authority cited, will be deemed abandoned.").

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I.

[1] Defendant argues by his second, third and fourth assignments of error that the trial court erred in excusing a potential juror, Ms. Barbee, for cause *ex mero motu*. N.C. Gen. Stat. § 15A-1212 (8) (1999) states that any party may challenge a juror for cause “on the ground that the juror . . . [a]s a matter of conscience, regardless of the facts and circumstances, would be unable to render a verdict with respect to the charge in accordance with the law of North Carolina.”

“It is within the discretion of the trial judge, who has the opportunity to see and hear the juror on voir dire and to make findings based on the juror’s credibility and demeanor, to ultimately determine whether the juror could be fair and impartial.” *State v. Kennedy*, 320 N.C. 20, 26, 357 S.E.2d 359, 363 (1987) (citations omitted). Therefore, the trial court’s ruling on a challenge for cause is not reviewable on appeal except for abuse of discretion. *State v. Robinson*, 355 N.C. 320, 329, 561 S.E.2d 245, 251-52 (2002).

Defendant argues that (1) the trial court erroneously considered answers given by Ms. Barbee as a potential juror in an earlier case, in violation of defendant’s constitutional right to counsel and to be present during jury selection, (2) the record does not show sufficient grounds to sustain a challenge for cause against Ms. Barbee, and (3) the trial court erred in refusing to allow defense counsel to question Ms. Barbee.

A review of the transcript in the record in this case includes the following exchange among the trial court, Ms. Barbee and defense counsel:

THE COURT: All right. Ms. Barbee, I’m going to come back to you. I believe at an earlier session of court, were you a potential juror?

MS. BARBEE: Yes, sir, I was.

THE COURT: And I think I’m correct. As I told the jury here and as I told that jury, it’s most important that the jury—It is absolutely necessary and most important that the jury understand and apply the law that I would give to the jury and not as the jury or an individual might think it to be or might like it to be. And you told me, I believe earlier, that if you didn’t like the law, then you would not apply the law that I would give you. Were you the lady that said that?

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MS. BARBEE: I didn't use those words, but that is what I responded.

THE COURT: That is what you mean?

MS. BARBEE: Absolutely.

THE COURT: In other words, if I tell you that this is the law and you don't like that law, then you would not follow that law, is that what you told me earlier and is that what you're telling me now?

MS. BARBEE: What I'd like to say, sir, is that I follow the Bible for faith and practice and if the law of the land does not line up with that, then I do not follow the law of the land.

THE COURT: Well, I'm just trying to get you to tell me what you told me before.

I believe I asked you that if I told you that this was the law and you disagreed with that, then you would not follow my instructions.

MS. BARBEE: Absolutely. That is correct.

THE COURT: All right. I'm going to excuse her for cause. Any objections?

MR. BATTAGLIA: I'd like to ask her a couple of questions.

THE COURT: No. She said she can't follow the law if she didn't agree with it. She is excused for cause.

We disagree with defendant's argument that the trial court "effectively made the prior jury selection a part of this case." Although it is clear from the record that the trial court recognized Ms. Barbee as a potential juror from an earlier session of court, the trial court did not rely on answers given by Ms. Barbee at that earlier time when determining whether to excuse her for cause in this case. Rather, the trial court properly established on the record in this case the grounds upon which he excused Ms. Barbee for cause. There is no evidence in the record that the trial court improperly relied on statements made by Ms. Barbee when defendant or his counsel were not present.

Additionally, defendant's argument that there are insufficient grounds to sustain a challenge for cause is without merit. The United States Supreme Court has held that the standard for determining if a juror is qualified is whether the juror's views would "prevent or sub-

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stantially impair the performance of his duties as a juror in accordance with his instructions and his oath.’ ” *State v. Taylor*, 332 N.C. 372, 390, 420 S.E.2d 414, 425 (1992) (quoting *Wainwright v. Witt*, 469 U.S. 412, 424, 83 L. Ed. 2d 841, 851-52 (1985)) (quoting from *Adams v. Texas*, 448 U.S. 38, 45, 65 L. Ed. 2d. 581, 589 (1980)). There is substantial evidence in the record that Ms. Barbee’s views would impair her duty as a juror to follow and apply the laws of North Carolina as instructed by the trial court because she stated unequivocally that she would not be able to follow the law as instructed if it differed from her religious faith and practice.

Finally, although defendant contends the trial court erroneously refused to allow defense counsel to question Ms. Barbee, our Supreme Court has held that “the defendant is not entitled to engage in attempts to rehabilitate such jurors by repeating the questions the jurors have already answered.” *State v. Hill*, 331 N.C. 387, 403, 417 S.E.2d 765, 771 (1992), *cert. denied*, 507 U.S. 924, 122 L. Ed. 2d 684 (1993) (citing *State v. Cummings*, 326 N.C. 298, 307, 389 S.E.2d 66, 71 (1990)). *See also State v. Zuniga*, 320 N.C. 233, 250, 357 S.E.2d 898, 909, *cert. denied*, 484 U.S. 959, 98 L. Ed. 2d 384 (1987). Further,

“[w]hen challenges for cause are supported by prospective jurors’ answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged [about the same matter].”

Hill, 331 N.C. at 403, 417 S.E.2d at 772 (quoting *Cummings*, 326 N.C. at 307, 389 S.E.2d at 71). As we have determined, the challenge to Ms. Barbee for cause is supported by her answers in the record in this case and defendant has made no showing that further questioning would produce different responses from Ms. Barbee.

“The nature and extent of the inquiry made of prospective jurors on *voir dire* ordinarily rests within the sound discretion of the trial court.” *Hill*, 331 N.C. at 404, 417 S.E.2d at 772 (citing *State v. Brown*, 315 N.C. 40, 53, 337 S.E.2d 808, 820 (1985), *cert. denied*, 476 U.S. 1165, 90 L. Ed. 2d 733 (1986), *overruled on other grounds by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988)). Defendant has failed to show that the trial court abused its discretion in dismissing Ms. Barbee for cause. Defendant’s second, third and fourth assignments of error are overruled.

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II.

[2] Defendant argues by his fifth assignment of error that the trial court erred in allowing the State to introduce photographs into evidence which had not been provided to defendant in discovery.

Following Officer Smith's testimony, the State moved to introduce exhibits one through seven, which included certain photographs. Defendant objected to the admission of the photographs because they had not been provided to defendant during discovery.

The trial court found that

this is a violation of the discovery order in this case.

Counsel for the State, the Assistant D.A., an officer of the court, stated he only received these photographs this morning during jury selection. That he immediately thereafter gave them to counsel for the defendant. Counsel for the State contends that the defendant was placed on notice. That he was advised that there had been fingerprints and photographs and that the counsel for the defendant did not seek to secure those.

The trial court then found that the State sought to introduce the photographs for the limited purpose of illustrating the testimony of the witness, that the photographs were relevant, and that their probative value was not outweighed by unfair prejudice to defendant.

In his brief to our Court, defendant argues that the trial court failed "to properly exercise its discretion by considering sanctions for this discovery violation[.]" N.C. Gen. Stat. § 15A-910 (1999) states that

If at any time during the course of the proceedings the court determines that a party has failed to comply with [discovery] or with a [discovery order], the court in addition to exercising its contempt powers *may*

- (1) Order the party to permit the discovery or inspection, or
- (2) Grant a continuance or recess, or
- (3) Prohibit the party from introducing evidence not disclosed, or
- (3a) Declare a mistrial, or
- (3b) Dismiss the charge, with or without prejudice, or
- (4) Enter other appropriate orders.

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(emphasis added). “The decision as to which sanctions to apply, or whether to apply any of the sanctions at all, however, rests with the discretion of the trial court.” *State v. Carson*, 320 N.C. 328, 336, 357 S.E.2d 662, 667 (1987) (citing *State v. Stevens*, 295 N.C. 21, 37, 243 S.E.2d 771, 781 (1978)). Therefore, the trial court’s decision will only “be reversed for an abuse of discretion . . . upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision.” *Id.* (citing *State v. Gladden*, 315 N.C. 398, 412, 340 S.E.2d 673, 682, *cert. denied*, 479 U.S. 871, 93 L. Ed. 2d 166 (1986)).

We find the trial court did not abuse its discretion in this case by failing to impose sanctions upon the State for the discovery violation. N.C. Gen. Stat. § 15A-910 leaves the determination of whether to impose sanctions solely within the discretion of the trial court and does not require the trial court to make specific findings on the record that it considered sanctions before determining not to impose sanctions.

Also, the transcript in this case demonstrates the trial court properly considered the circumstances surrounding the production of the photographs. “[T]he purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate.” *State v. Payne*, 327 N.C. 194, 202, 394 S.E.2d 158, 162 (1990), *cert. denied*, 498 U.S. 1092, 112 L. Ed. 2d 1062 (1991). The trial court found that defendant was not surprised by the introduction of the photographs at trial, but rather was on notice of the existence of the photographs. Although the State committed a discovery violation, the circumstances of the violation did not require imposition of a sanction. Therefore, the trial court’s failure to impose sanctions was the result of a reasoned decision and was not an abuse of discretion. Defendant’s fifth assignment of error is overruled.

III.

[3] Defendant argues by his sixth assignment of error that the trial court erred in allowing the State’s motion to amend the larceny indictment by changing the name of the alleged victim.

Over defendant’s objection, the trial court allowed the State’s motion to amend the larceny count of the indictment to conform to the evidence presented at trial, by changing the name of the owner of the personal property from Salvador Santos to Ever Antonio Hernandez. Following the jury’s verdict, the trial court entered prayer for judgment continued on the conviction of felonious larceny.

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A defendant “is entitled to appeal as a matter of right when final judgment has been entered.” N.C. Gen. Stat. § 15A-1444(a) (1999). N.C. Gen. Stat. § 15A-101(4a) (1999) states that “[p]rayer for judgment continued upon payment of costs, without more, does not constitute the entry of judgment.” See also *State v. Southern*, 71 N.C. App. 563, 322 S.E.2d 617 (1984), *aff’d*, 314 N.C. 110, 331 S.E.2d 688 (1985); *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

In this case, no final judgment has been entered as to the conviction for felonious larceny; therefore, our Court is unable to address this assignment of error under the circumstances in this case. Nevertheless, should the State move the trial court to impose judgment on the conviction of felonious larceny and the trial court does in fact impose judgment, defendant may raise the issues in this assignment of error on appeal. *State v. Maye*, 104 N.C. App. 437, 439-40, 410 S.E.2d 8, 10 (1991). See also *State v. Pledger*, 257 N.C. 634, 127 S.E.2d 337 (1962).

IV.

By his seventh assignment of error, defendant contends the trial court erred in denying his motion to dismiss because the State failed to produce sufficient evidence of every element of each offense.

“A motion to dismiss is properly denied if ‘there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense.’” *State v. Gilmore*, 142 N.C. App. 465, 469, 542 S.E.2d 694, 697 (2001) (quoting *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990)). “ ‘Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’ ” *Id.* (quoting *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990)). Upon consideration of a motion to dismiss, “all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence.” *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). “ ‘The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct.’ ” *State v. Holmes*, 142 N.C. App. 614, 617, 544 S.E.2d 18, 20 (2001) (quoting *State v. Harding*, 110 N.C. App. 155, 162, 429 S.E.2d 416, 421 (1993)).

A. Felonious Larceny

Defendant first argues that because there was a fatal variance between the indictment for felonious larceny and the evidence pro-

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duced at trial, the trial court erred in not granting defendant's motion to dismiss this charge. As we determined above, defendant's appeal based upon his conviction for felonious larceny is not properly before this Court; therefore, we are unable to address this argument.

B. Possession of Stolen Goods

[4] Defendant also argues that the State failed to produce sufficient evidence to support the charge of felonious possession of stolen property.

The essential elements of felonious possession of stolen goods are "(1) possession of personal property, (2) valued at more than [\$1000.00], (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose." *State v. Davis*, 302 N.C. 370, 373, 275 S.E.2d 491, 493 (1981). See N.C. Gen. Stat. §§ 14-71.1 and 14-72 (1999).

Defendant argues that, as to the charge of felonious possession of stolen property, there was a fatal variance between the indictment and the evidence produced at trial regarding the ownership of the personal property; therefore, the State's evidence was insufficient to prove that defendant possessed the property without the owner's permission.

As support for his argument, defendant relies on our Court's decision in *State v. Salters*, 137 N.C. App. 553, 528 S.E.2d 386, cert. denied, 352 N.C. 361, 544 S.E.2d 556 (2000). This reliance, however, is misplaced because in *Salters* the defendant's convictions of felonious larceny and felonious breaking and entering were at issue, not a conviction for felonious possession of stolen goods. *Id.* at 554, 528 S.E.2d at 388. Our Court held in *State v. Medlin*, 86 N.C. App. 114, 124, 357 S.E.2d 174, 180 (1987), that "the name of the person from whom [the] goods were stolen is not an essential element of an indictment alleging possession of stolen goods, nor is a variance between the indictment[s] allegations of ownership of [the] property and the proof of ownership fatal."

The trial court did not err in denying defendant's motion to dismiss the charge of felonious possession of stolen goods.

C. Breaking and Entering

[5] Defendant also argues the trial court erred in denying his motion to dismiss the charge of breaking and entering. Specifically, defend-

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ant argues that “the critical flaw is the absence of testimony that Ever Hernandez did not give [defendant] permission to enter the house and/or to take the property.”

“The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein.” *State v. Litchford*, 78 N.C. App. 722, 338 S.E.2d 575 (1986) (citing N.C.G.S. 14-54(a)).

In a larceny case, “evidence is sufficient to prove lack of consent if it can support a reasonable inference by the jury that the dwelling was entered without the permission of the occupants.” *Salters*, 137 N.C. App. at 558, 528 S.E.2d at 390 (citing *State v. Sweezy*, 291 N.C. 366, 384, 230 S.E.2d 524, 535 (1976)). Further,

“[n]either . . . statute nor [case law] requires that the evidence be direct; rather, the evidence must be substantial. It is well-established in the appellate courts of this State that jurors may rely on circumstantial evidence to the same degree as they rely on direct evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. Rather, ‘the law requires only that the jury shall be fully satisfied of the truth of the charge.’ ”

Salters, 137 N.C. App. at 557, 528 S.E.2d at 390 (quoting *State v. Sluka*, 107 N.C. App. 200, 204, 419 S.E.2d 200, 203 (1992) (internal citations omitted)).

Although defendant argues that “there is nothing about the evidence inconsistent with [Ever Antonio Hernandez] having given [the defendant] permission to come by and take or borrow the property,” we disagree and find the evidence presented by the State in this case was sufficient to submit the charge of breaking and entering to the jury. Despite the fact that Ever Antonio Hernandez was not a witness at trial and therefore did not testify as to whether he gave defendant permission to enter his room, the evidence showed that defendant was observed exiting the apartment through a window with a crowbar in his hand, as well as a knapsack or nylon jacket containing a VCR, a compact disc player and compact discs. Further, pry marks were located on the window through which defendant exited the apartment.

Viewing the evidence in a light most favorable to the State, the evidence at trial was sufficient to support an inference, and the jury’s finding, that defendant had no legal authority to enter the apartment

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and entered the apartment without consent. Defendant's seventh assignment of error as to the possession of stolen goods and breaking and entering charges are overruled.

V.

[6] By his ninth assignment of error, defendant argues the trial court erred in accepting his no contest plea to the habitual felon indictment because the habitual felon statutes do not authorize no contest pleas to habitual felon indictments.

An habitual felon is “[a]ny person who has been convicted of or pled guilty to three felony offenses[.]” N.C. Gen. Stat. § 14-7.1 (1999). “The proceedings for determining whether a defendant is an habitual felon ‘shall be as if the issue of habitual felon were a principal charge.’” *Gilmore*, 142 N.C. App. at 471, 542 S.E.2d at 698-99 (quoting N.C. Gen. Stat. § 14-7.5 (1999)). The issue of whether a defendant is an habitual felon is to be submitted to the jury for its determination. N.C. Gen. Stat. § 14-7.5 (1999). “[U]pon conviction or plea of guilty under indictment” for being an habitual felon, the felon must be sentenced as a Class C felon. N.C. Gen. Stat. § 14-7.6 (1999).

Defendant argues that “[u]nder the principle *expressio unius est exclusio alterius*, if the legislature had intended to permit pleas of no contest to habitual felon indictments,” then the legislature would have included the words “no contest” in N.C. Gen. Stat. § 14-7.6. Defendant states he has found no appellate case in which a no contest plea has been accepted under N.C. Gen. Stat. § 14-7.6 as a “conviction.” However, our Court has recognized that a no contest plea is a “conviction” within the meaning of N.C. Gen. Stat. § 14-7.1, provided the plea of no contest was entered after 1 July 1995. *State v. Jackson*, 128 N.C. App. 626, 630, 495 S.E.2d 916, 919 (1998). A no contest plea entered prior to 1 July 1995, which was the effective date of N.C. Gen. Stat. § 15A-1022, is not a “conviction” sufficient to support the charge of being an habitual felon because the safeguards established by N.C. Gen. Stat. § 15A-1022 were not in place prior to that effective date. *State v. Petty*, 100 N.C. App. 465, 467-68, 397 S.E.2d 337, 339-40 (1990). However, a no contest plea entered after 1 July 1995 can be used as one of the three prior felony convictions required by N.C. Gen. Stat. § 14-7.1 to support a charge of being an habitual felon. *Jackson*, 128 N.C. App. at 630, 495 S.E.2d at 919. We hold that a “conviction” within the context of N.C. Gen. Stat. § 14-7.6 similarly includes a judgment entered upon a no contest plea, as long as the

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statutory procedures in N.C. Gen. Stat. § 15A-1022 for entering a no contest plea are followed by the trial court in entering the plea.

N.C. Gen. Stat. § 15A-1022 (1999) establishes guidelines the trial court must follow before accepting a plea of guilty or no contest from a defendant. The statute states in part that the trial court must address the defendant personally before accepting a plea of guilty or no contest and inform the defendant of the consequences of his plea. N.C. Gen. Stat. § 15A-1022(a)(1). Before accepting a plea, the trial court must also determine that a factual basis exists for the plea. N.C. Gen. Stat. § 15A-1022(c). Further, the trial court

may accept the defendant's plea of no contest even though the defendant does not admit that he is in fact guilty if the judge is nevertheless satisfied that there is a factual basis for the plea. The judge must advise the defendant that if he pleads no contest *he will be treated as guilty whether or not he admits guilt.*

N.C. Gen. Stat. § 15A-1022(d) (emphasis added).

Applying our holding to the case at hand, we find the trial court did not err in accepting defendant's plea of no contest to being an habitual felon after complying with the statutory guidelines for accepting a no contest plea. The record before us shows that defendant was fully informed as to the consequences of his action, and that he knowingly and voluntarily stated his plea. Defendant acknowledged under oath that he understood that by pleading no contest he was giving up his constitutional rights to a jury trial on the habitual felon charge, that he would be treated as guilty of being an habitual felon, and that he considered it in his best interest to plead no contest. The oral exchange between defendant and the trial court in the transcript is consistent with the written "Transcript of Plea" signed by defendant, defense counsel, the prosecutor and the trial court. It is clear from the record that defendant understood that upon his plea of no contest he would be treated as being guilty.

The trial court also properly requested that the prosecutor state for the record the factual basis for the habitual felon charge, which the prosecutor did by referring to certified true copies of documents establishing three prior felony convictions of defendant and defense counsel stipulated there was a factual basis for the trial court accepting the plea.

Defendant also argues that our case law

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indicate[s] that in order for a defendant to waive the right to have habitual felon status determined by a jury, there must be both a stipulation to the three alleged prior convictions and a colloquy with the trial court to establish that the defendant understands the consequences of waiving the right to a jury determination of the habitual felon indictment.

We agree and find that the circumstances in the case before us are similar to those in *State v. Williams*, 133 N.C. App. 326, 515 S.E.2d 80 (1999). In *Williams*, the defendant stipulated at trial that she had attained the status of being an habitual felon. Following the defendant's stipulation, the trial court established a record of the defendant's plea of guilty on the charge of being an habitual felon. Our Court held that the defendant "did in fact plead guilty to the habitual felon charge despite the fact that she did not expressly admit her guilt." *Id.* at 330, 515 S.E.2d at 83. *But see Gilmore*, 142 N.C. App. at 471, 542 S.E.2d at 699 (stating that although the defendant stipulated to habitual felon status, "such stipulation, 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").

In this case, although defendant did not stipulate to the three prior convictions, he stated on the record and in his transcript of plea that upon his plea of no contest he understood he would be treated as guilty even though he did not expressly admit his guilt. Further, as we stated above, the trial court properly established a record of defendant's plea pursuant to N.C. Gen. Stat. § 15A-1022. This assignment of error is overruled.

VI.

[7] Defendant contends by his tenth and final assignment of error that the trial court erred in failing to arrest judgment on the larceny charge upon entering judgment to the charge of possession of stolen goods.

Our case law is clear that although larceny and possession of stolen property are "two separate and distinct offenses," the General Assembly did not intend to punish a defendant "for both receiving and possession of the same stolen property." *State v. Perry*, 305 N.C. 225, 234-36, 287 S.E.2d 810, 816-17 (1982). However, because defendant was not punished for both the convictions of felonious larceny and felonious possession of stolen goods, this argument is without merit. This assignment of error is overruled.

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No error.

Judges GREENE and THOMAS concur.

SANDRA O. WILKERSON, ANCILLARY ADMINISTRATRIX OF THE ESTATE OF JOHNNIE ALAN WILKERSON, AND SANDRA O. WILKERSON, INDIVIDUALLY, PLAINTIFFS V. NORFOLK SOUTHERN RAILWAY COMPANY, AND THE CITY OF DURHAM, A MUNICIPAL CORPORATION, DEFENDANTS

No. COA01-330

(Filed 16 July 2002)

1. Judges— one judge overruling another—summary judgment after Rule 12 ruling—different questions

A second judge had the authority to hear and decide defendant City's motion for summary judgment where another judge had denied in part defendant's motion to dismiss under N.C.G.S. § 1A-1, Rules 12(b)(6) and 12(c). The first judge determined the legal sufficiency of the complaint, taking the allegations as true, and the second decided whether there was any genuine issue of material fact and whether the movant was entitled to judgment as a matter of law.

2. Immunity— governmental—improvement of railroad crossing

The trial court did not err by finding that Durham had immunity in an action arising from an accident at a railroad crossing where plaintiff conceded that the City performed a governmental function in agreeing with the State to work on the crossing improvement, but argued that carrying out the decision was a ministerial undertaking. Plaintiff did not file suit against individual City employees and the distinction between discretionary and ministerial acts is important only when an individual pleads qualified or public officer immunity.

3. Immunity— governmental—railroad crossing

Durham was not liable in an action arising from a railroad crossing accident where the City did not own, operate or maintain the crossing and did not waive its immunity through the purchase of insurance or participation in a local government risk pool.

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4. Cities and Towns— railroad crossing—safety improvement project—authority and control

The trial court did not err in an action arising from a railroad crossing accident by finding that Durham had not exercised authority and control over a street regarding a safety improvement project where plaintiff asserted that the street was within municipal limits, that the City had asserted ownership and control during the project, and that the DOT had asked the City for permission to act on the project. The fact that the City has the authority to make certain decisions does not mean that the City is under an obligation to do so, and the City in this case had no duty to have the warning or safety devices in place.

5. Cities and Towns— railroad crossing—duty to maintain clear view

The trial court did not err in an action arising from a railroad crossing accident by granting summary judgment for Durham on the issues of whether the City had neglected a duty to keep foliage and other obstructions from blocking drivers' views of oncoming trains where the obstructions complained of were not on City property, the City did not have authority over the area, and the City did not have a duty to keep the area clear.

Appeal by plaintiff from order and judgment entered 6 September 2000 by Judge Orlando F. Hudson, Jr., in Durham County Superior Court. Heard in the Court of Appeals 22 January 2002.

Law Offices of William F. Maready, by William F. Maready, Celie B. Richardson, and Gary V. Mauney, for plaintiff appellant.

Faison & Gillespie, by Reginald B. Gillespie, Jr., and Keith D. Burns, for the City of Durham defendant appellee.

THOMAS, Judge.

Based on its interpretation of governmental immunity, the trial court in this case granted the summary judgment motion of defendant, the City of Durham (the City). Plaintiff appeals.

The complaint stems from a collision between a truck driven by Johnnie Alan Wilkerson and an Amtrak train at the Plum Street railroad crossing in Durham, North Carolina. The accident, which occurred on 18 June 1998, resulted in Wilkerson's death.

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Plaintiff, Sandra O. Wilkerson, Ancillary Administratrix of the Estate of Johnnie Alan Wilkerson, argues five assignments of error. She contends the trial court erred by (I) overruling the previous order of another superior court judge; (II) finding that the City had immunity with regard to a safety improvement project at the crossing; (III) finding that the City did not have a ministerial duty to complete the safety improvement project within a reasonable time; (IV) finding that the City did not exercise authority and control over Plum Street regarding the safety improvement project; and (V) finding that the City did not have a duty to keep foliage and other obstructions from blocking drivers' views of oncoming trains. For the reasons herein, we affirm the order and judgment of the trial court.

The facts tend to show the following: Prior to 1992, the North Carolina Department of Transportation (DOT) conducted a study of railroad crossings in North Carolina. Among those examined was the Plum Street crossing (the crossing). The railroad tracks at the crossing were owned, operated, and maintained by defendant, Norfolk Southern Railway Company (Norfolk Southern).

DOT examined several features of the crossing, including the number of vehicles that crossed the tracks, the number and speed of trains passing through the crossing, the history of accidents over a ten-year period, and the existing safety precautions. DOT determined the crossing to be dangerous. It contacted the City in the spring of 1992 and proposed that the crossing's safety devices be improved with lights and gates installed.

The Durham City Council approved the proposal on 20 July 1992 and agreed to pay 20% of the construction cost and 50% of the maintenance cost. DOT was to administer the project and obtain federal funding. It was also responsible for contracting with Norfolk Southern to install the traffic control safety devices. DOT agreed to initially pay for the project but would be reimbursed by an 80% contribution from the federal government and the 20% contribution from the City.

The final agreement was executed by the parties on 14 September 1992. On 30 December 1992, DOT sent the City a supplemental agreement with the only modification being that the City's share of construction costs was reduced to 10%. The supplemental agreement was approved by the Durham City Council on 1 February 1993, but was not returned to DOT at that time.

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In 1993 and 1994, DOT worked on the preliminary engineering and asked Norfolk Southern to prepare full engineering plans and an estimate of costs. From 1994 to 1996, Norfolk Southern put the project on hold while it prepared the cost estimate and project plans and investigated the possible involvement of other railroad track owners. Norfolk Southern did not grant final approval until 17 July 1996.

On 9 August 1996, DOT forwarded a construction agreement to Norfolk Southern with a recitation that Norfolk Southern would begin work “as soon as possible.” Norfolk Southern executed the agreement and returned it to DOT on 14 February 1997.

Also on 9 August 1996, DOT sent the City a letter asking for its approval of Norfolk Southern’s plans and for the City to sign and return the supplemental agreement from 30 December 1992. This was the first time the City became aware that the supplemental agreement had not been returned to DOT. On 30 April 1997, the City approved Norfolk Southern’s plans, materials list, and cost estimate. City Transportation Engineer Edward Sirgany was responsible for notifying DOT of the City’s approval. However, Sirgany’s office was damaged by Hurricane Fran in September 1996 and he “had a lot of the documents that got lost and flooded and destroyed.” On 7 May 1997, the City executed and returned the 1992 supplemental agreement to DOT.

On 28 May 1997, DOT authorized Norfolk Southern to proceed with its work but nothing was done at the crossing for more than a year. The work began after the 18 June 1998 accident and was completed by 30 June 1998.

Plaintiff filed her complaint on 10 February 1999, alleging, *inter alia*, that the City was negligent and proximately caused Wilkerson’s death by (1) delaying the return of the supplemental agreement to DOT from 30 December 1992 to 7 May 1997; (2) delaying approval of construction plans from August 1996 to April 1997; and (3) failing to remove a large mound of dirt, a metal building, and bushes at the crossing, all of which obstructed the decedent’s view of the crossing and the oncoming train.

The City moved to dismiss portions of plaintiff’s complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(6) and 12(c) (2001). The trial court allowed the City’s motion in part. It dismissed plaintiff’s claim for punitive damages, her third cause of action (asserting a third-party beneficiary claim with respect to contracts between DOT

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and the City and between DOT and Norfolk Southern regarding a signal upgrade), and her fourth cause of action (asserting a claim for infliction of severe emotional distress). Plaintiff was allowed to proceed with her claims for negligence in the execution and performance of the agreement for the safety improvements and for negligent failure to maintain the area surrounding the crossing.

The City later filed a summary judgment motion based on governmental immunity and a lack of duty to provide traffic control safety devices at, or to maintain, the crossing. The trial court granted the motion and dismissed plaintiff's action against the City. Plaintiff appeals.

While the trial court granted summary judgment for the City, plaintiff's case against Norfolk Southern remained alive. "A grant of partial summary judgment, because it does not completely dispose of the case, is an interlocutory order from which there is ordinarily no right of appeal." *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993).

However, an interlocutory order may nonetheless be appealed pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure if: (1) the action involves multiple claims or multiple parties, (2) the order is "a final judgment as to one or more but fewer than all of the claims or parties," and (3) the trial court certifies that "there is no just reason for delay."

Yordy v. North Carolina Farm Bureau Mut. Ins. Co., 149 N.C. App. 230, 231, 560 S.E.2d 384, 385 (2002) (quoting N.C. Gen. Stat. § 1A-1, Rule 54(b) (1999)). Here, the trial court certified that "there is no just reason for delay in the entry of a final judgment dismissing Plaintiff's claims against the City." Having determined that the order and judgment fully complies with the requirements set forth in *Yordy*, we conclude plaintiff's appeal is properly before us and therefore turn to the merits of the case.

Summary judgment is appropriate when

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). "On appeal from an order granting summary judgment, we must review the pleadings, affidavits

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and all other materials produced by the parties at the summary judgment hearing to determine whether there existed any genuine issue of fact and whether one party was entitled to judgment as a matter of law.” *Bradley v. Wachovia Bank & Trust Co.*, 90 N.C. App. 581, 582, 369 S.E.2d 86, 87 (1988). *See also Willis v. Town of Beaufort*, 143 N.C. App. 106, 108, 544 S.E.2d 600, 603, *disc. review denied*, 354 N.C. 371, 555 S.E.2d 280 (2001).

Previous Order by Trial Court

[1] In her first assignment of error, plaintiff contends the trial court erred by overruling the previous order of another superior court judge. We disagree.

On 10 April 2000, the City filed a motion to dismiss plaintiff’s complaint based on N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (failure to state a claim upon which relief can be granted) and N.C. Gen. Stat. § 1A-1, Rule 12(c) (judgment on the pleadings). On 30 May 2000, the City’s motion was granted in part and denied in part. The trial court allowed plaintiff to proceed with her claims for negligence in the execution and performance of the agreement and for negligent failure to maintain the area surrounding the crossing.

The City then filed a motion for summary judgment on 23 June 2000. In support of its motion, the City asked the trial court to consider numerous affidavits from City employees, depositions, maps, photographs, and other documentary materials. On 6 September 2000, a different judge granted summary judgment on the remaining claims.

While plaintiff contends these separate rulings are in conflict, we do not agree that the first ruling rendered improper the subsequent grant of summary judgment. When the trial court considered the City’s motion to dismiss based on Rule 12(b)(6) and Rule 12(c), it determined the legal sufficiency of plaintiff’s complaint. There was no finding as to the merits of the City’s defenses. The trial court took the allegations as true and concluded the complaint stated claims upon which relief could be granted. However, with the City’s motion for summary judgment, the legal test was whether, on the basis of the materials presented to the trial court, there was any genuine issue as to any material fact and whether the movant was entitled to judgment as a matter of law. *See* N.C. Gen. Stat. § 1A-1, Rule 56(c). “[T]he denial of a motion to dismiss made under Rule 12(b)(6) does not prevent the court, whether in the person of the same or a different superior court

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judge, from thereafter allowing a subsequent motion for summary judgment made and supported as provided in Rule 56.” *Barbour v. Little*, 37 N.C. App. 686, 692, 247 S.E.2d 252, 256, *disc. review denied*, 295 N.C. 733, 248 S.E.2d 862 (1978); *Alltop v. Penney Co.*, 10 N.C. App. 692, 179 S.E.2d 885, *cert. denied*, 279 N.C. 348, 182 S.E.2d 580 (1971). *See also Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987) (explaining that “[a] motion for judgment on the pleadings [does] not present the same question as that raised by the later motion for summary judgment[.]” so denial of a motion for judgment on the pleadings does not preclude a later judge from considering and allowing a motion for summary judgment). Accordingly, the second judge had the authority to hear and decide the City’s motion for summary judgment. Plaintiff’s first assignment of error is overruled.

Immunity and Ministerial Duty

[2] By her next two assignments of error, plaintiff contends the trial court erred in finding that (1) the City had immunity with regard to the project and (2) the City did not have a ministerial duty to complete the project within a reasonable time. We disagree.

“In North Carolina the law on governmental immunity is clear. In the absence of some statute that subjects them to liability, the state and its governmental subsidiaries are immune from tort liability when discharging a duty imposed for the public benefit.” *McIver v. Smith*, 134 N.C. App. 583, 585, 518 S.E.2d 522, 524 (1999), *disc. review dismissed as improvidently allowed*, 351 N.C. 344, 525 S.E.2d 173 (2000).

The liability of a county for torts of its officers and employees is dependent upon whether the activity in which the latter are [sic] involved is properly designated “governmental” or “proprietary” in nature, “a county [being] immune from torts committed by an employee carrying out a governmental function” and “liable for torts committed [by an employee] while engaged in a proprietary function.”

Schmidt v. Breeden, 134 N.C. App. 248, 252, 517 S.E.2d 171, 174 (1999) (quoting *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990)). The distinction between governmental and proprietary acts is as follows:

When a municipality is acting “in behalf of the State” in promoting or protecting the health, safety, security or general wel-

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fare of its citizens, it is an agency of the sovereign. When it engages in a public enterprise essentially for the benefit of the compact community, it is acting within its proprietary powers. In either event it must be for a public purpose or public use.

So then, generally speaking, the distinction is this: If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and "private" when any corporation, individual, or group of individuals could do the same thing. Since, in either event, the undertaking must be for a public purpose, any proprietary enterprise must, of necessity, at least incidentally promote or protect the general health, safety, security or general welfare of the residents of the municipality.

Britt v. Wilmington, 236 N.C. 446, 450-51, 73 S.E.2d 289, 293 (1952).

Plaintiff argues the trial court's decision to grant summary judgment in favor of the City misconstrued accepted concepts of governmental immunity, because the creation of a nuisance (the unimproved crossing) was not a governmental, discretionary, or legislative event, regardless of what might otherwise be considered a governmental or discretionary function. *See Pierson v. Cumberland County Civic Ctr. Comm'n*, 141 N.C. App. 628, 540 S.E.2d 810 (2000).

Plaintiff concedes that the City Council performed a governmental function (to which immunity applies) when it considered and agreed to work on the crossing improvement project. However, plaintiff maintains that, after the decision was made and money appropriated, the City was liable. Once a discretionary function is complete, plaintiff notes, carrying out the matter further is a ministerial undertaking. For example, maintenance of city streets has been deemed a ministerial function. *See* N.C. Gen. Stat. § 160A-296 (2001); and *Millar v. Wilson*, 222 N.C. 340, 23 S.E.2d 42 (1942). Plaintiff asserts that, while a public official is engaged in governmental activities which involve discretion, "public employees perform ministerial duties." *Isenhour v. Hutto*, 350 N.C. 601, 610, 517 S.E.2d 121, 128 (1999). However, plaintiff has not filed suit against individual City employees. She filed suit against the City. It is only when an individual pleads qualified immunity or public officer immunity that the distinction between discretionary and ministerial acts is important. We decline plaintiff's invitation to add a ministerial category to the well-settled dichotomy of governmental and proprietary functions within the doctrine of sovereign immunity. "[D]espite our sympathy for the plaintiff

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in this case, we feel that any further modification or the repeal of the doctrine of sovereign immunity should come from the General Assembly, not this Court.” *Steelman v. City of New Bern*, 279 N.C. 589, 595, 184 S.E.2d 239, 243 (1971).

Here, the City was carrying out a governmental function with respect to the improvement project. The record and the supplemental agreement indicate that the project was initiated by DOT, pursuant to a federal grant funded by the Surface Transportation and Uniform Relocation Assistance Act of 1987. All work on the project was to be performed by DOT and Norfolk Southern. The City’s input was limited to a financial contribution of 10%.

[3] Plaintiff argues the City is nonetheless liable because its conduct was “so unreasonable as to constitute an abuse of discretion.” *Lonon v. Talbert*, 103 N.C. App. 686, 692, 407 S.E.2d 276, 281 (1991). Plaintiff claims the City is liable because one who enters into an undertaking “owes . . . the duty of exercising reasonable care with respect to such matters.” *Cathey v. Construction Co.*, 218 N.C. 525, 532, 11 S.E.2d 571, 575 (1940).

The City, meanwhile, maintains that it was an agent acting on behalf of the State and was not subject to an action in tort unless it waived governmental immunity. *See Colombo v. Dorrity*, 115 N.C. App. 81, 84, 443 S.E.2d 752, 755, *disc. review denied*, 337 N.C. 689, 448 S.E.2d 517 (1994). The City also argues that the construction and maintenance of public streets and bridges are governmental functions of a municipality. *See Reidsville v. Burton*, 269 N.C. 206, 210, 152 S.E.2d 147, 151 (1967). When municipalities lose immunity, it is because they have failed to maintain their own streets and sidewalks in a safe condition. *See Eakes v. City of Durham*, 125 N.C. App. 551, 481 S.E.2d 403 (1997); *McDonald v. Village of Pinehurst*, 91 N.C. App. 633, 372 S.E.2d 733 (1988); and *Millar*, 222 N.C. 340, 23 S.E.2d 42. Sirgany stated the City does not own, operate, or maintain the crossing. Because of this fact, the City’s position is that it did not have a duty to install safety devices. *See Lavelle v. Schultz*, 120 N.C. App. 857, 463 S.E.2d 567 (1995), *disc. review denied*, 342 N.C. 656, 467 S.E.2d 715 (1996).

We note that “[a]ny city is authorized to waive its immunity from civil liability in tort by the act of purchasing liability insurance. Participation in a local government risk pool . . . shall be deemed to be the purchase of insurance for the purposes of this section.” N.C. Gen. Stat. § 160A-485(a) (2001). The record contains

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the affidavit of Laura W. Henderson, the City's Risk Manager. Henderson stated:

3. At no time during the month of June 1998, and specifically at no time on June 18, 1998, did the City have in force and effect a liability insurance policy providing coverage for claims arising out of or relating to any act or omission by persons employed in the City's Public Works Department, or its predecessor, the City's Transportation Department, or arising out of or relating to the activities and operations of the City's Public Works Department, or its predecessor, the City's Transportation Department.

4. Further, the City did not purchase any insurance policy indemnifying the City with respect to any of the matters alleged in Plaintiff's complaint.

This testimony clearly supports the finding that the City did not waive its immunity regarding the improvement project.

Additionally, plaintiff failed to allege that the City waived immunity by the purchase of insurance or by participation in a local government risk pool. "If a plaintiff does not allege a waiver of immunity by the purchase of insurance, the plaintiff has failed to state a claim against the governmental unit." *Reid v. Town of Madison*, 137 N.C. App. 168, 170, 527 S.E.2d 87, 89 (2000) (quoting *Mullins v. Friend*, 116 N.C. App. 676, 681, 449 S.E.2d 227, 230 (1994)).

Plaintiff's assignments of error are rejected.

Exercise of Authority

[4] In her next assignment of error, plaintiff contends the trial court erred in failing to find that the City exercised authority and control over Plum Street regarding the safety improvement project. In support of her argument, plaintiff asserts that Plum Street is within the municipal limits of the City. Additionally, the City asserted ownership and control over Plum Street during all stages of the project. The process began with DOT *asking* the City Council for permission to act. The agreement stated DOT was without authority to act alone because the crossing was "on the Municipal Street System."

N.C. Gen. Stat. § 160A-298(c) (2001) authorizes a city to require "the installation, construction, erection, reconstruction, and improvement of warning signs, gates, lights, and other safety devices at grade crossings" Nonetheless,

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[t]he fact that a city has the *authority* to make certain decisions, however, does not mean that the city is under an *obligation* to do so. The words “authority” and “power” are not synonymous with the word “duty.” When the legislature intended to create a duty in Chapter 160A, it did so expressly. *See* G.S. 160A-296.

G.S. 160A-298 allows a city to exercise its discretion in requiring improvements at railroad crossings. There is no mandate of action. Courts will not interfere with discretionary powers conferred on a municipality for the public welfare unless the exercise (or nonexercise) of those powers is so clearly unreasonable as to constitute an abuse of discretion. *Riddle v. Ledbetter*, 216 N.C. 491, 493-94, 5 S.E. 2d 542, 544 (1939).

Cooper v. Town of Southern Pines, 58 N.C. App. 170, 173, 293 S.E.2d 235, 236 (1982). Therefore, the City had no duty to have the warning or safety devices in place. Plaintiff’s assignment of error is therefore overruled.

Duty to Maintain Railroad Right-of-Way

[5] By her final assignment of error, plaintiff argues the trial court erred in granting summary judgment on the issues of whether the City had a duty to keep foliage and other obstructions from blocking drivers’ views of oncoming trains, and whether the City neglected the duty. We disagree.

Plaintiff claims the City’s duty arises from common law and N.C. Gen. Stat. § 160A-296, which provides:

(a) A city shall have general authority and control over all public streets, sidewalks, alleys, bridges, and other ways of public passage within its corporate limits except to the extent that authority and control over certain streets and bridges is vested in the Board of Transportation. General authority and control includes but is not limited to:

- (1) The duty to keep the public streets, sidewalks, alleys, and bridges in proper repair;
- (2) *The duty to keep the public streets, sidewalks, alleys, and bridges open for travel and free from unnecessary obstructions[.]*

N.C. Gen. Stat. § 160A-296(a) (emphasis added). Plaintiff points to the testimony of Sirgany, who stated that trimming of foliage was part of

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“routine maintenance” done by “[the City’s] street crews[,]” even on railroad rights-of-way, on portions where the City also has a duty.

The City, meanwhile, argues that it did not have authority over the land and foliage in question. “[I]n the absence of any control of the place and of the work there [is] a corresponding absence of any liability incident thereto. That authority precedes responsibility, or control is a prerequisite of liability, is a well recognized principle of law as well as of ethics.” *Mack v. Marshall Field & Co.*, 218 N.C. 697, 700, 12 S.E.2d 235, 237 (1940). Based on this reasoning, the City believes it should not be held to a duty over an area that was controlled by the railroad.

Nowhere in plaintiff’s complaint do we find an allegation that the obstructions existed on City property. Nor, in the face of the City’s denial that the obstructions were on City property, do we find any evidence or forecast of evidence to the contrary. Because we agree with the City that authority is a prerequisite to responsibility, plaintiff’s failure to allege or present evidence of the obstructions being on City property compels us to conclude that the obstructions complained of were not located on City property, the City did not have authority over the area, and the City did not have a duty to keep the area clear. We need not address the issue of whether the City would be liable had it owned the property where the alleged obstructions were located. Plaintiff’s final assignment of error is therefore overruled.

The order and judgment of the trial court granting summary judgment in favor of the City is

Affirmed.

Chief Judge EAGLES and Judge CAMPBELL concur.

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[151 N.C. App. 344 (2002)]

WILLIAM J. WISE AND LYNN P. WISE, PLAINTIFFS v. HARRINGTON GROVE COMMUNITY ASSOCIATION, INC., AND TOM FITZGERALD, TAMARA JAMES, DAVE BECHERER, STEWART JOSLIN, BILL SCHULTZ, AND MIKE DALTON, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE HARRINGTON GROVE COMMUNITY ASSOCIATION BOARD OF DIRECTORS, DEFENDANTS

No. COA01-661

(Filed 16 July 2002)

Associations—homeowners—violating declaration of covenants—authority to charge reasonable fines

The trial court did not err in a declaratory judgment action by concluding that N.C.G.S. § 47F-3-102(12) of the North Carolina Planned Community Act (PCA) granted defendant homeowners' association formed prior to 1 January 1999 the authority to charge reasonable fines against its members without the subdivision's declaration of covenants expressly providing for such power, because: (1) while the declaration does not expressly provide for the power to fine, the PCA provides that additional power; (2) there is no language in the articles of incorporation or the declaration that limits or restricts the association's power to fine; and (3) plaintiffs failed to preserve any constitutional issue regarding impairment of property or contract rights by failing to assign any error as required by N.C. R. App. P. 10(a).

Judge WYNN dissenting.

Appeal by plaintiffs from declaratory judgment entered 25 March 2001 by Judge Gary Trawick in Wake County Superior Court. Heard in the Court of Appeals 13 March 2002.

Hunton & Williams, by William D. Dannelly and Carolyn A. Dubay, for plaintiffs-appellants.

Jordan Price Wall Gray Jones & Carlton, by Henry W. Jones, Jr., Hope Derby Carmichael, and Brian S. Edlin, for defendants-appellees.

TYSON, Judge.

William J. Wise and Lynn P. Wise ("plaintiffs") appeal from a declaratory judgment entered in favor of Harrington Grove Community Association, Inc. ("Association"). We affirm the trial court's judgment.

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[151 N.C. App. 344 (2002)]

I. Facts

Plaintiffs purchased their home in the spring of 1999, automatically became members of the Association by virtue of their status as homeowners in the Harrington Grove Subdivision (“Subdivision”), and became subject to the recorded “Declaration of Covenants, Conditions, and Restrictions” (“Declaration”) of the Subdivision. Article VII, Section 2(a) of the Declaration requires prior written approval from the Association’s Architectural Committee (“Committee”) before any “building, fence, or other structure” is “erected, placed, or altered” on a homeowner’s lot.

Plaintiffs constructed a retaining wall around the perimeter of their back yard without obtaining prior written approval from the Committee. The Association requested that plaintiffs file an application for the retaining wall *post facto*. Plaintiffs complied. After review, the Committee denied plaintiffs’ application to approve the previously constructed retaining wall.

Plaintiffs were provided written notice of the Association’s Board of Directors’ intention to fine plaintiffs \$150.00 for their violation of the Declaration. Prior to the imposition of the fine, the Association afforded plaintiffs notice and an opportunity to be heard on the matter. Plaintiffs presented their case through counsel, and the Committee presented its case at a hearing conducted on 7 July 1999. Following the hearing, the Association issued a written decision that imposed a one-time fine of \$150.00 for plaintiffs’ failure to obtain written approval prior to constructing the retaining wall.

Plaintiffs filed an amended complaint on 26 May 2000 against defendants seeking: (1) a declaratory judgment that the Association’s approval of plaintiffs’ swimming pool application on 2 March 1999 constituted approval of a wall, (2) a declaratory judgment that the Association’s attempt to levy a fine was *ultra vires* and void, (3) injunctive relief, (4) unfair and deceptive trade practices, and (5) damages. Defendants answered on 14 June 2000. Plaintiffs moved for partial summary judgment on 23 February 2001. Prior to hearing, the parties entered into a settlement agreement that resolved all issues except plaintiffs’ declaratory judgment claim.

The trial court conducted a hearing on 5 March 2001. On 25 March 2001, the trial court: (1) denied plaintiffs’ motion for partial summary judgment, (2) denied plaintiffs’ request for injunctive relief, and (3) declared that the Association had authority, pursuant to the North

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Carolina Planned Community Act ("PCA"), to levy a fine against plaintiffs. Plaintiffs appeal.

II. Issue

The sole issue presented is whether G.S. § 47F-3-102(12) of the PCA grants the Harrington Grove Community Association, formed prior to 1 January 1999, authority to charge reasonable fines against its members without the Declaration expressly providing for such power.

Plaintiffs contend that the "Association's Articles expressly provide that its power is strictly limited to those [powers] conferred in the Declaration." They argue that the Declaration does not contain any power to impose fines, and G.S. § 47F-3-102(12) cannot automatically confer such power on the Association, unless "the Declaration is amended to allow for the Association to exert power against homeowners beyond what is already provided in the Declaration." Plaintiffs claim that the "plain meaning of [G.S.] § 47F-3-102(12) is obvious: the association may impose a fine upon reasonable notice to the homeowner *if the declaration or articles of incorporation so allow.*" (Emphasis supplied).

III. North Carolina Planned Community Act

The PCA is codified at Chapter 47F of the North Carolina General Statutes. G.S. 47F-1-102(a) states that "This Chapter applies to all planned communities within this State except as provided in subsection (b) of this section." N.C. Gen. Stat. § 47F-1-102(a) (2001). Subsection (b) excludes from the PCA planned communities which contain twenty or fewer lots and planned communities in which all lots are exclusively restricted for non-residential purposes, "unless the declaration provides or is amended to provide that this Chapter does apply to that planned community." N.C. Gen. Stat. § 47F-1-102(b)(1)-(2) (2001).

It is undisputed that Harrington Grove Subdivision: (1) contains more than twenty lots, (2) contains lots which are not all restricted to non-residential purposes, (3) is located within the State of North Carolina, (4) that the Association was incorporated on 29 April 1987, and (5) the Declaration was enacted on 11 May 1987 and filed on 17 May 1987. We hold that the Subdivision is a planned community as defined by the PCA.

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A. PCA's Applicability1. Associations Formed After 1 January 1999

The PCA is generally applicable prospectively from 1 January 1999. The official North Carolina Comment ("Comment") to G.S. § 47F-1-102, "Applicability", states that "The Act is effective January 1, 1999 and applies *in its entirety* to all planned communities created on or after that date . . ." (Emphasis supplied). The Comment reiterates Section 3 of the Session Law, enacting the PCA: "This act becomes effective January 1, 1999 and applies to planned communities created on or after that date." North Carolina Planned Community Act of October 15, 1998, ch. 199, sec. 3, 1998 N.C. Sess. Laws 674-692, 691.

In addition to the PCA applying to all planned communities formed after 1 January 1999, the PCA limits associations' flexibility to vary or modify the PCA's applicability. The PCA provides that: "Except as specifically provided in specific sections of this Chapter, the provisions of this Chapter may not be varied by the declaration or bylaws." N.C. Gen. Stat. § 47F-1-104(a) (2001). "To be sure, there are many central statutory provisions that can not [sic] be varied by the declaration or bylaws; however, there are also numerous instances throughout the act where the declaration or bylaws can alter significant provisions of the PCA." James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 30A-28, at 1243 (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 5th ed. 1999).

Article 3 of the PCA entitled "Management of Planned Community" contains a section entitled "Powers of owners' association." G.S. § 47F-3-102 lists seventeen "powers" the Act confers upon "owners' associations." N.C. Gen. Stat. § 47F-3-102(1)-(17) (2001). All seventeen powers apply to associations formed on or after 1 January 1999. See Comment to N.C. Gen. Stat. § 47F-1-102.

2. Associations Formed Before 1 January 1999

The PCA also provides a procedure that allows associations formed prior to 1 January 1999 to "opt in" and adopt the entire Act. N.C. Gen. Stat. § 47F-1-102(d) (2001) provides that:

Any planned community created prior to the effective date of this Chapter may elect to make the provisions of this Chapter applicable to it by amending its declaration to provide that this

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Chapter shall apply to that planned community. The amendment may be made by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) percent of the votes in the association are allocated or any smaller majority the declaration specifies. To the extent the procedures and requirements for amendment in the declaration conflict with the provisions of this subsection, this subsection shall control with respect to any amendment to provide that this Chapter applies to that planned community.

Certain provisions of the PCA apply retroactively. The Session Law enacting the PCA and the Comment to the codified version of the PCA states that certain provisions apply to associations formed prior to 1 January 1999. At bar, we focus only on the powers contained in section 47F-3-102.

The official transcript of the Session Law enacted by the North Carolina General Assembly includes sections 2 and 3, which are not contained in the codified version of the Session Law found in the North Carolina General Statutes. Section 3 of the Session Law states: "G.S. 47E-3-102(1) through (6) and (11) through (17), G.S. 47E-3-107(a)(b), and (c), G.S. 47E-3-115, and G.S. 47E-3-116 as enacted by Section 1 of this act apply to planned communities created prior to the effective date. . . ." North Carolina Planned Community Act of October 15, 1998, ch. 199, sec. 3, 1998 N.C. Sess. Laws at 691.

Section 2 of the Session Law states: "The Revisor of Statutes shall cause to be printed with this act all relevant portions of the official comments to the North Carolina Planned Community Act and all explanatory comments of the drafters of this act, as the Revisor deems appropriate." North Carolina Planned Community Act of October 15, 1998, ch. 199, sec. 2, 1998 N.C. Sess. Laws at 691.

Chapter 47E as written in the Session Law was later codified as Chapter 47F in the North Carolina General Statutes. The Comment to G.S. § 47F-1-102 states that "G.S. 47F-3-102(1) through (6) and (11) through (17), G.S. 47F-3-107(a)(b) and (c), G.S. 47F-3-115 and G.S. 47F-3-116 also apply to planned communities created prior to January 1, 1999." (Emphasis supplied). N.C. Gen. Stat. § 47F-102, North Carolina Comment. The Comment to G.S. § 47F-3-102 also states that: "Subdivisions (1) through (6) and (11) through (17) apply to planned communities formed prior to January 1, 1999." N.C.

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Gen. Stat. § 47F-3-102, North Carolina Comment. *See also Creek Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159, 552 S.E.2d 220 (2001) (applying G.S. § 47F-3-102(4) retroactively to homeowners' associations formed prior to the PCA's effective date of 1 January 1999).

We hold that the plain language of the Session Law enacting the PCA states that the power contained in section 47F-3-102(12) applies to homeowner associations formed prior to 1 January 1999.

B. N.C. Gen. Stat. § 47F-3-107.1

G.S. § 47F-3-107.1, "Procedures for fines and suspension of planned community privileges or services," provides procedures by which an association may impose fines or suspensions upon homeowners within an association.

Unless a specific procedure for the imposition of fines or suspension of planned community privileges or services is provided for in the declaration, a hearing shall be held before an adjudicatory panel appointed by the executive board to determine if any lot owner should be fined or if planned community privileges or services should be suspended pursuant to the powers granted to the association in G.S. 47F-3-102(11) and (12). If the executive board fails to appoint an adjudicatory panel to hear such matters, hearings under this section shall be held before the executive board. The lot owner charged shall be given notice of the charge, opportunity to be heard and to present evidence, and notice of the decision. If it is decided that a fine should be imposed, a fine not to exceed one hundred fifty dollars (\$150.00) may be imposed for the violation and without further hearing, for each day after the decision that the violation occurs. Such fines shall be assessments secured by liens under G.S. 47F-3-116. If it is decided that a suspension of planned community privileges or services should be imposed, the suspension may be continued without further hearing until the violation or delinquency is cured.

N.C. Gen. Stat. § 47F-3-107.1 (2001) (emphasis supplied).

C. N.C. Gen. Stat. § 47F-3-102

While G.S. § 47F-3-107.1 provides the procedure, G.S. § 47F-3-102(12) grants associations power to fine or suspend privileges of homeowners within the association.

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Subject to the provisions of the articles of incorporation or the declaration and the declarant's rights therein, the association may:

....

(12) After notice and an opportunity to be heard, impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violations of the declaration, bylaws, and rules and regulations of the association;

....

N.C. Gen. Stat. § 47F-3-102(12) (emphasis supplied).

It is undisputed that the Association was created prior to 1 January 1999. The dispositive issue here is the meaning of the phrase “apply to planned communities created prior to the effective date” used in Section 3 of the Session Law. Plaintiffs assert the provisions “become available” for a planned community to adopt by amendment to its declaration. If not adopted, the Association does not have the power to fine. The Association asserts that “the [PCA] allows the imposition of fines regardless of what is contained in a community association’s declaration or by-laws.”

We disagree with both interpretations. We hold that the plain language of section 47F-3-102 and the language of Section 2 and 3 of the certified transcript of the Session Laws grants specific powers to associations formed prior to 1 January 1999 “subject to the provisions of the articles of incorporation or the declaration and the declarant’s rights therein.”

G.S. § 47F-3-116(a) states that “*Unless the declaration otherwise provides*, fees, charges, late fees, *fin*es, interest and other charges imposed pursuant to G.S. 47F-3-102, 47F-3-107, 47F-3-107.1, and 47F-3-115 *are enforceable as assessments* under this section.” N.C. Gen. Stat. § 47F-3-116(a) (2001) (emphasis supplied). The Association’s Declaration is silent and does not provide “otherwise” regarding fines. “Such fines shall be assessments secured by liens under G.S. 47F-3-116.” N.C. Gen. Stat. § 47F-3-107.1. Pursuant to the plain language of the PCA, fines imposed by section 47F-3-102(12) are “assessments.”

The PCA’s grant of the power to fine contained in G.S. § 47F-3-102(12), by the statute’s plain language, is not absolute. The

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power is “[s]ubject to the provisions of the articles of incorporation or the declaration and the declarant’s rights therein.” We must determine whether there are provisions in the Association’s Articles of Incorporation, or the Declaration and the Declarant’s rights therein, that limits the Association’s power to fine the Association’s members as granted by the PCA. We have thoroughly reviewed the Association’s Articles of Incorporation, Declaration and the Declarant’s rights therein. We hold that no provision contained in those documents *limits* the Association’s power to fine, which the North Carolina General Assembly granted to all community associations formed prior to 1 January 1999 by enacting the PCA.

Plaintiffs interpret the plain language “subject to” essentially to mean that if the Association “[did] not have the power in their Declaration or Articles to impose the fines at issue, the action of Defendants to do so was *ultra vires* and void.” We disagree.

Plaintiffs’ and the dissent’s reading of the phrase “subject to” is synonymous with the language the General Assembly used in section 47F-3-120: “the court may award reasonable attorneys’ fees to the prevailing party *if recovery of attorneys’ fees is allowed in the declaration.*” N.C. Gen. Stat. § 47F-3-120 (2001) (emphasis supplied). The phrase “subject to” is unambiguous, and its meaning is clear. The General Assembly did not grant the power to fine if “*allowed in the declaration.*” “Subject to” cannot mean “if allowed in the declaration.” The dissent’s exegesis of the phrase “subject to” renders the distinction between “subject to” and “if allowed in the declaration” non-existent.

“Subject to” means that the Declaration and/or Articles of Incorporation can restrict or limit the power that the PCA grants to community associations created prior to 1 January 1999. Not allocating a power is different than limiting a power. The former is a condition precedent to receiving the power, and the latter limits the power already given. Plaintiffs’ argument is overruled.

D. The Association’s Declaration and Articles

Article III(a) of the Association’s Articles of Incorporation states that to further the purposes of the Association it can “exercise all of the powers and privileges and perform all of the duties and obligations of the Association as set forth in the Declaration.” Plaintiff claims that this statement “strictly limits” the Association’s powers to what is contained in the Declaration. This provision of the

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Association's Articles of Incorporation is not written that restrictively. Two listed Association purposes are: (1) "to provide for architectural control of the Lots within Harrington Grove;" and (2) "to promote the health, safety and welfare of the residents within Harrington Grove." The statutory power to fine plaintiffs for violating the Declaration by constructing a retaining wall without obtaining prior written approval promotes both stated purposes listed in the Articles of Incorporation.

The Declaration specifically provides for the power to charge assessments. Both annual and special assessments may be charged to the Association's members. The Declaration only limits the amount of the annual and special assessments. The Declaration is silent concerning the Association's ability to fine and assess its members for violating the Declaration.

While the Declaration does not expressly provide for the power to fine, the PCA provides that additional power. We find no language in the Articles of Incorporation or the Declaration that limits or restricts the Association's power to fine, which is granted by the PCA.

Article VIII, Section 4 of the Declaration entitled "Enforcement" states that:

The Association or any Member shall have the right to enforce these covenants and restrictions by any proceeding at law or in equity against any person or persons violating or attempting to violate enforcement of these covenants against the land and to enforce any lien created by these covenants. Enforcement may be to restrain violation or to recover damages resulting therefrom. (Emphasis supplied).

This provision in the Declaration grants the Association the power to enforce "any lien created by these covenants." It also grants power to "enforce these covenants and restrictions by *any proceeding at law.*" It is undisputed that the plaintiffs violated the covenants. The PCA provides an additional power to the Association's arsenal of enforcement.

The dissent states that "the declarations specifically limit the remedy that the association may obtain against a homeowner." The dissent reads "may" as "may only." The language of the Declaration is not that restrictive.

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There is no requirement that an older planned community opt in to the PCA in order to receive the benefits of most of the powers conferred by that Act. Through the application of the powers section to pre-1999 planned communities, formerly impotent associations will soon discover that they are now strong. These reinvigorated associations will probably surprise homeowners when they start flexing their enforcement muscles.

Patrick K. Hetrick, *Of "Private Governments" and the Regulation of Neighborhoods: The North Carolina Planned Community Act*, 22 Campbell L. Rev. 1, 51 (1999); *See also* Webster, § 30A-28, at 1261-1272 (discussing in detail the sweeping changes and the powers the PCA confers upon associations, including retroactivity of thirteen of the seventeen powers enumerated in the statute).

The Association is not prohibited by its Declaration or Articles of Incorporation from fining its members for violation of the Declaration. The PCA grants that power to the extent not prohibited by the Articles of Incorporation or the Declaration and the Declarant's rights therein.

IV. Constitutional Argument

Alternatively, plaintiffs attempt to argue that if the PCA allows the Association to "impose fines and liens upon homeowners . . . [the PCA] would violate fundamental constitutional principles protecting against the denial of due process and the impairment of property rights." Plaintiffs failed to preserve this issue for appellate review. "The scope of appellate review is limited to those issues presented by assignment of error set out in the record on appeal." *State v. Thomas*, 332 N.C. 544, 554, 423 S.E.2d 75, 80 (1992) (citing N.C.R. App. P. 10(a)), *disapproved on other grounds*, *State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677 (1998); *see also Koufman v. Koufman*, 330 N.C. 93, 97-98, 408 S.E.2d 729, 731 (1991)). Plaintiffs did not assign any error in the record regarding unconstitutional impairment of property or contract rights. N.C.R. App. P. 10(a) (2002). The trial court did not make any finding or conclusion concerning this argument. *State v. Cooke*, 306 N.C. 132, 137, 291 S.E.2d 618, 621 (1982) (citations omitted) (constitutional questions not raised before the trial court will not ordinarily be considered on appeal). This issue is not properly preserved or presented for our consideration.

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V. Conclusion

The trial court correctly held that the PCA provides the Association with the power to impose reasonable fines against its members. We must give effect to the plain meaning of G.S. § 47F-3-102. There is nothing contained in the Association's Articles of Incorporation or Declaration which limits the powers contained in G.S. 47F-3-102(12).

We hold that the trial court properly applied the statutes to the facts of this case. The judgment of the trial court is affirmed.

Affirmed.

Judge McGEE concurs.

Judge WYNN dissents.

WYNN, Judge dissenting.

Homeowners William J. Wise and his wife, Lynn P. Wise, argue that a 1998-enacted statute does not confer upon their 1987-created homeowner's association the authority to levy fines upon them where the declarations of that association only authorizes the restraint of the violation or the recovery of damages. I agree with the homeowners.

The issue on appeal is whether Chapter 47F subordinates the statutory authority granted by N. C. Gen. Stat. § 47F-3-102(12) to impose fines to the expressed declarations of an association that restricts the authority of the association to impose a fine.¹ I would find that the declarations in this case prohibits the association to impose a fine against the homeowners.

N.C. Gen. Stat. § 47F-3-102(12) which authorizes an association to impose fines against homeowners states that the association may:

1. The majority opinion undertakes an extensive discussion on the applicability of G.S. § 47F-3-102(12) (2001) to an association created before the enactment of the Act. However, the answer to that query is found in the comments to N.C. Gen. Stat. § 47F-1-102:

G.S. § 47F-3-102 . . . (11) through (17) . . . also apply to planned communities created prior to January 1, 1999.

Nothing more need be said on this issue.

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(12) [a]fter notice and an opportunity to be heard, impose reasonable fines or suspend privileges or services provided by the association (except rights of access to lots) for reasonable periods for violation of the declaration, bylaws, and rules and regulations of the association.

However, the introductory language of N.C. Gen. Stat. § 47F-3-102 specifically states that the authority of an association to impose fines against homeowners under subsection (12) is:

Subject to the provisions of the articles of incorporation or the declaration and the declarant's rights therein

(emphasis added). The majority implies that there is ambiguity in the “subject to” language of Chapter 47F. However, not every legislative act requires judicial interpretation; for assuredly, our courts have recognized that when the meaning of a statute is clear and unambiguous, we do not engage in discussions of legislative intent. Rather, we accord the legislature the respect of following the plain meaning of its words. In my opinion there is no ambiguity in the “subject to” language of N.C. Gen. Stat. § 47F-3-102. The term “subject to” means that the provisions of the declarations control as between statute and the declarations. Thus, N.C. Gen. Stat. § 47F-3-102 subjects the applicability of subsection (12) to the provisions under the declarations of the association.

In the subject case, the powers of the homeowners’ association are specified in its articles of incorporation, bylaws and declarations. Additional burdens, restrictions and obligations are imposed on the homeowners in their restrictive covenants.

Under the declarations, the homeowners’ association is empowered to enforce covenants, such as the one in this case, by proceeding in law or equity against the homeowner. However, the declarations specifically limit the remedy that the association may obtain against a homeowner:

Enforcement may be to restrain violation or to recover damages resulting therefrom.

Thus, the declarations limit the authority of the association to any remedy other than a restraint of the violation or damages. Moreover, the declarations expressly limit the power of the homeowners’ association to “exercise all of the powers and privileges and perform all of the duties and obligations of the Association as set forth in the Declaration.”

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[151 N.C. App. 356 (2002)]

In sum, there is no dispute that the homeowners in this case never amended their declarations to allow the imposition of a fine against them. To the contrary, their declarations limit the remedy for covenant violations to the restraint of the violation or damages. Since N.C. Gen. Stat. § 47F-3-102 respects the rights of homeowners to limit their exposure to fines by their homeowners association, I dissent from the majority opinion upholding the imposition of a fine against the Wises.



LINDA M. BAILEY, EMPLOYEE-PLAINTIFF v. WESTERN STAFF SERVICES, EMPLOYER-
DEFENDANT, AND TRAVELERS INSURANCE COMPANY, CARRIER-DEFENDANT

No. COA01-716

(Filed 16 July 2002)

1. Workers' Compensation— employer's failure to admit liability for claim-entitlement to direct medical treatment

The Industrial Commission did not err by concluding that defendant employer failed to properly admit liability for plaintiff employee's workers' compensation claim and thus was not entitled to direct plaintiff's medical treatment, because: (1) defendant failed to file an appropriate Industrial Commission Form stating its position regarding liability within fourteen days of notice of the claim as required by N.C.G.S. § 97-18 and Industrial Commission Rule 601; and (2) defendant's 21 July letter to plaintiff's attorney failed to admit liability for plaintiff's disability claim or medical expenses, and the other documents provided by defendant do not establish a course of conduct indicating acceptance of plaintiff's claim.

2. Workers' Compensation— suitable employment—make-shift positions

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee was not barred by N.C.G.S. § 97-32 from receiving wage compensation even though she refused defendant employer's alleged offer of suitable employment, because: (1) creation for injured employees of makeshift positions which do not exist in the ordinary marketplace will not meet an employer's responsibilities under the

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Workers' Compensation Act, and the facts of this case suggest the position was "make work;" (2) several days before the job's starting date, defendants wrote to plaintiff to terminate her employment for failure to appear at the "temporary job;" and (3) there is evidence to support the finding that plaintiff's refusal of the work was reasonable.

3. Workers' Compensation— temporary total disability—competent evidence

The Industrial Commission did not err in a workers' compensation case by determining that plaintiff employee was entitled to temporary total disability compensation because there is competent evidence to support the Commission's findings of fact, and thus, they are conclusively established notwithstanding any evidence tending to contradict the findings.

Appeal by defendant-appellants from an Opinion and Award entered 11 January 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 April 2002.

Robert A. Lauver for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Neil P. Andrews for defendant-appellants.

BIGGS, Judge.

Defendants, Western Staff Services and Travelers Insurance Company, appeal from the Industrial Commission's award of workers' compensation benefits and attorney fees to plaintiff (Linda M. Bailey). For the reasons that follow, we affirm.

In 1998, plaintiff was employed by defendant Western Staff Services (Western), a temporary employment agency, and in March of that year Western placed her at 'Pharmagraphics' as a machine operator. On 28 April 1998, plaintiff struck her elbow on a machine while performing an assigned cleaning procedure for Pharmagraphics. Several days later, when plaintiff reported the incident to a supervisor at Pharmagraphics, she was directed to report it to Western, which she did on 5 May 1998. Plaintiff later testified that she did not seek medical care at that time because her Pharmagraphics supervisor had warned her that she would be fired if her injury caused her to miss any work. Following her injury, plaintiff continued to work for ten days, but her arm became swollen and tender,

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and her injury was increasingly painful. Plaintiff was unable to work an overtime shift on Saturday, 9 May 1998, and was thereafter terminated by Pharmagraphics. She did not work between that time and the time of the hearing. During the six months following her injury, plaintiff was treated by several physicians, including a neurologist and an orthopedist.

On 26 May 1998, Western filed an Industrial Commission Form 19, reporting plaintiff's injury to the Industrial Commission, and acknowledging that plaintiff was not working or receiving wages from them. On 1 June 1998, defendants wrote to plaintiff, denying her workers' compensation claim for "noncompliance" with their investigation. However, because the letter was sent to the incorrect city, plaintiff did not receive it until 3 June 1998, at which time she participated in a tape-recorded telephone interview with defendants regarding her injury. The next day, 4 June 1998, defendants wrote to plaintiff offering her a "temporary position" to begin 8 June 1998. However, on 5 June, three days before the job's starting date, defendants wrote plaintiff that she was terminated for failure to "appear at the job site[.]" On 18 June 1998, defendants wrote plaintiff, asserting the right to "direct your medical treatment once we accept compensability for your claim." The letter expressly denied liability for plaintiff's disability claim, based upon plaintiff's purported refusal of the "modified duty" offered by Western. On 21 July 1998, defendants wrote to plaintiff's attorney regarding plaintiff's workers' compensation claim; this letter was copied to the Industrial Commission.

On 30 July 1998, plaintiff filed a request for a hearing on her workers' compensation claim; the next day, defendants filed an Industrial Commission Form 61, "Denial of Workers' Compensation Claim." Plaintiff's case was heard before an Industrial Commission deputy commissioner on 11 February 1999. In its opinion filed 11 March 2000, the deputy commissioner concluded that (1) defendants had failed to admit liability for plaintiff's claim prior to the hearing, and thus had not obtained the right to direct plaintiff's medical treatment; and (2) plaintiff was entitled to temporary total disability and to medical expenses. Defendants appealed to the Full Commission, which heard the matter on 25 October 2000. The Industrial Commission issued an opinion on 11 January 2001, affirming the deputy commissioner's ruling with minor modifications. Defendants appeal from the Industrial Commission's Opinion and Award.

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Standard of Review

Appellate review of decisions of the Industrial Commission is “limited to a determination of (1) whether the Commission’s findings of fact are supported by any competent evidence in the record; and (2) whether the Commission’s findings justify its conclusions of law.” *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000) (citation omitted). The Commission’s findings of fact are conclusive on appeal if supported by competent evidence, even if there is evidence to support a contrary finding, *Hedrick v. PPG Industries*, 126 N.C. App. 354, 484 S.E.2d 853, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997), and the Commission is the sole judge regarding the credibility of witnesses and the strength of evidence, *Effingham v. Kroger Co.*, 149 N.C. App. 105, 561 S.E.2d 287 (2002). The Commission’s conclusions of law, however, are reviewed *de novo*. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 491 S.E.2d 678 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

I.

[1] Defendants argue first that the Industrial Commission erred in finding that they failed to properly admit liability for plaintiff’s workers’ compensation claim, and thus were not entitled to direct plaintiff’s medical treatment. We disagree.

N.C.G.S. § 97-18 (2001), which sets out an employer’s duties when notified of an employee’s injury or accident, generally requires an employer to make a determination regarding liability for compensation within 14 days of notice of an employee’s injury, and to file the appropriate form with the Industrial Commission indicating the employer’s position. The statute provides in pertinent part:

(b) When the employer admits the employee’s right to compensation, the first [payment]. . . . shall [be] due . . . [14] day[s] after the employer has . . . notice of the injury[, and] . . . the insurer shall immediately notify the Commission, on a form prescribed by the Commission, that compensation has begun[.] . . . The first notice of payment to the Commission shall contain the date and nature of the injury, . . . the [employee’s wages], the weekly compensation rate, the date the disability . . . began, and the date compensation commenced.

(c) If the employer denies the employee’s right to compensation, the employer shall notify the Commission, . . . [by] the fourteenth

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day after . . . notice of the injury[,] on a form prescribed by the Commission. . . .

(d) [If] . . . the employer or insurer is uncertain on reasonable grounds whether . . . it has liability for the claim . . . the employer or insurer may initiate compensation payments without prejudice and without admitting liability. The initial payment shall be accompanied by a form prescribed by and filed with the Commission[.]

The use of the word “shall” in the statute indicates that the use of an Industrial Commission form to admit liability is mandatory. *Bostick v. Kinston-Neuse Corp.*, 145 N.C. App. 102, 110, 549 S.E.2d 558, 563 (2001) (use of “shall” means “the provisions of G.S. § 97-18(g) are mandatory”). Specifically, Industrial Commission Form 60, “Employer’s Admission of Employee’s Right to Compensation, [G.S. 97-18(b)],” references N.C.G.S. § 97-18(b), and should be filed by an employer who wishes to admit liability. Similarly, Form 61, Denial of Workers’ Compensation Claim, corresponds to N.C.G.S. § 97-18(c); and Form 63, Notice to Employee of Payment of Compensation Without Prejudice, references N.C.G.S. § 97-18(d). The statutory requirements are further emphasized by Industrial Commission Rule 601, which provides in part:

Upon notice of a claim, the employer must admit or deny compensability of the claim to the Commission within 14 days after the employer has written or actual notice of the claim, or commence payment without prejudice pursuant to N.C. Gen. Stat. § 97-18(d).

Thus, we conclude that defendants in the case *sub judice* were required under N.C.G.S. § 97-18 and Industrial Commission Rule 601 to file an appropriate Industrial Commission form stating their position regarding liability within fourteen days of plaintiff’s 5 May notification of her injury, or no later than 19 May 1998.

Although defendants argue that there have been instances in which, under specific factual circumstances, a party’s failure to employ an Industrial Commission form was excused by the Industrial Commission or by this Court, the sole case cited by defendants for this proposition is *Cross v. Fieldcrest Mills*, 19 N.C. App. 29, 198 S.E.2d 110 (1973). We find *Cross* inapplicable to the facts before us, in that it (1) involves the interpretation of a totally different statutory provision, N.C.G.S. § 97-24, which does not prescribe the use of an

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Industrial Commission form, and (2) was decided in 1973, many years before our present workers' compensation statute, which was amended in 1997.

Notwithstanding their failure to adhere to the clear statutory mandate to file the appropriate Industrial Commission form within the prescribed time, defendants contend that they are nevertheless entitled to direct plaintiff's medical treatment. It is undisputed that the first Industrial Commission form that defendants filed regarding their liability for plaintiff's injury was the Form 61, denying plaintiff's workers compensation claim, which was filed 31 July 1998, several months after the deadline prescribed by the statute. Moreover, although defendants claim that they accepted liability and are entitled to direct plaintiff's medical care, they acknowledge that they did not rescind the Form 61 or file a Form 60. Rather, defendants argue that their letter of 21 July 1998, sent to plaintiff's counsel and copied to the Industrial Commission, "was sufficient to constitute the filing of a Form 60," and thus served to admit plaintiff's right to compensation. We do not agree.

In its order, the Industrial Commission made the following pertinent finding of fact regarding the letter of 21 July:

...

15. On 21 July 1998, [defendants] wrote to plaintiff's counsel . . . that plaintiff "did have a compensable event. . . . However, further medical investigation needs to take place to determine if her current symptoms are indeed related to this contusion." . . . [Defendants] provided a copy of this letter to the Industrial Commission. This letter did not constitute an admission of defendants' liability for plaintiff's continuing medical treatment[, and] . . . did not conform to the requirements of N.C. Gen. Stat. § 97-18(b). . . . [Defendants] did not . . . admit liability for plaintiff's 29 April 1998 injury until . . . 11 February 1999[, when] . . . defendants through counsel admitted . . . [liability] for medical compensation for treatment of [plaintiffs'] injury.

Based upon this finding, the Industrial Commission concluded that defendants "having failed to admit liability for plaintiff's claim, did not obtain the right to direct plaintiff's medical treatment."

The 21 July letter fails in numerous respects to comply with N.C.G.S. § 97-18. The letter was not sent within fourteen days of notice of the injury, and was not "on a form prescribed by the

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Commission.” Further, the letter omitted certain information required by N.C.G.S. § 97-18(b), in that it: (1) did not notify the Industrial Commission that compensation had begun; (2) did not state plaintiff’s weekly wages or weekly compensation rate; (3) did not include the date that plaintiff’s disability resulting from her injury began; and (4) did not state the date compensation was begun.

Moreover, the 21 July letter failed to accept liability either for plaintiff’s disability claim or for her medical expenses. Although defendants conceded in the letter that plaintiff had experienced “a compensable event,” the letter expressly declined to assume responsibility for plaintiff’s ongoing medical treatment unless “further medical investigation . . . [determines that] her current symptoms are indeed related to this contusion.” Nor does the letter accept liability for plaintiff’s disability claim; indeed defendants explicitly deny liability for plaintiff’s wage claim. We conclude that the record clearly establishes that the 21 July letter did not meet the procedural or substantive requirements of N.C.G.S. § 97-18(b).

Defendants argue that if the letter of 21 July is evaluated in conjunction with their “course of conduct” it establishes that “Plaintiff’s claim was accepted by Defendants.” The “course of conduct” to which defendants refer consists of their letter sent on 18 June 1998, and of the Form 33R filed by defendants, which they contend establish their acceptance of liability for plaintiff’s medical expenses. However, inasmuch as defendants’ letter of 21 July 1998 explicitly declines to admit that plaintiff’s “current symptoms are indeed related to this contusion,” we conclude that the other documents to which defendants direct our attention fail to establish a “course of conduct” indicating acceptance of plaintiff’s claim.

Defendants also contend that they should be excused from using an Industrial Commission form to communicate their position, arguing that the Industrial Commission generally follows only “informal policies and practices.” Defendants contentions in this regard are meritless, and are contradicted by the plain language of N.C.G.S. § 97-18 and Industrial Commission Rule 601, discussed above. Defendants assert that, because they wished to accept liability only for plaintiff’s medical expenses but not for her disability claim, the use of a Form 60 would have been inappropriate. We note that Form 63, Notice to Employee of Payment of Compensation Without Prejudice, was available to defendants if they wished to reserve the right to challenge liability. *See Shah v. Howard Johnson*, 140 N.C.

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App. 58, 535 S.E.2d 577 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001) (Form 63 appropriate where employer has “reasonable grounds” to question its liability for plaintiff’s claim).

We conclude that there is factual support in the record for the Industrial Commission’s finding that defendants’ 21 July letter “did not constitute an admission of defendants’ liability for plaintiff’s continuing medical treatment[,] . . . [and] did not conform to the requirements of N.C. Gen. Stat. § 97-18(b).” Accordingly, this finding is binding on appeal.

Further, this finding by the Industrial Commission supports its conclusion that “[d]efendants, having failed to admit liability for plaintiff’s claim, did not obtain the right to direct plaintiff’s medical treatment.” “[T]he right to direct medical treatment is triggered only when the employer has accepted the claim as compensable.” *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 624, 540 S.E.2d 785, 788 (2000). Having upheld the Industrial Commission’s finding that defendants failed to accept plaintiff’s claim as compensable, we necessarily affirm its conclusion that defendants did not have the right to direct plaintiff’s medical treatment.

[2] Defendants argue next that plaintiff is barred from receiving wage compensation because she refused their offer of suitable employment. We disagree.

N.C.G.S. § 97-32 provides that “[i]f an injured employee refuses employment . . . suitable to his capacity he [is not] . . . entitled to any compensation . . . unless in the opinion of the Industrial Commission such refusal was justified.” However:

[I]f the proffered employment is not suitable for the injured employee, the employee’s refusal thereof cannot be used to bar compensation[.] . . . Furthermore, an employer cannot avoid its duty to pay compensation by offering the employee a position that could not be found elsewhere under normally prevailing market conditions.

Moore v. Concrete Supply Co., 149 N.C. App. 381, 389, 561 S.E.2d 315, 320 (2002) (citing *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 342 S.E.2d 798 (1986)) (compensation not barred where “maintenance worker” position constituted “make work” specially created for plaintiff). See also *Smith v. Sealed Air Corp.*, 127 N.C. App. 359, 362, 489 S.E.2d 445, 447 (1997) (“creation for injured employees of makeshift

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positions which do not exist in the ordinary marketplace will not meet an employer's responsibilities under the Workers' Compensation Act"). In the instant case, the Industrial Commission made the following pertinent findings of fact:

...

11. . . . [O]n 4 June 1998 . . . [defendants] offered plaintiff . . . a "temporary position[.]" . . . [Defendants] stated that the physical requirements of the position have been approved by plaintiff's treating physician. However, . . . [no one] had provided any physician with a description of the . . . position[, and] . . . defendants [did not] offer[] plaintiff any description of the nature or actual duties of the temporary, modified position[, which] . . . was to begin on 8 June 1998.

12. . . . Dr. Crowell excused plaintiff from work from 3 June 1998 through 15 July 1998.

....

16. Considering plaintiff's physical restrictions, her excuse from work by Dr. Crowell, and the vague description of the temporary, modified position . . . plaintiff's non-acceptance . . . was reasonable.

These findings are supported by competent evidence in the record. Although Western offered plaintiff a temporary office job, the record establishes that Western normally employed only one full time and one part time employee in its office, and that plaintiff was right handed, was restricted from using her right arm, and had no prior clerical experience. These facts suggest that the position was "make work." Moreover, several days before the job's starting date, defendants wrote to plaintiff terminating her employment for failure to appear at the "temporary job." We conclude that there is evidence in the record to support the Industrial Commission's finding that plaintiff's refusal of this work was reasonable. Accordingly, plaintiff is not barred from receiving compensation on this ground.

II.

[3] Defendants also argue that the Industrial Commission erred in its determination that plaintiff was entitled to temporary total disability compensation, contending that plaintiff presented "no competent evidence" that she was disabled. We disagree.

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“Disability” is defined by the Workers’ Compensation Act as the “incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.” N.C.G.S. § 97-2(9) (2001). “Disability is a legal conclusion and will be binding on the reviewing court if supported by proper findings.” *Derosier v. WNA, Inc.*, 149 N.C. App. 597, 601 562 S.E.2d 41, 44 (2002) (citing *Harris v. North American Products*, 125 N.C. App. 349, 354, 481 S.E.2d 321, 324 (1997)). An employee claiming disability benefits bears the initial burden of proof on the existence and degree of disability. *Snead v. Carolina Pre-Cast Concrete, Inc.*, 129 N.C. App. 331, 499 S.E.2d 470, *cert. denied*, 348 N.C. 501, 510 S.E.2d 656 (1998). “To do so, he must demonstrate that he is unable to earn pre-injury wages in the same employment or in any other employment and that the inability to earn such wages is due to his work-related injury.” *Olivares-Juarez v. Showell Farms*, 138 N.C. App. 663, 666, 532 S.E.2d 198, 201 (2000) (citing *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982)).

In its order, the Industrial Commission made the following pertinent findings of fact:

1. . . . [P]laintiff [is] forty-seven years old[,] . . . graduated from high school[,] . . . [and has] work[ed] as a . . . nursing assistant and respiratory therapist. . . .

....

4. Plaintiff is right hand dominant. . . .

....

6. . . . [F]ollowing the incident . . . her right elbow became progressively swollen, discolored and painful. . . .

7. . . . Plaintiff did not work on [9 May 1998] due to right upper extremity pain. . . . Due to her absence from work on that date, Pharmagraphics terminated plaintiff[.] . . .

8. On 10 May 1998, . . . the emergency department of Forsyth Memorial Hospital . . . restricted plaintiff from using her right arm for one week[.] . . .

....

12. On 4 June 1998, . . . Dr. Crowell excused plaintiff from work from 3 June 1998 through 15 July 1998.

....

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18. Plaintiff first [saw] Dr. O'Keefe on 30 September 1998. . . . [Her] symptoms, which she had experienced since 29 April 1998, were caused by lateral epicondylitis . . . [which] was caused by the incident on 29 April 1998.

19. Dr. O'Keefe . . . restricted plaintiff from any use of her right arm pending a follow-up evaluation in two months. . . .

20. At defendant-insurer's direction, plaintiff presented to Dr. Meyerdierks for evaluation on 28 July 1998. . . . Plaintiff did not exhibit signs of symptom magnification. . . .

. . . .

22. When the conservative treatment provided by Dr. O'Keefe failed to provide relief, he recommended that plaintiff undergo epicondylar release surgery. . . .

. . . .

26. . . . [P]laintiff [did not seek] employment after 8 May 1998. However, from 10 May 1998 through the date of the hearing, plaintiff's physicians excused her from work or imposed restrictions that severely limited the duties she was capable of performing. Considering plaintiff's age, education, work experience, work restrictions, and work excuses, any effort to obtain employment after 8 May 1998 would have been futile. 27. From 9 May 1998 through the date of the hearing before the Deputy Commissioner plaintiff was incapable of earning wages from defendant-employer or any other employer as a result of her right lateral epicondylitis.

We conclude that there is competent evidence in the record to support each of these findings of fact. Thus, they are conclusively established, notwithstanding any evidence tending to contradict the findings. *Allen v. Roberts Elec. Contr'rs.*, 143 N.C. App. 55, 546 S.E.2d 133 (2001). We further conclude that these findings support the Industrial Commission's determination that plaintiff was entitled to temporary total disability benefits. This assignment of error is overruled.

For the reasons discussed above, the order of the Industrial Commission is

Affirmed.

Judges WYNN and McCULLOUGH concur.

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RICHARD D. SIBLEY, PETITIONER-APPELLANT v. THE NORTH CAROLINA BOARD OF
THERAPY EXAMINERS, RESPONDENT-APPELLEE

No. COA01-471

(Filed 16 July 2002)

1. Laches— administrative hearing—no prejudice

The trial court did not err by denying petitioner's motion to dismiss for laches a disciplinary proceeding which led to suspension of petitioner's license to practice physical therapy where the charges were based on events which occurred in 1990 and 1991 but petitioner did not receive notice from the Board of any complaint until 1996 and did not receive notice of a hearing until August of 1998. Petitioner did not show prejudice resulting from the delay.

2. Constitutional Law— vagueness—physical therapy licensing statutes

Statutory language concerning disciplinary action against physical therapists is not unconstitutionally vague and is sufficiently specific to provide the Board of Physical Therapy Examiners with the authority to determine that petitioner violated acceptable standards of practice by having a sexual relationship with a patient.

3. Administrative Law— physical therapy—professional standards—personal knowledge of board members

The trial court did not err by allowing the members of the Board of Physical Therapy Examiners to determine from their own knowledge as physical therapists that petitioner knew or should have known that having a sexual relationship with a patient would violate statutory standards. There was evidence in the record on which the Board could base its decision.

4. Administrative Law— physical therapist—sexual relationship with patient—no specific standard prohibiting

The trial court did not err by upholding a decision of the Board of Physical Therapy Examiners to suspend petitioner's license for having a sexual relationship with a patient even though petitioner contended that the evidence failed to establish the appropriate standards of practice for the time when the relationship occurred. The Board's findings that petitioner knew or should have known that his actions were wrong is sup-

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ported by testimony from an expert witness and petitioner's own acknowledgment.

5. Physical Therapy— sexual contact with patient— consensual

There was substantial evidence in a disciplinary proceeding against a physical therapist that the therapist knew or should have known that a consensual sexual relationship with a patient was prohibited, even outside the confines of his office.

6. Physical Therapy— penalty for sexual contact with patient—not excessive

The Board of Therapy Examiners did not act arbitrarily or capriciously in suspending the license of a physical therapist who had sex with a patient where there was no indication that the Board acted in bad faith, unfairly, or without judgment.

Judge GREENE dissenting.

Appeal by petitioner from an order dated 17 November 2000 by Judge Ronald K. Payne in Superior Court, Buncombe County. Heard in the Court of Appeals 12 February 2002.

Hylar and Lopez, P.A., by George B. Hylar, Jr. and Robert J. Lopez, for petitioner-appellant.

Satisky & Silverstein, L.L.P., by John M. Silverstein, for respondent-appellee.

McGEE, Judge.

The North Carolina Board of Physical Therapy Examiners (Board) issued a Notice of Hearing to Richard D. Sibley (petitioner) on 4 December 1998. This notice alleged violations of provisions of the North Carolina Physical Therapy Act. The Board held a contested case hearing concerning these allegations on 14 January 1999 and 15 January 1999.

Evidence presented at the hearing tended to show that Jan Taibi (Taibi) became a physical therapy patient of petitioner on 28 August 1990. She testified she initially saw petitioner twice a week, then one to two times per week, and then about every other week. On two occasions Taibi told petitioner she had feelings for him; petitioner thanked her, but he wanted to work through the feelings and remain professional. The next time Taibi expressed to petitioner her feelings

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for him, on 8 May 1991, she asked if he would kiss her. Petitioner kissed Taibi. She told him she wanted to make love to him, and he turned away and continued with the therapy session. Petitioner went to Taibi's apartment to return some videos on 11 May 1991. The two hugged, began kissing, and had sexual relations. Taibi testified she and petitioner had sexual relations six more times. Taibi saw petitioner again on 7 June 1991, and one final time on 25 June 1991. Their relationship ended when Taibi told petitioner she was pregnant.

Boo Bouchard (Bouchard) testified she also received treatment from petitioner. Bouchard saw petitioner six or seven times from 15 March 1990 until approximately 20 June 1990 or 2 July 1990. After Bouchard's second session with petitioner, on 2 April 1990, petitioner and Bouchard talked for a long time after the session. During the third session, Bouchard testified she began to have unusual feelings. They again talked for a long time about personal matters, and the session ended with a full body hug that lasted five or six seconds. The same full body hug followed the next session. Bouchard testified that after a session in early June, the two left the office together. Petitioner kissed Bouchard on the lips. Bouchard had one more treatment session with petitioner where nothing unusual occurred.

Petitioner testified that he and Taibi mutually terminated Taibi's treatment following her 8 May 1991 visit. He and Taibi then had sexual relations on approximately four occasions over a short time. Petitioner testified that when Taibi returned for treatment on 7 June 1991, the two had already mutually terminated their sexual relationship. Petitioner denied ever leaving his office with Bouchard and testified that he never kissed her on her mouth. Following the hearing, the Board issued a decision and order in which they suspended petitioner's license to practice physical therapy for three years, nine months of which were active suspension. Petitioner filed a petition for judicial review in Superior Court in Buncombe County on 4 February 1999. The trial court remanded the case to the Board in order to determine if petitioner knew or should have known whether his behavior constituted grounds for disciplinary action. The Board issued a decision and order dated 19 November 1999, in which it determined petitioner knew or should have known his actions were subject to discipline. Petitioner again filed for a judicial review. The trial court heard the matter on 17 October 2000 through 20 October 2000. The trial court issued an order affirming the decision and order of the Board on remand dated 17 November 2000. Petitioner appeals from this order.

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I.

[1] Petitioner first argues the trial court erred in denying petitioner's motion to dismiss on the basis of laches. Petitioner states the charges brought were based on events which occurred in 1990 and 1991, yet petitioner did not receive any notification from the Board of any complaint until August 1996, and he did not receive notice of a hearing until August 1998. Petitioner contends this delay irreparably prejudiced him because he was not allowed to investigate Taibi's allegations closer in time to the alleged conduct, that his own recollection of any alleged events was diminished, and that he was not given an opportunity to record his contemporaneous statements to defend this action. We disagree.

We note there is no North Carolina case where the defense of laches has been applied to an administrative hearing concerning the revocation of a professional license. Petitioner urges us to adopt the reasoning of *Appeal of Plantier*, 494 A.2d 270 (1985), in which the New Hampshire Supreme Court dismissed a complaint where a nine and a half year delay existed between the alleged misconduct and the filing of the complaint. In *Plantier*, the court stated the case was a

classic case in which the disposition turns on the credibility of the witnesses' testimony. . . . Because the resolution turns on the credibility of testimonial evidence, the failure to impose a limitation on the time in which such a disciplinary proceeding may be brought would significantly increase the problems of proof and would increase the danger of false, fraudulent, frivolous, speculative or uncertain claims.

Id., 494 A.2d at 274. The court concluded the physician had demonstrated his due process rights were violated by the delay. *Id.*, 494 A.2d at 275.

However, in the case before us we do not conclude petitioner's due process rights were violated. Petitioner points to no specific instance where the delay resulted in prejudice to his case. Furthermore, Taibi filed a lawsuit against petitioner in 1993. Although Taibi eventually withdrew her complaint, petitioner verified answers to interrogatories; consequently, he was aware of the specifics of the allegations in the Board's notice of hearing. The record before us does not reveal that any of the witnesses had problems recollecting the events which transpired, nor has petitioner shown that any witness is now unavailable, nor has petitioner shown difficulty in remembering

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the events.

We believe the case is more analogous to *Reddy v. State Bd. for Prof. Med. Conduct*, 686 N.Y.S.2d 520 (1999). In *Reddy*, the court held a physician failed to demonstrate any prejudice by a thirteen year delay. All witnesses were able to recall the events and the physician's ability to contest the charges was not impaired. *Id.*, 681 N.Y.S.2d at 522. We choose to adopt the holding of *Reddy* and *Giffone v. De Buono*, 693 N.Y.S.2d 691 (1999). In *Giffone*, the court held that with "respect to the time delay between the charged incidents of misconduct and the ensuing disciplinary proceeding, petitioner must demonstrate that any delay in bringing the charges caused him actual prejudice." *Giffone*, 693 N.Y.S.2d at 693. In the case before us, petitioner has failed to show any prejudice resulting from the delay. As a result, we dismiss this assignment of error.

II.

[2] Petitioner next argues the trial court erred in affirming the order of the Board because the statutes under which petitioner was charged are unconstitutionally vague. We disagree.

Petitioner contends N.C. Gen. Stat. § 90-270.36(7) and N.C. Gen. Stat. § 90-270.36(9) are unconstitutionally vague. These statutes state:

Grounds for disciplinary action shall include but not be limited to the following:

...

(7) The commission of an act or acts of malpractice, gross negligence or incompetence in the practice of physical therapy;

...

(9) Engaging in conduct that could result in harm or injury to the public.

N.C. Gen. Stat. §§ 90-270.36(7),(9) (1999). The test used to determine whether a statute which sets out standards of professional conduct is unconstitutionally vague is "whether a reasonably intelligent member of the profession would understand that the conduct in question is forbidden." *In re Wilkins*, 294 N.C. 528, 548, 242 S.E.2d 829, 840-41 (1978), *overruled on other grounds by In re Guess*, 324 N.C. 105, 376 S.E.2d 8 (1989). *See also White v. N.C. Bd. of Examiners of*

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Practicing Psychologists, 97 N.C. App. 144, 388 S.E.2d 148, *disc. review denied*, 326 N.C. 601, 393 S.E.2d 891 (1990). In the case before us, petitioner had a sexual relationship with one of his patients. It is not inconceivable that such a practice “could result in harm or injury to the public.” N.C.G.S. § 90-270.36(9). Our Supreme Court has held that there “is no requirement, however, that every action taken by the Board specifically identify or address a particular injury or danger to any individual or to the public.” *In Re Guess*, 327 N.C. 46, 54, 393 S.E.2d 833, 838 (1990), *cert. denied*, 498 U.S. 1047, 112 L. Ed. 2d. 774 (1991). The *Guess* Court concluded the “statutory phrase ‘standards of acceptable and prevailing medical practice’ is sufficiently specific to provide the Board—comprised overwhelmingly of expert physicians—with the ‘adequate guiding standards’ necessary to support the legislature’s delegation of authority.” *Guess*, 327 N.C. at 54, 393 S.E.2d at 837-38 (quoting N.C. Gen. Stat. § 90-14(a)(6) (1985)). Likewise, in the case before us, we conclude the language of N.C.G.S. § 90-270.36(7) and N.C.G.S. § 90-270.36(9) is not unconstitutionally vague and is sufficiently specific to provide the Board with the authority to determine that petitioner’s actions violated acceptable standards of practice in the physical therapy field. We overrule this assignment of error.

III.

[3] Petitioner next argues the trial court erred in allowing the members of the physical therapy board to determine from their own knowledge as physical therapists that the petitioner knew or should have known that his actions were in violation of N.C.G.S. § 90-270.36(7) and N.C.G.S. § 90-270.36(9).

Petitioner relies on *In re Dailey v. Board of Dental Examiners*, 309 N.C. 710, 309 S.E.2d 219 (1983), for his argument that a licensing board may not substitute its own expertise for that of expert witnesses. In *Dailey*, our Supreme Court stated there must be a record preserved in order to have proper judicial review. *Id.*, 309 N.C. at 724, 309 S.E.2d at 227.

However, petitioner ignores the decision in *Leahy v. N.C. Bd. of Nursing*, 346 N.C. 775, 488 S.E.2d 245 (1997), which distinguished and restricted the holding in *Dailey*. In *Leahy*, our Supreme Court explained the

concern in *Dailey* was that the board would use its own expertise to decide the case without any evidence to support it. That is not

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the case here. There is evidence in the record which the Board could use its expertise to interpret, including its expertise as to whether the petitioner had violated the standard of care for registered nurses. From the record, we are able to determine the validity of the Board's action.

Id. at 780, 488 S.E.2d at 248. As in *Leahy*, in the case before us there is evidence in the record upon which the Board can base its decision; consequently, *Dailey* does not apply. We dismiss this assignment of error.

IV.

[4] Petitioner argues the trial court erred by upholding the Board's decision because the record contained insufficient evidence to support a conclusion that petitioner had violated N.C.G.S. § 90-270.36(7) or N.C.G.S. § 90-270.36(9). Petitioner contends the evidence in the record failed to establish the appropriate standards of practice during 1990-1991, when the alleged incidents took place.

“Judicial review of the decisions of administrative agencies is governed by the whole record test[.]” *Woodlief v. N.C. State Bd. of Dental Examiners*, 104 N.C. App. 52, 55, 407 S.E.2d 596, 598 (1991). The whole record test requires that

“ [i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand.’ In this context substantial evidence has been held to mean ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’ Therefore, in reaching its decision, the reviewing court is prohibited from replacing the Agency’s findings of fact with its own judgment of how credible, or incredible, the testimony appears to them to be, so long as substantial evidence of those findings exist in the whole record.”

Id. at 55-56, 407 S.E.2d at 598 (quoting *Little v. Board of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983) (citations omitted)).

In the case before us, the Board found as fact that

3. A physical attraction confuses the relationship between the patient and the therapist, particularly in cranial sacral therapy, which can induce a somato emotional release that requires a very

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strong level of trust between the physical therapist and the patient.

4. [Petitioner] knew it would be wrong to take advantage of a patient during somato emotional release.

5. [Petitioner] knew that an attraction between himself and a patient would interfere with physical therapy treatment.

6. [Petitioner] knew in 1991 that it was not permissible for a licensed physical therapist to have a sexual relationship with a patient outside the office.

7. During his physical therapy education, [Petitioner] was taught not to have sex with a patient.

8. Licensees, including [Petitioner], should have known that it was a violation of the Physical Therapy Practice Act in 1991 to engage in full body hugs with a patient, kiss a patient on the lips or have sexual intercourse with a patient.

The Board then concluded, as a result of petitioner's actions in light of the findings of fact, that petitioner violated N.C.G.S. § 90-270.36(7) and N.C.G.S. § 90-270.36(9) with regard to his treatment of both Taibi and Bouchard. Petitioner argues the Board failed to identify and establish definitive and appropriate standards which existed in 1990 and 1991. Petitioner directs the Court to the lack of a definitive rule in the code of ethics for physical therapists specifically prohibiting sexual relations with a patient. However, a lack of definitive rules in the code of ethics alone does not excuse petitioner's behavior. The Board's findings of fact that petitioner knew or should have known that his actions were wrong is supported by testimony from an expert witness and petitioner's own acknowledgment that he knew he should not have a sexual relationship with a patient.

Furthermore, while petitioner testified he had ended his treatment with Taibi during the time when he had a sexual relationship with her, the evidence tends to show otherwise. Petitioner kissed Taibi in his office on 8 May 1991. After this visit, petitioner had sexual relations with Taibi at least five times before his last treatment of her on 25 June 1991. While petitioner testified he stopped treating Taibi on 8 May 1991, his records indicate that she was to return. Petitioner's notes regarding that day's visit contain the term "continue." The Board concluded that Taibi was still a patient of petitioner when the sexual relationship occurred. The whole record test does

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not permit the reviewing court “to replace the agency’s judgment when there are two reasonable conflicting views, although the court could have reached a different decision had the matter been before it *de novo*.” *White*, 97 N.C. App. at 153-54, 388 S.E.2d at 154, *disc. review denied*, 326 N.C. 601, 393 S.E.2d 891 (1990). After reviewing the whole record, we find sufficient evidence to support these findings.

V.

[5] Petitioner next argues there was insufficient evidence in the record to support both the Board’s and the trial court’s findings of fact and conclusions of law. We disagree.

Petitioner argues that since the touching and sexual activity that occurred between Taibi and petitioner and the activity which occurred between Bouchard and petitioner was consensual, this type of activity was not prohibited. Petitioner contends there is no evidence in the record of any non-consensual touching or sexual activity; therefore, there is no substantial evidence to support any violation. However, as discussed above, under the whole record test, our review of the record reveals substantial evidence that petitioner knew or should have known consensual sexual relationship with a patient, even outside the confines of his office, was prohibited. We overrule this assignment of error.

VI.

[6] Petitioner also argues the trial court erred in upholding the Board’s decision because the disciplinary action imposed by the Board was excessively severe and therefore arbitrary and capricious in nature and in violation of N.C. Gen. Stat. § 150B-51(b)(6).

“The arbitrary and capricious standard is a difficult one to meet. Administrative agency decisions may be reversed as arbitrary or capricious if they are patently in bad faith or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment. . . .”

Elliot v. N.C. Psychology Bd., 126 N.C. App. 453, 460, 485 S.E.2d 882, 886 (1997) (quoting *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (citations omitted)). In *Elliot*, a psychologist’s license was suspended for sixty months, with an active suspension of thirty days following a finding by the Board that he had a sexual relationship with two clients. Our Court deter-

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mined this suspension was not arbitrary or capricious. In the case before us, petitioner was found to have had a sexual relationship with one patient and engaged in physical touching with another. Petitioner's license was suspended for three years with an active suspension of nine months. As in *Elliot*, we find "no indication in this case that the Board acted in bad faith, unfairly, or without judgment." *Elliot*, 126 N.C. App. at 460, 485 S.E.2d at 886. We overrule this assignment of error.

We affirm the order of the trial court.

Affirmed.

Judge THOMAS concurs.

Judge GREENE dissents with a separate opinion.

GREENE, Judge, dissenting.

As the Board's findings and the evidence presented are inadequate to support the conclusion that petitioner's conduct amounted to incompetence and could result in harm or injury to the public, I dissent.

The Board found petitioner, a physical therapist licensed in North Carolina, had engaged in sexual relations with one of his patients at a time when she was still his patient and had engaged in full-body hugs and kissed another patient on the lips during a treatment session. The Board further found that:

3. A physical attraction confuses the relationship between the patient and the therapist, particularly in cranial sacral therapy, which can induce a somato emotional release that requires a very strong level of trust between the physical therapist and the patient.
4. [Petitioner] knew it would be wrong to take advantage of a patient during somato emotional release.
5. [Petitioner] knew that an attraction between himself and a patient would interfere with physical therapy treatment.
6. [Petitioner] knew in 1991 that it was not permissible for a licensed physical therapist to have a sexual relationship with a patient outside the office.

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7. During his physical therapy education, [petitioner] was taught not to have sex with a patient.

8. Licensees, including [petitioner], should have known that it was in violation of the Physical Therapy Practice Act in 1991 to engage in full body hugs with a patient, kiss a patient on the lips, or have sexual intercourse with a patient.

Based on these findings, the Board concluded petitioner's conduct amounted to incompetence in violation of N.C. Gen. Stat. § 90-270.36(7) and could result in harm or injury to the public in violation of N.C. Gen. Stat. § 90-270.36(9).

Pursuant to section 90-270.36, grounds for disciplinary action against a physical therapist in North Carolina include "[t]he commission of an act or acts of malpractice, gross negligence or incompetence" and "conduct that could result in harm or injury to the public." N.C.G.S. §§ 90-270.36(7), (9) (2001). North Carolina's Physical Therapy Act, however, does not give a definition of what it means to be incompetent. See N.C.G.S. ch. 90, art. 18B (2001). "Where the language of a statute is clear and unambiguous, . . . the courts must give it its plain and definite meaning." *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974) (citation omitted). "[C]ourts may . . . resort to dictionaries for assistance in determining the common and ordinary meaning of words and phrases." *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970). According to Black's Law Dictionary, incompetence is defined as "[t]he state or fact of being unable or unqualified to do something." *Black's Law Dictionary* 768 (7th ed. 1999).

In this case, the Board's findings, as well as the evidence, fail to reflect how petitioner was unable or unqualified to perform his duties as a physical therapist. If anything, the findings indicate petitioner was a licensed physical therapist who had received the proper training and possessed the ability to apply this training. While a finding that petitioner ignored the rules of his profession by engaging in the conduct alleged by his patients may amount to malpractice or gross negligence, it is insufficient to justify the conclusion he was incompetent to perform his job. See *In re Dailey v. Bd. of Dental Examiners*, 309 N.C. 710, 725, 309 S.E.2d 219, 228 (1983) (findings of fact based on the evidence must support conclusions of law).

The Board's findings are also silent as to the potential harm the public could suffer as a result of petitioner's conduct. I realize our

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Supreme Court has previously held that “a general risk of endangering the public is inherent in any practices which fail to conform to the standards of ‘acceptable and prevailing’ medical practice in North Carolina,” and that “[t]here is no requirement . . . that every action taken by the Board specifically identify or address a particular injury or danger to any individual or to the public.” *In re Guess*, 327 N.C. 46, 52-54, 393 S.E.2d 833, 837-38 (1990) (emphasis omitted), *cert. denied*, 498 U.S. 1047, 112 L. Ed. 2d 774 (1991). *Guess*, however, was decided pursuant to N.C. Gen. Stat. § 90-14(a)(6), which “allow[ed] the Board to act against any departure from acceptable medical practice, ‘irrespective of whether or not a patient [was] injured thereby.’” *Id.* at 53, 393 S.E.2d at 837 (citation omitted); N.C.G.S. § 90-14(a)(6) (2001) (disciplinary grounds under the Practice of Medicine Act include “[u]nprofessional conduct, including, but not limited to, departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby”). Unlike section 90-14(a)(6), the statute at issue in this case rests specifically on the potential for harm that could result to the public due to a therapist’s conduct. See N.C.G.S. § 90-270.36(9). Accordingly, the Board was under a duty to make findings as to the harm that generally could result to patients, and thus the public, based on petitioner’s conduct.¹ Such findings must be based on the evidence and cannot merely rest on the Board’s expertise with respect to the practice of physical therapy. See *Leahy v. N.C. Bd. of Nursing*, 346 N.C. 775, 780, 488 S.E.2d 245, 248 (1997) (rejecting the petitioner’s argument that the Board’s order could not stand due to a lack of expert testimony defining the standard of care for registered nurses because there was evidence in the record which the Board could use its expertise to interpret). As there were, however, no findings that speak to the potential harm which can result when a therapist hugs, kisses, and engages in sexual

1. If the holding in *Guess* that “a general risk of endangering the public is inherent in any practices which fail to conform to the standards of ‘acceptable and prevailing’ medical practice in North Carolina” were to apply in the context of section 90-270.36(9) of the Physical Therapy Act, it would essentially read out of the statute the need for many of the other grounds warranting disciplinary action. See N.C.G.S. § 90-270.36(1)-(8); *Woodlief v. N.C. State Bd. of Dental Examiners*, 104 N.C. App. 52, 59, 407 S.E.2d 596, 600 (1991) (a dentist’s negligence or incompetence is to be measured by the standard of practice). Such a construction would defeat the legislature’s purpose in delineating more than nine separate grounds for disciplinary action against a physical therapist. See *Woodlief*, 104 N.C. App. at 58, 407 S.E.2d at 600 (citation omitted) (“the primary rule of [statutory] construction [states] the intent of the legislature controls’ . . . [.] [w]e must avoid a construction which will defeat or impair the object of a statute”).

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intercourse with a patient and the evidence failed to establish such potential harm, the Board erred in concluding petitioner had violated section 90-270.36(9). I would therefore reverse the trial court's order affirming the Board's decision.

STATE OF NORTH CAROLINA v. BOBBY JOE REID, JR.

No. COA01-957

(Filed 16 July 2002)

1. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon, because: (1) the State presented sufficient evidence that defendant perpetrated the robbery under the doctrine of recent possession; and (2) although the State failed to present evidence of the exact weapon used to hit the victim during the robbery, the evidence was sufficient to establish that the object was a dangerous weapon where the object exerted such force that it drove the victim's top teeth through her lower lip requiring twenty-five stitches and caused several other teeth to loosen, and the victim's knees buckled and she fell to the ground where she lay dazed for an unknown amount of time.

2. Credit Card Crimes— financial transaction card theft—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of financial transaction card theft, because the State presented sufficient evidence under the doctrine of recent possession that defendant stole the victim's purse which contained her financial transaction cards.

3. Constitutional Law— double jeopardy—financial transaction card theft—robbery with a dangerous weapon

A defendant's conviction for financial transaction card theft was not required to be vacated on double jeopardy grounds even though defendant contends he was subject to multiple punishment for the same act when he was also convicted for robbery

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with a dangerous weapon, because: (1) financial transaction card theft requires proof that the perpetrator obtain the financial card with the intent to then use the card, which is not an element of robbery with a dangerous weapon; and (2) robbery with a dangerous weapon requires that the perpetrator possess a dangerous weapon during the commission of a robbery, which is not an element of financial transaction card theft.

4. Constitutional Law— right to self-representation—statutory requirements for waiver of counsel

Defendant is not entitled to a new trial in a robbery with a dangerous weapon, financial transaction card theft, and financial transaction card fraud case even though defendant contends the trial court unconstitutionally denied his request to represent himself, because the statutory requirements for waiver of counsel under N.C.G.S. § 15A-1242 for a clear, unequivocal, knowing, voluntary, and intelligent waiver were not sufficiently established.

5. Criminal Law— defendant's removal from courtroom during closing arguments—harmless error

Defendant is not entitled to a new trial in a robbery with a dangerous weapon, financial transaction card theft, and financial transaction card fraud case even though the trial court removed defendant from the courtroom during closing arguments, because: (1) defendant waived his right to be present and the trial court complied with the requirements under N.C.G.S. § 15A-1032; and (2) defendant has not established that his removal from the courtroom, if error, affected the outcome of the trial.

Appeal by defendant from judgment entered 7 February 2001 by Judge Russell G. Walker, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 15 May 2002.

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

Jarvis John Edgerton, IV for defendant-appellant.

HUNTER, Judge.

Bobby Joe Reid, Jr. ("defendant") appeals convictions of robbery with a dangerous weapon, financial transaction card theft, and financial transaction card fraud. We find no error.

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The State's evidence tended to show that on 27 June 2000 at approximately 7:15 p.m., Elizabeth Stanaland was placing her purse and some prescriptions she had just purchased in the back seat of her car in a CVS Pharmacy parking lot. As Stanaland was placing the items in her car, someone came up behind her and struck her in the face with an object. Stanaland was hit so hard with the object that her knees buckled and she fell to the ground. The assailant then began pulling at her purse strap, which was still around her arm, consequently dragging Stanaland across the ground. The assailant was able to take her purse. Stanaland lay "dazed" in the parking lot for a few moments before being able to return to the pharmacy for help.

Stanaland testified that, although she was not able to see what the assailant used to hit her, she did not believe it was his hand. She testified that the object had a smooth surface, but that it was "firm" and "rigid enough to have . . . exerted some force." The force of the object loosened several of Stanaland's teeth and drove her upper teeth through her lower lip, requiring twenty-five stitches.

On the afternoon of 28 June 2000, the day following the robbery, defendant entered a department store and attempted to buy several hundred dollars' worth of clothes using Stanaland's credit card. The store's employees notified police, and defendant was apprehended. Defendant was carrying a briefcase on his person that contained the contents of Stanaland's stolen purse, including her wallet, checkbooks, prescription glasses, medicine, business cards, soap dispenser, and hair accessories. Stanaland identified all of the items found in defendant's briefcase, as well as the credit card defendant attempted to use, as the items stolen from her the previous evening.

On 7 February 2001, a jury convicted defendant of felonious financial transaction card theft, non-felonious financial transaction card fraud, and robbery with a dangerous weapon. The trial court consolidated the convictions, and sentenced defendant to a single term of 117 to 150 months' imprisonment. Defendant appeals.

Defendant makes five arguments on appeal: (1) the evidence was insufficient to support his conviction for robbery with a dangerous weapon; (2) the evidence was insufficient to support his conviction for financial transaction card theft; (3) the conviction for financial transaction card theft must be vacated to protect defendant from double jeopardy; (4) the trial court unconstitutionally prevented defendant from representing himself; and (5) the trial court unconsti-

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tutionally removed defendant from the courtroom during closing arguments. For reasons discussed herein, we hold that the trial court did not commit prejudicial error, and defendant received a fair trial.

[1] Defendant first argues that the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon for insufficient evidence that defendant perpetrated the crime and that he did so using a dangerous weapon. We disagree. In ruling upon a motion to dismiss, the trial court must determine if the State has presented substantial evidence of each essential element of the offense. *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002). “Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion.” *Id.* at 336, 561 S.E.2d at 255 (citation omitted). In considering the motion, 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 the evidence, and resolving any contradictions in favor of the State. *Id.* at 336, 561 S.E.2d at 256.

In the present case, the State presented sufficient evidence that defendant perpetrated the robbery under the doctrine of recent possession. This doctrine allows the jury to infer that the possessor of the stolen property is guilty of its taking. *State v. Pickard*, 143 N.C. App. 485, 487, 547 S.E.2d 102, 104, *disc. review denied*, 354 N.C. 73, 553 S.E.2d 210 (2001). The doctrine of recent possession applies where the State can prove three things: (1) that the property was stolen; (2) that the defendant had possession of this stolen property, possession being that “he is aware of its presence and has, either by himself or together with others, both the power and intent to control its disposition or use”; and (3) “that the defendant had possession of this property so soon after it was stolen and under such circumstances as to make it unlikely that he obtained possession honestly.” *Id.* at 487-88, 547 S.E.2d at 104 (citation omitted).

Here, the State presented evidence that the contents of Stanaland’s purse were stolen, and that the entire contents of the purse were recovered from defendant’s possession upon his attempt to make a substantial purchase using Stanaland’s credit card less than twenty-four hours after the robbery. The stolen goods were located in a briefcase that defendant carried on his person, thereby allowing the inference that defendant was aware that he possessed the stolen goods, and had both the power and intent to control them. Taking this evidence in the light most favorable to the State, there was sufficient

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evidence establishing defendant's identity as the perpetrator to allow for the jury to consider the evidence.

Likewise, the State presented sufficient evidence that defendant used a dangerous weapon to perpetrate the robbery. Whether an instrument constitutes a dangerous weapon depends upon the nature of the instrument and the manner in which it was used, *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985), as well as the extent of the victim's injuries, *State v. Greene*, 67 N.C. App. 703, 706, 314 S.E.2d 262, 264, *appeal dismissed and disc. review denied*, 311 N.C. 405, 319 S.E.2d 276 (1984). In *State v. Sturdivant*, 304 N.C. 293, 283 S.E.2d 719 (1981), our Supreme Court observed that "[n]o item, no matter how small or commonplace, can be safely disregarded for its capacity to cause serious bodily injury or death when it is wielded with the requisite evil intent and force." *Id.* at 301 n.2, 283 S.E.2d at 725 n.2 (citing various cases in which such common place items as brooms, nail clippers, baseball bats, plastic bags, soda bottles, and rocks have been held to constitute deadly weapons).

In *Greene*, we held that although the State failed to present evidence of the exact weapon used to hit the victim on the back of the head during a robbery, the evidence was sufficient to establish that the object was a dangerous weapon where the blow stunned the victim, knocking him to the ground, and caused a hematoma and laceration on the victim's head requiring four to five stitches. *Greene*, 67 N.C. App. at 706, 314 S.E.2d at 264. Similarly, in *Peacock*, we held that a glass vase used to strike the victim's head constituted a dangerous weapon where the blow inflicted lacerations on the victim and was sufficient to render her unconscious. *Peacock*, 313 N.C. at 563, 330 S.E.2d at 196.

In this case, Stanaland testified that she was hit with a firm, rigid object that she did not believe to be a hand. The object exerted such force that it drove Stanaland's top teeth through her lower lip, requiring twenty-five stitches, and caused several other teeth to loosen. When hit with the object, Stanaland's knees buckled and she fell to the ground where she lay dazed for an unknown amount of time. Taken in the light most favorable to the State, the evidence was sufficient to allow the jury to consider whether defendant perpetrated the crime using a dangerous weapon. The trial court did not err in denying defendant's motion to dismiss.

[2] We also reject defendant's second argument, that the evidence was insufficient to support his conviction for financial transaction

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card theft. Defendant argues that the evidence was insufficient to establish that he was the perpetrator of the theft; however, as discussed above, the State presented sufficient evidence under the doctrine of recent possession that defendant stole Stanaland's purse, which contained her financial transaction cards. This argument is overruled.

[3] In his third argument, defendant maintains that his conviction for financial transaction card theft must be vacated because that conviction, along with his conviction for robbery with a dangerous weapon, constitutes multiple punishment for the same act in violation of the Fifth Amendment prohibition against double jeopardy. Again we disagree.

This Court has recently summarized the appropriate analysis to use in considering a defendant's claim that he has been subject to multiple punishments for essentially the same offense. *See State v. Haynesworth*, 146 N.C. App. 523, 553 S.E.2d 103 (2001). We stated the general rule that "[w]hen the same act or transaction constitutes a violation of two criminal statutes, the test to determine whether there are two separate offenses [for purposes of double jeopardy] is whether each statute requires proof of a fact which the other does not." *Id.* at 530-31, 553 S.E.2d at 109 (citing *Blockburger v. United States*, 284 U.S. 299, 76 L. Ed. 306 (1932)). This is the so-called *Blockburger* test. " 'When each statutory offense has an element different from the other, the *Blockburger* test raises no presumption that the two statutes involve the same offense.' " *Id.* at 531, 553 S.E.2d at 109 (citation omitted). "The fact that each crime requires proof of an element which the other does not demonstrates the intent of the General Assembly to allow multiple punishments to be imposed for the separate crimes." *Id.* Thus, in *Haynesworth*, we rejected the defendant's argument that he could not be convicted and sentenced for both first degree murder and assault on a law enforcement officer stemming from the same incident because each offense required proof of an element which the other did not. *Id.*

In this case, defendant's constitutional rights have not been abridged because the offenses of financial transaction card theft and robbery with a dangerous weapon each require proof of an essential element which the other does not. Financial transaction card theft requires proof that the perpetrator obtain the financial card with the intent to then use the card. N.C. Gen. Stat. § 14-113.9(a)(1) (2001). This is not an element of robbery with a dangerous weapon. Robbery with a dangerous weapon requires that the perpetrator possess a dan-

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gerous weapon during the commission of the robbery. N.C. Gen. Stat. § 14-87(a) (2001). This is not an element of financial transaction card theft. Accordingly, defendant's rights have not been violated and this argument is without merit.

[4] Fourth, defendant argues that he is entitled to a new trial because the trial court unconstitutionally denied his request to represent himself. On two occasions prior to trial, defendant signed waiver of counsel forms indicating a desire to represent himself. However, subsequent to those waivers, during a pretrial discovery meeting on 25 October 2000, defendant refused to sign a waiver of his right to counsel when he learned of the potential punishment he faced. Thereafter, on 13 December 2000, the trial court entered an order assigning a public defender to represent defendant. On 22 December 2000, defendant filed a hand-written motion to suppress evidence and dismiss the charges. On 3 January 2001, defendant addressed a letter to both the trial court and his assigned counsel expressing his dissatisfaction with counsel's handling of the matter. Defendant also addressed a letter to his attorney directing him to follow his wishes, and stating that if he refused, defendant wished to represent himself.

On 26 January 2001, the trial court conducted a hearing regarding defendant's representation. The trial court asked defendant if he wanted to represent himself when his trial commenced. Defendant responded that what he really wanted was to have his motion to suppress and dismiss heard immediately. When asked a second time if he wanted to represent himself during trial, defendant asked the trial court whether, if he represented himself, he would be allowed to proceed that day with his motions. Defendant expressed confusion regarding the proceedings, particularly with respect to the date of trial, and upon the trial court's attempt to explain, defendant opined that "[t]his is crap." Defendant also indicated that his counsel was there to "dismiss himself." The trial court retained defendant's counsel, who then conducted defendant's trial when it commenced on 6 February 2001.

Although a defendant may request to proceed *pro se*, before a trial court may allow a defendant to waive representation, it must ensure that constitutional and statutory standards are met. *State v. Fulp*, 355 N.C. 171, 174-75, 558 S.E.2d 156, 159 (2002). First, the defendant's waiver must be expressed clearly and unequivocally. *Id.* at 175, 558 S.E.2d at 159. Second, the trial court must ensure that the defendant's waiver is knowing, voluntary, and intelligent. *Id.* Our

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Supreme Court has held that the trial court's inquiry into these matters is sufficient where the trial court complies with the guidelines set forth in N.C. Gen. Stat. § 15A-1242 (2001). *Id.* That statute provides:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242.

In the present case, it is evident from the transcript that defendant's main focus was having his motion to suppress and dismiss heard immediately, and that he failed to understand that the issue of his representation had no bearing on whether his motions would proceed that day. Defendant appeared willing to waive counsel if such action would assist him in having his motions heard immediately, even after the trial court explained that defendant's motions could not proceed that day. Although defendant argues that he clearly requested several times to proceed on his own, the trial court was under an obligation to ensure, before granting such a request, that all constitutional and statutory requirements were met. Our review of the transcript leads us to conclude that the trial court did not err in determining that the statutory requirements for a clear, unequivocal, knowing, voluntary, and intelligent waiver were not sufficiently established. This argument is overruled.

[5] Finally, defendant maintains that he is entitled to a new trial because the court unconstitutionally removed him from the courtroom during closing arguments. The Confrontation Clause in Article I, Section 23 of the North Carolina Constitution provides a defendant with the right to be present during each stage of his trial. *State v. Miller*, 146 N.C. App. 494, 499-500, 553 S.E.2d 410, 414 (2001). However, in a non-capital case, a defendant may waive the right to be

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present through his behavior. *Id.* at 500, 553 S.E.2d at 414. N.C. Gen. Stat. § 15A-1032 (2001) provides:

(a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge's warning and order for removal must be issued out of the presence of the jury.

(b) If the judge orders a defendant removed from the courtroom, he must:

- (1) Enter in the record the reasons for his action; and
- (2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.

N.C. Gen. Stat. § 15A-1032.

Here, following the close of all evidence, and outside the presence of the jury, defendant's counsel informed the trial court that defendant wished to give his own closing argument. The trial court stated it would not allow this, whereupon defendant said to the court, "[n]o, sir." The trial court instructed defendant to stand, and defendant, who remained seated, replied again, "[n]o, sir." Defendant then stated to the court, "[y]esterday . . . was a total jerk." The trial court instructed defendant to be quiet and began to explain that the courtroom would be conducted as the court determined. Defendant then interrupted the court, complaining about a previous evidentiary ruling. The trial court instructed that defendant be removed, and entered findings in the record that by his conduct, defendant waived his right to be present. When the jury returned, the trial court instructed that it was not to consider defendant's absence in weighing the evidence and coming to a verdict. The trial court invited defendant to return to the courtroom following closing arguments, but defendant refused.

We hold that the trial court did not err in finding that defendant waived his right to be present and in removing him from the courtroom in accordance with N.C. Gen. Stat. § 15A-1032. Defendant argues that the trial court failed to comply with the statute in that it failed to warn defendant prior to ordering his removal. The State

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maintains that the trial court warned defendant when it instructed him to be quiet and began to explain that the trial would be conducted as the court determined, only to be interrupted by defendant's complaints about a prior ruling.

In any event, the right to be present at all critical stages of a trial is subject to a harmless error analysis. *Miller*, 146 N.C. App. at 502, 553 S.E.2d at 415. Defendant is only entitled to a new trial where he can establish the usefulness of his presence during trial and that absent the trial court's error, the result of the trial would have been different. *Id.* In *Miller*, we held that the court's failure to comply with N.C. Gen. Stat. § 15A-1032(b)(2) by instructing the jury that it was not to consider the defendant's absence did not warrant a new trial. *Id.* In so holding, we noted that defendant had the opportunity to keep informed of the proceedings through his attorney; that defendant was present during the admission of all evidence and confronted all witnesses; that defendant failed to show the usefulness of his presence during that portion of the trial during which he was absent; and that defendant failed to show that absent any error, the result of his trial would have been different. *Id.* at 501, 553 S.E.2d at 415.

Likewise, in this case, defendant has not established that his removal from the courtroom, if error, entitles him to a new trial. Defendant was present during the presentation of all evidence and was able to confront all witnesses; defendant failed to show how his presence in the courtroom would have been useful during closing arguments; the trial court invited defendant to return to the courtroom following closing arguments, but he refused; and, in light of the evidence presented, defendant failed to show that any error in his removal during closing arguments affected the outcome of his trial.

Defendant received a fair trial.

No error.

Judges WYNN and THOMAS concur.

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[151 N.C. App. 389 (2002)]

TRANSYLVANIA COUNTY, TRANSYLVANIA COUNTY BOARD OF COMMISSIONERS,
TRANSYLVANIA COUNTY INSPECTIONS DEPARTMENT, PLAINTIFFS v. FRANK A.
MOODY, PNE AOA MEDIA, LLC, DEFENDANTS

No. COA01-485

(Filed 16 July 2002)

1. Zoning— sign control ordinance—general police power

Transylvania County had the statutory authority to enact a sign control ordinance under the general police power granted in N.C.G.S. § 153A-121.

2. Zoning— sign control ordinance—public safety purpose

Transylvania County did not exceed its authority by imposing its aesthetic tastes on the county in enacting a sign control ordinance where the ordinance stated that one purpose was to insure motorist safety by reducing distractions. Public safety is well within the authority granted by N.C.G.S. § 153A-121(a).

3. Constitutional Law— due process—sign control ordinance—not arbitrary or unreasonable—legitimate state objective

A sign control ordinance was not arbitrary and unreasonable in violation of due process where aesthetics was only one of the listed purposes of the ordinance, there was nothing arbitrary or unreasonable about the restrictions, and the ordinance was reasonably related to the legitimate state objective of protecting the health, welfare and safety of the county's citizens.

4. Constitutional Law— sign control ordinance—equal protection—legitimate state interest—restrictions rationally related to state interest

A sign control ordinance did not violate equal protection because the health, welfare and safety of citizens is a legitimate state interest and the restrictions in the ordinance are rationally related to that interest.

5. Zoning— sign control ordinance—enforcement provisions—notice—strict adherence

The trial court erred by assessing a civil penalty against defendants for violation of a sign control ordinance where the county did not strictly adhere to the ordinance's enforcement provisions concerning notice.

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Appeal by defendants from judgment and order entered 28 December 2000 by Judge Mark Powell in Transylvania County District Court. Heard in the Court of Appeals 12 March 2002.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for plaintiff-appellees.

Holt York McDarris, LLP, by Jeffrey P. Gray and Charles F. McDarris, for defendant-appellants.

CAMPBELL, Judge.

On 22 September 1999, Transylvania County, the Transylvania County Board of Commissioners and the Transylvania County Inspections Department (hereinafter, "Plaintiffs" or "the County") filed a complaint against Frank A. Moody and PNE AOA Media, LLC (hereinafter, "Defendants"), alleging that Defendants had violated certain provisions of the Transylvania County Sign Control Ordinance (hereinafter, "the ordinance"). Plaintiffs sought an injunction and/or an order of abatement ordering Defendants to dismantle and remove two sign structures alleged to be in violation of the ordinance. The County also sought to recover a civil penalty of \$100.00 per day for each day that Defendants' sign structures were in violation of the ordinance. On 30 November 1999, Defendants answered Plaintiffs' complaint, filed a motion to dismiss, and asserted a counterclaim alleging that the ordinance exceeded the County's statutory authority and was unconstitutional. On 1 December 1999, Plaintiffs filed a reply and a motion to dismiss Defendants' counterclaim.

The trial court heard arguments and entered a judgment and order on 23 December 2000 denying Defendants' motion to dismiss Plaintiffs' claim and granting Plaintiffs' motion to dismiss Defendants' counterclaim. In addition, the trial court entered an order of abatement directing Defendants to dismantle the two sign structures and remove them within sixty days of 18 December 2000. The trial court also granted Plaintiffs' motion for a permanent injunction enjoining Defendants "from erecting any billboard or off-premise sign in the areas of Transylvania County governed by the ordinance except as in the manner permitted by the ordinance." Finally, the trial court entered judgment against Defendants, jointly and severally, in the amount \$22,300.00 as a civil penalty for violating the ordinance.

The ordinance in question was enacted on 23 September 1991 by the Transylvania County Board of Commissioners pursuant to the

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general ordinance-making authority conferred upon it by N.C. Gen. Stat. § 153A-121.¹ The stated purpose of the ordinance is to:

- (1) Guide and regulate the construction and placement of signs in the county in order to preserve the scenic and aesthetic features of the county and the quality of life for residents and visitors. The board of commissioners is aware of, and sensitive to, the need for local businesses to adequately identify their products and services and is committed to safeguarding the interests of local businesses while providing reasonable regulations.
- (2) Insure the safety of the local and visiting motorist on the roads in the county by reducing the distracting influence of uncontrolled signs throughout the county.

Sign Control Ordinance of Transylvania County, North Carolina (hereinafter, "Sign Control Ordinance") § 16-103.

Section 16-106 of the ordinance requires that all signs not otherwise prohibited or exempted by its terms shall have a permit prior to construction and shall be constructed in accordance with the North Carolina State Building Codes. Section 16-106 of the ordinance also regulates the size, height, configuration and location of both on-premise and off-premise signs.

Section 16-108 of the ordinance requires that all signs not otherwise prohibited or exempted must have a sign permit and permit emblem issued by the County's Sign Enforcement Officer prior to construction, placement or repair. New signs and sign structures shall not be constructed until a permit and permit emblem have been issued and the permit emblem must be placed on the sign structure so as to be visible from the nearest adjacent road.

Section 16-109 sets forth the administration and enforcement provisions of the ordinance. The County's Sign Enforcement Officer is authorized to issue a violation notice identifying the sign, the nature of the violation, and the section of the ordinance violated. The violation notice shall specify in detail what action must be taken to correct the violation and specify a reasonable time up to fifteen calendar days within which the violator must correct the violation. Sign Control Ordinance § 16-109(a)(1). If the sign or sign structure is not corrected

1. N.C.G.S. § 153A-121(a) (2001) provides:

A county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances.

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within the time allotted in the violation notice, the Sign Enforcement Officer is authorized to issue a compliance order which also must identify the sign and the section of the ordinance violated.² The compliance order recipient (the sign owner or the record owner of the property on which the sign is located) is then allowed thirty calendar days to remove the subject sign at the owner's expense. Sign Control Ordinance § 16-109(a)(2). The recipient of a violation notice and/or compliance order has thirty working days in which to appeal to the County Planning Board. If the Planning Board finds that the action of the Sign Enforcement Officer has been taken for good cause and in accordance with the ordinance, it shall so declare and the time period for compliance shall run from the issuance of the Board's order. Sign Control Ordinance § 16-109(b).

After the owner of the sign, or the property on which the sign is located, has received a violation notice *and* compliance order (or just a compliance order if that is all that is required under the ordinance), and has failed to comply within the time set forth in the ordinance, the Sign Enforcement Officer or the County Attorney may impose a civil penalty of up to \$100.00 per day. Sign Control Ordinance § 16-109(c). The County is also authorized to enforce the ordinance by any one of the remedies set forth in N.C. Gen. Stat. § 153A-123, with the exception of N.C.G.S. § 153A-123(b). The available remedies permitted by N.C.G.S. § 153A-123 and authorized by the ordinance include injunctions and abatement orders.

In July 1999, Defendant PNE AOA Media, LLC, an outdoor advertising company, constructed two single-pole steel sign structures with lights installed for the purpose of erecting billboards on property owned by Defendant Frank Moody. Defendants did not apply for a permit prior to beginning or completing construction of the sign structures as required by the ordinance, did not pay the necessary fees connected with the permitting process under the ordinance, and did not obtain a permit emblem to display on the sign structures as required by the ordinance.

On 12 August 1999, the Transylvania County Inspections Department posted a Stop Work Order and a Notice of Violation/Compliance Order on one of Defendants' sign structures. The Stop

2. For a prohibited sign or any temporary portable sign not permitted by the ordinance, the Sign Enforcement Officer may issue a compliance order without having first issued a violation notice. For all other violations, such as the violations at issue in the case *sub judice*, a violation notice must be issued first, followed by a compliance order. Sign Control Ordinance § 16-109(a)(1)-(2).

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Work Order specified that the sign structure was in violation of the ordinance for having no permit. The Violation Notice/Compliance Order directed Defendants to contact the Planning Department and listed the telephone number. The Violation Notice/Compliance Order also notified Defendants that construction of a sign without a permit violated section 16-106 of the ordinance and that violators of the ordinance were subject to a civil penalty of up to \$100.00 per day.

On 20 August 1999, Plaintiffs posted a second Stop Work Order and Violation Notice/Compliance Order on Defendants' sign structures identical in all respects to the notice posted on 12 August 1999. In response, Defendant Frank Moody, General Manager of PNE AOA Media, LLC, and the property owner, sent the County Planning Department a facsimile message that read as follows:

It is the position of PNE AOA Media, LLC, and Frank A. Moody II, that there has been no wrongdoing in erecting two steel poles on privately owned, unzoned property. Should you have any further complaints, please be advised you may contact our attorneys[.]

On 26 August 1999, Defendants were served with a letter from the County's Director of Inspections which was titled: "RE: NOTICE OF VIOLATION SIGN CONTROL ORDINANCE OF TRANSYLVANIA COUNTY." The letter stated that Defendants' sign structures were in violation of the ordinance's requirements regarding size, location, compliance with the North Carolina State Building Code, and obtaining a permit prior to construction. Defendants were informed that they had ten days to bring the violations into compliance with the ordinance and thirty working days in which to appeal to the County Planning Board. This letter made no reference to the civil penalty of up to \$100.00 per day set forth in the ordinance.

On 22 September 1999, prior to the expiration of Defendants' thirty-day period in which to appeal the violation letter, the County filed the instant action which resulted in the order and judgment appealed from by Defendants. Defendants maintain that the ordinance is not statutorily authorized, is an arbitrary and unreasonable violation of due process, and violates the Equal Protection Clause. Defendants further maintain that the trial court erred in imposing the \$22,300.00 civil penalty on Defendants because Plaintiffs failed to follow the notice requirements set forth in the ordinance.

[1] Defendants first argue that the Transylvania County Sign Ordinance was enacted in violation of the procedural safe-

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guards applicable to zoning and the regulation of land use set forth in Article 18 of Chapter 153A of the North Carolina General Statutes. We disagree.

Article 18 of the General Statutes sets forth rules for county planning and regulation of development. N.C. Gen. Stat. § 153A-320 to -378 (2001). In passing ordinances pursuant to Article 18, counties must follow certain notice and public hearing requirements. *See* N.C.G.S. §§ 153A-323 and 153A-343. In addition, N.C.G.S. § 153A-341 requires that all zoning regulations adopted by counties “shall be made in accordance with a comprehensive plan[.]”

The record in the instant case shows that the Transylvania County Sign Ordinance was enacted in September 1991 while a document entitled “A Comprehensive Plan For Transylvania County” was not adopted until January 1994. Accordingly, Defendants claim that the County failed to follow the statutory procedures for the adoption of land use regulations by enacting the ordinance before the adoption of a comprehensive zoning plan. Defendants also claim that the document entitled “A Comprehensive Plan For Transylvania County” does not meet the definition of a comprehensive zoning plan as set forth by the appellate courts of this State. Further, Defendants question whether the County followed the notice and public hearing requirements set forth in Article 18. For these reasons, Defendants contend that the ordinance exceeded the County’s statutory authority and is thus null and void.

The County responds by arguing that it was not required to adhere to Article 18 because the ordinance was enacted pursuant to the general police power granted counties under N.C.G.S. § 153A-121. Plaintiffs correctly point out that section 16-102 of the ordinance expressly states that it was enacted “[p]ursuant to the authority and provision conferred in Chapter 153A-121(a).”

The dispositive question is whether the County had the authority to pass the ordinance pursuant to N.C.G.S. § 153A-121, or was the County required to follow the requirements of Article 18 in adopting the ordinance. This Court addressed the exact issue in *Summey Outdoor Advertising v. County of Henderson*, 96 N.C. App. 533, 386 S.E.2d 439 (1989), which involved a challenge to a Henderson County Sign Control Ordinance which was likewise expressly enacted pursuant to N.C.G.S. § 153A-121. In upholding the Henderson County ordinance, the *Summey* Court held:

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We do not believe that because defendant has authority to regulate signs under G.S. 153A-340 [**Article 18**], it may not regulate signs in a similar manner under the general police powers in G.S. 153A-121 (allowing regulation of “conditions detrimental to the health, safety or welfare of its citizens and the peace and dignity of the county . . .”). G.S. 153A-121 and 153A-340 [**Article 18**] do not operate exclusively of each other. *See* G.S. 153A-124 (Specific powers enumerated in Article 6, [**for other portions of**] Chapter 153A to “regulate, prohibit or abate acts, omissions or conditions [**are**] not exclusive [or] a limit on the general authority to adopt ordinances . . . [under] G.S. 153A-121.”).

Id. at 538, 386 S.E.2d at 443 (alterations in bold added). The Court further stated:

While it may have been more desirable and better planning for [the county] to adopt a county-wide zoning ordinance, the fact that [the county] did not do so does not preclude [the county] from regulating outdoor advertising signs under G.S. 153A-121.

Id. (alterations added).

This Court recently reaffirmed its decision in *Summey* in a case involving a challenge to a sixty-day outdoor advertising moratorium passed by the Jackson County Board of Commissioners pursuant to N.C.G.S. § 153A-121. *PNE AOA Media, L.L.C. v. Jackson Cty.*, 146 N.C. App. 470, 554 S.E.2d 657 (2001).

In both written and oral argument, Defendants asked this Court to reconsider and reverse its earlier decision in *Summey* and hold that a county may not use the general police power under N.C.G.S. § 153A-121 to regulate land use through the adoption of a general sign control ordinance. However, we are bound by this Court’s prior decisions in *Summey* and *PNE AOA Media*. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court.”). Defendants have not presented arguments distinct from those rejected in these earlier decisions and have failed to bring to our attention a decision of the Supreme Court overturning, expressly or by implication, *Summey* or *PNE AOA Media*. Therefore, we conclude that Transylvania County had the statutory authority under N.C.G.S. § 153A-121 to enact the sign control ordinance in question in the instant case.

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[2] Moreover, the County did not exceed its authority under N.C.G.S. § 153A-121(a), as Defendants contend, by allowing the “county board of commissioners to impose its own aesthetic tastes on [the] entire county.” Contrary to Defendants’ assertion, aesthetics is not the only purpose of the ordinance. Section 16-103(2) states that one purpose of the ordinance is to “[i]nsure the safety of the local and visiting motorist on the roads in the county by reducing the distracting influence of uncontrolled signs throughout the county.” This public safety purpose is well within the authority granted by N.C.G.S. § 153A-121(a).

[3] Defendants next challenge the validity of the ordinance on the grounds that it is arbitrary and unreasonable in violation of due process. We find no merit to this claim.

In order to determine whether the ordinance is unconstitutionally arbitrary and unreasonable we look to see if the ordinance is reasonably related to the accomplishment of a legitimate state objective. *Town of Atlantic Beach v. Young*, 307 N.C. 422, 428, 298 S.E.2d 686, 690-91 (1983); *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979); *Raleigh Mobile Home Sales, Inc. v. Tomlinson*, 276 N.C. 661, 174 S.E.2d 542 (1970). The County passed the ordinance in question pursuant to its police power under N.C.G.S. § 153A-121(a) (“A county may by ordinance define, regulate, prohibit . . . conditions detrimental to the health, safety or welfare of its citizens.”), and the ordinance expressly states that one of its purposes is to insure the safety of its citizens while traveling on roads in the county. While the mere assertion within an ordinance that it is for the public welfare is not enough in and of itself to make the ordinance a constitutionally valid exercise of police power, there can be no question that the public purpose of protecting the health, welfare and safety of the citizens of this State is a legitimate state objective. *Town of Atlantic Beach*, 307 N.C. at 428, 298 S.E.2d at 691. Thus, we are left to determine whether the contested ordinance is reasonably related to protecting the health, welfare and safety of the citizens of the County.³

The ordinance in question does not prohibit the erection of all signs within the County’s jurisdiction. The provisions of the ordinance completely prohibit certain types of signs, expressly exempt

3. The ordinance also states as one of its purposes the preservation of “the scenic and aesthetic features of the county and the quality of life for residents and visitors.” Sign Control Ordinance § 16-103. Since aesthetics is listed as only one of the purposes for the ordinance, we need not consider whether the ordinance is constitutional as an aesthetics-only regulation.

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other types of signs, and for signs and sign structures not otherwise prohibited or exempted, like the ones in the instant case, the ordinance merely sets forth restrictions as to their size, location and configuration, and requires that a permit be secured prior to construction. We find nothing arbitrary or unreasonable about these restrictions. In fact, the ordinance allows Defendants to obtain permits for all outdoor advertising signs so long as such signs comply with the ordinance's restrictions. Thus, we conclude that the ordinance is reasonably related to the legitimate state objective of protecting the health, welfare and safety of the County's citizens.

[4] Defendants also challenge the ordinance on the grounds that it violates the Equal Protection Clauses of the United States and North Carolina Constitutions. We disagree.

When a statute or ordinance is challenged on equal protection grounds, the first determination for the court is what standard of review to apply in determining constitutionality. It is well settled that when an equal protection claim does not involve a suspect class or a fundamental right, the contested ordinance need only bear a rational relationship to a legitimate state interest. *Id.* at 429, 298 S.E.2d at 691 (citing *New Orleans v. Dukes*, 427 U.S. 297, 49 L. Ed. 2d 511 (1976)).

Defendants in the instant case do not fall within a suspect class and we do not view the right to construct outdoor advertising signs within a county's jurisdiction as a fundamental right. Thus, we need only find a rational relationship between the ordinance and a legitimate state interest. As earlier indicated, the health, welfare and safety of the citizens of this State is a legitimate state interest. In addition, we find that the restrictions in the ordinance in question are rationally related to such a legitimate state concern. Therefore, we conclude that the ordinance does not violate the equal protection guarantees of the federal and state constitutions.

[5] Defendants next argue that the trial court erred in assessing a civil penalty against them because the County did not follow the notice requirements set forth in the ordinance. We agree.

The record shows that the County posted a Stop Work Order and Violation Notice/Compliance Order on the sign structures in question on two occasions (12 August and 20 August). These two notices identified the nature of the violation (No permit) and the section of the ordinance violated (Section 16-106), directed Defendants to contact

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the Planning Department, and notified Defendants that violation of the ordinance could result in a civil penalty of up to \$100.00 per day. However, these two preliminary notices did not “specify a reasonable time limit of up to fifteen (15) calendar days within which the violation must be corrected.” Sign Control Ordinance § 16-109(a)(1). As a result, these preliminary notices did not adhere to the requirements for violation notices set forth in Section 16-109(a)(1) of the ordinance.

On 26 August 1999, following the two preliminary notices, the County sent Defendant Moody a letter entitled: “RE: NOTICE OF VIOLATION SIGN CONTROL ORDINANCE OF TRANSYLVANIA COUNTY.” This letter identified in detail the sections of the ordinance allegedly being violated by Defendants’ sign structures. The letter also informed Defendants that they had ten days to correct the violations and thirty days to appeal the decision of the Sign Enforcement Officer to the County Planning Board. However, this letter made no reference to the civil penalty authorized under the ordinance.

At no point in the enforcement process did the County provide Defendants with notice that they had thirty calendar days in which to remove the subject sign structures, as set forth in Section 16-109(a)(2). Consequently, the County never issued Defendants a valid compliance order adhering to the requirements of Section 16-109(a)(2). For violations such as those alleged in the instant case, Section 16-109(c) of the ordinance does not allow the County to impose a civil penalty until the violator has been provided with due notice *and* order. Here, Defendants were never issued a proper violation notice followed by a proper compliance order in the manner set forth in the ordinance. In addition, the County filed the complaint in the instant action before the expiration of the thirty-day period in which Defendants had a right to appeal from the violation notice letter. This right to appeal is provided in the ordinance and was set forth in the 26 August 1999 violation notice letter received by Defendants. In sum, the record reveals several ways in which the County failed to follow the procedural safeguards for administration and enforcement set forth in the ordinance.

Although the County was authorized under N.C.G.S. § 153A-123 to collect a civil penalty for violation of the terms of the ordinance, it was also required to follow the notice procedures set forth in the ordinance and this it did not do. In *Lee v. Simpson*, 44 N.C. App. 611, 261 S.E.2d 295 (1980), this Court, in striking down a zoning amendment enacted by the Union County Board of Commissioners, wrote:

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“The procedural rules of an administrative agency ‘are binding upon the agency which enacts them as well as upon the public To be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken, particularly those designed to provide procedural safeguards for fundamental rights.’ ”

Id. at 612, 261 S.E.2d at 296 (citations omitted). Due to the County’s failure to strictly adhere to the ordinance’s enforcement provisions, we conclude that the civil penalty assessed against Defendants cannot stand.

Having ruled in favor of Defendants on this assignment of error, we need not address Defendants’ remaining assignments of error.

In summary, we hold that enactment of the Transylvania County Sign Control Ordinance was a valid exercise of the general police power under N.C.G.S. § 153A-121 and that the ordinance does not violate due process or equal protection. Thus, the order of abatement and permanent injunction entered by the trial court is affirmed. However, the civil penalty assessed against Defendants must be vacated due to the County’s failure to follow the enforcement provisions set forth in the ordinance.

Affirmed in part and vacated in part.

Judges GREENE and McGEE concur.

BARBARA SLOAN, PLAINTIFF v. FREDERICK SLOAN, DEFENDANT

No. COA01-1276

(Filed 16 July 2002)

**1. Jurisdiction— subject matter—domestic relations—
bankruptcy**

The trial court did not lack subject matter jurisdiction to order defendant to pay the equity line secured against the marital residence in its alimony and equitable distribution order filed 24 May 2002 even though defendant filed a Chapter 7 proceeding in bankruptcy court on 25 August 1999, because: (1) the dischargeability of defendant’s debts was not challenged and the question

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here involves the trial court's authority to vacate the permanent order regarding alimony and equitable distribution, and to modify a previous order concerning alimony pendente lite; and (2) it is well-established that our General Assembly has specifically conferred on the district court division subject matter jurisdiction over domestic relations cases under N.C.G.S. § 7A-244.

2. Civil Procedure— Rule 60 motion—notice

The trial court did not abuse its discretion by setting aside the 1 September 1998 order for permanent alimony and equitable distribution under N.C.G.S. § 1A-1, Rule 60(b) even though defendant contends plaintiff was required to give defendant five days' notice of a hearing for a Rule 60 motion pursuant to N.C.G.S. § 1A-1, Rule 6(d), because: (1) any objection based on lack of notice was deemed waived since defendant may not assert alleged error below for the first time on appeal; (2) this form of motion is clearly permitted and is not subject to the actual notice requirement of Rule 6(d); and (3) defendant's silence as to the existence of the debt on the marital home would serve as specific grounds to set aside the order and would serve as appropriate grounds to set aside the dismissal of plaintiff's permanent alimony claim.

3. Divorce— alimony—modification—notice—change of circumstances

The trial court did not err by modifying the 1 May 1988 order for alimony pendente lite even though defendant contends that there was no motion to modify the alimony and that he never received notice of a hearing for a motion to modify alimony or alimony pendente lite, because: (1) defendant had constructive notice of plaintiff's motion for modification of the alimony pendente lite, actual notice was not required, and defendant's assignment of error based on lack of notice is deemed waived; (2) defendant's debt and subsequent discharge in bankruptcy constitutes a change in circumstances warranting modification; and (3) the trial court may direct payments to a third party as an award of alimony or alimony pendente lite.

4. Contempt— civil—willfulness—competent evidence

The trial court did not err by finding defendant husband in willful contempt in its order filed 15 May 2001 based on defendant's failure to pay the equity line debt to BB&T as alimony pendente lite, because the trial court's findings of defendant's ability

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to pay the debt and willful failure to pay are supported by competent evidence including evidence that defendant works but has not taken a salary so as not to pay the indebtedness.

Appeal by defendant from contempt order entered 15 May 2001 by Judge Elizabeth Keever in Cumberland County District Court. Heard in the Court of Appeals 13 June 2002.

Parish, Cooke, Boose & Bullard, by James H. Cooke, for plaintiff-appellee.

Marshall, Dubree & Taylor, by Travis R. Taylor, for defendant-appellant.

TYSON, Judge.

I. Facts

Barbara Sloan (“plaintiff”) married Frederick Sloan (“defendant”) on 31 April 1978. The parties separated on 7 August 1993 and divorced on 17 November 1995. On 18 May 1994, plaintiff filed a complaint seeking alimony, alimony *pendente lite*, custody of the minor child, child support, equitable distribution, and a restraining order preventing the disposal or encumbrance of the marital property. An *ex parte* order was entered on 18 May 1994 awarding plaintiff temporary custody of the minor child, child support, exclusive possession of the marital home, and a restraining order. On 31 May 1994, an *ex parte* order was entered extending the previous order.

The parties entered into a consent order on 13 October 1994 for alimony *pendente lite*. Pursuant to that consent order, the parties stipulated that plaintiff was entitled to an award of alimony *pendente lite*; that they would work together to refinance the mortgage payment on the marital home; and that defendant would pay the outstanding marital debts except: (1) health insurance covering defendant, (2) car payment on the 1993 Oldsmobile, and (3) all utilities on the marital residence.

On 22 October 1998, *nunc pro tunc* 1 September 1998, an order was entered regarding permanent alimony, equitable distribution, contempt of court, and a motion to decrease alimony. The order in pertinent part awarded: (1) the marital home to plaintiff with plaintiff to assume all indebtedness, taxes, and insurance owed on the property, and (2) \$2,000 to plaintiff as full and final settlement for any past due temporary alimony and for permanent alimony.

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Plaintiff filed a Motion in the Cause on 17 September 1999 for enforcement of a prior order, alleging that defendant willfully failed and refused to abide by the terms of the parties' consent order by continuing use of the parties' equity line, incurring a debt of \$40,000, and failing to pay the debt, causing foreclosure notice to be served on plaintiff. An Order to Show Cause was entered against defendant which was heard on 19 April 2000.

At the hearing, plaintiff moved to treat the Motion in the Cause for Contempt as a motion pursuant to Rule 60 of the North Carolina Rules of Civil Procedure and to set aside the previous order of equitable distribution and permanent alimony based on Rule 60(b)(1) mistake and excusable neglect, as well as Rule 60(b)(6) fundamental fairness. In an order filed 24 May 2000, the trial court granted plaintiff's Rule 60 motion and set aside the previous order of 1 September 1998. The trial court also granted plaintiff's motion to modify alimony and entered: (1) an Order of Interim Alimony *Pendente Lite*, ordering defendant to pay as alimony *pendente lite* the obligation owed by plaintiff on the equity line, secured against the marital residence, and (2) an Order of Interim Equitable Distribution, awarding plaintiff exclusive ownership of the parties rental property, located in Cumberland County, for the purpose of sale of said property.

On 30 March 2001, plaintiff filed a Motion in the Cause for enforcement of the 24 May 2000 order, alleging that defendant willfully failed to pay the equity line payments as alimony *pendente lite*. An Order to Show Cause was entered against defendant which was heard on 26 April 2001. In an order filed 15 May 2001, defendant was found in willful contempt for failure to abide by the terms of the previous order filed 24 May 2000. Defendant appeals.

II. Issues

The issues presented are whether: (1) the trial court had subject matter jurisdiction to order defendant to pay the equity line secured against the marital residence in its order filed 24 May 2000, (2) the trial court erred in setting aside the 1 September 1998 order for permanent alimony and equitable distribution pursuant to Rule 60(b), (3) the trial court erred in modifying the 1 September 1998 order for alimony *pendente lite*, (4) the trial court erred in finding defendant in willful contempt in its order filed 15 May 2001, and (5) the findings of fact in the contempt order filed 15 May 2001 and order filed 24 May 2000 are supported by competent evidence. We affirm.

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III. Subject Matter Jurisdiction

[1] Defendant argues that the trial court lacked subject matter jurisdiction to order him to pay the equity line debt. Defendant filed a Chapter 7 proceeding in bankruptcy court on 25 August 1999. Defendant listed Branch Banking and Trust Company (“BB&T”) as a creditor. On 4 January 2000, defendant was discharged of his obligation to BB&T. Defendant contends that his discharge for the BB&T obligation divested the trial court of subject matter jurisdiction related to his liability on that debt. This argument is without merit.

In the present case, the dischargeability of defendant’s debts was not challenged. The question here involves the trial court’s authority to vacate the permanent order regarding alimony and equitable distribution, and modify a previous order concerning alimony *pendente lite*. It is well established that our General Assembly has specifically conferred on the district court division subject matter jurisdiction over domestic relations cases, N.C. Gen. Stat. § 7A-244 (2001), and we conclude that the district court had subject matter jurisdiction over the domestic orders entered in this case.

IV. Rule 60(b) Motion

[2] Initially, defendant argues that the trial court erred in transforming a Motion in the Cause for Contempt to a Rule 60(b) motion to set aside the judgment. Defendant contends that he did not receive proper notice of a hearing for a Rule 60(b) motion or a motion to modify alimony. We disagree.

N.C.G.S. 1A-1, Rule 60, “Relief from judgment or order” provides that “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding” for the reasons specified in the rule, such as “[m]istake, inadvertence, surprise or excusable neglect.” N.C. Gen. Stat. § 1A-1, Rule 60(b)(1) (2001). The court may also grant relief for “[a]ny other reason justifying relief from the operation of the judgment.” N.C. Gen. Stat. § 1A-1, Rule 60(b)(6) (2001). “The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. *Id.*”

Rule 60(b) makes no express provisions for the manner in which a motion thereunder must be served. Furthermore, it does not pro-

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vide that notice be given to any party. Defendant contends that plaintiff was required to give him five days notice of a hearing for a Rule 60 motion pursuant to Rule 6(d) of the North Carolina Rules of Civil Procedure. This argument is without merit.

The record reveals that during the hearing on the Motion in the Cause for Contempt, plaintiff requested the district court to consider the motion as a Rule 60 motion, and set aside the permanent alimony and equitable distribution order pursuant to Rule 60(b). Defendant and his attorney were present, participated in the hearing, and did not object to the motion or deficient notice. Accordingly, any objection based on lack of notice is deemed waived because defendant may not assert alleged error below for the first time on appeal. N.C.R. App. P. 10(b)(1) (2001); *see also Dobos v. Dobos*, 111 N.C. App. 222, 226, 431 S.E.2d 861, 863 (1993), *rev'd on other grounds, Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).

Additionally, this form of motion is clearly permitted and is not subject to the actual notice requirement of Rule 6(d) contended by defendant. *See Wood v. Wood*, 297 N.C. 1, 5-6, 252 S.E.2d 799, 801-02 (1979) (defendant was charged with constructive notice of plaintiff's motion for relief from the judgment entered in the action and actual notice to defendant was not required, where during defendant's motion seeking termination of alimony, plaintiff orally moved to vacate the divorce judgment).

Defendant also argues that the trial court abused its discretion in setting aside the prior order pursuant to Rule 60(b). Defendant contends that the record does not support setting aside the order. We disagree.

Rule 60(b) has been described as "a grand reservoir of equitable power to do justice in a particular case." *Branch Banking & Trust Co. v. Tucker*, 131 N.C. App. 132, 137, 505 S.E.2d 179, 182 (1998) (citation omitted). The decision whether to grant relief under Rule 60(b) "is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). Our Supreme Court has stated that this Court should not disturb a discretionary ruling of a trial court unless it "probably amounted to a substantial miscarriage of justice," *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982), or that the challenged actions "are manifestly unsupported by reason," *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980).

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At bar, the trial court set aside the previous order pursuant to Rule 60(b)(1) and Rule 60(b)(6). Rule 60(b)(1) provides that a party may be granted relief from a judgment or order for “[m]istake, inadvertence, surprise, or excusable neglect” N.C. Gen. Stat. § 1A-1, Rule 60(b)(1). Rule 60(b)(1) motions must be filed within one year. N.C. Gen. Stat. § 1A-1, Rule 60(b)(6). Since this motion was not raised within one year it was untimely.

On the other hand, Rule 60(b)(6) provides relief from a judgment or order for “any reason justifying relief from the operation of the judgment.” *Id.* Timing under Rule 60(b)(6) requires the motion to be made within a reasonable time. *Id.* “What constitutes a reasonable time depends on the circumstances of the individual case.” *McGinnis v. Robinson*, 43 N.C. App. 1, 8, 258 S.E.2d 84, 88 (1979) (citation omitted). Plaintiff testified that she learned of the subsequent balance owed on the equity line in August of 1999 when BB&T informed her that they were instituting a foreclosure action. Plaintiff filed a Motion in the Cause for Contempt on 17 September 1999. The hearing, which was originally scheduled for 8 November 1999, was held 19 April 2000. We conclude that plaintiff acted within a reasonable time on the facts of this case.

A trial court cannot set aside a judgment or order pursuant to Rule 60(b)(6) without a showing: (1) that extraordinary circumstances exist and (2) that justice demands relief. *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987).

Here, defendant admitted in his Response to the Motion in the Cause for Contempt that the parties refinanced the marital home pursuant to a consent order paying off the equity line to BB&T, that he subsequently borrowed against the line of credit, and that he paid on the line of credit until March of 1999. During the hearing, defendant acknowledged that he was asked at the equitable distribution hearing about other debts and that he failed to inform the court that he borrowed against the equity line. This evidence supports the trial court’s conclusion that defendant’s silence as to the existence of the debt on the marital home “would serve as specific grounds to set aside the Order entered on September 1, 1998” and “serve as appropriate grounds to set aside the dismissal of Plaintiff’s permanent alimony claim” pursuant to Rule 60(b)(6). These assignments of error are overruled.

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V. Modification of Alimony

Defendant correctly states that the standard to modify alimony or alimony *pendente lite* is a motion in the cause and a showing of changed circumstances. N.C. Gen. Stat. § 50-16.9(a) (2001). “To determine whether a change of circumstances under [N.C.]G.S. 50-16.9 has occurred, it is necessary to refer to the circumstances or factors used in the original determination of the amount of alimony awarded under [N.C.]G.S. 50-16.5.” *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982).

[3] Defendant initially argues that there was no motion to modify the alimony and that he never received notice of a hearing for a motion to modify alimony or alimony *pendente lite*. This argument is without merit.

In the instant case, plaintiff requested the trial court to consider her Motion in the Cause for Contempt as a Rule 60 motion and a motion to “reinstate the alimony” or modify the alimony *pendente lite* which she had previously waived. Defendant and his attorney were present, participated in the hearing, and did not object to the motion or deficient notice. For the reasons previously stated, we conclude that defendant had constructive notice of plaintiff’s motion for modification of the alimony *pendente lite*, that actual notice to defendant was not required, and that defendant’s assignment of error based on lack of notice is deemed waived.

Defendant further contends, without supporting argument, that the evidence does not show a substantial change in circumstances to support the trial court’s modification and reinstatement of alimony *pendente lite*. We disagree.

Other courts have found that a discharge in bankruptcy constitutes a “change in circumstances” warranting reconsideration or modification of an alimony or child support award. *See In re Danley*, 14 B.R. 493 (Bankr. D.N.M. 1981) (bankruptcy discharge of husband resulted in change in financial condition of wife, who was required to make payment of discharged debts); *Kruse v. Kruse*, 464 N.E.2d 934 (Ind. Ct. App. 1984) (husband’s discharge of second mortgage on house, which resulted in foreclosure, constituted a substantial change of circumstances for modification of child support); *In re Zick*, 123 B.R. 825 (Bankr. E.D. Wis. 1990) (state court may find that debtor’s discharge in bankruptcy constitutes a change of circumstances warranting an increase in maintenance or support); *see also*

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Eckert v. Eckert, 424 N.W.2d 759 (Wis. Ct. App. 1988); *Myers v. Myers*, 773 P.2d 118 (Was. Ct. App. 1989); *Hopkins v. Hopkins*, 487 A.2d 500 (R.I. 1985). We join these courts and hold that a discharge in bankruptcy can constitute a “change in circumstances” warranting reconsideration or modification of an alimony or child support award.

Here, defendant entered a consent order to refinance the liens on the marital residence and consolidate those debts into one obligation. Defendant was ordered not to dispose of or encumber the marital assets. Defendant admitted in his Response to the Motion in the Cause for Contempt that he subsequently borrowed against the lien, and that he paid on the lien until March of 1999. Defendant filed a Chapter 7 bankruptcy proceeding and was subsequently discharged from the BB&T obligation. As a result, BB&T began foreclosure proceedings against the marital residence. Pursuant to the equitable distribution order, plaintiff was granted exclusive ownership of the marital residence and became obligated for the debts and encumbrances on the residence. Plaintiff has become liable for the debt incurred by defendant. There is little doubt that defendant’s debt and subsequent discharge has affected a substantial change.

Defendant argues that the order requiring him to pay alimony *pendente lite* directly to the lien holder and not to plaintiff is an improper assignment of the debt for which he was discharged. We disagree.

This same issue was addressed by the Rhode Island Supreme Court which held that the ordering of payment to a third party is the equivalent to a decree for alimony. *Hopkins*, 487 A.2d 500, 504. The court in *Hopkins* stated:

[i]n looking behind the terms of a divorce decree, it is obvious that by ordering payment to a third party in lieu of alimony, state courts intend, in fact, an award of alimony to the spouse measured by the amount of such debt or the monthly payments of such debt. The court, in effect, is ordering an amount of alimony paid to the ex-spouse, but authorizing the payment of same to be made to a creditor.

Id. (quoting *In re Dirks*, 15 B.R. 775, 780 (D.N.M. 1981) (emphasis in original). We agree with these courts and hold that the trial court may direct payments to a third party as an award of alimony or alimony *pendente lite*. These assignments of error are overruled.

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VI. Contempt Order

[4] Defendant contends that the trial court erroneously held him in contempt for failure to pay the equity line debt to BB&T as alimony *pendente lite*, in violation of an order filed 24 May 2000. Defendant argues that his actions were not willful and that he did not have the ability to comply with the order.

In reviewing a trial court's contempt order, the appellate court is limited to determining whether there is competent evidence to support the trial court's findings of fact and whether the findings of fact support the conclusions of law. *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986).

Here, defendant's current wife testified that she is president of F.M. Sloan Associates, Inc., insurance agency; that defendant is vice-president; that defendant works regularly for the agency; and that due to a notification from the Internal Revenue Service to garnish defendant's wages, defendant has not taken a salary so as not to pay the indebtedness. Defendant's wife also testified that she receives a weekly salary of \$650, that she received a profit of \$15,000, that the agency hired a third employee at a salary of \$400 per week, and that the agency pays defendant's medical bills and \$1,213.42 per month on their marital residence. The trial court's findings of defendant's ability to pay the debt and willful failure to pay are clearly supported by the evidence. *See Frank v. Glanville*, 45 N.C. App. 313, 262 S.E.2d 677 (1980) (a person may be guilty of civil contempt if he could take a job which would enable him to make the payments and he fails to do so). These assignments of error are overruled.

VII. Competent Evidence

Defendant argues that the findings of fact in the contempt order are not supported by competent evidence. Defendant also attempts to argue that the findings of fact in the 24 May 2000 order modifying the alimony *pendente lite* and equitable distribution award are not supported by competent evidence. Defendant failed to appeal from this order and fails to present any supporting argument for his contention. Thus we do not address those assignments of error relating to the 24 May 2000 order. N.C.R. App. P. 28(a) (2001).

With respect to the contempt order, defendant seems to contend that there were two debts against the marital home, thus the trial court's finding that plaintiff "was further directed to assume respon-

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sibility for and pay for what was believed to be the sole indebtedness owing on the marital residence” is not supported by competent evidence. We disagree.

Plaintiff testified that the parties had refinanced the marital home and that she paid what she believed to be the sole indebtedness against the property. Defendant admitted that he subsequently incurred additional debt on the equity line without informing plaintiff or the trial court, and paid on the debt until March of 1999.

Additionally, defendant raises the same argument that the findings of willfulness and ability to pay the alimony *pendente lite* are not supported by competent evidence. We have already concluded that the evidence supported these findings by the trial court, therefore, they are conclusive on appeal. *See Cornelison v. Cornelison*, 47 N.C. App. 91, 93, 266 S.E.2d 707, 709 (1980).

VIII. Conclusion

In summary, we hold that the trial court had jurisdiction over the domestic orders, we affirm the trial court’s 24 May 2000 decision to set aside the previous order pursuant to Rule 60(b) and modifying the alimony *pendente lite* award based on substantial change of circumstances, and we affirm the trial court’s 15 May 2001 civil contempt order.

Affirmed.

Judges MARTIN and THOMAS concur.

IN RE ADOPTION OF CUNNINGHAM

[151 N.C. App. 410 (2002)]

IN THE MATTER OF THE ADOPTION OF RUSSELL CLAYTON CUNNINGHAM BY
RICHARD ALLEN CUNNINGHAM, MICHELLE LEA CLINE CUNNINGHAM,
PETITIONERS

IN THE MATTER OF THE ADOPTION OF SHAWN ALLEN CUNNINGHAM BY
RICHARD ALLEN CUNNINGHAM, MICHELLE LEA CLINE CUNNINGHAM,
PETITIONERS

IN THE MATTER OF THE ADOPTION OF MEREDITH CHAREE CUNNINGHAM BY
RICHARD ALLEN CUNNINGHAM, MICHELLE LEA CLINE CUNNINGHAM,
PETITIONERS

No. COA01-1106

(Filed 16 July 2002)

1. Adoption— DSS consent—not acknowledged or filed

The trial court's conclusion that DSS had not consented to adoptions was supported by the findings. Although there was conflicting evidence as to whether consent forms had been prepared and signed, there was no evidence that they had been acknowledged under oath or filed as required by statute.

2. Adoption— petitions—court's authority to dismiss—best interests of child

The trial court had full statutory authority to dismiss petitions for adoption based on the best interests of the children regardless of whether DSS had previously consented to the adoptions.

3. Adoption— best interests of the children—physical discipline and verbal abuse

On a petition for adoption, the evidence supported the trial court's findings of verbal abuse and physical discipline, and the findings supported the court's conclusions that adoption would not be in the best interests of the children.

4. Adoption— denial—propriety of certain evidence—sufficiency of other evidence

Even assuming that evidence of the abuse of other children should not have been admitted in an adoption proceeding, other testimony fully supported the critical findings and the court's ultimate denial of the petitions.

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5. Evidence— adoption—juvenile and mental health files of other children

There was no error in an adoption proceeding in the exclusion of the juvenile and mental health files of foster children who were verbally abused and physically disciplined by petitioners where petitioners failed to show precisely how such evidence would have influenced the trial court's decision. Evidence of favorable treatment of the children would not have negated the plenary evidence of neglect offered during the hearing, and speculation that the files might contain evidence pertaining to veracity is insufficient.

Appeal by petitioners from an order entered 30 March 2001 by Judge Jackie Lee in Harnett County District Court. Heard in the Court of Appeals 5 June 2002.

Jones and Jones, P.L.L.C., by Cecil B. Jones, for petitioner-appellants.

Morgan, Reeves & Gilchrist, by C. Winston Gilchrist, for respondent-appellee Harnett County Department of Social Services.

Harrington, Ward, Gilleland, and Winstead, L.L.P., by Eddie S. Winstead, III, for appellee Guardian Ad Litem.

HUNTER, Judge.

Richard Allen Cunningham and Michelle Lea Cline Cunningham ("petitioners") appeal the trial court's "Order Dismissing Adoption Petitions" entered 30 March 2001 ("the Order"). We affirm.

Petitioners filed petitions for the adoption of three minor children: Russell Clayton Cunningham ("Clayton"), Shawn Allen Cunningham ("Shawn"), and Meredith Charee Cunningham ("Charee"), in accordance with Article 2 ("General Adoption Procedure") of Chapter 48 ("Adoptions") of our General Statutes. The Harnett County Department of Social Services ("DSS"), the agency which had placed the three minor children with petitioners, filed a "Motion to Dismiss Petition for Adoption" for each of the three minor children. The guardian *ad litem* for the three minor children filed a "Motion to Dismiss" in response to each of the three adoption petitions.

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Petitioners filed three motions requesting orders dispensing with the requirement that consent be given by DSS. *See* N.C. Gen. Stat. § 48-3-603(b)(1) (2001) (“[t]he court may issue an order dispensing with the consent of . . . an agency that placed the minor upon a finding that the consent is being withheld contrary to the best interest of the minor”). Petitioners also filed a “Reply to Motion to Dismiss” in response to the motions to dismiss filed by DSS, alleging that DSS had previously consented to the adoption of each of the three minor children. Finally, petitioners filed a “Reply to Motion to Dismiss” in response to the motions to dismiss filed by the guardian *ad litem*. The three cases were transferred to district court for a hearing on the motions by orders of the clerk of court.

Following a hearing on the motions, the trial court entered an “Order Dismissing Adoption Petitions.” The trial court found and concluded: (1) that petitioners had not offered competent evidence that DSS had executed written consent for adoption by petitioners in accordance with N.C. Gen. Stat. § 48-3-605(d) (2001); (2) that DSS had removed the three minor children from petitioners’ home on 28 August 2000 following a report by petitioners’ neighbor that Mr. Cunningham had verbally assailed and physically assaulted a foster child living in petitioners’ home; (3) that the petitioners’ home environment would be injurious to the physical and emotional well-being of the three minor children; and (4) that adoption by petitioners would not be in the best interests of the three minor children. Thus, the trial court: (1) denied petitioners’ motions to dispense with the requirement that DSS consent to the adoptions; (2) granted the motions by DSS and the guardian *ad litem* to dismiss the petitions to adopt; and (3) ordered that DSS retain physical and legal custody of the three minor children. Petitioners appeal.

On appeal, petitioners have raised forty-one assignments of error. Seven of these are not raised in petitioners’ appellate brief and are therefore deemed abandoned. N.C.R. App. P. 28(b)(6). The remaining assignments of error are condensed into the following three issues: (1) whether the trial court erred in concluding that DSS did not consent to the adoption of the three minor children by petitioners; (2) whether the trial court’s findings are supported by competent evidence and whether the findings support the legal conclusions; and (3) whether the trial court erred in admitting certain evidence and refusing to admit certain other evidence.

Initially, we note that adoption proceedings are “heard by the court without a jury.” N.C. Gen. Stat. § 48-2-202 (2001). “Our scope of

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review, when the Court plays such a dual role, is to determine whether there was competent evidence to support its findings of fact and whether its conclusions of law were proper in light of such facts.” *In re Norris*, 65 N.C. App. 269, 275, 310 S.E.2d 25, 29 (1983), *cert. denied*, 310 N.C. 744, 315 S.E.2d 703 (1984).

I.

[1] Petitioners first argue that the trial court’s order is reversible because the trial court erred in finding that petitioners offered “[n]o competent evidence” that DSS had “executed a written consent for Petitioners to adopt the children in question in compliance with [N.C. Gen. Stat. §] 48-3-605(d),” and because the trial court erred in concluding that “DSS did not consent to the adoption of the children.” We disagree.

Pursuant to N.C. Gen. Stat. § 48-3-601(3)(a) (2001), in all cases in which an agency has placed the minor for adoption, the agency must give its consent to a petition to adopt (unless consent is not required under N.C. Gen. Stat. § 48-3-603). Specifically, consent by an agency must be “executed by the executive head or another authorized employee” of the agency, and “must be signed and acknowledged under oath in the presence of an individual authorized to administer oaths or take acknowledgments.” N.C. Gen. Stat. § 48-3-605(d). Here, although there was conflicting testimony at the hearing as to whether consent forms had been prepared and signed by DSS, there was no evidence that any prepared and signed consent forms were acknowledged under oath. Thus, the trial court’s specific finding that there was no competent evidence that DSS had “executed a written consent for Petitioners to adopt the children in question in compliance with [N.C. Gen. Stat. §] 48-3-605(d),” is supported by the evidence.

Moreover, the statutory scheme mandates that, “[a]t the time the petition is filed, the petitioner shall file or cause to be filed . . . [a]ny required consent . . . that has been executed,” N.C. Gen. Stat. § 48-2-305(2) (2001), and further mandates that, before granting an adoption petition, the court must make a finding that “[e]ach necessary consent . . . has been obtained and filed with the court,” N.C. Gen. Stat. § 48-2-603(a)(4) (2001). There is no evidence in the record that petitioners filed or caused to be filed any executed consent forms from DSS at the time the petitions were filed, or at any time thereafter. In fact, petitioners have not assigned error to the trial court’s finding that “[n]o written consent executed by DSS was filed or caused to be filed by the Petitioners pursuant to N.C. Gen.

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Stat. [§] 48-2-305[(2)] at the time the adoption petitions were filed.” We hold that the trial court’s conclusion that DSS did not consent to the adoptions was supported by the findings.

[2] Even assuming *arguendo* that the evidence established that DSS had executed consent to the adoptions, and that petitioners had filed or caused to be filed executed consent forms by DSS, the trial court’s ultimate determination to dismiss petitioners’ petitions for adoption would not be reversible on this basis. One of the primary purposes of Chapter 48 of our General Statutes is “protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing.” N.C. Gen. Stat. § 48-1-100(b)(1) (2001). More specifically, N.C. Gen. Stat. § 48-3-502(b) (2001) provides:

Before a decree of adoption becomes final, the agency may for cause petition the court to dismiss the adoption proceeding and to restore full legal and physical custody of the minor to the agency; and the court may grant the petition on finding that it is in the best interest of the minor.

N.C. Gen. Stat. § 48-3-502(b). Moreover, N.C. Gen. Stat. § 48-2-604(a) (2001) provides:

If at any time between the filing of a petition to adopt a minor and the issuance of the final order completing the adoption it appears to the court that the minor should not be adopted by the petitioners or the petition should be dismissed for some other reason, the court may dismiss the proceeding.

N.C. Gen. Stat. § 48-2-604(a). Thus, the trial court had full statutory authority to dismiss the petitions for adoption based on the best interests of the three minor children regardless of whether DSS had previously consented to the adoptions. This assignment of error is overruled.

II.

[3] Petitioners next argue that certain findings were not supported by competent evidence, and that certain conclusions were not supported by the findings. We have carefully reviewed the record and the assignments of error, and have determined that it is not necessary to address each and every one of petitioners’ assignments of error concerning the trial court’s numerous findings and conclusions. This is because we believe the testimony described in detail below fully supports certain critical findings by the trial court (also set forth below),

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and that these findings fully support the trial court's conclusion of law that adoption by petitioners would not be in the best interests of the three minor children.

Art McRoberts testified that on 27 August 2000 he witnessed Mr. Cunningham, who was "out of control," cursing at a boy, later identified as Charlie, on his property, using the words "fuck" and "fucker." He turned away and, when he looked back, he saw Charlie on the ground. Mr. Cunningham continued to scream at Charlie, and kicked Charlie in his side with the toe of his shoe at least three times. Mr. McRoberts subsequently reported the incident to DSS.

Gail Langford, a child protective services investigator for Wake County Department of Human Services, testified as follows. Following Mr. McRoberts' neglect report filed against petitioners on 27 August 2000 pertaining to the incident involving Charlie, Ms. Langford conducted an investigation in order to determine whether the neglect allegation could be substantiated. Ms. Langford conducted interviews with: the four foster children who were placed with petitioners at that time (Charlie, Clayton, Shawn, and Charee); three children who had previously resided with petitioners (Danielle, Cherokee, and Tonya); petitioners; Mr. McRoberts; and an additional neighbor. Ms. Langford documented the results of her investigation in a report, which report was admitted in evidence over petitioners' objection on the grounds of hearsay. Petitioners do not assign error to the admission of Ms. Langford's testimony, or her report, on appeal.

Ms. Langford testified that Charlie told her the following about the 27 August 2000 incident. Petitioners had been upset with Charlie because he had eaten some of Mr. Cunningham's cereal, did not put some clothes away, and left a dirty bowl in his bedroom. Mr. Cunningham said to Charlie, "[g]et out of my face, get out of my house, go out the door. Don't come back." Charlie left the house and Mr. Cunningham followed him and yelled, "[m]otherfucker, get back inside." As Charlie was walking back to the house, he tripped and fell. Mr. Cunningham "nudged . . ." Charlie with his foot three times, twice on Charlie's side and once on Charlie's thigh. Mr. Cunningham pulled him up by both arms, held one of Charlie's arms, and directed him to the garage. Charlie also added that Mr. Cunningham was very angry that morning and had "ripped the Nintendo wires from the television set" because Clayton was not getting ready for church.

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Ms. Langford testified that Clayton told her that Mr. Cunningham had pushed Charlie down, and that he saw Mr. Cunningham “kick Charlie one time.” Clayton also told her that Mr. Cunningham had kicked Charlie before. Ms. Langford testified that Mr. Cunningham told her that he had grabbed for Charlie’s arm, had accidentally hit him in the side causing Charlie to fall to the ground, and had nudged Charlie once with the side of his shoe while saying, “‘[g]et in the house.’” Ms. Cunningham told Ms. Langford that she saw Mr. Cunningham administer “several short kicks of about 12 inches with the toe of the shoe.” Ms. Cunningham’s testimony was consistent with the testimony of Mr. McRoberts who had witnessed the incident.

Ms. Langford also testified to the following: that Danielle and Cherokee told her that, on one occasion, Mr. Cunningham had told Cherokee to leave the table because she would not eat her potatoes, and that as she walked up the stairs, he followed her “kicking her up the stairs, his foot on her buttocks as she went up the stairs”; that on this occasion, Mr. Cunningham followed her upstairs to the bathroom, slammed the door, put his hand on her neck and yelled at her; that Cherokee told her that Mr. Cunningham, on one occasion, “told Cecily to shut up and he kicked her”; that Jacob told her that Mr. Cunningham had kicked him on one occasion while Jacob was lying on the floor; that Charlie told her that petitioners had made Cherokee “swish vinegar in her mouth” because she had not told petitioners that she had wet her bed; that Cherokee told her Mr. Cunningham had spanked her on one occasion causing her to wet the bed, and that she was then made to sleep in her wet pants and on the wet sheets; that Charlie and Danielle told her that Mr. Cunningham had slapped Charlie in the face on one occasion; that Charlie, Cherokee and Danielle told her that Mr. Cunningham had spanked Charlie with a belt occasionally; that Shawn told her that he had been spanked once; that Charlie, Shawn and Charee told her that Clayton had been “popped with a hand on his buttocks”; that Clayton told her Mr. Cunningham had “hit him on his buttocks with a belt,” and Ms. Cunningham spanked him with her hand.

Ms. Langford further testified that petitioners acknowledged that Mr. Cunningham had a temper and often lost his temper and sometimes cursed at the children, and that they spanked the children with their hands and with a belt, but that petitioners contended they had not done so since DSS had changed their policy to prohibit physical discipline. Ms. Langford testified that Charlie told her that he tends to cry when he sees his biological family, and that Mr. Cunningham

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“calls him a baby or a girl if he cries.” She also testified: that Clayton told her Mr. Cunningham had pushed Ms. Cunningham in the kitchen causing her to fall and cut her knee; that Danielle told her that Mr. Cunningham yells and curses at Ms. Cunningham; that Charlie told her that he has heard Mr. Cunningham call Ms. Cunningham a “fuck-ing bitch”; and that Mr. Cunningham admitted to calling his wife “a bitch.”

After completing her investigation, Ms. Langford met with five other staff members from her organization and together they unanimously concluded that there was sufficient evidence to substantiate allegations of neglect for improper supervision specifically as to the incident involving Charlie, and neglect for injurious environment as to Charlie, Clayton, Shawn and Charee.

Petitioners have not challenged the admission of the testimony offered by Mr. McRoberts or Ms. Langford on appeal, which testimony fully supports the following critical findings by the trial court:

8. On August 27, 2000, Art McRoberts . . . observed [Mr. Cunningham] yelling and cursing at Charlie America, a thirteen year old foster child then living in the Cunningham home. [Mr. Cunningham] used the terms “fuck” and “fucker” toward Charlie . . . [and was] out of control with anger. . . . Mr. McRoberts . . . saw Charlie . . . lying on the ground. [Mr.] Cunningham then kicked or nudged Charlie . . . with the toe of his shoe between three and six times. . . . [Mr. McRoberts’] testimony in open court regarding the incident . . . was credible.
. . .
12. Petitioners admitted that [Mr.] Cunningham used his foot against Charlie . . . while Charlie was on the ground [Mr.] Cunningham’s use of his foot to discipline Charlie was inappropriate.
. . .
14. An investigation on behalf of DSS substantiated an allegation of neglect for improper discipline as to Petitioners because of the incident reported by [Mr.] McRoberts. An allegation of environment injurious to the well-being of [the] children was also substantiated as to Petitioners’ home.
15. It was not unusual for [Mr.] Cunningham to lose his temper with foster children and become enraged.

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16. [Mr.] Cunningham kicked foster children before the August 27 incident.
17. [Mr.] Cunningham has yelled and cursed at Shawn . . . and Charee . . . while they were foster children in his care. [Mr.] Cunningham has also yelled and cursed at Clayton
18. Petitioners . . . have used physical discipline, including whipping with a belt, on foster children in their home
19. Petitioners . . . have used other inappropriate forms of discipline for foster children, including requiring children to hold vinegar in their mouths.
20. At least one episode of domestic violence has occurred in Petitioners' home. Specifically, [Mr.] Cunningham pushed [Ms.] Cunningham down in their kitchen during an argument. [Ms.] Cunningham hurt her knee as a result of this episode, which was observed by Clayton
- . . .
22. [Mr.] Cunningham's temper and history of using improper physical force against children and against his wife creates a substantial danger that future physical and emotional harm could occur to children living in the Cunningham household. . . .
23. The attitude and conduct of Petitioners with respect to physical discipline, domestic violence and verbal abuse toward foster children in their care demonstrates a lack of understanding by Petitioners of appropriate parenting skills. . . .

We hold that these findings are supported by competent evidence in the record, and that they support the trial court's conclusion that adoption by petitioners would not be in the best interests of the three minor children. For this reason, we need not reach petitioners' numerous other assignments of error as to various other findings by the trial court, since reversal would not be warranted even if such other findings were not supported by competent evidence in the record.

III.

[4] Finally, petitioners argue that the trial court erred in admitting certain evidence and refusing to admit certain other evidence. Petitioners assign error to the trial court's admission of: (1) certain

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testimony by Anne Verdin, an adoption worker employed by DSS, on the grounds that the testimony constituted hearsay, and that Ms. Verdin lacked sufficient personal knowledge and was not qualified as an expert; (2) a report regarding a foster child named Jacob, and accompanying photographs of Jacob's bruises, which formed the basis of a complaint filed against petitioners in April 1996 alleging that Jacob had been abused, on the grounds that the report contained hearsay and no foundation was established for admission of the photographs; (3) testimony by Dr. Vivian Denise Everett, director of the Child Sexual Abuse Team at Wake Medical Hospital, regarding her examination of a foster child named Cecily, on the grounds of hearsay. We need not address these assignments of error because, as noted above, we conclude that the testimony offered by Ms. Langford and Mr. McRoberts fully supports the critical findings set forth above, and that such findings support the trial court's ultimate determination in the matter. In other words, even assuming *arguendo* that the evidence identified by petitioners should not have been admitted, and that the findings based upon such evidence were therefore not supported by competent evidence in the record, such determination would not warrant reversal.

[5] Petitioners also contend that the trial court erred in excluding the juvenile files of five foster children (Cecily, Danielle, Cherokee, Charlie, and Jacob), and the mental health records of two foster children (Danielle and Cherokee). Petitioners argue that they were prejudiced by the exclusion of this evidence because the files and mental health records "would certainly be relevant for purposes of care and treatment by the Petitioners and the health history and veracity of the children." Petitioners have failed to indicate precisely how such evidence would have influenced the trial court's decision in this matter. Evidence of favorable "care and treatment" of the children by petitioners would not have negated the plenary evidence of neglect offered during the hearing, and petitioners' mere speculation that such files might contain evidence pertaining to the veracity of the children is insufficient to compel the conclusion that the exclusion of such evidence constitutes reversible error.

For the reasons stated herein, we affirm the trial court's order dismissing the adoption petitions.

Affirmed.

Judges WYNN and THOMAS concur.

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[151 N.C. App. 420 (2002)]

STATE OF NORTH CAROLINA v. THOMASINA DENISE REID

No. COA01-985

(Filed 16 July 2002)

1. Search and Seizure— probable cause for warrant—controlled buy—sufficiency of affidavit

An officer's affidavit was sufficient to establish probable cause for the issuance of a warrant to search an apartment leased by defendant for narcotics based upon a controlled buy of cocaine at the apartment by a confidential informant, although the affidavit did not indicate the identity of the specific person from whom the informant had purchased cocaine, where the affidavit stated that (1) the informant purchased cocaine from someone at the apartment within the previous six days, (2) the informant had told officers that a white female with the same first name as defendant and a black male were in the business of selling cocaine from the apartment, and (3) the informant had witnessed the white female and the black male in possession of cocaine within the previous six days.

2. Search and Seizure— search warrant—knock and announce—forcible entry—delay of six to eight seconds

A delay of only six to eight seconds between the time officers knocked on the door of defendant's apartment and announced "Sheriff's Office, search warrant" and their forcible entry into the apartment by breaking down the door with a battering ram did not violate defendant's statutory or constitutional rights so as to render inadmissible cocaine discovered in a search of the apartment where the officers were executing a warrant to search for narcotics which could have been easily disposed of by persons in the apartment.

3. Drugs— trafficking by possession of cocaine—instruction on lesser included offense of trafficking by possession of less than twenty-eight grams of cocaine

The trial court did not err in a trafficking by possession of cocaine case by denying defendant's request to instruct the jury on the lesser included offense of trafficking by possession of less than twenty-eight grams of cocaine even though defendant contends the cocaine was not fully dry when weighed after its submersion in the toilet, because it is well-established that the

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total quantity of the mixture containing cocaine is the relevant weight to be used in determining a violation of N.C.G.S. § 90-95(h)(3) rather than the actual weight of the cocaine portion of the mixture.

4. Drugs—trafficking by possession of cocaine—jury instruction on acting in concert

The trial court did not err in a trafficking by possession of cocaine case by instructing the jury on the theory of acting in concert, because: (1) a defendant acts in concert in committing the offense of trafficking where the evidence establishes that defendant was present while a trafficking offense occurred and that defendant acted in concert with others to commit the offense pursuant to a common plan or purpose; and (2) the evidence was sufficient to warrant an instruction on the doctrine of acting in concert, and the instruction itself correctly stated the law.

Appeal by defendant from judgment entered 18 January 2001 by Judge Michael E. Helms in Forsyth County Superior Court. Heard in the Court of Appeals 22 May 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Joseph Ellis Herrin, for the State.

White and Crumpler, by F. Kevin Mauney, for defendant-appellant.

HUNTER, Judge.

Thomasina Denise Reid (“defendant”) appeals from a judgment entered against her on the charge of trafficking by possession of cocaine. Defendant argues that the trial court erred in denying her motion to suppress, and that the trial court erred in its jury instructions. We affirm the denial of the motion to suppress and find no error at trial.

The evidence tended to show that on 20 March 2000, at approximately 9:00 or 9:30 p.m., approximately six to eight police officers executed a search warrant and forcibly entered an apartment leased by defendant at 4338 Grove Avenue, Apartment F, in Winston-Salem, North Carolina. The police officers used a battering ram to break down the door. Approximately three or four individuals were found on the ground floor, and these individuals were detained. The officers also found a black male on the stairs coming down from the second floor. The officers also discovered defendant on the second floor

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leaving a bedroom with a wet sleeve. The officers subsequently discovered an unsealed plastic bag in a toilet on the second floor that was recycling after having been recently flushed, as well as drops of water from the bathroom to the bedroom from which defendant had exited. The bag contained a powder substance that had become wet, and which was later determined to be cocaine. The police officers also seized from the bedroom additional items such as digital scales, a pack of rolling paper, and additional plastic bags and a five dollar bill with cocaine residue.

Defendant was charged pursuant to N.C. Gen. Stat. § 90-95 (2001) with one count of trafficking by possession of cocaine, and one count of trafficking by transportation of cocaine. Defendant moved to suppress the evidence obtained during the execution of the search warrant, which motion was denied. At trial, the court granted defendant's motion to dismiss the trafficking by transportation charge at the conclusion of the State's evidence. Upon a jury verdict of guilty for trafficking by possession of more than twenty-eight but less than 200 grams of cocaine, the trial court entered judgment and sentenced defendant to a prison term of thirty-five to forty-two months and fined defendant \$50,000.00. Defendant appeals.

On appeal, defendant argues: (1) the trial court erred in denying her motion to suppress the evidence obtained during the execution of the search warrant; (2) the trial court erred in denying her request to instruct the jury on the lesser included offense of trafficking by possession of less than twenty-eight grams of cocaine; and (3) the trial court erred in instructing the jury on the theory of " 'acting in concert.' "

I.

Defendant argues that the trial court erred in denying her motion to suppress the evidence. Where a trial court conducts a hearing upon a motion to suppress made prior to trial, the trial court must make findings of fact. *See* N.C. Gen. Stat. § 15A-977(d) (2001). In reviewing the denial of a motion to suppress, we are limited to determining whether the trial court's findings of fact are supported by competent evidence and whether the findings of fact in turn support legally correct conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982).

Here, defendant presents two arguments in support of her contention that the trial court erred in denying her motion to suppress. We address each in turn.

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A.

[1] Defendant first argues that the trial court erred in denying the motion to suppress because there was insufficient evidence to constitute probable cause to justify the issuance of a search warrant. The search warrant for the apartment in question was issued upon an affidavit submitted by Officer Joe Adkins, Jr. of the Forsyth County Sheriff's Office, which affidavit stated, in pertinent part:

Members of the Forsyth County Sheriff's Narcotics Unit received information from a confidential reliable source (herein identified as CI regardless of sex) who stated that a white female named "Thomasina" and an Unknown Black Male are in the business of selling Cocaine from the residence located at 4338, apartment #F, Winston-Salem, North Carolina. The CI stated that he/she has observed "Thomasina" and the Unknown Black Male[] in possession of Cocaine within the past six (6) days.

...

[The CI made] a "controlled buy" . . . from the residence of 4338-F Grove Avenue, Winston-Salem, North Carolina; within the past six (6) days. . . . The CI . . . went to the location given while under the direct supervision and surveillance of the member of the . . . Narcotics Unit, purchased the controlled substance and returned directly to the member with the controlled substances and/or money. . . .

In each "controlled buy" the controlled substance tested positive for . . . Cocaine.

Defendant argues that the information provided by Officer Adkins was insufficient because it did not indicate the identity of the specific person from whom "CI" had purchased cocaine, or whether such individual was likely to be present in the premises six days after the purchase.

The standard for a court reviewing the issuance of a search warrant is "whether there is substantial evidence in the record supporting the magistrate's decision to issue the warrant."

...

Whether an applicant has submitted sufficient evidence to establish probable cause to issue a search warrant is a "nontech-

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nical, common-sense judgment[] of laymen applying a standard less demanding than those used in more formal legal proceedings.” “The affidavit [in support of an application for a search warrant] is sufficient if it supplies reasonable cause to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender.”

. . .

Moreover, great deference is to be paid the magistrate’s determination of probable cause, and reviewing courts “should not conduct a *de novo* review of the evidence to determine whether probable cause existed at the time the warrant was issued.”

State v. Ledbetter, 120 N.C. App. 117, 121-22, 461 S.E.2d 341, 343-44 (1995) (citations omitted).

Here, the affidavit states: (1) that “CI” purchased cocaine from someone at the specific apartment in question within the previous six days; (2) that, according to “CI,” a white female named “‘Thomasina’” and a black male were in the business of selling cocaine from the apartment in question; and (3) that “CI” had witnessed “‘Thomasina’” and the black male in possession of cocaine within the previous six days. Although defendant is correct that the affidavit does not specify the person from whom “CI” purchased the cocaine during the “‘controlled buy,’” defendant has failed to set forth any authority to support the proposition that such a deficiency is material under these circumstances. We hold that the information in the affidavit was sufficient to establish probable cause and to support the issuance of the search warrant for the apartment in question. *See* N.C. Gen. Stat. § 15A-244(2) (2001) (the substantive core of an application for a search warrant is “[a] statement that there is probable cause to believe that items subject to seizure . . . may be found in or upon a designated or described place, vehicle, or person”); *State v. Smith*, 124 N.C. App. 565, 570, 478 S.E.2d 237, 241 (1996) (“[t]he judicial official’s decision pivots on whether the affidavits submitted to her supply probable cause that the illegal item[s] or evidence sought will be at the premises described when the search warrant is executed” (emphasis omitted)). Thus, the trial court did not err in denying the motion to suppress on this basis.

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B.

[2] Defendant also argues that the cocaine was obtained as the result of an illegal and unconstitutional forced entry, and that the trial court therefore should have suppressed the evidence pursuant to N.C. Gen. Stat. § 15A-974 (2001). We disagree.

At the hearing on defendant's motion to suppress, Officer Adkins testified that at approximately 9:00 p.m. on 20 March 2000, after obtaining a search warrant for the apartment in question, police officers including Officer Adkins proceeded to the front door of the apartment, knocked three times and announced " 'Sheriff's Office, search warrant,' " then again knocked three times and made the same announcement. After waiting six to eight seconds, the police officers forcibly entered the apartment by breaking down the door with a battering ram. Based on Officer Adkins' testimony, the trial court found that "the officer had reason to believe that entry was being unreasonably denied or that no one was home or that evidence was being destroyed." The trial court did not make any findings as to the duration of time between the officers' announcement of their identity and purpose, and the forced entry into the apartment. The trial court concluded that the police officers had complied with the applicable statutes and that defendant's constitutional rights had not been violated, and, therefore, denied the motion to suppress.

The common law " 'knock and announce' " principle has been codified at N.C. Gen. Stat. §§ 15A-251 and 15A-401(e)(1) and (2) (2001). *State v. Knight*, 340 N.C. 531, 542-43, 459 S.E.2d 481, 488-89 (1995). N.C. Gen. Stat. § 15A-249 (2001) requires an officer executing a search warrant, before entering the premises, to "give appropriate notice of his identity and purpose," and "[i]f 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. N.C. Gen. Stat. § 15A-251 further authorizes an officer who has given the notice required by N.C. Gen. Stat. § 15A-249, and who "reasonably believes" either (1) that "admittance is being denied or unreasonably delayed" or (2) "that the premises . . . is unoccupied," to break and enter the premises involved when necessary to execute the warrant. N.C. Gen. Stat. § 15A-251(1).

Defendant argues that the police officers failed to comply with N.C. Gen. Stat. § 15A-251(1), and violated her Fourth Amendment rights, because, after giving proper notice under N.C. Gen. Stat. § 15A-249, the officers waited only six to eight sec-

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onds before beginning to break down the door with a battering ram. Defendant contends that six to eight seconds was insufficient to allow the officers to reasonably conclude either (1) that “admittance [was] being denied or unreasonably delayed” or (2) “that the premises . . . [was] unoccupied.” N.C. Gen. Stat. § 15A-251(1).

This Court has repeatedly stated that “[w]hat is a reasonable time between notice and entry depends on the particular circumstances in each case.” *State v. Edwards*, 70 N.C. App. 317, 320, 319 S.E.2d 613, 615 (1984) (citing *State v. Gaines*, 33 N.C. App. 66, 234 S.E.2d 42 (1977)), *reversed on other grounds*, 315 N.C. 304, 337 S.E.2d 508 (1985). Specifically, where “exigent circumstances” exist at the time of the execution of a search warrant, a brief delay between notice and forced entry is more likely to be considered reasonable. *See Knight*, 340 N.C. at 543, 459 S.E.2d at 489.

North Carolina case law appears to adhere to the general rule that exigent circumstances may be found to exist where police are executing a search warrant for narcotics which may be easily disposed of prior to being discovered. *See State v. Sumpter*, 150 N.C. App. 431, 434, 563 S.E.2d 60, 62 (2002); *Edwards*, 70 N.C. App. at 320, 319 S.E.2d at 615 (relying upon fact that object of search was quantity of powdery contraband “peculiarly susceptible to being almost instantly disposed of”); *State v. Willis*, 58 N.C. App. 617, 622-23, 294 S.E.2d 330, 333 (1982) (officers feared that persons inside house might destroy contraband), *per curiam affirmed*, 307 N.C. 461, 298 S.E.2d 388 (1983); *but see Richards v. Wisconsin*, 520 U.S. 385, 391-94, 137 L. Ed. 2d 615, 622-24 (1997). Here, Officer Adkins testified that it is always possible that persons inside the premises to be searched may attempt to dispose of the narcotics.

Based upon the fact that the police officers were executing a warrant to search for narcotics which are easily disposed of, we hold that the delay of six to eight seconds did not violate defendant’s statutory and constitutional rights. *See Sumpter*, 150 N.C. App. at 434, 563 S.E.2d at 62 (no substantial violation where officer announced his presence and purpose simultaneously with entering through an unlocked door and where entry was effected to prevent destruction of easily destructible contraband); *Gaines*, 33 N.C. App. at 68-69, 234 S.E.2d at 44 (no substantial violation where door was open, officers announced presence and purpose simultaneously with entry, and there was no objection to the entry). We therefore affirm the trial court’s denial of defendant’s motion to suppress.

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II.

[3] Defendant also argues that the trial court erred in denying her request for a jury instruction on the lesser included offense of trafficking by possession of less than twenty-eight grams of cocaine. Four items were seized from the apartment containing a total of thirty-three and a half grams of cocaine or cocaine residue, including Exhibit Four, a bag weighing thirty and one half grams. The evidence indicated that Exhibit Four was discovered submerged by water in a toilet, and that the bag and the cocaine therein were wet when seized. At trial, no evidence was presented as to whether the weight of Exhibit Four included water weight. Defendant argues that the trial court should have instructed the jury on the lesser included offense of trafficking by possession of less than twenty-eight grams of cocaine because the jury could have concluded that the cocaine in Exhibit Four was not fully dry when weighed and that, absent the water weight resulting from submersion in the toilet, it would have weighed less than twenty-five grams (in which case the total weight of the cocaine seized would have been less than twenty-eight grams). We disagree.

A judge is required to charge the jury on a lesser included offense “[o]nly when there is evidence of a lesser-included offense.” *State v. Willis*, 61 N.C. App. 23, 38, 300 S.E.2d 420, 429 (1983). Pursuant to N.C. Gen. Stat. § 90-95(h) (2001):

- (3) Any person who . . . possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, . . . or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as “trafficking in cocaine” and if the quantity of such substance or mixture involved:
 - a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State’s prison and shall be fined not less than fifty thousand dollars (\$50,000).

N.C. Gen. Stat. § 90-95(h)(3)(a) (emphasis added). It is well established that the total quantity of the *mixture* containing cocaine is the relevant weight to be used in determining a violation under N.C. Gen. Stat. § 90-95(h)(3). See, e.g., *State v. Broome*, 136 N.C. App. 82, 85, 523 S.E.2d 448, 451 (1999) (defendant properly convicted of trafficking by

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possession of 200-400 grams of cocaine in violation of N.C. Gen. Stat. § 90-95(h)(3) based upon seized package of cocaine mixture weighing 273 grams and containing only 27 grams of pure cocaine), *appeal dismissed and disc. review denied*, 351 N.C. 362, 543 S.E.2d 136 (2000); *State v. Tyndall*, 55 N.C. App. 57, 61, 284 S.E.2d 575, 577 (1981). The reason that the total weight of the mixture, rather than only the actual weight of the cocaine portion of the mixture, is used in determining a violation is because

[o]ur legislature has determined that certain amounts of controlled substances and certain amounts of mixtures containing controlled substances indicate an intent to distribute on a large scale. Large scale distribution increases the number of people potentially harmed by use of drugs.

Tyndall, 55 N.C. App. at 60-61, 284 S.E.2d at 577.

Here, the undisputed evidence indicated that the total weight of the mixture contained in Exhibit Four was thirty and one half grams. Thus, there was no evidence of the lesser included offense of trafficking by possession of less than twenty-eight grams of cocaine, and the trial court did not err in denying defendant's request for an instruction on this lesser included offense. *See State v. Agubata*, 94 N.C. App. 710, 711, 381 S.E.2d 191, 192 (1989) (no error in not charging jury on lesser included offense where defendant convicted for possession of fourteen to twenty-eight grams of heroin pursuant to N.C. Gen. Stat. § 90-95(h)(4) and only evidence showed defendant possessed several "mixtures" containing heroin and other substances weighing more than twenty-two grams altogether); *Willis*, 61 N.C. App. at 38, 300 S.E.2d at 429.

III.

[4] Lastly, defendant argues that the trial court erred in instructing the jury on the doctrine of "acting in concert" because such a theory is generally improper where the charge involves possession of narcotics. We disagree.

The "knowing possession" element of the offense of trafficking by possession may be established by a showing that (1) the defendant had actual possession, (2) the defendant had constructive possession, or (3) the defendant acted in concert with another to commit the crime. *State v. Garcia*, 111 N.C. App. 636, 639-40, 433 S.E.2d 187, 189 (1993). A person has actual possession of a substance if it is on his

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person, he is aware of its presence, and either by himself or together with others he has the power and intent to control its disposition or use. *State v. Crawford*, 104 N.C. App. 591, 600, 410 S.E.2d 499, 504 (1991). “Under the theory of constructive possession, a person may be charged with possession of . . . narcotics when he has both the power and intent to control its disposition or use even though he does not have actual possession.” *Garcia*, 111 N.C. App. at 640, 433 S.E.2d at 189 (citation omitted).

As to the third theory, “[a] defendant acts in concert with another to commit a crime when he acts ‘in harmony or in conjunction . . . with another pursuant to a common criminal plan or purpose.’” *State v. Diaz*, 317 N.C. 545, 547, 346 S.E.2d 488, 490 (1986) (citation omitted). Thus, a defendant acts in concert in committing the offense of trafficking where the evidence establishes that the defendant was present while a trafficking offense occurred and that the defendant acted in concert with others to commit the offense pursuant to a common plan or purpose. *Id.* at 552, 346 S.E.2d at 493 (clarifying that the reason the “acting in concert” doctrine was inapplicable in *State v. Baize*, 71 N.C. App. 521, 529, 323 S.E.2d 36, 41 (1984), is because, in *Baize*, “the drugs in question were in the possession and under the control of a person other than [the defendant], and [the defendant] was not present when the drugs were seized”).

Where an instruction correctly states the law and is supported by the evidence, it is properly given. *State v. Ball*, 324 N.C. 233, 377 S.E.2d 70 (1989). Here, the evidence was sufficient to warrant an instruction on the doctrine of acting in concert, and the instruction itself correctly stated the law. Thus, we hold the trial court did not err in giving the instruction.

No error.

Judges WYNN and THOMAS concur.

STATE v. DEXTER

[151 N.C. App. 430 (2002)]

STATE OF NORTH CAROLINA v. AARON DEXTER

STATE OF NORTH CAROLINA v. RONALD EDWARD EVANS

STATE OF NORTH CAROLINA v. BRYON KEITH HOWARD

No. COA01-564

(Filed 16 July 2002)

Jury— deliberations—unanimous verdict—coercive surrounding circumstances

Defendants in an attempted robbery with a firearm, robbery with a firearm, first-degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious larceny case are entitled to a new trial based on the coercive circumstances surrounding jury deliberations, because: (1) having notified the trial court on three separate occasions that it was unable to reach a unanimous verdict and not having been given an Allen instruction after its final note to the trial court, the jury could reasonably have concluded that it was required to deliberate until it did in fact reach a verdict; (2) by not addressing a juror's concerns in the presence of the jury concerning whether that juror would receive permission to attend his wife's surgery the next day, that juror may have felt pressured to reach a verdict by the end of the day; and (3) the trial court erred by addressing only two members of the jury when it told them to go back and said that they may want to stay.

Judge HUNTER dissenting.

Appeal by defendants from judgments dated 18 September 2000 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 26 March 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General W. Richard Moore, for the State as to defendant-appellant Aaron Dexter.

Attorney General Roy Cooper, by Assistant Attorney General Gaines M. Weaver, for the State as to defendant-appellant Ronald Edward Evans.

Attorney General Roy Cooper, by Assistant Attorney General Fred Lamar, for the State as to defendant-appellant Bryon Keith Howard.

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Kevin P. Bradley for defendant-appellant Aaron Dexter.

Daniel Shatz for defendant-appellant Ronald Evans.

Thomas, Ferguson & Charns, L.L.P., by D. Tucker Charns, for defendant-appellant Bryon Keith Howard.

GREENE, Judge.

Aaron Dexter, Ronald Edward Evans, and Bryon Keith Howard¹ (collectively, Defendants) appeal judgments dated 18 September 2000 entered consistent with jury verdicts finding them guilty of attempted robbery with a firearm, robbery with a firearm, first-degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious larceny.

Defendants were indicted for offenses committed during the attempted robbery of a Home Depot store and jointly tried before a jury. At 4:15 p.m. on 11 September 2000, the jury began its deliberations. At 3:45 p.m. on 12 September 2000, the trial court received a note from the jury stating: "There are jurors who have consistent, unwavering reasonable doubt. The jury requests guidance at this point." In response to this note, the trial court reinstructed the jury on the State's burden of proof beyond a reasonable doubt. The jury resumed deliberations thereafter. At 11:20 a.m. on 13 September 2000, the jury again submitted a note to the trial court explaining that "[a]t this time [it did] not have a unanimous verdict." The trial court brought the jury back into the courtroom and inquired as to the numerical division of the jurors' votes. The foreperson responded that there was a 10:2 split. The trial court then excused the jury for morning recess. After the recess, the trial court gave the following *Allen* instruction, see *Allen v. United States*, 164 U.S. 492, 41 L. Ed. 528 (1896), and advised the jury of its duties pursuant to N.C. Gen. Stat. § 15A-1235(b):

Members of the jury, I am going to allow you to resume your deliberations in an attempt to reach and return a verdict. I have already instructed you that your verdict must be unanimous; that is, that each of you must agree on the verdict. I am going to give you some additional instructions.

1. We note that the judgments and commitments and the arrest warrant relating to this defendant identify him as Bryon Keith Howard whereas the briefs to this Court refer to him as Byron Keith Howard.

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First, it is your duty to consult with one another and to deliberate with a view to[ward] reaching an agreement if it can be done without violence to individual judgment. Second, each of you must decide the case for yourself[,] but only after an impartial consideration of the evidence with your fellow jurors. Third, in the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion if you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your own views and opinions if you remain convinced they are correct. Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Now ladies and gentlemen, please be mindful that I am in no way trying to force or coerce you to return or reach a verdict. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions that I have just given to you, I merely want to emphasize that it is your duty to do whatever you can to reason this matter over together as reasonable people and to reconcile your differences if that can be done and it is possible without the surrender of conscientious convictions and to reach a verdict.

The jury resumed its deliberations but was still unable to reach a unanimous verdict when, at 3:45 p.m., it submitted two more notes to the trial court. One note stated that there were “still . . . jurors with consistent and unwavering reasonable doubt” who felt “their minds [were] made up.” The other note constituted a request by Juror Gock to be excused from jury duty on 14 September 2000 to attend his wife’s surgery. Juror Gock anticipated being able to return to court before noon that day.

When the jury was brought back into the courtroom, the trial court questioned the foreperson regarding the jury’s progress. Upon being told that while the jurors had continued to have “thoughtful discussion[s],” the jurors felt that “their minds [were] set,” the trial court asked the jury to retire in order to continue deliberations. At this time, the trial court did not repeat its previous *Allen* instruction on the duty of jurors to follow their individual consciences nor did it comment on Juror Gock’s request in the presence of the jury. Only after the jury had retired did the trial court state its intent to grant Juror Gock’s request if the jury had not reached a verdict by the end of the day. Thereafter, Defendants moved for a mistrial.

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At approximately 4:45 p.m., the trial court instructed the bailiff to knock on the jury room door and bring the jury back. Upon his return, the bailiff was accompanied by only two jurors. The bailiff explained to the trial court that “[the jurors] indicated they wanted to stay in [the jury room], but [he] told them they had to come out.” The trial court asked if they wanted to stay in the jury room, and the two jurors said “yes.” At that point, the trial court responded: “Go back. You want to stay, they can stay.” The two jurors then returned to the jury room. Defendants renewed their motion for a mistrial, which the trial court denied. By 5:06 p.m., the jury had reached a unanimous verdict finding Defendants guilty of all charges.

The dispositive issue is whether the circumstances surrounding the jury deliberations in this case might reasonably be construed as coercive to the jury to reach a unanimous verdict.

Every person charged with a crime has an absolute right to a fair trial and an impartial jury. *See State v. Jones*, 292 N.C. 513, 521, 234 S.E.2d 555, 559 (1977). Article I, section 24 of the North Carolina Constitution prohibits a trial court from coercing a jury to return a verdict. *State v. Patterson*, 332 N.C. 409, 415, 420 S.E.2d 98, 101 (1992). According to N.C. Gen. Stat. § 15A-1235(c), the trial court “may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.” N.C.G.S. § 15A-1235(c) (2001). In determining whether a trial court’s actions are coercive, an appellate court must look to the totality of the circumstances. *Patterson*, 332 N.C. at 415-16, 420 S.E.2d at 101. Thus, the defendant is entitled to a new trial if the circumstances surrounding jury deliberations

might reasonably be construed by [a] member of the jury unwilling to find the defendant guilty as charged as coercive, suggesting to him that he should surrender his well-founded convictions conscientiously held or his own free will and judgment in deference to the views of the majority and concur in what is really a majority verdict rather than a unanimous verdict.

State v. Roberts, 270 N.C. 449, 451, 154 S.E.2d 536, 538 (1967).

In this case, the trial court, on the third day of deliberations and upon receipt of the jury’s two notes regarding its inability to reach a verdict and Juror Gock’s request to attend his wife’s surgery, simply asked the jury to continue deliberations. Having notified the trial court on three separate occasions that it was unable to reach a unan-

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imous verdict and not having been given an *Allen* instruction after its final note to the trial court, the jury could reasonably have concluded that it was required to deliberate until it did in fact reach a verdict. Moreover, by not addressing Juror Gock's concerns in the presence of the jury, Juror Gock, not knowing if he would receive permission to attend his wife's surgery the next day, may have felt pressured to reach a verdict by the end of the day. Accordingly, the circumstances surrounding the jury deliberations were such that the jury might reasonably have construed them as coercive, requiring a new trial for Defendants. Furthermore, the trial court erred in addressing only two members of the jury when it told them to "[g]o back" and said "[y]ou want to stay, they can stay." See *State v. King*, 342 N.C. 357, 365, 464 S.E.2d 288, 293 (1995) (after jury deliberations have begun, "all communications between the [trial] court and the jury [must] be conducted in open court with all members of the jury present"); see also N.C.G.S. § 15A-1234 (2001). In addition, depending on how these words were understood and relayed by the two jurors, the trial court's statement could have further conveyed the impression to the jury that it was to stay in the jury room until it had reached a verdict. *State v. Ashe*, 314 N.C. 28, 36, 331 S.E.2d 652, 657 (1985) ("[t]he danger . . . is that [a juror], even the jury foreman, having alone . . . heard the [trial] court's response firsthand, may through misunderstanding, inadvertent editorialization, or an intentional misrepresentation, inaccurately relay . . . the [trial] court's response . . . to the defendant's detriment"). As these errors were prejudicial, Defendants are entitled to a new trial.

New trial.

Judge TIMMONS-GOODSON concurs.

Judge HUNTER dissents.

HUNTER, Judge, dissenting.

Having closely examined the transcript of the proceedings, I am not persuaded that any irregularities during the jury deliberations warrant a new trial. The essence of defendants' argument is that the actions of the trial court and the circumstances of the jury deliberation process had the effect of improperly coercing the jury to reach a unanimous verdict. Section 15A-1235 of our General Statutes, which is entitled "[l]ength of deliberations; deadlocked jury," provides in pertinent part:

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(c) If it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

(d) If it appears that there is no reasonable possibility of agreement, the judge may declare a mistrial and discharge the jury.

N.C. Gen. Stat. § 15A-1235(c), (d) (2001). “The purpose behind the enactment of N.C.G.S. § 15A-1235 was to avoid coerced verdicts from jurors having a difficult time reaching a unanimous decision.” *State v. Evans*, 346 N.C. 221, 227, 485 S.E.2d 271, 274 (1997), *cert. denied*, 522 U.S. 1057, 139 L. Ed. 2d 653 (1998).

“It is well settled that Article I, Section 24 of the Constitution of North Carolina prohibits a trial court from coercing a jury to return a verdict.” *State v. Patterson*, 332 N.C. 409, 415, 420 S.E.2d 98, 101 (1992). “In determining whether a trial court’s actions are coercive under this section of our Constitution, we must analyze the trial court’s actions in light of the totality of the circumstances facing the trial court at the time it acted.” *Id.* at 415-16, 420 S.E.2d at 101.

“It is well-settled that the decision to grant or deny a motion for mistrial lies within the sound discretion of the trial judge,” and that “[t]he trial judge’s ruling on a motion for mistrial will not be disturbed on appeal ‘unless it is so clearly erroneous as to amount to a manifest abuse of discretion.’” *State v. Baldwin*, 141 N.C. App. 596, 607, 540 S.E.2d 815, 823 (2000) (citation omitted). Factors that may properly be considered in analyzing the totality of the circumstances include, but are not necessarily limited to

whether the court conveyed an impression to the jury that it was irritated with them for not reaching a verdict, whether the court intimated to the jury that it would hold them until they reached a verdict, and whether the court told the jury a retrial would burden the court system if the jury did not reach a verdict.

State v. Beaver, 322 N.C. 462, 464, 368 S.E.2d 607, 608 (1988).

Considering the totality of the circumstances here, I do not believe that the trial court abused its discretion in refusing to grant a

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mistrial, nor do I believe that the trial court's actions were coercive. First, as to the time involved in the jury deliberations, "[o]ur courts . . . have not adopted a bright-line rule setting an outside time-limit on jury deliberations, or a rule that deliberations for a certain length of time, in relation to the length of time spent by the State presenting its evidence, is too long." *Baldwin*, 141 N.C. App. at 608, 540 S.E.2d at 823. Here, the jury deliberated for a total of more than eleven hours over a period of three days. Given the complexity of the trial, involving three defendants and numerous charges, I do not believe the duration of the jury deliberations itself was so long as to be coercive of a unanimous verdict. *See, e.g., State v. Jones*, 110 N.C. App. 169, 178-79, 429 S.E.2d 597, 603 (1993) (no error in denying motion for mistrial where jury deliberated for approximately twelve hours over period of three days in case involving single defendant and two counts of second degree murder), *cert. denied*, 336 N.C. 612, 447 S.E.2d 407 (1994).

Moreover, I believe the trial court adequately instructed the jury during deliberations so as to mitigate the possibility of coercion as a result of the length of deliberations. On the third day, after a total of almost nine hours deliberating, the trial court instructed the jury as to its duties in accordance with subdivision (b) of N.C. Gen. Stat. § 15A-1235:

Members of the jury, I am going to allow you to resume your deliberations in an attempt to reach and return a verdict. I have already instructed you that your verdict must be unanimous; that is, that each of you must agree on the verdict. I am going to give you some additional instructions.

First, it is your duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. Second, each of you must decide the case for yourself but only after an impartial consideration of the evidence with your fellow jurors. Third, in the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion if you become convinced it is erroneous. On the other hand, you should not hesitate to hold to your own views and opinions if you remain convinced they are correct. Fourth, none of you should surrender an honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

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Now ladies and gentlemen, please be mindful that I am in no way trying to force or coerce you to return or reach a verdict. I recognize the fact that there are sometimes reasons why jurors cannot agree. Through these additional instructions that I have just given to you, I merely want to emphasize that it is your duty to do whatever you can to reason this matter over together as reasonable people and to reconcile your differences if that can be done and it is possible without the surrender of conscientious convictions and to reach a verdict.

Given the complexity of the trial, and because the trial court specifically instructed the jurors not to surrender their honest convictions only two and one-half hours prior to the jury reaching a verdict, I am not persuaded that the length of the deliberations had a coercive effect upon the jurors. Furthermore, the trial judge is not required to instruct the jury in accordance with N.C. Gen. Stat. § 15A-1235 every time a jury returns to the courtroom without a verdict; rather, N.C. Gen. Stat. § 15A-1235 merely provides guidelines, and a trial judge “must be allowed to exercise his sound judgment to deal with the myriad different circumstances he encounters at trial.” *State v. Hunter*, 48 N.C. App. 689, 692-93, 269 S.E.2d 736, 738 (1980).

As to the effect of the trial court’s silence regarding Juror Gock’s request on Wednesday to be excused on Thursday morning, there is nothing in the record indicating that the jurors were led to suspect that the trial court intended to deny Juror Gock’s request, or that such a suspicion, even if it existed, had a coercive impact upon the jury. I believe it is more likely that the trial court’s silence as to Juror Gock’s request simply led the jurors to conclude that the trial court intended to wait to address the matter until the end of the afternoon.

As to the communication that transpired between the trial court and only two of the jurors at approximately 4:45 p.m. on Wednesday, I believe this communication was clearly harmless. It is true that N.C. Gen. Stat. § 15A-1234(a)(1) (2001) has been broadly interpreted as requiring “that all communications between the court and the jury be conducted in open court with all members of the jury present.” *State v. King*, 342 N.C. 357, 365, 464 S.E.2d 288, 293 (1995). In such situations there is a concern that a court’s statements may be misinterpreted by jurors who are not present. *See State v. Nelson*, 341 N.C. 695, 701, 462 S.E.2d 225, 228 (1995). However, I do not believe the brief and innocuous communication at issue here (which significantly did not include any actual jury instructions) amounts to prejudicial error pursuant to N.C. Gen. Stat. § 15A-1234(a)(1). Furthermore,

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defendants did not specifically object to this communication and, therefore, have waived any objection to the procedure. *See* N.C.R. App. P. 10(b)(1); *State v. Davis*, 353 N.C. 1, 17, 539 S.E.2d 243, 255 (2000), *cert. denied*, — U.S. —, 151 L. Ed. 2d 55 (2001).

Finally, as to the period of time during which only ten of the jurors remained in the jury room while two of the jurors communicated with the trial court, there is, again, nothing in the record to indicate that the jurors inappropriately continued to deliberate during this very brief period of time. Moreover, the trial court expressly instructed the jurors on at least four separate occasions during the deliberation process that they should only deliberate when all twelve jurors were present, and there is no reason to believe that the jurors disobeyed this instruction.

In summary, under the totality of the circumstances, I do not believe either that the trial court abused its discretion in refusing to grant a mistrial, or that the actions of the trial court resulted in coercion of the jury verdict pursuant to the test set forth in *State v. Roberts*, 270 N.C. 449, 451, 154 S.E.2d 536, 537-38 (1967). Thus, I disagree with the majority that a new trial is warranted on this basis.



JOHN W. NIX, EMPLOYEE-PLAINTIFF v. COLLINS & AIKMAN, CO., EMPLOYER,
SELF/INSURED, (CONSTITUTION STATE SERVICE, COMPANY), SERVICING AGENT,
DEFENDANTS

No. COA01-690

(Filed 16 July 2002)

Workers' Compensation— hyperactive airways disease—personal sensitivity

The Industrial Commission correctly found and concluded in a workers' compensation action that plaintiff had not sustained a compensable occupational disease where plaintiff contended that he had contracted hyperactive airways disease through his work as a chemist, but the Commission concluded that his condition was caused by his personal, unusual sensitivity to small amounts of certain chemicals and denied benefits. The role of the court is limited; there was competent evidence to support the

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Commission's findings and the conclusions are supported by the facts.

Judge GREENE dissenting.

Appeal by plaintiff from opinion and award filed 2 October 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 16 April 2002.

Doran & Shelby, P.A., by David A. Shelby, for plaintiff-appellant.

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

TIMMONS-GOODSON, Judge.

John W. Nix ("plaintiff") appeals from an opinion and award of the North Carolina Industrial Commission ("Commission") denying his claim for compensation following an alleged occupational disease. For the reasons discussed herein, we affirm.

Plaintiff began employment with Collins & Aikman Co. ("defendant") in July of 1977 as a senior research chemist evaluating dyes and chemical dying procedures in the textile field. Plaintiff spent fifty percent (50%) of his time working in defendant's research and development lab at the corporate headquarters building located in Charlotte, North Carolina. The laboratory area was divided into an office space and laboratory space where the chemicals were mixed and applied. Defendant employed a laboratory technician who performed most of the actual lab testing under plaintiff's direction. Plaintiff rarely performed the tests himself.

During the seventeen years that plaintiff was employed with defendant, he often supervised "strike rate" tests, which were tests conducted for the purpose of heating dyes used on fabrics to determine the temperature at which the dye "strikes" or binds to the fabric. There were a large number of dyes and chemicals used in the laboratory for these tests, some of which were known to be respiratory irritants when present in high quantities.

Plaintiff's first reported respiratory problems were recorded in September of 1979 by Dr. William Kouri ("Dr. Kouri"), his family physician. Between 1979 and 1994, Dr. Kouri treated plaintiff for various respiratory problems including severe coughing and chest pain.

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These episodes occurred every two to three years and were usually diagnosed as bronchitis. On 12 June 1994, plaintiff returned to Dr. Kouri's office, complaining of constant chest burning and severe coughing. Dr. Kouri's initial impression was that plaintiff had contracted pneumonia. Although plaintiff began experiencing respiratory problems as early as 1979, he did not connect the health problems to his employment until July of 1994. Plaintiff was diagnosed with Legionnaires disease in 1994.

After treatment by Dr. Kouri, plaintiff was referred to Dr. Carl Smart ("Dr. Smart"), a pulmonologist. Dr. Smart concluded that plaintiff had hyperactive airways disease and that, based upon his history, his symptoms were due to an occupational exposure to chemicals at his employment. Plaintiff remained under Dr. Smart's care for several years until he left the practice. Dr. Scott A. Kremers ("Dr. Kremers") assumed plaintiff's care after Dr. Smart's departure from the practice. When Dr. Kremers examined plaintiff, he discovered that plaintiff's airways were hypersensitive and were reacting to chemical fumes, car exhausts, cleaning fluids, perfumes, and other substances. However, Dr. Kremers opined that plaintiff's reaction was more of a personal "idiosyncratic" nature as opposed to any chemical exposure in the workplace.

Plaintiff was sent to Dr. Reginald T. Harris ("Dr. Harris"), a pulmonary disease specialist and a member of the Commission's Textile Occupational Disease Panel. Dr. Harris evaluated plaintiff on 24 January 1995. Dr. Harris found no evidence of obstructive or restrictive lung disease and concluded that there was not enough evidence to suggest that chemical exposures at work had precipitated plaintiff's problems. Plaintiff did not return to work after 12 July 1994.

In affirming the decision of the deputy commissioner to deny compensation, the Commission made the following pertinent findings of fact:

10. Plaintiff has claimed that he has developed hyperactive airways disease as a result of his exposure to chemicals during his employment with defendant. For the following reasons, he has not proven that allegation. Contrary to what he told Dr. Smart, he did not have "fairly extensive exposure" to hazardous chemicals; nor were his symptoms associated with chemical exposures at work until he was also reacting to any fumes, whether at work or at home. The lab where plaintiff worked was well ventilated. Plaintiff was not performing most of the tests himself and the

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activities conducted in the lab usually involved small amounts of chemicals. Therefore, the evidence did not establish a hazardous exposure.

11. Even with an inaccurate history, Dr. Smart could not state that an employee in plaintiff's position would have been placed at an increased risk of developing hyperactive airways disease as compared to the general public not so employed. The medical evidence established only that there was a possible risk and possible relationship associated with plaintiff's workplace exposures, but, with the present state of medical knowledge, the exposures could not be said to be a probable significant contributing factor in the development of his hyperactive airways disease. Rather, if plaintiff did have some sort of a reaction to the chemicals at work, it was due to an unusual sensitivity on his part to small amounts of chemicals that would not be a problem for most people.

12. By the greater weight of the evidence, plaintiff was not proven to have been placed at an increased risk of developing hyperactive airways disease by reason of his exposure to chemicals at work as compared to the general public not so employed. Nor was plaintiff's workplace exposure proven to have been a significant contributing factor in the development of his pulmonary condition.

13. Plaintiff has failed to prove that he developed an occupational disease that was due to causes and conditions characteristic of and peculiar to his employment with defendant-employer and which excluded all ordinary diseases of life to which the general public was equally exposed.

Based upon the above findings of fact, the Commission entered the following conclusions of law:

1. Plaintiff has not proven that he developed an occupational disease which was due to causes and conditions characteristic of and peculiar to his employment and which was not an ordinary disease of life to which the general public was equally exposed. N.C. Gen. Stat. § 97-53(13); *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 265 S.E.2d 389 (1980); *Booker v. Duke Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979).
2. Plaintiff's condition was caused by his personal, unusual sensitivity to small amounts of certain chemicals. *Sebastian v. Hair*

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Styling, 40 N.C. App. 30, [251 S.E.2d 872], *disc. review denied*, 297 N.C. 301, 254 S.E.2d 921 (1979).

3. Plaintiff is not entitled to benefits under the Workers' Compensation Act for his hyperactive airways disease. N.C. Gen. Stat. § 97-2 *et seq.*

From this opinion and award plaintiff appeals.

In his first assignment of error, plaintiff contends that there is no competent evidence in the record to support the Commission's findings and conclusions that plaintiff has not sustained a compensable occupational disease. We disagree.

Appellate review of an opinion and award from the Industrial Commission is limited to a determination of "(1) whether the findings of fact are supported by competent evidence and (2) whether the conclusions of law are supported by the findings." *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980). The findings of fact by the Commission are conclusive on appeal if supported by any competent evidence, even if there is evidence to support a contrary finding. *Allens v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001).

For an injury to be compensable under our Workers' Compensation Act, "it must be either the result of an 'accident arising out of and in the course of employment' or an 'occupational disease.'" *Booker v. Medical Center*, 297 N.C. 458, 465, 256 S.E.2d 189, 194 (1979) (citation omitted). Under N.C. Gen. Stat. § 97-53 (13), an occupational disease is defined as:

Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

N.C. Gen. Stat. § 97-53 (13) (2001). Our Supreme Court has identified three elements which an employee must show in order to prove the existence of an occupational disease: "(1) the disease must be characteristic of a trade or occupation, (2) the disease is not an ordinary disease of life to which the public is equally exposed outside of the employment," and (3) proof of a causal connection between the disease and the employment. *Hansel v. Sherman Textiles*, 304 N.C. 44,

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52, 283 S.E.2d 101, 106 (1981). In *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983), our Supreme Court further explained what is required in establishing the first two elements:

To satisfy the first and second elements it is not necessary that the disease originate exclusively from or be unique to the particular trade or occupation in question. All ordinary diseases of life are not excluded from the statute's coverage. Only such ordinary diseases of life to which the general public is exposed equally with workers in the particular trade or occupation are excluded. Thus, the first two elements are satisfied, if, as a matter of fact, the employment exposed the worker to a greater risk of contracting the disease than the public generally. "The greater risk in such cases provides the nexus between the disease and the employment which makes them an appropriate subject for workmen's compensation."

Id. at 93-94, 301 S.E.2d at 365 (quoting *Booker*, 297 N.C. at 475, 256 S.E.2d at 200). The burden is on plaintiff to show that he suffered a compensable occupational disease under N.C. Gen. Stat. 97-53(13). See *Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 621, 534 S.E.2d 259, 261 (2000), *cert. denied*, 353 N.C. 378, 547 S.E.2d 15 (2001). "[F]indings regarding the nature of a disease—its characteristics, symptoms, and manifestations—must ordinarily be based upon expert medical testimony." *Id.* at 623, 534 S.E.2d at 262.

In the instant case, the Full Commission considered the testimony of four physicians who evaluated plaintiff: Dr. Kouri, Dr. Smart, Dr. Kremers, and Dr. Harris. Dr. Kouri testified that she had little information about the type of chemicals to which plaintiff was exposed, the extent of the exposure, and the duration and degree of exposure. Dr. Smart also admitted that he had no information about the actual chemicals to which plaintiff was exposed or their potential health effects. When asked whether plaintiff was at an increased risk than the public at large, he stated, "the general population, I can't speak for . . . but specific to him and for him, it is likely, once again that's what caused his cough." Dr. Smart admitted that plaintiff contracted Legionnaires disease in 1994, which could have produced the same symptoms of which he complained. Contrary to Dr. Smart's assertions, the Commission found that the lab where plaintiff was employed was "well ventilated" and that the evidence did not establish a hazardous exposure, since plaintiff would have reacted to any kind of fumes, not just chemicals he may have been exposed to at the workplace. The Commission further found that the medical evidence

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by Dr. Smart only establishes that there was a “possible risk and relationship associated with plaintiff’s workplace exposure, but, with the present state of medical knowledge, the exposures” could not have been a significant contributing factor in the development of hyperactive airways disease.

Dr. Kremers testified that the vast majority of the public would not react to the extremely small amount of chemicals that plaintiff may have been exposed to at the workplace. Dr. Kremers opined that plaintiff was only at an increased risk due to his “idiopathic” sensitivity to chemicals at the workplace. In fact, Dr. Kremers testified that plaintiff was not at a greater risk than the general population and that only plaintiff’s sensitivities to the chemicals made him more susceptible to the disease. Dr. Kremers further stated that plaintiff’s sensitivity was not solely limited to chemicals to which he was exposed to in the workplace; rather, other chemicals such as fumes, perfumes, auto emissions, and pollution had the same effect.

Lastly, Dr. Harris opined that based upon his evaluation of plaintiff in 1998 and his review of the medical records, plaintiff’s condition was not exacerbated or accelerated by his work conditions. Dr. Harris found no evidence of “obstructive or restrictive lung disease” and concluded that there was not enough evidence to suggest that chemical exposures at work may have precipitated the problems. Dr. Harris further opined that plaintiff’s sensitivities to chemicals were of a pre-existing idiopathic nature and were aggravated by normal experiences common to the general public, unrelated to any chemical exposure at the workplace. *See Sebastian v. Hair Styling*, 40 N.C. App. 30, 32, 251 S.E.2d 872, 874 (holding that “there is no evidence whatsoever that subsequent to 31 January 1977 plaintiff’s incapacity to earn wages was a result of an occupational disease; rather, it was the result of her personal sensitivity to chemicals used in her work.”), *disc. review denied*, 297 N.C. 301, 254 S.E.2d 921 (1979).

Although evidence was presented that plaintiff had hyperactive airways disease, caused in whole or in part by his exposure to chemicals throughout his employment with defendants, the role of this Court is limited, and we cannot say that the Commission erred, as a matter of law, in its findings and conclusions. There was competent evidence to support the Commission’s findings of fact and the conclusions of law are supported by the findings. We therefore hold that the Commission properly found and concluded that plaintiff has not sustained a compensable occupational disease.

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Accordingly, the opinion and award of the Full Commission is affirmed.

Affirmed.

Judge HUNTER concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

There is no dispute in this case plaintiff suffers from hyper-reactive airways disease. The only question is whether this disease qualifies as an occupational disease within the meaning of the Workers' Compensation Act.

Central to the Commission's denial of benefits to plaintiff was its finding that any reaction plaintiff had to chemicals at work "was due to an unusual sensitivity on his part to small amounts of chemicals that would not be a problem for most people." Relying on *Sebastian v. Hair Styling*, 40 N.C. App. 30, 251 S.E.2d 872, *disc. review denied*, 297 N.C. 301, 254 S.E.2d 921 (1979), the Commission then concluded "[p]laintiff's condition was caused by his personal, unusual sensitivity to small amounts of certain chemicals."

The Commission's reliance on *Sebastian* as a basis for denying plaintiff benefits in this case is misplaced and constitutes error. Prior to 31 January 1977, the plaintiff in *Sebastian* had developed a skin condition due to her sensitivity to chemicals used at the hair salon for which she worked. The plaintiff's skin condition cleared up within one month of her terminating her employment as a hair stylist, and she suffered no continuing disability as a result of the skin condition. The Commission recognized the plaintiff's skin condition as an occupational disease and awarded medical expenses and temporary total disability benefits. The Commission did, however, deny the plaintiff any disability benefits beyond 31 January 1977, the date by which the skin condition had ceased. It was this denial of disability benefits the plaintiff appealed and which this Court considered in *Sebastian*. Accordingly, *Sebastian* does not stand for the proposition that a condition caused by the interaction of an employee's sensitivities to work-related factors is not compensable under the Workers' Compensation Act. Instead, *Sebastian* simply holds that if an employee's occupational disease ceases after the employee leaves the work environment that caused the disease and the employee does not

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suffer from any lasting effects, she will be denied disability benefits after the healing date.

In this case, the evidence revealed and the Commission found Plaintiff had an “unusual sensitivity . . . to small amounts of chemicals.” It is immaterial that this “would not be a problem for most people.” See 1 Arthur Larson, *Larson’s Workers’ Compensation Law* § 9.02[1] (2001) (as the “employer takes the employee as it finds that employee,” an employee’s preexisting disease or infirmity is compensable under the Workers’ Compensation Act if the employment aggravated, accelerated, or combined with the disease or infirmity to cause disability). The relevant issues are whether plaintiff had a sensitivity to chemicals he came in contact with at work and as a result of this contact his lung disease was aggravated and, if so, whether his employment exposed him to a greater risk of having the disease aggravated than the risk assumed by the general population suffering from the disease.

I would reverse the opinion and award of the Commission and remand for the entry of new findings and conclusions.

STATE OF NORTH CAROLINA v. JOSE EUGENIO UVALLE, SR., DEFENDANT

No. COA01-531

(Filed 16 July 2002)

1. Criminal Law— testimony through translator—no plain error

There was no plain error in an assault prosecution where defendant testified through an interpreter. There may be circumstances in which translation difficulties could violate a non-English speaking defendant’s constitutional rights, but those issues were not raised here, and the difficulties with court interpreters in this case did not impede the defense from confronting and cross-examining the State’s witnesses or from presenting its evidence.

2. Assault— deadly weapon inflicting serious injury—assault inflicting serious injury—instruction not given

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury by not giving an instruc-

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tion on assault inflicting serious bodily injury. Assault inflicting serious bodily injury is not a lesser included offense of assault with a deadly weapon inflicting serious injury because “serious injury” does not necessarily rise to the level of “serious bodily injury.”

3. Assault— deadly weapon inflicting serious injury—lesser included offenses—instruction not given

The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury by not giving instructions on the lesser included offenses of assault with a deadly weapon, assault inflicting serious injury, or simple assault where the uncontroverted evidence indicated that the victim sustained several deep knife wounds resulting in permanent debilitating injuries and that the injuries (however they occurred) were inflicted with a butcher knife with a blade about a foot long.

4. Assault— instructions—misdemeanor assault—use of weapon

The trial court did not err by not instructing on misdemeanor simple assault in an action for assault with a deadly weapon inflicting serious injury where defendant testified that he picked up a knife and a struggle ensued. Even if the knife was introduced by an accident such as falling out from under a pillow, there was no evidence to dispute that defendant used it.

Appeal by defendant from judgment entered 13 December 2000 by Judge Wiley F. Bowen in Brunswick County Superior Court. Heard in the Court of Appeals 21 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Dorothy Powers, for the State.

John Calvin Chandler, for defendant-appellant.

HUDSON, Judge.

Defendant was convicted by a jury of felonious assault with a deadly weapon inflicting serious injury and sentenced to a minimum term of twenty-five months and a maximum term of thirty-nine months. Defendant appeals.

We begin with a brief summary of pertinent facts. The State presented evidence to show that on the evening of 30 March 2000, defendant was involved in an altercation with his wife, Norma Uvalle.

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Ms. Uvalle testified through an interpreter that her husband came to see her at work on 30 March 2000 and accused her of seeing another man. After an argument, defendant left, and Ms. Uvalle returned to her work. That night, Ms. Uvalle left work earlier than usual, arriving home at 11:15 p.m. Five minutes later, defendant arrived accompanied by the Uvalles' twelve year old son, Junior. Ms. Uvalle testified that defendant followed her to the bedroom and "kept asking if [she] would tell the truth" about seeing another man. Defendant left the room, and Ms. Uvalle heard noises like he was looking for something in the sink in the kitchen. Ms. Uvalle testified that he came back to the bedroom and threw her off the bed; she did not see a knife until, "[j]ust when he had it in his hand and he started to stab me—hurt me." Ms. Uvalle began to scream and her children ran into the bedroom. Junior took the knife away from his father and he helped put a pillow under his mother, trying to stop the bleeding. Defendant told Ms. Uvalle that "first [] he was going to finish with her (Ms. Uvalle), and then afterwards, he was going to finish with himself." She sustained knife wounds in both arms, her shoulder, and her ribs. Ms. Uvalle testified that defendant had threatened and attacked her previously, and had attempted to cut her with a razor blade in January of the same year.

Dr. Kevin Reese, who treated Ms. Uvalle when she was brought into the emergency room on 30 March 2000, testified that Ms. Uvalle had at least five lacerations or stab wounds, four of which required treatment. Three of the lacerations were connected to each other in that the blade went through the tissue of Ms. Uvalle's forearm and penetrated her abdomen and chest. She also sustained injuries to the shoulder, which Dr. Reese described as "directed straight down into the shoulder, entering through the Deltoid muscle, which is the muscle that allows you to raise the shoulder like this (indicating), and then entered—hit bone down into the joint space." Dr. Reese opined that Ms. Uvalle was stabbed in the shoulder from above, and from the front in the case of the forearm and torso injuries. He did not believe the injuries were self-inflicted and described them as defensive wounds. On cross-examination, Dr. Reese said that the wounds did not necessarily indicate a struggle, although he agreed that they did indicate that Ms. Uvalle's body changed positions during the incident. Dr. Reese also testified that Ms. Uvalle's injuries were both serious and permanent.

The State also introduced the testimony of Ms. Uvalle's sister, Olga Gavan Castellio, who was living in the Uvalles' home at the time

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of these events. She testified that on 30 March 2000, she heard her sister screaming and found the defendant “on top of” his wife with a butcher knife in his hand. Ms. Castellio also testified that just before the screams, she heard defendant in the kitchen and heard the sounds of dishes moving in the sink, where she had earlier put the butcher knife. The Uvalles’ son, Junior, testified that when he heard his mother screaming, he rushed into the bedroom, and found his father holding the knife over his mother, who had blood on her. In part, Junior testified as follows:

A. I grabbed my dad from the neck and was trying to pull him back so he wouldn’t stab my mom again.

Q. And were you able to do that, were you able to stop him?

A. No.

Q. What happened?

A. I went in the bed (sic)—I was trying to pull the knife and my mom said let go so he won’t stab you. I said, I’m not going to until he lets go. And—and then my aunt came and she said, “Let her go, Eugenio (the defendant).” And he said, “No, I ain’t.” And then he said, “Okay, I’m going to let her go, but I’m going to kill myself.” And I said, “Dad, don’t do that because if you do that, I’m going to kill myself, too.”

...

Q. Were you—both of you just holding it (the knife) for a little while?

A. It was me, and my mom, and my dad was holding it.

Q. Now, what part of the knife did your mom have?

A. It was sharp—

Q. Did she have the blade in her hand?

A. Yes, the blade.

...

Q. Did your father receive any cuts that night?

A. No.

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Q. What was your father saying while all this was going on?

A. He—I can't remember, but I—can't remember.

Q. Did he threaten your mother in any way that you remember?

A. He said he was going to kill her.

Junior testified that he acted as interpreter for his mother when emergency medical personnel arrived, during the trip to the hospital, and once they arrived at the hospital. He also reported that in January of the same year, he saw his father threaten his mother with a pocket knife.

Defendant testified through an interpreter in his own defense. He agreed that he was upset with his wife on the night of 30 March 2000, because he suspected that she was seeing another man. However, he testified that he did not bring the knife in from the kitchen. Instead he contended that the knife was underneath Ms. Uvalle's pillow on the bed, and that he first saw the knife when it fell out from underneath the pillow. He testified during direct-examination:

Q. And how did the knife get from under the pillow?

(QUESTION TRANSLATED TO WITNESS BY INTERPRETER)

A. (ANSWER IN SPANISH)

INTERPRETER: He don't know.

Q. Well, did he take it out from under the pillow or did his wife take it out from under the pillow?

(QUESTION TRANSLATED TO WITNESS BY INTERPRETER)

A. (ANSWER IN SPANISH)

INTERPRETER: The knife fell when she moved.

Q. And did she later grab the knife?

(QUESTION TRANSLATED TO WITNESS BY INTERPRETER)

A. (ANSWER IN SPANISH)

INTERPRETER: When—when he saw the knife on the floor, he asked his wife, "Are you going to—you going to kill me after you done to me?"

(WITNESS SAYS SOMETHING IN SPANISH)

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INTERPRETER: I was very mad. I picked up the knife and I cut myself.

Q. All right. Did you then struggle for the knife? Did your wife try to grab the knife?

(QUESTION TRANSLATED TO WITNESS BY INTERPRETER)

A. (ANSWER IN SPANISH)

INTERPRETER: No, he tried to take away the knife from her.

Q. Did you—did you all have a struggle together?

(QUESTION TRANSLATED TO WITNESS BY INTERPRETER)

A. (ANSWER IN SPANISH)

INTERPRETER: Yes.

Defendant later testified during cross-examination that at first his wife was sitting on the bed, then they both fell down in the bed, then he was under her, and once he had the knife, he was on top of her. Defendant insisted that his wife cut herself accidentally when they were struggling for the knife.

The defendant also presented the testimony of his uncle, who saw the Uvalles' argument the previous January. On that occasion, the uncle said that Ms. Uvalle had a piece of a broom handle in her hand. Defendant's employer testified as to his opinion that defendant is a truthful, law-abiding, and non-aggressive citizen who is a dependable worker.

The trial court instructed the jury on assault with a deadly weapon inflicting serious injury and not guilty. The court further instructed the jurors that if they found that defendant acted in self-defense, that would excuse defendant's actions, and they should find him not guilty. The jury found defendant guilty as charged. In his brief, defendant makes two arguments: (1) problems with the court interpreter amounted to plain and reversible error, and (2) the trial court erred by failing to instruct the jury on four lesser included offenses of assault with a deadly weapon inflicting serious injury. Although he raised eight assignments of error in the record on appeal, he only brings forward numbers 1, 3, 4, 5, and 7. Accordingly, assignments of error 2, 6, and 8 are deemed abandoned. *See* N.C. R. App. Proc. 28(a) (2001). We address defendants' two issues in order.

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[1] First, defendant contends that the “trial court committed reversible error and plain error by not directing the interpreter for the State to interpret exactly the question asked by the State and the answer as given by the witness.” The State repeatedly asked the interpreter to repeat exactly what the witness and attorney said. The trial judge instructed the interpreter several times, as requested by the attorneys on both sides, and replaced one interpreter during a recess “to give [her] a break.”

We recognize that there may be circumstances in which translation difficulties could violate a non-English speaking defendant's constitutional rights to a fair trial, to confront and cross-examine witnesses, or to due process under the North Carolina and United States Constitutions. However, these issues were not raised here. During trial, when an interpreter failed to interpret in the first person, or engaged in conversation in Spanish with the testifying witness without translating for the court the contents of the exchange, defendant's counsel expressed concern and requested further instructions, but never expressly noted an objection. Defendant has properly couched his argument as plain error. *See State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). When we review for plain error, we only grant relief when the “error is a *fundamental* error, something so basic, so prejudicial . . . that justice cannot have been done,” or where it denies a fundamental right to a fair trial, or where it had “a probable impact on the jury's finding that the defendant was guilty.” *Id.* (internal citation and quotations omitted) (emphasis in original). We do not find error, let alone error of this magnitude, in the instructions given or not given to the interpreters here. After careful review of the transcript and record on appeal, we conclude that the difficulties with the court interpreters did not impede the defense from confronting and cross-examining the state's witnesses or from presenting its evidence for the jury's consideration. Thus, we overrule this assignment of error.

In his second argument, defendant contends that the trial court erred by not instructing the jury on four lesser included offenses of assault with a deadly weapon inflicting serious injury, to wit: (1) felonious assault inflicting serious bodily injury, (2) assault with a deadly weapon, (3) assault inflicting serious injury, and (4) simple assault. We disagree.

A defendant “is entitled to an instruction on lesser included offense[s] if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater.” *State v.*

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Leazer, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000); *see also State v. Collins*, 334 N.C. 54, 58, 431 S.E.2d 188, 190-91 (1993); *State v. Siler*, 66 N.C. App. 165, 166, 311 S.E.2d 23, 24, *aff'd as modified*, 310 N.C. 731, 314 S.E.2d 547 (1984). However, "a lesser offense should not be submitted to the jury if the evidence is sufficient to support a finding of all the elements of the greater offense, and there is no evidence to support a finding of the lesser offense." *State v. Nelson*, 341 N.C. 695, 697, 462 S.E.2d 225, 226 (1995).

[2] The elements of assault with a deadly weapon inflicting serious injury are "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Aytche*, 98 N.C. App. 358, 366, 391 S.E.2d 43, 47 (1990); *see also* N.C. Gen. Stat. § 14-32(b) (2001). We first note that assault inflicting serious bodily injury is not a lesser included offense of assault with a deadly weapon inflicting serious injury, and that such an instruction would not have been proper here. *See e.g., State v. Hannah*, 149 N.C. App. 713, 563 S.E.2d 1 (2002) (holding that assault inflicting serious bodily injury is not a lesser included offense of assault with a deadly weapon with intent to kill and inflict serious injury as defined in N.C.G.S. § 14-32(a)). The language of N.C. Gen. Stat. § 14-32.4 (2001), defines "serious bodily injury" as: "[a] 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." However, our courts have held that "serious injury," as used in connection with a charge under N.C.G.S. § 14-32(b), does not necessarily rise to the level of "serious bodily injury." *See Hannah*, 149 N.C. App. at 718, 563 S.E.2d at 5. The *Hannah* Court stated: "Thus, while there may be factual situations in which the elements of 'serious bodily injury' and 'serious injury' are in apparent identity, this does not satisfy the definitional approach required to determine whether one offense is a lesser included offense of another." *Id.* "We conclude that, because the element of 'serious bodily injury' requires proof of more severe injury than the element of 'serious injury,'" assault inflicting serious bodily injury is not a lesser included offense of assault with a deadly weapon inflicting serious injury. *Id.* Thus, since defendant was not charged with an offense under N.C.G.S. § 14-32.4, but only under N.C.G.S. § 14-32(b), he was not entitled to an instruction on an offense which is not a lesser included offense and with which he was not charged.

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[3] Defendant also argues that he was entitled to instructions on the lesser included offenses of assault with a deadly weapon (no serious injury), assault inflicting serious injury (no deadly weapon), and simple assault (no serious injury or deadly weapon). *See* N.C.G.S. § 14-32(b). Assault is defined as either “a show of violence causing a reasonable apprehension of immediate bodily harm” or “an intentional offer or attempt by force or violence to do injury to the person of another.” *State v. Thompson*, 27 N.C. App. 576, 577, 219 S.E.2d 566, 567-68 (1975), *disc. rev. denied*, 289 N.C. 141, 220 S.E.2d 800 (1976). Whether defendant is entitled to an instruction on an offense which is a lesser included offense depends upon the evidence presented at trial.

Defendant testified that the knife was under the pillow, that it fell out, and the struggle ensued. During the struggle, he testified that Ms. Uvalle was accidentally cut by the knife. Ms. Uvalle, on the other hand, testified that the defendant repeatedly stabbed her with the knife, that she grabbed the blade to stop him from stabbing her. Their son corroborated this description of events. The emergency room doctor also gave his opinion that Ms. Uvalle’s injuries were not self-inflicted.

Generally, “[w]hether a serious injury has been inflicted depends upon the facts of each case and is generally for the jury to decide under appropriate instructions.” *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991), *cert. denied*, 529 U.S. 1006, 146 L. Ed. 2d 223 (2000). “Pertinent factors for jury consideration include hospitalization, pain, blood loss, and time lost at work.” *State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997). Here, the trial court did not instruct the jury on the offense of assault with a deadly weapon, which does not include the element of “serious injury.” In *Hedgepeth*, the Supreme Court approved a peremptory instruction on serious injury, where the evidence of the prosecuting witness’s injury “is not conflicting and is such that reasonable minds could not differ as to the serious nature of the injuries inflicted.” 330 N.C. at 54, 409 S.E.2d at 318 (quoting *State v. Pettiford*, 60 N.C. App. 92, 97, 298 S.E.2d 389, 392 (1982)).

In *State v. Crisp*, 126 N.C. App. 30, 37, 483 S.E.2d 462, 466-67, *disc. rev. denied*, 346 N.C. 284, 487 S.E.2d 559 (1997), the trial court gave a peremptory instruction on “serious injury” when the victim was shot and the bullet went through his calf muscle. The defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury under the same statute as the one at issue in

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the present case, N.C.G.S. § 14-32. This Court “decline[d] to disturb the trial court’s determination that [the victim’s] injury was ‘serious’ within the meaning of [N.C.G.S.] § 14-32(a) and that reasonable minds could not differ as to the seriousness of his injuries.” *Id.* at 37, 483 S.E.2d at 467. “Thus, the trial court was not required to submit the lesser included offense of assault with a deadly weapon to the jury.” *Id.*

Here, the trial court did not give a peremptory instruction, but there is no genuine dispute in the evidence as to the serious nature of the prosecuting witness’ injury. The uncontroverted evidence, including the unequivocal opinion of the treating physician, indicates that she sustained several deep knife wounds resulting in permanent debilitating injuries. Thus, defendant was not entitled to instructions on either simple assault or assault with a deadly weapon which omitted the element of “serious injury,” since the evidence did not “permit the jury rationally to find him guilty of the lesser offense and acquit him of the greater.” *Leazer*, 353 N.C. at 237, 539 S.E.2d at 924.

Further, the evidence was undisputed that, however it occurred, Ms. Uvalle’s injuries were sustained by a butcher knife with a blade “about a foot long,” which qualifies as a deadly weapon *per se*. *See State v. Cox*, 11 N.C. App. 377, 380, 181 S.E.2d 205, 207 (1971); *State v. Parker*, 7 N.C. App. 191, 171 S.E.2d 665 (1970). Thus, defendant was not entitled to an instruction on an assault not involving a deadly weapon.

[4] Finally, defendant argues that the jury should have been instructed on misdemeanor simple assault, pursuant to N.C. Gen. Stat. § 14-33 (2001). However, this Court has explained in *State v. Owens*, 65 N.C. App. 107, 110-11, 308 S.E.2d 494, 498 (1983),

[t]he 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.

(emphasis in original). Defendant contended at oral argument and the State agreed, that if the knife was introduced into the altercation by accident, he was entitled to this instruction because the jury could find the absence of the “use of a deadly weapon” element. However,

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the defendant testified that he “picked up the knife” and the struggle ensued. Thus, we believe that the trial court correctly concluded that, even if the jury believed that the knife fell out from under the pillow, there was no evidence to dispute that defendant “used” it. We concluded above that a deadly weapon caused the victim’s injuries, and that there is no rational dispute about whether serious injury resulted. Therefore, we hold that the trial court properly declined to instruct the jury on misdemeanor assault.

In sum, the trial court did not commit plain error in managing the interpreters, and did not err by refusing to instruct the jury on the lesser-included offenses of assault with a deadly weapon inflicting serious injury.

No error.

Judges MARTIN and CAMPBELL concur.

ROY FUTRELL, EMPLOYEE, PLAINTIFF V. RESINALL CORPORATION, EMPLOYER,
LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA01-703

(Filed 16 July 2002)

1. Workers’ Compensation— occupational disease—carpal tunnel syndrome

The Industrial Commission did not err in a workers’ compensation case by concluding that plaintiff employee’s carpal tunnel syndrome was not a compensable occupational disease, because: (1) the Commission’s finding that plaintiff was not at a greater risk of contracting the disease than the general public was supported by competent evidence; and (2) although there may have been some evidence tending to show plaintiff’s employment could have aggravated the condition, there is no authority from this State which allows the Court of Appeals to ignore the requirement that a plaintiff seeking to prove an occupational disease show that the employment placed him at a greater risk for contracting the condition, even where the condition may have been aggravated but not originally caused by plaintiff’s employment.

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2. Workers' Compensation— failure to remand case—abuse of discretion standard

The Industrial Commission's failure to remand a workers' compensation case to the deputy commissioner to clarify or take additional evidence did not constitute an abuse of discretion even though plaintiff contends that he was unaware of the importance that the Commission would place on plaintiff's ability to establish that his employment placed him at an increased risk of developing carpal tunnel syndrome and that plaintiff should have produced medical testimony to that effect.

Judge GREENE dissenting.

Appeal by plaintiff from an opinion and award entered 7 August 2000 by the North Carolina Industrial Commission. Heard in the Court of Appeals 26 March 2002.

Cannon & Taylor, LLP, by Richard L. Cannon, III, for plaintiff-appellant.

Barber & Wilson, P.A., by Timothy C. Barber and Leslie Hickman-Loucks, for defendant-appellees.

HUNTER, Judge.

Roy Futrell ("plaintiff") appeals an opinion and award of the North Carolina Industrial Commission denying his workers' compensation claim against defendant Resinall Corporation ("Resinall") and its carrier, Liberty Mutual Insurance Company. We affirm.

On 19 April 1996 plaintiff filed a claim with the Commission contending that he had contracted an occupational disease, carpal tunnel syndrome. The evidence presented during a hearing before the deputy commissioner established that plaintiff was employed by Resinall from August 1989 through 23 December 1996. The last position held by plaintiff with Resinall was that of a resin kettle operator. His job responsibilities consisted of tearing open fifty-pound bags of chemicals with his hands, using an axe to bang on drums to loosen their contents, and monitoring kettles. Plaintiff spent at least half of his time monitoring kettles as opposed to opening bags or banging on drums, and from May until September 1996 plaintiff did not open bags or bang on drums.

In February 1996, plaintiff visited Dr. Douglas Kells complaining of pain and numbness in his right hand. Dr. Kells prescribed a splint,

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some medication, and light duty work. Plaintiff continued to experience problems with his hands, and a 10 September 1996 nerve test confirmed that plaintiff had developed moderately severe carpal tunnel syndrome. Following an examination in October 1996, Dr. Kells indicated that plaintiff would be able to return to light duty work in December 1996. Plaintiff took an unpaid leave of absence from his work at Resinall pursuant to the Family Medical Leave Act. Plaintiff was discharged when he failed to return to work after his leave of absence expired on 23 December 1996.

The deputy commissioner concluded plaintiff had failed to establish that he suffered from a compensable occupational disease because he failed to show that his carpal tunnel syndrome was caused by conditions characteristic of and peculiar to his employment at Resinall, and that his employment exposed him to a greater risk of contracting the condition than the general public. Plaintiff appealed to the Full Commission. On 7 August 2000, the Full Commission entered an opinion and award agreeing with the deputy commissioner. It found as fact that plaintiff had failed to show that he was at a greater risk of developing carpal tunnel syndrome than the general public, and accordingly, denied plaintiff's claim. Plaintiff appeals.

Plaintiff brings forth two arguments on appeal: (1) the Commission erred in concluding that plaintiff had not suffered a compensable occupational disease; and (2) the Commission erred in failing to exercise its discretion to remand the case to the deputy commissioner for the taking of further evidence.

I.

[1] Plaintiff first argues that the Commission erred in concluding he had not suffered a compensable occupational disease because he presented sufficient evidence as to each required element of proof. Our review of an opinion and award of the Commission is limited to the determination of (1) whether the findings of fact are supported by any competent evidence in the record; and (2) whether the findings support the Commission's conclusions of law. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001). The Commission's findings of fact are conclusive on appeal where supported by any competent evidence, notwithstanding the existence of evidence which would support findings to the contrary. *Id.*

A plaintiff seeking compensation for an occupational disease under N.C. Gen. Stat. § 97-53(13) (2001) must establish that his dis-

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ease or condition meets the following three criteria: (1) the condition is “characteristic of persons engaged in the particular trade or occupation in which the claimant is engaged”; (2) the condition is “not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation”; and (3) there is “‘a causal connection between the disease and the [claimant’s] employment.’” *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983) (citations omitted). The first two elements of the three-prong test are satisfied where the plaintiff can show that “the employment exposed [him] to a greater risk of contracting the disease than the public generally.” *Id.* at 94, 301 S.E.2d at 365.

With respect to whether plaintiff’s employment placed him at an increased risk for developing carpal tunnel syndrome than the public generally, the Commission found that Dr. Cecil Neville, an orthopedic surgeon, testified that the nature of plaintiff’s job was high impact/low repetition and would not cause carpal tunnel syndrome, and that plaintiff’s employment did not place him at a greater risk for developing carpal tunnel syndrome than the general public. The Commission also found that neither of plaintiff’s treating physicians, Drs. Vernon Kirk and Anthony DiStasio, offered evidence that plaintiff’s job placed him at an increased risk for development of the disease as compared to the employment population at large. In addition, the Commission found that a review of Resinall’s records established no other employee who performed the same duties as plaintiff had ever complained of or developed carpal tunnel syndrome. The Commission’s findings are supported by the evidence.

The Commission’s finding that plaintiff was not at a greater risk of contracting the disease than the general public is supported by competent evidence, and is therefore conclusive on appeal, though there may be evidence to the contrary. This finding alone supports the conclusion that plaintiff did not prove the presence of a compensable occupational disease, as case law from this jurisdiction consistently and unambiguously requires that a plaintiff prove such increased risk. *See, e.g., id.* With respect to the dissent’s position that the Commission was required to make findings as to whether plaintiff’s condition was aggravated by his employment, this issue has not been argued by plaintiff, and his brief makes no mention of the Commission’s failure to do so. In fact, plaintiff’s argument is that the evidence shows that his employment caused him to contract the disease. The issue of whether the Commission erred in failing to make findings on aggravation is therefore not properly before us. *See* N.C.R.

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App. P. 28(a) (scope of appellate review limited to those issues specifically argued in briefs, and issues not so argued are deemed abandoned).

In any event, although there may have been some evidence tending to show plaintiff's employment could have aggravated the condition, there is no authority from this State which allows us to ignore the well-established requirement that a plaintiff seeking to prove an occupational disease show that the employment placed him at a greater risk for *contracting* the condition, even where the condition may have been aggravated but not originally caused by the plaintiff's employment. We cannot agree with the dissent's position that this reading of *Rutledge* effectively precludes recovery in all cases where a claimant does not argue that his employment caused him to contract the disease. It simply precludes recovery where a claimant cannot meet all three well-established requirements for proving an occupational disease. This is not a novel approach or reading of *Rutledge*.

Indeed, if the first two elements of the *Rutledge* test were meant to be altered or ignored where a claimant simply argued aggravation or contribution as opposed to contraction, then our courts would not have consistently defined the third element of the *Rutledge* test as being met where the claimant can establish that the employment caused him to contract the disease, *or* where he can establish that it significantly contributed to or aggravated the disease. *See, e.g., Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 354, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). *Rutledge* and subsequent case law applying its three-prong test make clear that evidence tending to show that the employment simply aggravated or contributed to the employee's condition goes only to the issue of causation, the third element of the *Rutledge* test. Regardless of how an employee meets the causation prong (i.e., whether it be evidence that the employment caused the disease or only contributed to or aggravated the disease), the employee must nevertheless satisfy the remaining two prongs of the *Rutledge* test by establishing that the employment placed him at a greater risk for contracting the condition than the general public. *See, e.g., Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 622, 534 S.E.2d 259, 261 (2000) (upholding Commission's determination that although evidence showed plaintiff's fibromyalgia was "caused or aggravated" by her employment, where plaintiff failed to present evidence showing that employment placed her at increased risk for

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contracting fibromyalgia, plaintiff did not establish compensable occupational disease).¹

As our Supreme Court stated in *Rutledge*:

[C]hronic obstructive lung disease may be an occupational disease provided the occupation in question exposed the worker to a greater risk of contracting this disease than members of the public generally, and provided the worker's exposure to cotton dust significantly contributed to, or was a significant causal factor in, the disease's development. This is so even if other non-work-related factors also make significant contributions, or were significant causal factors.

Rutledge, 308 N.C. at 101, 301 S.E.2d at 369-70. Thus, *Rutledge* itself contemplates the fact that although the employment may have only contributed to or aggravated the disease, in order to be considered an occupational disease, the claimant must nevertheless prove that the employment exposed the claimant to a greater risk of "contracting" the disease. This argument is overruled.

II.

[2] Additionally, plaintiff argues that the Commission erred in failing to exercise its discretion to remand the matter *sua sponte* to the deputy commissioner to take further evidence or clarify existing evidence prior to entering its final order. Plaintiff argues that he was unaware of the importance that the Commission would place on his being able to establish specifically that his employment placed him at an increased risk of developing the condition, and that he should have produced medical testimony to that effect. Plaintiff contends the Commission should have remanded the matter to the deputy commissioner to ascertain whether Dr. Kells was of the opinion that plaintiff's job placed him at an increased risk of developing carpal tunnel syndrome than the public at large. We do not agree with plaintiff that the Commission's failure to remand the matter to the deputy commissioner for plaintiff to clarify and/or add to his evidence constituted an abuse of discretion.

1. The dissent distinguishes *Norris* on the basis that the plaintiff in that case argued that her employment placed her at a greater risk for contracting the disease, thereby limiting the court's review to that issue, as opposed to aggravation. However, a review of the issues presented in this case likewise reveals that plaintiff's argument is that his employment caused him to contract his disease, and he makes no argument as to the absence of findings on aggravation, which, under the dissent's reasoning, would preclude us from reviewing the issue of aggravation.

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Affirmed.

Judge TIMMONS-GOODSON concurs.

Judge GREENE dissents in a separate opinion.

GREENE, Judge, dissenting.

I disagree with the majority that our case law requires a plaintiff who is attempting to prove an *aggravation* of his disease due to his employment to show he was also at a greater risk of *contracting* the disease than the general population, I therefore dissent in part I of the majority opinion.

For diseases not specifically listed in N.C. Gen. Stat. § 97-53, such as carpal tunnel syndrome, the claimant must show that his disease is considered occupational under section 97-53(13). N.C.G.S. § 97-53(13) (2001). The burden rests on the claimant to show that: (1) “‘a causal connection between the disease and the [claimant’s] employment’” exists and (2) “the employment exposed the worker to a greater risk of contracting the disease than the public generally.” *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983) (citations omitted). Although the second prong of the test outlined in *Rutledge* uses the words “contracting the disease,” this language evolved in the context of workers’ compensation claims based on diseases that were brought about by the plaintiffs’ employment conditions. *See, e.g., id.* at 90, 301 S.E.2d at 363; *Booker v. Med. Ctr.*, 297 N.C. 458, 472-74, 256 S.E.2d 189, 198-200 (1979). The analysis, however, must necessarily change when the focus shifts from causation as it relates to the initial development of a disease to the aggravation of an existing condition, because a plaintiff whose disease was aggravated by his employment does not claim to have contracted the disease at work.

While the majority cites *Norris v. Drexel Heritage Furnishings, Inc.* to support its proposition that this Court has previously held an increased risk of contracting the disease must be shown even in an aggravation case, *Norris* did not specifically deal with aggravation. *See Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 622, 534 S.E.2d 259, 261 (2000), *cert. denied*, 353 N.C. 378, 547 S.E.2d 15 (2001). Instead, the Commission in *Norris* simply found the plaintiff’s fibromyalgia to have been “caused or aggravated” by her employment. *Id.* Furthermore, the plaintiff in *Norris* argued she had

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presented sufficient evidence that her employment as a splicing machine operator placed her at a greater risk of contracting fibromyalgia than the general public, thereby limiting the court's scope of review to this issue. *Id.* In this case, however, plaintiff's appeal to this Court rests in part on the proposition that the "*Rutledge* standard is not a perfect fit" in respect to plaintiff's claim.

As this Court has not yet considered the proper formulation of the "increased risk" factor in an aggravation case, I would hold that, in the context of an aggravation case, the analysis must rest on whether the plaintiff's job exposed him to a greater risk of having his carpal tunnel syndrome aggravated than the general population suffering from the disease. *See Goodman v. Cone Mills Corp.*, 75 N.C. App. 493, 497, 331 S.E.2d 261, 264 (1985) (a disease is compensable when it "is aggravated or accelerated by causes and conditions characteristic of and peculiar to [the] claimant's employment") (citing *Walston v. Burlington Indus.*, 304 N.C. 670, 679-80, 285 S.E.2d 822, 828 (1982)). To read *Rutledge* as the majority does would generally preclude recovery for every workers' compensation claim asserting an occupational disease based on aggravation. This would be inconsistent with N.C. Gen. Stat. § 97-53(13), which defines an occupational disease as one "due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment." N.C.G.S. § 97-53(13). Accordingly, I would hold the Commission's finding in this case that plaintiff's employment did not place him at an increased risk of developing carpal tunnel syndrome as compared to the general public did not support a conclusion to deny plaintiff disability compensation based on aggravation.

Furthermore, as the majority concedes, plaintiff's evidence with respect to the employment-related aggravation of his carpal tunnel syndrome is undisputed. As such, the Commission erred in failing to find plaintiff's carpal tunnel syndrome was aggravated by his employment. *See Goodman*, 75 N.C. App. at 497, 331 S.E.2d at 264. I would therefore remand this case to the Commission for entry of a finding that plaintiff's carpal tunnel syndrome was aggravated by his employment and for consideration of whether plaintiff's job exposed him to a greater risk of having his carpal tunnel syndrome aggravated than the general population suffering from the disease.

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CAROLANTIC REALTY, INC., PLAINTIFF v. THE MATCO GROUP, INC. AND CAN-AM SEVEN PROPERTIES, LLC, DEFENDANTS

No. COA01-1091

(Filed 16 July 2002)

1. Brokers— commission—actual execution of lease required

Plaintiff broker was not entitled to a commission on a commercial real estate lease pursuant to the language of the listing agreement where the undisputed facts established that the lease which was eventually executed was the direct and proximate result of plaintiff's efforts, but the listing agreement indicated that the parties intended to condition the commission upon the actual execution of a lease or the formation of a binding agreement to execute the lease by the expiration of the exclusive listing period plus a grace period, and the lease was not executed and no binding contract to enter the lease was made within that time.

2. Brokers— commission—listing agreement—waiver of termination date

Summary judgment was improperly granted for defendant in plaintiff broker's action for the commission on a commercial real estate lease where there was a genuine issue of fact as to whether defendants waived the agreement's termination date. Plaintiff alleged and presented evidence that he continued to work on the lease through the signing date and that the parties agreed to but never signed an extension of the termination date.

3. Brokers— commission—services during grace period—quantum meruit

There was a genuine issue of material fact as to whether a real estate broker was entitled to recovery of a commission on quantum meruit for a lease executed after the listing period expired. No contract will be implied where an express contract exists, but the express contract here was applicable only if services during the listing period resulted in a sale during the grace period. There was no contract concerning services rendered subsequently.

Appeal by plaintiff from an order entered 11 July 2001 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 22 May 2002.

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Manning, Fulton & Skinner, P.A., by William C. Smith, Jr., for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Pressly M. Millen, for defendant-appellees.

HUNTER, Judge.

Carolantic Realty, Inc. (“plaintiff”) appeals the trial court’s denial of its motion for summary judgment, and the trial court’s grant of summary judgment in favor of The Matco Group, Inc. (“Matco”) and CAN-AM Seven Properties, LLC (“CAN-AM”) (collectively “defendants”). We reverse the trial court’s grant of summary judgment in favor of defendants and remand for further proceedings.

The undisputed facts are as follows. Plaintiff, a real estate company, entered into a contractual brokerage relationship with Matco, a corporation authorized to enter into listing contracts on behalf of CAN-AM. Between 1996 and 1999, and pursuant to three separate listing agreements between plaintiff and Matco, plaintiff undertook efforts to lease or sell a warehouse space in Raleigh (“the Property”) owned by CAN-AM. The third listing agreement (“the Listing Agreement”) gave plaintiff the “exclusive right to Lease and/or Sell the Property” during the “exclusive [one-year] listing period” from 25 February 1998 through 24 February 1999. Paragraph 7a(i) of the Listing Agreement states: “The commission shall be paid upon delivery of the deed or other evidence of transfer of title or interest.” Paragraph 7b(i) states: “Commissions shall be earned on execution of a lease by Seller/Landlord and a Buyer/Tenant in accordance with the following rates” Paragraph 8 of the Listing Agreement further provides, in pertinent part:

If within 45 days after the expiration of the exclusive listing period, [Matco] shall directly or indirectly lease or agree to lease or sell or agree to sell the property to a party to whom [plaintiff] . . . has communicated concerning the property during this exclusive listing period, [Matco] shall pay [plaintiff] the same commission to which they would have been entitled had the sale or lease been made during the exclusive period

As noted, the “exclusive listing period” expired on 24 February 1999, and, therefore, the forty-five day “grace period” set forth in paragraph 8 ended on 10 April 1999.

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In the fall of 1998, during the exclusive listing period of the Listing Agreement, plaintiff communicated with the State of North Carolina Department of Health and Human Services, Disability Determination Services (“DDS”) as a possible tenant. The State had put out a contract seeking to lease property, and had provided detailed lease specifications to prospective bidders. On behalf of Matco, plaintiff made a bid for the contract by means of completing and submitting a “PO-28 Proposers Form” on 12 October 1998. The PO-28 identified plaintiff as Matco’s agent on the bid. In late October and November of 1998, a representative from the State visited the property, met with Matco officials, and conducted “lease negotiations” with defendants. Plaintiff attended the bid openings on 19 November 1998, at which time Matco’s bid was determined to be the low bid on the contract. The State subsequently ceased all efforts to locate lease property for DDS, and architects and designers for defendants and the State began “intensive space planning efforts . . . to prepare a functional layout” of the property. The parties determined that DDS would need approximately 8,000 square feet of additional space, and defendants “agreed to provide it” and also agreed to reserve an additional 8,000 to 10,000 square feet of “expansion space” for DDS adjacent to the leased space.

On 3 December 1998, the State sent defendants a “draft of the lease document,” which was approved by defendants. Toward the end of December of 1998, the Council of State officially recommended that the State lease the property from defendants, and the State decided not to exercise an option to renew the lease on the property then occupied by DDS. On 5 January 1999, the Governor and Council of State, on behalf of the State, officially approved the execution of a lease agreement for the property in accordance with the terms of defendants’ offer. In January and February of 1999, the State and defendants engaged in numerous conversations and meetings regarding the details of preparing for “the State’s move-in,” including the selection of a floor plan. On 26 April 1999, lease documents were distributed by DDS to defendants. The final lease agreement between defendants and the State (“the Lease Agreement”) was executed on 20 May 1999.

On 23 September 1999, plaintiff filed a complaint against defendants seeking a commission of \$476,940.00 under the Listing Agreement based upon a breach of contract theory or, in the alternative, a *quantum meruit* theory, and seeking attorney’s fees under the Listing Agreement. Plaintiff and defendants moved for

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summary judgment. On 11 July 2001, the trial court entered an order denying plaintiff's motion for summary judgment and granting defendants' motion for summary judgment. Plaintiff appeals.

On appeal, plaintiff argues that the trial court erred (1) in granting defendants' motion for summary judgment and (2) in denying plaintiff's motion for summary judgment. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 (2001), a motion for summary judgment is properly granted if, considering the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998). The moving party bears the burden of showing that there are no genuine issues of material fact. *Id.* at 394, 499 S.E.2d at 775. "The evidence is to be viewed in the light most favorable to the nonmoving party." *Id.*

[1] We first address whether the trial court erred in granting defendants' motion for summary judgment. The undisputed facts establish that defendants and the State did not execute the Lease Agreement until 20 May 1999, after the "exclusive listing period" and the additional forty-five day grace period had expired. However, the undisputed facts also establish that the Lease Agreement was the direct and proximate result of plaintiff's efforts to lease or sell the property. The question is whether this latter fact establishes that plaintiff is entitled to a commission under the Listing Agreement.

Ordinarily, a broker with whom an owner's property is listed for sale becomes entitled to his commission whenever he procures a party who actually contracts for the purchase of the property at a price acceptable to the owner. If any act of the broker in pursuance of his authority to find a purchaser is the initiating act which is the procuring cause of a sale ultimately made by the owner, the owner must pay the commission *provided the case is not taken out of the rule by the contract of employment*. The broker is the procuring cause if the sale is the direct and proximate result of his efforts or services.

Realty Agency, Inc. v. Duckworth & Shelton, Inc., 274 N.C. 243, 250-51, 162 S.E.2d 486, 491 (1968) (citations omitted) (emphasis added).

Defendants acknowledge the general rule as set forth in *Realty Agency*, but argue that it is inapplicable in this case due to the spe-

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cific terms of the Listing Agreement. Defendants contend that the express language of the Listing Agreement indicates that the parties intended to contract around the general rule and to condition plaintiff's commission upon the actual execution of a lease (or the formation of a legally binding agreement to lease) within the exclusive listing period or within the grace period. Based upon our reading of the Listing Agreement, we are compelled to agree with defendants.

Generally, the parties to a listing agreement may agree that the broker will only be entitled to a commission upon the happening of some specified event, such as a consummated transaction. See Patrick K. Hetrick & James B. McLaughlin, Jr., *Webster's Real Estate Law in North Carolina* § 8-11(b), 254 (5th ed. 1999). As noted above, paragraph 7b(i) of the Listing Agreement states: "Commissions shall be earned on execution of a lease by Seller/Landlord and a Buyer/Tenant in accordance with the following rates . . ." The Listing Agreement nowhere indicates any intention to the contrary, such as a provision that plaintiff's entitlement to a commission would be based upon procuring a party ready, willing, and able to lease or purchase the property.

Moreover, the language of the grace period provision itself further supports our conclusion. This provision states that if plaintiff communicated with a certain party during the listing period, and that party ultimately purchased (or agreed to purchase) or leased (or agreed to lease) the property within 45 days after the end of the listing period, plaintiff would be entitled to "the same commission to which [it] would have been entitled *had the sale or lease been made during the exclusive period.*" (Emphasis added.) This provision implies that, but for this provision, plaintiff would *not* be entitled to a commission where he procured a buyer or lessee during the listing period who did not purchase or lease (or enter a binding agreement to purchase or lease) until shortly after the end of the listing period. This supports the conclusion that the parties intended to contract around the general rule that a commission would be earned upon the procuring of a ready, willing, and able buyer or lessee during the listing period.

In a related argument, plaintiff points to the fact that the Listing Agreement provides that plaintiff is entitled to a commission if Matco "shall directly or indirectly . . . agree to lease" the property within 45 days after the end of the listing period. Plaintiff's argument appears to be that the language "shall . . . agree to lease" must contemplate something less than an actual execution of a lease, and that the sta-

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tus of the relationship between defendants and the State prior to 10 April 1999 (the end of the grace period) established at least an agreement to lease.

Although we agree with plaintiff that the language “shall directly or indirectly . . . agree to lease” must contemplate something less than an executed lease, we believe the parties simply intended to clarify that a commission would be earned, not only upon the execution of an actual lease, but also upon the formation of a binding contract whereby the parties agreed to enter into a lease at some point in the future. In other words, the likely reason for including the language “agree to lease” is to prevent the property owner from being able to avoid paying a commission by entering a contract to lease during the listing period and then delaying the actual execution of the lease until after the listing period. *See Busch v. Eisin*, 422 N.E.2d 135, 137 (Ill. App. 1 Dist. 1981). Because we do not believe that, as of 10 April 1999, there was a binding contract between defendants and the State that they would execute a lease at some point in the future, we reject plaintiff’s argument.

[2] Although plaintiff was not entitled to a commission in this case pursuant to the language of the Listing Agreement itself, we nonetheless conclude that summary judgment in favor of defendants was improperly granted for two reasons. First, plaintiff argues, and we agree, that there are genuine issues of material fact as to whether defendants waived the termination date in the agreement.¹

Although we have been unable to find cases in this state addressing the specific issue, it is well established in other jurisdictions and among the authorities in the area that a time limitation in a listing agreement may be expressly waived by the property owner, or impliedly waived by the acts of the property owner:

The time limit of a brokerage contract may be waived or impliedly extended by the principal, thereby entitling the broker to a commission on a transaction consummated after the technical termination of the agency contract. A provision in a broker’s contract of employment terminating it as of a given date is for the benefit of the principal, and like all other provisions in favor of a

1. Plaintiff also sets forth an estoppel argument, which we do not address because we believe it is, in substance, equivalent to plaintiff’s waiver argument. *See* Annotation, *Broker’s Right to Commission on Sales Consummated After Termination of Employment*, 27 A.L.R.2d 1348 (1953) (index listing equates “estoppel” with “waiver” in this context).

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party, may be waived either expressly or impliedly if the principal chooses.

12 Am. Jur. 2d *Brokers* § 273, 920-21 (1997) (footnotes omitted), and cases cited therein; *see also* 27 A.L.R.2d 1348, 1355-57, and cases cited therein. Furthermore, whether a time limit has been waived or extended is a question of fact for the jury, and involves consideration of

whether the principal accepts the services of the broker and recognizes the contract as still in force, whether the principal tacitly or expressly encourages the broker to continue efforts to effect a sale, and whether the prior acts and conduct between the parties would lead the broker to believe that adherence to the time frame would not be insisted upon.

12 Am. Jur. 2d *Brokers* § 273, 921 (footnote omitted).

Here, defendants admitted in their answer to plaintiff's complaint that plaintiff "continued to have minimal involvement in issues related to the lease" after the listing period expired. Further, plaintiff asserts in its complaint, and defendants deny, that "Plaintiff continued to work with the State . . . on the lease at Defendants' request and with their knowledge and express and implied consent through the date of lease signing, May 20, 1999, and thereafter." In addition, plaintiff presented testimony in the form of an affidavit by Patrick Keenan, plaintiff's employee, that on numerous occasions, both prior to and after the end of the listing period, an agent for Matco requested that plaintiff continue to perform work pursuant to the Listing Agreement, and further agreed to execute an extension of the term of the Listing Agreement but never actually executed such an extension. We hold that there was sufficient evidence to establish genuine issues of material fact as to whether plaintiff might be entitled to recover a commission from defendants based upon waiver.

[3] Second, plaintiff also argues, and we agree, that there are genuine issues of material fact as to whether plaintiff is entitled to recover pursuant to a theory of *quantum meruit*. Pursuant to this theory, even if the Listing Agreement expired on 24 February 1999, and even if defendants did not waive the termination date, plaintiff might still recover in *quantum meruit* upon a showing that "(1) services were rendered to defendants; (2) the services were knowingly and voluntarily accepted; and (3) the services were not given gratuitously." *Environmental Landscape Design v. Shields*, 75 N.C. App. 304, 306,

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330 S.E.2d 627, 628 (1985). Based upon the disputed factual allegations discussed above in reference to the waiver issue, we believe there were genuine issues of material fact regarding plaintiff's *quantum meruit* claim.

Defendants contend that the facts establish that plaintiff may not recover pursuant to a claim for *quantum meruit* because there was an express contract that covered the same subject matter. Defendants are correct that recovery in *quantum meruit* is appropriate only where an implied contract exists, and that, "where an express contract concerning the same subject matter is found, no contract will be implied." *Beckham v. Klein*, 59 N.C. App. 52, 58, 295 S.E.2d 504, 508 (1982). Here, however, the express contract between the parties concerned only services rendered during the exclusive listing period.

Defendants argue that the express contract concerned not only services rendered during the exclusive listing period, but also services rendered during the additional grace period. This is incorrect. The grace period provision contemplates plaintiff earning a commission if *services rendered during the exclusive listing period* result in a sale or lease during the grace period; the grace period does not contemplate any additional services rendered during the grace period. Because plaintiff's *quantum meruit* claim is based upon services allegedly rendered after the termination of the exclusive listing period, and because we hold that there was no express contract concerning services rendered after the exclusive listing period, we reject defendants' argument.

We have reviewed plaintiff's various arguments contending that the trial court erred in denying plaintiff's motion for summary judgment and find them to be without merit. Thus, we affirm the trial court's denial of plaintiff's motion for summary judgment, reverse the trial court's grant of defendants' motion for summary judgment, and remand for further proceedings.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and THOMAS concur.

IN RE POOLE

[151 N.C. App. 472 (2002)]

IN THE MATTER OF: RAVEN POOLE

No. COA01-871

(Filed 16 July 2002)

Juveniles— dependency adjudication—summons to both parents required

An order adjudicating a child dependent and awarding custody to her aunt and uncle was vacated where a summons was not issued to nor served on the father. Earlier cases holding that it was not necessary to serve a dependency petition on both parents were based on a statute which has now been changed. Moreover, the Uniform Child Custody Jurisdiction and Enforcement Act applies to all child custody determinations arising out of child custody proceedings and requires notice to both parents.

Judge TIMMONS-GOODSON dissenting.

Appeal by respondent father from order entered 30 April 1997 by Judge John S. Hair, Jr. in Cumberland County District Court. Heard in the Court of Appeals 23 April 2002.

Staff Attorney John F. Campbell for petitioner-appellee, Cumberland County Department of Social Services.

Hatley & Stone, P.A., by Michael A. Stone, for respondent-appellant, Bernard Poole.

Deborah Koenig, Attorney Advocate, for guardian ad litem.

GREENE, Judge.

Bernard Poole (Respondent) appeals an adjudication and disposition order entered 30 April 1997 adjudicating his daughter Raven Poole (Raven) dependent and awarding legal and physical custody of Raven to her maternal aunt and uncle, Jamesetta and Dwight Nixon (collectively, the Nixons).

In a petition dated 7 October 1996, the Cumberland County Department of Social Services (Petitioner) alleged Raven to be a dependent and neglected juvenile. The petition named the mother and Respondent as the “parent/guardian/custodian/caretaker(s).” The petition stated the mother’s address but listed Respondent’s address

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as “unknown.” A summons was not issued to Respondent; thus he was never served with a summons and a copy of the petition, personally or by publication. The trial court entered a temporary nonsecure order dated 20 December 1996 granting legal and physical custody of Raven to the Nixons. Thereafter, on 30 April 1997, the trial court entered an order adjudicating Raven to be a dependent juvenile and awarded legal and physical custody to the Nixons.

On 2 May 2000, Respondent filed a motion to dismiss the dependency adjudication/disposition due to “lack of . . . valid service of process.” This motion was denied by the trial court in an order filed 30 November 2000.

The dispositive issue is whether the issuance and service of a summons on each parent is a prerequisite to the trial court’s authority to enter an adjudicatory and dispositional order addressing the abuse, neglect, or dependency of a juvenile.

A trial court has the authority to enter an adjudicatory and dispositional order in a chapter 7B abuse, neglect, or dependency case only if it has subject matter jurisdiction under sections 7B-200(a) and 50A-201 and notice has been provided pursuant to sections 7B-407 and 50A-205(a). N.C.G.S. §§ 7B-200(a), 7B-407, 50A-201 (2001); N.C.G.S. § 50A-205(a) (2001) (notice must be given to both parents unless a parent’s parental rights have been previously terminated); *see* N.C.G.S. § 50A-102(4) (2001) (the Uniform Child-Custody Jurisdiction and Enforcement Act (the UCCJEA) applies to proceedings for abuse, neglect, and dependency); *In Re Van Kooten*, 126 N.C. App. 764, 768, 487 S.E.2d 160, 162-63 (1997) (the “jurisdictional requirements of the [UCCJEA] must . . . be satisfied for the district court to have jurisdiction to adjudicate abuse, neglect, and dependency petitions”); *Copeland v. Copeland*, 68 N.C. App. 276, 278, 314 S.E.2d 297, 299 (1984); *see also In re Mitchell*, 126 N.C. App. 432, 433, 485 S.E.2d 623, 624 (1997). While it is not necessary for the trial court to satisfy all the elements of personal jurisdiction in order to have the authority to enter a chapter 7B adjudicatory or dispositional order in an abuse, neglect, or dependency case, *see Harris v. Harris*, 104 N.C. App. 574, 577-79, 410 S.E.2d 527, 529-30 (1991) (personal jurisdiction requires compliance with the applicable long-arm statute, notice, and minimum contacts); *Shingledecker v. Shingledecker*, 103 N.C. App. 783, 785, 407 S.E.2d 589, 591 (1991) (“personal jurisdiction over . . . nonresident is not required under the [UCCJEA]”), service of a

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summons on both parents is required.¹ Indeed, sections 7B-406 and 7B-407 require the summons be issued to and served on both parents of a juvenile alleged to be abused, neglected, or dependent unless a parent's parental rights have been previously terminated. N.C.G.S. §§ 7B-406, -407 (2001) (issuance of a summons to and service on "the parent" required); *see* N.C.G.S. § 7B-101 (2001) ("[t]he singular includes the plural"); N.C.G.S. § 50A-205(a) (2001).

We acknowledge this Court has previously stated that "it is not necessary to serve [a dependency] petition on both parents, but only on one of them." *In the Matter of Arends*, 88 N.C. App. 550, 554, 364 S.E.2d 169, 171 (1988) (quoting *In re Yow*, 40 N.C. App. 688, 691, 253 S.E.2d 647, 649, *disc. review denied*, 297 N.C. 610, 257 S.E.2d 223 (1979)). This Court's holding in *Yow*, however, is based on a statute which provided that the summons must be served upon "the parents or either of them." N.C.G.S. § 7A-283 (1969) (amended 1979). As the legislature has changed the statute on which *Yow* relied, we are not bound by the holding of that case or *Arends*, which relied on *Yow*. In any event, as noted above, the UCCJEA now applies to abuse, neglect, and dependency actions under chapter 7B; and it requires notice to both parents.²

In this case, there is no dispute that Respondent is the father of Raven and that, although he was listed as the father in the petition, a summons was not issued to or served on him. Thus, the trial court did

1. Service of summons on the parents, however, is not necessary in order for the trial court to have authority to enter temporary nonsecure custody orders for the emergency protection of a juvenile. *See* N.C.G.S. §§ 7B-502, -506(h) (2001); *Hart v. Hart*, 74 N.C. App. 1, 6, 327 S.E.2d 631, 635 (1985) (if the jurisdictional requirements of the UCCJEA are met, the trial court may enter an *ex parte* order for temporary custody prior to service of process or actual notice).

2. The dissent disagrees with the UCCJEA's applicability to intrastate matters. We disagree. The UCCJEA applies to all child-custody determinations arising out of child-custody proceedings. *See* N.C.G.S. § 50A-102(3)-(4) (2001). The statutory definition of child-custody proceedings includes proceedings for neglect, abuse and dependency and makes no reference that these proceedings are limited to interstate matters. *See* N.C.G.S. § 50A-102(4). Accordingly, as stated by Professor Homer H. Clark, Jr., there is "no authority for [the dissent's position] in the Act." Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 12.5 n.73 (2d ed. 1988); *see also* *Van Kooten*, 126 N.C. App. at 768, 487 S.E.2d at 162-63. We further note the practical necessity of compliance with the UCCJEA as the official comment to section 50A-205 states that "[a]n order is entitled to interstate enforcement and nonmodification under this Act only if there has been notice and an opportunity to be heard" pursuant to this Act. N.C.G.S. § 50A-205 official commentary. In any event, the record seems to indicate Respondent was a resident of New York at the time the dependency/neglect petition was filed, thus making this an interstate matter.

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not have the authority to enter the 30 April 1997 order adjudicating Raven to be a dependent juvenile and granting permanent custody to the Nixons. Accordingly, the 30 April 1997 order and any subsequent dispositional orders are vacated.

Vacated and remanded.

Judge HUNTER concurs.

Judge TIMMONS-GOODSON dissents.

TIMMONS-GOODSON, Judge, dissenting.

Because I disagree with the majority's conclusion that the trial court lacked jurisdiction to enter the order adjudicating Raven to be a dependent juvenile, I respectfully dissent.

Under the Juvenile Code, the district courts of North Carolina have "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C. Gen. Stat. § 7B-200(a) (2001). The issuance and service of process is the means by which the court obtains jurisdiction, *see* N.C. Gen. Stat. § 7B-401 (2001), and thus where *no* summons is issued, the court acquires jurisdiction over neither the parties nor the subject matter of the action. *See In re Mitchell*, 126 N.C. App. 432, 433, 485 S.E.2d 623, 624 (1997); *In re McAllister*, 14 N.C. App. 614, 616, 188 S.E.2d 723, 725 (1972). In the instant case, it is undisputed that Raven's mother was properly served with the summons. The trial court therefore clearly had subject matter jurisdiction over the action and personal jurisdiction over the mother. *See In the Matter of Arends*, 88 N.C. App. 550, 554-55, 364 S.E.2d 169, 172 (1988). The trial court obtained personal jurisdiction over respondent when he appeared in court on 24 May 2000. The issue is therefore whether the trial court's initial lack of personal jurisdiction over the juvenile's father divests the court of its ability to enter an order adjudicating the juvenile to be dependent. I conclude that the trial court could properly enter such an order.

As the majority recognizes, it is not necessary for the trial court to have personal jurisdiction over the juvenile's parents in order to have the authority to enter a chapter 7B adjudicatory or dispositional order in an abuse, neglect, or dependency case. The majority nevertheless concludes that, without service of a summons on both parents, the trial court is without "authority" to enter an adjudicatory or dispositional order relating to abuse, neglect, or dependency.

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Although it is unclear what the majority means by the term “authority,” the majority appears to base its conclusion that summons must be issued to both parents before the court can properly enter an order of adjudication on requirements set forth in the UCCJEA. The majority is mistaken in its conclusion on several grounds.

First, the requirements set forth by the UCCJEA do not divest a court of jurisdiction where, as here, no other court has any claim to jurisdiction over the action. The UCCJEA is a jurisdictional act relating to child custody proceedings. *See* N.C. Gen. Stat. § 50A-101 (2001). It seeks, among other goals, to “[a]void jurisdictional competition and conflict with courts of other States in matters of child custody” and to “[p]romote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child[.]” N.C. Gen. Stat. § 50A-101, Official Comment. It also seeks to “[f]acilitate the enforcement of custody decrees of other States.” *Id.* The mandates set forth in the UCCJEA, while applicable to adjudicatory hearings, *see, e.g., In re Malone*, 129 N.C. App. 338, 342, 498 S.E.2d 836, 838 (1998), do not divest the trial court of its authority to enter an order of adjudication under the facts of the present case. The petition for adjudication of neglect and dependency was brought pursuant to the Juvenile Code, and there is no indication in the record that any other court in any other State might have competing jurisdiction. As such, the UCCJEA simply does not control the outcome of the case at bar.

Further, the section of the UCCJEA addressing notice requirements states that “[b]efore a child-custody determination is made *under this Article*, notice and an opportunity to be heard in accordance with the standards of G.S. 50A-108 must be given to all persons entitled to notice *under the law of this State* as in child-custody proceedings between residents of this State[.]” N.C. Gen. Stat. § 50A-205(a) (2001) (emphasis added). As previously noted, the instant action was brought pursuant to the Juvenile Code, and not the UCCJEA. Under the law of this State, it is well established that “in order to have a child declared dependent, it is not necessary to serve the petition on both parents, but only on one of them.” *Arends*, 88 N.C. App. at 554, 364 S.E.2d at 171; *see also In re Yow*, 40 N.C. App. 688, 691, 253 S.E.2d 647, 649 (holding that the trial court properly entered an order of adjudication where notice was served on only one parent), *disc. review denied*, 297 N.C. 610, 257 S.E.2d 223 (1979). I am unpersuaded by the majority’s conclusion that we are not bound by this established precedent. Moreover, although the UCCJEA requires

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that notice be given to “any parent whose parental rights have not been previously terminated,” *see* N.C. Gen. Stat. § 50A-205(a), the UCCJEA “does not govern the enforceability of a child-custody determination made without notice or an opportunity to be heard.” N.C. Gen. Stat. § 50A-205(b). Finally, under the UCCJEA, the trial court need not have personal jurisdiction over a party in order to make a child-custody determination. *See* N.C. Gen. Stat. § 50A-201(c) (2001).

Thus, because the trial court had subject matter jurisdiction over the action and personal jurisdiction over at least one of the parties, the trial court did not lack “authority” and could properly enter the order adjudicating Raven to be a dependent child. The true issue and nature of respondent’s argument, which the majority fails to address, is that of due process. *See Arends*, 88 N.C. App. at 555, 364 S.E.2d at 172 (noting that the failure to serve the father with notice of neglect and dependency proceedings raises the question of due process and not jurisdiction). Under section 7B-406 of the North Carolina Juvenile Code,

[i]mmediately after a petition has been filed alleging that a juvenile is abused, neglected, or dependent, the clerk shall issue a summons to the parent, guardian, custodian, or caretaker requiring them to appear for a hearing at the time and place stated in the summons. . . . Service of the summons shall be completed as provided in G.S. 7B-407

N.C. Gen. Stat. § 7B-406(a) (2001). As the biological father of the juvenile in the instant case, respondent was entitled to notice of the dependency and neglect proceedings concerning his daughter. Although the petition correctly identified respondent as the father, no summons was ever issued or served on him. “[T]he giving of notice in cases involving child custody is subject to due process requirements.” *Yow*, 40 N.C. App. at 692, 253 S.E.2d at 650.

To determine whether the lack of notice unreasonably deprived respondent of his due process rights requires a balancing of respondent’s right to custody of his child with the State’s interest in the welfare of children, as well as Raven’s right to be protected by the State from abuse or neglect. *See Arends*, 88 N.C. App. at 555, 364 S.E.2d at 172. At the adjudicatory hearing, Raven’s mother stipulated to the court that she had a history of substance abuse, that she had frequently left Raven with her aunt and uncle, and that she had exposed

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Raven to domestic violence. Finding these matters to be true by clear and convincing evidence, the trial court concluded that Raven was a dependent juvenile and placed her in the custody of her maternal aunt and uncle, with whom she had been living since June 1995. Such a custody determination is reviewable upon the filing of a motion in the matter by any party. *See* N.C. Gen. Stat. § 7B-906(b) (2001). The court may, upon reviewing the matter, return custody to a parent if the court finds that it is in the best interests of the juvenile to do so. *See* N.C. Gen. Stat. § 7B-906(d) (2001). Three years after the court entered its order, respondent filed his motion to dismiss the order of adjudication.

Balancing the interest of the State in Raven's welfare with that of the respondent's right that he not be arbitrarily deprived of custody of his child, and considering Raven's right of protection from neglect, in conjunction with the potential for placement of Raven to be returned to her father after appropriate review by the court, I would hold that petitioner's due process rights were adequately protected. *See Arends*, 88 N.C. App. at 555-56, 364 S.E.2d at 172; *Yow*, 40 N.C. App. at 692, 253 S.E.2d at 650. I would therefore affirm the order of the trial court.



PEARL KANIPE, EMPLOYEE, PLAINTIFF V. LANE UPHOLSTERY, HICKORY TAVERN
FURNITURE CO., EMPLOYER, SELF-INSURED, DEFENDANTS

No. COA01-1023

(Filed 16 July 2002)

1. Workers' Compensation— competency of doctor's testimony—law of the case doctrine inapplicable

A plaintiff in a workers' compensation case was not barred by the doctrine of the law of the case and could present the issue of the competency of a doctor's testimony as a lawful basis for the Industrial Commission's denial of disability compensation, because: (1) the law of the case doctrine only applies to points actually presented that are necessary for the determination of the case and not to dicta; and (2) the Court of Appeals' failure to consider the competency of the doctor's testimony as a basis for the

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Commission's conclusion in a prior appeal means the statement in the Court's opinion that the Commission might lawfully have based its denial of disability compensation on the doctor's treatment plan in which plaintiff would not have missed more than a week of work was mere dicta and not binding in regard to plaintiff's present appeal.

2. Workers' Compensation— doctor's generalized statements concerning treatment—speculation

The Industrial Commission erred in a workers' compensation case by denying plaintiff's claim for total disability benefits and by subsequently concluding that plaintiff was not entitled to any disability benefits based on a doctor's general statements as to the treatment plan of his patients and the time line under which he operates to return them to work, because: (1) if the Commission's findings are based entirely upon the weight of one doctor's expert opinion testimony, that testimony must be competent and not based on conjecture and speculation; (2) while the doctor's testimony reflects his general treatment of the majority of his patients, it does not leave room for the possibility that some patients will be incapable of returning to work after the seven-day period following surgery; and (3) as the doctor stated that he individualizes the decision to return a patient to work and that he did not see plaintiff after her surgeries or express an opinion regarding her post-surgery condition, any inferences made in respect to plaintiff's ability to return to work would be mere speculation.

Appeal by plaintiff from opinion and award filed 10 April 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 May 2002.

Patterson, Harkavy & Lawrence, L.L.P., by Henry N. Patterson, Jr. and Martha A. Geer, for plaintiff appellant.

Robinson & Lawing, L.L.P., by Jolinda J. Babcock, for defendant appellees.

GREENE, Judge.

Pearl Kanipe (Plaintiff) appeals an opinion and award filed 10 April 2001 by the Full Commission (the Commission) of the North Carolina Industrial Commission (the Industrial Commission) denying

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her claim for disability compensation against Lane Upholstery, Hickory Tavern Furniture Co. (Defendant).¹

On 26 June 1997, Plaintiff filed a Form 18 claiming workers' compensation due to bilateral carpal tunnel syndrome. On 11 July 1997, Plaintiff filed a Form 33 request for hearing before a deputy commissioner of the Industrial Commission in which she stated that Defendant refused to pay for treatment with her choice of physician, Dr. DePerczel, and requested compensation for her disability. On 9 September 1997, Defendant filed a Form 60 admitting Plaintiff's "right to compensation for an . . . occupational disease as of 4/10, 1997" but denying that Plaintiff had suffered any disability "from work to date."

The evidence presented at the hearing revealed that while Defendant had authorized carpal tunnel release surgery for Plaintiff with Dr. Carl Michael Nicks (Dr. Nicks), she underwent surgery for both her wrists with Dr. DePerczel instead. After the first surgery on 9 July 1997, Dr. DePerczel never released Plaintiff to go back to work because Plaintiff could no longer perform her duties as a sewer and "did[] [not] have any other work options." While Plaintiff developed other health problems sometime after her carpal tunnel release surgeries, Dr. DePerczel thought that even without these additional problems "she would have had [only] a small chance of going back to work" as a sewer. Dr. DePerczel based his decision to keep Plaintiff out of work on the fact that "both of [Plaintiff's] hands were severely involved." Plaintiff had experienced "symptoms for such a long time, which mean[t] that there [was] more inflammation of the nerve and probably more permanent damage to the nerve." Dr. DePerczel also testified at his deposition that he had not yet rated Plaintiff for maximum medical improvement in respect to her hands.

Dr. Nicks testified during his deposition that he had performed thousands of carpal tunnel release surgeries and was familiar with the type of work that is done at furniture and upholstery plants such as the one operated by Defendant. The first and only time Dr. Nicks saw Plaintiff was on 4 June 1997. At this time, Dr. Nicks diagnosed Plaintiff with bilateral carpal tunnel syndrome and recommended surgery, beginning with the right wrist and followed by surgery on the left wrist after three to four weeks. Dr. Nicks testified that, after

1. While Plaintiff, in her notice of appeal to this Court, states that she is also appealing the Commission's denial of her request for treatment with her doctor, Dr. John DePerczel (Dr. DePerczel), she has not assigned error to this. Accordingly, this issue is not before this Court. See N.C.R. App. P. 10(a).

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surgery, he generally returns his patients to work after only a couple of days with limitations of one-handed work for approximately three weeks. If the work environment is dirty and could potentially soil or damage a patient's wound, Dr. Nicks will keep his patient out of work for up to a week. "At the end of three to four weeks, [Dr. Nicks] generally . . . review[s] each case individually." Because Dr. Nicks individualizes the decision to return a patient to work, he could not give a general answer when asked what type of restriction he tends to impose after returning a patient to work. In explaining his approach of returning patients to work, Dr. Nicks noted that:

[t]hey[] [are] always allowed to work, but with restrictions. Our policy in our office is to document the restrictions medically speaking that a patient needs to observe[,] and we let the employer decide whether they want to take them out of work or not. Sometimes those restrictions are so profound that they cannot legitimately do the job that they have always performed. And they might have to be put in a much less demanding position, but we very rarely take anybody completely out of work.

Anne Story, Defendant's human resource manager, testified at the hearing that had Plaintiff been released to light-duty employment, Defendant would have accommodated her "if there were jobs available within the restrictions."

In its opinion and award filed 26 June 1998, the deputy commissioner concluded Plaintiff was entitled to all medical expenses incurred as a result of her carpal tunnel syndrome, including expenses incurred while receiving treatment from Dr. DePerczel. The deputy commissioner also concluded Plaintiff was entitled to payment of temporary total disability compensation from 9 July 1997 onward. On appeal, the Commission, in an opinion and award filed 25 May 1999, reversed the deputy commissioner's award. The Commission found that:

1. Plaintiff began working as a sewer for [D]efendant in November 1969 and continued working in that capacity throughout her employment with [D]efendant.
2. In April 1997, [P]laintiff reported numbness in both her hands and left shoulder to her [doctor] [Her doctor] referred [P]laintiff to [Dr. DePerczel].

. . . .

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5. On 6 May 1997, Dr. [D]ePerczel examined [P]laintiff and diagnosed bilateral carpal tunnel syndrome.

6. Upon learning [from Plaintiff] that [P]laintiff's condition was caused by her work, [D]efendant attempted to direct [P]laintiff to appropriate medical treatment. . . .

....

9. On 4 June 1997, [P]laintiff presented [herself] to Dr. Nicks for examination, which was approved by [D]efendant. Dr. Nicks diagnosed her with bilateral carpal tunnel syndrome . . . and recommended surgical treatment consisting of carpal tunnel releases. Dr. Nicks scheduled [P]laintiff for surgery for 12 June 1997.

10. On 9 June 1997, [P]laintiff filed an Industrial Commission Form 18 . . . stating that she had contracted bilateral carpal tunnel syndrome as a result of her work as a sewer for [D]efendant. By that date, [D]efendant had already informed [P]laintiff that it would accept liability for her workers' compensation claim and would pay for and direct her medical treatment.

11. On 10 June 1997, [P]laintiff canceled the surgery . . . with Dr. Nicks.

....

13. Although [P]laintiff was aware that [D]efendant was refusing to pay for treatment by Dr. [D]ePerczel, she chose to proceed with surgery on 7 July 1997. On that date, Dr. [D]ePerczel performed a right carpal tunnel release[,] and on 13 August 1997, he performed a left carpal tunnel release.

14. Dr. [D]ePerczel removed [P]laintiff from work beginning 9 July 1997 and, at the time of the hearing before the [d]eputy [c]ommissioner, had not released her to return to work. After 9 July 1997, [P]laintiff did not return[] to work in any capacity for any employer.

....

20. Any inability by [P]laintiff to earn wages subsequent to 9 July 1997 was not related to her work for [D]efendant or her occupational disease.

The Commission concluded that (1) Defendant was not responsible for Plaintiff's unauthorized treatment with Dr. DePerczel and

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(2) Plaintiff was not entitled to “any disability compensation” after 9 July 1997.

Upon Plaintiff’s appeal from the 25 May 1999 decision, this Court affirmed the Commission’s denial of Plaintiff’s medical expenses with Dr. DePerczel but vacated and remanded the Commission’s opinion and award in part because the Commission had failed to make any findings explaining its denial of disability compensation. *See Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 540 S.E.2d 785 (2000) (hereinafter *Kanipe I*). This Court stated that:

Perhaps the Commission based its denial on [P]laintiff’s refusal to undergo medical treatment with Dr. Nicks. If so, this is not a valid reason for denial Alternatively, the Commission might have based its denial of disability compensation on Dr. Nicks’ treatment plan, in which he determined that [P]laintiff would not have missed more than a week of work due to her injury. If that were the case, this basis would be lawful. *See* N.C. Gen. Stat. § 97-28 (“No compensation . . . shall be allowed for the first seven calendar days of disability resulting from an injury, except [medical expenses].”). But because the Commission never made any specific findings, we simply do not know whether it denied disability compensation on a lawful or unlawful basis. We therefore remand to the Commission to reconsider [P]laintiff’s claim for disability compensation and to make explicit findings with respect to this claim.

Id. at 627, 540 S.E.2d at 790.

On 16 February 2001, Plaintiff filed with the Commission a request for supplemental briefing and oral arguments to address issues raised by the Court of Appeals decision. Without ruling on Plaintiff’s request, the Commission filed a revised opinion and award on 10 April 2001 in which it added the following findings:

15. Dr. Nicks has performed thousands of carpal tunnel release surgeries. Based upon his professional experience and his personal examination of [P]laintiff, Dr. Nicks recommended that she undergo carpal tunnel release on her right wrist and the same surgery on the left wrist about three to four weeks later. Under Dr. Nicks’ care, [P]laintiff would have remained out of work for two days after each surgery and returned to work with restrictions of one-handed work for three to four weeks. At most, [P]laintiff would have missed an entire week of work if her work

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environment was dirty because her wound could have been soiled or damaged.

16. The . . . Commission gives great weight to the medical opinion of Dr. Nicks and finds that [P]laintiff did not miss more than seven days from work as a result of her bilateral carpal tunnel syndrome.

....

22. The greater weight of the evidence fails to show that [P]laintiff missed more than seven days from work as a result of her bilateral carpal tunnel syndrome.

The Commission again found that “[a]ny inability by [P]laintiff to earn wages subsequent to 9 July 1997 was not related to her work for [D]efendant or her occupational disease.” The Commission then concluded that:

3. Plaintiff did not miss more than seven days as a result of her bilateral carpal tunnel syndrome. Therefore, [P]laintiff is not entitled to total disability benefits.

4. Any inability by [P]laintiff to earn wages subsequent to 9 July 1997 was not related to her occupational disease[,] and she is, therefore, not entitled to any disability compensation after that date.

The dispositive issues are whether: (I) *Kanipe I* is binding on this Court in determining the competency of Dr. Nicks’ testimony; and if not, (II) Dr. Nicks’ testimony is sufficient to support the Commission’s denial of disability compensation.

I

[1] Defendant argues “the doctrine of ‘the law of the case’ prevents Plaintiff from appealing the issue[] presently before this Court” because the issue has already been decided in *Kanipe I*. We disagree.

“As a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case.” *Creech v. Melnik*, 147 N.C. App. 471, 473, 556 S.E.2d 587, 589 (2001) (citations omitted). Pursuant to the law of the case

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doctrine, “an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.” *Id.* at 473-74, 556 S.E.2d at 589. The law of the case doctrine, however, only applies to points actually presented and necessary for the determination of the case and not to dicta. *Id.* at 474, 556 S.E.2d at 589.

In *Kanipe I*, this Court held the Commission’s findings were insufficient to determine the basis of its denial of disability compensation and remanded the case. *Kanipe I*, 141 N.C. App. at 627, 540 S.E.2d at 790. This Court stated that “the Commission might have based its denial of disability compensation on Dr. Nicks’ treatment plan, in which he determined that [P]laintiff would not have missed more than a week of work due to her injury,” which this Court perceived as a lawful basis for the Commission’s denial of disability compensation. As this Court, however, did not consider the competency of Dr. Nicks’ testimony in reaching this conclusion, it is mere dicta and not binding on this Court in regard to Plaintiff’s present appeal.

II

[2] Plaintiff argues Dr. Nicks’ testimony is insufficient to support the Commission’s findings that “[P]laintiff did not miss more than seven days from work as a result of her bilateral carpal tunnel syndrome” and therefore “[a]ny inability by [P]laintiff to earn wages subsequent to 9 July 1997 was not related to her work for [D]efendant or her occupational disease.” We agree.

If the Commission’s findings are based entirely upon the weight of one doctor’s expert opinion testimony, that testimony must be competent and not based on “conjecture and speculation.” *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230-31, 538 S.E.2d 912, 914-15 (2000).

In this case, Dr. Nicks made only general statements as to the treatment plan of his patients and the time line under which he returns them to work. As Dr. Nicks explained, his office operates under the policy that patients are “always allowed to work, but with restrictions.” Only “rarely” does he “take anybody completely out of work.” While this testimony reflects Dr. Nicks’ general treatment of the majority of his patients, it does leave room for the possibility that

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some patients will be incapable of returning to work after the seven-day period following surgery. Moreover, as Dr. Nicks stated that he individualizes the decision to return a patient to work and he did not see Plaintiff after her surgeries nor express an opinion² regarding her post-surgery condition, any inferences made in respect to Plaintiff's ability to return to work would be mere speculation. As such, Dr. Nicks' testimony was insufficient to support the Commission's findings that "[P]laintiff did not miss more than seven days from work as a result of her bilateral carpal tunnel syndrome" and therefore "[a]ny inability by [P]laintiff to earn wages subsequent to 9 July 1997 was not related to her work for [D]efendant or her occupational disease." Accordingly, the Commission's denial of Plaintiff's claim for total disability benefits and its subsequent conclusion that Plaintiff was not entitled to "any disability benefits" was error and must be reversed and remanded.

Reversed and remanded.

Judges MCGEE and BIGGS concur.

STATE OF NORTH CAROLINA v. BILLY RAY MANEY

No. COA01-1036

(Filed 16 July 2002)

**1. Evidence— defendant's statements to psychologist—
motion to suppress—effective assistance of counsel—prej-
udicial effect**

The trial court did not err in a first-degree statutory sexual offense case by denying defendant's motion to suppress statements he made to a psychologist during a sex offender evaluation conducted as a condition of a plea agreement in an indecent liberties case in another county even though defendant contends he received ineffective assistance of counsel and that the admission violated N.C.G.S. § 8C-1, Rule 403, because: (1) counsel's representation of defendant was limited to the charges brought in the other county and not the present case, and also there was ample and substantial evidence against defendant for the State to have

2. Based, for instance, on a review of Plaintiff's medical documents.

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still obtained a guilty verdict without the testimony of the psychologist; and (2) the trial court heard defendant's argument to exclude the testimony on Rule 403 grounds, questioned defense counsel, and only then found that the value of the statements outweighed any prejudicial effect.

2. Evidence— motion in limine—prior judgment acquitting defendant of first-degree statutory rape of same victim

The trial court did not err in a first-degree statutory sexual offense case by granting the State's motion in limine forbidding defendant from admitting evidence of a prior judgment acquitting him on the charge of first-degree statutory rape of the same victim, because defendant failed to show that the trial court's ruling could not have been the result of a reasoned decision or that it resulted from an abuse of discretion.

3. Appeal and Error— preservation of issues—failure to cite authority

Although a defendant in a first-degree statutory sexual offense case contends the trial court erred by its instruction to the jury regarding its failure to reach a verdict and by failing to grant a mistrial, this assignment of error is deemed abandoned because defendant failed to cite any legal authority in support of his arguments as required by N.C. R. App. P. 28(b)(5).

Appeal by defendant from judgment entered 16 November 2000 by Judge Ronald K. Payne in Buncombe County Superior Court. Heard in the Court of Appeals 5 June 2002.

Roy Cooper, Attorney General, by Margaret A. Force, Assistant Attorney General, for the State.

Siemens Law Office, P.A., by Jim Siemens, for defendant-appellant.

THOMAS, Judge.

Defendant, Billy Ray Maney, appeals a judgment finding him guilty of first-degree statutory sexual offense. He makes three assignments of error, contending the trial court erred by: (1) denying his motion to suppress statements he made to a psychologist; (2) granting the State's motion *in limine* forbidding defendant to admit evidence of a prior judgment acquitting him on the charge of first-degree statutory rape of the same victim; and (3) improperly instructing the

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jury on failure to reach a verdict and failing to grant a mistrial. For the reasons herein, we find no error.

Defendant was married to the victim's mother in 1992. The victim, "K", born in 1983, and her sister, "J", who is three years older, approached their mother in July 1999 and explained that their step-father, defendant, had been inappropriately touching them for some time. The family was then living in Jackson County. K and J were interviewed by representatives of the Jackson County Department of Social Services and the Jackson County Sheriff's Department. Subsequently, defendant was charged with taking indecent liberties in Jackson County and entered into a plea arrangement.

As a condition of the plea arrangement, defendant went to Smokey Mountain Mental Health Center for a sex offender specific evaluation. During an evaluation by Arthur Dosch, a licensed psychological associate, defendant admitted to two counts of indecent liberties. In February 2000, defendant tendered his guilty plea and was sentenced in accordance with the plea arrangement.

However, unknown to defendant and his Jackson County counsel at the time of the plea, charges of first-degree statutory sexual offense and first-degree statutory rape involving K were pending against defendant in Buncombe County, relating to an incident occurring while K and defendant were visiting her great-grandmother in Asheville in 1998. The two warrants were served on defendant four days after he entered the plea in Jackson County. Defendant's counsel in Jackson County moved to have defendant's plea set aside. The request was granted.

Defendant was subsequently found not guilty of the first-degree statutory rape charge in Buncombe County, but the jury was deadlocked as to the first-degree statutory sexual offense charge. The trial court declared a mistrial on the charge of first-degree statutory sexual offense. Defendant was re-tried in the instant case and the jury returned a guilty verdict. He was sentenced to a minimum term of 250 months and a maximum term of 309 months in prison. Defendant now appeals.

The State's evidence tends to show the following: Defendant began to sexually touch K in 1992, when she was eight years old. On occasion, as she went to kiss him goodnight, he would grab her face and stick his tongue into her mouth. He sometimes touched her buttocks when he hugged her. Frequently, defendant would put his fingers into her vagina when she was on the couch at night after her

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mother went to bed. He would also force K to put her hand down his pants to touch his penis.

In October 1993, late at night, the family was returning from Tennessee. Defendant was driving the van, K was in the front passenger seat, and her mother, sister, and brothers were in the back seats. Defendant reached over and tried to touch K's vaginal area after touching one of her breasts. She then turned away so he could not reach her.

The statutory sexual offense charge in the present case relates to an incident in Buncombe County during the summer of 1998. K was fourteen years old when she went with defendant to her great-grandmother's home in Asheville. Her great-grandmother had been placed in a nursing home, so defendant and K mowed the lawn and did other work in her yard. Afterwards, K went into the house and sat on one of the beds. Defendant went into the house, took a shower and, wrapped in a towel, sat behind her on the bed. He reached around her, moved her shorts aside, and put his finger into her vagina while touching her breast. K got up, but defendant restrained her by hugging her and then stuck his tongue into her mouth. K pushed away and they eventually went home.

K told several people, including friends at school and her sister, J, that defendant was inappropriately touching her. J told K that defendant had also been touching her in the same manner. Together, they told their mother. They then informed the authorities, but K did not tell them about every incident she could remember.

Defendant presented no evidence.

After being found guilty of first-degree statutory sexual offense, defendant was sentenced to a minimum term of 250 and a maximum term of 309 months. He appeals.

[1] By defendant's first assignment of error, he argues the trial court committed reversible error by denying his motion to suppress his statements to Dosch, in violation of the Sixth Amendment to the Constitution of the United States and Rule 403 of the North Carolina Rules of Evidence. We disagree.

"The Sixth Amendment recognizes the right to counsel because effective counsel plays a role that is critical to the ability of the adversarial system to produce just results." *State v. Davidson*, 77 N.C. App. 540, 546, 335 S.E.2d 518, 522 (1985) (quoting *Golden v. Newsome*, 755

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F.2d 1478, 1484 (11th Cir. 1985)). Defendant first contends he was denied effective assistance of counsel under the Sixth Amendment because his attorney in the Jackson County cases, Reid Brown, convinced him to go to the Smokey Mountain Mental Health Center to have a sex offender specific evaluation done. Defendant maintains this advice constituted ineffective assistance of counsel since Brown knew of the possibility that defendant may be charged in Buncombe County and that the statements made to Dosch could be used as an admission in a later case.

To substantiate a claim for ineffective assistance of counsel, a defendant must show that his counsel's representation was deficient and there is a reasonable possibility that, but for the inadequate representation, there would have been a different result. *State v. Frazier*, 142 N.C. App. 361, 367, 542 S.E.2d 682, 687 (2001). Reid's representation of defendant was limited to the charges brought in Jackson County. At no time did he represent defendant in the present case. Further, after a careful review of the record and trial transcript, we hold that there is ample and substantial evidence against defendant for the State to have still obtained a guilty verdict even without the testimony of Dosch. We therefore reject this argument.

Defendant contends the admission also violated Rule 403 of the North Carolina Rules of Evidence. Rule 403 provides, in pertinent part, that: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C.R. Evid. 403. Under the balancing test required by the Rule, evidence must be "sufficiently similar and not so remote in time as to be more probative than prejudicial." *State v. Boyd*, 321 N.C. 574, 577, 364 S.E.2d 118, 119 (1988). Whether or not to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial judge. *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986). This Court will not intervene where the trial court has properly weighed both the probative and prejudicial value of the evidence and made its ruling accordingly. *Tomika Invs., Inc. v. Macedonia True Vine Pent. Holiness Ch. of God*, 136 N.C. App. 493, 498, 524 S.E.2d 591, 595 (2000).

Here, defendant did not contend that the incidents he admitted to in Jackson County were dissimilar, or lacked sufficient temporal proximity, to those in Buncombe County. Rather, he maintained that Rule 403 was violated because, given the circumstances, allowing Dosch's testimony was unfair and gave the appearance of prosecuto-

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rial treachery. The trial court heard defendant's arguments to exclude Dosch's testimony on Rule 403 grounds, questioned defense counsel, and only then found that the value of the statements outweighed any prejudicial effect. Its ruling was the result of the exercise of sound discretion and we therefore reject this argument.

[2] By defendant's second assignment of error, he argues the trial court committed reversible error by granting the State's motion *in limine* forbidding defendant to address his prior acquittal on the charge of first-degree rape brought by K. We disagree.

A motion *in limine* seeks " 'pretrial determination of the admissibility of evidence proposed to be introduced at trial,' and is recognized in both civil and criminal trials." *Nunnery v. Baucom*, 135 N.C. App. 556, 566, 521 S.E.2d 479, 486 (1999) (quoting *State v. Tate*, 44 N.C. App. 567, 569, 261 S.E.2d 506, 508, *rev'd on other grounds*, 300 N.C. 180, 265 S.E.2d 223 (1980)). The trial court has wide discretion in ruling on motions *in limine* and will not be reversed absent an abuse of discretion. *Id.* "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) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998)).

Here, the trial court heard arguments from both sides before reaching a decision. The State argued that evidence of a prior acquittal was not relevant to defendant's guilt or innocence in the instant case and that any probative value would be substantially outweighed by the danger of prejudice to the State. The defense argued that the acquittal indicated that the earlier jury did not believe the victim. The State then pointed out that an acquittal can also indicate that the State simply did not satisfy its burden of proof as to one or more of the elements of first-degree statutory rape.

Defendant has not shown that the trial court's ruling could not have been the result of a reasoned decision. He has thus failed to demonstrate an abuse of discretion. Consequently, we reject his argument.

[3] By defendant's final assignment of error, he argues the trial court committed reversible error by failing to instruct the jury as requested pertaining to its failure to reach a verdict and by failing to declare a mistrial.

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Here, the jury requested to “see the state statutes or the instructions” given by the judge and deliberated for a total of almost twelve hours. During the deliberations, the trial court denied defendant’s request that the trial court instruct the jury that its “failure to reach a verdict need not be their concern, but they need to report that to [the court].”

After the first full day of deliberation, the jury gave a note to the trial court stating that two separate votes had yielded the same tally, and that “[i]t appears we are firm in this decision and cannot meet a unanimous vote.” This note was not shown to counsel for either party and the trial court responded with the following instruction, taken from the North Carolina Pattern Jury Instructions:

You should reason the matter over together as reasonable men and women and to reconcile your differences, if you can, without surrender of conscientious convictions. No juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

See N.C.P.I.—Crim. 101.40. Defendant contends the trial court gave an incomplete instruction because N.C.P.I.—Crim. 101.40 prefaces the second sentence with the word “But” and the trial court failed to do so. Given the totality of the circumstances, he claims, the denial of his motion for a mistrial constituted error.

However, defendant fails to cite any legal authority in support of his arguments. This assignment of error is therefore deemed abandoned. N.C.R. App. P. 28(b)(5).

NO ERROR.

Judges WYNN and HUNTER concur.

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STATE OF NORTH CAROLINA v. VICKIE HARKEY WRIGHT

No. COA01-1123

(Filed 16 July 2002)

1. Evidence— hearsay—911 call identifying defendant as shooter of victim—personal knowledge—excited utterance exception

The trial court did not err in a second-degree murder case by admitting evidence of the exchange between defendant's son and the 911 operator including statements that defendant shot the victim, because: (1) the personal knowledge of defendant's son was such that he could rationally infer that defendant had shot the victim, including the fact that defendant's son was in a bedroom immediately adjacent to the room where the victim had been shot; and (2) the statements of defendant's son fell within the excited utterance exception to the hearsay rule, and the statements were probative as to whether defendant had shot the victim.

2. Homicide— second-degree murder—jury instruction on flight

The trial court did not commit plain error in a second-degree murder case by instructing the jury that it could consider defendant's flight as circumstantial evidence of her guilt, because: (1) the evidence in the record is such that the instruction had a negligible effect on the jury's determination of defendant's guilt; and (2) the trial court specifically instructed the jury that proof of defendant's flight by itself was insufficient to establish defendant's guilt.

Appeal by defendant from judgment entered 22 March 2001 by Judge Dennis J. Winner in Henderson County Superior Court. Heard in the Court of Appeals 5 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General Stewart L. Johnson, for the State.

Roy D. Neill for defendant-appellant.

WALKER, Judge.

Defendant appeals her conviction for second degree murder. The State's evidence tends to show that, on 27 June 2000 at approximately

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2:28 a.m., the Henderson County Sheriff's Department received a 911 call from someone in a trailer-home located at 115 Dania Drive in Henderson County. The caller, later determined to be defendant's son, Jake Wright (Wright), stated that someone had been shot and that he needed the police. Thereafter, in response to a question from the 911 operator, Wright identified defendant as the shooter and defendant's boyfriend, Jerry Demary, as the victim. Wright further stated that, at the time of the shooting, he was in an adjacent bedroom when he heard a gunshot and that his mother had left the trailer. He also informed the 911 operator that the victim appeared to be unconscious, but he was "gasping."

While Wright was on the telephone, several officers arrived at the trailer. The 911 operator then instructed Wright to exit the trailer. After the officers secured the area, they began searching for defendant. They located her sitting with her legs crossed next to a truck approximately 300 yards from the trailer. As the officers approached, defendant said, "Here I am."

Inside the trailer, officers found the victim lying face up on the living room floor near a sofa and a recliner. A .410 shotgun was found on the sofa. The television was on and playing cards were spread out on a table and on the floor. The officers observed fresh blood on the floor, on the right arm of the recliner, and on a nearby end table. Also on this end table were the victim's wallet and mail addressed to him. A half-empty "Icehouse" beer can was found between the recliner and end table. An ashtray containing cigarette ashes and a half-empty "Natural Light" beer can were found on a small footstool against the sofa.

Summer Jones (Jones), a long-time friend of defendant, testified that she recognized the .410 shotgun as the one her grandfather had previously purchased for defendant. Jones stated she had seen defendant two weeks before the shooting incident using the shotgun for target practice and noted that defendant kept it in a case near the living room sofa. She further testified that defendant drinks "Natural Light" beer and that she smokes cigarettes.

Next, Dr. William Dunn (Dr. Dunn), a forensic pathologist, testified that the victim suffered a shotgun injury to the upper part of his chest and died due to excessive bleeding in his right lung. Dr. Dunn opined that, based on the nature of the injury, the muzzle of the shotgun was between two and four feet away from the victim's chest at the time it was discharged. Defendant did not present any evidence.

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[1] Defendant first contends the trial court erred in admitting evidence of the exchange between Wright and the 911 operator. Specifically, she maintains the trial court should not have admitted any statements made in the exchange which refer to her as having shot the victim. Defendant's argument is based on two alternative grounds: (1) the State failed to provide sufficient evidence demonstrating that Wright had personal knowledge of the facts contained within the statements, and (2) the statements are inadmissible hearsay.

A. Personal Knowledge

Defendant first maintains that because Wright did not observe defendant discharge the shotgun, he had no actual knowledge as to whether she shot the victim. Therefore, according to defendant, any statements made by Wright during his exchange with the 911 operator implicating her as the shooter lacked the proper foundation to be admitted as evidence.

Pursuant to Rule 602 of our Rules of Evidence:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself.

N.C. Gen. Stat. § 8C-1, Rule 602 (2001). “[P]ersonal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception.” N.C. Gen. Stat. § 8C-1, Rule 602 official commentary; *see also State v. Harshaw*, 138 N.C. App. 657, 661, 532 S.E.2d 224, 227, *disc. rev. denied*, 352 N.C. 594, 544 S.E.2d 793 (2000). Additionally, when a witness' statement is in the form of an opinion, the opinion is “limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701.

In support of her position, defendant cites our Supreme Court's holding in *State v. King*, 343 N.C. 29, 468 S.E.2d 232 (1996), and this Court's holdings in *Harshaw*, *supra*, and *State v. Shaw*, 106 N.C. App. 433, 417 S.E.2d 262, *disc. rev. denied*, 333 N.C. 170, 424 S.E.2d 914 (1992). However, the facts in those cases are notably distinguishable from the facts of this case. In *King*, the witness testified that the victim did not have a gun on his person the day of the shooting, yet the witness had not been with nor talked with the victim that day. *King*,

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343 N.C. at 41-42, 468 S.E.2d at 240. Similarly, in *Shaw*, an officer opined that there had been a “break-in” at a residence; however, he had arrived at the residence after the “break-in” occurred and had no knowledge of how the defendant had entered the residence. *Shaw*, 106 N.C. App. at 440-41, 417 S.E.2d 267. Finally, in *Harshaw*, the witness testified the defendant had purchased a gun for the purpose of threatening the victim; yet, he could not point to any evidence as to how he had knowledge of the defendant’s intentions. *Harshaw*, 138 N.C. App. at 661, 532 S.E.2d at 227. Unlike these cases, the evidence here establishes that, during the shooting, Wright was in a bedroom immediately adjacent to the room where the victim had been shot. After he heard a gunshot, Wright called 911 from the room where the shooting had taken place, while the victim was still “gasping” in front of him. Moreover, the time of night, the location of various items in the livingroom, and Wright’s statement to the 911 operator that his mother had left the trailer reasonably point to the fact that defendant had been inside when the shooting occurred. Hence, we conclude that, at the time of the shooting, Wright was positioned to hear the circumstances surrounding the shooting and observe events immediately thereafter. Accordingly, his personal knowledge was such that he could rationally infer that defendant had shot the victim.

B. Hearsay

Defendant also asserts that Wright’s statements to the 911 operator are inadmissible hearsay. Generally, a statement made by a declarant, other than the witness who is testifying, is hearsay and is inadmissible for its truth unless it is relevant and falls within one of the recognized hearsay exceptions. *See* N.C. Gen. Stat. § 8C-1, Rules 801-803. The “excited utterance” exception permits the admission of statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.” N.C. Gen. Stat. § 8C-1, Rule 803(2). For a statement to be considered an “excited utterance” there must be: “(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.” *State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988) (*quoting State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985)); *see also State v. Anthony*, 354 N.C. 372, 403, 555 S.E.2d 557, 579 (2001), *cert. denied*, — U.S. —, 153 L. Ed. 2d 791 (2002).

Defendant concedes that Wright “was excited by the startling events that he observed” in his home. Nonetheless, she contends that

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Wright's statements to the 911 operator were not a "spontaneous reaction" because the statements were made in response to questions asked by the 911 operator. However, our courts have consistently held that "statements or comments made in response to questions do not necessarily rob the statements of spontaneity." *State v. Boczkowski*, 130 N.C. App. 702, 710, 504 S.E.2d 796, 801 (1998); see also *State v. Murphy*, 321 N.C. 72, 77, 361 S.E.2d 745, 747 (1987); *State v. Hamlette*, 302 N.C. 490, 495, 276 S.E.2d 338, 342 (1981); and *State v. Thomas*, 119 N.C. App. 708, 714, 460 S.E.2d 349, 353, *disc. rev. denied*, 342 N.C. 196, 463 S.E.2d 248 (1995). The critical determination is whether the statement was made under conditions which demonstrate that the declarant lacked the "opportunity to fabricate or contrive" the statement. 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 164 (3d ed. 1988).

The circumstances surrounding Wright's statement are similar to those which were present in *State v. Kerley*, 87 N.C. App. 240, 360 S.E.2d 464 (1987), *disc. rev. denied*, 321 N.C. 476, 364 S.E.2d 661 (1988). In that case, the declarant was asleep when the defendant set fire to his mattress and residence. After several minutes, a state trooper arrived on the scene and the declarant told the trooper that the defendant "had tried to burn him while he was inside asleep." Although this Court held that the statement should have been excluded on constitutional grounds, it determined that the statement "falls squarely within the excited utterance exception to the hearsay rule . . ." *Kerley*, 87 N.C. App. at 241-43, 360 S.E.2d at 465-66.

Here, the record shows Wright made the 911 call immediately after hearing the gunshot and from the room in which the victim lay dying. Additionally, the portion of the 911 call played for the jury confirms Wright's excited condition:

911 OPERATOR: Okay. Is he conscious?

WRIGHT: I don't know. I don't know. He just fell over. He just fell over. I think he fell over. Mom shot.

911 OPERATOR: So your mother did it?

WRIGHT: Yeah.

...

911 OPERATOR: When did this happen? How long ago?

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WRIGHT: A minute ago. I don't know. I heard it and I got up and I don't know. I don't know to touch him—if I should touch him. I don't know.

...

911 OPERATOR: Yeah. You were in the bed when it happened?

WRIGHT: I was in the bedroom. Yeah. I wasn't—I was in the room right next to 'em. Is there somebody on the way?

911 OPERATOR: Yeah, they're all on the way and you say it's not bleeding right now?

WRIGHT: I can't—it looks—it's not like it's spurting.

911 OPERATOR: Uh huh. And you don't know where she went for sure? You know she's not in the house.

WRIGHT: No. I don't know. I don't know. I don't know. Oh God, Almighty. And my mom.

Under these circumstances, we conclude Wright's statements fall within the "excited utterance" exception to the hearsay rule. Further, as the statements were clearly probative as to whether defendant had shot the victim, the trial court did not err in admitting them into evidence. We overrule defendant's assignment of error.

[2] Next, defendant contends the trial court committed plain error by instructing the jury that it could consider defendant's "flight" as circumstantial evidence of her guilt. It is well settled that "[i]n deciding whether a defect in the jury instruction constitutes 'plain error,' the appellate court must examine the entire record and determine if the instructional error had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983) (citations omitted); see also *State v. Holden*, 346 N.C. 404, 435, 488 S.E.2d 514, 531 (1997), cert. denied, 522 U.S. 1126, 140 L. Ed. 2d 132 (1998) ("In order to rise to the level of plain error, the error in the trial court's instructions must be so fundamental that (i) absent the error, the jury probably would have reached a different verdict; or (ii) the error would constitute a miscarriage of justice if not corrected"). "[W]hen the 'plain error' rule is applied, '[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection had been made in the trial court.'" *Odom*, 307 N.C. at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)).

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Here, the record shows the trial court, without objection from defendant, instructed the jury as follows:

The State contends and the defendant denies that the defendant fled. Evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. *However, proof of this circumstance is not sufficient by itself to establish defendant's guilt.*

(emphasis added). Without determining whether an instruction regarding defendant's "flight" was warranted in this case, we conclude the evidence in the record is such that the instruction had a negligible effect on the jury's determination of defendant's guilt. Further, the trial court specifically instructed the jury that proof of defendant's "flight," by itself, was insufficient to establish defendant's guilt. *See generally State v. Warren*, 348 N.C. 80, 499 S.E.2d 431, cert. denied, 525 U.S. 915, 142 L. Ed. 2d 216 (1998). Accordingly, we overrule defendant's assignment of error.

In sum, we conclude defendant received a fair trial free from prejudicial error.

No error.

Judges McCULLOUGH and BRYANT concur.

STATE OF NORTH CAROLINA v. TOMMY LEE EUBANKS

No. COA01-1031

(Filed 16 July 2002)

1. Evidence— other offenses—similar testimony elicited by defendant—no prejudice

There was no prejudicial error in a murder prosecution where the court admitted testimony on direct examination tending to show that defendant had used and supplied drugs and that defendant had orchestrated a scheme to obtain refunds by returning stolen clothing. Defendant elicited similar testimony on cross-examination.

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2. Criminal Law— instruction on flight—sufficiency of evidence

The trial court did not err in a murder prosecution by instructing the jury on flight where defendant provided no assistance to the victim after shooting him; fled the scene of the shooting and disposed of his gun; and did not voluntarily contact the police or turn himself in, but merely cooperated once he was contacted by the police.

3. Homicide— murder—old firearm—no evidence of unintentional firing—no instruction on involuntary manslaughter

The trial court did not err in a murder prosecution by not submitting involuntary manslaughter to the jury where defendant contended that the shooting occurred through the mishandling of an old firearm, but there was no evidence tending to show that this particular firing of the gun was unintentional. In fact, there was evidence that defendant fired the gun intentionally.

4. Sentencing— determination of prior record level—State's worksheet—construed stipulation by defendant

There was no error in a second-degree murder sentencing proceeding where the court determined defendant's prior record level from a worksheet prepared by the State. Although a worksheet prepared by the State is insufficient to satisfy the State's burden, statements by defendant's attorney here may be construed as a stipulation that defendant had been convicted of the charges listed on the worksheet.

Appeal by defendant from judgment entered 19 October 2000 by Judge James M. Webb in Richmond County Superior Court. Heard in the Court of Appeals 5 June 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Steven F. Bryant, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defenders Beth S. Posner and Daniel R. Pollitt, for defendant-appellant.

HUNTER, Judge.

Tommy Lee Eubanks ("defendant") appeals the trial court's judgment sentencing him to a prison term of 240 to 297 months for second degree murder. We find no prejudicial error.

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The evidence at trial tended to establish the following facts. The victim, Jimmy Quick, had been friends with defendant, despite the fact that Quick had stolen items from defendant on multiple occasions, and despite the fact that defendant had, as a result, previously taken out criminal charges against Quick and had threatened to kill Quick. On 22 January 2000, Quick was present at defendant's home, along with defendant (who was sick and in bed that day), Candy Sharpe, Wanda Smith, Donald Dawkins, and defendant's ex-wife, Betty Eubanks. The individuals were all friends and some had been smoking crack cocaine and consuming alcohol. At some point during the evening, while defendant was asleep, Sharpe, Eubanks, Smith and Quick took defendant's van. Due to heavy snow, they were unable to return defendant's van to defendant's home that evening. Sharpe called defendant, and defendant became angry and threatened to kill Quick because Quick had stolen defendant's vehicle on a prior occasion. Due to the weather, Smith and Quick spent the night at Sharpe's home.

The following day, after Smith called defendant, defendant and Dawkins (who had spent the night at defendant's home) arrived at Sharpe's home in a truck at approximately 12:45 p.m. Defendant was angry, but appeared to calm down once Smith showed defendant where the van was parked. Shortly thereafter, after returning to the kitchen of Sharpe's home, Smith heard defendant, Quick, and Dawkins talking outside. She then heard Quick scream, "No, Tommy Lee; no, Tommy Lee," and saw him run by the window. Smith heard a single gunshot, opened the door, and saw Quick laying on the ground and defendant standing nearby holding a shotgun and aiming it at Quick. Defendant said, "You'd better call some son of a bitch to come after this motherf---er," and then he and Dawkins left. Quick subsequently died as a result of the gunshot wound. At some point immediately following the shooting, defendant took the gun and hid it in his sister's house.

Richmond County Chief Deputy Sheriff Phil Sweatt arrived at the scene of the shooting and subsequently called defendant's home and left a message for him. Defendant returned Deputy Sweatt's call within minutes and asked about the severity of Quick's injuries and whether defendant had killed Quick. Defendant indicated that he was at the house of Linda Jacobs, and he agreed to meet with Deputy Sweatt and to help the police locate the gun. Deputy Sweatt and other deputies then went to Jacobs' home. Deputy Robert Lee Taylor took defendant to locate the gun, and defendant admitted that he had left

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the gun at his sister's house. During the ride to defendant's sister's house, defendant said to Deputy Taylor, "I tried to shoot him in the ass, but I missed." Deputy Taylor located the gun in a closet at defendant's sister's house.

Defendant was charged and tried for the offense of first degree murder. The jury found defendant guilty of second degree murder, and the trial court entered judgment and sentenced defendant to a prison term of 240 to 297 months. On appeal, defendant has entered twenty-five assignments of error. Defendant has incorporated five of these into the four arguments in his appellate brief; defendant's remaining assignments of error are deemed abandoned. *See* N.C.R. App. P. 28(b)(6). Defendant's four arguments are: (1) the trial court erred in admitting certain testimony by Sharpe and Smith; (2) the trial court erred by instructing the jury on "flight"; (3) the trial court erred by refusing to submit the charge of involuntary manslaughter to the jury; and (4) the trial court erred in determining defendant's prior record level.

I.

[1] By two assignments of error, defendant argues that the trial court erred in admitting testimony by Sharpe and Smith tending to show that defendant orchestrated a scheme whereby Quick, Sharpe, Smith, and others routinely stole clothing and then obtained refunds by returning the stolen clothing, and that, in exchange for their participation in the scheme, defendant provided them with drugs, and also that defendant himself used drugs.¹ Defendant argues that this evidence should have been excluded pursuant to Rule 404(b) of the North Carolina Rules of Evidence ("Rule 404(b)") because its only purpose was to demonstrate defendant's character. However, a review of the transcript reveals that defendant elicited substantively similar testimony during cross-examination of Smith. Thus, even assuming *arguendo* that the admission of the testimony in question during the direct examinations of Sharpe and Smith constituted error, we hold that any such error was not prejudicial. *See, e.g., State v. Featherston*, 145 N.C. App. 134, 138, 548 S.E.2d 828, 831 (2001). These assignments of error are overruled.

1. We note that, although defendant initially assigned error to the trial court's admission of testimony by Sharpe and Smith tending to show that defendant had threatened to kill Quick on numerous prior occasions, defendant has failed to present this argument in his appellate brief and has, therefore, abandoned this specific argument.

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II.

[2] Defendant next argues that the trial court erred by instructing the jury on “flight” (pursuant to N.C.P.I., Crim. 104.36) over defendant’s objection. It is well established that

“[e]vidence of a defendant’s flight following the commission of a crime may properly be considered by a jury as evidence of guilt or consciousness of guilt.” A trial court may properly instruct on flight where there is “‘some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged.’” However, “[m]ere evidence that defendant left the scene of the crime is not enough to support an instruction on flight. There must also be some evidence that defendant took steps to avoid apprehension.”

State v. Lloyd, 354 N.C. 76, 119, 552 S.E.2d 596, 625-26 (2001) (citations omitted). Defendant argues that the instruction on flight was not supported by the record because, although it was undisputed that defendant drove away from Sharpe’s home shortly after the shooting, there was no additional evidence that defendant “took steps to avoid apprehension.” *Id.* Furthermore, defendant argues, the prejudice resulting from the improper instruction is demonstrated by the fact that the prosecutor for the State specifically argued to the jury during his closing argument that the jury could infer defendant’s intent to kill Quick from the fact that he fled the scene and hid his gun.

We disagree with defendant that the instruction was improper. The undisputed evidence established the following factors which, taken together, support an instruction on flight: (1) defendant provided no assistance to Quick after shooting him, *see id.* at 119, 552 S.E.2d at 626; (2) defendant fled the scene of the shooting and disposed of his gun, *see State v. Nixon*, 117 N.C. App. 141, 152, 450 S.E.2d 562, 568 (1994); and (3) defendant did not voluntarily contact the police or turn himself into the police but, rather, merely cooperated with their investigation once he was contacted by the police, *see State v. Brewton*, 342 N.C. 875, 878-79, 467 S.E.2d 395, 397-98 (1996). This assignment of error is overruled.

III.

[3] Defendant next argues that the trial court erred by denying his request to submit the verdict of involuntary manslaughter to the jury. A defendant is entitled to have a verdict of a lesser included offense submitted to the jury if it is supported by the evidence, and in deter-

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mining whether a lesser included offense is supported by the evidence, the evidence must be viewed in the light most favorable to the defendant. *See State v. Barlowe*, 337 N.C. 371, 377-78, 446 S.E.2d 352, 356-57 (1994). Involuntary manslaughter, which is a lesser included offense of murder, “is the unlawful and unintentional killing of another without malice which proximately results from an unlawful act not amounting to a felony nor naturally dangerous to human life, or by an act or omission constituting culpable negligence.” *State v. Barts*, 316 N.C. 666, 692, 343 S.E.2d 828, 845 (1986). Defendant argues that a verdict of involuntary manslaughter should have been submitted to the jury because there was evidence tending to show that “the shooting occurred through the mishandling of an extremely old, indeed, antique and battered, firearm which [defendant] was negligently waving around.” However, although there was evidence that the shotgun was old and, therefore, might generally have been prone to being discharged by accident, there was no evidence tending to show that this particular firing of the gun by defendant resulting in Quick’s death was unintentional. In fact, there was evidence tending to show that defendant fired the gun intentionally, including evidence that defendant told Deputy Taylor that he had intended to shoot Quick in the rear end and had missed. “[W]hen all the evidence tends to show that defendant committed the crime charged and did not commit a lesser included offense, the court is correct in refusing to charge on the lesser included offense.” *State v. Gerald*, 304 N.C. 511, 520, 284 S.E.2d 312, 318 (1981). We hold that the trial court did not err in refusing to submit the verdict of involuntary manslaughter to the jury. This assignment of error is overruled.

IV.

[4] Finally, defendant argues that the trial court erred in determining that defendant had twelve prior record points and a prior record level of four. The record indicates that the only evidence presented by the State was a prior record level worksheet purporting to list five prior convictions between 1958 and 1990. The following colloquy transpired immediately prior to the State’s submission of this document:

THE COURT: Evidence for the State?

[THE PROSECUTOR]: If Your Honor please, under the Structured Sentencing Act of North Carolina, the defendant has a prior record level of four in this case, Your Honor.

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THE COURT: Do you have a prior record level worksheet?

[THE PROSECUTOR]: Yes, sir, I do.

THE COURT: All right. Have you seen that, Mr. Prelipp [attorney for defendant]?

MR. PRELIPP: I have, sir.

THE COURT: Any objections to that?

MR. PRELIPP: No, sir.

Defendant contends that the State failed to satisfy the requirements set forth in Section 15A-1340.14(f) of our General Statutes, which provides, in pertinent part:

(f) Proof of Prior Convictions.—A prior conviction shall be proved by any of the following methods:

- (1) Stipulation of the parties.
- (2) An original or copy of the court record of the prior conviction.
- (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts.
- (4) Any other method found by the court to be reliable.

The State bears the burden of proving, by a preponderance of the evidence, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction.

N.C. Gen. Stat. § 15A-1340.14(f) (2001). There is no question that a worksheet, prepared and submitted by the State, purporting to list a defendant's prior convictions is, without more, insufficient to satisfy the State's burden in establishing proof of prior convictions. *See State v. Hanton*, 140 N.C. App. 679, 689, 540 S.E.2d 376, 382 (2000). Thus, the question here is whether the comments by defendant's attorney constitute a "stipulation" to the prior convictions listed on the worksheet submitted by the State.

In *Hanton*, the defendant on appeal challenged the trial court's calculation of his prior record level. *Id.* at 688-89, 540 S.E.2d at 382. The State had not presented any evidence as to the defendant's prior convictions other than a work sheet and a computer printout. *Id.* at

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689, 540 S.E.2d at 382. The Court reviewed the following exchange that occurred between defense counsel, the prosecutor, and the trial court:

[THE PROSECUTOR]: [T]he State would like to present a work sheet on Mr. Hanton. If I may approach, Your Honor.

THE COURT: All right.

[THE PROSECUTOR]: Mr. Hanton, by the State's reckoning, has 18 prior points, making him a Level 5.

...

THE COURT: Mr. Farfour, with the exception of the kidnaping charge, is there any disagreement about the other convictions on there?

[THE DEFENSE ATTORNEY]: No, Your Honor.

THE COURT: All right.

[THE PROSECUTOR]: If I may approach, Your Honor, with that and the computer documentation supporting the charges."

Id. The Court concluded that this colloquy "might reasonably be construed as an admission by defendant that he had been convicted of the other charges appearing on the prosecutor's work sheet." *Id.* at 690, 540 S.E.2d at 383.

Likewise, we hold that the statements made by the attorney representing defendant in the present case may reasonably be construed as a stipulation by defendant that he had been convicted of the charges listed on the worksheet. We also note that defendant has not asserted in his appellate brief that any of the prior convictions listed on the worksheet do not, in fact, exist. This assignment of error is overruled.

For the reasons stated herein, we find no prejudicial error in defendant's trial or sentencing.

No error.

Judges WYNN and THOMAS concur.

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DAN D. BARNHOUSE, PLAINTIFF V. AMERICAN EXPRESS FINANCIAL ADVISORS, INC., AMERICAN ENTERPRISE INVESTMENT SERVICES, INC., AND BANK OF AMERICA CORPORATION, DEFENDANTS

No. COA01-936

(Filed 16 July 2002)

Arbitration and Mediation— denial of arbitration—initial finding that agreement existed—required

The trial court erred by denying defendant's motion to stay the proceeding pending arbitration in an action arising from the sale of stock where the court did not first determine whether an agreement to arbitrate existed.

Judge GREENE dissenting.

Appeal by defendants American Express Financial Advisors, Inc., and American Enterprise Investment Services, Inc., from order entered 8 December 2000 by Judge Forrest D. Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 April 2002.

Cansler Lockhart, P.A., by F. Lane Williamson, for plaintiff appellee.

The Banks Law Firm, P.A., by R. Jonathan Charleston, for American Express Financial Advisors, Inc., and American Enterprise Investment Services, Inc., defendant appellants.

TIMMONS-GOODSON, Judge.

American Express Financial Advisors, Inc. and American Enterprise Investment Services, Inc. (collectively, "defendants") appeal an order by the trial court denying their motion to stay proceedings pending arbitration. For the reasons stated herein, we reverse the order and remand this case to the trial court.

The facts pertinent to the instant appeal are as follows: On 2 December 1999, Dan D. Barnhouse ("plaintiff") filed a complaint against defendants and Bank of America Corporation in Mecklenburg County Superior Court alleging negligence and breach of fiduciary duty in the sale of certain stock owned by plaintiff. Defendants thereafter filed a motion to stay further proceedings, alleging that

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plaintiff had agreed, upon opening his account with defendants, to submit to arbitration any dispute arising over his account. Plaintiff denied that such an agreement to arbitrate existed, and defendants' motion came before the trial court on 9 October 2000. After arguments by counsel, the trial court denied defendants' motion to stay proceedings, from which order defendants appeal.

The dispositive issue is whether the trial court properly denied defendants' motion to stay proceedings without first determining whether or not an agreement to arbitrate existed between the parties. Because we conclude that the court was required to first resolve the issue of whether or not an agreement to arbitrate existed before granting or denying defendants' motion, we reverse and remand the order of the court.

We note initially that the denial of a motion to compel arbitration, although interlocutory, is nevertheless immediately appealable, as it affects a substantial right. *See Blow v. Shaughnessy*, 68 N.C. App. 1, 12, 313 S.E.2d 868, 874, *disc. review denied*, 311 N.C. 751, 321 S.E.2d 127 (1984). Defendants' appeal is therefore properly before this Court.

Upon a motion seeking stay of a court proceeding on the grounds that the parties had previously agreed to arbitrate the controversy at issue and the opposing party's denial of the existence of an arbitration agreement, the trial court "shall proceed summarily" to determine whether or not an agreement to arbitrate exists between the parties. N.C. Gen. Stat. § 1-567.3(a) (2001). By its plain terms, the statute requires the court to summarily determine whether a valid arbitration agreement exists. *See Routh v. Snap-On Tools Corp.*, 101 N.C. App. 703, 706, 400 S.E.2d 755, 757 (1991). Failure of the court to determine this issue, where properly raised by the parties, constitutes reversible error. *See Burke v. Wilkins*, 131 N.C. App. 687, 689, 507 S.E.2d 913, 914 (1998). In determining whether or not an agreement to arbitrate exists, the court may also properly resolve preliminary issues surrounding the agreement, such as whether or not the agreement was induced by fraud, *see Henderson v. Herman*, 104 N.C. App. 482, 486, 409 S.E.2d 739, 741 (1991), *disc. review denied*, 330 N.C. 851, 413 S.E.2d 551 (1992), or whether the doctrines of *res judicata* or waiver apply. *See Cyclone Roofing Co. v. LaFave Co.*, 67 N.C. App. 278, 281-82, 312 S.E.2d 709, 711, *reversed on other grounds*, 312 N.C. 224, 321 S.E.2d 872 (1984). Where the trial court determines that the parties entered into an enforceable contract providing for arbitration,

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the trial court “shall order the parties to proceed to arbitration.” N.C. Gen. Stat. § 1-567.3(b). Accordingly, where the court concludes that no agreement to arbitrate exists, the court will grant the moving party’s motion to stay arbitration. *See id.*

In the instant case, there is no indication that the trial court made any determination regarding the existence of an arbitration agreement between the parties before denying defendants’ motion to stay proceedings. The order denying defendants’ motion to stay proceedings does not state upon what basis the court made its decision, and as such, this Court cannot properly review whether or not the court correctly denied defendants’ motion. *See CIT Grp./Sales Fin., Inc. v. Bray*, 141 N.C. App. 542, 545, 539 S.E.2d 690, 692 (2000). Although it is possible to infer from the order denying defendants’ motion that the trial court found that no arbitration agreement existed, other possibilities are equally likely. For instance, the trial court might have concluded that an arbitration agreement existed, but that the doctrine of equitable estoppel precluded enforcement of the agreement. It is also possible that the trial court made no determination on the validity of the agreement, but denied the motion on procedural grounds, for example. Because the trial court failed to determine whether or not an agreement to arbitrate existed between the parties, the trial court erred in denying defendants’ motion to stay proceedings.¹ *See CIT Grp./Sales Fin., Inc.*, 141 N.C. App. at 545, 539 S.E.2d at 692; *Burke*, 131 N.C. App. at 689, 507 S.E.2d at 915 (both holding that the trial courts erred where they denied motions to compel arbitration and stay proceedings without first determining whether a valid agreement to arbitrate existed between the parties). We therefore reverse the order and remand to the trial court for a determination of whether or not there exists an agreement to arbitrate between the parties. The order of the trial court is therefore

Reversed and remanded.

Judge HUNTER concurs.

Judge GREENE dissents.

1. Despite the dissent’s assertions to the contrary, our holding does not require the trial court to make detailed and specific findings of fact regarding the agreement to arbitrate. Rather, the trial court’s order must simply reflect whether or not a valid agreement to arbitrate exists between the parties.

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GREENE, Judge, dissenting.

Because I disagree with the majority that the trial court was under a duty to make findings as to the existence of an agreement to arbitrate, I dissent.

On 2 December 1999, plaintiff filed a complaint against defendants and Bank of America Corporation (BOA) alleging negligence and breach of fiduciary duty in the sale of his stock. On 3 February 2000, defendants filed an unverified answer denying plaintiff's allegations together with a motion to stay proceedings pending arbitration. In support of the motion to stay the proceedings, defendants alleged in their answer that plaintiff had opened an AEFA investment management account and, in so doing, agreed to certain written provisions, including an agreement to arbitrate any controversies arising out of the relationship between plaintiff and defendants. BOA filed an answer dated 4 February 2000 and a motion to compel arbitration dated 7 March 2000.²

Plaintiff submitted an affidavit stating he "never entered into any kind of arbitration agreement with [defendants] in connection with the purchase of . . . stock for [his] account. [He] never discussed such an agreement with . . . AEFA and did not even know that such a provision existed until this lawsuit [commenced]." Defendants' attorney submitted a memorandum of law in support of their motion to stay proceedings pending arbitration (the memorandum) dated 9 October 2000, to which the alleged agreement outlining the arbitration provision was attached. The memorandum was not in the form of an affidavit and was neither filed nor presented into evidence in the trial court.

In this case, the trial court ruled on defendants' motion to stay proceedings pending arbitration. Accordingly, the trial court was not required to enter any findings or conclusions unless requested to do so by a party. *See* N.C.G.S. § 1A-1, Rule 52(a)(2) (2001). Furthermore, "[w]hen the trial court is not required to find facts and make conclusions of law and does not do so, it is presumed that the [trial] court[,] on proper evidence[,] found facts to support its judgment." *Estrada v. Burnham*, 316 N.C. 318, 324, 341 S.E.2d 538, 542 (1986). As neither party requested the trial court to enter findings and conclusions, it

2. While the record does not reflect the trial court's ruling on BOA's motion, both plaintiff and defendants indicate in their briefs to this Court that the trial court allowed the motion.

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must be presumed that the trial court found facts to support its order. Thus, the majority is mistaken in its assumption that the trial court's failure to enter specific findings in its order is equivalent to a failure to determine whether an arbitration agreement existed between the parties.

The dispositive issue in this case is whether defendants met their burden of showing the existence of a written agreement to arbitrate.

Upon a motion seeking a stay of a court proceeding on the grounds that the parties had previously agreed to arbitrate the controversy at issue and the opposing party's denial of the existence of an arbitration agreement, the trial court is required to "proceed summarily"³ to determine the issue. N.C.G.S. § 1-567.3 (2001); *Routh*, 101 N.C. App. at 706, 400 S.E.2d at 757. The party seeking enforcement of an arbitration agreement has the burden of showing the existence of that agreement, *Sciolino v. TD Waterhouse Investor Servs., Inc.*, — N.C. App. —, —, 562 S.E.2d 64, 66, (2002), and may do so with affidavit(s) and documentary evidence filed with or presented into evidence in the trial court and, with the trial court's permission, the use of "oral testimony or depositions," N.C.G.S. § 1A-1, Rule 43(e) (2001) (permissible evidence to be heard on motions); see *Hankins v. Somers*, 39 N.C. App. 617, 619-20, 251 S.E.2d 640, 642, *disc. review denied*, 297 N.C. 300, 254 S.E.2d 920 (1979) (Rule 56(e) affidavit requirements read into Rule 43(e)). "[A]ffidavits or other material offered which set forth facts which would not be admissible in evidence should not be considered" when passing on a section 1-567.3 motion. *Borden, Inc. v. Brower*, 17 N.C. App. 249, 253, 193 S.E.2d 751, 753, *rev'd on other grounds*, 284 N.C. 54, 199 S.E.2d 414 (1973); N.C.G.S. § 1A-1, Rule 56(e) (2001). Inadmissible evidence may nonetheless "be considered by the [trial] court if not challenged by means of a timely objection." *Insurance Co. v. Bank*, 36 N.C. App. 18, 26, 244 S.E.2d 264, 269 (1978).

3. This requires the trial court to "summarily determine" whether there exists a written agreement to arbitrate and in doing so, the trial court is not to use the summary judgment standard. *Routh v. Snap-On Tools Corp.*, 101 N.C. App. 703, 706, 400 S.E.2d 755, 757 (1991). Upon the filing of a section 1-567.3 motion and the other party's denial of the existence of an arbitration agreement, the trial court must, as soon as practical, conduct a hearing and resolve the issues of fact and law presented by the motion. If oral testimony is permitted by the trial court, the parties must be allowed an adequate opportunity for cross-examination.

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To be valid, the agreement to arbitrate must be in writing. N.C.G.S. § 1-567.2(a) (2001).⁴ There is no requirement, however, that the written agreement be signed. *See Real Color Displays v. Universal Applied Tech.*, 950 F. Supp. 714, 717 (E.D.N.C. 1997) (applying federal arbitration statute similar to this state's statute). Thus, "parties may become bound by the terms of a [written] contract, even though they do not sign it, where their assent is otherwise indicated." 17A Am. Jur. 2d *Contracts* § 185 (1991) (assent indicated upon "acceptance of benefits under the contract, or the acceptance by one of the performance by the other"); *Daisy Mfg. Co., Inc. v. NCR Corp.*, 29 F.3d 389, 392 (8th Cir. 1994) (under ordinary contract principles, parties can "become contractually bound absent their signatures").

In this case, defendants have not presented any competent evidence within the meaning of Rule 43(e) and thus have failed to meet their burden of showing the existence a written agreement with plaintiff to arbitrate the controversy at issue. Defendants' answer states the terms of the alleged agreement, the allegations, however, do not qualify as evidence within the meaning of Rule 43(e) because the answer was not verified.⁵ *See Schoolfield v. Collins*, 281 N.C. 604, 612, 189 S.E.2d 208, 212-13 (1972) (verified pleading qualifies as an affidavit under Rule 56(e)). Although defendants' attorney attached a copy of the alleged agreement to the memorandum submitted to the trial court, the memorandum does not qualify as a Rule 56(e) affidavit for two reasons: it was not sworn to, and it does not "show affirmatively that [the attorney] is competent to testify" with respect to the agreement. *See* N.C.G.S. § 1A-1, Rule 56(e). Furthermore, the attachment to the memorandum does not qualify as documentary evidence because the memorandum was not filed with the trial court or otherwise presented into evidence.⁶ The trial court therefore properly denied defendants' motion to stay proceedings pending arbitration, and I would affirm the trial court's order.

4. "Both state and federal statutes address the validity and effect of arbitration provisions." *Eddings v. S. Orthopedic & Musculoskeletal Assocs. P.A.*, 147 N.C. App. 375, 380, 555 S.E.2d 649, 653 (2001), *disc. review denied*, 355 N.C. 285, 560 S.E.2d 799 (2002). The Federal Arbitration Act (the FAA) applies only to maritime transactions and "contract[s] evidencing a transaction involving commerce." 9 U.S.C. § 2 (1999). Neither party argues the FAA applies in this case.

5. Furthermore, there is nothing in this record to indicate defendants were relying on their unverified answer to support their section 1-567.3 motion or any indication the trial court was considering it. Thus, plaintiff had no obligation to object.

6. Because it was neither presented into evidence nor filed with the trial court, plaintiff had no obligation to lodge an objection to its consideration.

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[151 N.C. App. 513 (2002)]

ROGER D. DAVIS, PETITIONER v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY, DIVISION OF STATE HIGHWAY PATROL, RESPONDENT

No. COA01-805

(Filed 16 July 2002)

Public Officers and Employees— highway patrolman—demotion—just cause—unbecoming conduct

A de novo review reveals that the trial court did not err by affirming the State Personnel Commission's decision and order upholding petitioner highway patrolman's demotion based on just cause for personal misconduct including proceeding to drive after drinking three beers and speeding, because: (1) substantial competent evidence supports the conclusion that the Highway Patrol had just cause to demote petitioner for unbecoming conduct under North Carolina Highway Patrol Directive F.1, Section IV; and (2) even if the whole record test was applied, the result would have been the same since the decision was supported by substantial evidence and was neither arbitrary nor capricious.

Appeal by petitioner from order entered 24 January 2001 by Judge L. Oliver Noble, Jr., in Catawba County Superior Court. Heard in the Court of Appeals 20 May 2002.

C. Gary Triggs and Curt J. Vaught for petitioner-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

EAGLES, Chief Judge.

Roger Davis ("petitioner") appeals from the trial court's order affirming the State Personnel Commission's ("Commission") Decision and Order upholding his demotion. On appeal, petitioner contends that the trial court, the Commission, and the Administrative Law Judge erred in concluding that there existed just cause for his demotion. After careful consideration of the record and briefs, we disagree and affirm the trial court.

The evidence tends to show the following. Petitioner had served as a member of the North Carolina State Highway Patrol ("Highway Patrol"), a division of the North Carolina Department of Crime Control and Public Safety, for approximately twenty-seven years. On

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12 September 1996, petitioner was a First Sergeant with the Highway Patrol. On the morning of 12 September 1996, petitioner and his wife were packing their vehicles for a trip to Myrtle Beach, South Carolina. At 12:00 p.m., petitioner consumed one 12 ounce can of beer. Shortly thereafter, petitioner and his wife, driving separate vehicles, left their residence. The couple drove approximately 130 miles and stopped at a convenience store. While in the parking lot of the convenience store, petitioner consumed a hot dog and two 12 ounce cans of beer. Petitioner placed the empty beer cans on his vehicle's floorboard and resumed his trip.

At approximately 2:30 p.m., Trooper C.S. Grubbs was patrolling U.S. Highway 64 when he observed petitioner's vehicle traveling at a high rate of speed. After confirming with his radar unit that petitioner's vehicle was traveling 70 miles per hour in a 55 miles per hour zone, Trooper Grubbs activated his blue lights and followed petitioner. Petitioner stopped his vehicle on the shoulder of U.S. Highway 64, approximately 13.8 miles from the convenience store where he consumed the two beers, and Trooper Grubbs approached the vehicle.

While conversing with petitioner, Trooper Grubbs detected an odor of alcohol on petitioner's breath. Trooper Grubbs asked petitioner if he had been drinking, and petitioner admitted that he drank one beer at home and two beers at the convenience store. Trooper Grubbs also noticed a cooler on the vehicle's right front floorboard and one empty beer can on the floorboard between petitioner's feet. Trooper Grubbs asked petitioner to perform a field sobriety test which he did. Trooper Grubbs formed the opinion that petitioner was not appreciably impaired.

Nevertheless, Trooper Grubbs decided to administer an alcohol sensor test. The first test resulted in an alcohol concentration of 0.09, and the second test, administered five to six minutes later, resulted in an alcohol concentration of 0.08. Trooper Grubbs did not arrest petitioner for impaired driving, but he did tell petitioner not to drive. Petitioner left the scene with his wife driving his vehicle. The couple left their other vehicle on the shoulder of the highway.

Trooper Grubbs reported the 12 September 1996 incident to his immediate supervisor, and the incident report was communicated up through the chain of command. Subsequently, a Highway Patrol Internal Affairs investigation was conducted, and petitioner, petitioner's wife, and Trooper Grubbs, *inter alia*, were interviewed. At

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the conclusion of the investigation, it was recommended that petitioner be demoted to the rank of Line Sergeant with a corresponding salary reduction. A pre-demotion conference was held on 25 February 1997.

Petitioner timely filed an appeal to the Secretary of the North Carolina Department of Crime Control and Public Safety. The Secretary convened an Employee Advisory Committee, which recommended that petitioner be reinstated to the rank of First Sergeant. The Secretary considered the Committee's recommendation, but the Secretary upheld petitioner's demotion due to his personal misconduct.

Petitioner filed a petition for a contested case hearing, and a hearing was held before Administrative Law Judge Sammie Chess, Jr. By Recommended Decision entered 27 May 1998, Administrative Law Judge Chess affirmed petitioner's demotion. In so doing, Administrative Law Judge Chess concluded that there was just cause to demote petitioner pursuant to (1) G.S. § 20-138.1 (impaired driving) and (2) North Carolina State Highway Patrol Directive F.1, Section IV (unbecoming conduct). Petitioner next appealed to the State Personnel Commission.

By Decision and Order entered 14 October 1998, the Commission adopted the Administrative Law Judge's findings and conclusions and affirmed his Recommended Decision. Thereafter, petitioner filed a petition for judicial review. A hearing was held during the 16 January 2001 Civil Session of Catawba County Superior Court, the Honorable L. Oliver Noble, Jr., presiding. The trial court affirmed the Commission's Decision and Order by order entered 24 January 2001. Petitioner appeals.

At the outset, we note that respondent North Carolina Department of Crime Control and Public Safety has on two occasions moved to dismiss this appeal alleging petitioner's untimely notice of appeal. Nevertheless, in our discretion under N.C. R. App. P. 21, we deny respondent's motions and treat petitioner's appeal as a petition for writ of certiorari.

In his brief, petitioner contends that the trial court "failed to properly review the record using the 'whole record test' and therefore erred in the entry of its order on January 24, 2001 affirming the final decision and order of the North Carolina State Personnel Commission." In essence, petitioner argues that the Highway Patrol

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did not have “just cause” under G.S. § 126-35 to warrant his demotion. After careful review, we disagree.

Pursuant to G.S. § 126-35(a), “[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.” “‘Just cause’ is a legal basis, set forth by statute, for the termination [or demotion] of a State employee, and requires the application of legal principles. Thus, its determination is a question of law.” *Gainey v. N.C. Dept. of Justice*, 121 N.C. App. 253, 259 n.2, 465 S.E.2d 36, 41 n.2 (1996), but see *N.C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 441, 462 S.E.2d 824, 827 (1995) (applying “whole record” test in reviewing whether just cause existed to demote State employee). “We review questions of law *de novo*.” *Staton v. Brame*, 136 N.C. App. 170, 174, 523 S.E.2d 424, 427 (1999).

Here, the trial court stated in its order that it reviewed petitioner’s petition for judicial review under the “whole record” test. Additionally, petitioner now requests that this Court review the Commission’s decision under the “whole record” test. However, “the manner of our review is [not] governed merely by the label an appellant places upon an assignment of error; rather, we first determine the actual nature of the contended error, then proceed with an application of the proper scope of review.” *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 675, 443 S.E.2d 114, 118 (1994). “[W]here the initial reviewing court should have conducted *de novo* review, this Court will directly review the State Personnel Commission’s decision under a *de novo* review standard.” *Id.* at 677, 443 S.E.2d at 119.

As noted above, a trial court’s “determination of whether a termination [or demotion] was for ‘just cause’ based upon personal misconduct is a question of law, and [] questions of law are to be reviewed *de novo*.” *Souther v. New River Area Mental Health*, 142 N.C. App. 1, 4, 541 S.E.2d 750, 752, *aff’d*, 354 N.C. 209, 552 S.E.2d 162 (2001); see also *Amanini*, 114 N.C. App. at 678, 443 S.E.2d at 120. “We will employ the proper standard of review regardless of that employed by the reviewing trial court.” *Souther*, 142 N.C. App. at 4, 541 S.E.2d at 753.

“‘*De novo*’ review requires a court to consider a question anew, as if not considered or decided by the agency.” *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118. Here, competent evidence before this Court shows that petitioner was sworn to uphold the law as a mem-

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ber of the Highway Patrol; that petitioner had written thousands of criminal citations for speeding and had arrested motorists for impaired driving and other alcohol-related violations during his twenty-seven years with the Highway Patrol; that petitioner drank three beers within a two and a half hour period on 12 September 1996; that petitioner proceeded to drive after drinking the three beers; that petitioner exceeded the posted speed limit while driving; that petitioner had an odor of alcohol on his breath; that two alco-sensor tests administered on petitioner registered 0.09 and 0.08 alcohol concentration readings respectively. Moreover, petitioner readily admitted that he drank three beers in a two and a half hour period and that he was driving 60 to 62 miles per hour in a 55 miles per hour zone when he was stopped by Trooper Grubbs.

Under the State Personnel Act, G.S. § 126-1 *et seq.*, “[a]ny employee may be demoted as a disciplinary measure. Demotion may be made on the basis of either unsatisfactory or grossly inefficient job performance or unacceptable personal conduct.” 25 N.C.A.C. § 1J.0612(a). Moreover, “[a]n employee may be demoted for unacceptable personal conduct without any prior disciplinary action.” 25 N.C.A.C. § 1J.0612(a)(3). Unacceptable personal conduct includes “conduct unbecoming a state employee that is detrimental to state service.” 25 N.C.A.C. § 1J.0614(i)(5).

Additionally, the Highway Patrol has a written policy that provides:

Members shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably upon the Highway Patrol and in keeping with the high standards of professional law enforcement. Unbecoming conduct shall include any conduct which tends to bring the Patrol into disrepute, or which reflects discredit upon any member(s) of the Patrol, or which tends to impair the operation and efficiency of the Patrol or of a member, or which violates Patrol policy.

North Carolina State Highway Patrol Directive F.1, Section IV. The primary mission of the Highway Patrol is to ensure highway safety. To accomplish that mission in part, the Highway Patrol admonishes members of the general public not to drink and drive. Here, petitioner was demoted for unacceptable personal conduct for violating the Highway Patrol's policy.

After conducting our *de novo* review, we conclude that substantial competent evidence supports the conclusion that the Highway

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Patrol had just cause to demote petitioner for unbecoming conduct pursuant to North Carolina State Highway Patrol Directive F.1, Section IV. Having determined that substantial competent evidence supports the Highway Patrol's decision to demote petitioner pursuant to Highway Patrol Directive F.1, Section IV, we need not address petitioner's argument that the Commission erred in concluding that the Highway Patrol had just cause to demote him pursuant to G.S. § 20-138.1 (impaired driving).

Parenthetically, we note that the result here would have been the same even if we had reviewed the decision below utilizing the "whole record" test. "The 'whole record' test requires the court to examine all competent evidence comprising the 'whole record' in order to ascertain if substantial evidence therein supports the administrative agency decision." *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62, 468 S.E.2d 557, 560 (1996). In examining the "whole record," we would hold that the Highway Patrol's decision here is supported by substantial evidence and was neither arbitrary nor capricious.

Accordingly, we affirm the trial court.

Affirmed.

Judges MCGEE and TYSON concur.

W. GLEN ROBBINS, JR., HUSBAND AND EXECUTOR OF THE ESTATE OF GAYLE C. ROBBINS,
DECEASED EMPLOYEE, PLAINTIFF V. WAKE COUNTY BOARD OF EDUCATION,
EMPLOYER, SELF INSURED, DEFENDANT

No. COA01-1224

(Filed 16 July 2002)

**Workers' Compensation— occupational disease—asbestos
tainted building**

The Industrial Commission did not err by concluding that plaintiff sustained a compensable occupational disease when she developed mesothelioma from working within a building with high levels of asbestos. While the record may contain evidence supporting contrary findings, the Commission's findings were sufficiently supported by competent evidence to be deemed conclusive.

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[151 N.C. App. 518 (2002)]

Appeal by defendant from an opinion and award entered 21 May 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 June 2002.

Wallace and Graham, P.A., by Richard L. Huffman, for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Jeffrey A. Doyle and Tonya D. Davis, for defendant-appellant.

HUNTER, Judge.

Wake County Board of Education (“defendant”) appeals an opinion and award of the North Carolina Industrial Commission awarding compensation to W. Glen Robbins, Jr. (“plaintiff”), executor of the estate of his deceased wife, Gayle C. Robbins (“Robbins”), on grounds that Robbins contracted an occupational disease while employed with defendant. We affirm the Commission’s opinion and award.

The evidence of record establishes that Robbins worked for defendant from May 1978 until October 1981 as a secretary and graphic artist. During her employment with defendant, Robbins worked at a facility on Devereaux Street in Raleigh which was used as defendant’s central administrative office building. Robbins worked in a large room on the second floor that was divided by partitions, and she also spent about two hours daily in the office’s print shop. Robbins also made daily trips to the basement of the building to place materials in courier boxes. The courier boxes were located next to the boiler room. Robbins testified that there was almost always construction being performed in the building, and that she would often observe that dust and other particles accumulated on her desk.

In 1988, pursuant to the Asbestos Hazard Emergency Response Act, a survey was performed at the Devereaux Street facility. The result of the survey revealed the building contained substantial amounts of asbestos, including in the ceiling plaster, wall plaster, floor tile, pipe insulation in the boiler room and print shop, vibration dampers of the heating system, and numerous other areas. The building contained a significant amount of asbestos that was damaged and in friable condition. The Commission found that the 1988 survey was indicative of the conditions in the building at the time Robbins was employed by defendant.

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In late 1992, Robbins developed a persistent cough. A January 1993 chest x-ray revealed a suspicious shadow in her lungs, and a CT scan confirmed the presence of an egg-sized tumor in Robbins' right lung. Robbins was diagnosed with mesothelioma, a cancer most often associated with asbestos exposure. On 24 June 1994, Robbins filed this claim with the Commission seeking compensation for the occupational disease of mesothelioma. Despite aggressive treatment, Robbins died of mesothelioma in June 1995 at the age of forty-one. Plaintiff continued the matter after Robbins' death, and a hearing was held in December 1998. The deputy commissioner entered an opinion and award denying compensation, and plaintiff appealed.

On 21 May 2001, the Full Commission entered an opinion and award reversing the deputy commissioner and concluding that plaintiff had sustained a compensable occupational disease as a result of her employment with defendant. In so concluding, the Commission found that during her employment with defendant, Robbins was exposed to more than normal amounts of asbestos which resulted in her contracting mesothelioma, that her employment placed her at a greater risk for contracting mesothelioma than the public generally, and that mesothelioma is not an ordinary disease of life to which the general public is equally exposed. Defendant appeals.

Defendant argues on appeal that the Commission erred in finding and concluding that Robbins' mesothelioma was an occupational disease within the meaning of the Worker's Compensation Act. Our review of an opinion and award of the Commission is limited to the two-part inquiry of whether (1) there was any competent evidence to support the Commission's findings of fact; and (2) the Commission's findings of fact support its legal conclusions and decision. *Stevenson v. Noel Williams Masonry, Inc.*, 148 N.C. App. 90, 93, 557 S.E.2d 554, 557 (2001). "The Commission's findings of fact are conclusive on appeal if supported by competent evidence. This is so even if there is evidence which would support a finding to the contrary." *Id.* (citation omitted).

N.C. Gen. Stat. § 97-53 (2001) sets forth several diseases which are considered compensable occupational diseases. Mesothelioma is not one of them. However, N.C. Gen. Stat. § 97-53(13) provides that a disease not specifically listed in the statute may still be compensable where certain criteria are met. In order to establish a compensable occupational disease under N.C. Gen. Stat. § 97-53(13), a claimant must show:

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(1) the disease is characteristic of individuals engaged in the particular trade or occupation in which the claimant is engaged; (2) the disease is not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there is a causal relationship between the disease and the claimant's employment.

Hardin v. Motor Panels, Inc., 136 N.C. App. 351, 354, 524 S.E.2d 368, 371 (citing *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93, 301 S.E.2d 359, 365 (1983)), *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). The first two elements of the *Rutledge* test are satisfied where the claimant can show that "the employment exposed the worker to a greater risk of contracting the disease than the public generally." *Rutledge*, 308 N.C. at 94, 301 S.E.2d at 365. The third element is satisfied if the employment " 'significantly contributed to, or was a significant causal factor in, the disease's development.' " *Hardin*, 136 N.C. App. at 354, 524 S.E.2d at 371 (citation omitted).

Here, defendant argues that the Commission erred in finding and concluding that plaintiff's evidence met the three-part *Rutledge* test for establishing an occupational disease. However, we hold that there is competent evidence in the record to support the Commission's findings with respect to each of the three requirements for proving an occupational disease, and that its findings support its conclusion that Robbins sustained a compensable occupational disease as a result of her employment with defendant.

The Commission found as fact that Robbins' employment at defendant's Devereaux Street facility exposed her to a greater risk of contracting mesothelioma than the public generally. The Commission found that while the nature of Robbins' employment as a secretary and graphic artist did not place her at risk for contracting the disease, the fact that her employment required her to work in a building with higher-than-normal levels of asbestos did place her at such a risk, and that the risk was higher than that to which the general public was exposed, as not all buildings contain significant amounts of friable asbestos. The Commission further found that mesothelioma is not an ordinary disease of life to which the general public would be equally exposed as someone like Robbins, who worked in a building containing significant levels of asbestos.

These findings are supported by the testimony of Dr. Victor Roggli, who testified before the Commission as an expert in the pathology of asbestos and asbestos-related diseases of the lung,

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including mesothelioma. Dr. Roggli testified that he was of the opinion that Robbins' exposure to asbestos at the Devereaux Street facility placed her at an increased risk for developing mesothelioma. Dr. Roggli opined that mesothelioma is a disease which is characteristic of particular trades or occupations, such as Robbins' employment, where the employee is exposed to asbestos. He also testified that mesothelioma is not an ordinary disease of life that one typically sees in the general population. Dr. Roggli stated that mesothelioma is very rare among the general population, and that it is estimated that there exist only one or two cases per million people per year where mesothelioma develops without asbestos exposure.¹ He further testified there is no doubt in the medical community regarding the association between mesothelioma and asbestos exposure, and that the connection between the two is so strong that when mesothelioma is identified, a doctor would first inquire about possible exposure to asbestos. Thus, the Commission's findings with respect to the first two elements of the *Rutledge* test were sufficiently supported by competent evidence.

The Commission also found as fact that Robbins' exposure to asbestos during her employment with defendant was a significant contributing factor in the development of her mesothelioma. This finding is supported by extensive evidence regarding the higher-than-normal asbestos levels present in the Devereaux Street facility and the connection between such exposure and mesothelioma. Additionally, Dr. Roggli opined that Robbins would have been injuriously exposed to asbestos while employed by defendant if she had "nontrivial" exposure. Howard Cole, a certified industrial hygienist and licensed asbestos consultant, opined that Robbins would have been exposed to "nontrivial" levels of asbestos while working for defendant. He testified that, in his opinion, Robbins would have been exposed to levels of asbestos at the Devereaux Street facility significant enough to contribute to mesothelioma.

1. We note that this evidence distinguishes the present case from *Woody v. Thomasville Upholstery, Inc.*, 355 N.C. 483, 562 S.E.2d 422 (2002) in which the Supreme Court recently adopted the view of the dissenting judge in *Woody v. Thomasville Upholstery, Inc.*, 146 N.C. App. 187, 552 S.E.2d 202 (2001). The dissent in that case concluded that the claimant had failed to establish an occupational disease based upon her depression and fibromyalgia which she claimed were caused by a verbally abusive supervisor. *Id.* at 202, 552 S.E.2d at 211. The dissent observed that depression and fibromyalgia are clearly ordinary diseases of life to which the general public are equally exposed, and to which the claimant could be equally susceptible in any employment or in her personal life. *Id.* In contrast, the testimony of Dr. Roggli in this case supports the Commission's finding that mesothelioma is not an ordinary disease of life to which the general public is equally exposed.

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[151 N.C. App. 523 (2002)]

Defendant argues that Cole's testimony should have been ignored by the Commission as being too speculative, in part because he based some of his opinions on his previous experience with other buildings containing asbestos and because he never personally inspected the Devereaux Street facility. We disagree, and note that "[i]n occupational disease cases the causal connection between the disease and the employee's occupation must of necessity be based upon circumstantial evidence." *Lumley v. Dancy Construction Co.*, 79 N.C. App. 114, 122, 339 S.E.2d 9, 14 (1986) (citing *Booker v. Medical Center*, 297 N.C. 458, 256 S.E.2d 189 (1979)).

In conclusion, though the record may contain evidence tending to support contrary findings, the Commission's findings are sufficiently supported by competent evidence in the record to be deemed conclusive on appeal. We hold that these findings support the Commission's conclusion of law that, as a result of her employment with defendant, Robbins sustained a compensable occupational disease within the meaning of N.C. Gen. Stat. § 97-53(13), and we therefore uphold the opinion and award of the Commission.

Affirmed.

Judges GREENE and McCULLOUGH concur.

ROBERT E. WOLF, PLAINTIFF V. LORENE L. WOLF, DEFENDANT

No. COA01-766

(Filed 16 July 2002)

1. Child Support, Custody, and Visitation; Divorce— child support—postseparation support—modification—voluntary unemployment

The trial court did not err by failing to reduce, modify, or eliminate plaintiff husband's child support and postseparation support payments, because there was sufficient evidence in the record to show that plaintiff's unemployment was voluntary.

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[151 N.C. App. 523 (2002)]

2. Contempt—civil—child support—postseparation support—failure to pay bonus or relocation expense

The trial court did not err in an action for child support and postseparation support by holding plaintiff husband in civil contempt for his failure to pay defendant wife twenty percent and fifteen percent of the gross amount of his hiring bonus of \$5,769.24 when the trial court's order required plaintiff to pay this percentage of his bonuses, because: (1) there is nothing in the trial court's order that restricted the provision on bonuses to plaintiff's work at a particular employment, and the provision applies to all future bonuses; and (2) there is sufficient evidence to show that the money plaintiff received was a bonus covered by the final order, and plaintiff prevented defendant and his children from receiving it in accordance with the final order by willfully relabeling the bonus a relocation expense.

3. Contempt—civil—child support—postseparation support—failure to pay—willfulness

The trial court did not err by failing to find plaintiff husband in civil contempt for willful failure to pay his child support obligation in the amount of \$1,129.00 per month and his postseparation support obligation of \$609.00 per month, because the trial court did not find that plaintiff had the ability to pay or that his failure to pay was willful concerning his fixed amount of child and post-separation support.

Appeal by plaintiff and defendant from an order entered 19 December 2000 by Judge J. David Abernethy in Catawba County District Court. Heard in the Court of Appeals 20 May 2002.

Starnes and Killian, PLLC, by Wesley E. Starnes, for plaintiff.

Crowe & Davis, P.A., by H. Kent Crowe, for defendant.

TYSON, Judge.

Robert E. Wolf ("plaintiff") appeals from an order that (1) denied his motion to modify post-separation and child support orders and (2) held him in contempt. Lorene L. Wolf ("defendant") also appeals from that order that denied in part and allowed in part her motion for contempt and attorney's fees. We affirm the order of the trial court.

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[151 N.C. App. 523 (2002)]

I. Facts

Plaintiff and defendant married on 14 December 1985. Three children were born of the marriage. Plaintiff and defendant separated on 30 March 1997. Plaintiff was employed by Shurtape Technologies (“Shurtape”) earning approximately \$6,127.00 per month.

Plaintiff filed a complaint that requested permanent custody of the minor children, child support, and equitable distribution of the marital estate on 23 May 1997. Defendant answered and counter-claimed for divorce from bed and board, sole custody of the minor children, child support payments, alimony, post-separation support, possession of the marital property, equitable distribution, and attorney’s fees in the alimony and child support actions on 22 September 1997.

After a hearing on 4 March 1998, the trial court entered two orders on 7 December 1998, *nunc pro tunc* 3 April 1998, granting defendant (1) primary care and custody of the minor children, (2) post-separation support in the amount of \$609.00 per month, (3) fifteen percent (15%) of the gross amount of any bonus received by plaintiff in the future as additional post-separation support, (4) child support in the amount of \$1,129.00 per month, (5) twenty percent (20%) of the gross amount of any bonus received by plaintiff in the future as additional child support, and (6) attorney’s fees in the child support action.

Plaintiff was laid off by Shurtape when his department was eliminated in January 1999. On 4 March 1999, plaintiff was hired with Tesa Tape, Inc. (“Tesa”). Plaintiff received a hiring bonus in the amount of \$5,069.24. Plaintiff contends that the additional money received at hiring was not a “hiring bonus” but “relocation expenses.” Plaintiff earned approximately the same salary with Tesa as he had with Shurtape. Plaintiff’s employment with Tesa was terminated on 28 September 1999. Plaintiff had paid his child and post separation support payments in the amount of \$1,129.00 per month and \$609.00 per month respectively until he was terminated. Plaintiff did not pay fifteen percent and twenty percent of his hiring bonus in child or post-separation support.

Plaintiff filed a verified motion to “Modify/Reduce/Eliminate Post-Separation Support” on 17 November 1999. The next day Plaintiff filed a motion to “Modify/Reduce Child Support.” On 7 April 2000, defendant filed a “Motion For Contempt” for nonpayment of

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child support, post-separation support, and reimbursement of medical expenses and an “Order to Show Cause” setting the contempt motion for hearing on 19 April 2002.

Plaintiff’s and defendant’s motions were heard on 31 May 2000 and 26 June 2000. The trial court issued an Order on 19 December 2000 that (1) denied plaintiff’s motions to modify the child support order and the post-separation order, and (2) granted in part and denied in part defendant’s motion for contempt. Both plaintiff and defendant appeal.

II. Issues

Plaintiff assigns as error the trial court’s (1) failure to reduce, modify or eliminate plaintiff’s child support and post-separation support payments and (2) holding plaintiff in contempt for his failure to pay defendant twenty percent and fifteen percent of the gross amount of his “relocation expense” of \$5,769.24. Defendant assigns as error the trial court’s denying, in part, her motion for contempt.

III. Plaintiff’s Assignments

A. Motion To Reduce Support Payments

[1] Plaintiff contends that the trial court erred by failing to modify his child and post-separation support obligations. Plaintiff argues that no evidence supports a finding or conclusion that plaintiff was voluntarily unemployed. We disagree.

Plaintiff sought to reduce his child support obligation pursuant to G.S. § 50-13.7 and his post-separation support obligation pursuant to G.S. § 50-16.9. Both statutes require plaintiff to show that there has been “changed circumstances” since the entry of the order. N.C. Gen. Stat. § 50-13.7 (2002); N.C. Gen. Stat. § 50-16.9 (2002).

A change in circumstances must be shown by the party moving for the modification in order to modify an order for support or alimony. *Rock v. Rock*, 260 N.C. 223, 132 S.E.2d 342 (1963). The fact that a husband’s salary or income has been reduced substantially does not automatically entitle him to a reduction. *Medlin v. Medlin*, 64 N.C. App. 600, 307 S.E.2d 591 (1983).

The trial court may refuse to modify support and/or alimony on the basis of an individual’s earning capacity instead of his actual income when the evidence presented to the trial court shows that a husband has disregarded his marital and parental obligations by: (1)

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failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) wilfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) intentionally leaving his employment to go into another business. *Bowes v. Bowes*, 287 N.C. 163, 171-72, 214 S.E.2d 40, 45 (1975) (citations omitted); see also *Wachacha v. Wachacha*, 38 N.C. App. 504, 507-08, 248 S.E.2d 375, 377-78 (1978).

When the evidence shows that a party has acted in "bad faith," the trial court may refuse to modify the support awards. *Chused v. Chused*, 131 N.C. App. 668, 671, 508 S.E.2d 559, 561-62 (1998). If a husband has acted in "good faith" that resulted in the reduction of his income, application of the earnings capacity rule is improper. *Wachacha*, 38 N.C. App. at 508, 248 S.E.2d at 377-78. See also *Chused*, 131 N.C. App. 668, 508 S.E.2d 559 (held no evidence that husband acted in bad faith by deliberately depressing his income, and the evidence was sufficient to prove husband was "involuntarily" terminated from his employment).

The dispositive issue is whether a party is motivated by a desire to avoid his reasonable support obligations. To apply the earnings capacity rule, the trial court must have sufficient evidence of the proscribed intent. *Wachacha*, 38 N.C. App. at 508, 248 S.E.2d at 378 (quoting *Sguros v. Sguros*, 252 N.C. 408, 114 S.E.2d 79 (1960)).

Here there is substantial evidence in the record and the trial court did not err by finding and concluding that the plaintiff disregarded his marital and parental obligations. The trial court found and concluded that:

the change in the Plaintiff's employment circumstances in being terminated from [Tesa] and his continued unemployment were voluntarily effected by the Plaintiff in conscious and reckless disregard of his duty to provide support to his former wife and children as ordered by the Court in this action. (Emphasis supplied).

The trial court supported this finding and conclusion with extensive findings of fact. Notwithstanding plaintiff's arguments, there is sufficient evidence in the record to show that his unemployment was voluntary. The trial court made the following findings of fact, which

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are supported by the evidence, concerning plaintiff's termination at Tesa: (1) upon being hired by Tesa, plaintiff insisted on renaming his "bonus" as a relocation expense that irritated his new employer, (2) plaintiff overinflated his expense reports, (3) plaintiff failed to disclose vital information about his bankruptcy which embarrassed his supervisor, (4) plaintiff made unreasonable demands about his business trips, and (5) all of plaintiff's actions with respect to his new job lead to an "entirely predictable termination." This assignment of error is overruled.

B. Trial Court's Order Holding Plaintiff In Contempt

[2] Plaintiff contends that the trial court erred when it held him in contempt for not paying defendant twenty percent and fifteen percent, respectively, of his \$5,769.24 "bonus" or "relocation expense." Plaintiff argues that the final order did not contemplate bonuses received from sources other than Shurtape. Alternatively, plaintiff argues that there is no evidence that his "relocation expense" was a "bonus." We disagree.

The trial court considered the percentages of the bonuses to be paid to defendant and found that "Plaintiff acted in conscious and reckless disregard of his duty to provide support to the Defendant and the minor children as previously ordered by the Court in this action." We do not accept plaintiff's interpretation of the final order, which obligated plaintiff to pay certain percentages of his bonuses to defendant. The child support and post-separation support orders provided that:

In addition to the foregoing monthly child [and post-separation] support obligation[s] of the Plaintiff, the Plaintiff shall, within ten (10) days from the date he receives any bonus from his employment in the future, pay . . . to the Defendant, the sum of twenty percent (20%)[and fifteen (15%)] of the gross amount of any and all future bonuses which he receives from his employment. (Emphasis supplied).

There is nothing contained in these portions of the final order that restricts this provision to plaintiff's work at Shurtape. The provision applies to *all future bonuses*.

After thorough review of the record, there is sufficient evidence to show that the money plaintiff received from Tesa upon hire was a "bonus" covered by the final order, and that plaintiff prevented

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[151 N.C. App. 523 (2002)]

defendant and his children from receiving it in accordance with the final order by wilfully re-labeling the bonus a relocation expense. This assignment of error is overruled.

IV. Defendant's Assignments

Defendant listed eight assignments of error in the record. All assignments of error raised but not argued are deemed abandoned. N.C.R. App. P. 28(b)(5) (2002).

[3] Defendant contends that the trial court erred by not finding plaintiff in contempt for "willful" failure to comply with the other provisions of the child support and post-separation support orders. We disagree.

To find plaintiff in contempt, the trial court must find that (1) plaintiff failed to comply with the order, and (2) that plaintiff presently possesses the means to comply. *Gorrell v. Gorrell*, 264 N.C. 403, 141 S.E.2d 794 (1965). "In proceedings in contempt the facts found by the judge are not reviewable by this court, except for the purpose of passing upon their sufficiency to warrant the judgment." *Green v. Green*, 130 N.C. 578, 578, 41 S.E. 784, 785 (1902).

The trial court concluded that plaintiff was not in contempt by failing to pay his child support obligation in the amount of \$1,129.00 per month and his separation support obligation in the amount of \$609.00 per month. The trial court did not find that plaintiff had the ability to pay or that his failure to pay was willful concerning his fixed amount of child and post-separation support. This assignment of error is overruled. The order of the trial court is affirmed.

Affirmed.

Chief Judge EAGLES and Judge MCGEE concur.

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[151 N.C. App. 530 (2002)]

STATE OF NORTH CAROLINA v. ROBERT ARNOLD GAY

No. COA01-795

(Filed 16 July 2002)

1. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence

The trial court did not err by failing to dismiss the charge of robbery with a dangerous weapon even though defendant contends that use of a stun gun was not a dangerous weapon that threatened or endangered the victim's life, because defendant's actions constituted the use of a dangerous weapon which threatened the victim's life when defendant wrapped his arm around the victim's neck, attempted to shock her with his stun gun, and ripped her backpack from her shoulder.

2. Appeal and Error— preservation of issues—failure to make offer of proof

Although defendant contends the trial court erred in a robbery with a dangerous weapon case by excluding testimony of the victim's reputation for untruthfulness, defendant did not preserve this issue for appellate review because: (1) defendant failed to make an offer of proof concerning the answers to the excluded questions; and (2) it is not obvious from the record what the excluded testimony would have shown.

Appeal by defendant from judgment entered 18 January 2001 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General John F. Oates, Jr., for the State.

Noell P. Tin, for defendant-appellant.

TYSON, Judge.

Robert Arnold Gay ("defendant") appeals from the trial court's entry of judgment after a jury returned a verdict finding him guilty of robbery with a dangerous weapon. We find no error.

I. Facts

The evidence at trial tended to show that on 11 June 1999, Jennifer Ellen Barnes ("Barnes") was working at Cookies by Design

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in Charlotte, North Carolina. Cookies by Design is located in a shopping center adjacent to various other stores. At approximately 6:00 p.m., Barnes prepared to close the store. She turned off the lights and exited the front door wearing a backpack that contained \$24,000.00 in cash that she had recently received from her father's estate. Barnes immediately noticed a person, later identified as defendant, standing at the corner of the building. She observed that he had a red face and "completely bloodshot" eyes. Defendant wore a "sock hat," a long-sleeve sweatshirt, and long pants. Barnes testified that she thought defendant's dress was highly unusual since it was a hot summer afternoon. Barnes turned to lock the front glass door. Defendant approached her and asked if she had any spare change. Barnes looked at defendant and said "[n]o, I don't have anything." She looked at defendant for approximately ten to fifteen seconds. Barnes again returned to locking the front door. With her back toward defendant, defendant wrapped his left arm around her neck and placed a "stun gun" up against her neck. Defendant took Barnes' backpack with the money inside and fled the scene. Five days later, defendant appeared inside the store where Barnes worked and asked for a co-worker. Barnes telephoned the police and defendant was eventually arrested. Defendant was tried on 15 January 2001. Defendant offered evidence, testified at trial, and denied robbing Barnes. The jury found defendant guilty of robbery with a dangerous weapon. The trial court sentenced defendant to a minimum of seventy months and a maximum of ninety-three months, and ordered him to pay \$24,000.00 in restitution. Defendant appeals.

II. Issues

Defendant argues that the trial court erred by (1) failing to dismiss the charges for insufficiency of evidence, and (2) excluding testimony of the victim's reputation for untruthfulness. Assignments of error set out in the record by defendant and not argued are deemed abandoned. N.C.R. App. P. 28(b)(5) (2001).

III. Sufficiency of the Evidence

[1] Defendant contends the State presented no evidence that the "stun gun allegedly used by [him] was a dangerous weapon that endangered or threatened [Barnes'] life." Defendant claims that the trial court should have dismissed the charge of robbery with a dangerous weapon, and the jury should have been instructed on common law robbery only. We disagree.

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When ruling on a motion to dismiss for insufficiency of the evidence, the trial court determines whether substantial evidence exists for each essential element of the offense charged, and whether defendant is the perpetrator of the offense. *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted).

"In ruling on a motion to dismiss, the trial court must view all of the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from the evidence." *State v. McAllister*, 138 N.C. App. 252, 259, 530 S.E.2d 859, 864, *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000) (citation omitted). "If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958). "In 'borderline' or close cases, our courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the twelve and to avoid unnecessary appeals." *State v. Hamilton*, 77 N.C. App. 506, 512, 335 S.E.2d 506, 510 (1985) (citing *State v. Vestal*, 283 N.C. 249, 195 S.E.2d 297, *cert. denied*, 414 U.S. 874, 38 L. Ed. 2d 114 (1973); *State v. Holt*, 90 N.C. 749 (1884); *Cunningham v. Brown*, 62 N.C. App. 239, 302 S.E.2d 822, *disc. rev. denied*, 308 N.C. 675, 304 S.E.2d 754 (1983)). Once substantial evidence is before the jury, any conflicts and discrepancies are for the jury to resolve and do not supply basis for dismissal. *Id.* (citing *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971); *State v. Bolin*, 281 N.C. 415, 189 S.E.2d 235 (1972)).

The elements of robbery with a dangerous weapon are: (1) the unlawful attempt to take or taking of personal property from a person or presence, (2) by use or threatened use of a firearm or *other dangerous weapon*, (3) whereby the life of the person is threatened or endangered. *State v. Mann*, 355 N.C. 294, 303, 560 S.E.2d 776, 782 (2002) (citations omitted). Defendant contends that elements two and three are unsatisfied. He argues that use of the stun gun was not a dangerous weapon that threatened or endangered Barnes' life. We disagree.

"The element of danger or threat to the life of the victim is the essence of the offense." *State v. Gibbons*, 303 N.C. 484, 489, 279 S.E.2d 574, 578 (1981). "Prerequisite to conviction for armed robbery

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. . . the jury must find from the evidence beyond a reasonable doubt that the life of the victim was *endangered or threatened* by the *use or threatened use* of ‘firearms or other dangerous weapon, implement or means.’” *State v. Covington*, 273 N.C. 690, 699-700, 161 S.E.2d 140, 147 (1968) (emphasis in original). The offense requires “an act with the weapon which endangers or threatens the life of the victim” *Gibbons*, 303 N.C. at 491, 279 S.E.2d at 578.

Defendant admits that a stun gun can be a dangerous weapon, depending on how it is used. The evidence tended to show that defendant “put his left arm around [Barnes’] neck and attempted to use a stun gun which was in his right hand. Mrs. Barnes began struggling with [defendant] and, as she fell to the ground, [he] ripped the back pack off her back and ran away.”

We hold that when defendant wrapped his arm around Barnes’ neck, attempted to “shock” her with his stun gun, and ripped her back pack from her shoulder, defendant’s actions constituted the use of a dangerous weapon which threatened Barnes’ life. *Cf. State v. Joyner*, 295 N.C. 55, 243 S.E.2d 367 (1978) (held that use of glass soda bottle in the course of sexual assault and robbery was sufficient evidence to support an armed robbery with a dangerous weapon jury instruction); *State v. Cockerham*, 129 N.C. App. 221, 497 S.E.2d 831, *disc. rev. denied*, 348 N.C. 503, 510 S.E.2d 659 (1998) (held that gasoline thrown onto a victim’s face with matches later found on the ground constituted the offense of robbery with a dangerous weapon); *State v. Westall*, 116 N.C. App. 534, 449 S.E.2d 24, *disc. rev. denied*, 338 N.C. 671, 453 S.E.2d 185 (1994) (held that placement of a pellet gun against a victim’s back in the course of a robbery was sufficient to instruct the jury on robbery with a dangerous weapon); *State v. Funderburk*, 60 N.C. App. 777, 299 S.E.2d 822 (1983) (held use of inoperable air pistol to strike victim, which caused a black eye was sufficient evidence to instruct the jury on robbery with a dangerous weapon). This assignment of error is overruled.

IV. Excluded Testimony

[2] Defendant contends that the trial court erred by sustaining the State’s objection when defendant attempted to ask Tina Walsh, Barnes’ supervisor, on direct examination about Barnes’ “poor reputation for truthfulness with her co-workers.”

The following exchange took place at trial between defense counsel and Tina Walsh:

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Q. Did you form an opinion about [Barnes'] truthfulness?

....

A. I didn't believe everything she said.

Q. Can you answer this question that you formed an opinion or not?

A. Yeah.

Q. And what was that opinion?

State. Objection.

Court. Overruled.

A. Well, she was very dramatic, and she liked to carry on and disrupt work. And—

State. Objection.

Court. Sustained as not being—you're not responsive.

Q. What was your opinion as to her honesty or truthfulness?

A. I didn't think she was honest.

Q. When did [Barnes] leave work at Cookies By Design?

A. I think it was like the end of August.

Defendant then attempted to elicit specific instances of conduct about the circumstances surrounding Barnes' leaving her employment and Barnes' co-workers' opinions concerning her reputation for truthfulness. The trial court sustained the objections. Defendant did not make a proffer regarding what the excluded testimony would have revealed.

“[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record.” *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). *See also* N.C. Gen. Stat. § 8C-1, Rule 103 (2001); N.C. Gen. Stat. § 15A-1446(a) (2001). When evidence is excluded, “the essential content or substance of the witness’s testimony is required” before we can determine whether exclusion of evidence was prejudicial. *State v.*

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Satterfield, 300 N.C. 621, 628, 268 S.E.2d 510, 515-16 (1980) (quoting *Currence v. Hardin*, 296 N.C. 96, 249 S.E.2d 387 (1978)).

Here, Ms. Walsh gave her opinion of Barnes' truthfulness. Defendant made no offer of proof concerning what Ms. Walsh's answers to the excluded question might have been, nor is it obvious from the record what the excluded testimony would have shown. We hold that defendant failed to preserve this issue for appellate review, and that this issue is not properly before us. This assignment of error is dismissed.

V. Conclusion

We hold that defendant received a trial by a jury of his peers before an able judge free from errors he assigned and argued.

No error.

Chief Judge EAGLES and Judge McGEE concur.

STATE OF NORTH CAROLINA v. RONALD KENNETH WILLIAMS

No. COA01-1187

(Filed 16 July 2002)

1. Evidence— hearsay—murder victim's state of mind

The trial court did not err in a first-degree domestic murder prosecution by admitting testimony that the victim had moved in with the witness because the victim was fed-up with defendant's alleged infidelities, that altercations occurred between the victim and defendant, and that the victim had said to come and check on her if she did not return from her last meeting with defendant within thirty minutes. The testimony was probative of the victim's state of mind, and the court admitted the testimony only after conducting a voir dire hearing and concluding that the probative value outweighed any prejudicial effect.

2. Homicide— first-degree murder—evidence of premeditation and deliberation

A first-degree murder defendant's motion to dismiss for insufficient evidence of premeditation and deliberation was correctly

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denied where defendant brought a .357 revolver to a meeting with the victim, stated to an officer that he shot the victim because “she was going to take my kids,” and there was no evidence of provocation on the victim’s part.

Appeal by defendant from judgments entered 6 June 2001 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 13 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General K.D. Sturgis, for the State.

Gay, Stroud & Jackson, L.L.P., by Andy W. Gay and Darren G. Jackson, for defendant-appellant.

MARTIN, Judge.

Defendant was convicted of first degree murder of Peatrice Latrice Alston, and assault with a deadly weapon with the intent to kill, inflicting serious injury, upon police officer Matthew May, both offenses occurring on 6 August 2000. The trial court entered judgments upon the verdicts imposing concurrent sentences of life imprisonment without parole for first degree murder and a minimum of 73 months and a maximum of 97 months for assault with a deadly weapon with intent to kill inflicting serious injury. Defendant appeals.

The evidence at trial tended to show that defendant and Ms. Alston had lived together in Franklinton for a number of years, and were the biological parents of two children. Although defendant and Ms. Alston had planned to marry, their relationship ended and Ms. Alston moved out of their shared home three or four months prior to August 2000. She moved to Wake Forest and began living with her sister and Shamika Bledsoe.

On the evening of 6 August 2000, Ms. Alston entered a convenience store in Wake Forest and asked the clerk, Patrick Coogan, if he would call the police. She told Coogan that her boyfriend was acting “erratic.” Coogan stated that he called the police but that Ms. Alston would not take the phone and talk because she said her boyfriend, who was in a car outside the store, might see her. Coogan said Ms. Alston seemed “very, very nervous” and that she was “really upset.” Coogan told her to remain in the store but she paid for her items and returned to her car. Moments later Coogan heard a “loud noise like a backfire.”

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Wake Forest Police Officer May testified that he responded to a domestic disturbance call placed from an Express USA Mart gas station. He arrived, approached the vehicle and asked if everything was OK. May testified that Ms. Alston answered “yeah,” then “looked over and looked back at me,” which May interpreted as a sign that she wanted to communicate with him. May asked her to step out of the car; he reached to open the door, and at that moment “there was an explosion in the car.” May saw that Ms. Alston was slumped over and had a “tremendous amount of blood on her.” He also realized that he had been shot in the hand. He called for immediate back-up and moved to the back of the car, where he saw defendant sitting in the vehicle holding a chrome revolver. Defendant then threw the weapon out of the car. Officer May ordered defendant out of the vehicle and onto the ground. After reading defendant his *Miranda* rights, May asked defendant why he shot the victim; according to May, defendant said he shot her because “she was going to take my kids.”

Defendant subsequently gave a written statement to Detective J. M. Leonard in which he said that he became upset upon learning that Ms. Alston had moved their children to Wake Forest and planned to send them to school there. He asked Ms. Alston to meet him to discuss the matter. He told Detective Leonard that he carried a .357 revolver with him to the meeting. Defendant stated that he and Ms. Alston met at a Food Lion, and she then drove to a gas station. According to defendant, she entered the store and “stayed in the store for a long period of time.” When she returned to the car, the car would not start; at that point, Officer May arrived and approached the car. According to defendant, “[t]hat is when I lost my mind and shot her not realizing what I did until it was too late.”

Shamika Bledsoe, a friend of Ms. Alston, testified that Ms. Alston had moved in with her because she was “fed up” with defendant’s alleged infidelities; Ms. Bledsoe also testified that altercations had occurred between Ms. Alston and defendant. According to Ms. Bledsoe, defendant called Ms. Alston on the evening of 6 August 2000 and asked her to meet him so the two of them could talk. Ms. Bledsoe stated that after Ms. Alston finished the conversation with defendant, she prepared to leave and told Ms. Bledsoe that if she did not return in thirty minutes, “we needed to come and check on her and—and make sure she was okay.”

Defendant neither testified nor offered evidence.

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I.

[1] Defendant first argues the trial court erred by allowing Shamika Bledsoe to testify about statements made to her by Ms. Alston, contending the testimony was inadmissible hearsay and that any probative value was outweighed by the prejudicial effect of the testimony. North Carolina Rule of Evidence 803(3) provides that “[a] statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), . . .” is not excluded by the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(3).

The state of mind exception allows for the introduction of hearsay evidence which tends to “indicate the victim’s mental condition by showing the victim’s fears, feelings, impressions or experiences,” so long as the possible prejudicial effect of such evidence does not outweigh its probative value under Rule 403.

State v. Corpening, 129 N.C. App. 60, 66, 497 S.E.2d 303, 308, *disc. review denied*, 348 N.C. 503, 510 S.E.2d 659 (1998) (citations omitted). The availability of the declarant under this rule is immaterial. N.C. Gen. Stat. § 8C-1, Rule 803(3).

In the present case, Shamika Bledsoe was permitted to testify that Ms. Alston asked to move in with her because she was “fed up” with defendant’s alleged infidelities, and that altercations had occurred between her and defendant. After defendant called Ms. Alston on the evening of 6 August 2000, according to Ms. Bledsoe, Ms. Alston prepared to leave and told her that if she did not return in thirty minutes, “we needed to come and check on her and—and make sure she was okay.” The trial court instructed the jury

[t]hese statements may be considered by you not for the truth of what was asserted therein. But rather they may be considered by you as evidence of Ms. Alston’s state of mind and as evidence to explain actions that she may subsequently have taken. You may accept it for those purposes and those purposes only.

Ms. Bledsoe’s testimony was probative of Ms. Alston’s state of mind prior to her meeting defendant. Ms. Bledsoe’s testimony explained Ms. Alston’s feelings and conduct and revealed her fear of defendant, particularly her fear of the imminent encounter. The trial court did not err in admitting these statements into evidence pursuant to Rule of Evidence 803(3).

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As noted above, however, relevant evidence may be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice.” N.C. Gen. Stat. § 8C-1, Rule 403. “[T]he determination of whether relevant evidence should be excluded is a matter left to the sound discretion of the trial court, and the trial court can be reversed only upon a showing of abuse of discretion.” *State v. Wallace*, 351 N.C. 481, 523, 528 S.E.2d 326, 352-53, cert. denied, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000) (citation omitted). The trial court admitted the testimony only after a *voir dire* hearing and, after hearing the proffered questions and answers, found that the probative value of the testimony outweighed any prejudicial effect and overruled defendant’s objection. On this record, we discern no abuse of discretion in the trial court’s ruling. The assignment of error is overruled.

II.

[2] Defendant next argues the trial court erred by denying his motion to dismiss the charge of first degree murder because there was insufficient evidence of premeditation and deliberation. We disagree.

In reviewing the denial of a motion to dismiss, this Court

must examine the evidence adduced at trial in the light most favorable to the State to determine if there is substantial evidence of every essential element of the crime. Evidence is “substantial” if a reasonable person would consider it sufficient to support the conclusion that the essential element exists.

State v. McKinnon, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). The test is whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* (citations omitted). Murder in the first degree is defined by statute as the “willful, deliberate, and premeditated killing” of another person. N.C. Gen. Stat. § 14-17 (2001). To satisfy the element of premeditation, the State must present sufficient evidence indicating that the perpetrator “thought out the act beforehand for some period of time, however short, but no particular amount of time is necessary.” *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992) (citation omitted). The element of deliberation requires that “the perpetrator carried out an intent to kill in a cool state of blood and not under the influence of a violent passion or sufficient legal provocation.” *Id.* (citation omitted).

Premeditation and deliberation are mental processes which are ordinarily not susceptible to proof by direct evidence. In a

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majority of cases, they must be proved by circumstantial evidence. Some of the circumstances from which premeditation and deliberation may be implied are (1) absence of provocation on the part of the deceased, (2) the statements and conduct of the defendant before and after the killing, (3) threats and declarations of the defendant before and during the occurrence giving rise to the death of the deceased, (4) ill will or previous difficulties between the parties, (5) the dealing of lethal blows after the deceased has been felled and rendered helpless, (6) evidence that the killing was done in a brutal manner, and (7) the nature and number of the victim's wounds.

Id. at 565, 411 S.E.2d at 596 (citing *State v. Gladden*, 315 N.C. 398, 430-31, 340 S.E.2d 673, 693 (1986)).

In the present case, the evidence shows that defendant brought a .357 revolver to the meeting with Ms. Alston, indicative of some preparation and intent to do her harm. In his statement to Officer May, defendant said that he shot Ms. Alston because "she was going to take my kids," demonstrating the existence of ill will or previous difficulties between the parties. There was no evidence of provocation on Ms. Alston's part; Officer May testified that she and defendant were sitting in the car together when he arrived. Defendant shot Ms. Alston in the head at point blank range. Taking the evidence in a light most favorable to the State, as we are constrained to do, we hold there was substantial evidence that defendant acted with premeditation and deliberation in shooting Ms. Alston. Defendant's motion to dismiss was properly denied, and his assignment of error is overruled.

No error.

Judges TYSON and THOMAS concur.

OSMOND v. CAROLINA CONCRETE SPECIALTIES

[151 N.C. App. 541 (2002)]

AARON DWAYNE OSMOND, EMPLOYEE, PLAINTIFF v. CAROLINA CONCRETE SPECIALTIES, EMPLOYER AND KEY BENEFIT SERVICES, CARRIER, DEFENDANTS

No. COA01-1203

(Filed 16 July 2002)

1. Workers' Compensation— special errand rule—sufficiency of evidence

There was competent evidence to support the Industrial Commission's ruling in a workers' compensation case that plaintiff's injury was compensable under the special errand exception to the coming and going rule where plaintiff was injured while riding to work and, on this day, he had been told to be ready an hour and a half earlier than in the past so that a dump truck could be picked up and driven to the work site.

2. Workers' Compensation— disability—burden of proof

The Industrial Commission did not err in a workers' compensation action by determining that plaintiff suffered a compensable injury and awarding temporary total disability and temporary partial disability where plaintiff presented evidence that he had returned to work at diminished earnings since his injury, there were no findings that defendant presented any evidence that plaintiff was offered vocational rehabilitation or employment with defendant, and there was no finding that defendant presented any evidence that plaintiff was capable of earning higher wages. Plaintiff met his burden of proving employment at a diminished capacity, shifting the burden to defendant to prove that he was capable of earning high wages, and defendant failed to meet that burden.

Appeal by defendants from opinion and award filed 26 July 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 22 May 2002.

Mark T. Sumwalt, P.A., by Mark T. Sumwalt and Vernon Sumwalt, for plaintiff-appellee.

Orbock Bowden Ruark & Dillard, PC, by Barbara E. Ruark, for defendants-appellants.

WALKER, Judge.

On 23 August 1999, plaintiff was working for defendant-employer (defendant) as a laborer. Plaintiff's supervisor, Greg Braun, was the

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husband of the owner of defendant. Plaintiff, plaintiff's brother, and a co-employee, Joe Whitehead, lived together south of Charlotte in South Carolina. Mr. Whitehead typically drove plaintiff and his brother to work since they did not have transportation; however, on 23 August 1999, Mr. Whitehead's vehicle was inoperable. Mr. Braun agreed to pick up the three of them.

Mr. Braun instructed them to be ready at 5:30 a.m. This was an hour and a half earlier than he had required them to be ready when he picked them up in the past. Upon arriving at plaintiff's home, Mr. Braun instructed Mr. Whitehead to stay at home to fix the vehicle so that he would be able to drive in the future. Mr. Braun intended to drive plaintiff and his brother back to Mr. Braun's house north of Charlotte at Lake Norman to pick up a dump truck to be used at work. One person was to drive the dump truck to the work site located south of Charlotte while another was to drive Mr. Braun's pick-up truck so that he could leave the dump truck at the site and still have transportation home. Plaintiff's brother was not experienced in driving a dump truck and did not have a valid driver's license. Mr. Braun knew that plaintiff had experience driving dump trucks while in the military.

While traveling from plaintiff's house back to his house to get the dump truck, Mr. Braun lost control of his pick-up truck and wrecked. Plaintiff, who was riding in the back of the pick-up truck, was thrown out and sustained a severe head injury. He was initially treated at Carolinas Medical Center and he was finally discharged from inpatient care on 21 September 1999. He was released to return to work in December of 1999.

On 20 December 1999, plaintiff began working as a dishwasher at a restaurant in South Carolina; however, he only worked there for one week. He then worked for one week in New York in February of 2000. In March of 2000, plaintiff returned to North Carolina and began working for Black and Decker through a temporary service. As of the date of the hearing, he was still employed at Black and Decker at a pay rate less than what he was earning with defendant prior to his injury.

After a hearing, the Industrial Commission (Commission) found the following additional facts in part:

16. The evidence of record is unclear who would have driven the dump truck and the pickup truck after Mr. Braun, plaintiff and

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Donald Osmond arrived at Mr. Braun's house at Lake Norman. However, the evidence clearly shows that Donald Osmond had failed a road test given by Mr. Braun and was unable to drive the dump truck. Joe Whitehead, Donald Osmond and plaintiff believed plaintiff was to drive the dump truck upon arrival at Mr. Braun's house. Mr. Braun knew plaintiff had military experience driving a dump truck.

17. At the time of the accident, plaintiff had a valid driver's license, but Donald Osmond did not. Therefore, the greater weight of the evidence by inference demonstrates that Mr. Braun asked plaintiff to accompany him back to Mr. Braun's house on August 23, 1999 so plaintiff could drive the dump truck to the job site. Mr. Braun required the assistance of plaintiff in order to have two vehicles driven to the job site, which benefited [sic] defendant-employer.

18. Defendant-employer required plaintiff to travel on a special errand on August 23, 1999. The hazards of this route of travel became the hazards of plaintiff's employment with defendant-employer.

19. On August 23, 1999 plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant-employer.

20. As a result of the compensable injury by accident, plaintiff was disabled and unable to earn wages in any employment from August 23, 1999 until December 20, 1999. Thereafter, plaintiff's wage earning capacity was diminished in that he was unable to earn the same wages he was earning at the time of his injury.

The Commission concluded the following in part:

2. In this case plaintiff was on a special errand that directly benefitted his employer. Plaintiff's supervisor, Mr. Braun, required the assistance of plaintiff in order to transport the two vehicles to the job site. Mr. Braun instructed plaintiff to be ready at 5:30 a.m. so that Mr. Braun, plaintiff and Donald Osmond would avoid the rush-hour traffic and have time to drive to the Lake Norman location to pick up the dump truck and then continue back to the Charlotte job site. Therefore, plaintiff's injury is compensable under the special errand exception to the coming and going rule On August 23, 1999, plaintiff sustained an injury

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by accident arising out of and in the course of his employment with defendant-employer. N.C. Gen. Stat. § 97-2(6).

3. As a result of his compensable injury by accident on August 23, 1999, plaintiff was disabled and is entitled to temporary total disability compensation at the rate of \$216.88 per week from August 23, 1999 through December 19, 1999. N.C. Gen. Stat. § 97-29.

4. As a result of plaintiff's compensable injury by accident, plaintiff is entitled to compensation for partial disability at the rate of two-thirds of the difference between his former average weekly wage of \$325.31 and the weekly wages he was able to earn from December 20, 1999 and continuing for as long as he remains so disabled, subject to the 300-week statutory limitation. He shall receive his full compensation rate during any weeks he was not so employed. N.C. Gen. Stat. § 97-30.

[5]. Plaintiff is entitled to have defendants provide all medical treatment incurred or to be incurred as a result of his compensable injury by accident. N.C. Gen. Stat. § 97-25.

Defendant contends on appeal that the trial court erred in finding plaintiff suffered a compensable injury and in awarding disability benefits.

[1] Defendant first contends that the accident was not one "arising out of and in the course of the employment" and thus not compensable. To be a compensable injury under the Workers' Compensation Act, the injury must be "by accident arising out of and in the course of the employment." N.C. Gen. Stat. § 97-2(6) (2001). "Whether an injury arises out of and in the course of a claimant's employment is a mixed question of fact and law," and this Court is limited to determining whether there is competent evidence to support the Commission's findings and conclusions. *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 481 (1997).

"Ordinarily, an injury suffered by an employee while going to or coming from work is not an injury arising out of and in the course of employment." *Felton v. Hospital Guild*, 57 N.C. App. 33, 34, 291 S.E.2d 158, 159, *aff'd*, 307 N.C. 121, 296 S.E.2d 297 (1982). However, there is an exception to this rule where an employee "is injured while performing a special duty or errand" which directly benefits the employer. *McBride v. Peony Corp.*, 84 N.C. App. 221, 227, 352 S.E.2d 236, 240 (1987). Whether there was a special errand and when the errand began and ended is a question of fact and is to be

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determined on a case-by-case basis. *Felton*, 57 N.C. App. at 35, 291 S.E.2d at 159.

Here, plaintiff's supervisor required plaintiff to be ready at 5:30 a.m. which was an hour and a half earlier than he had ever required plaintiff to be ready in the past. Plaintiff had experience in driving dump trucks while his brother was not qualified to drive a dump truck nor did he have a valid driver's license. Plaintiff's driving the dump truck to the work site directly benefitted the employer. The Commission found "the greater weight of the evidence by inference demonstrates that Mr. Braun asked plaintiff to accompany him back to Mr. Braun's house on August 23, 1999 so plaintiff could drive the dump truck to the job site." Thus, the Commission concluded "plaintiff was on a special errand that directly benefitted his employer Therefore, plaintiff's injury is compensable under the special errand exception to the coming and going rule." We find there was competent evidence to support the Commission's findings which, in turn, support its conclusions.

[2] Defendant next contends the trial court erred in ordering compensation past 1 December 1999 when plaintiff was released to return to work. Disability under the Workers' Compensation Act is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9). Thus, disability means "a diminished capacity to earn money rather than physical infirmity." *Arrington v. Texfi Industries*, 123 N.C. App. 476, 478, 473 S.E.2d 403, 405 (1996).

The burden is on the employee to show that he is unable to earn the same wages as he had before the injury and thus he is still disabled under the statute. *Bond v. Foster Masonry, Inc.*, 139 N.C. App. 123, 131, 532 S.E.2d 583, 588 (2000). One method of meeting this burden is "by producing evidence that he has obtained other employment at a wage less than that earned prior to the injury." *Larramore v. Richardson Sports Ltd. Partners*, 141 N.C. App. 250, 259, 540 S.E.2d 768, 773 (2000), *aff'd*, 353 N.C. 520, 546 S.E.2d 87 (2001) (*citing Bond*, 139 N.C. App. at 131, 532 S.E.2d at 588). Our Supreme Court recently affirmed this Court's holding in *Larramore* that an employee's evidence of employment at a diminished capacity shifted the burden to the employer to establish that the employee could have obtained higher earnings. *Larramore*, 141 N.C. App. at 259-60, 540 S.E.2d at 773.

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Here, plaintiff presented evidence that, since the injury and his medical release, plaintiff had returned to work at diminished earnings. There are no findings by the Commission that defendant presented any evidence that plaintiff was offered vocational rehabilitation or employment back with defendant. Furthermore, there was no finding that defendant presented any evidence that plaintiff was capable of earning higher wages. We can only conclude that plaintiff met his burden of proving employment at a diminished capacity, thus shifting the burden to defendant to prove that plaintiff was capable of earning higher wages, which burden defendant failed to meet. *See Larramore, supra.* and *Bond, supra.* Thus, we find the Commission did not err in finding that plaintiff was temporarily partially disabled since 20 December 1999 under the Workers' Compensation Act.

In conclusion, we find the Commission did not err in determining that plaintiff suffered a compensable injury and awarding temporary total disability until 20 December 1999 and temporary partial disability since 20 December 1999. The order and award of the Commission is

Affirmed.

Judges McCULLOUGH and BRYANT concur.



ROBERT SCOTT BAKER, JR., PLAINTIFF, WAKE COUNTY HUMAN SERVICES,
CHILD SUPPORT ENFORCEMENT, INTERVENOR/PLAINTIFF v. SHERI USSERY
SHOWALTER, DEFENDANT

No. COA01-920

(Filed 16 July 2002)

1. Estoppel— equitable—child support modification—detrimental reliance not shown

The trial court did not err in a child support case in which the parties agreed between themselves to reduce the support by concluding that equitable estoppel did not apply. Although defendant may have relied on the oral agreement and letter to reduce her payment, she did not demonstrate that such reliance was to her detriment.

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[151 N.C. App. 546 (2002)]

2. Child Support, Custody, and Visitation— support—modification by parties—later action for arrears

The trial court correctly ordered payment of child support arrears where the parties had agreed between themselves to a reduction, but there was no judicial modification of the earlier order.

Appeal by defendant from order entered 21 February 2000 by Judge Kristin H. Ruth in Wake County District Court. Heard in the Court of Appeals 24 April 2002.

Constance M. Ludwig, for defendant-appellant.

Elisabeth P. Clary, for plaintiff-appellee.

BIGGS, Judge.

Defendant appeals from an order requiring her to pay child support arrears in the amount of \$11,350.00. For the reasons herein, we affirm the trial court.

Robert Scott Baker, Jr. (plaintiff) and Sheri Ussery Showalter (defendant) were married on 22 July 1978 and separated on 15 December 1990. On 5 April 1991, the parties executed a separation agreement which provided, in part, that plaintiff would have custody of their child, Robert Scott Baker, III, (the child), and that defendant would pay \$500.00 per month in child support until the child reached the age of 18. This separation agreement was incorporated into the Judgment of Divorce entered on 19 March 1992.

In April 1992, the parties verbally agreed to reduce the amount of child support the defendant would pay from \$500.00 to \$300.00 per month. On 10 September 1993, plaintiff signed a letter acknowledging this verbal agreement. The letter stated that plaintiff planned to “continue to accept” \$300 but that he did not “abdicate any rights as specified by the Separation Agreement.”

In 1995, defendant increased her child support payments from \$300 to \$350 per month, and in 1997 she again increased her payments to \$450 per month. In January, 1999, the child turned 18 and defendant’s child custody obligations ended.

In December 1998, plaintiff wrote a letter to defendant demanding all of the unpaid amounts based on the separation agreement. On 13 October 1999, plaintiff applied to Child Support Enforcement in

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Durham to establish child support arrears and a repayment schedule. The case was moved to Wake County on 21 January 2000. On 14 April 2000, Wake County filed a motion on plaintiff's behalf seeking to establish arrears and a repayment schedule.

On 30 June 2000, the trial court conducted a hearing on the motion. The defendant raised the defense of equitable estoppel arguing that she had detrimentally relied upon the verbal agreement and the letter memorializing that agreement to reduce her child support payments from \$500 to \$300. The trial court entered an order on 21 February 2001, concluding that equitable estoppel did not apply and ordering defendant to pay the \$11,350.00 in arrears. From that order, defendant appeals.

I.

[1] Defendant first contends that the trial court erred by concluding "that equitable estoppel did not apply because there was no detrimental reliance by defendant." We agree with the trial court.

"North Carolina courts have recognized the doctrine of equitable estoppel to preclude a party from denying the validity of a divorce decree or separation agreement." *Amick v. Amick*, 80 N.C. App. 291, 294, 341 S.E.2d 613, 614 (1986). "Equitable estoppel arises when an individual by his acts, representations, admissions, or by his silence when he has a duty to speak, intentionally or through culpable negligence induces another to believe that certain facts exist, and such other person rightfully relies and acts upon that belief to his detriment." *Thompson v. Soles*, 299 N.C. 484, 487, 263 S.E.2d 599, 602 (1980). "A party seeking to rely on equitable estoppel must show that, in good faith reliance on the conduct of another, he has changed his position for the worse." *Griffin v. Griffin*, 96 N.C. App. 324, 328, 385 S.E.2d 526, 529 (1989). "Application of equitable estoppel in general is dependent upon the parties' actions along with the facts and circumstances of each individual case." *Chance v. Henderson*, 134 N.C. App. 657, 665, 518 S.E.2d 780, 785 (1999).

In the case, *sub judice*, the trial court made the following pertinent findings:

1. That a Separation Agreement requiring the payment of \$500.00 per month by the Defendant to Robert Scott Baker, Jr. for the support of the parties' child, was incorporated into a March 19, 1992, judgment of divorce between the parties

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which judgment is recorded in Durham County Clerk of Superior Court File Number 92CVD574.

....

6. That at the request of the Defendant, the Plaintiff signed a document dated September 10, 1993, which stated the parties had agreed since April 1993, to the Defendant's paying child support in the amount of \$300.00 per month. The Plaintiff specifically stated in the document that he was not abdicating any of his rights under the parties' separation agreement.

7. That the September 10, 1993, document was provided to Defendant's mortgage lender because she was in the process of buying a townhome.

8. That in reliance upon the September 10, 1993 document, the Defendant decreased her monthly payments to \$300.00; however, her reliance was not detrimental because she had use of funds that she would not have otherwise had.

The trial court's findings of facts are conclusive on appeal when drawn on facts supported by competent evidence. *Henderson*, 134 N.C. App. at 661, 518 S.E.2d at 783. The trial court's conclusions, however, are completely reviewable. *Id.* We conclude that the findings of the trial court are supported by competent evidence in the record. Moreover, we conclude that these findings support the trial court's conclusion that equitable estoppel does not apply because there was no detrimental reliance by the defendant. Further, we hold that this conclusion is legally correct.

This Court in *Griffin*, 96 N.C. App. at 328, 385 S.E.2d at 529, considered a situation similar to the one before us. In *Griffin*, a divorce judgment required the plaintiff-father to pay \$200.00 in child support per month. Subsequently, the plaintiff sent a letter to the defendant stating that he could not send \$200.00 per month, and began sending reduced sums. The defendant never complained about this reduction. Eight months after the support payments ended, the defendant brought an action for approximately \$18,000 in arrears. This Court held that the defendant was not equitably estopped from bringing the action because there was no detrimental reliance; the "only change made in [plaintiff's] position was the retention to his benefit of money owed for the support of his children." *Id.* at 328.

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Likewise, in the instant case, though defendant may have relied upon the oral agreement and letter to reduce her payment to \$300, she is unable to demonstrate that such reliance was to her detriment. The only change made in her position inured to her benefit. She testified that the money she retained allowed her to “buy a town-home and to have some money to spend with [her] son.”

Further, defendant's reliance upon several cases to support her claim of detrimental reliance is misplaced. First, *Tepper v. Hoch*, 140 N.C. App. 354, 536 S.E.2d 654 (2000), involved the equitable doctrine of laches, as recognized under a specific Illinois statute. The Court in that case analyzed the statute using Illinois case law and was careful to limit its holding accordingly. We conclude that *Tepper* has no application here. Second, defendant cites *Godley v. County of Pitt*, 306 N.C. 357, 293 S.E.2d 167 (1982), and other workers' compensation cases for the proposition that an insurance company that accepts the benefit of premium payments is estopped from declining to honor the policy and pay the claim. Yet in the present case, the only party receiving a benefit is the defendant. Not only are these cases not supportive of defendant's position, they appear contrary to it. In addition, defendant relies on a number of cases from other jurisdictions which we determine have no application here.

Though it appears that defendant attempts to assert the defense of laches in her brief, this defense was not raised during trial or in the Assignments of Error and, therefore, is not properly before this Court. North Carolina Rule of Appellate Procedure 10(b).

We conclude that defendant has failed to establish that she relied to her detriment on the written and oral agreement of the parties for reduced child support; therefore, the trial court did not err by declining to apply the doctrine of equitable estoppel. This assignment of error is overruled.

II.

[2] Defendant argues next that the trial court erred in determining that defendant is now in arrears in the amount of \$11,350.00. Defendant argues that both parties intended the oral and written agreement to permanently modify the court ordered judgment of divorce and, therefore, she should not be required to pay the arrearages. We disagree.

“An order setting child support only may be modified ‘upon motion in the cause and a showing of changed circumstances by

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either party.’ ” N.C.G.S. § 50-13.7(a) (2001); *Bogan v. Bogan*, 134 N.C. App. 176, 179, 516 S.E.2d 641, 643 (1999). Individuals may not modify a court order for child support through extrajudicial written or oral agreements. *Griffin*, 96 N.C. App. at 328, 385 S.E.2d at 529, *quoting Fuchs v. Fuchs*, 260 N.C. 635, 639, 133 S.E.2d 487, 491 (1963), (“no agreement or contract between husband and wife will serve to deprive the courts of their inherent as well as their statutory authority to protect the interests and provide for the welfare of infants.”) Further, N.C.G.S. § 50-13.10(a) (2001) provides in part:

Each past due child support payment is vested when it accrues and may not thereafter be vacated, reduced, or otherwise modified in any way for any reason, in this State or any other state, except that a child support obligation may be modified as otherwise provided by law, and a vested past due payment is to that extent subject to divestment, if, but only if, a written motion is filed, and due notice is given to all parties. . . .

“When the obligor under a child support judgment or order is in arrears, the trial court may, ‘upon motion in the cause, judicially determine the amount then properly due and enter its final judgment for the total then properly due[.]’ ” *Fitch v. Fitch*, 115 N.C. App. 722, 724, 446 S.E.2d 138, 140 (1994) (citation omitted).

In the case *sub judice*, the trial court specifically found “[t]hat at no time did the parties execute a formal modification of the separation agreement nor was the order modified by any Court.” Further, the court found defendant was in arrears under the separation agreement that was incorporated into the divorce judgment in the amount of \$11,350.00 as of 30 June 2000. We conclude that these findings are supported by competent evidence in the record and are therefore binding on appeal. There being no judicial modification of the court order, the separation agreement remained in full force and effect. Thus, the trial court properly ordered payment of the arrears in the amount of \$11,350.00 based upon the separation agreement sum of \$500.00 per month. This assignment of error is overruled.

For the reasons discussed above, the trial court’s order is

Affirmed.

Judges WYNN and McCULLOUGH concur.

IN RE APPEAL OF FRIZZELLE

[151 N.C. App. 552 (2002)]

IN THE MATTER OF: APPEAL OF ROSCOE FRIZZELLE FROM THE DECISION OF THE
ONSLow COUNTY BOARD OF EQUALIZATION AND REVIEW DENYING PRESENT-USE VALUE
CLASSIFICATION FOR YEAR 2000 AND THE CORRESPONDING ROLLBACK

No. COA01-1167

(Filed 16 July 2002)

**Taxation— property—present-use value classification—
agricultural**

The Property Tax Commission did not err by denying a taxpayer present-use value classification of his property in Onslow County as agricultural even though the taxpayer contends the land is part of his larger Harnett County farm unit, because: (1) the legislature did not intend to allow agricultural tax breaks for landowners who lump significantly smaller tracts of land across North Carolina with just one being ten acres, even if there is little or no actual farming on the smaller tracts; (2) there is competent evidence to establish that the taxpayer's Onslow County land, which falls below the ten-acre requirement, is more than 100 miles from the taxpayer's land in Harnett County and that only a fraction of the Onslow County land is utilized for the growing of crops; (3) where it is not clear, tax exemptions are strictly construed against the taxpayer in favor of the State; and (4) the taxpayer has not shown an arbitrary method of valuation was used, and the Commission's decision has a rational basis.

Appeal by taxpayer from judgment entered 3 May 2001 by Commissioner Terry L. Wheeler of the Property Tax Commission. Heard in the Court of Appeals 23 May 2002.

Roger A. Moore for appellee Onslow County.

Bain & McRae, by Edgar R. Bain and Alton D. Bain, for appellant taxpayer.

THOMAS, Judge.

Taxpayer, Roscoe Frizzelle, appeals the decision of the Property Tax Commission that his land in Onslow County, North Carolina, does not meet the requirements for agricultural classification. For the reasons discussed herein, we affirm.

The pertinent facts are as follows: The tract at issue is 7.99 acres. Prior to 1 January 2000, the land was assessed under present-use

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value status, agricultural classification. After that date, the Onslow County Tax Administrator determined that the property did not meet minimum standards for present-use value classification and would be taxed at a higher market value rate.

On 12 April 2000, Frizzelle appeared before the Onslow County Board of Equalization and Review challenging the removal of the property from the present-use value classification. He contended it qualified for agricultural classification under the North Carolina Machinery Act (N.C. Gen. Stat. §§ 105-277.2 et. seq.). The Board rejected Frizzelle's arguments and found that the best use of the property was for residential development. He appealed to the North Carolina Property Tax Commission.

The Commission found that the property does not qualify for present-use value status, agricultural classification, because it is not part of a farm unit that is actively engaged in the commercial production of growing crops. Further, a farm must be at least ten acres. *See* N.C. Gen. Stat. § 105-277.3(a)(1) (2001). Frizzelle testified he owns only 7.99 acres in Onslow County, with the Commission finding that the recorded deed supports Frizzelle's contention. Frizzelle, however, argued that despite the tract being less than ten acres, it is part of a farm unit involving his other land in Harnett, Beaufort, and Hyde Counties. The Commission concluded that Frizzelle failed to produce competent, material, and substantial evidence to show that his property is agricultural land that is part of a farm unit actively engaged in the commercial growing of crops. The Commission upheld the Board's denial of present-use value classification for the tax year 2000. Frizzelle appeals.

By his sole assignment of error, Frizzelle contends the Commission erred in denying present-use value classification of his property. We disagree.

The standard of appellate review for property valuations is set forth in N.C. Gen. Stat. § 105-345.2(b), which provides that this Court "shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action." N.C. Gen. Stat. § 105-345.2(b) (1999). This Court has the authority to reverse, remand, modify, or declare void any Commission decision which is:

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- (1) In violation of constitutional provisions;
- (2) In excess of statutory authority or jurisdiction of the Commission;
- (3) Made upon unlawful proceedings;
- (4) Affected by other errors of law;
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
- (6) Arbitrary or capricious.

Id. We must “review the decision of the Commission analyzing the ‘whole record’ to determine whether the decision has a rational basis in evidence.” *In re Appeal of Owens*, 144 N.C. App. 349, 351, 547 S.E.2d 827, 828, *appeal dismissed, rev. denied*, 354 N.C. 361, 556 S.E.2d 575 (2001).

There is a presumption that tax assessments are correct and that the assessors acted in good faith in reaching a valid decision. *Id.* However, the presumption is rebutted where a taxpayer can “show that an illegal or arbitrary method of valuation was used, and that the assessed value substantially exceeds the properties [sic] fair market value.” *Id.* (citing *In re Appeal of AMP, Inc.*, 287 N.C. 547, 563, 215 S.E.2d 752, 762 (1975)) (emphasis omitted).

The owner of agricultural, forest or horticultural lands may apply to have the lands appraised at their present-use value, a value lower than the market value of the property. Agricultural land, for classification, is defined as:

Individually owned agricultural land consisting of one or more tracts, one of which consists of *at least 10 acres* that are in actual production and that, for the three years preceding January 1 of the year for which the benefit of this section is claimed, have produced an average gross income of at least one thousand dollars (\$1,000). Gross income includes income from the sale of the agricultural products produced from the land and any payments received under a governmental soil conservation or land retirement program. Land in actual production includes land under improvements used in the commercial production or growing of crops, plants, or animals.

N.C. Gen. Stat. § 105-277.3(a)(1) (1999) (emphasis added). Thus, the minimum standards for agricultural classification are: (1) individually

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owned land; (2) one or more tracts; (3) one of which is at least ten acres; (4) one that is in actual production; and (5) one that has produced at least \$1,000 in average gross income during the preceding three years. Additionally, section 105-277.2 requires that each tract must be under a sound management program:

The following definitions apply in G.S. 105-277.3 through G.S. 105-277.7:

(1) Agricultural land.—Land that is a part of a farm unit that is actively engaged in the commercial production or growing of crops, plants, or animals under a sound management program. Agricultural land includes woodland and wasteland that is a part of the farm unit, but the woodland and wasteland included in the unit shall be appraised under the use-value schedules as woodland or wasteland. A farm unit may consist of more than one tract of agricultural land, but at least one of the tracts must meet the requirements in G.S. 105-277.3(a)(1), and each tract must be under a sound management program.

N.C. Gen. Stat. § 105-277.2 (2001).

Frizzelle argues that because he owns over 100 acres in Harnett County, with the Onslow County land merely a part of the Harnett County tract, he has complied with section 105-277.3(a)(1).

However, Kenneth L. Joyner, Jr., the tax administrator for Onslow County, testified that the allowance of multiple tracts as a unit was not meant to link farms a hundred or more miles apart. A farm unit, he contends, is one in which a farmer could feasibly drive his tractor from one tract to another and use the same farming equipment on all of the land. He further testified that only 0.23 of an acre in Onslow County was devoted to growing tobacco. Even under Frizzelle's testimony, the amount is no higher than 0.8 of an acre.

Frizzelle's position would allow agricultural tax breaks for landowners, both large and small, who lump significantly smaller tracts of land across North Carolina with just one being ten acres, even if there is little or no actual farming on the smaller tracts. We do not believe this was the legislative intent behind the Machinery Act. In complying with the previously stated statutory requirements, the tracts should at least have a rational relationship with each other in order to comprise a tract within a farm unit. By their definitions, there must be a reasonable amount of commonality so as to qualify it as being a part of the whole. *See generally, The American Heritage*

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Dictionary 476, 1283, 1322 (2d ed. 1985). There is competent evidence here to establish that the Onslow County land is more than 100 miles from that in Harnett County and only a fraction of the Onslow County land is utilized for the growing of crops. This is not a case where land is contiguous or closely situated, but where it is in different counties.

Other jurisdictions have similarly addressed the issue. *See generally, First Nat'l Bank of West Chicago v. State Property Tax Appeal Board*, 377 N.E.2d 339 (Ill. App. 1978). Further, where it is not clear, tax exemptions are strictly construed against the taxpayer in favor of the State. *Institutional Food House, Inc. v. Coble, Sec. of Revenue*, 289 N.C. 123, 221 S.E.2d 297 (1976); *In re Clayton-Marcus Co.*, 286 N.C. 215, 210 S.E.2d 199 (1974).

Accordingly, because Frizzelle, the taxpayer, has not shown that an arbitrary method of valuation was used, and because the Commission's decision has a rational basis in the evidence, we reject his argument and affirm the Commission.

AFFIRMED.

Judges MARTIN and TIMMONS-GOODSON concur.

BARRY WEAVER, ADMINISTRATOR OF, THE ESTATE OF BEVERLY DAVIS WEAVER, DECEASED,
PLAINTIFF V. GENERAL DOUGLAS MCARTHUR O'NEAL, MATTHEW BRIAN DALE,
AND MARY K. UMBERGER, DEFENDANTS

No. COA01-1098

(Filed 16 July 2002)

Insurance—uninsured motorist—addition of person to policy with rejected coverage

Summary judgment was correctly granted for Farm Bureau Mutual Insurance Company in an action which sought uninsured motorist coverage for the death of Mrs. Weaver where Mrs. Weaver was added to a policy originally issued to Mr. Weaver as sole named insured with uninsured motorist coverage expressly rejected. Although plaintiff contended that the rejection of uninsured motorist coverage was not valid for Mrs. Weaver because

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she did not sign the rejection form, the addition of Mrs. Weaver as a named insured constituted an amendment to an existing policy rather than the issuance of a new policy and a new rejection form was not required. Moreover, the addition of an "M" in the policy number to distinguish these policies from those of a separate stock company did not constitute issuance of a new policy.

Appeal by plaintiff from judgment entered by Judge Jack W. Jenkins Superior Court, Johnston County. Heard in the Court of Appeals on 22 May 2002.

Mast, Schulz, Mast, Mills & Stem, P.A., by Bradley N. Schulz, for plaintiff-appellant.

George L. Simpson, III, for defendant-appellee.

WYNN, Judge.

This appeal arises from an action to obtain uninsured motorist coverage for the vehicular death of Beverly Weaver notwithstanding the fact that her named insured husband, Barry Weaver, had expressly rejected the coverage before she was added as an insured. We uphold the trial court's grant of summary judgment favoring defendant North Carolina Farm Bureau Mutual Insurance Company.

The underlying incident occurred on 9 July 1999 when an automobile driven by General Douglas McArthur O'Neal and owned by Matthew Brian Dale collided head-on with another vehicle killing its driver, Beverly Weaver. Mary K. Umberger had borrowed the vehicle from Dale and permitted O'Neal to drive it.

After obtaining default judgments against O'Neal and Umberger, and dismissing without prejudice the action against Dale, the Estate of Beverly Davis Weaver brought this action under N.C. Gen. Stat. § 20-279.21(b)(3) directly against Mr. Weaver's insurer, Farm Bureau Mutual Insurance Company, seeking uninsured motorist coverage. Neither party disputes that O'Neal and Umberger were uninsured at the time of the accident.

Farm Bureau Mutual Insurance Company initially issued the subject policy to Mr. Weaver in 1981 as the sole named insured. He married Mrs. Weaver six years later. On renewing the policy in February 1992, Mr. Weaver expressly rejected both the Uninsured motorist and Underinsured motorist coverage on a

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selection/rejection form promulgated by the North Carolina Insurance Rate Bureau and approved by the North Carolina Commissioner of Insurance. In October 1992, Mr. Weaver added Mrs. Weaver to the policy as a named insured; thereafter, the policy was renewed for consecutive six-month policy periods through the 3 February to 3 August 1999 policy period in which the accident occurred.

Following the grant of summary judgment favoring Farm Bureau Mutual Insurance Company, the estate of Mrs. Weaver appealed contending that the trial court erred in concluding that there are no genuine issues of material fact; and in making findings of fact not supported by the evidence. We disagree.

Initially, we point out that “[a] trial judge is not required to make finding[s] of fact and conclusions of law in determining a motion for summary judgment, and if he does make some, they are disregarded on appeal.” *White v. Town of Emerald Isle*, 82 N.C. App. 392, 398, 346 S.E.2d 176, 179, *review denied*, 318 N.C. 511, 349 S.E.2d 874 (1986) (citation omitted). However, such findings and conclusions do not render a summary judgment void or voidable. *Id.* Accordingly, we disregard the findings of fact made by the trial judge and therefore do not reach the Estate of Mrs. Weaver’s argument that such findings were not supported by the evidence.

Summary judgment is properly granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. N.C.R. Civ. P. 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. *See Koontz v. Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

Uninsured motorist coverage is governed by the Financial Responsibility Act, N.C. Gen. Stat. § 20-279.1, *et seq.* (2001). The purpose of the Act is to protect innocent victims of financially irresponsible motorists. *See Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763, *reh’g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). The Act is to be liberally construed, and if a motorist’s policy conflicts with the Act, the Act prevails. *See id.*; *Wilmoth v. State Farm Mut. Auto Ins. Co.*, 127 N.C. App. 260, 262, 488 S.E.2d 628, 630, *review denied*, 347 N.C. 410, 494 S.E.2d 601 (1997).

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N.C. Gen. Stat. § 20-279.21(b)(3) (2001) provides in pertinent part that: 1) “the selection or rejection of the uninsured motorist coverage by a name insured is valid and binding on all insureds and vehicles under the policy”; 2) “the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended, altered, modified, transfer, or replacement policy unless the named insured makes a written request to exercise a different option”; 3) “the selection or rejection of uninsured motorist coverage or the failure to select or reject by the named insured is valid and binding on all insureds and vehicles under the policy”; and 4) a rejection of the uninsured motorist coverage must be on form promulgated by the North Carolina Insurance Rate Bureau and approved by the Commissioner of Insurance. If the named insured does not effectively reject Uninsured motorist coverage, the coverage will be written into the policy by operation of law with limits equal to the policy’s bodily injury liability limits. *See id.*

The Estate of Mrs. Weaver argues that the selection or rejection of the Uninsured motorist coverage by named insured was not valid or binding on Mrs. Weaver because she did not sign a selection/rejection form relating to the coverage. However, the plain language of N.C. Gen. Stat. § 20-279.21(b)(3) does not support that interpretation.

N.C. Gen. Stat. § 20-279.21(b)(1) states that “the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended . . . policy unless the named insured makes a written request to exercise a different option.” In the subject case, the record shows that the addition of Mrs. Weaver as a named insured was an amendment to policy.

As provided by the plain language of N.C. Gen. Stat. § 20-279.21, an amendment to a policy does not require the execution of a new selection/rejection form because it does not result in the issuance of a new policy. When interpreting the language of a statute, the primary rule of construction is that the intent of the legislature controls. *See Colonial Pipeline Co. v. Clayton*, 275 N.C. 215, 226, 166 S.E.2d 671, 679 (1969).

It is well settled that “[w]here the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give [the statute] its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.” *State v. Camp*, 286 N.C.

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148, 152, 209 S.E.2d 754, 756 (1974) (quoting 7 John M. Strong, North Carolina Index 2d Statutes § 5 (1968)).

Union Carbide Corp. v. Offerman, 351 N.C. 310, 314, 526 S.E.2d 167, 170 (2000).

In the present case, it is undisputed that Mr. Weaver, a named insured in the policy, rejected the Uninsured motorist coverage in February 1992 on a selection form promulgated by the Rate Bureau and approved by the Commissioner of Insurance. The form gave the insured the options of (1) rejecting combined uninsured/underinsured motorists coverage and selecting uninsured motorists coverage or (2) choosing combined uninsured/underinsured motorists coverage or; (3) rejecting both uninsured and uninsured/underinsured motorists coverages. Additionally, Mr. Weaver signed separate statement, prepared by his insurance agent, in which he acknowledged:

I have been explained uninsured motorist and underinsured motorist coverage and the recommendation and importance of carrying this coverage by my agent, but I wish not to carry the underinsured motorist coverage and uninsured motorist coverage.

On 10 February 1992, Farm Bureau Mutual Insurance Company mailed Mr. Weaver an amended declarations page for the 2/3/92-8/3/92 policy period showing that the policy continued to provide liability, med pay, other than collision, and collision coverage, with the same limits as before, but that it no longer provided uninsured and underinsured motorists coverage at all. On 26 October 1992, Mrs. Weaver was added to the policy as a named insured and her 1983 Ford LTD was added to the policy as a covered auto. We hold that the addition of Mrs. Weaver as a named insured constituted an amendment to the existing policy, not the issuance of a new policy.

Moreover, we reject the Estate of Mrs. Weaver's argument that the insertion by Farm Bureau Mutual Insurance Company of an "M" in the policy number constituted the issuance of a new policy rather than an amended policy. The insertion of an "M" in the policy number began in 1994 when Farm Bureau Mutual Insurance Company sought to distinguish its policies from its separate stock insurance company. Thus, the subject policy with the number of AP3453749 became AMP3453749. The policy remained the same in all other aspects and it had not been cancelled nor lapsed since its inception. Indeed, Mr. Weaver recognized in his sworn statement that the policy in force at his wife's death was the same policy issued to him in 1981.

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In sum, N.C. Gen. Stat. § 20-279.21 states that “the insurer is not required to offer the option in any renewal, reinstatement, substitute, amended . . . policy unless the named insured makes a written request to exercise a different option.” Since the policy in this case was amended to add Mrs. Weaver, the statute does not require her separate rejection of the uninsured motorist coverage. Accordingly, we uphold the grant of summary judgment in favor of Farm Bureau Mutual Insurance Company.

Affirmed.

Judges HUNTER and THOMAS concur.

STATE OF NORTH CAROLINA v. PARIS LAMONT STEVENS

No. COA01-1202

(Filed 16 July 2002)

1. Appeal and Error— preservation of issues—motion to suppress—waiver after guilty plea

Although defendant contends the trial court erred by finding probable cause to support the search of his person on 28 October 2000 and by denying defendant’s motion to suppress, defendant failed to preserve this issue for appellate review, because N.C.G.S. § 15A-979(b) provides that a defendant bears the burden of notifying the State and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty.

2. Drugs— felonious possession of drug paraphernalia—motion to dismiss—State’s concession of error

Although defendant contends the trial court erred by denying defendant’s motion to dismiss the charge of felonious possession of drug paraphernalia under N.C.G.S. § 90-95(e)(3) since this offense is not a substantive charge but merely a status for sentence enhancement, this argument does not need to be addressed because defendant’s conviction is vacated based on the State’s concession that defendant was improperly indicted for this charge.

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3. Sentencing— habitual felon—dismissal of underlying felony

Defendant's habitual felon conviction is vacated because there is no felony conviction to which the habitual felon indictment attaches after the felonious possession of drug paraphernalia conviction was vacated.

Appeal by defendant from judgments entered 23 May 2001 by Judge Howard R. Greeson, Jr. in Forsyth County Superior Court. Heard in the Court of Appeals 13 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General Marvin R. Waters, for the State.

Grace, Holton, Tisdale & Clifton, P.A., by Michael A. Grace, Christopher R. Clifton, and Stacey D. Rubain, for defendant-appellant.

TYSON, Judge.

I. Facts

Defendant was indicted on 22 January 2001 for felonious possession with intent to manufacture, sell and deliver marijuana (00CRS057820). Defendant was also indicted for habitual felon status on 22 January 2001 (01CRS000062). On 14 May 2001, a superseding indictment was issued charging defendant with felonious possession with intent to manufacture, sell and deliver marijuana and felonious possession of drug paraphernalia based upon defendant's previous conviction of possession with intent to manufacture, sell and deliver marijuana on 25 May 2000.

Defendant filed a Motion to Suppress evidence seized from him which was denied after a hearing on the evidence. Defendant filed a Motion to Dismiss arguing that the felonious possession of drug paraphernalia is not a substantive charge but a status, which was denied.

Defendant pled guilty to felonious possession of drug paraphernalia and being an habitual felon, pursuant to a plea agreement. The jury convicted defendant of misdemeanor possession of marijuana. Defendant was sentenced within the aggravated range to a minimum of seventy months and a maximum of ninety-three months for felonious possession of drug paraphernalia and twenty days for misdemeanor possession of marijuana. Defendant appeals.

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II. Issues

The issues presented on appeal are whether: (1) the trial court erred in denying defendant's motion to suppress, (2) the trial court erred in denying defendant's motion to dismiss, and (3) defendant's due process rights and freedom from double jeopardy were violated. We affirm the denial of defendant's motion to suppress and vacate defendant's conviction for felonious possession of drug paraphernalia.

III. Motion to Suppress

[1] Defendant contends that the trial court erred in finding probable cause to support the search of his person on 28 October 2000 and denial of his motion to suppress. Defendant failed to preserve this assignment of error for our review, thus we do not reach the merits of defendant's arguments.

N.C. Gen. Stat. § 15A-979(b) (2001) states that “[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.” However, “[t]his statutory right to appeal is conditional, not absolute.” *State v. McBride*, 120 N.C. App. 623, 625, 463 S.E.2d 403, 404 (1995), *disc. review allowed in part*, 343 N.C. 126, 468 S.E.2d 790, *aff'd*, 344 N.C. 623, 476 S.E.2d 106 (1996). Pursuant to N.C.G.S. § 15A-979(b), “a defendant bears the burden of notifying the state and the trial court during plea negotiations of the intention to appeal the denial of a motion to suppress, or the right to do so is waived after a plea of guilty.” *Id.*

In the present case, defendant entered in the record after the denial of his motion to dismiss, that he wanted to preserve an appeal on the denial of his motion to suppress. After the jury was empaneled, defendant pled guilty, pursuant to a plea agreement, to felonious possession of drug paraphernalia and to being an habitual felon, specifically preserving a right to appeal his pretrial motion to dismiss only. Defendant also admitted to misdemeanor possession of marijuana, denying intent to sell. Defendant was tried on possession with intent to sell and deliver marijuana and was convicted of misdemeanor possession of marijuana. Accordingly, we conclude that defendant has waived the right to appeal the denial of his motion to suppress.

IV. Motion to Dismiss

[2] Defendant contends that the felonious possession of drug paraphernalia charged pursuant to N.C.G.S. § 90-95(e)(3) should have

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been dismissed, and argues that this offense is not a substantive charge but merely a status for sentence enhancement. In light of the State's concession at oral argument, we do not address defendant's argument.

Possession of drug paraphernalia is a Class I misdemeanor punishable under N.C. Gen. Stat. § 90-113.22 (2001). The indictment against defendant charged an enhanced felony version of this offense by application of the enhancement provision contained in N.C. Gen. Stat. § 90-95(e)(3) (2001), which provides that:

[i]f any person commits a Class I misdemeanor under *this Article* and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of *this Article*, he shall be punished as a Class I felon.

(Emphasis supplied). N.C.G.S. § 90-95(e)(3) is codified within Article 5, the North Carolina Controlled Substances Act. N.C.G.S. § 90-113.22 is codified within Article 5B, the North Carolina Drug Paraphernalia Act, and does not fall within N.C.G.S. § 90-95(e)(3). Accordingly, it was error to indict defendant for felonious possession of drug paraphernalia.

[3] The State conceded, during oral argument, that defendant was improperly indicted for felonious possession of drug paraphernalia and that his conviction should be vacated. We therefore vacate defendant's conviction for felonious possession of drug paraphernalia in 00CRS057820. There being no felony conviction to which the habitual felon indictment attaches, defendant's habitual felon conviction in 01CRS000062 is vacated. In light of our disposition, review of defendant's remaining arguments is unnecessary.

We render no opinion as to any other charge which properly could have been brought against defendant under the facts of this case.

No error on possession of marijuana conviction (00CRS057820), vacate felonious possession of drug paraphernalia conviction (00CRS057820), vacate habitual felon conviction (01CRS000062).

Judgments vacated.

Judges MARTIN and THOMAS concur.

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MARK GROUP INTERNATIONAL, INC., PLAINTIFF V. JAMES STILL AND NORTHSTAR
COMMODITIES, CORP., DEFENDANTS

No. COA01-1262

(Filed 16 July 2002)

Venue— motion to dismiss—contract provision—exclusive language required for mandatory selection clause

The trial court did not abuse its discretion in a breach of contract, breach of fiduciary duty, and constructive fraud case by denying defendants' motion to dismiss based on improper venue even though the contract of the parties stated that disputes "shall finally be settled, and the undersigned hereby submits itself to the jurisdiction of the 13th Judicial District Court of Hillsborough County Florida U.S.A. in order to resolve any such dispute," because: (1) the general rule is that when a jurisdiction is specified in a provision of a contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intention to make jurisdiction exclusive; and (2) the contract provision in this case simply allows or permits the parties to air their particular disputes in a particular jurisdiction or court without requiring them to do so.

Appeal by defendants from order entered 23 July 2001 by Judge Lindsay R. Davis, Jr., Superior Court, Forsyth County. Heard in the Court of Appeals on 12 June 2002.

McCall Doughton Blancato & Hart PLLC by Thomas J. Doughton and William A. Blancato, for plaintiff-appellant.

Burton & Sue, L.L.P., by Gary K. Sue and Stephanie W. Anderson for defendants-appellants.

WYNN, Judge.

The parties to this appeal are Defendants Northstar Commodities Corporation (a North Carolina Corporation with its principal office in Forsyth County) and James Still (the sole shareholder of Northstar Commodities) and Plaintiff Mark Group International (a Kentucky corporation with its principal place of business in Fort Mitchell, Kentucky).

The issue on appeal is whether a clause in their contract prohibits the parties from filing a contract dispute action in North Carolina. We

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answer no, and therefore uphold the trial court's denial of defendants' motion to dismiss based on improper venue.

In their 1997 Purchase and Sales Contract for the purchase and delivery of cigarettes, the parties included a clause stating:

21—Disagreement or Dispute:

The parties shall attempt to amicably settle any disagreement or dispute which may arise between them. *In the case said dispute cannot be settled amicably then it shall finally be settled, and the undersigned hereby submits itself to the jurisdiction of the 13th Judicial District Court of Hillsborough County Florida U.S.A.* in order to resolve any such dispute.

In November 2000, plaintiff brought a contract action in Forysth County, North Carolina against defendants seeking damages for breach of contract, breach of fiduciary duty/constructive fraud, and conversion. Defendants answered and moved to dismiss the action based on improper venue. Following the trial court's denial of that motion, defendants appealed to this Court.¹

We employ the abuse-of-discretion standard to review a trial court's decision concerning clauses on venue selection. *See Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 776, 501 S.E.2d 353, 355 (1998) (holding that "because the disposition of such cases is highly fact-specific, the abuse-of-discretion standard is the appropriate standard of review."). Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision. *Id.*

In general, there are three kinds of provisions used by contracting parties to avoid litigation concerning jurisdiction and governing laws: 1) a choice of law provision, which names a particular state and provides that the substantive laws of that jurisdiction will be used to determine the validity and construction of the contract, regardless of

1. This appeal from the denial of that motion is clearly interlocutory; nonetheless, it is properly before us because our case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right that would be lost. *See L. C. Williams Oil Co. v. NAFCO Capital Corp.*, 130 N.C. App. 286, 288, 502 S.E.2d 415, 416 (1998); *accord Perkins v. CCH Computax, Inc.*, 106 N.C. App. 210, 212, 415 S.E.2d 755, 757, *reviewed on other grounds*, 332 N.C. 149, 419 S.E.2d 574, *decision reversed on other grounds*, 333 N.C. 140, 423 S.E.2d 780 (1992); *Appliance Sales & Service v. Command Elec. Corp.*, 115 N.C. App. 14, 443 S.E.2d 784 (1994).

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any conflicts between the laws of the named state and the state in which the case is litigated; 2) a consent to jurisdiction provision, which concerns the submission of a party or parties to a named court or state for the exercise of personal jurisdiction over the party or parties consenting thereto. By consenting to the jurisdiction of a particular court or state, the contracting party authorizes that court or state to act against him; and 3) a forum selection provision, which goes one step further than a consent to jurisdiction provision by designating a particular state or court as the jurisdiction in which the parties will litigate disputes arising out of the contract and their contractual relationship. See *Johnston County v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 92-93, 414 S.E.2d at 30, 33 (1992); *Corbin Russwin, Inc. v. Alexander's Hardware, Inc.*, 147 N.C. App. 722, 726-27, 556 S.E.2d 592, 596 (2001) ("To summarize, a forum selection clause designates the venue, a consent to jurisdiction clause waives personal jurisdiction and venue, and a choice of law clause designates the law to be applied.").

In *Johnston County v. R.N. Rouse & Company*, our Supreme Court recognized that due to the varying language used by parties drafting these clauses and the tendency to combine such clauses in one contractual provision, the courts have often confused the different types of clauses.

One commentator recognizing this confusion has offered the following guidance:

A typical forum-selection clause might read: "[B]oth parties agree that only the New York Courts shall have jurisdiction over this contract and any controversies arising out of this contract." . . .

A . . . "consent to jurisdiction" clause[] merely specifies a court empowered to hear the litigation, in effect waiving any objection to personal jurisdiction or venue. Such a clause might provide: "[T]he parties submit to the jurisdiction of the courts of New York." Such a clause is "permissive" since it allows the parties to air any dispute in that court, without requiring them to do so.

. . . A typical choice-of-law provision provides: "This agreement shall be governed by, and construed in accordance with, the law of the State of New York."

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Leandra Lederman, Note, *Viva Zapata!: Toward a Rational System of Forum-Selection Clause Enforcement in Diversity Cases*, 66 N.Y.U.L. Rev. 422, 423 n. 10 (1991) (citations omitted).

Johnston County v. R.N. Rouse & Co., Inc., 331 N.C. at 93-94, 414 S.E.2d at 33.

Defendants in this case argue that since the parties specified a particular court under their contract clause, the trial court erred in not recognizing it as a mandatory forum selection clause. However, the general rule is when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties' intent to make jurisdiction exclusive. See, e.g., *S&D Coffee, Inc. v. GEI Auto Wrappers*, 995 F. Supp. 607, 610 (M.D. N.C. 1997). Indeed, mandatory forum selection clauses recognized by our appellate courts have contained words such as "exclusive" or "sole" or "only" which indicate that the contracting parties intended to make jurisdiction exclusive. See *Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 403, 553 S.E.2d 84, 86 (2001) ("The parties . . . stipulate that the State Courts of North Carolina shall have sole jurisdiction . . . and that venue shall be proper and shall lie exclusively in the Superior Court of Pitt County, North Carolina."); *Appliance Sales & Service, Inc. v. Command Elec. Corp.*, 115 N.C. App. 14, 23, 443 S.E.2d 784, 790 (1994) ("the Courts in Charleston County, South Carolina shall have exclusive jurisdiction and venue,"); *Perkins v. CCH Computax*, 333 N.C. 140, 141, 423 S.E.2d 780, 781 (1992) ("Any action relating to this Agreement shall only be instituted . . . in courts in Los Angeles County, California.").

In contrast, although the contract provision in this case contains the name of a court, it does not contain further language to indicate that it is a mandatory jurisdiction clause. Notably, the provision directs only that disagreements and disputes "shall finally be settled," not that 13th Judicial District Court of Hillsborough County Florida shall have "sole" or "exclusive" jurisdiction.

In sum, we hold that the contract provision in this case simply allows or permits the parties to air their particular disputes in a particular jurisdiction or court without requiring them to do so. See *Johnston County v. R.N. Rouse & Co., Inc.* Accordingly, we conclude that the trial court did not abuse its discretion in denying defendants' motion to dismiss based on improper venue.

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Affirmed.

Judges HUDSON and CAMPBELL concur.

IN THE MATTER OF: DOUGLAS A. BEASLEY, ATTORNEY AT LAW

No. COA01-1270

(Filed 16 July 2002)

**Attorneys— suspension of license—jurisdiction of trial court
to enter consent order**

The trial court had jurisdiction to enter a third interim consent order between the parties suspending petitioner's law license for one year for alcohol abuse and also had the authority to deny petitioner's request for the reinstatement of his license to practice law, because: (1) the courts of this State have inherent authority to regulate the conduct of attorneys practicing in the State; and (2) N.C.A.C. 1D .0617 allows the trial court to enter an order suspending a lawyer's license if the lawyer consents to such suspension, and petitioner consented to the suspension imposed in the third interim consent order.

Appeal by petitioner from order entered 23 July 2001 by Judge Russell G. Walker in Randolph County Superior Court. Heard in the Court of Appeals 13 June 2002.

J. Jane Adams, for petitioner-appellant.

North Carolina State Bar, by Michael D. Zetts, III, for respondent-appellee.

MARTIN, Judge.

Petitioner-appellant Douglas A. Beasley suffers from alcohol addiction. Beginning in 1994, the North Carolina State Bar's Positive Action for Lawyers ("PALS") program began working with petitioner-appellant in an effort to assist him in recovery. Following reports received by PALS in 1996 that petitioner-appellant was appearing in court while intoxicated, petitioner-appellant entered into a rehabilitation contract with PALS which required that he refrain from alcohol and drug use and fulfill other conditions as a part of a structured

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recovery plan. He breached the rehabilitation contract by using alcohol and by appearing in court while under the influence of alcohol. On 17 September 1997, petitioner-appellant and W. Donald Carroll, Jr., a representative of the State Bar's PALS Committee, consented to the entry of a "Consent Order *In Camera*" by the Randolph County Superior Court wherein petitioner-appellant accepted the suspension of his law license; the suspension was stayed pending petitioner-appellant's maintaining a program of recovery and abstaining from all alcohol use. On 15 November 1997, however, petitioner-appellant was arrested for driving while impaired. Following treatment for chemical addiction, petitioner-appellant again relapsed in December 1997.

On 24 February 1998, petitioner-appellant and Carroll consented to the entry of an "Interim Consent Order *In Camera*," which stayed the suspension of petitioner-appellant's law license for a period of two years contingent on petitioner-appellant's adherence to several conditions, including the total abstention from all mind-altering substances, the completion of 90 Alcoholics Anonymous (AA) meetings, and submission to random urine and/or blood tests. Petitioner-appellant failed to adhere to these conditions, and a "Second Interim Consent Order *In Camera*" was signed on 5 June 1998. Petitioner-appellant's law license was suspended for one year, with the suspension once again stayed contingent on petitioner-appellant's abiding by certain mandatory conditions. Petitioner-appellant violated this consent order when he was involved in a single car accident resulting from his alcohol intoxication on 21 August 1998; he was charged with driving while impaired in the accident.

On 25 February 1999, petitioner-appellant and Carroll consented to the entry of a "Third Interim Consent Order *In Camera*." The order stated, as had the orders preceding it, that the court's authority in the matter was based upon G.S. § 84-21 and 84-28, as well as 27 North Carolina Administrative Code 1D, Section .0600, entitled, "Rules Governing the Lawyer Assistance Program." This order suspended petitioner-appellant's law license for one year, with the first six months of the suspension activated.

On 8 November 2000, petitioner-appellant filed a petition seeking reinstatement by the court to active status with the North Carolina State Bar. He alleged, among other things, that he had remained sober since 6 November 1999. On 23 July 2001, the trial court entered its order denying petitioner-appellant's petition for reinstatement. The trial court found that following the third interim consent order, petitioner-appellant tested positive for addictive pain medication,

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missed several scheduled drug screening tests, and tested positive for alcohol. The trial court concluded as a matter of law that petitioner-appellant did not produce sufficient evidence of his compliance with 27 N.C.A.C. 1D .0616(i), as well as with the provisions of the third interim consent order. Petitioner appeals.

Petitioner-appellant argues that the trial court did not have jurisdiction to enforce the third interim consent order and continue the suspension of petitioner-appellant's license to practice law. We disagree.

The courts of this State have inherent authority to regulate the conduct of attorneys practicing in the State:

“Attorneys are answerable to the summary jurisdiction of the court for any dereliction of duty except mere negligence or mismanagement. A court may enforce honorable conduct on the part of its attorneys and compel them to act honestly toward their clients by means of fine, imprisonment or disbarment. The power is based upon the relationship of the attorney to the court and the authority which the court has over its own officers to prevent them from, or punish them for, committing acts of dishonesty or impropriety calculated to bring contempt upon the administration of justice.”

In re Burton, 257 N.C. 534, 542-43, 126 S.E.2d 581, 587-88 (1962) (citation omitted). The trial court's power to discipline attorneys “is not dependent upon statutory authority, but arises because of a court's inherent authority to take disciplinary action against attorneys licensed to practice before it.” *In re Paul*, 84 N.C. App. 491, 499, 353 S.E.2d 254, 259, cert. denied, 319 N.C. 673, 356 S.E.2d 779 (1987), cert. denied, 484 U.S. 1004, 98 L. Ed. 2d 646 (1988) (citations omitted).

Unprofessional conduct subject to this power includes “misconduct, malpractice, or deficiency in character” and “any dereliction of duty except mere negligence or mismanagement.” This power to discipline or disbar attorneys is essential in order that the court may protect itself from fraud and impropriety and to serve the administration of justice.

Id. at 499-500, 353 S.E.2d at 259-60 (citations omitted).

Chapter 84 of the North Carolina General Statutes, entitled “Attorneys-at-Law,” provides for the manner and method of regulation of the legal profession. Article 4 creates the North Carolina State

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Bar as an agency of the State. N.C. Gen. Stat. § 84-15 (2001). The State Bar, through a governing “Council,” G.S. § 84-17, is granted “the authority to regulate the professional conduct of licensed attorneys.” N.C. Gen. Stat. § 84-23 (2001). Among other powers, the Council may “investigate and prosecute matters of professional misconduct” and “grant or deny petitions for reinstatement.” *Id.* Nevertheless, “[n]othing contained in this Article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys.” N.C. Gen. Stat. § 84-36 (2001).

Petitioner-appellant argues that the trial court, in the third interim consent order, was limited in its authority to impose an active suspension exceeding 180 days based on the language of 27 N.C.A.C. 1D .0616, which states:

If it appears that a lawyer’s ability to practice law is impaired by substance abuse and/or chemical addiction, the board, or its duly authorized committee, may petition any superior court judge to issue an order, pursuant to the court’s inherent authority, suspending the lawyer’s license to practice law in this state for up to 180 days.

Petitioner-appellant’s argument, however, fails to recognize that the court’s inherent authority to regulate the conduct of attorneys is not limited by the North Carolina Administrative Code. *See Burton*, 257 N.C. 534, 126 S.E.2d 581 (nothing in the statutes abridges the inherent power of the court to deal with its attorneys). 27 N.C.A.C. 1D .0616 simply limits the relief the North Carolina State Bar may seek from the court when it petitions the court to act in the event an attorney is found to be impaired by substance abuse or a chemical addiction; it does not and can not limit the inherent authority of the court to act. In any event, notwithstanding petitioner-appellant’s argument, the instant case is governed not by Section .0616 but by Section .0617. *See* 27 N.C.A.C. 1D .0617 “Consensual Suspension” (“Notwithstanding the provisions of 27 NCAC 1D .0616 of this Subchapter, the court may enter an order suspending a lawyer’s license if the lawyer consents to such suspension. The order may contain such other terms and provisions as the parties agree to and which are necessary for the protection of the public.”) In this case, petitioner consented to the suspension imposed in the third interim consent order.

For the reasons stated above, the trial court in this case had jurisdiction to enter the third interim consent order between the parties, and also had the authority to deny petitioner’s request for the rein-

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statement of his license to practice law. Petitioner's assignments of error to the contrary are overruled.

Affirmed.

Judges TYSON and THOMAS concur.

IN RE: KIEAFA LOCKLEAR

No. COA01-1269

(Filed 16 July 2002)

Termination of Parental Rights— findings—insufficient

The trial court's findings were insufficient to terminate parental rights under Chapter 7A where the court failed to specifically list the conditions which the parent had not met, failed to find that the parent had the ability to pay support, failed to find that the parent had failed to address the concerns which led to her child's removal, and attempted to incorporate by reference another order which was not included in the record, made some findings which were not adequately specific, and made some findings in the double negative.

Appeal by respondent from judgment entered 6 April 2001 by Judge John B. Carter in Robeson County District Court. Heard in the Court of Appeals 25 April 2002.

J. Hal Kinlaw, Jr. for petitioner-appellee.

Tiffany Peguise-Powers for respondent-appellant.

THOMAS, Judge.

Gwendolyn Sue Locklear Smith, respondent, appeals the termination of her parental rights to her son, Kieafa Ladarian Armandi Locklear.

Smith argues four assignments of error: (1) the trial court committed reversible error in finding as a fact that grounds existed to terminate her parental rights; (2) the trial court committed reversible error in finding as a fact that it was in Kieafa's best interests that

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Smith's parental rights be terminated; (3) the trial court committed reversible error in concluding as a matter of law that grounds existed to terminate Smith's parental rights; and (4) the trial court committed reversible error in ordering that Smith's parental rights be terminated. We address assignments of error (1) and (3). For the reasons discussed herein, we reverse and remand and do not reach assignments of error (2) and (4).

Kieafa was born 19 March 1995, but the Robeson County Department of Social Services (DSS) became involved with Smith as early as 1990 concerning her other children. DSS received several reports of Smith failing to take proper care of her children and using crack cocaine since Kieafa's birth. Further, Smith has previously lost custody of three of her children. One of those three, Jareka, is still in the custody of DSS and Smith's visitation with her had to be stopped because of domestic violence.

In 1996, Kieafa was adjudicated neglected. Smith had left Kieafa, who suffers from severe asthma, with Frank Williams, stating that she was going to buy Kieafa some shoes. Instead, Smith went to stay with Mark McNeill, did not return for several days, and did not contact Williams. He became concerned that Smith may have become a victim of a drug dealer, who was supposedly looking for her and had threatened her with bodily harm. He eventually took Kieafa to the Robeson County Sheriff's Department.

DSS was notified and filed a petition alleging neglect. On 1 July 1996, the trial court adjudicated Kieafa neglected and placed him in the custody of DSS. He was later returned to her care.

However, DSS filed another neglect petition in June 1997 because Smith again left Kieafa with a neighbor, said she would return in "a few hours," but did not. The first neighbor had another neighbor watch Kieafa that night. On the following day, Smith still did not return. Five days after initially leaving Kieafa with a neighbor, Smith's whereabouts remained unknown. DSS eventually obtained custody.

At the adjudicatory hearing, Smith explained that she had traveled to Newton Grove with her boyfriend and he had left her there. She claimed to have spent the five days attempting to return home.

The trial court adjudicated Kieafa neglected and again placed him in the custody of DSS.

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On 19 March 1999, DSS filed a petition to terminate the parental rights of Smith. We note that when the petition was filed, Chapter 7A of the North Carolina General Statutes governed termination of parental rights and is therefore the controlling authority in the instant case. By the time the case was heard, however, Chapter 7B had been enacted.

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, there must be established 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 in order to proceed to disposition. 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). We note that Chapters 7A and 7B interchangeably use the "clear, cogent and convincing" and the "clear and convincing" standards. It has long been held that these two standards are synonymous. *Montgomery*, 311 N.C. at 109, 316 S.E.2d at 252.

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 terminating the parental rights of Smith, the trial court found:

That the [sic] prior to filing the petition the juvenile's mother has not [sic]:

- (a) failed to cooperate with the Department of Social Services for the return of the juvenile;
- (b) has willfully left the juvenile in custody of the Department in foster care for at least twelve months;
- (c) has paid no child support towards the care of the juvenile;
- (d) has not visited the juvenile on a regular basis.

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Beyond these findings, most of the trial court's findings concern the efforts made by DSS to reunify the family.

The North Carolina General Statutes provide that, in the adjudicatory stage, "[t]he court shall take evidence, find the facts, and shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent." N.C. Gen. Stat. § 7B-1109(e) (2001). However, in the instant case, the trial court failed to: (1) find that Smith had the ability to pay support; (2) find that Smith had not addressed the concerns which led to Kieafa's removal; and (3) specifically list the conditions that Smith had not met. Further, the trial court attempts to incorporate by reference another order dated 15 March 1995 into its findings. See *In re Brownlee*, 301 N.C. 532, 272 S.E.2d 861 (1981). But that order was not included as a part of the record. Additionally, the findings were stated in the double negative. The findings are actually problematic not only because some of them were in the double negative, but also because the few others were not adequately specific.

Our review on appeal is limited to determining whether the trial court's findings are based on clear, cogent and convincing competent evidence. *In re Allen*, 58 N.C. App. 322, 293 S.E.2d 607 (1982). If they are, then the findings are binding on appeal. *Id.* Here, the trial court's findings are clearly insufficient to establish grounds for termination.

Due to a lack of adequate findings, we reverse the trial court's order terminating Smith's parental rights and remand for proceedings consistent with this opinion. The trial court shall determine whether it is appropriate to allow additional evidence prior to making findings and conclusions.

REVERSED AND REMANDED.

Judges MARTIN and TYSON concur.

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[151 N.C. App. 577 (2002)]

JEFFREY LANE EFIRD, AS ADMINISTRATOR OF THE ESTATE OF DYLAN LANE EFIRD,
(DECEASED), PLAINTIFF v. CHARLIE HUBBARD, JR. AND DEIRDRE BULLOCK
NEELY, DEFENDANTS

No. COA01-662

(Filed 16 July 2002)

**Motor Vehicles— negligence—.068 alcohol level—no evidence
of causation**

The trial court correctly granted summary judgment for defendant in an action arising from an automobile collision at an intersection where the driver of the car in which plaintiff's decedent was driving ran a stop sign and defendant's blood alcohol level was 0.068. Plaintiff did not forecast any evidence of a causal relationship between defendant's blood alcohol level and the accident.

Appeal by plaintiff from judgment entered 1 March 2001 by Judge Catherine C. Eagles in Stanly County Superior Court. Heard in the Court of Appeals 13 March 2002.

Charles G. Monnett & Associates, by Charles G. Monnett III, for plaintiff-appellant.

Robinson & Elliott Law Firm, by Kevin D. Elliott, for defendant-appellees.

TIMMONS-GOODSON, Judge.

Jeffrey Lane Efird ("plaintiff"), administrator of the estate of Dylan Efird, appeals from an order granting summary judgment in favor of Charlie Hubbard, Jr. ("defendant").

On 14 January 1999, Deirdre Bullock Neely ("Neely") was traveling in an easterly direction on Rocky River Road (R.P. 1520) located near Monroe, North Carolina. Accompanying Neely in her vehicle were Neely's minor child, Jamie Neely, Dylan Lane Efird ("Dylan") and Dylan's mother, Esther Davis. At the same time Neely was traveling east, defendant was traveling south on Rocky River Road (R.P. 1514). At the intersection of R.P. 1520 and R.P. 1514 was a stop sign which required all traffic turning onto or crossing R.P. 1520 to yield the right of way to traffic traveling on R.P. 1514. The speed limit for R.P. 1520 and for Neely's direction of travel was forty-five miles per hour (45 m.p.h.), while the speed limit for R.P. 1514

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and defendant's direction of travel was fifty-five miles per hour (55 m.p.h.).

Upon traveling on R.P. 1520 at approximately thirty-five miles per hour (35 m.p.h.), Neely entered the intersection without stopping at the stop sign or yielding to oncoming traffic. As a result, the vehicles operated by Neely and defendant collided at the intersection of R.P. 1520 and R.P. 1514. On 20 January 1999, Dylan and Jamie Neely died from the injuries sustained as a result of the collision.

State Trooper J.B. Moser ("Trooper Moser") of the North Carolina State Highway Patrol investigated the collision. The investigation revealed that defendant was traveling at a speed of fifty miles per hour (50 m.p.h.). During the course of the investigation, Trooper Moser detected an odor of alcohol on defendant and noticed that defendant's eyes were "bloodshot." Trooper Moser obtained defendant's consent to take a blood sample for testing by the State Bureau of Investigation. Laboratory tests later revealed defendant's blood alcohol concentration to be 0.068 grams of alcohol at the time of the collision, less than the legal standard of 0.08 for driving while impaired as provided in N.C. Gen. Stat. § 20-138.1.

At deposition, defendant presented the testimony of Brian Anders ("Anders"), an engineer with Engineer Design and Testing. Anders gathered information concerning the accident coupled with the information given to him by Trooper Moser. Based on measurements and the weight of the vehicle, along with his analysis of the average perception reaction time in which to avoid impact, Anders determined that there was insufficient time for defendant to have avoided the accident with Neely once she proceeded through the intersection without stopping.

On 27 December 2000, defendant filed a motion for summary judgment. On 1 March 2001, the trial court entered an order granting defendant's motion for summary judgment. Plaintiff appeals.

In his first assignment of error, plaintiff contends that the trial court erred by granting defendant's motion for summary judgment. We disagree.

Summary judgment is proper when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that any party is entitled to judgment as a matter of law. N.C. Gen.

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Stat. § 1A-1, Rule 56 (c) (2001). The moving party has the burden of “positively and clearly showing that there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law.” *James v. Clark*, 118 N.C. App. 178, 180, 454 S.E.2d 826, 828, *disc. review denied*, 340 N.C. 359, 458 S.E.2d 187 (1995). The record is viewed in the light most favorable to the non-movant, and all inferences will be drawn against the non-movant. *Bruce Terminex Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

In general, summary judgment is not appropriate where issues of negligence are involved. *Sink v. Andrews*, 81 N.C. App. 594, 596, 344 S.E.2d 831, 832 (1986). “It is only in exceptional negligence cases that summary judgment is appropriate, since the standard of reasonable care should ordinarily be applied by the jury under appropriate instructions from the court.” *Thompson v. Bradley*, 142 N.C. App. 636, 641, 544 S.E.2d 258, 261 (quoting *Ragland v. Moore*, 299 N.C. 360, 363, 261 S.E.2d 666, 668 (1980)), *disc. review denied*, 353 N.C. 532, 550 S.E.2d 506 (2001). “However, if the evidentiary forecasts establish either a lack of any conduct on the part of the movant which would constitute negligence, or the existence, as a matter of law, of a complete defense to the claim, summary judgment may be properly allowed.” *Sink*, 81 N.C. App. at 596, 344 S.E.2d at 832.

The complaint in the instant case alleged that defendant’s negligent driving caused the collision that claimed Dylan’s life. “Negligence is the failure to exercise proper care in the performance of a legal duty owed by a defendant to a plaintiff under the circumstances.” *Cassell v. Collins*, 344 N.C. 160, 163, 472 S.E.2d 770, 772 (1996). In order to state a claim for negligence, the party asserting negligence must show that defendant owed a duty to plaintiff, breached that duty, and that such breach was an actual and proximate cause of plaintiff’s injuries. See *Pulley v. Rex Hospital*, 326 N.C. 701, 705, 392 S.E.2d 380, 383 (1990). “Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff’s injuries, and without which the injuries would not have occurred.” *Hairston v. Alexander Tank & Equip. Co.*, 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). “It is not enough to establish liability if all that can be shown is that the actor was negligent. There must be a showing or determination of proximate cause.” *King v. Allred*, 309 N.C. 113, 117, 305 S.E.2d 554, 557 (1983), *disc. review denied*, 315 N.C. 184, 337 S.E.2d 857 (1985).

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“Unquestionably[,] a motorist is guilty of negligence if he operates a motor vehicle on the highway while under the influence of intoxicating liquor.” *Atkins v. Moye*, 277 N.C. 179, 186, 176 S.E.2d 789, 794 (1970).

Such conduct, however, will not constitute either actionable negligence or contributory negligence unless—like any other negligence—it is causally related to the accident. Mere proof that a motorist involved in a collision was under the influence of an intoxicant at the time does not establish a causal connection between his condition and the collision. His condition must have caused him to violate a rule of the road and to operate his vehicle in a manner which was the proximate cause of the collision.

Id.

In the instant case, although plaintiff presented proof that defendant had a blood alcohol content of 0.068 at the time of the accident, plaintiff failed to present any evidence that would establish a causal relationship between defendant’s blood alcohol content and the accident. *See King*, 309 N.C. at 118, 305 S.E.2d at 558 (holding that although the defendant’s affidavit clearly indicated that she was under the influence of intoxicants at the time of the accident, it did not settle “nor determine as a matter of law, the causal relationship between her negligence and the accident”). Indeed, the plaintiff produced no evidence showing that defendant’s blood alcohol content caused him to violate a rule of the road and to operate his vehicle in a manner which was the proximate cause of the collision. Instead, the evidence only established that Neely, while operating her vehicle, proceeded through the stop sign without yielding to oncoming traffic and thus collided with defendant’s vehicle. We therefore hold that, although the plaintiff produced evidence that defendant had a blood alcohol content of 0.068 at the time of the accident, plaintiff failed to forecast any evidence that defendant’s blood alcohol content proximately caused the accident in question.

Accordingly, the trial court’s order granting summary judgment in favor of defendant is

Affirmed.

Judges WYNN and TYSON concur.

CRAIG v. FAULKNER

[151 N.C. App. 581 (2002)]

TERRY DEAN CRAIG, PETITIONER v. JANICE FAULKNER, COMMISSIONER OF THE
NORTH CAROLINA DIVISION OF MOTOR VEHICLES, RESPONDENT

No. COA01-539-2

(Filed 16 July 2002)

**Motor Vehicles— commercial driver’s license—restriction—
superior court jurisdiction**

The trial court erred by granting the Department of Motor Vehicle’s (DMV’s) motion to dismiss petitioner’s claim that DMV placed a restriction on petitioner’s commercial driver’s license without due process of law based on lack of subject matter jurisdiction and the case is remanded for further proceedings, because: (1) the legislature has not provided by statute an effective administrative remedy, and the fact that DMV as a matter of policy allows individuals with restrictions on their licenses to request a hearing before the Medical Review Board does not constitute an effective administrative remedy sufficient to preclude jurisdiction in superior court; and (2) the superior court would have subject matter jurisdiction over this action on a writ of certiorari.

Appeal by petitioner from judgment entered 26 February 2001 by Judge Timothy S. Kincaid in Caldwell County Superior Court. Heard in the Court of Appeals 14 February 2002. Petition for rehearing granted 25 June 2002.

Attorney General Roy Cooper, by Associate Attorney General Kimberly P. Hunt, for respondent-appellee.

Wilson, Palmer, Lackey & Rohr, P.A., by Timothy J. Rohr, for petitioner-appellant.

HUDSON, Judge.

Terry Dean Craig (“petitioner”) appeals an order granting the motion to dismiss filed on behalf of the Division of Motor Vehicles (the “DMV”). In an opinion filed 7 May 2002, we reversed and remanded. *See Craig v. Faulkner*, 149 N.C. App. 968, 562 S.E.2d 588 (2002). Respondent filed a petition for rehearing on 30 May 2002, which we allowed. We have modified the previous opinion accordingly.

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[151 N.C. App. 581 (2002)]

Petitioner asserts, and the DMV does not dispute, that he has held a commercial driver's license "since the inception of Commercial Driver's Licenses." By letter dated 26 May 2000, an official with the Medical Review Branch of the Driver License Section of the DMV informed petitioner as follows:

We have received a favorable recommendation from our Medical Adviser regarding your health as it pertains to your driving status.

You must visit any Driver License Office to make application for a driver's license or learner's permit. The following restriction(s) will be necessary: CLASSIFIED C ONLY. If you currently have a valid driver's license, failure to comply within 15 days from the date of this letter will result in the cancellation of your driving privilege, G.S. 20-29.1.

You must be reexamined and/or submit a current medical report for evaluation on or after 05-26-2001. We will advise you concerning this requirement at a later date.

It appears that this letter was issued pursuant to N.C. Gen. Stat. § 20-7(e) (1999) and N.C. Gen. Stat. § 20-9(e) (1999). Section 20-7(e) provides that "[t]he [DMV] may impose any restriction it finds advisable on a drivers license." Section 20-9(e) provides that

[t]he [DMV] shall not issue a driver's license to any person when in the opinion of the [DMV] such person is afflicted with or suffering from such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways, nor shall a license be issued to any person who is unable to understand highway warnings or direction signs.

Counsel for the DMV explained to the superior court at the hearing on its motion to dismiss that petitioner had been committed to "Broughton or some—several other hospitals in the mid-1990s," and "[a]s a result of that commitment, he was put in the Medical Review Program and has since—since had assessments, the last assessment having occurred in the year 2000."

On 13 June 2000, petitioner filed the instant action in the Caldwell County Superior Court alleging, *inter alia*, that the DMV revoked his commercial driver's license without due process of law. On 10 July 2000, the DMV filed a motion to dismiss on the ground that the court does not have subject matter jurisdiction over the matter because

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petitioner failed to exhaust his administrative remedies. The superior court granted the motion to dismiss. Petitioner appeals.

“As a general rule, where the legislature has provided by statute an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse may be had to the courts.” *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979). “An action is properly dismissed under Rule 12(b)(1) for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies.” *Shell Island Homeowners Ass’n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999).

The DMV argued before the superior court that a hearing before a medical review board was petitioner’s exclusive remedy. The DMV relied on N.C. Gen. Stat. § 20-9(g)(4) (1999), which provides that “[w]henver a license is denied by the Commissioner, such denial may be reviewed by a reviewing board upon written request of the applicant filed with the [DMV] within 10 days after receipt of such denial.” That statute further provides that “[a]ctions of the reviewing board are subject to judicial review as provided under Chapter 150B of the General Statutes.” N.C.G.S. § 20-9(g)(4)(f). Thus, the DMV argued, petitioner could not file a petition in the superior court without first pursuing his right to a hearing before the medical review board. Because petitioner failed to request such a hearing, the DMV contended that he failed to exhaust his administrative remedies, and, as a result, the court did not have subject matter jurisdiction over his petition.

On appeal, the DMV argues in the alternative that petitioner was not entitled to a hearing because his license was not actually revoked, but merely restricted. The DMV asserts that N.C.G.S. § 20-9(g)(4) provides for a hearing only in case a license is revoked. The DMV observes, however, that “as a matter of policy,” the DMV allows one whose license is restricted to request a hearing. Thus, the DMV now argues that petitioner was afforded more process than is required by law.

We agree with the DMV that N.C.G.S. § 20-9(g)(4), by its express language, applies only to the case where a license has been denied. Thus, the legislature has not “provided by statute an effective administrative remedy,” *Presnell*, 298 N.C. at 721, 260 S.E.2d at 615, to one who, like petitioner, retains his license with restrictions.

We conclude that the fact that the DMV “as a matter of policy allows individuals with restrictions on their licenses to request a

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hearing before the Medical Review Board” does not constitute an effective administrative remedy sufficient to preclude jurisdiction in superior court. Therefore, pursuant to *Davis v. Hiatt*, 326 N.C. 462, 465, 390 S.E.2d 338, 340 (1990), the superior court would have subject matter jurisdiction over this action on a writ of certiorari. *See also Russ v. Board of Education*, 232 N.C. 128, 130, 59 S.E.2d 589, 591 (1950) (“[C]ertiorari is the appropriate process to review the proceedings of . . . bodies and officers exercising judicial or quasi-judicial functions in cases where no appeal is provided by law.” (emphasis omitted)). Accordingly, we reverse the judgment granting the DMV’s motion to dismiss and remand for further proceedings.

Reversed and remanded.

Judges MARTIN and CAMPBELL concur.

J.M. DEVELOPMENT GROUP v. DARRELL GLOVER AND ROSINA GLOVER

No. COA01-948

(Filed 16 July 2002)

Civil Procedure— failure to include requested findings of fact and conclusions of law in order—out-of-state-judgment

Although a defendant contends the trial court erred by its enforcement of an out-of-state judgment for past due rent, this issue is not reached and the case is remanded for appropriate findings because the trial court’s order does not contain requested findings of facts and conclusions of law as required by N.C.G.S. § 1A-1, Rules 52(a)(1) and (a)(2).

Appeal by defendant Rosina Glover from judgment entered 12 January 2001 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 25 April 2002.

Haywood, Denny & Miller, LLP, by Robert E. Levin, for plaintiff-appellee.

North Central Legal Assistance Program, by John W. Van Alst, for defendant-appellant.

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[151 N.C. App. 584 (2002)]

THOMAS, Judge.

Defendant Rosina Glover appeals the trial court's enforcement of an out-of-state judgment. However, because the trial court's order does not contain requested findings of facts and conclusions of law, we do not reach that ultimate issue.

The evidence tends to show that defendant and her husband, defendant Darrell Glover, lived together with their six children in New Jersey. In 1995, Darrell abandoned his wife and children and moved into an apartment in New York with a female co-worker named Terry. In 1998, Rosina's home in New Jersey became uninhabitable due to a fire and she moved with her children to North Carolina.

In September 1998, Rosina was served with a notice for entry of a \$13,965.35 New York judgment against her for rent owed on an apartment in Brooklyn, New York. Rosina claims the apartment was leased by Darrell and Terry, not her. The lease application, in fact, is in the name of Darrell and Terry Glover. Terry wrote on the application that her occupation was with the New York Department of Corrections. No children were listed as occupants.

Rosina has never been employed with the New York Department of Corrections, has never used the name "Terry," and since their birth, has never resided anywhere without her children.

Darrell and Terry were in arrears in their rent payments from March 1995 to March 1997. Being unable to locate the pair, plaintiff, J.M. Development Group, employed a private investigator. The investigator determined that Darrell was living in the New Jersey home that was damaged by fire. The investigator indicated that Rosina Glover lived at the same address. Based on the investigator's information, plaintiff sued Darrell and Rosina instead of Darrell and Terry for the past due rent.

Service of the original New York complaint was obtained upon Rosina by leaving a copy of the summons and complaint with her sister, Lola Kirkland, in Durham County, North Carolina. Although Rosina and her children were staying there at the time, Kirkland never informed Rosina of the notice. Thus, Rosina did not respond to the lawsuit and never appeared in the New York action.

A default judgment was obtained solely against Rosina Glover. Terry Glover is not mentioned in the judgment.

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When Rosina received notice of the judgment, she filed a notice of defense, claiming: (1) she was not personally served in New York; (2) she never appeared in the proceedings; (3) she never agreed to submit to New York's jurisdiction; (4) she was never domiciled in New York; (5) the proceedings do not arise out of her operation of a motor vehicle or airplane in New York; and (6) the New York judgment was based upon Darrell Glover's fraud. In an attached affidavit, Rosina stated: (a) Darrell abandoned her and their children; (b) she has not lived with Darrell since 1995; (c) she has had no contact with Darrell since 1998; (d) she has never lived at 189 Jefferson Avenue in Brooklyn, New York; and (e) she never entered into any lease agreement regarding 189 Jefferson Avenue in Brooklyn, New York.

On 20 November 2000, plaintiff filed a motion to enforce the New York judgment pursuant to N.C. Gen. Stat. § 1C-1705(b). The trial court granted the motion. Rosina Glover appeals.

Defendant argues the trial court erred in failing to make specific findings of fact and conclusions of law pursuant to Rules 52(a)(1) and 52(a)(2) of the North Carolina Rules of Civil Procedure. We agree.

The trial judge is not required to make specific findings of facts and conclusions of law absent a request to do so by the parties. *Allen v. Wachovia Bank & Trust Co.*, 35 N.C. App. 267, 241 S.E.2d 123 (1978). A request is untimely if made after the entry of a trial court's order. *Nobles v. First Carolina Communications, Inc.*, 108 N.C. App. 127, 423 S.E.2d 312 (1992), *rev. denied*, 333 N.C. 463, 427 S.E.2d 623 (1993). A "judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. R. Civ. P. 58.

In the instant case, the trial court denied defendant's request because it was "untimely." The trial court's order was announced in open court and signed on 10 January 2001. The defense made a request for findings of fact on the next day. The order was not filed with the clerk of court until 12 January 2001. Thus, the request was timely and the trial court should have granted defendant's request. Accordingly, we reverse and remand this issue to the trial court for appropriate findings and do not reach defendant's remaining assignments of error.

REVERSED AND REMANDED.

Judges MARTIN and TYSON concur.

PINEDA-LOPEZ v. N.C. GROWERS ASS'N

[151 N.C. App. 587 (2002)]

LUCIANO PINEDA-LOPEZ, PLAINTIFF v. NORTH CAROLINA GROWERS ASSOCIATION, INC., PHILLIP MORGAN AND HORACE MORGAN, DEFENDANTS

No. COA01-1273

(Filed 16 July 2002)

Civil Procedure— Rule 52—mixed findings of fact and conclusions of law

A claim for retaliatory employment discrimination was remanded where the trial court dismissal of the claim violated N.C.G.S. § 1A-1, Rule 52 by making mixed findings of fact and conclusions of law.

Appeal by plaintiff from order entered on 14 March 2001 by Judge Henry W. Hight, Jr., Superior Court, Wake County. Heard in the Court of Appeals 12 June 2002.

Legal Services of North Carolina, Farmworker Unit, by Alice Tejada and Mary Lee Hall, North Carolina Justice and Community Development Center, by Carol L. Brooke, for plaintiff-appellant.

Constangy, Brooks, & Smith, LLC, by Virginia A. Pierkarski and A. Robert Bell, III and W.R. Loftis, Jr., for defendant-appellant.

WYNN, Judge.

Plaintiff Luciano Pineda-Lopez appeals a trial court order dismissing his North Carolina Retaliatory Employment Discrimination Act claim. Because the order of the trial court violates the mandate of Rule 52 of the North Carolina Rules of Civil Procedure to make separate findings of fact and conclusions of law, we vacate the order and remand it to the trial court to comply with the rule.

Mr. Pineda-Lopez is a Mexican national who worked in North Carolina under a temporary visa granted through a federal program to allow migrant workers to perform agricultural work in this country. Defendant North Carolina Growers Association operates on behalf of its agricultural employer members; it recruits, hires and assigns migrant workers to its grower members. Defendants Horace and Phillip Morgan are members of the North Carolina Growers Association who operate a farm in Wake County, North Carolina.

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The Morgans employed Mr. Pineda-Lopez from 6 June 1997 through 7 August 1997.

On 31 July 1997, Mr. Pineda-Lopez and one of his co-workers, Marco Antonio Barrios, complained to a lawyer in the Farmworkers Unit of Legal Services of North Carolina about his working conditions on the Morgan Farm. He complained that after being sprayed with pesticides, while working in the tobacco fields, he experienced headaches and vomiting, and reported his condition to Philip Morgan the same day. He also stated that the Morgans failed to provide him and other workers with sufficient drinking water in the fields to last the entire work day.

Upon hearing the complaints, the lawyer contacted the North Carolina Growers Association about the workers' complaints and requested that they be transferred to another grower. On 1 August 1997, the North Carolina Growers Association conducted an investigation of the workers' complaints and reported to the lawyer that none of the workers on the farm had complained about the drinking water supply, pesticide exposure, or sickness from the work. The investigation also revealed that there had been an issue about Mr. Pineda-Lopez and Mr. Barrios using alcohol on the job and that they had informed the other members of the crew that the work was too hard and that they intended to quit as soon as the tobacco leaf harvest began. Based on its investigation, the North Carolina Growers Association denied Mr. Pineda-Lopez's request for a transfer to another grower.

On 7 August 1997, a representative from North Carolina Growers Association met with Mr. Pineda-Lopez at the Morgan farm. According to Mr. Pineda-Lopez, the representative refused to grant his request for a transfer, and told him to sign a resignation form unless he wanted to be taken to an abandoned house and remain there until a transfer was available. Mr. Pineda-Lopez signed the resignation form; thereafter, the representative drove him to the bus station for return to Mexico.

On 7 January 1998, several months after his return to Mexico, Mr. Pineda-Lopez filed a Retaliatory Discrimination Act complaint with the North Carolina Department of Labor. Ultimately, the matter was resolved in Superior Court where after conducting a nonjury trial, the trial court dismissed his claims in their entirety with prejudice. Mr. Pineda-Lopez appealed to this Court.

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The dispositive issue on appeal is whether the trial court erred in making mixed findings of fact and conclusions of law. We answer, yes.

Our standard of review of a nonjury trial 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). If the court's factual findings are supported by competent evidence, they are conclusive on appeal, even though there is evidence to the contrary. *Lagies v. Myers*, 142 N.C. App. 239, 246, 542 S.E.2d 336, 341, *review denied*, 353 N.C. 526, 549 S.E.2d 218 (2001); *Chicago Title Ins. Co. v. Wetherington*, 127 N.C. App. 457, 460, 490 S.E.2d 593, 596 (1997), *review denied*, 347 N.C. 574, 498 S.E.2d 380 (1998).

On appeal, Mr. Pineda-Lopez contends that the trial court erred by making mixed findings of fact and conclusions of law. We agree.

Rule 52(a)(1) which governs findings by the trial court in a nonjury proceeding states that:

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

N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2001) (emphasis added). Thus, this rule requires the trial judge hearing a case without a jury to make findings of fact and conclusions of law. *See Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350, 328 S.E.2d 849, *cert. denied*, 314 N.C. 329, 333 S.E.2d 485 (1985); *see also* N.C. Gen. Stat. § 1A-1, Rule 52(a)(1).

Surely under Rule 52, a trial court must avoid the use of mixed findings of fact and instead, separate the findings of fact from the conclusions of law. However, in this case the trial judge labeled his order "Mixed Findings of Fact and Conclusions of Law." In reviewing this order, it is difficult to discern what indeed is a finding of fact and what is a conclusion of law.

The language of Rule 52 is mandatory; in nonjury actions, the trial court *shall* find the facts *specially* and state *separately* its conclusions of law. *See, e.g., DKH Corp. v. Rankin-Patterson Oil Co., Inc.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998) (Our Supreme Court held

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that the mandatory language of Rule 54(b) of the North Carolina Rules of Civil Procedure that stated, "Such judgment shall then be subject to review by appeal," required the appellate court to hear the appeal.). Since the trial court violated that mandate in issuing the subject order, we are compelled to remand this matter to the trial court to reissue its order in compliance with Rule 52(a)(1).

Vacated and remanded.

Judges HUNTER and CAMPBELL concur.

THOMAS M. URQUHART, JR., ADMINISTRATOR OF THE ESTATE OF BETSEY ALLEN DERR URQUHART, PLAINTIFF V. UNIVERSITY HEALTH SYSTEMS OF EAST CAROLINA, INC. (D/B/A PITT COUNTY MEMORIAL HOSPITAL, INCORPORATED), VINCENT SORRELL, M.D., WILLIAM C. REEVES, M.D., PATRICK J. DiGIACOMO, M.D., JULIA A. NELSON, M.D., "JOHN OR JANE DOE" LEWIS, M.D. (AN ON-CALL PHYSICIAN AT THE PITT COUNTY MEMORIAL HOSPITAL ON MAY 30-31, 1998, RESPONSIBLE FOR THE CARE OF PLAINTIFF'S DECEDENT), NICOLE H. BRAXTON, ELIZABETH GIBBS, AND LEAH RODRIGUEZ, DEFENDANTS

No. COA01-1229

(Filed 16 July 2002)

Immunity—sovereign—medical school employees

The trial court erred by dismissing a wrongful death action against employees of East Carolina School of Medicine who claimed sovereign immunity as employees of the State of North Carolina. There is nothing in the complaint suggesting that defendants were sued in their official capacity.

Appeal by plaintiff from order and judgment filed 29 May 2001 by Judge W. Russell Duke, Jr. in Pitt County Superior Court. Heard in the Court of Appeals 11 June 2002.

Ferguson, Stein, Chambers, Wallas, Adkins, Gresham & Sumter, by Adam Stein and William Simpson, for plaintiff appellant.

Herrin & Morano, by Mark R. Morano, for defendant-appellees Vincent L. Sorrell, M.D. and William C. Reeves, M.D.

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GREENE, Judge.

Thomas M. Urquhart, Jr. (Plaintiff) appeals an order filed 29 May 2001 granting summary judgment in favor of William C. Reeves, M.D.¹ (Dr. Reeves) and Vincent L. Sorrell, M.D. (Dr. Sorrell) (collectively, Defendants).

Plaintiff, the administrator of the estate of Betsey Allen Derr Urquhart (Urquhart) who died on 31 May 1998, commenced this wrongful death action on 27 September 2000. The suit names as defendants: University Health Systems of East Carolina, Inc. (Health Systems), ECU Cardiology Practice (the Practice), Dr. Reeves, Dr. Sorrell, and several other doctors and nurses. The complaint alleges in pertinent part that: (1) Health Systems “is an entity organized and existing pursuant to the laws of the State of North Carolina . . . and operates a general hospital in Greenville, Pitt County, North Carolina”; (2) the Practice “is a North Carolina business . . . hold[ing] itself out to the general public as offering medical services in the speciality of cardiology”; (3) Drs. Sorrell and Reeves are “medical doctor[s] who . . . held [themselves] out to the general public as [] medical physician[s],” were “employee[s] or agent[s] of [the Practice and Health Systems], and [were] acting within the course and scope of that employment”; and (4) all the defendants were negligent in providing medical care to Urquhart. Plaintiff, in his prayer for relief, prays that he “have and recover against the defendants, jointly and severally, for the wrongful death of . . . Urquhart” compensatory and punitive damages. On 30 April 2001, Plaintiff filed a notice of voluntary dismissal as to the Practice.

Defendants filed a motion for summary judgment on 30 April 2001 claiming Plaintiff was suing them in their official rather than individual capacity and consequently the action against them must be dismissed based on sovereign immunity. This motion was accompanied by affidavits from Defendants affirming they were employees of the East Carolina University School of Medicine, to which the Practice belongs, and as such, were employees of the State of North Carolina. The trial court granted this motion in an order filed 29 May 2001 and dismissed the claims against Defendants.

1. On 11 July 2002, this Court allowed Plaintiff’s motion to substitute Micah D. Ball, Executor of the Estate of William C. Reeves, for Dr. Reeves.

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[151 N.C. App. 590 (2002)]

The dispositive issue is whether Plaintiff sued Defendants in their official rather than individual capacity.²

As a general proposition, public employees or public officials are entitled to sovereign immunity with respect to their actions in the performance of governmental duties. *See Meyer v. Walls*, 347 N.C. 97, 111-12, 489 S.E.2d 880, 888 (1997). In some instances, however, they may be held individually liable for their actions. *Id.* Thus, it is critical to know whether a complaint asserts claims against a defendant in his official or individual capacity. If the complaint is unclear on this issue, our courts will look to the caption of the case, the allegations of the complaint, and the prayer for relief to ascertain the capacity in which the defendant has been sued. *Warren v. Guilford County*, 129 N.C. App. 836, 839, 500 S.E.2d 470, 472, *disc. review denied*, 349 N.C. 241, 516 S.E.2d 610 (1998); *see Mullis v. Sechrest*, 347 N.C. 548, 552, 495 S.E.2d 721, 723 (1998) (need to determine capacity under which the defendant has been sued only if the complaint is “not clear[.]”).

In this case, there is nothing in the complaint suggesting Plaintiff has sued Defendants in their official capacity. It thus follows they have been sued in their individual capacity and the trial court erred in dismissing the complaint against Defendants. In so holding, we determine the affidavits offered by Defendants asserting they are employees of the East Carolina University School of Medicine and, as such, are employees of the State of North Carolina, are not relevant to the question of whether they have been sued in their individual or official capacity. Thus, to the extent the trial court may have considered those affidavits, it erred.³

2. While Plaintiff's appeal is interlocutory, it is nevertheless immediately appealable because it affects a substantial right. *See Johnson v. York*, 134 N.C. App. 332, 335, 517 S.E.2d 670, 671-72 (1999).

3. In this case, the single allegation in Plaintiff's complaint is that Defendants were negligent. Had Defendants asserted in their affidavits they were public officials, that information could be used to defeat Plaintiff's claim because public officials are immune from individual liability unless their actions were corrupt, malicious, or outside the scope of their employment. *Meyer*, 347 N.C. at 112, 489 S.E.2d at 888; *Epps v. Duke Univ.*, 122 N.C. App. 198, 205, 468 S.E.2d 846, 852 (the defendant can contest the plaintiff's allegation that actions were corrupt, malicious, or outside the scope of employment by asserting immunity as an affirmative defense), *disc. review denied*, 344 N.C. 436, 476 S.E.2d 115 (1996); *Locus v. Fayetteville State Univ.*, 102 N.C. App. 522, 526, 402 S.E.2d 862, 865 (1991) (claim against public official in his individual capacity subject to dismissal under Rule 12(b) unless complaint alleges action was either corrupt, malicious, or outside the scope of his employment). Because, however, Defendants claim they were public employees, they have no immunity for their negligent acts in a claim against them in their individual capacity. *Meyer*, 347 N.C. at 111, 489 S.E.2d at 888.

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[151 N.C. App. 593 (2002)]

Reversed and remanded.

Judges HUNTER and McCULLOUGH concur.

INTEGON SPECIALTY INSURANCE COMPANY, PLAINTIFF v. JACKIE McCOLLUM
AUSTIN, ADMINISTRATRIX OF THE ESTATE OF AUDREY SIMONE AUSTIN, DEFENDANT

No. COA01-613

(Filed 16 July 2002)

**Insurance—uninsured motorist coverage—normal or ordinary
use of motor vehicle—shooting at another car**

The trial court correctly granted summary judgment for plaintiff insurer in a declaratory judgment action to determine coverage under an uninsured motorist policy where defendant's daughter (Audrey) was a passenger in a car when the driver (Gregory) held a gun out his window, the gun discharged, and Audrey was killed by the ricochet. Even accepting Gregory's claim that the discharge was accidental, intentionally pointing a gun out the window of a moving automobile towards the occupants of another moving automobile does not constitute normal or ordinary use of a motor vehicle.

Appeal by defendant from judgment entered 29 January 2001 by Judge A. Moses Massey in Guilford County Superior Court. Heard in the Court of Appeals 20 May 2002.

Frazier & Frazier, L.L.P., by Torin L. Fury, for plaintiff-appellee.

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

EAGLES, Chief Judge.

On 14 December 1997, Gregory Austin (Gregory) was driving a 1994 Mazda Protégé near the intersection of Randleman Road and Interstate 85 in Greensboro, North Carolina. Gregory had obtained possession of the car in return for \$25.00 rock cocaine. Audrey Austin (Audrey) was a passenger in the Mazda and was seated behind Gregory. As Gregory drove, he "exchanged words with the driver of

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another car” in the next lane. Gregory thought that one or more of the occupants of the other car had a gun. Acting on this belief, Gregory held his handgun out the driver’s side window of the Mazda and fired once in the direction of the other car. As Gregory tried to fire a second time, his gun jammed. Gregory resolved the gun’s jammed condition and then fired a second time. The second bullet ricocheted off the other car and then reentered the back portion of the Mazda Protégé killing Audrey. As a result of the shooting, Gregory pleaded guilty to second-degree murder.

Jackie McCollum Austin, Audrey’s mother, filed a civil action against Gregory. Ms. Austin also brought an uninsured motorist claim against her insurer, Integon, for the wrongful death of her daughter.

Ms. Austin’s policy states in relevant part:

We will pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of:

(1) Bodily injury sustained by an insured and caused by an accident

The owner’s or operator’s liability for these damages must arise out of the ownership, maintenance or use of the uninsured motor vehicle.

Integon (plaintiff) filed a declaratory judgment action on 2 March 2000 alleging that coverage was not available to Ms. Austin under her uninsured motorist policy because the damages sought by Ms. Austin did not arise out of the operation, maintenance, or use of an uninsured motor vehicle. Ms. Austin (defendant) answered on 18 April 2000. Plaintiff moved for summary judgment on 19 December 2000. On 29 January 2001, the Honorable A. Moses Massey granted plaintiff’s motion for summary judgment. Defendant appeals.

When determining whether a movant is entitled to summary judgment, this Court applies a two-part analysis of whether: (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and (2) the moving party is entitled to judgment as a matter of law. *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994). On appeal, this Court must view the record in the light most favorable to the non-movant and draw all reasonable inferences in the non-

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movant's favor. *Aetna Cas. & Sur. Co. v. Welch*, 92 N.C. App. 211, 213, 373 S.E.2d 887, 888 (1988).

Here, defendant contends that a genuine issue of material fact exists relating to whether the discharge of Gregory's gun was accidental. Defendant argues that Gregory's operation of a vehicle during which his gun accidentally discharged created a causal connection between the use of the vehicle and the accidental gun discharge that in turn spawned a viable claim for uninsured motorist coverage. We disagree.

In *Scales v. State Farm Mut. Auto. Ins. Co.*, 119 N.C. App. 787, 460 S.E.2d 201 (1995), this Court considered whether an insured's general automobile liability policy issued by State Farm covered an intentional shooting from the insured vehicle. The *Scales* Court held:

In order for an injury to be compensable, there must be a causal connection between the use of the vehicle and the injury. This connection is shown if the injury is the natural and reasonable consequence of the vehicle's use. However, an injury is not a "natural and reasonable consequence of the use" of the vehicle if the injury is the result of something "wholly disassociated from, independent of, and remote from" the vehicle's normal use. Clearly, an automobile chase with guns blazing is not a regular and normal use of a vehicle.

An intentional shooting such as occurred in this case is not a compensable act arising out of the ownership, maintenance, or use of an insured vehicle.

Id. at 790, 460 S.E.2d at 203 (citations omitted). *See also Wall v. Nationwide Mut. Ins. Co.*, 62 N.C. App. 127, 302 S.E.2d 302, (1983) (person outside vehicle injured by intentional discharge of gun by person inside vehicle not covered by vehicle's insurer). *Cf. State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 350 S.E.2d 66 (1986) (holding that "[s]ince the transportation and unloading of firearms are ordinary and customary uses of a motor vehicle, and the injury-causing accident here resulted from the unloading of the transported rifle, such injuries were a natural and reasonable incident or consequence of the use of the motor vehicle").

Here, Gregory filed an affidavit wherein he stated that he "held the handgun out the window and it accidentally discharged after jamming" and that he "did not intend to harm the passenger, Audrey

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Simone Austin.” Even accepting as true Gregory’s claim that the discharge of the gun was accidental, summary judgment is still proper. Intentionally pointing a gun out the window of a moving automobile towards the occupants of another moving automobile does not constitute normal or ordinary use of a motor vehicle. The fact that the gun may have accidentally discharged after it jammed while Gregory was attempting to fire it is irrelevant. Gregory’s pointing of the gun violated N.C.G.S. § 14-34, which states: “If any person shall point any gun or pistol at any person, either in fun or otherwise, whether such gun or pistol be loaded or not loaded, he shall be guilty of a Class A1 misdemeanor.”

In this instance, “the automobile was merely the situs of the assault.” See *Nationwide Mut. Ins. Co. v. Webb*, 132 N.C. App. 524, 526, 512 S.E.2d 764, 765 (1999). The death of Audrey Austin “resulted from something wholly disassociated from, independent of, and remote from the [Mazda’s] normal use.” *Id.* at 526-27, 512 S.E.2d at 766 (citations omitted). Because Audrey Austin’s death was the result of Gregory’s intentional pointing of the gun out the window of the Mazda Protégé and the subsequent discharge of the gun, we hold that Audrey Austin’s death was not the natural and reasonable consequence of the use of the Mazda Protégé but was the result of something “ ‘wholly disassociated from, independent of, and remote from’ the vehicle’s normal use.” *Scales*, 119 N.C. App. at 790, 460 S.E.2d at 203 (citation omitted). Accordingly, we hold that defendant’s uninsured motorist policy did not provide coverage for the wrongful death of defendant’s daughter, Audrey Austin. The trial court’s entry of summary judgment in favor of plaintiff is affirmed.

Affirmed.

Judges McGEE and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 16 JULY 2002

ASPHALT EXPERTS, INC. v. BARNES PLUMBING No. 01-1453	Durham (01CVS2789)	Appeal dismissed
BELL v. TRANSAMERICAN MED., INC. No. 01-1196	Transylvania (01CVD290)	Dismissed
BOWLING v. BOWLING No. 01-1165	Moore (99CVD1117)	Appeal dismissed
CANTRELL v. BOARD OF ADJUST. OF POLK CTY. No. 01-787	Polk (00CVS260)	Vacated and remanded
COONEY v. SABISTON No. 01-1295	Onslow (97CVS2467)	No error
ERWIN v. TWEED No. 01-678	Burke (99CVS278)	Affirmed
FULFORD v. AIKEN No. 01-1344	Durham (00CVS5120)	Dismissed
IN RE BETHEA No. 01-1001	Buncombe (99J319) (99J320) (99J321)	Affirmed
IN RE HERNDON No. 02-32	Granville (00J92) (00J93)	Affirmed
IN RE LEE No. 01-992	Forsyth (00J41)	Affirmed
IN RE RAMSEY No. 01-1317	Henderson (99J157-T)	Affirmed
IN RE WILLIAMS No. 01-1076	Wake (93J66)	Affirmed
JOLLY v. GARCIA'S, INC. No. 01-1421	Brunswick (01CVS884)	Affirmed
MINTON v. BOWMAN No. 01-1189	Wilkes (00CVS566)	Affirmed
NATIONWIDE MUT. INS. CO. v. PRICE No. 01-1277	Caldwell (99CVS1958)	Affirmed

N.C. ASS'N, LONG TERM CARE FACILS. v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 01-1313	Wake (01CVS5425)	Dismissed
OLIVARES-JUAREZ v. SHOWELL FARMS No. 01-714	Ind. Comm. (I.C. 558811)	Reversed and remanded
PERLMUTER PRINTING CO. v. ELITE FORCE, INC. No. 01-1005	Forsyth (98CVD4566)	New trial
SANTOS v. SANTOS No. 01-707	Catawba (96CVD569)	Affirmed
SPRINCENATU v. ALLSTATE INDEM. CO. No. 01-1092	Durham (01CVS21)	Affirmed
STATE v. ALEXANDER No. 01-1002	Alexander (97CRS3912) (97CRS3913)	No error
STATE v. ALSTON No. 01-1218	Guilford (00CRS96123)	No error
STATE v. BILLINGS No. 01-1398	Iredell (99CRS22743) (99CRS17467)	No error
STATE v. BROWN No. 01-1240	New Hanover (99CRS17551)	No error
STATE v. BROWN No. 01-252	Onslow (99CRS57459)	No error
STATE v. BURNS No. 01-574	Forsyth (00CRS35132) (00CRS54324) (00CRS54326)	No error
STATE v. CANTRELL No. 01-1378	Wayne (00CRS51117) (00CRS51118) (00CRS51119)	No error
STATE v. CARMON No. 01-525	Pitt (99CRS64973)	No error
STATE v. CHRISTIAN No. 01-1011	Forsyth (00CRS52665) (01CRS3848)	No error

STATE v. CLIFTON No. 01-57	Forsyth (99CRS37247) (99CRS37251) (99CRS37252)	No error
STATE v. DAMERON No. 01-1254	Gaston (97CRS20344)	No error
STATE v. FLOWERS No. 01-1024	Cleveland (97CRS7538) (97CRS7539) (97CRS7540) (97CRS3039)	No error
STATE v. GARDNER No. 01-451	Wake (98CRS98313)	No error
STATE v. GELL No. 01-826	Cabarrus (01CRS2803)	Affirmed
STATE v. HARGETT No. 01-835	Forsyth (00CRS3607) (00CRS52546)	New trial
STATE v. HAYES No. 01-1503	Guilford (99CRS23624) (99CRS52869) (99CRS52870)	No error
STATE v. HENDRICKS No. 01-786	Guilford (00CRS83135)	No error
STATE v. HERBIN No. 01-1041	Rockingham (99CRS3782) (99CRS3783) (99CRS3784) (99CRS3785) (99CRS3786) (99CRS3787)	No error
STATE v. HINNANT No. 01-1425	Wake (96CRS990)	No error
STATE v. HINTON No. 01-1416	Forsyth (00CRS58316)	No error
STATE v. HOWZE No. 01-1116	Mecklenburg (00CRS8825) (00CRS8826)	No error
STATE v. HUNICHEN No. 01-1083	Wake (99CRS18803) (99CRS35200) (99CRS64657)	No error

STATE v. JACKSON No. 01-1139	Pitt (99CRS55307) (99CRS55727)	No error
STATE v. JOHNSON No. 01-1133	Halifax (98CRS3157)	No error
STATE v. KIRBY No. 01-1327	Anson (97CRS84)	No error
STATE v. KUBRICHT No. 01-1278	Onslow (00CRS52330)	No error
STATE v. LEWIS No. 00-1462	Gaston (99CRS3778) (99CRS3779) (99CRS3781) (99CRS3782) (99CRS3783)	No error
STATE v. LEWIS No. 01-554	Cumberland (97CRS57684)	No error
STATE v. MALLOY No. 01-1499	Wake (99CRS85270) (99CRS97205)	No error
STATE v. MASON No. 01-1444	Swain (00CRS1149)	No error

STATE v. McCRAE No. 01-342	Forsyth (00CRS28213) (00CRS50003)	No error
STATE v. MILLER No. 01-958	Guilford (98CRS15719)	No error
STATE v. NEALE No. 01-1177	Durham (00CRS18778) (00CRS61211) (00CRS61212)	No error
STATE v. PARSON No. 01-477	Guilford (00CRS23572) (00CRS86976)	No error
STATE v. PAYNE No. 01-732	Buncombe (99CRS4235) (99CRS50017)	No error
STATE v. PINEDA No. 01-631	Wayne (00CRS746)	No error
STATE v. POTEAT No. 01-1228	Cabarrus (99CRS12325)	No error
STATE v. ROUSE No. 01-1117	Wayne (00CRS52024) (00CRS52025)	No error
STATE v. SMITH No. 01-1322	Wayne (98CRS15006)	No error
STATE v. SPEASE No. 01-1191	Forsyth (00CRS20202) (00CRS20205) (00CRS21098)	No error
STATE v. SUTTON No. 01-760	Swain (99CRS800) (99CRS801)	No error
STATE v. WEST No. 01-401	Carteret (99CRS9998) (99CRS9999)	No error
STATE v. WHITE No. 01-798	Gaston (97CRS22156) (97CRS24483) (97CRS24489)	No error; remanded for correction of clerical errors
STATE v. YOUNG No. 01-361	Buncombe (97CRS7061) (97CRS7062) (97CRS50521) (99CRS2319) (99CRS2320)	No error

STEIN v. ASHEVILLE CITY SCHOOLS No. 01-1028	Buncombe (01CVS1219)	Dismissed
TGC DEV., INC. v. AEGEAN LAND CO. No. 01-544	Wake (99CVS3101) (99CVS3102) (99CVS3103) (99CVD6579)	Affirmed
THOMPSON v. CARDINAL FREIGHT No. 01-1062	Ind. Comm. (I.C. 805856)	Affirmed
TRASK v. PENDER CTY. No. 01-1241	Pender (00CVS386)	Dismissed

BOWMAN v. ALAN VESTER FORD LINCOLN MERCURY

[151 N.C. App. 603 (2002)]

JAMES AND CATHY BOWMAN, PLAINTIFFS v. ALAN VESTER FORD LINCOLN MERCURY AND JOANN ROBINSON, DEFENDANTS/THIRD PARTY PLAINTIFFS v. GREENSBORO AUTO AUCTION, INC. AND MIKE'S AUTO SALES, INC., THIRD PARTY DEFENDANTS

No. COA01-987

(Filed 6 August 2002)

1. Appeal and Error— appealability—motion to dismiss—substantial right

Although an appeal from the grant of a motion to dismiss is generally an appeal from an interlocutory order, the right to avoid the possibility of two trials on the same issues affects a substantial right and allows an immediate appeal of an order allowing a motion to dismiss defendants' third-party claim against a third-party defendant.

2. Indemnity— contribution—motion to dismiss—failure to state claim

The trial court did not err by granting third party defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) the third party complaint by defendants for indemnity and contribution under N.C.G.S. § 20-71.4(a) and N.C.G.S. § 20-348(a) based on third party defendant's failure to disclose the fact that a car it sold to defendants had been involved in a collision, because: (1) defendants failed to allege fraud on the part of third party defendant; (2) there is no allegation that third party defendant made any representation to defendants, much less a representation recklessly and without regard for its truth; (3) defendants have cited no authority in their brief to support a negligence claim against third party defendant even though the complaint asserted vague allegations of negligence in these causes of action; and (4) defendants failed to allege that third party defendant had any duty to make this disclosure.

3. Costs— attorney fees—sanction—error to award

The trial court erred by awarding attorney fees to third party defendant as a sanction against defendants, because: (1) the trial court made no findings of misconduct, malpractice, deficiency in character, or dereliction of duty; and (2) the order suggests nothing tending to show that the second hearing was necessitated by misconduct amounting to more than mere negligence or mismanagement.

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Appeal by defendants/third party plaintiffs from judgment entered 10 May 2001 by Judge Steve A. Balog in Halifax County Superior Court. Heard in the Court of Appeals 21 May 2002.

Teague, Rotenstreich & Stanaland, L.L.P., by Kenneth B. Rotenstreich and Paul A. Daniels, for defendant/third party plaintiff-appellants.

Randolph and Fischer, by J. Clark Fischer, and Edward L. Powell, for third party defendant-appellee Mike's Auto Sales, Inc.

HUDSON, Judge.

Alan Vester Ford Lincoln Mercury and Joann Robinson (collectively, "defendants") appeal from an order of the superior court granting the motion by third-party defendant Mike's Auto Sales, Inc. ("Mike's") to dismiss defendants' third-party complaint for failure to state a claim upon which relief may be granted, *see* N.C.R. Civ. P. 12(b)(6), and awarding attorneys fees. For the reasons given below, we affirm in part and reverse in part.

The facts alleged in the third-party complaint, which are taken as true on a motion to dismiss for failure to state a claim, *see Holloman v. Harrelson*, 149 N.C. App. 861, 864, 561 S.E.2d 351, 353 (2002), tend to show the following. In 1997, Mike's purchased a 1996 Chevrolet Cavalier that had been seriously damaged in a collision. Mike's repaired the vehicle and sold it to Greensboro Auto Auction, Inc., which in turn sold the vehicle to defendants. Defendants subsequently sold the Chevrolet to the plaintiffs in this case.

On 29 September 2000, the plaintiffs filed a lawsuit against defendants, alleging, *inter alia*, that Defendant Robinson, an agent and/or employee of Defendant Alan Vester Ford Lincoln Mercury, made false, misleading, and deceptive representations regarding the vehicle, that defendants knew or should have known that these representations were false, misleading, and deceptive, and that the representations were made with an intent to deceive.

Defendants filed an answer and a third-party complaint against Greensboro Auto Auction, Inc., and Mike's. The relevant allegations and claims are discussed below. Mike's filed a motion to dismiss the third-party claims against it.

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The motion to dismiss was scheduled to be heard on 30 April 2001, but counsel for defendants was not present. After hearing argument from counsel for Mike's, the court granted the motion to dismiss.

On 3 May 2001, defendants' counsel contacted the court, and, with the consent of the parties, the court set the motion to dismiss for hearing on 7 May 2001. Counsel for defendants informed the court that he had called the clerk of court on the morning of 30 April 2001 and asked that the court be advised that he had a conflict and could not be at the hearing. The court was not so advised. Defendants' counsel did not contact counsel for Mike's on that day.

After hearing from both parties on the motion to dismiss, the trial court granted the motion to dismiss and ordered defendants to pay attorney fees in the amount of the reasonable additional expenses incurred by Mike's in undergoing a second hearing. Defendants appeal.

[1] The order from which defendants appeal "does not dispose of the entire controversy between all parties," and is thus interlocutory. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 311 (1999). Although an interlocutory order is generally not immediately appealable, *see id.*, defendants assert that the order from which they appeal is immediately appealable because it affects defendants' substantial right to "prevent[] separate trials of the same factual issues." *Id.*, 511 S.E.2d at 312; *see Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 25, 376 S.E.2d 488, 491, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989).

In *Beemer*, the plaintiff filed suit against the defendant/third-party plaintiff alleging, *inter alia*, that the defendant/third-party plaintiff was negligent in executing a subordination agreement on behalf of the plaintiff. The defendant/third-party plaintiff filed a third-party complaint against the third-party defendants alleging that they induced him to execute the agreement through fraud and/or negligent misrepresentation. The third-party defendants alleged in defense that the defendant/third-party plaintiff was contributorily negligent in executing the agreement. The trial court granted the motion to dismiss by one of the third-party defendants, and the defendant/third-party plaintiff sought immediate appeal. *See Beemer*, 132 N.C. App. at 342-43, 345, 511 S.E.2d at 310-12. We held that

delaying the appeal [would] prejudice [the defendant/third-party plaintiff's] substantial right to have the same factual issues tried

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before a single jury. . . . If [the defendant/third-party plaintiff] is not permitted immediate review of the order dismissing his claims against [one of the third-party defendants], he may ultimately face a second trial on the issue of whether he too acted negligently in executing the subordination agreement.

Id. at 345, 511 S.E.2d at 312. Thus, “[d]ue to the possibility of inconsistent verdicts should this case be tried in two separate proceedings,” we held that the appeal was “not premature.” *Id.*

Here, as in *Beemer*, there is a common factual issue in the plaintiffs’ claim and the defendants’ third-party claim: whether Mike’s disclosed the condition of the Chevrolet to defendants. The plaintiffs alleged that defendants made misrepresentations that “were false, misleading and deceptive,” and engaged in “actions and/or commissions . . . [that] were calculated and intended to deceive and mislead Plaintiff [sic].” Defendants defend by alleging that they did not know the condition of the Chevrolet they sold to the plaintiffs because Mike’s did not inform them of the Chevrolet’s condition. Defendants’ third-party claim against Mike’s is also based on the allegation that Mike’s failed to disclose the condition of the Chevrolet. Thus, under *Beemer*, the defendants are entitled to an immediate appeal. Accordingly, we consider the merits of defendants’ appeal.

[2] Defendants argue that the trial court erred in granting Mike’s motion to dismiss their third party complaint pursuant to N.C.R. Civ. P. 12(b)(6).

Our standard of review of an order allowing a motion to dismiss is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not. In ruling upon such a motion, the complaint is to be liberally construed, and the court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief.

Holloman, 149 N.C. App. at 864, 561 S.E.2d at 353 (internal quotation marks and citations omitted) (alteration in original). “A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim.” *Burgess v. Your House of Raleigh*, 326 N.C. 205, 209, 388 S.E.2d 134, 136 (1990). “A complaint is not sufficient to withstand a

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motion to dismiss if an insurmountable bar to recovery appears on the face of the complaint. Such an insurmountable bar may consist of an absence of law to support a claim, an absence of facts sufficient to make a good claim, or the disclosure of some fact that necessarily defeats the claim." *Al-Hourani v. Ashley*, 126 N.C. App. 519, 521, 485 S.E.2d 887, 889 (1997) (citation omitted).

Here, defendants alleged two causes of action in their third-party complaint: indemnity and contribution. Specifically, the third party complaint states:

FIRST CAUSE OF ACTION

X.

Even if the Defendants/Third Party Plaintiffs were careless and negligent in any of the respects alleged in the Complaint, which alleged actionable negligence is again expressly denied, then, in that event, any action on the part of the Defendants/Third Party Plaintiffs was passive and secondary and was insulated and superseded by the active, primary and intervening negligence on behalf of the Third Party Defendants, individually or collectively, who failed to inform the Defendants/Third Party Plaintiffs that the 1996 Chevrolet Cavalier . . . had been involved in a collision and had, upon information and belief, been damaged to the extent that the cost of repair exceeded 25% of its fair market value; and the aforementioned acts on behalf of the Third Party Defendants were active and primary and intervening and superseded and insulated the negligent acts, if any, of the Defendants/Third Party Plaintiffs in proximately causing and producing Plaintiff's [sic] alleged injuries and damages; and in the event that the Plaintiff [sic] is adjudged entitled to recover damages from the Defendants/Third Party Plaintiffs, then, in that event, the Defendants/Third Party Plaintiffs are entitled to recover full and complete indemnity from the Third Party Defendants, individually or collectively, in this action.

SECOND CAUSE OF ACTION

XI.

Alternatively, in the event that the Plaintiff [sic] is adjudged entitled to recover damages from the Defendants/Third Party Plaintiffs in this action, based on any alleged negligence or misrepresentation, which is again specifically denied, then the aforementioned negligence and/or misrepresentation by the Third

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Party Defendants joined, concurred and cooperated with the negligent actions or misrepresentations, if any, on behalf of the Defendants/Third Party Plaintiffs in proximately causing and producing Plaintiff's [sic] alleged injuries and damages; and in the event that the Plaintiff [sic] is adjudged entitled to recover damages from the Defendants/Third Party Plaintiffs, then, in that event, the Defendants/Third Party Plaintiffs are entitled to recover of the Third Party Defendants, individually and collectively, contribution as provided in Chapter 1B of the North Carolina General Statutes.

Neither indemnity nor contribution are independent causes of action: the right to either indemnity or contribution is predicated on the parties being joint tortfeasors. *See* N.C. Gen. Stat. § 1B-1 (2001) ("Right to contribution."); *Clemmons v. King*, 265 N.C. 199, 201, 143 S.E.2d 83, 85 (1965) ("An original defendant may not invoke the statutory right of contribution against another party in a tort action unless both parties are liable as joint tort-feasors to the plaintiff in the action." (citation omitted)); *Ingram v. Insurance Co.*, 258 N.C. 632, 635, 129 S.E.2d 222, 225 (1963) ("Where two persons are jointly liable in respect to a tort, one being liable because he is the active wrongdoer, and the other by reason of constructive or technical fault imposed by law, the latter, if blameless as between himself and his co-tortfeasor, ordinarily will be allowed to recover full indemnity over against the actual wrongdoer." (internal quotation marks omitted)). Thus, if defendants failed to allege that Mike's committed some tort against the plaintiffs, then defendants' claim must fail.

Defendants argue that they properly alleged that Mike's violated N.C. Gen. Stat. § 20-71.4 (2001), which provides in relevant part as follows:

It shall be unlawful and constitute a Class 2 misdemeanor for any transferor who knows or reasonably should know that:

- (1) A motor vehicle up to and including five model years old has been involved in a collision or other occurrence to the extent that the cost of repairing that vehicle exceeds twenty-five percent (25%) of its fair market retail value at the time of the damage . . .

to fail to disclose that fact in writing to the transferee prior to the transfer of the vehicle. Failure to disclose any of the above information will also result in civil liability under G.S. 20-348. . . .

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N.C.G.S. § 20-71.4(a). Significantly, N.C.G.S. § 20-71.4(a) creates only criminal liability. Civil liability is governed by N.C. Gen. Stat. § 20-348 (2001), which provides in relevant part as follows:

Any person who, *with intent to defraud*, violates any requirement imposed under this Article shall be liable in an amount equal to the sum of:

- (1) Three times the amount of actual damages sustained or one thousand five hundred dollars (\$1,500), whichever is the greater; and
- (2) In the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney fees as determined by the court.

N.C.G.S. § 20-348(a) (emphasis added). In order to properly plead a cause of action under N.C.G.S. § 20-71.4(a) and N.C.G.S. § 20-348(a), a plaintiff must allege fraudulent intent in addition to a violation of the provisions of N.C.G.S. § 20-71.4(a).

In order to survive a motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(6) on a fraud claim, the party alleging fraud must include allegations in the complaint “that the defendants knew the representation was false or made the representation recklessly and without regard for its truth.” *Braun v. Glade Valley School, Inc.*, 77 N.C. App. 83, 87, 334 S.E.2d 404, 407 (1985). Here, defendants did not allege fraud on the part of Mike’s. Defendants’ factual allegations against Mike’s, in their entirety, are as follows:

V.

During the calendar year of 1997, Third Party Defendant Mike’s Auto Sales, Inc., purchased a 1996 Chevrolet Cavalier, . . . which said vehicle, upon information and belief, and unknown to the Defendants/Third Party Plaintiffs, had been involved in a collision.

VI.

Subsequent to purchasing the vehicle, Third Party Defendant Mike’s Auto Sales, Inc., made repairs to the vehicle, upon information and belief, which repairs totaled, upon information and belief, 40% of fair market value of the vehicle at the time that said repairs were made, which said repairs and damage was unknown to the Defendants/Third Party Plaintiffs.

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VII.

Subsequent to making the repairs to the vehicle, Third Party Defendant Mike's Auto Sales, Inc., sold the 1996 Chevrolet Cavalier . . . to Third Party Defendant Greensboro Auto Auction, without disclosing that the vehicle had prior damage or had been involved in a collision to the extent that the damage to the vehicle exceeded 25% of its fair market value; or, in the alternative, did, in fact, disclose such information, but did not place said information on the appropriate forms promulgated by the North Carolina Department of Motor Vehicles.

There is no allegation here that Mike's made any representation to defendants, much less that Mike's made a representation "recklessly and without regard for its truth." *Id.* Accordingly, defendants, having failed to allege that Mike's acted with fraudulent intent, have not properly stated a claim for relief pursuant to N.C.G.S. § 20-71.4(a) and N.C.G.S. § 20-348(a).

Defendants cite *Payne v. Parks Chevrolet, Inc.*, 119 N.C. App. 383, 458 S.E.2d 716 (1995), and *Wilson v. Sutton*, 124 N.C. App. 170, 476 S.E.2d 467 (1996), *disc. review denied*, 345 N.C. 354, 483 S.E.2d 192 (1997), in support of their contention that they have properly alleged a cause of action pursuant to these statutes. However, these cases support our holding that civil liability requires pleading both N.C.G.S. § 20-71.4(a) and N.C.G.S. § 20-348(a). The plaintiffs in *Payne* alleged that the defendant had violated both N.C.G.S. § 20-71.4(a) and N.C.G.S. § 20-348(a). *See Payne*, 119 N.C. App. at 384, 458 S.E.2d at 717. The verdict sheet contained the question, "did the defendant . . . act with such gross negligence or recklessness in its dealings with plaintiff as to indicate an intent to defraud him?" *Id.*, 458 S.E.2d at 718. Similarly, in *Wilson*, the jury found that the defendants intended to defraud the plaintiff. *See Wilson*, 124 N.C. App. at 173, 476 S.E.2d at 469.

Defendants' third-party complaint asserted vague allegations of negligence in the causes of action for indemnity and contribution. However, defendants have cited no authority in their brief to support a negligence claim against Mike's. Defendants allege only that Mike's failed to disclose the fact that the Chevrolet had been involved in a collision, yet they have not alleged that Mike's had any duty to make this disclosure. *See, e.g., Stamm v. Salomon*, 144 N.C. App. 672, 680-81, 551 S.E.2d 152, 158 (2001) (quoting with approval an instruction to the jury that "A person has a duty to disclose all facts

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material to a transaction or event where he is a fiduciary, he has made a partial or incomplete representation, [or] he is specifically questioned about them.' ” (alteration in original)), *disc. review denied*, 355 N.C. 216, 560 S.E.2d 139 (2002). Accordingly, we conclude that the trial court did not err in granting the motion to dismiss for failure to state a claim upon which relief may be granted.

Defendants additionally argue that the trial court erred in granting the motion to dismiss on the ground that the third-party complaint failed to give Mike’s sufficient notice of the nature and basis of the claim against it. We need not consider this alleged error, however. We held above that the motion to dismiss was properly granted on the ground that the third-party complaint failed to state a claim upon which relief may be granted. “Since the motion to dismiss can be sustained on [this ground], it is unnecessary to review the dismissal further.” *Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 792, 561 S.E.2d 905, 909 (2002).

[3] Finally, defendants argue that the trial court erred in awarding attorneys fees. The relevant part of the trial court’s order states as follows:

IN ADDITION, THE COURT FINDS that the Third Party Defendant, Mike’s Auto Sales, Inc., has had to endure additional expenses in this matter that were in no way the fault of said Third Party Defendant, but rather were caused by the failure of the Third Party Plaintiffs and their counsel to notify Third Party Defendant’s counsel concerning a conflict on April 30, 2001 and causing a second hearing of this matter. The Court finds that the Third Party Plaintiffs and their counsel shall bear the reasonable additional expenses incurred by Third Party Defendant, Mike’s Auto Sales, Inc., which the Court determines to be the sum of \$600.00, which shall be paid to the attorney for the Third Party Defendant, Edward L. Powell, upon entry of this Order.

The award of attorneys fees here was a sanction against defendants. As such, this part of the interlocutory order does not affect a substantial right and hence, is not immediately appealable. *See Cochran v. Cochran*, 93 N.C. App. 574, 577, 378 S.E.2d 580, 582 (1989) (stating that an order granting attorney fees is interlocutory and does not affect a substantial right); *Routh v. Weaver*, 67 N.C. App. 426, 428, 313 S.E.2d 793, 795 (1984) (stating that an order imposing sanctions is interlocutory). Although defendants have not met their burden of demonstrating that a substantial right will be compromised without

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an immediate appeal of this issue, see *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994), we have, in our discretion and in the interest of judicial economy, reviewed the award of attorneys fees.

The general rule in this State is that a successful litigant cannot recover attorneys fees absent statutory authority. See, e.g., *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*, 350 N.C. 379, 536 S.E.2d 70 (1999). However, we have held that the trial court has authority to impose a sanction of attorneys fees against an attorney who violates the Rules of General Practice for the Superior and District Courts and the Rules of Professional Conduct. See *Couch v. Private Diagnostic Clinic*, 146 N.C. App. 658, 665, 554 S.E.2d 356, 362 (2001), *disc. review denied and appeal dismissed*, 355 N.C. 348, 563 S.E.2d 562 (2002). We upheld the lower court's determination that trial courts have "inherent authority to sanction attorneys for misconduct, which sanctions may include the imposition of attorney's fees, irrespective of statutory authority," and we explained that "this inherent authority encompasses not only the power but also the duty to discipline attorneys, who are officers of the court, for unprofessional conduct." *Id.* at 665-66, 554 S.E.2d at 362 (internal quotation marks omitted). "Unprofessional conduct subject to this power and duty includes misconduct, malpractice, or deficiency in character, and any dereliction of duty *except mere negligence or mismanagement.*" *In re Hunoval*, 294 N.C. 740, 744, 247 S.E.2d 230, 233 (1977) (internal quotation marks and citation omitted) (emphasis added).

Mike's did not cite any statutory authority for the imposition of attorneys fees here; rather, Mike's argues that the trial court assessed the fees in the exercise of its inherent authority. However, the trial court made no finding of misconduct, malpractice, deficiency in character, or dereliction of duty. Here, the court's order suggests nothing tending to show that the second hearing was necessitated by misconduct amounting to more than "mere negligence or mismanagement." Accordingly, we believe the court erred in awarding the attorneys fees to Mike's, and we reverse this part of the order.

Affirmed in part and reversed in part.

Judges GREENE and BIGGS concur.

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JOSEPH T. CONNOLLY AND WIFE, PATRICIA A. CONNOLLY; PHILLIP CRAWFORD; WENDELL HAINLIN AND WIFE, MARY E. HAINLIN; RICHARD C. HALFORD AND WIFE, MELINDA HALFORD; RONALD HALLIBURTON AND WIFE, SHIRLEY HALLIBURTON; PATRICK S. LLOYD; MARK S. MORRIS AND WIFE, DARLENE A. MORRIS; S. JASON TRONCALE AND WIFE, LINDA L. TRONCALE; M. D. WARD AND WIFE, ANNETTE P. WARD, PLAINTIFFS V. COLIN ROBERTSON, DEFENDANT

No. COA01-1047

(Filed 6 August 2002)

1. Easement— appurtenant—subdivision road—standing to enjoin use

Homeowners in a subdivision have an easement appurtenant to a road in the subdivision which gives them standing to seek to enjoin use of the road by an owner of an adjacent tract of land.

2. Highways and Streets— right to use of roads in subdivision—fee simple ownership—directed verdict

The trial court did not abuse its discretion by granting a directed verdict in favor of plaintiff homeowners on defendant's claim of right to the roads in the pertinent subdivision even though it excluded an attorney witness's testimony regarding defendant's alleged fee simple ownership of the roads, because the attorney witness based his expert opinion on inadequate facts and data.

3. Easements— by prescription—use of roads in subdivision

The trial court did not abuse its discretion by granting a directed verdict in favor of plaintiff homeowners on defendant's claim of right to the roads in the pertinent subdivision even though defendant alleges the acquisition of an easement by prescription, because: (1) absent evidence establishing that the prior adverse user's intentions in using the land were hostile, his use of the road is considered to be permissive; and (2) even assuming arguendo that the use of the road was adverse or hostile, defendant has still failed to meet his burden of providing a continuous and uninterrupted use of the property when defendant cannot establish privity between himself and the prior adverse user.

4. Easements— express grant—use of roads in subdivision

The trial court did not abuse its discretion by granting a directed verdict in favor of plaintiff homeowners on defendant's claim of right to the roads even though defendant alleges he had

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an easement by express grant provided in a 1927 agreement, because: (1) the agreement grants an express easement only after the condition precedent of platting both pertinent properties is met; and (2) there was insufficient evidence that a previous platting of the properties was done or that it was approved by one of the named individuals.

Appeal by defendant from an order entered 25 October 2000 by Judge James L. Baker, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 16 May 2002.

Ball Barden & Bell, P.A., by Stephen L. Barden, III, for plaintiff-appellees.

Ferikes & Bleyнат, P.L.L.C., by Joseph A. Ferikes, for defendant-appellant.

CAMPBELL, Judge.

Summer Haven is a platted and recorded subdivision located in Buncombe County. Plaintiffs are homeowners who own lots in sections "C" and "D" of Summer Haven. A circular road (hereinafter "Loop Road") serves these lots and is the subject of this appeal. Loop Road is a one-way road that has never been dedicated or used as a public way or accepted by any governmental body or agency. None of the lots acquired in Summer Haven gave plaintiffs a deed to Loop Road. Nevertheless, plaintiffs entered into a road maintenance agreement, recorded around 1987, whereby they agreed to "keep the routine maintenance [of Loop Road] going and any new pavement that needed to be done."

As a partner in Bee Tree Land Partnership, defendant is one of the owners of a 253.35-acre tract of land (hereinafter "Bee Tree Property") that is located to the northwest of and adjacent to Summer Haven. The Bee Tree Property has access to a public road and several other roads running throughout the tract. Despite this access to other roads, defendant, believing that he and the other owners of the Bee Tree Property had an easement appurtenant for ingress and egress across the roads within Summer Haven, began using Loop Road to access a portion of that property. Defendant based his belief on a 1927 agreement (recorded in the Office of Register of Deeds in and for Buncombe County in Deed Book 371, at page 378) between the Summer Haven predecessors, H. A. and Vera Coggins, and the Bee Tree Property predecessors, C. T. Hodges and Carolina Florida

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Realty Company, that provided for a “full and unrestricted easement, right of way and perpetual right to the use of any and all of the streets . . . of the Summer Haven property[.]” However, defendant and the other owners purchased the Bee Tree Property without any assurances that they actually had a right-of-way over the Summer Haven roads and defendant’s deed of conveyance did not mention such a right-of-way.

On 12 November 1998, plaintiffs filed a complaint in the Buncombe County District Court seeking to enjoin defendant from using the roads within Summer Haven, particularly Loop Road, to access the Bee Tree Property. On 8 February 1999, defendant filed an answer raising as a defense his “right to ingress, egress and regress across said roadways as a result of an express grant of easement and fee simple ownership, or in the alternative, a prescriptive easement, easement by dedication, an implied easement or an easement by estoppel.”¹ The parties consented to the transfer of the case to the Buncombe County Superior Court on 14 April 1999.

Plaintiffs filed a motion for summary judgment and notice of hearing that was dated 26 August 1999. Thereafter, defendant also filed a motion for partial summary judgment on 11 January 2000. Both summary judgment motions were denied.

The trial on this matter was held on 16 October 2000. Plaintiffs presented evidence of their status as lot owners in Summer Haven. Additionally, plaintiffs presented expert testimony from a licensed attorney in North Carolina, Douglas Thigpen (“Attorney Thigpen”). Attorney Thigpen testified that in his opinion the 1927 agreement did not convey an interest in the roads to defendant or his predecessors in title. At the close of plaintiffs’ evidence, defendant moved for directed verdict based, in part, on plaintiffs’ lack of standing to make such a claim. This motion was denied.

Defendant presented evidence, which included expert testimony from another licensed attorney in North Carolina, John Parce (“Attorney Parce”). Attorney Parce testified that in his opinion the 1927 agreement did grant defendant an interest in the Summer Haven roads. Defendant’s expert also attempted to present evidence that defendant had fee simple ownership of the Summer Haven roads pursuant to a 1999 deed received from William T. Penrod, Jr. (“Penrod, Jr.”), allegedly the sole heir to the remaining property and roads in

1. Defendant also counterclaimed for malicious prosecution, but this claim was severed on 19 June 2000 and a separate trial was ordered.

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Summer Haven. The trial court did not allow Attorney Parce to testify as to his opinion regarding ownership of the roads, but his opinion was heard by the court on *voir dire*. Afterwards, defendant presented additional evidence with respect to his having an interest in the roads based on a prescriptive easement and/or an easement by express grant.

At the close of defendant's evidence, plaintiffs moved for a directed verdict on all issues raised by defendant. The plaintiffs' motion was granted. On 25 October 2000, the trial court entered an order "prohibit[ing] and permanently enjoin[ing defendant] from using the loop road located in Sections C and D of Summer Haven Subdivision or the right-of-way shown on the plats of Sections C and D for access to property in which Defendant has an ownership interest located near or adjacent to the Summer Haven Subdivision." Defendant appeals.

I. *Standing*

[1] By defendant's first assignment of error he argues plaintiffs lack standing to challenge his use of Loop Road. Specifically, defendant contends that since none of the plaintiffs' lots included a deed to Loop Road, their only legal rights are to use the road without interference but that plaintiffs have no right to enjoin him from using the road. We disagree.

In *Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E.2d 30 (1964), our Supreme Court addressed a similar situation involving a lot owner's right to the streets in the subdivision to which he or she had no ownership interest. The Supreme Court held, in pertinent part, that:

Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets . . . , a purchaser of a lot or lots acquires the right to have the streets . . . kept open for his reasonable use It is said that such streets . . . are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. It is a right in the nature of an easement appurtenant. . . . [that] may not be extinguished, altered or diminished except by agreement or estoppel.

Id. at 421, 135 S.E.2d at 35-36 (citations omitted). An easement appurtenant "adheres to the land, cannot exist separate from it, and can be conveyed only by conveying the land involved; its use is limited to the

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land it was created to serve and cannot be extended to other land or other landowners without the consent of all owners of the easement.” *Frost v. Robinson*, 76 N.C. App. 399, 400, 333 S.E.2d 319, 320 (1985) (holding that an easement appurtenant created only to serve lots owned by the plaintiff and the defendant could not be partially deeded by the defendant for use by the owner of an adjacent tract of land immediately behind the defendant’s lots because that owner had no interest in the easement appurtenant). *See also Wood v. Woodley*, 160 N.C. 17, 75 S.E. 719 (1912).

Plaintiffs in the present case have an easement appurtenant in Loop Road. The property they own is “shown and described on plats recorded in the Buncombe County Registry of Deeds in Plat Book 7, at Page 24, 35, and 36 and in Plat Book 10, at Page 23.” As such, plaintiffs have a right to ensure that the road is not extended to other lands (such as the Bee Tree Property) or used by other landowners (such as defendant) without their consent, especially when that use will likely alter or diminish plaintiffs’ use. Thus, plaintiffs have the right to bring an action seeking to enjoin defendant’s use of Loop Road if he does not have an interest in the road and is attempting to interfere with their use of it by making the road available to all the other owners of the 253.53-acre tract that comprises the Bee Tree Property. *See generally Frost*, 76 N.C. App. at 400-01, 333 S.E.2d at 320.

II. *Directed Verdict*

With respect to defendant’s three remaining assignments of error, they each present a different theory under which defendant attempted to prove he was legally entitled to use the Summer Haven roads, in particular, Loop Road. By these assigned errors defendant contends that the trial court erred in ultimately directing verdicts against him on the issues of (A) fee simple ownership, (B) easement by prescription, and (C) easement by express grant. We disagree as to all three assignments of error.

“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 discre-

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tion. *G.P. Publications, Inc. v. Quebecor Printing-St. Paul, Inc.*, 125 N.C. App. 424, 481 S.E.2d 674 (1997).

A. Fee Simple Ownership

[2] By his second assignment of error, defendant argues the court erred in excluding the testimony of Attorney Parce regarding defendant's claim to ownership of the Summer Haven roads, which ultimately led to a directed verdict against him on the issue of fee simple ownership of the roads.

The general rule is that the party attempting to claim possession of land has the burden of proving that he has good title against the whole world or against the opposing party by estoppel. *Mobley v. Griffin*, 104 N.C. 112, 114, 10 S.E. 142, 142 (1889). A *prima facie* showing of title may be made by offering a connected chain of title to the party. *Id.* This connected chain of title can be established by relevant documentation, such as deeds, as well as through the opinions of expert witnesses who have based their opinions on this documentation or other evidence that may or may not be otherwise admissible. See 1 Henry Brandis, Jr., *Brandis on North Carolina Evidence*, § 136 (3rd ed. 1988) (providing that an admissible expert opinion "may be based upon the opinion of another expert or upon hearsay."). Nevertheless, if the expert's opinion is based on inadequate facts or data, it should be excluded. *Id.* It is generally well established that North Carolina courts are "afforded wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984).

In the instant case, Attorney Parce testified that following several conveyances of lots in the Summer Haven subdivision, the remainder of the property was deeded to William T. Penrod, Sr. ("Penrod, Sr.") as trustee. Penrod, Sr. subsequently conveyed additional property in Summer Haven before dying and leaving any remaining but unspecified property not conveyed to his son, Penrod, Jr. Penrod, Jr. and his wife deeded this remaining property to defendant in 1999. However, the trial court did not allow Attorney Parce to further testify that, in his expert opinion, the Summer Haven roads were part of the remaining property deeded to defendant. We do not find that the court erred in doing so.

Attorney Parce attempted to base his expert opinion regarding defendant's fee simple ownership of the roads solely on (1) a deed whereby Penrod, Sr. conveyed property to the plaintiffs' predecessors in title while he was trustee, (2) a deed from Penrod, Jr. and his

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wife to defendant, and (3) the affidavit of Penrod, Jr. stating that he was Penrod, Sr.'s sole heir and that his father owned all the roads in Summer Haven. However, Attorney Parce testified that, aside from the deed, there was nothing in the Buncombe County public records officially granting Penrod, Sr. authority to hold the property as trustee. Secondly, there was no conclusive documentation to identify Penrod, Jr. as his father's sole heir. The only documentation establishing this allegation was Penrod, Jr.'s own affidavit and an unprobated, unrecorded copy of Penrod, Sr.'s will that Attorney Parce did not have with him in court. Finally, Penrod, Jr. personally struck out of his affidavit all references to his father having retained any ownership in the Summer Haven roads. Thus, having based his expert opinion on inadequate facts and data, the trial court did not abuse its discretion in excluding Attorney Parce's expert opinion and directing a verdict on this issue.

B. Easement by Prescription

[3] By defendant's third assignment of error he argues the trial court erred by directing a verdict on the issue of his acquisition of an easement by prescription. It is well recognized in North Carolina that in order to prevail on an issue of easement by prescription:

'[A] plaintiff must prove the following elements by the greater weight of the evidence: (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed through the twenty-year period.'

Town of Sparta v. Hamm, 97 N.C. App. 82, 86, 387 S.E.2d 173, 176 (1990) (citation omitted). Defendant has failed to meet his burden with respect to the first and third elements.

"North Carolina adheres to the presumption of permissive use which plaintiffs must rebut in order to prevail on the element of adversity, hostility and claim of right." *Id.* "A 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right." *Dulin v. Faires*, 266 N.C. 257, 261, 145 S.E.2d 873, 875 (1966). In the case *sub judice*, Peter Medure ("Medure") acquired ownership of the Bee Tree Property from H. A. Coggins in 1969. Two nephews of Medure testified that they used Loop Road throughout Medure's own-

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ership of the land even after being told not to do so by a Summer Haven property owner. However, even though this testimony may indicate that each nephew's state of mind in using the road was adverse or hostile, it does not provide any insight into Medure's state of mind. Therefore, absent evidence establishing Medure's intentions in using the land were hostile, we must consider his use of the road to be permissive.

Nevertheless, assuming *arguendo* that Medure's use of the road was adverse or hostile, defendant has still failed to meet his burden with respect to the third element required to establish an easement by prescription. The third element requires that there be a continuous and uninterrupted use of the property by the party claiming a possessory interest for a period of at least twenty years. The possessions of successive adverse users in privity may be "tacked" with prior adverse users so as to aggregate this prescriptive twenty-year period. Tacking is a permissible legal principle between a successive and prior adverse user when there is no hiatus or interruption in the possession. See *Beam v. Kerlee*, 120 N.C. App. 203, 212, 461 S.E.2d 911, 918 (1995).

Here, defendant contends that he has met his burden regarding this element because, as the successive adverse user of Loop Road, defendant can tack his use with that of Medure, the prior adverse user of the road. However, when Medure died in 1991, Medure's widow acquired ownership of the Bee Tree Property. In 1995, she deeded title to that property to Bee Tree Land Partnership (and thus defendant). Defendant offered no evidence that Medure's widow used Loop Road or claimed prescriptive rights to any of the Summer Haven roads between the years of 1991 and 1995. Therefore, defendant cannot establish privity between himself and Medure because the absence of such evidence clearly indicates an interruption in the use of Loop Road over the last twenty years. Thus, the trial court did not err in granting plaintiffs' motion for a directed verdict on this issue.

C. *Easement by Express Grant*

[4] By his final assignment of error, defendant argues the trial court erred by directing a verdict against him on the issue of easement by express grant.

Our Supreme Court has held that:

'No particular words are necessary to constitute a grant, and any words which clearly show the intention to give an easement,

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which is by law grantable, are sufficient to effect that purpose, provided the language is certain and definite in its terms. . . . The instrument should describe with reasonable certainty the easement created and the dominant and servient tenements.'

Hensley v. Ramsey, 283 N.C. 714, 730, 199 S.E.2d 1, 10 (1973) (quoting 28 C.J.S. *Easements* § 24). In the case at bar, defendant points to the 1927 agreement between the original predecessors of Summer Haven and Bee Tree Property, which stated the two properties were to be "platted and subdivided under the direction and approval of C. T. Hodges and H. A. Coggins, they to determine the size of lots, the streets, etc." The agreement further stated that:

Whenever the said platting shall have been done, it is hereby mutually agreed between the parties of the first part and Carolina Florida Realty Company, that full and unrestricted easement, right of way and perpetual right to the use of any and all of the streets and alleys marked out upon any of the sections of the Summer Haven property, and all of the streets and alleys laid out upon the platted portions of the lands belonging to the parties of the first, shall be given to the said H. A. Coggins and to the Carolina Florida Realty Company[.]

Based on our reading of the agreement, we conclude that it grants an express easement to the Bee Tree Property owners only after a condition precedent is met.

In *Cargill, Inc. v. Credit Assoc., Inc.*, 26 N.C. App. 720, 217 S.E.2d 105 (1975), this Court defined "conditions precedent" as:

'[T]hose facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available.'

Id. at 722-23, 217 S.E.2d at 107 (quoting 3A Arthur L. Corbin, *Corbin on Contracts* § 628 (1960)). Conditions precedent are not favored by the law. *Jones v. Realty Co.*, 226 N.C. 303, 37 S.E.2d 906 (1946). Thus, absent clear and plain language, provisions of a contract will ordinarily be construed as a promise instead of a condition precedent. *Stewart v. Maranville*, 58 N.C. App. 205, 206, 292 S.E.2d 781, 782 (1982). However, the use of language such as "when," "after," and "as soon as" clearly indicates that a promise will not be performed except upon the happening of a stated event, i.e., a condition precedent. *Craftique, Inc. v. Stevens and Co., Inc.*, 321

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N.C. 564, 567, 364 S.E.2d 129, 131 (1988) (citing *Jones*, 226 N.C. at 306, 37 S.E.2d at 908).

Here, the condition precedent in the 1927 agreement stated that *whenever* both properties were subdivided into plats under the direction and approval of C. T. Hodges and H. A. Coggins, an easement to the Summer Haven roads would be granted. H. A. Coggins subsequently died in 1948. The only evidence defendant offered that the platting was done before his death was a notation on one of defendant's exhibits (showing a plat of both properties) that stated, in part: "Scale: 1" = 500'—22 October 1935[,] Revised 1 February 1950[.]" This single notation referencing a date prior to H. A. Coggins' death is insufficient to establish that a previous platting of the properties was done, much less, that the platting was approved by H. A. Coggins. Thus, the trial court did not abuse its discretion in directing a verdict in favor of plaintiffs because there was insufficient evidence to allow submission of this issue to the jury.

Accordingly, for the aforementioned reasons, plaintiffs did have standing to challenge defendant's use of the roads in the Summer Haven subdivision. Also, the trial court did not err in granting a directed verdict in favor of plaintiffs on defendant's claim of right to the roads based on fee simple ownership, easement by prescription, and/or easement by express grant.

Affirmed.

Judges TIMMONS-GOODSON and LEWIS concur.

SUSAN McCONNELL, PLAINTIFF V. NACY McCONNELL, DEFENDANT

No. COA01-1009

(Filed 6 August 2002)

1. Appeal and Error— appealability—child custody—safety of child

A substantial right was affected and an interlocutory appeal was heard where plaintiff appealed from a child custody and support order that did not address claims for alimony or equitable distribution but the physical well being of the child was at issue.

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2. Child Support, Custody, and Visitation— findings—no assignment of error or exception—conclusive

The trial court's findings were conclusive on appeal in a child custody action where plaintiff did not assign error or except to any of the court's findings.

3. Child Support, Custody, and Visitation— custody—changed circumstances—remarriage to convicted molester

An order changing the custody of a child was justified by a change of circumstances, and the court did not abuse its discretion in concluding that it was in the child's best interest to change custody to defendant, where plaintiff indicated her intention to marry a man convicted of molesting a 14 year old female and who admitted to continued sexual urges for postpubescent females.

4. Child Support, Custody, and Visitation— custody—changed circumstances—effect on the child

An order changing child custody sufficiently set forth changed circumstances affecting the welfare of the child where there was a direct threat of sexual molestation. The order must demonstrate consideration of the effect on the child's welfare, which was clearly done here, but the court is not required to wait for the adverse effects to manifest themselves or for harm to come to the minor before it can alter custody.

Judge GREENE dissenting.

Appeal by plaintiff from judgment entered 13 November 2000 by Judge V. Bradford Long in Moore County District Court. Heard in the Court of Appeals 21 May 2002.

Law Firm of Richard J. Costanza, by Hal Morris, for plaintiff.

Robbins, May & Rich, LLP, by P. Wayne Robbins, for defendant.

BIGGS, Judge.

This appeal arises from a modification of a custody order based upon changed circumstances. For the reasons herein, we affirm the trial court.

Susan McConnell (plaintiff) and Nancy McConnell (defendant) were married on 27 December 1971, and lived together as husband and wife until June 1996, when they separated. Although four children were born of this marriage, only one child, born on 8 October

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1985, was a minor at all relevant times and she is the subject of this action.

Following their separation, on 13 August 1996, plaintiff filed a complaint in Moore County Civil District Court, seeking custody of the parties' minor child, child support, equitable distribution, temporary possession of marital home, post separation support and alimony. Defendant filed an answer admitting that it was in the minor child's best interest for plaintiff to have sole physical custody.

On 11 March 1997, following a hearing for permanent custody and child support, the trial court entered an order awarding joint legal custody, with plaintiff having primary physical custody of the minor child and defendant having secondary custody in the form of visitation.

Some time after the 1997 order, defendant remarried and purchased a home in Clayton, North Carolina. Plaintiff began corresponding with Davis Chung, a Virginia resident she met through a Christian Internet chat room. Plaintiff and Chung were later engaged to marry. Plaintiff planned to relocate to Virginia with the minor child, but has not yet moved.

On 5 June 2000, defendant filed a Motion to Modify Child Custody alleging that plaintiff was engaged to marry Davis Chung, a convicted child sex offender, and that she intended to relocate to Virginia with the parties' minor child.

On 13 November 2000, the trial court entered an order granting defendant's motion to modify and placing the minor child in his custody. From this order, plaintiff appeals.

[1] At the outset, we note that plaintiff appeals from a child custody and support order that does not address her claims for alimony or equitable distribution. Thus based on the record before us, this appeal would appear to be interlocutory, since the order appealed from does not resolve all of the parties' claims arising out of this action. *See generally, Embler v. Embler*, 143 N.C. App. 162, 545 S.E.2d 259 (2001); *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377 (1950). An immediate appeal from an interlocutory order will only lie where (1) 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.G.S. § 1A-1, Rule 54(b); or (2) when the challenged order affects a substantial right that may be lost without immediate review.

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Flitt v. Flitt, 149 N.C. App. 475, 561 S.E.2d 511 (2002). Whether an interlocutory appeal affects a substantial right is determined on a case by case basis. *McCallum v. North Carolina Coop. Extensive Serv. of N.C. State Univ.*, 142 N.C. App. 48, 542 S.E.2d 227 (2001). The burden to establish that a substantial right will be affected unless he is allowed immediate appeal from an interlocutory order is on the appellant.¹ *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 444 S.E.2d 252 (1994).

In the case *sub judice*, the trial court did not certify the case for immediate appeal pursuant to Rule 54, and thus we must determine whether the order appealed from affects a substantial right. "A substantial right is 'one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.'" *Turner v. Norfolk S. Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666, 670 (2000) (citations omitted). Our Supreme Court, in *Oestreicher v. Stores*, 290 N.C. 118, 130, 225 S.E.2d 797, 805 (1976), defined a substantial right as "a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right." This appeal arises from an order modifying a permanent custody order for a minor child. Our Courts have not addressed whether a permanent custody order affects a substantial right.² However, the order in this case involves the removal of the child from a home where the court specifically concluded "that there is a direct threat that the child is subject to sexual molestation if left in the mother's home." Where as here, the physical well being of the child is at issue, we conclude that a substantial right is affected that would be lost or prejudiced unless immediate appeal is allowed. Accordingly, we will address the merits of this appeal.

[2] Although plaintiff sets forth several assignments of error in her brief, the dispositive issue on appeal is whether the trial court erred in modifying the 1997 custody order. Plaintiff specifically argues that (1) there was insufficient evidence presented to establish a substantial change of circumstances; (2) the court in its order failed to make a specific finding of fact that a substantial change of circumstance

1. Though not applicable to the present case, effective 31 October 2001, N.C.R. App. P. 28(b)(4) requires that when an appeal is interlocutory, appellant's brief must include a statement to support appellate review when the appeal is based on the existence of a substantial right.

2. Our Courts have generally held that interlocutory orders in domestic cases that implicate only financial repercussions do not affect a substantial right. *Embler v. Embler*, 143 N.C. App. at 166, 545 S.E.2d at 262.

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that “affects the welfare of the child” had occurred; and (3) the court’s findings of fact do not support its conclusions of law. We disagree.

It is well settled that the trial court is vested with broad discretion in child custody cases. *Henderson v. Henderson*, 121 N.C. App. 752, 468 S.E.2d 454 (1996). The decision of the trial court should not be upset on appeal absent a clear showing of abuse of discretion. *Falls v. Falls*, 52 N.C. App. 203, 278 S.E.2d 546 (1981). “Findings of fact by a trial court must be supported by substantial evidence.” *Browning v. Helff*, 136 N.C. App. 420, 423, 524 S.E.2d 95, 97-98 (2000) (citation omitted). Substantial evidence has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Union Transfer and Storage Co. Inc. v. Lefeber*, 139 N.C. App. 280, 533 S.E.2d 550 (2000). “A trial court’s findings of fact in a bench trial have the force of a jury verdict and are conclusive on appeal if there is evidence to support them.” *Browning*, 136 N.C. App. at 423, 524 S.E.2d at 98. However, the trial court’s conclusions of law must be reviewed *de novo*. *Id.*

In the case *sub judice*, plaintiff does not assign error or except to any of the court’s findings. Where no error is assigned to the findings of fact, such findings are presumed to be supported by competent evidence and are binding on appeal. *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 292 S.E.2d 159 (1982) (citations omitted); *see also Baker v. Log Systems, Inc.*, 75 N.C. App. 347, 350-51, 330 S.E.2d 632, 635 (1985) (where appellant does not bring forth exceptions in his brief to certain findings of the trial court, he is deemed to have abandoned them under N.C.R. App. P. 28(b)(5)). The court’s findings in this case are therefore conclusive on appeal. Thus, we must determine whether these findings support the trial court’s conclusions of law.

[3] A court order for custody of a minor child “may be modified . . . at any time, upon motion in the cause and a showing of changed circumstances . . . ” pursuant to N.C.G.S. § 50-13.7(a) (2001). Our Supreme Court has held that a custody order may not be modified until the movant establishes that a substantial change in circumstances exists which affects the welfare of the minor child. *Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). The required change in circumstances need not have adverse effects on the child. *Id.* “The court need not wait for any adverse effects on the child to manifest themselves before the court can alter custody.” *Evans v. Evans*, 138

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N.C. App. 135, 140, 530 S.E.2d 576, 579 (2000). “It is neither necessary nor desirable to wait until the child is actually harmed to make a change in custody.” *Id.* (citations omitted). Moreover, “a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.” *Pulliam*, 348 N.C. at 620, 501 S.E.2d at 900.

Once the movant has shown a substantial change in circumstances affecting the welfare of the minor child, the trial court must determine whether a change in custody is in the best interest of the child. *Id.* at 619, 501 S.E.2d at 899. Our Supreme Court has previously held that “the welfare of the child has always been the polar star which guides the courts in awarding custody.” *Id.* (citation omitted).

The trial court made the following pertinent findings of fact in support of its determination that substantial changed circumstances existed to modify the child custody order:

....

20. Since the entry of the 1997 Custody Order, the Plaintiff met Mr. Davis Chung through a Christian Internet chat room in May of 1999.

....

22. Since meeting in July of 1999, the Plaintiff and Mr. Chung have fallen in love, are engaged and plan to marry.

23. Mr. Chung was convicted in the state courts of the Commonwealth of Virginia in May of 1995 of Indecent Liberties With a Minor Child, was sentenced to 4 years in prison and was paroled after approximately 20 months.

24. The minor child, who was the victim of Mr. Chung’s crime, was at the time a 14 year old female who was in Mr. Chung’s charge as he was a teacher in the public schools of the Commonwealth of Virginia, also serving as a coach and a counselor at a girl’s summer camp.

25. There is believable evidence before the Court that Mr. Chung has admitted to others that the 14 year old of whom he was convicted of molesting was not his only victim.

....

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28. The Court further finds that there has been no evidence that the minor child of the parties is under any danger of being sexually molested in the Father's home by either the Father or the Father's current wife.

29. The Court finds that the Plaintiff after learning of Mr. Davis Chung's past history refused to disclose Mr. Chung's history to the Defendant.

30. The Plaintiff was urged by her brothers, given the past history of sexual molestation in their family, to disclose Mr. Chung's past to the Defendant and the Plaintiff continued to refuse.

31. The Defendant only learned of Mr. Chung's past convictions of sexual molestation through the Plaintiff's brothers who made the disclosure to the Defendant.

32. The Court specifically finds that the minor child in question is by observation of the Court as well as by the stipulation by all the parties, an attractive young female who is 14 years of age and will be 15 years of age in 11 days, who has taken modeling classes and is an aspiring model.

33. The Court finds that Mr. Davis Chung, again forthrightly and candidly informs the Court that he continues to battle inappropriate urges toward post-pubescent teenage girls.

....

35. The Court further finds as a fact that as Mr. Chung has again forthrightly testified, that should this Court leave custody in the mother's home, Mr. Chung will unavoidably at times be left unsupervised with the minor child.

36. The Court finds that Mr. Chung has already transported the juvenile unsupervised on at least two occasions in an automobile from a teen club in Moore County to her home, that these automobile rides took place some time between midnight and 12:30 a.m.

37. Since meeting Mr. Chung personally in July of 1999, Plaintiff has spent the night in Mr. Chung's home and Mr. Chung has spent the night in Plaintiff's home with the minor child present and that the parties acknowledge sleeping with one another.

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38. The Court finds that the Plaintiff's plan in addition to marrying Mr. Chung is to move with the minor child to Mr. Chung's grandparents [sic] farm.

....

47. The Court specifically finds as a fact that this Court cannot find that it is in the child's best interest to place the child in a home where the Mother's fiancée and potential husband with whom she sleeps in the same house on occasion and plans to marry is a person convicted of sexually molesting 14 year old females and the minor child under consideration is a 14 year old attractive female and where the Mother's fiancée forthrightly and candidly admits that he is still subject to inappropriate urges towards post pubescent female children and further where Mother's background is one of coming from a home of which her brothers were sexually abused and her mother was an enabler of the sexual abuse of the brothers and mother has refused to disclose Mr. Chung's background to the Defendant and that this matter only came to light through the efforts of the Plaintiff's brothers.

While this Court has held that remarriage or relocation alone are insufficient to justify a modification based on changed circumstances, *Kelly v. Kelly*, 77 N.C. App. 632, 335 S.E.2d 780 (1985), this case involves much more. Here, plaintiff had indicated her intention to marry an individual who has admitted and been convicted of molesting a 14 year old female. More importantly, plaintiff's fiancée admits to continued sexual urges for postpubescent females. The minor child in the case *sub judice* "is a 14 year old attractive female." The court found that the child has been left alone in the care of plaintiff's fiancée in the past and will likely be left under his supervision in the future. These findings support the trial court's conclusion that circumstances have changed since the 1997 order to justify a modification.

[4] Moreover, we conclude that the order sufficiently sets forth how this changed circumstance "affects the welfare of the minor child." The court concluded "that there is a direct threat that the child is subject to sexual molestation in this mother's home." The court is not required to wait for adverse effects to manifest themselves or harm to come to the minor before it can alter custody. Though plaintiff relies on *Brewer v. Brewer*, 139 N.C. App. 222, 533 S.E.2d 541 (2000) and *Browning v. Helff*, 136 N.C. App. 420, 524 S.E.2d 95 (2000), for the

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proposition that the court must make specific findings as to any effect a change in circumstance has on the welfare of the child, we do not read *Brewer* or *Browning* to require that the court use specific language in its order. Rather, the order must demonstrate that the court has considered the effect on the child's welfare, which was clearly done here.

We hold that the trial court's findings support its conclusion, that a change of circumstances affecting the welfare of the child had occurred to justify modification of the order. Moreover, we hold that the court did not abuse its discretion in concluding that it was in the child's best interest to award custody to defendant.

Accordingly, the trial court's order is

Affirmed.

Judge GREENE dissents.

Judge HUDSON concurs.

GREENE, Judge, dissenting.

Because I believe plaintiff's appeal is interlocutory and therefore must be dismissed, I dissent.

A party may not immediately appeal an interlocutory order unless: (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 that there is no just reason to delay an appeal or (2) the " 'order deprives the appellant of a substantial right which would be jeopardized absent a review prior to a final determination on the merits.' " *See Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994) (citation omitted). In either situation, the burden is on the appellant to present an argument in her brief to this Court to support the acceptance of the appeal. *Id.*

In this case, the appeal is interlocutory as no final judgment exists on plaintiff's claims for alimony or equitable distribution. *See Embler v. Embler*, 143 N.C. App. 162, 165, 545 S.E.2d 259, 262 (2001) (an equitable distribution order explicitly leaving open the issue of alimony is interlocutory). While the trial court's judgment constitutes a final adjudication of the custody issue, the trial court did not certify the order pursuant to Rule 54(b). Furthermore, plaintiff presents no

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argument in her brief to this Court that the judgment affects a substantial right.³ Accordingly, I would dismiss plaintiff's appeal as interlocutory. *See Embler*, 143 N.C. App. at 167, 545 S.E.2d at 263.

STATE OF NORTH CAROLINA v. CLINTON McGRIFF, JR., DEFENDANT-APPELLANT

No. COA01-599

(Filed 6 August 2002)

**1. Indictment and Information— variance with evidence—
date of sexual abuse of child**

There was not a fatal variance between the indictments and the evidence in a prosecution for statutory rape and indecent liberties where defendant took issue with the dates, but courts are lenient in child abuse cases where there are differences between the dates alleged in the indictment and those proven at trial if they do not prejudice a defendant's opportunity to present an ade-

3. The majority has constructed an argument for plaintiff that the appeal affects a substantial right which would be jeopardized absent immediate appellate review. I disagree with that construct. There is no indication in the record to this Court that the child's well-being is in any danger while she is in defendant's custody. Indeed, the trial court specifically concluded there was no evidence "the child is under any threat of [sexual] molestation in [defendant's] home." Even so, this Court has specifically stated that a temporary custody order is interlocutory and "does not affect any substantial right . . . which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits." *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807, *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986). I see no reason to distinguish the interlocutory nature of temporary custody orders from the interlocutory nature of final custody determinations. While I acknowledge the importance of prompt appellate review of child custody orders, I also see the importance of prompt appellate review of temporary custody, alimony, and equitable distribution cases. Thus, absent some special facts, which do not exist in this case on this record, there can be no basis for differentiating between these domestic claims in the context of whether they affect a substantial right.

In the context of current law which labels an appeal as interlocutory if there are other claims asserted in the complaint that have not been resolved, a party seeking to assert multiple claims, i.e. equitable distribution and alimony, might better be served by not joining them into the same complaint. If this is done, resolution of a single claim would constitute a final order and be ripe for immediate appeal. If multiple claims are joined into one complaint and only one claim is fully and finally resolved, the trial court could be petitioned to issue a Rule 54(b) certification thus clearing the claim for immediate appellate review. Certification should be issued unless there is some "just reason" to delay the appeal. N.C.G.S. § 1A-1, Rule 54(b) (2001).

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quate defense. This defendant offered no alibi defense; in fact, defendant offered no evidence at all.

2. Indictment and Information— amendment—dates of sexual offenses

The trial court did not err during a trial for statutory rape and indecent liberties by allowing the State to amend the indictment to conform to the evidence of dates. Changing the dates in the indictment to expand the time frame did not substantially alter the charge set forth in the indictment.

3. Evidence— intercepted telephone conversation—protection of minor

The trial court did not err in a prosecution for statutory rape and indecent liberties by admitting evidence of an intercepted telephone conversation where a neighbor stepped outside while talking on a cordless telephone; she heard a conversation between defendant and the victim, recognized the voices, and was alarmed at the conversation; she continued to listen because she intended to inform the victim's mother; and she had another party listen to confirm the identity of the voices and the substance of the conversation. The continued listening was not done with bad purpose or without justifiable excuse but with concern for the welfare of a minor.

4. Sentencing— aggravating factor—abuse of trust

The trial court did not abuse its discretion when sentencing defendant for statutory rape and indecent liberties by finding as an aggravating factor that defendant took advantage of a position of trust or confidence where the fourteen-year-old victim knew defendant because defendant was living with a friend's sister; the friend and the victim visited everyday to babysit, often with no adult but defendant present; and the victim had known defendant for about two months when he began calling her, touching her, and writing to her.

Appeal by defendant from judgment entered 12 January 2000 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 20 February 2002.

Attorney General Roy Cooper, by Assistant Attorney General Alexandra M. Hightower, for the State.

John T. Hall, for defendant-appellant.

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BRYANT, Judge.

Defendant appeals from convictions of statutory rape and taking indecent liberties with a minor.

Defendant lived with his girlfriend, Ebony Hunter, in a complex of townhouses in Raleigh, North Carolina. Ebony's sister A.H., who was thirteen, frequently went to Ebony's house after school with the victim, K.S.W., then fourteen. In 1998, defendant began to call K.S.W. on the phone, write letters to her, kiss her and inappropriately touch her. The kissing and inappropriate touching occurred at Ebony's house when K.S.W. visited with A.H. One day in December of 1998, defendant talked K.S.W. into coming over. When K.S.W. arrived, defendant was dressed only in boxer shorts and he told her to come upstairs. K.S.W. followed him into a bedroom, where there was a blanket on the floor. K.S.W. told defendant that she did not want to do anything, but defendant unbuttoned her pants. Defendant then had vaginal intercourse with her. A few weeks later, defendant attempted to force K.S.W. to perform oral sex on him. K.S.W. told only her friends at school what had happened. At trial, K.S.W.'s friend, C.S., testified that K.S.W. told her that defendant "came up behind her and put his arms around her waist, and . . . one day . . . he tried to make her have oral sex and she didn't want to . . ." C.S. further testified that K.S.W. told her she had sexual intercourse with defendant, that defendant was "trying to pull down [her] pants and she was trying to keep them up but—I don't know what happened, but she told me that she was telling him to pull it out because it hurt and he wouldn't do it."

On 27 January 1999, Tonya Lesley, who lived a few doors away from K.S.W. and from defendant, was talking to a friend on a cordless telephone when she inadvertently intercepted a call between a male and a female whose voice she recognized as belonging to K.S.W. Lesley heard K.S.W. tell the male that she was mad at him for trying to force her to perform oral sex. After listening a while longer, Lesley determined that the male was defendant. While listening to the intercepted phone call, Lesley saw Ebony's eighteen-year-old sister, Tasha. Lesley motioned for her to come over and listen to the call to verify what she had heard. Tasha recognized defendant's voice. Tasha talked to Ebony later that day, and Ebony confronted K.S.W. K.S.W. called her mother and told her what happened.

Defendant was indicted on one count each of statutory rape of a 14-year-old and taking indecent liberties with a child. Defendant moved to exclude evidence of the phone conversation. The trial court

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denied the motion. The jury returned guilty verdicts on both counts. On 13 January 2000, defendant was sentenced to 300 to 369 months imprisonment for statutory rape, and 20 to 24 months imprisonment for indecent liberties with a minor after the judge found as an aggravating factor that defendant had taken advantage of a position of trust or confidence to commit the offense. Defendant appealed.

Defendant presents five assignments of error: whether the trial court erred by 1) denying defendant's motion to dismiss the charges due to a fatal variance between the indictments and the evidence; 2) allowing the State's motion to amend the indictment; 3) denying defendant's motion to exclude evidence of an illegally intercepted telephone conversation; 4) sentencing defendant in a manner not authorized by law, thus violating his constitutional rights; and 5) denying defendant's motion to dismiss the charges due to an insufficiency of the evidence.

I.

[1] Defendant first argues that the trial court erred by denying defendant's motion to dismiss the charges because of a fatal variance between the indictments and the evidence. We disagree.

N.C.G.S. § 15A-924(a)(5) states that criminal pleadings must contain "[a] plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation." N.C.G.S. § 15A-924(a)(5) (2001). The purpose of a bill of indictment is to put a defendant on such notice that he is reasonably certain of the crime of which he is accused. *State v. Brinson*, 337 N.C. 764, 448 S.E.2d 822 (1994). "An indictment is 'constitutionally sufficient if it apprises the defendant of the charge against him with enough certainty to enable him to prepare his defense and to protect him from subsequent prosecution for the same offense.'" *State v. Hutchings*, 139 N.C. App. 184, 188, 533 S.E.2d 258, 261 (quoting *State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996)), *review denied*, 353 N.C. 273, 546 S.E.2d 381 (2000).

In the case *sub judice*, the first count of the indictment, alleging statutory rape of a 14-year-old person, stated:

[O]n or between 01/04/1999, through 01/27/1999, in Wake County, the defendant . . . unlawfully, willfully and feloniously did engage

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in vaginal intercourse with K. S. W. (DOB: 04/05/1984), a]person of the age of fourteen (14) years. At the time the defendant was at least six years older than the victim and was not lawfully married to the victim. This act was done in violation of G. S. 14-27.7A.

Count II of the indictment, alleging indecent liberties with a child, stated:

[O]n or between 01/04/1999 through 01/27/1999, in Wake County, the defendant . . . unlawfully, willfully and feloniously did take and attempt to take immoral, improper, and indecent liberties with K. S. W. (DOB: 04/05/1984), who was under the age of sixteen (16) years at the time, for the purpose of arousing and gratifying sexual desire. At the time, the defendant was over sixteen (16) years of age and at least five (5) years older than said child. This act was done in violation of G.S. 14-202.1.

Defendant concedes that the indictment was proper on its face. However, defendant takes issue with the dates in both counts of the indictment, arguing that “there was a fatal variance between the allegations contained in the indictment . . . and the evidence introduced at trial.” The evidence introduced at trial showed that at least one of the offenses occurred in December, between 1 December and 25 December 1998, as opposed to “on or between 01/04/1999, through 01/27/1999” as alleged in the indictment. The court, upon motion by the State, allowed an amendment of the indictment to conform to the evidence. (See Issue II)

Courts are lenient in child sexual abuse cases where there are differences between the dates alleged in the indictment and those proven at trial. *Hutchings*, 139 N.C. App. at 188, 533 S.E.2d at 261. Our Supreme Court has stated that “in the interests of justice and recognizing that young children cannot be expected to be exact regarding times and dates, a child’s uncertainty as to time or date upon which the offense charged was committed goes to the weight rather than the admissibility of the evidence.” *State v. Wood*, 311 N.C. 739, 742, 319 S.E.2d 247, 249 (1984). Leniency has been allowed in cases involving older children as well. See *State v. Hardy*, 104 N.C. App. 226, 409 S.E.2d 96 (1991) (allowing leniency in case where the victim was fifteen years old). “Unless the defendant demonstrates that he was deprived of his defense because of lack of specificity, this policy of leniency governs. ‘[I]t is sufficient for conviction that the jury is satisfied upon the whole evidence that each element of the crime has been proved beyond a reasonable doubt.’” *State v. Everett*, 328 N.C.

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72, 75, 399 S.E.2d 305, 306 (1991) (alterations in original) (citations omitted) (quoting *State v. May*, 292 N.C. 644, 655, 235 S.E.2d 178, 185, *cert. denied*, 434 U.S. 928, 54 L. Ed. 2d 288 (1977)).

In *State v. Blackmon*, 130 N.C. App. 692, 696-97, 507 S.E.2d 42, 45 (1998), this Court stated that

this Court has observed more generally that “the date given in the bill of indictment is not an essential element of the crime charged and [that therefore] the fact that the crime was committed on some other date is not fatal.” In that same vein, we have also stated that a “variance between allegation and proof as to time is not material where no statute of limitations is involved.”

(Citations omitted.). In *Blackmon*, the defendant was convicted of eight counts of first-degree sexual offense of a minor and taking indecent liberties with a minor. On appeal, the defendant argued that the trial court erred in denying his motion to dismiss the indictments for lack of specificity. Specifically, the defendant argued that he was denied an opportunity to raise an alibi defense because the indictments listed the dates of the offenses as occurring between 1 January and 12 September 1994. In finding no error, the *Blackmon* Court stated that

in a case . . . in which the minor child testified at trial that the sexual acts and indecent liberties committed by defendant occurred when she was seven years old and that some of those acts happened when it was cold outside and some when it was warm outside, any variance between the indictments brought against defendant and the proof presented at trial is not fatal to the propriety of the indictments brought by the State.

Id. at 697, 507 S.E.2d at 46.

In this case, defendant argues that “[t]he change in dates prejudiced his ability to present a potential alibi defense.” However defendant offered no alibi defense for the dates originally alleged in the indictment, nor for the December dates shown by the evidence. In fact, defendant presented no evidence at all.

The State’s evidence tended to show that K.S.W. was unsure of the exact dates that defendant engaged in sexual acts with her. However, she thought it was before she went to Florida during her school Christmas break in 1998. Evidence also tended to show that defendant tried to force K.S.W. to perform oral sex on him after that

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Christmas break. This evidence substantially corresponds with the dates in the indictment.

Time variances do not require dismissal if they do not prejudice a defendant's opportunity to present an adequate defense. *See State v. Campbell*, 133 N.C. App. 531, 536, 515 S.E.2d 732, 735 (1999). "[A] defendant suffers no prejudice when the allegations and proof substantially correspond; when defendant presents alibi evidence relating to neither the date charged nor the date shown by the State's evidence." *State v. Booth*, 92 N.C. App. 729, 731, 376 S.E.2d 242, 244 (1989) (citations omitted). Defendant's contention that the variance between the dates in the indictment and the evidence presented at trial was fatal and deprived him of a potential alibi defense has no merit. Accordingly, this assignment of error is overruled.

II.

[2] Defendant next argues that the trial court erred by allowing the State's motion to amend the indictment. During the trial, the prosecutor moved to amend the indictment to conform to the evidence. Specifically, the prosecutor moved to change the time frame from between 4 January 1999 and 27 January 1999, to between 1 December 1998 and 27 January 1999. Defendant objected that the change would deprive him of the opportunity to pursue a bill of particulars to possibly prepare for an alibi defense. The court granted the motion to amend the indictment.

N.C.G.S. § 15A-923(e) (2001) states that "A bill of indictment may not be amended." However, this statutory requirement has been interpreted to mean that "an indictment may not be amended in a way which 'would substantially alter the charge set forth in the indictment.'" *Brinson*, 337 N.C. at 767, 448 S.E.2d at 824 (quoting *State v. Carrington*, 35 N.C. App. 53, 240 S.E.2d 475 (1978)). In the instant case, changing the dates in the indictment to expand the time frame to include December 1998 did not "substantially alter the charge set forth in the indictment." *Id.*

N.C.G.S. § 15A-924(a)(4) states:

A criminal pleading must contain:

A statement or cross reference in each count indicating that the offense charged was committed on, or on or about, a designated date, or during a designated period of time. Error as to a date or its omission is not ground for dismissal of the charges or for

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reversal of a conviction if *time was not of the essence* with respect to the charge and the error or omission did not mislead the defendant to his prejudice.

N.C.G.S. § 15A-924(a)(4) (2001) (emphasis added). Accordingly, this assignment of error is overruled.

III.

[3] Defendant next argues that the trial court erred by denying his motion to exclude evidence of an illegally intercepted telephone conversation. Defendant complains that the conversation was intercepted in violation of N.C.G.S. § 15A-287(a)(1) and 18 U.S.C.A. § 2511(1)(a) (2000), of the Omnibus Crime Control and Safe Streets Act of 1968 (Federal Wiretapping Statute). See 18 U.S.C.A. §§ 2510 et seq. Specifically, defendant contends that N.C.G.S. § 15A-287(a)(1) precludes the admission of statements made during the telephone conversation because the conversation was willfully intercepted without consent.¹ We disagree.

N.C.G.S. § 15A-287(a)(1) states:

Except as otherwise specifically provided in this Article, a person is guilty of a Class H felony if, without the consent of at least one party to the communication, the person . . . [w]illfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication.

N.C.G.S. § 15A-287(a)(1) (2001) (emphasis added). To “intercept” means “the aural or other acquisition of the contents of any wire, oral, or electronic communication through the use of any electronic, mechanical, or other device.” N.C.G.S. § 15A-286(13) (2001).

The key to our analysis is the interpretation of “willful” interception. Although § 15A-286 does not offer a definition of “willful,” North Carolina law is modeled after the Federal Wiretapping Statute and our federal courts have addressed the issue of “willful” interception. In *Adams v. Sumner*, 39 F.3d 933 (9th Cir. 1994), a hotel switchboard

1. Defendant's argument appears to be based on a belief that his reasonable expectation of privacy was invaded; however, defendant engaged in a conversation with someone using a cordless telephone. On the contrary, there is no reported North Carolina decision that has concluded a cordless telephone user has a reasonable expectation of privacy in his cordless telephone conversations. See *In re Askin*, 47 F.3d 100, 104 (4th Cir. 1995); *McKamey v. Roach*, 55 F.3d 1236, 1239 (6th Cir. 1995); *United States v. Carr*, 805 F. Supp. 1266, 1271 (E.D.N.C. 1992).

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operator inadvertently overheard a hotel guest make a reference to guns and remained on the line for several minutes thereafter. The issue before the court was whether the continued eavesdropping was willful, and therefore inadmissible under the Federal Wiretapping Statute. The *Adams* Court relied on the definition of willful in *United States v. Murdock*, 290 U.S. 389, 78 L. Ed. 381 (1933). “*Murdock* defined ‘willful’ to mean ‘done with a bad purpose,’ ‘without justifiable excuse,’ or ‘stubbornly, obstinately, or perversely.’” *Adams* at 936 (quoting *United States v. Murdock*, 290 U.S. 389, 394, 78 L. Ed. 381, 385 (1933)).² The *Adams* Court concluded that the hotel switchboard operator remained on the line out of his concern for other hotel guests after hearing the reference to guns; therefore, his “continued eavesdropping was not done with a bad purpose or without a justifiable excuse.” *Adams* at 936. The *Adams* Court held that the continued eavesdropping after the inadvertent interception was not willful; therefore, statements overheard during the call were admissible under the Federal Wiretapping Statute.

Based on *Adams*, we conclude that Tonya Lesley’s interception of the phone conversation between defendant and K.S.W. was not willful. Evidence presented at trial indicates that Lesley, who lived in the same subdivision as defendant and K.S.W., was talking to her friend on a cordless phone when she stepped outside to check the mail. The reception faded and Lesley began to pick up a conversation between defendant and K.S.W. Like the hotel switchboard operator in *Adams*, Lesley heard a telephone conversation that was “so disturbing and so ugly,” it caused her alarm. Lesley recognized K.S.W.’s voice and heard K.S.W. tell the person she was talking to that she was upset with him for trying to force her to perform oral sex. She identified the male voice as the defendant when she heard him say Ebony’s daughter would not be home for twenty-five minutes. Lesley, who testified she listened for about an hour, continued to listen because she intended to tell K.S.W.’s mother about the conversation. Lesley motioned for Tasha to listen to the conversation to confirm the identity of the voices and the substance of the conversation. We conclude that Lesley’s continued listening was not done with a bad purpose or without a justifiable excuse; rather, it was done out of concern for the welfare of a minor. Because we find that Lesley’s continued listening was not done in violation of N.C.G.S. § 15A-287(a)(1), we need not address whether a conversation heard in violation of the statute is

2. The legislative history of the Federal Wiretapping Statute included a reference to *United States v. Murdock*, 290 U.S. 389, 78 L. Ed. 381 (1933), for the meaning of “willful.”

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admissible in a criminal. Accordingly, this assignment of error is without merit.

IV.

[4] Defendant next argues that the trial court abused its discretion by sentencing defendant in a manner not authorized by law, thus violating his constitutional rights. Specifically, defendant argues that he is entitled to a new sentencing hearing because the trial court erroneously found as an aggravating factor that defendant took advantage of a position of trust or confidence to commit the offenses. We disagree.

N.C.G.S. § 15A-1340.16(a) states:

The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

N.C.G.S. § 15A-1340.16(a) (2001). Here, the State presented evidence that, prior to the incidents leading to these convictions, K.S.W. knew defendant because defendant was dating and living with her friend's sister, Ebony. K.S.W. and her friend visited Ebony's house every day after school to babysit, often when there were no adults but defendant in the house. K.S.W. had known defendant for approximately two months when he began calling her on the phone, touching her inappropriately, and writing letters to her. We find that this is sufficient evidence that defendant took advantage of a position of trust.

In *State v. Gilbert*, 96 N.C. App. 363, 385 S.E.2d 815 (1989), defendant was convicted of taking indecent liberties with a minor child. The victim frequently visited defendant's house, and defendant let her play with his dog and gave her candy. The defendant even gave her money for performing jobs around the house. This Court found this evidence sufficient to support the trial court's finding that defendant took advantage of a position of trust. *Gilbert*, 96 N.C. App. at 365, 385 S.E.2d at 817. We find this case analogous; accordingly, this assignment of error is overruled.

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V.

Defendant's final argument is that the trial court erred by denying his motion to dismiss the charges due to an insufficiency of the evidence. Defendant contends that the State's evidence was insufficient because it was the "fruits of the poisonous tree" or was at variance with the allegations in the indictment. As we concluded above, evidence of the intercepted telephone call was properly admitted. Furthermore, we have found that there was no fatal variance between the indictment and the evidence. Accordingly, this assignment of error is overruled.

For the reasons stated above, we find no error.

AFFIRMED.

Judges WALKER and HUNTER concur.

SABRINA PITILLO, EMPLOYEE/PLAINTIFF v. N.C. DEPARTMENT OF ENVIRONMENTAL HEALTH AND NATURAL RESOURCES, EMPLOYER/SELF-INSURED; KEY RISK MANAGEMENT SERVICES, CARRIER/DEFENDANT

No. COA01-999

(Filed 6 August 2002)

1. Workers' Compensation— stressful performance evaluation—not an injury by accident

The Industrial Commission did not err in a workers' compensation proceeding by concluding that plaintiff did not suffer an injury by accident where plaintiff alleged that a meeting to discuss her performance evaluation led to her nervous breakdown, but the meeting was called at plaintiff's request. Her contention that the people present, the subject matter, and the participants' behavior were unexpected and traumatic was contradicted by others who attended the meeting.

2. Workers' Compensation— job stress—significant causal factor—not accidental

A workers' compensation plaintiff did not suffer a compensable injury as a result of a meeting to discuss her performance evaluation where there was competent evidence to support a

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finding that the meeting was a significant causal factor in the development of plaintiff's psychological condition, but the meeting was not an accident.

3. Workers' Compensation— job stress—not an occupational disease

The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff did not suffer from an occupational disease where plaintiff sought compensation for stress induced anxiety after a meeting to discuss a performance evaluation, but no evidence was presented that plaintiff's condition was characteristic of and peculiar to her particular occupation; that it was not an ordinary disease of life to which the public is equally exposed; or that there was a causal connection between the disease and plaintiff's employment.

4. Workers' Compensation— doctor's relationship with defendant—motion to compel accounting

Any error was harmless where a workers' compensation plaintiff contended that the Industrial Commission erred by failing to rule on her motion to compel an accounting of defendant's financial transactions with a doctor, but plaintiff did not seek a ruling on her motion and was allowed to thoroughly cross-examine the doctor. Plaintiff could have presented any issues concerning the doctor's fees even without the accounting.

Appeal by plaintiff from an Opinion and Award entered 2 May 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 May 2002.

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

Attorney General Roy Cooper, by Special Deputy Attorney General Jonathan P. Babb, for defendant-appellees.

BIGGS, Judge.

Sabrina Pitillo (plaintiff) appeals from the Industrial Commission's denial of her workers' compensation claim. For the reasons that follow, we affirm the Industrial Commission.

Plaintiff began work for the North Carolina Department of Environmental Health and Natural Resources (defendant; with Key

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Risk Management Services, Inc., collectively, defendants), in 1995, as a waste management specialist. She was responsible for inspection of commercial hazardous waste facilities, which required travel to industrial work sites in order to ascertain whether companies were in compliance with applicable environmental laws and regulations. In June 1997, plaintiff received an annual performance review from her supervisor, Ms. Arms. She received ratings of "outstanding" or "very good" in twelve areas, and a rating of "good" in two areas, for an overall rating of "very good plus." Plaintiff was very upset that she was rated "good" in two areas, and angry that the "good" ratings were based in part upon input from unidentified co-workers. To "appeal the inclusion of alleged comments" in her review, plaintiff sought a meeting with Mike Kelly, the deputy director of the Division of Waste Management, and Brenda Rivers, personnel officer in the division's department. Plaintiff wrote Kelly that Arms' performance evaluation was "arbitrary and capricious"; that she was "outraged" at her annual evaluation; and that she had decided to "stand up to this injustice."

The meeting requested by plaintiff took place in Raleigh, on 24 July 1997. In attendance were plaintiff, Kelly, Rivers, Arms, and Ann Waddell, the manager of employee relations for the Department. Rivers later testified that she informed plaintiff in advance that Arms and Waddell would be included. The meeting focused on plaintiff's job performance, and on her concerns about the annual evaluation. There was also discussion of areas in which her supervisor saw some room for improvement.

The meeting ended after two hours of discussion, with no change in plaintiff's employment status or her overall performance rating of "very good plus." After the meeting, as plaintiff was driving home, she became very upset, stopped driving, and called her fiancée for help. The following day, plaintiff met with Dr. Patel, her family doctor, who referred her to Dr. Patterson, a psychiatrist. Plaintiff received extensive psychiatric treatment during the following months, including medication, outpatient care for psychiatric illness, and psychiatric counseling from two psychiatrists.

On 21 August 1997, plaintiff filed an Industrial Commission Form 18 "Notice of Accident to Employer," in which she alleged that the 24 July 1997 meeting in Raleigh either constituted a workplace accident, or had precipitated an occupational disease. She sought workers' compensation benefits for "stress induced anxiety" and a "diagnosed nervous breakdown." Defendants denied her claim on 24 September

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1997, and the matter was subsequently heard by a deputy commissioner of the Industrial Commission. On 28 March 2000 the deputy commissioner issued an opinion denying plaintiff's claim for workers' compensation benefits. Plaintiff appealed to the Full Commission for a hearing, and filed a motion to compel a full accounting of bills submitted and fees received by Dr. Arnoff, a defense witness. The Commission issued an opinion on 2 May 2001, denying plaintiff's claim for benefits. They did not rule on plaintiff's motion to compel an accounting of Dr. Arnoff's fees. Plaintiff appealed from the Commission's Opinion and Award.

Standard of Review

"The standard of appellate review of an opinion and award of the Industrial Commission in a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings of fact and whether these findings support the Commission's conclusions of law." *Lineback v. Wake County Board of Commissioners*, 126 N.C. App. 678, 680, 486 S.E.2d 252, 254 (1997). Moreover:

[T]he Industrial Commission is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. The Commission may accept or reject the testimony of a witness solely on the basis of whether it believes the witness or not.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982) (citation omitted). "The Commission chooses what findings to make based on its consideration of the evidence[, and this] court is not at liberty to supplement the Commission's findings[.]" *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 653, 508 S.E.2d 831, 834 (1998). The Industrial Commission's findings of fact "are conclusive upon appeal if supported by competent evidence," even if there is evidence to support a contrary finding, *Morrison v. Burlington Industries*, 304 N.C. 1, 6, 282 S.E.2d 458, 463 (1981), and may be set aside on appeal only "when there is a complete lack of competent evidence to support them[.]" *Young v. Hickory Bus. Furn.*, 353 N.C. 227, 230, 538 S.E.2d 912, 914 (2000).

I.

[1] Plaintiff argues first that the Commission erred in its conclusion that plaintiff did not suffer an "injury by accident." We disagree.

Workers' compensation "does not provide compensation for injury, but only for injury by accident." *O'Mary v. Clearing Corp.*, 261

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N.C. 508, 510, 135 S.E.2d 193, 194 (1964). Thus, an injury is compensable under the North Carolina Workers' Compensation Act only if (1) it is caused by an "accident," and (2) the accident arises out of and in the course of employment. N.C.G.S. § 97-2(6) (2001). "The claimant bears the burden of proving these elements[,] including the existence of an accident. *Smith v. Pinkerton's Sec. and Investigations*, 146 N.C. App. 278, 280, 552 S.E.2d 682, 684 (2001) (citing *Pickrell v. Motor Convoy, Inc.*, 322 N.C. 363, 368 S.E.2d 582 (1988)). In the present case, plaintiff contends that the psychological trauma of her performance review meeting on 24 July 1997, constituted a workplace "accident," thus, meeting the first part of the statutory test for compensability.

An accident under the workers' compensation act has been defined as "an unlooked for and untoward event which is not expected or designed by the person who suffers the injury," and which involves "the interruption of the routine of work and the introduction thereby of unusual conditions likely to result in unexpected consequences." *Calderwood v. Charlotte-Mecklenburg Hosp. Auth.*, 135 N.C. App. 112, 115, 519 S.E.2d 61, 63 (1999) (quoting *Adams v. Burlington Industries*, 61 N.C. App. 258, 260, 300 S.E.2d 455, 456 (1983)), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 124 (2000) (accident occurred where plaintiff was injured when required to lift the legs of a 263 pound patient, a task she had never in her eleven years of work done before). If an injury occurs under normal working conditions, no accident has occurred. *Ruffin v. Compass Group, U.S.A.*, 150 N.C. App. 480, 563 S.E.2d 633 (2002).

Plaintiff correctly states that a mental or psychological illness may be a compensable injury if it has occurred as a result of an accident arising out of and in the course of the claimant's employment. *See Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 476 S.E.2d 410 (1996), *disc. review denied*, 345 N.C. 753, 485 S.E.2d 53 (1997) (upholding award of benefits to prison instructor who suffered post-traumatic stress disorder after inmate students engaged in violent fight while plaintiff was isolated from other prison employees or guards). However, an injury is not a compensable "injury by accident" if the relevant events were "neither unexpected nor extraordinary," and it was only the "[claimants'] emotional response to the [events that] was the precipitating factor." *Cody v. Snider Lumber Co.*, 328 N.C. 67, 71, 399 S.E.2d 104, 106 (1991).

In the case *sub judice*, plaintiff does not allege that the meeting's occurrence was unexpected, for it was called at her request. She con-

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tends, however, that the presence of Arms and Waddell, the subject matter discussed, and the participant's behavior towards her, all were unexpected and traumatic. Her testimony to this effect was contradicted by testimony from others who attended the meeting, presenting issues of credibility to be resolved by the Industrial Commission. In this regard, the Industrial Commission made the following pertinent findings of fact:

. . . .

9. . . . [T]he greater weight of the evidence presented . . . indicates that the discussion was a routine, problem-solving meeting in which everyone was treated courteously and with respect. Plaintiff was not verbally attacked, reprimanded or severely criticized. Nothing in this meeting was different from other meetings to discuss performance evaluations. . . .

10. At the meeting plaintiff's supervisors encouraged plaintiff to be less adversarial . . . [and] to develop cooperative relationships and to establish rapport with the industry in order to facilitate compliance. . . .

. . . .

20. . . . [P]laintiff's account of the meeting on July 24, 1997 . . . was not an accurate representation of what actually occurred at the meeting. The Commission gives greater weight to the testimony of . . . the four [other] individuals present [at the meeting.]

21. The Commission finds that the greater weight of the competent, credible evidence of record shows that the events of July 24, 1997 did not constitute an unexpected, unusual or untoward occurrence, nor did the meeting constitute an interruption of the work routine and the introduction thereby of unusual conditions likely to result in unexpected consequences. The meeting to discuss plaintiff's job performance evaluation was requested by plaintiff and was an ordinary incident of employment. Prior to the meeting, plaintiff knew who would be present at the meeting.

We conclude that these findings are amply supported by competent evidence in the record, and further conclude that they support the Industrial Commission's conclusion that plaintiff did not suffer an injury by accident. Accordingly, this assignment of error is overruled.

II.

[2] Plaintiff argues next that the meeting of 24 July 1997, which she has argued was an "accident," also meets the second requirement for

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a compensable injury, in that it was an accident that “arises out of and in the course of employment.”

An injury is said to ‘arise out of the employment’ “[w]here any reasonable relationship to the employment exists, or employment is a contributory cause[.]” *Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 479 (1960) (citations omitted). The determination of whether an injury “‘arises out of employment’ is a mixed question of law and fact[.]” *Janney v. J.W. Jones Lumber Co.*, 145 N.C. App. 402, 404, 550 S.E.2d 543, 546 (2001) (quoting *Mills v. City of New Bern*, 122 N.C. App. 283, 284, 468 S.E.2d 587, 589 (1996)). “This Court has held that an injury is compensable under workers’ compensation if it is . . . ‘fairly traceable to the employment’ . . . or if ‘any reasonable relationship to employment exists.’” *Pittman v. International Paper Co.*, 132 N.C. App. 151, 154, 510 S.E.2d 705, 707 (1999) (quoting *White v. Battleground Veterinary Hosp.*, 62 N.C. App. 720, 723, 303 S.E.2d 547, 549, *disc. review denied*, 309 N.C. 325, 307 S.E.2d 170 (1983)).

In the case *sub judice*, the Industrial Commission found in its finding of fact number 22, that although plaintiff’s job duties generally were not “a significant causal factor in the development of [her] psychological condition[.]” that “the meeting of July 24, 1997 contributed to or was a significant causal factor in the development of plaintiff’s psychological condition.” We conclude that this finding of fact was supported by competent evidence, and thus must be upheld. However, this finding does not entitle plaintiff to workers’ compensation unless the injury was caused by a workplace accident. *Cody*, 328 N.C. at 71, 399 S.E.2d at 106 (heart attack not compensable as injury by accident where the “events comprising the ‘situation’ . . . were neither unexpected nor extraordinary,” and heart attack was precipitated by claimant’s emotional overreaction to ordinary situation). Having upheld the Industrial Commission’s conclusion that the meeting of 24 July 1997 was not a workplace “accident,” we necessarily reject plaintiff’s contention that she suffered a compensable injury as a result of the meeting. This assignment of error is overruled.

III.

[3] Plaintiff argues next that the Industrial Commission erred by concluding that she did not suffer from an occupational disease. We disagree.

N.C.G.S. § 97-53 (2001) lists twenty-seven specifically designated compensable occupational diseases. Although psychological illness is

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not listed among these, N.C.G.S. § 97-53(13) (2001) expands the definition of an occupational disease to include “[a]ny disease, [caused by] . . . conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.” “The burden is on the plaintiff to show that he suffered a compensable occupational disease[.]” *Pressley v. Southwestern Freight Lines*, 144 N.C. App. 342, 346, 551 S.E.2d 118, 120 (2001). In *Pressley*, this Court stated that:

the plaintiff must prove the following elements: (1) the disease is characteristic of and peculiar to persons engaged in a particular trade or occupation in which the plaintiff is engaged; (2) “the disease is not an ordinary disease of life to which the public is equally exposed;” and (3) there is a causal connection between the disease and the plaintiff’s employment.

Pressley, 144 N.C. App. at 346, 551 S.E.2d at 120 (quoting *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981)).

Under appropriate circumstances, work-related depression or other mental illness may be a compensable occupational disease. *Jordan v. Central Piedmont Community College*, 124 N.C. App. 112, 476 S.E.2d 410 (1996); *Baker v. City of Sanford*, 120 N.C. App. 783, 463 S.E.2d 559 (1995), *disc. review denied*, 342 N.C. 651, 467 S.E.2d 703 (1996). However, the claimant must prove that the mental illness or injury was due to stresses or conditions different from those borne by the general public. *Woody v. Thomasville Upholstery Inc.*, 355 N.C. 483, 562 S.E.2d 422 (2002) (adopting dissent in 146 N.C. App. 187, 202, 552 S.E.2d 202, 211 (2001)). Thus, the claimant must establish both that her psychological illness is “‘due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment’” and that it is not “‘an ordinary disease of life to which the general public is equally exposed.’” *Booker v. Medical Center*, 297 N.C. 458, 468, 256 S.E.2d 189, 196 (1979) (quoting N.C.G.S. § 97-53(13) (2001)); *see also Norris v. Drexel Heritage Furnishings*, 139 N.C. App. 620, 534 S.E.2d 259 (2000) (upholding denial of claim based on occupational disease: although plaintiff’s fibromyalgia was caused or aggravated by employment with defendant, there was no evidence that her employment with defendant placed plaintiff at an increased risk of contracting or developing fibromyalgia as compared to the general public not so employed).

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In the case *sub judice*, the Commission made the following pertinent findings:

. . . .

22. The greater weight of the evidence of record fails to show that plaintiff's job duties significantly contributed to or were a significant causal factor in the development of plaintiff's psychological condition. . . .

23. The greater weight of the medical evidence fails to show that plaintiff's job as a waste management specialist exposed her to an increased risk of developing anxiety disorder and depression than members of the general public not so employed.

The Commission concluded that plaintiff "failed to prove by the greater weight of the evidence that she sustained a compensable occupational disease. Plaintiff's employment with defendant-employer did not place plaintiff at an increased risk of developing anxiety disorder and depression than members of the general public not so employed."

We hold that the Commission's findings are supported by competent evidence. Although plaintiff testified to several minor incidents at work in support of her contention that she suffered from an occupational disease, no evidence was presented that these incidents contributed to her emotional illness, nor that the "diagnosed nervous breakdown" or "stress induced anxiety" for which she sought compensation were (1) "characteristic of and peculiar to [her] particular trade or occupation" or employment; (2) "not an ordinary disease of life to which the public is equally exposed"; or that (3) "there is a causal connection between the disease and the plaintiff's employment." *Pressley*, 144 N.C. App. at 346, 551 S.E.2d at 120.

We conclude that the Industrial Commission's findings of fact support its conclusion that plaintiff failed to establish that her psychological depression or anxiety disorder was a compensable occupational disease. Accordingly, this assignment of error is overruled.

IV.

[4] Plaintiff's final argument is that the Commission erred by failing to rule on her motion to compel an accounting of defendant's financial interactions with Dr. Arnoff. Before the hearing, plaintiff moved

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to compel disclosure of all of defendants' financial dealings with Dr. Arnoff, their medical witness, in order to demonstrate bias connected to his financial relationship with defendants.

Pursuant to Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure, the complaining party must "obtain a ruling upon the party's request, objection or motion" in order to preserve a question for appellate review. Plaintiff has presented no evidence that she ever sought a ruling on her motion, and, therefore, she did not preserve the question for appellate review.

Moreover, although the Commission did not rule on plaintiff's motion, plaintiff cross-examined Dr. Arnoff extensively during his deposition concerning the amount of his fee; the fact that the fee was paid directly to him, and not remitted to a hospital or other third party; and the fact that his independent examinations in workers' compensation cases generally were undertaken on behalf of the defendant, and not the plaintiff. We conclude that, even without a full accounting from Dr. Arnoff, plaintiff could have adequately presented to the Commission any issues associated with Dr. Arnoff's fees, and, thus, that the error, if any, in the Commission's failure to rule on plaintiff's motion was harmless. Accordingly, this assignment of error is overruled.

For the reasons discussed above, the opinion of the Industrial Commission is

Affirmed.

Judges GREENE and BRYANT concur.

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BONEY PUBLISHERS, INC. d/B/A *THE ALAMANCE NEWS*, PLAINTIFF v. THE BURLINGTON CITY COUNCIL, AND JOSEPH P. BARBOUR, MAYOR, DR. DAVID L. MAYNARD, MAYOR PRO TEM, DAVID R. HUFFMAN, MARK A. JONES, AND STEPHEN M. ROSS, ALL IN THEIR OFFICIAL CAPACITIES AS OFFICIALS OF THE CITY OF BURLINGTON AND MEMBERS OF THE BURLINGTON CITY COUNCIL, DEFENDANTS

No. COA01-878

(Filed 6 August 2002)

1. Appeal and Error— mootness—capable of repetition yet evading review

Although plaintiff's appeal from the denial of its request for disclosure of information revealed in a closed city council meeting regarding the purchase of real property is technically moot since the information sought by plaintiff has been fully disclosed, a case which is capable of repetition yet evading review may present an exception to the mootness doctrine, and there is a reasonable likelihood that defendants in considering the acquisition of other property for municipal purposes could repeat the conduct which is at issue.

2. Open Meetings— closed session—location of real property and intended use

The trial court did not err by determining that defendant city council members violated the Open Meetings Law by going into closed session to discuss the potential purchase of real property without first disclosing, in open session, the location of the property and the intended use of the property, because: (1) while there may be cases in which the location and intended use of property being considered for acquisition may constitute material terms to be negotiated, this was not such a case; and (2) a public body may not reserve for discussion in closed session under the guise of N.C.G.S. § 143-318.11(a)(5) matters relating to the terms of a contract for acquisition of real property unless those terms are material to the contract and also actually subject to negotiation.

3. Open Meetings— closed session—identity of owners of real property

The trial court erred by determining that defendant city council members were not required under the Open Meetings Law to reveal the identity of the owners of the real property proposed for acquisition, because the identity of the owners of the property under consideration was not a material term for

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which the City was required to establish a position for purposes of negotiation.

4. Open Meetings— closed session—minutes—location of real property and intended use—price

The trial court erred by determining that defendants were entitled to withhold the minutes of the 6 November 2000 closed session relating to the proposed real property acquisition but did not err as to the portion of the minutes regarding the discussions with respect to price, because: (1) minutes or an account of a closed session are public records unless they are conducted in compliance with N.C.G.S. § 143-318.11 and public inspection would frustrate the purpose of the closed session; and (2) the location of the property, purposes of acquisition, and identity of the owner did not constitute confidential information protected by N.C.G.S. § 143-318.11.

Appeal by plaintiff and defendants from order and judgment entered 3 January 2001 by Judge Stafford G. Bullock in Alamance County Superior Court. Heard in the Court of Appeals 23 May 2002.

Smith Helms Mulliss & Moore, L.L.P., by John Bussian, for plaintiff.

City Attorney Robert M. Ward; and Thomas, Ferguson & Charns, L.L.P., by Jay H. Ferguson, for defendants.

MARTIN, Judge.

Plaintiff, publisher of a weekly newspaper in Alamance County, brought this action on 22 November 2000 seeking declaratory and injunctive relief upon allegations that defendants, as members of the City Council of the City of Burlington (hereinafter “Council” or “defendants”), had violated North Carolina’s Open Meetings Law, N.C. Gen. Stat. § 143-318.10 *et seq.*, and Public Records Act, N.C. Gen. Stat. § 132-1 *et seq.* Plaintiff alleged, and the record shows, that on 6 November 2000, the Council met in open meeting for a regularly scheduled work session. During that meeting, the Council voted to go into closed session pursuant to G.S. § 143-318.11(a)(3) and G.S. § 143-318.11(a)(5) for the purposes of discussing three lawsuits and the acquisition of a certain tract of real property. A reporter for plaintiff’s newspaper was present and requested, prior to the closed session, that the Council disclose the location of the property, the identity of the owner, and the proposed use of the property. Upon

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advice of the City Attorney, the Council declined to disclose the requested information and entered into closed session.

As pertinent to this appeal, the minutes of the closed session reflect that Council considered a proposal by the City's Recreation Director for the acquisition of property for the development of a city park. The Recreation Director identified the property, explained why the land would be useful as the site for a public park, identified the owners of the property, gave the appraised value of the property, and advised the Council of the owner's asking price. The Council directed the Recreation Director to proceed with negotiations for acquisition of the property, giving him authority to offer no more than \$1,275,000 to purchase it.

By letter dated 15 November 2000, plaintiff requested City officials to disclose (1) the location of the tract under consideration, (2) the identity of the owners, and (3) the purpose for the City's acquisition. In addition, plaintiff requested copies of all documents received or discussed during the closed session relative to the land acquisition, and the minutes of the closed session dealing with the purchase of the property. By letter dated 16 November 2000, plaintiff's request was denied. This lawsuit ensued.

On 27 November 2000, defendants moved to dismiss plaintiff's complaint pursuant to G.S. § 1A-1, Rule 12(b)(6). On 28 November 2000, the Council held a special meeting and disclosed the location of the property, the purpose for the acquisition, and the names of the landowners. At that meeting, the Council authorized the purchase of the subject property.

Following a hearing, the superior court entered an order and judgment, dated 29 December 2000, in which it found facts consistent with the foregoing summary and concluded that defendants had violated the Open Meetings Law by deliberating the proposed land acquisition in closed session without first disclosing the location of the property and the purpose for which its acquisition was being considered. The trial court also concluded, however, that the Council's action in withholding the names of the owners of the property did not violate the Open Meetings Law, and that the Council was authorized by the Open Meetings Law and the Public Records Act to withhold the minutes of the closed session until disclosure would not frustrate the purpose of the closed session. The trial court, in its discretion, declined to render the actions of the Council taken in the closed session null and void pursuant to G.S. § 143-318.16A. Because the

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requested information was disclosed in a subsequent open meeting held 28 November 2000, the trial court found it unnecessary to address plaintiff's request for injunctive relief. Finally, all parties were denied their respective requests for attorneys' fees.

All parties gave notice of appeal.

[1] This appeal is technically moot because the information sought by plaintiff has been fully disclosed. If no genuine present controversy exists between the parties, a case which was once "alive becomes moot." *Crumpler v. Thornburg*, 92 N.C. App. 719, 723, 375 S.E.2d 708, 711, *disc. review denied*, 324 N.C. 543, 380 S.E.2d 770 (1989). Nevertheless, a case which is " 'capable of repetition, yet evading review' may present an exception to the mootness doctrine." *Id.* (citations omitted).

There are two elements required for the exception to apply: (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

Id. In the present case, the parties have stipulated that all the requested information was disclosed in open session on 28 November 2000, well before the controversy could be fully litigated. There is also a reasonable likelihood that defendants, in considering the acquisition of other property for municipal purposes, could repeat the conduct which is at issue here, subjecting plaintiff to the same action. Consequently, we believe it appropriate that we consider the issues raised by the parties' respective appeals.

Defendants' Appeal

[2] Defendants argue the trial court erred in its determination that defendants violated the Open Meetings Law by going into closed session to discuss the potential purchase of real property without first disclosing, in open session, the location of the property and the intended use of the property. We disagree.

As a general rule, "each official meeting of a public body shall be open to the public . . ." N.C. Gen. Stat. § 143-318.10(a). However, G.S. § 143-318.11 permits a public body to hold a closed session for certain enumerated purposes. As pertinent to this appeal, the statute provides:

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(a) Permitted Purposes.—It is the policy of this State that closed sessions shall be held only when required to permit a public body to act in the public interest as permitted in this section. A public body may hold a closed session and exclude the public only when a closed session is required:

. . .

- (5) To establish, or to instruct the public body's staff or negotiating agents concerning the position to be taken by or on behalf of the public body in negotiating (i) the price and other material terms of a contract or proposed contract for the acquisition of real property by purchase, option, exchange, or lease; or (ii) the amount of compensation and other material terms of an employment contract or proposed employment contract.

N.C. Gen. Stat. § 143-318.11(a)(5) (2001). Interpreting the statute, the trial court held that defendants were required to reveal, in open session prior to the closed session, the location of the property and the purpose of the proposed acquisition. Defendants assign error, arguing specifically that the statute does not require public bodies to disclose in open session the location of the property and its intended purpose, because this information represents material terms of a contract to purchase real property. Plaintiff argues that the location of the property and its intended use cannot be construed as material terms of the contract and as such are not protected from public disclosure by G.S. § 143-318.11(a).

The singular goal of statutory construction “is to give effect to the intent of the Legislature.” *Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 354, 542 S.E.2d 668, 671, *disc. review denied*, 353 N.C. 450, 548 S.E.2d 524 (2001) (citation omitted). To this end,

the courts must refer primarily to the language of the enactment itself. [citation omitted] A statute that “*is free from ambiguity, explicit in terms and plain of meaning*” must be enforced as written, without resort to judicial construction.

Id. at 354, 542 S.E.2d at 671-72 (emphasis in original) (citations omitted). We believe exceptions to the operation of open meetings laws must be narrowly construed. See *Publishing Co. v. Board of Education*, 29 N.C. App. 37, 47, 223 S.E.2d 580, 586 (1976) (citations omitted) (“While neither our Supreme Court nor this Court has spoken on the question of strict construction as it pertains to our

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open meetings law, courts of other states have held that exceptions to their open meeting statutes allowing closed meetings must be narrowly construed since they derogate the general policy of open meetings.”).

The language of G.S. § 143-318.11(a)(5) is clear: a closed session is appropriate when a public body seeks “to establish . . . the position to be taken by . . . the public body *in negotiating . . . the price and other material terms* of a contract or proposed contract for the acquisition of real property . . .” (emphasis added). Closed session is therefore appropriate in the event the public body intends to discuss the price to be paid for a particular tract of land, or to discuss other material terms of the contract to purchase the tract which may be subject to negotiation. Under the facts of the present case, however, plaintiff sought public disclosure only of the location of the tract of land, its intended use, and the identity of the owner. In the closed session, the Council was presented with the option of purchasing a single tract of land from the Ingle Family for the specific purpose of creating a public park. The Council neither had to consider reasons to choose among multiple properties nor discuss different possible uses for the tract under consideration. In fact, the only material terms subject to discussion during the closed session were the offering price for the property and whether the seller would be seeking to structure the conveyance to gain tax advantages. Price is a material term of a contract and is specifically protected from public disclosure by G.S. § 143-318.11(a)(5); the manner in which the conveyance might be structured is also a material term of the contract, and a proper subject for discussion in closed session. While there may certainly be cases in which the location and intended use of property being considered for acquisition may constitute material terms to be negotiated, this was not such a case.

A secondary approach used to discern legislative intent is to examine the legislative history and the circumstances surrounding the adoption of the statute. *Milk Commission v. Food Stores*, 270 N.C. 323, 154 S.E.2d 548 (1967). In the 1993 legislative session, the General Assembly revised G.S. § 143-318.11, reducing the number of exceptions for which a public body could go into closed session from twenty to seven, and narrowing the property acquisition exception. The previous statutory exception for property acquisition stated: “A public body may hold an executive session and exclude the public: . . . [t]o consider the selection of a site or the acquisition by any means or lease as lessee of interests in real property.” N.C. Gen.

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Stat. § 143-318.11(a)(1) (effective prior to 1 October 1994). The current statute, as amended in 1993, clearly reveals a legislative intent to restrict the subject matter permitted to be considered in a closed session. The language of the current property acquisition exception, as quoted earlier in this opinion, is considerably more narrow and specific than the previous version. In its current version, a public body may enter a closed session to discuss the position to be taken by the public body in *negotiating material terms* of a property acquisition contract, such as price. See *N.C. Electric Membership Corp. v. N.C. Dept. of Econ. and Comm. Dev.*, 108 N.C. App. 711, 720, 425 S.E.2d 440, 446 (1993) (“the presumption is that the legislature intended to change the law through its amendments”). Thus, an analysis of the legislative history of G.S. § 143-318.11 indicates that the General Assembly intended to restrict the circumstances under which a public body could enter a closed session by revising the statute in the 1993 legislative session. See *H.B.S. Contractors v. Cumberland County Bd. of Education*, 122 N.C. App. 49, 55, 468 S.E.2d 517, 522, *review improv. allowed*, 345 N.C. 178, 477 S.E.2d 926 (1996) (citation omitted) (“public bodies should act in open session because they serve the *public-at-large*.”).

It is the policy of this State, as announced by the General Assembly, to conduct the public’s business in public. The General Assembly has made clear its intent to restrict the circumstances in which closed sessions are permitted. The language of G.S. § 143-318.11(a)(5) does not permit a public body to deny the public access to information which is not a material term subject to negotiation regarding the acquisition of real property. Therefore, we hold that a public body, such as defendants here, may not reserve for discussion in closed session, under the guise of G.S. § 143-318.11(a)(5), matters relating to the terms of a contract for acquisition of real property unless those terms are material to the contract and also actually subject to negotiation. Our holding adequately protects the interests of the public body in maintaining bargaining position while also protecting the public’s interest in open government. The trial court correctly ruled, under the facts of this case, that defendants were required to disclose, in open session, the location of the property proposed for acquisition and its intended purpose before going into closed session to consider and establish the City’s position with respect to the material terms of the contract to acquire the property. Defendants assignments of error to the contrary are overruled.

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Plaintiff's Appeal

[3] In its appeal, plaintiff assigns error to the trial court's determination that defendants were not required to reveal the identity of the owners of the real property proposed for acquisition. They contend the Open Meetings Law requires such disclosure. Under the facts of this case, we agree.

For the reasons which we have already stated, the identity of the owners of the property under consideration in the present case was not a material term for which the City was required to establish a position for purposes of negotiation; like the location of the tract, the identity of the owners should have been revealed in open session. The purpose of the Open Meetings Law is "to promote openness in the daily workings of public bodies." *H.B.S. Contractors*, 122 N.C. App. at 54, 468 S.E.2d at 521. To that end, this Court is compelled to construe narrowly exceptions to the operation of laws. *Publishing Co.*, 29 N.C. App. 37, 223 S.E.2d 580. Arguably, if the City's consideration of property acquisition involved different tracts of land with different owners, such facts could be protected by the statute from the requirement of disclosure in an open session because they would be material to the terms of any proposed contract to be negotiated. Such circumstances are not before us here, however, and we need not decide the extent to which disclosure is required under such hypothetical facts. Instead, as earlier pointed out, the discussion of material terms in this case appeared to be restricted to the purchase price.

[4] Plaintiff also assigns error to the trial court's determination that defendants were entitled to withhold the minutes of the 6 November 2000 closed session relating to the proposed real property acquisition because disclosure would "frustrate the purpose of the closed session." We agree with plaintiff's argument in part.

It is beyond argument that minutes of the Council's closed session are "public records" within the meaning of North Carolina's Public Records Law, N.C. Gen. Stat. § 132-1 *et seq.* See N.C. Gen. Stat. § 143-318.10 (minutes of all official meetings, including closed sessions, are public records within meaning of Public Records Law.) The Public Records Law provides that "it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law." N.C. Gen. Stat. § 132-1(b). However, even though they are public records, "minutes or an account of a closed session conducted *in compliance with G.S. 143-318.11* may be withheld from public

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inspection so long as public inspection would frustrate the purpose of a closed session.” N.C. Gen. Stat. § 143-318.10(e) (emphasis added).

The plain language of G.S. § 143-138.10 requires that a closed session be conducted in compliance with G.S. § 143-318.11 in order for the minutes of such session to be withheld from public inspection. In the present case, however, as explained above, the location of the property, purpose of acquisition, and identity of the owner was not confidential information protected by G.S. § 143-318.11. Therefore, the portions of the minutes which revealed such information should have been disclosed to plaintiff upon request, and the trial court erred in concluding defendants’ action in withholding such information complied with North Carolina’s Open Meetings and Public Records laws. Insofar as the portion of the minutes regarding the Council’s discussions with respect to price is concerned, however, we find no error in the trial court’s decision authorizing defendants to withhold such portion of the minutes until disclosure would no longer frustrate the purpose of the closed session.

Defendants’ appeal—affirmed.

Plaintiff’s appeal—affirmed in part, reversed in part.

Judges TIMMONS-GOODSON and THOMAS concur.

HCA HEALTH SERVICES OF TEXAS, INC. D/B/A WEST HOUSTON MEDICAL CENTER, PLAINTIFF V. IRANCE REDDIX, M.D. A/K/A IRANCE REDDIX-NORMAN A/K/A IRANCE REDDIX-COLLINS, DEFENDANT

No. COA01-589

(Filed 6 August 2002)

Judgments— Uniform Enforcement of Foreign Judgments Act—North Carolina Foreign Money Judgments Recognition Act

The trial court’s order denying plaintiff creditor’s motion to enforce a foreign judgment under the Uniform Enforcement of Foreign Judgments Act is vacated, because: (1) plaintiff complied with the procedural requirements of the Act by filing a certified copy of the agreed judgment with the clerk of court and notifying

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defendant of the filing, and plaintiff moved for enforcement of the judgment after defendant filed a motion for relief from the judgment; (2) the trial court did not make necessary findings of fact including whether defendant authorized the entry of the judgment or received notice of any hearing thereon; and (3) although defendant contends that the Texas court lacked personal jurisdiction over her, the North Carolina Foreign Money Judgments Recognition Act provides the foreign judgment shall not be refused recognition for lack of personal jurisdiction under certain circumstances that may be relevant in this case including that defendant voluntarily appeared in the proceedings, defendant agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved prior to commencement of the proceedings, and defendant was domiciled in the foreign state when the proceedings were instituted. N.C.G.S. §§ 1C-1705, 1C-1804.

Judge BRYANT dissenting.

Appeal by plaintiff from order entered 12 December 2000 by Judge Quentin Sumner in Nash County Superior Court. Heard in the Court of Appeals 25 March 2002.

Smith Helms Mulliss & Moore, L.L.P., by Julie F. Youngman and D. Todd Brosius, for plaintiff-appellant.

Reddix-Small's & Carter Law Firm, by Brenda Reddix-Small's and Delores Jones Faison, for defendant-appellee.

HUDSON, Judge.

HCA Health Services of Texas, Inc. ("plaintiff") appeals from an order denying its motion to enforce a foreign judgment pursuant to the Uniform Enforcement of Foreign Judgments Act, *see* N.C. Gen. Stat. §§ 1C-1701 to -1708 (2001). For the reasons given below, we vacate the order and remand for further proceedings.

The following facts are undisputed: In 1993, Dr. Irance Reddix ("defendant") entered into a contract with Rosewood Hospital, pursuant to which defendant obtained loans. Subsequently, plaintiff purchased Rosewood Hospital, and the contract was assigned to plaintiff. Defendant failed to repay the loans, and plaintiff filed suit in the District Court of Harris County, Texas. Defendant filed an answer.

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On 1 April 1994, plaintiff and defendant executed a Settlement Agreement, which provides in part as follows:

1. [Defendant] agrees to pay to the Hospital the sum of Fifty-four Thousand, Three Hundred Ninety-one and 80/100 Dollars (\$54,391.80) on a scheduled payout as follows [omitted].

2. Contemporaneously with the execution of this Agreement, the Parties shall also execute an Agreed Judgment . . . in the District Court of Harris County, Texas, 270th Judicial District, said Agreed Judgment to be in the amount of Fifty-four Thousand, Three Hundred Ninety-one and 80/100 Dollars (\$54,391.80) with interest thereon at the statutory rate of ten percent (10%) per annum from the date of execution of the Agreed Judgment until paid. Said Agreed Judgment shall remain in the possession of the Hospital and/or its attorneys, and shall not be submitted to nor entered by the Court unless [defendant] shall fail to maintain her obligations pursuant to Paragraph 1 above. Upon any such breach of [defendant's] obligations under Paragraph 1, the Hospital shall have the right to file said Agreed Judgment with the Court, without prior notice or demand to [defendant], and to thereafter pursue all legal remedies available to it for collection of the sums due pursuant to the Agreed Judgment, less all just and lawful offsets and credits.

3. The Lawsuit shall remain pending until the completion by [defendant] of all her obligations pursuant to Paragraph 1 above. Upon full and satisfactory completion of [defendant's] obligations under Paragraph 1, the Hospital shall dismiss the Lawsuit with prejudice.

The record contains a copy of a letter dated 26 April 1994 from the law firm of Kirkendall, Isgur & Rothfelder, L.L.P. addressed to attorney Gwendolyn F. Climmons. The letter provides as follows:

Please allow this letter to serve as notice to you that your client is currently in default on the previously agreed to settlement in the above-referenced matter. Not only has Dr. Reddix-Norman failed to make the April 10, 1994 and April 25, 1994 payments pursuant to the Settlement Agreement, but the initial payment of \$2,460.40 paid upon the execution of the Agreement by check has been returned due to insufficient funds.

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Clearly, the above conduct constitutes a violation of the Settlement Agreement and provides grounds for the filing of the Agreed Judgment.

In the event that Dr. Reddix-Norman has not made payment for the initial payment, the April 10, 1994 payment, and the April 25, 1994 payment, by this Thursday, April 28, 1994, we will file the Agreed Judgment and pursue all available remedies at law for collection of both the judgment and any costs and attorneys' fees associated therewith. Given the return of the initial payment check, we would request that all payments be made by either cashier's check or money order.

The record also contains a copy of a document entitled "Agreed Judgment." The Agreed Judgment begins: "On this the 1st day of April, 1994, [plaintiff] and [defendant] agreed to resolve the dispute between them as described in a Settlement Agreement entered into and executed by the parties on this date." The document then recites the terms of the Settlement Agreement. The document was signed by a judge in the District Court of Harris County, Texas, on 7 September 1994. Below the judge's signature appear the words, "approved as to form and content," followed by the signatures of an attorney with the law firm of Kirkendall & Collins, for plaintiff, and Gwendolyn F. Climmons, for defendant.

In February 2000, plaintiff filed an Affidavit of Non-Satisfaction of Foreign Judgment, accompanied by two certified copies of the Texas judgment, in Nash County Superior Court. Plaintiff notified defendant of the filing, and defendant filed a document entitled, "Relief and Opposition to Foreign Judgment." Plaintiff moved for enforcement of the foreign judgment, and, after a hearing, the court denied plaintiff's motion. Plaintiff appeals the trial court's denial of its motion for enforcement of the Texas judgment.

The Uniform Enforcement of Foreign Judgments Act (the "Act") provides that a judgment from another state, filed in accordance with the procedures set out in the Act,

has the same effect and is subject to the same defenses as a judgment of this State and shall be enforced or satisfied in like manner; provided however, if the judgment debtor files a motion for relief or notice of defense pursuant to G.S. 1C-1705, enforcement of the foreign judgment is automatically stayed, without security, until the court finally disposes of the matter.

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N.C.G.S. § 1C-1703(c). Once the foreign judgment has been filed and the judgment debtor has been notified of the filing, the judgment debtor has thirty days within which it

may file a motion for relief from, or notice of defense to, the foreign judgment on the grounds that the foreign judgment has been appealed from, or enforcement has been stayed by, the court which rendered it, or on any other ground for which relief from a judgment of this State would be allowed.

N.C.G.S. § 1C-1705(a); *see* N.C.G.S. § 1C-1704. If the judgment debtor files a motion for relief or notice of defenses, then the judgment creditor may move for enforcement of the judgment. *See* N.C.G.S. § 1C-1705(b). The trial court must then hold a hearing, conducted in accordance with the Rules of Civil Procedure, to determine if the foreign judgment “is entitled to full faith and credit.” *Id.*

Although the Act provides that the judgment creditor has the burden of proving that the judgment is entitled to full faith and credit, *see id.*, we have held that “[t]he introduction into evidence of a copy of the foreign judgment, authenticated pursuant to Rule 44 of the Rules of Civil Procedure, establishes a presumption that the judgment is entitled to full faith and credit.” *Lust v. Fountain of Life, Inc.*, 110 N.C. App. 298, 301, 429 S.E.2d 435, 437 (1993). The judgment debtor may rebut this presumption by establishing any of various defenses available to it. *See id.* Once the presumption is established, however, “the [judgment creditor is] not required . . . to bring forth evidence that none of the defenses available to [a judgment debtor are] valid.” *Id.* at 302, 429 S.E.2d at 437.

The North Carolina Foreign Money Judgments Recognition Act, *see* N.C. Gen. Stat. §§ 1C-1800 to -1808 (2001), provides the defenses available to a judgment debtor. Specifically:

- (a) A foreign judgment is not conclusive if:
- (1) The judgment was rendered under a system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
 - (2) The foreign court did not have personal jurisdiction over the defendant; or
 - (3) The foreign judgment did not have jurisdiction over the subject matter.

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- (b) A foreign judgment need not be recognized if:
- (1) The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable the presentation of a defense;
 - (2) The judgment was obtained by fraud;
 - (3) The cause of action on which the judgment is based is repugnant to the public policy of this State;
 - (4) The judgment conflicts with another final and conclusive judgment;
 - (5) The proceedings in the foreign court were contrary to an agreement between the parties under which the dispute in question was to be settled out of court;
 - (6) In the case of jurisdiction based on personal service, the foreign court was a seriously inconvenient forum for the trial of the action; or
 - (7) The foreign court rendering the judgment would not recognize a comparable judgment of this State.

N.C.G.S. § 1C-1804; *see also* N.C.G.S. § 1C-1705(a) (providing that judgment debtor may seek relief from enforcement of foreign judgment “on any . . . ground for which relief from a judgment of this State would be allowed”); *Lust*, 110 N.C. App. at 301, 429 S.E.2d at 437 (identifying defenses as “rendering court did not have subject matter jurisdiction, did not have jurisdiction over the parties, that the judgment was obtained by fraud or collusion, that the defendant did not have notice of the proceedings, or that the claim on which the judgment is based is contrary to the public policies of North Carolina”).

Here, plaintiff complied with the procedural requirements of the Act. Plaintiff filed a certified copy of the Agreed Judgment with the clerk of court and notified defendant of the filing. Defendant filed a motion for relief from the judgment, and plaintiff moved for enforcement of the judgment. Thereafter, defendant filed a memorandum and response and an affidavit signed by defendant.

At the hearing on the motion for enforcement, neither side presented witnesses. Defendant argued, *inter alia*, that the Agreed Judgment did not comport with Texas Rule of Civil Procedure 314, which governs confessions of judgment. As a consequence, defendant

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contended, the Texas court did not have personal jurisdiction over defendant. Defendant also argued that she did not receive notice of the entry of the Agreed Judgment and that plaintiff's representation to the court that the Agreed Judgment is a valid judgment constituted fraud.

At the conclusion of the hearing, the superior court denied plaintiff's motion for enforcement. Plaintiff then requested findings of fact and conclusions of law pursuant to N.C.R. Civ. P. 52. The court stated, "I'm going to make one simple finding," and asked defense counsel to prepare an order finding that "the purported judgment proffered by the plaintiff in this matter did not follow the procedures outlined in the Texas rules as it relates to confession of judgment."

The court's written order contained the following "findings of fact":

1. Plaintiff filed a certified Agreed Judgment signed on September 7, 1994 by an attorney in the State of Texas.

2. Plaintiff filed a Settlement Agreement signed by the Defendant on April 14, 1994.

3. Plaintiff did not enter evidence indicating that Defendant was provided with a Notice of Hearing or opportunity to be heard on the Agreed Judgment, dated September 7, 1994.

4. Defendant filed a Memorandum and alleged that Plaintiff's judgment was void; did not comply with the laws in the State of Texas for valid judgments and Plaintiff did not afford the Defendant the opportunity to appear or to contest said judgment. Defendant also alleged apparent fraud by Plaintiff HCA.

5. Defendant filed an affidavit stating that she did not sign the Agreed Judgment; nor was she given an opportunity to be heard on the filing of the judgment. The Defendant also stated in her affidavit that she was informed and believed that HCA Columbia had been sued by the United States Department of Justice for violations in physician relations, Mediare [sic] billing and home health issues.

6. Plaintiff entered evidence that Defendant had attempted to discharge the debt during the U.S. Bankruptcy Case No.: 95-40682-H4-7. Further, that the U.S. Bankruptcy Court entered an Order dated November 21, 1995 denying the discharge.

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7. Defendant alleged that Plaintiff had contested the Bankruptcy discharge, by filing a Complaint Objecting to Discharge on May 5, 1995, and that filing the instant action was in violation of Section 1-47 of the North Carolina General Statutes.

8. Defendant filed a Motion for Reconsideration on December 1, 1995.

The court's conclusions of law provide, in relevant part:

1. Plaintiff has not complied with the laws in the State of Texas requiring the entry of a valid Texas judgment; including but not limited to Rule 314, Texas Rules of Civil Procedure. If Defendant did not receive notice of the proceedings in sufficient time to enable the presentation of a defense, the North Carolina Courts need not recognize the foreign judgment. North Carolina General Statute 1C-1804(b)(1).

2. Plaintiff failed to present evidence to show that the Defendant was given notice or an opportunity to be heard regarding the judgment entered in Texas. The North Carolina courts review of the jurisdiction of a court rendering a judgment is limited to determining if the issues were fully and fairly litigated. *Boyles v. Boyles*, 308 N.C. 488, 302 S.E.2d 790.

3. As a result, the State of North Carolina is not required to give full faith and credit to the judgment. The judgment creditor shall have the burden of proving that the foreign judgment is entitled to full faith and credit. N.C.G.S. § 1C-1705(b) (1989). *Reinward v. Swiggett*, 107 N.C. App. 590 (1992).

Plaintiff argues that the trial court erroneously placed the burden of proof on it, overlooking the fact that it had carried that burden to the extent of raising a presumption in its favor by submitting an authenticated judgment. *See Lust*, 110 N.C. App. at 301-02, 429 S.E.2d at 437. To the extent that the court placed the burden of proof on plaintiff without reference to the *Lust* presumption, the court did err. However, the defendant's affidavit, in which she indicated that she did not sign the Agreed Judgment or receive notice of the hearing, constitutes evidence proffered to overcome the *Lust* presumption. The more serious problem with the trial court's order is that we are unable to determine what facts, if any, it found.

Although defendant's affidavit raised the issues of whether defendant had proper notice and plaintiff engaged in fraud, the trial

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court did not make necessary findings of fact, such as whether defendant authorized the entry of the judgment or received notice of any hearing thereon. The factual findings entered by the trial court are not sufficient to permit our review of the court's order. They are at most recitations of allegations and do not resolve the crucial factual issues. See *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195 n.1 (1984) ("The requirement for appropriately detailed findings is . . . not a mere formality or a rule of empty ritual; it is designed instead 'to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.'" (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)) (alteration in original)).

For these reasons, we must vacate the order and remand for further proceedings, including an evidentiary hearing if necessary, and a new order with appropriate findings of fact and conclusions of law. See *Andrews v. Peters*, 75 N.C. App. 252, 258-59, 330 S.E.2d 638, 642 (1985) (vacating order and remanding to trial court upon determination that the findings of fact were "not sufficient for a clear understanding of the basis of its decision" and observing that "the trial court's order is no more than a statement of its discretionary authority without detailing the factual basis for its decision"), *aff'd*, 318 N.C. 133, 347 S.E.2d 409 (1986).

With respect to defendant's assertion that the Texas court lacked personal jurisdiction over her, we note that, pursuant to the North Carolina Foreign Money Judgments Recognition Act, "[t]he foreign judgment shall not be refused recognition for lack of personal jurisdiction" under certain enumerated circumstances. N.C.G.S. § 1C-1805(a). Among the enumerated circumstances that may be relevant here are the following: "(2) The defendant voluntarily appeared in the proceedings . . . ; (3) The defendant, prior to the commencement of the proceedings, had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved; [and] (4) The defendant was domiciled in the foreign state when the proceedings were instituted . . ." *Id.*

Vacated and remanded.

Chief Judge EAGLES concurs.

Judge BRYANT dissents.

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BRYANT, Judge, dissenting.

The majority vacates the order of the trial court on the grounds that the “findings entered by the trial court are not sufficient to permit our review of the court’s order.” I disagree and instead believe this Court should address the merits. It appears the trial court made sufficient findings of fact to clearly indicate the basis of its decision. The trial court essentially found *inter alia* that defendant was not provided with notice of hearing and an opportunity to be heard, and that plaintiff’s judgment was void and did not comply with the laws of the state of Texas. Based on these and other findings the trial court concluded that “the State of North Carolina is not required to give full faith and credit to the [Texas] judgment.” Therefore, I believe the findings of fact and conclusions of law are adequate to allow this Court to review the order of the trial court on the merits.

CAROLYN J. POOLE, PLAINTIFF-EMPLOYEE V. TAMMY LYNN CENTER, DEFENDANT-
EMPLOYER, AND AETNA LIFE & CASUALTY CO., DEFENDANT-CARRIER

No. COA01-1178

(Filed 6 August 2002)

Workers’ Compensation— occupational disease—hepatitis C virus

The Industrial Commission did not err by rejecting plaintiff employee’s claim for workers’ compensation benefits under N.C.G.S. § 97-53(13) as a result of her contracting the hepatitis C virus allegedly by coming into contact with blood of patients during her employment with the Tammy Lynn Center, a facility serving persons with severe developmental disabilities and mental retardation, because: (1) although plaintiff had an increased risk of exposure by reason of the employment, there must be proof of causation between the increased risk of exposure and the contraction of the occupational disease; and (2) plaintiff has failed to prove by the greater weight of the evidence her exposure to the disease or the disease-causing agent while working for defendant employer, and exposure to blood standing alone is not sufficient evidence of exposure to the hepatitis C virus.

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[151 N.C. App. 668 (2002)]

Appeal by plaintiff from opinion and award entered 1 March 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 23 May 2002.

The Jernigan Law Firm, by N. Victor Farah and Gina E. Cammarano, for plaintiff-appellant.

Hedrick, Eatman, Gardner, & Kincheloe, L.L.P., by Thomas M. Morrow, for defendant-appellees.

MARTIN, Judge.

Plaintiff appeals from an opinion and award of the North Carolina Industrial Commission, rejecting her claim for workers' compensation benefits as a result of her contracting the hepatitis C virus. The evidence presented to the deputy commissioner and reviewed by the Full Commission tended to show that plaintiff was employed by Tammy Lynn Center ("Center" or "defendant-employer") from October 1989 until February 1995. The Center is a residential facility serving persons with severe and profound developmental disabilities and mental retardation. Plaintiff initially worked as an habilitation aide; as part of these duties, plaintiff assisted patients with "bathing, feeding, brushing teeth, shaving, clothes washing, and other activities related to personal hygiene." Plaintiff worked in this capacity for one year, when she was transferred to a classroom setting at the Center as a teacher's aide. Although she was not required to bathe or shave residents in her new job capacity, she was called upon to clean residents when they soiled themselves due to vomiting, menstruation, or bowel movements. She also fed them and assisted them with brushing their teeth.

In 1991, the Center implemented a plan to protect employees from exposure to blood, which included wearing protective gloves when undertaking a task which could expose residents or employees to blood and/or infection. Plaintiff followed this new procedure during part of her employment at the Center.

Plaintiff was diagnosed with the hepatitis C virus in 1994. Thereafter, plaintiff filed a claim for workers' compensation benefits, contending she contracted hepatitis C while employed at the Center. Plaintiff testified that she was exposed to the blood of residents while employed at the Center. She stated that she understood exposure to blood to be when "someone else's blood entered into a scratch or something or the other [sic] of my body, and it actually got in my body." Plaintiff identified the following residents as those to whose

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blood she may have been exposed: Jeff B., Tim A., Terry R., Kristen C., Jimmy M., Deborah C., Lauren F., Tim C., Steven E., Lindsey W., Lisa W., Haley C., June N., Alicia D., Melissa E., and Eric P. Plaintiff testified that she recalled working with several other residents, but that she could not remember whether she could have been exposed to the blood of these individuals.

After plaintiff brought her claim for workers' compensation benefits, defendant-employer attempted to determine whether any resident of the Center carried the virus which could have infected plaintiff. Defendant-employer reviewed its Employee Accident/Incident Reports involving plaintiff, as well as the Client Accident/Incident Reports which directly or indirectly involved plaintiff. In addition, defendant-employer reviewed every incident report involving the residents to whose blood plaintiff claimed to have been exposed during her employment at the Center. Further, defendant-employer searched its personnel records and safety committee records. Jan Pope, director of nursing at the Tammy Lynn Center, testified that out of four incidents which plaintiff reported in written form during her employment at the Center, only one incident involved a patient biting plaintiff which could have exposed her to blood infected with the hepatitis C virus. This particular patient, Tim A., died in 1997, and an autopsy performed on him revealed no liver disease. Further, during his last hospitalization prior to his death, Tim A. tested negative for all strains of hepatitis. Plaintiff eventually identified fifteen residents to whose blood she may have been exposed while employed at the Center; thereafter, defendant-employer attempted to have the blood tested of each of these individuals. Consensual testing of ten of the individuals was completed; none were found to be positive for the hepatitis virus. Two patients refused to have the test taken because their parents believed the presence of the virus was not medically indicated; the parent of one patient refused because of the trauma of the blood draw; one patient died in 1993 and no autopsy had been performed, and one patient could not be located. Nevertheless, none of the medical records from these five patients who would not or could not be tested indicated the presence of the hepatitis C virus, and plaintiff provided no evidence at the hearing of any direct blood-to-blood contact with any of these five patients whose hepatitis C status was not known. Jan Pope testified that her staff found "nothing to indicate that anyone that had been there [a resident at the Center] ever had hepatitis C."

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Plaintiff testified that she had never received a blood transfusion prior to 1994, never had a tattoo, never shared intravenous needles, never shared intra-nasal devices, and never engaged in sex with multiple sexual partners. Plaintiff had been married twice; although her current husband tested negative for hepatitis C, plaintiff did not know whether her first husband had been tested for the virus. Plaintiff's daughter also tested negative for hepatitis C.

The parties have stipulated that plaintiff has been totally disabled since she quit work on 23 February 1995 because of her hepatitis C infection. The Full Commission made the following findings of fact:

24. Of those residents with whose blood plaintiff most likely came into contact the majority were proven to not have hepatitis C. There is no evidence of record that plaintiff came into contact with blood infected with the hepatitis C virus while employed by defendant-employer. Further, there is no evidence of record that the hepatitis C virus was ever present in plaintiff's work environment while she was employed by defendant-employer.

...

26. The greater weight of the evidence shows only that plaintiff's employment exposed her to the blood of other persons and that this exposure to blood placed her at an increased risk of contracting hepatitis C as compared to persons not so employed.

27. There is insufficient evidence of record to prove that plaintiff was exposed to or contracted hepatitis C virus while employed by defendant.

Based on these findings, the Commission concluded that plaintiff was not entitled to compensation under G.S. § 97-53(13). Plaintiff's motion for reconsideration of the opinion and award was denied by the Industrial Commission. Plaintiff appeals.

By two arguments in support of eight assignments of error, plaintiff contends on appeal that the Commission erred "in finding that plaintiff was not exposed to hepatitis C at work" and "in concluding that plaintiff's hepatitis C infection was not caused by her employment." We note at the outset that the Full Commission made no finding "that plaintiff was not exposed to hepatitis C at work"; rather, the Commission found that insufficient evidence was presented to prove that plaintiff was exposed to or contracted the hepatitis C virus while employed by defendant-employer.

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When reviewing an opinion and award of the Industrial Commission, this Court is limited to a determination of “(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings.” *Barham v. Food World, Inc.*, 300 N.C. 329, 331, 266 S.E.2d 676, 678, *reh’g denied*, 300 N.C. 562, 270 S.E.2d 105 (1980) (citation omitted). Findings of fact of the Industrial Commission “are conclusive on appeal when supported by competent evidence, even though there be evidence that would support findings to the contrary.” *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965). “The evidence tending to support plaintiff’s claim is to be viewed in the light most favorable to plaintiff, and plaintiff is entitled to the benefit of every reasonable inference to be drawn from the evidence.” *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998), *reh’g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999) (citation omitted). We review the Commission’s conclusions of law, however, *de novo*. *Snead v. Carolina Pre-Cast Concrete, Inc.*, 129 N.C. App. 331, 499 S.E.2d 470, *cert. denied*, 348 N.C. 501, 510 S.E.2d 656 (1998).

Plaintiff has been diagnosed with hepatitis C, which is not one of the enumerated diseases listed in G.S. § 97-53. Accordingly, plaintiff must establish that her disease fits within G.S. § 97-53(13), which permits a party to receive benefits under the Act for

[a]ny disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

Plaintiff has the burden of proving that she suffers from an occupational disease which is compensable under G.S. § 97-53(13). *Norris v. Drexel Heritage Furnishings, Inc./Masco*, 139 N.C. App. 620, 534 S.E.2d 259 (2000), *cert. denied*, 353 N.C. 378, 547 S.E.2d 15 (2001). To establish a claim for compensation under G.S. § 97-53(13), the plaintiff must prove:

- (1) the disease is characteristic of and peculiar to persons engaged in a particular trade or occupation in which the plaintiff is engaged;
- (2) “the disease is not an ordinary disease of life to which the public is equally exposed;” and
- (3) there is a causal connection between the disease and the plaintiff’s employment.

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Pressley v. Southwestern Freight Lines, 144 N.C. App. 342, 346, 551 S.E.2d 118, 120 (2001) (citing *Hansel v. Sherman Textiles*, 304 N.C. 44, 52, 283 S.E.2d 101, 106 (1981)). The degree of proof required of a plaintiff to establish a claim for benefits is the “‘greater weight’ of the evidence or ‘preponderance’ of the evidence.” *Phillips v. U.S. Air, Inc.*, 120 N.C. App. 538, 541, 463 S.E.2d 259, 261 (1995), *affirmed*, 343 N.C. 302, 469 S.E.2d 552 (1996) (citation omitted).

In the present case, the Commission found that the record evidence established that plaintiff’s employment at the Center exposed her to an increased risk of contracting hepatitis C as compared to members of the public not so employed. However, the statute also requires proof of causation between the increased risk of exposure by reason of the employment and the contraction of the occupational disease. *See Booker v. Duke Medical Center*, 297 N.C. 458, 475, 256 S.E.2d 189, 200 (1979) (“The final requirement in establishing a compensable claim under subsection (13) is proof of causation.”) In *Booker*, the North Carolina Supreme Court outlined three areas for consideration when utilizing circumstantial evidence to prove causation:

- (1) the extent of exposure to the disease or disease-causing agents during employment,
- (2) the extent of exposure outside employment, and
- (3) absence of the disease prior to the work-related exposure as shown by the employee’s medical history.

Id. at 476, 256 S.E.2d at 200 (citations omitted). In *Booker*, the plaintiff’s supervisor testified that the plaintiff had come in contact with blood samples containing the hepatitis virus “at least once a day” while employed as a lab technician at Duke Medical Center. *Id.* at 474, 256 S.E.2d at 199.

In the instant case, however, the Commission found plaintiff had failed to prove by the greater weight of the evidence her exposure to the disease or the disease-causing agent while working for defendant-employer. Plaintiff submitted one incident report during her employment at the Center which involved the potential exposure to a resident’s blood. The resident, “Tim A.,” died in 1997, and his autopsy revealed no liver disease; in fact, during Tim A.’s last hospitalization, he was tested for all the hepatitis strains and the results were negative. In spite of the absence of incident reports detailing plaintiff’s possible exposure to other residents’ blood, plaintiff was subsequently able to recall incidents with fifteen other residents to whose blood she was exposed, and who she contends may have infected her.

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Defendant-employer tested ten of those fifteen residents; all ten tested negative for hepatitis. Plaintiff was unable to provide evidence of blood-to-blood contact with any of the five remaining residents who were not tested.

Nevertheless, plaintiff argues that the Industrial Commission failed to make the proper finding regarding plaintiff's increased exposure at work based upon the circumstantial evidence presented because the Commission was without this Court's reasoning in the recent case of *Pressley v. Southwestern Freight Lines*, 144 N.C. App. 342, 551 S.E.2d 118 (2001). In *Pressley*, the plaintiff claimed that he had contracted coccidioidomycosis due to exposure to the coccidioidomycosis fungus while on a trip to California in connection with his employment as a long-distance truck driver. The fungus is indigenous to the southwestern United States but is not present east of the Mississippi River. The Commission determined that plaintiff's employment placed him at an increased risk of contracting the disease as compared to the general public; and that plaintiff had satisfied his burden of proving that he had, in fact, contracted the disease due to such exposure. We affirmed, holding that the term "general public" pertained to the general public of North Carolina, so that plaintiff's employment requiring him to travel to the southwestern United States did place him at an increased risk of exposure as compared to the general public of North Carolina where the fungus is not present. We also held that evidence that plaintiff became symptomatic within two weeks of his trip supported the Commission's finding and conclusion that plaintiff had satisfied his burden of proving causation.

By contrast, plaintiff in the present case presented no evidence that she was exposed to the hepatitis C virus while employed at the Center; she relies on her alleged blood-to-blood exposure with residents at the Center as sufficient proof of causation. However, exposure to blood, standing alone, is not sufficient evidence of exposure to the hepatitis C virus; the holding in *Booker* requires proof of exposure "to the disease or disease-causing agents during employment." *Booker v. Duke Medical Center*, 297 N.C. at 476, 256 S.E.2d at 200. Uninfected blood cannot be characterized as a disease-causing agent. Rather, the disease-causing agent is the hepatitis C virus, which can be found in blood *infected with the virus*.

Plaintiff also argues the Full Commission failed to consider competent evidence of causation, specifically the deposition testimony of Dr. Robert S. Brown, M.D., a specialist in the area of liver disease,

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who testified that, “[b]ased on the testimony that I reviewed and evidence that I reviewed and stipulations that I have been given, more likely than not she got it [the Hepatitis C virus] at the Tammy Lynn Center. No where else.” Dr. Brown also stated that his conclusion was based in part on plaintiff’s testimony regarding her alleged exposure to blood at the Center: “[I]t depends on your belief in her [plaintiff’s] honesty.” The Full Commission, however, specifically refused to accept as credible portions of plaintiff’s testimony regarding her recollection of having open wounds on her body which came in contact with residents’ blood. Moreover, as explained above, findings of fact are conclusive on appeal “when supported by competent evidence, even though there be evidence that would support findings to the contrary.” *Jones v. Myrtle Desk Co.*, 264 N.C. at 402, 141 S.E.2d at 633.

On this record, taking the evidence in a light most favorable to plaintiff, and giving plaintiff the benefit of every reasonable inference to be drawn from the evidence, *Adams v. AVX Corp.*, *supra*, we cannot say the Full Commission erred in finding that plaintiff had not proved that she was exposed to or contracted hepatitis C by reason of her employment with defendant. The Commission’s findings, in turn, support its conclusion that plaintiff’s hepatitis C infection was not caused by her employment with defendant. Plaintiff’s assignments of error to the contrary are overruled. The Commission’s opinion and award are affirmed.

Affirmed.

Judges TIMMONS-GOODSON and THOMAS concur.

STATE OF NORTH CAROLINA v. ROGELIO ALONZO CASTELLON, DEFENDANT

No. COA01-949

(Filed 6 August 2002)

1. Arrest— traffic stop—25 minute detention—slow computer—developing suspicion

A traffic stop did not constitute an illegal seizure where defendant contended that a 25 minute detention for a warning ticket was unreasonable, but the officer developed a reasonable suspicion that criminal activity was afoot while he waited for his

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computer to function, he was justified in asking for permission to search the vehicle, and defendant voluntarily consented to the search.

2. Search and Seizure— consent to search car—packages seen inside television—removal of television panel

Officers did not exceed the scope of defendant's consent to search a car where they found a television set in the trunk, saw saran-wrapped packages through openings in the back of the television, and removed the back panel of the television. The officers discovered the packages inadvertently, recognized that they contained contraband, and were justified in opening the television and seizing the cocaine in the packages.

Appeal by defendant from judgment entered 5 April 2001 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 14 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Edwin L. Gavin II, for the State.

James R. Parish, for defendant-appellant.

HUDSON, Judge.

Defendant assigned error to the trial court's denial of his motion to suppress. We affirm.

Following a hearing, the trial court made extensive findings of fact in its order denying defendant's motion to suppress. The evidence presented at the hearing tended to show that on 21 March 2000, defendant was stopped while driving on Interstate 95 by Sergeant Mark Hart of the Cumberland County Sheriff's Office for failure to wear his seatbelt. *See* N.C. Gen. Stat. § 20-135.2A(a) (2001). Luz Ibarra, a passenger in the vehicle, also was not wearing her seatbelt.

Before issuing a warning ticket, Sergeant Hart used his mobile data computer to check defendant's driver's license and to determine whether defendant "was a wanted person." The computer operated slowly. While Sergeant Hart was waiting for the computer to respond with the information, Deputy Timothy Bailer of the Cumberland County Sheriff's Office arrived at the scene. Sergeant Hart and Deputy Bailer observed several indicators of criminal activity. Thus, after ascertaining the validity of defendant's driver's license and issuing a warning ticket, Sergeant Hart asked for permission to search

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defendant's vehicle. Defendant gave his consent, and during a search of the vehicle's trunk, Deputy Bailer found cocaine in the back of a television set.

Defendant was convicted following his plea of guilty to one count of trafficking in cocaine by possession and one count of trafficking in cocaine by transportation. He preserved his right to appeal the trial court's denial of his motion to suppress evidence, and he now appeals that ruling. *See* N.C. Gen. Stat. § 15A-979(b) (2001); *State v. Brown*, 142 N.C. App. 491, 543 S.E.2d 192 (2001).

[1] Defendant argues that the traffic stop constituted an illegal seizure, and, as a result, the evidence seized, as well as any inculpatory statements made during later questioning, must be suppressed. “[T]he scope of appellate review of an order such as this is strictly limited to determining whether the trial judge’s underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge’s ultimate conclusions of law.” *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Further, “the trial court’s ruling on a motion to suppress is afforded great deference upon appellate review as it has the duty to hear testimony and weigh the evidence.” *State v. McClendon*, 130 N.C. App. 368, 377, 502 S.E.2d 902, 908 (1998), *aff’d*, 350 N.C. 630, 517 S.E.2d 128 (1999).

Defendant has not assigned error to any of the findings of fact made by the trial court, nor does he argue in his brief on appeal that the facts are not supported by competent evidence. Additionally, defendant does not contend that the initial traffic stop was unlawful. Rather, he argues that his detention for over twenty-five minutes for a minor traffic violation was unreasonable. This is a conclusion of law, which we review *de novo*.

The trial court’s findings of fact indicate that Sergeant Hart performed the license check with his mobile data computer, which functioned slowly on that day. Specifically, the trial court made the following findings of fact:

10. Regarding his mobile data computer, there is not a normal response time for the information sought via the computer for reasons outside the deputy’s control, such as the amount of use of the system by others.
11. Sergeant Hart asked the Defendant in English where he was coming from and his length of stay. The Defendant responded

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in English that he was coming from New York and that he had been there for three or four days. Sergeant Hart explained to the Defendant in English that he was intending to issue the Defendant a warning ticket for the seat belt violation. The Defendant indicated that he understood what a warning ticket was. The mobile data computer operated slowly during the encounter, but ultimately began to provide information to Sergeant Hart regarding possible hits, that is, that people sharing the Defendant's name or a variation thereof were wanted. Particularly, one such "hit" indicated that the wanted person had a tattoo on his arm. Sergeant Hart asked the Defendant in English to lift his shirt sleeve, and the Defendant did so. Sergeant Hart did not see the described tattoo. He continued his investigation of the Defendant's identity, status of his driver's license, and status of being wanted. Sergeant Hart called EPIC [the El Paso Intelligence Center, a national database for criminal activity, including narcotic activity] to search their records for the existence of warrants and prior illegal activity. As with his mobile data computer, the EPIC system operated slowly during this encounter through no fault of Sergeant Hart.

12. At about 1:29 p.m., Sergeant Hart concluded his telephone call to EPIC, and Deputy Timothy Bailer with the Cumberland County Sheriff's Office arrived on the scene to assist Sergeant Hart. Sergeant Hart told the Defendant in English he would be writing him a warning ticket, but first he got out of the vehicle to speak with Deputy Bailer, a deputy who was also assigned to the interstate criminal enforcement unit and who had also been trained and had experience in conducting interdiction along Interstate 95.
13. Within about one minute, Sergeant Hart advised Deputy Bailer of the situation and asked him to speak to Ms. Ibarra concerning the indicators of criminal activity. At about 1:30 p.m., Sergeant Hart then got back into his patrol car and began writing the warning ticket. At this point, Sergeant Hart was receiving the final information from his mobile data computer regarding the Defendant's driver's license. The information verified that the Defendant's license was valid.
14. As Sergeant Hart prepared the paperwork, he and the Defendant engaged in polite conversation in English

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about the Defendant's country of origin, Cuba, and the events concerning the big news of the day, Elian. Within about two minutes, Deputy Bailer returned to Sergeant Hart's patrol car, whereupon Sergeant Hart got out to speak with him. Deputy Bailer told Sergeant Hart that Ms. Ibarra had told him that she and the Defendant were just friends despite a previous statement by the Defendant that they were married, that they had flown to New York the previous day, that they were only in New York for one day despite a previous statement by the Defendant that he had been in New York for the past three or four days, and that they were headed back to Miami, Florida.

15. As Deputy Bailer provided this information to Sergeant Hart, the audio equipment within Sergeant Hart's patrol car continued to function, and while the Defendant was alone within the patrol car, he twice said to himself in English, "This is not good."
16. At about 1:33 p.m., Sergeant Hart entered his patrol car with the Defendant. Within three minutes, Sergeant Hart completed the warning ticket, returned to the Defendant his driver's license and the rental agreement, and asked the Defendant in English if he understood everything, to which the Defendant said he did. At about 1:37 p.m., as the Defendant began to exit the patrol vehicle, Sergeant Hart asked him in English if he had any weapons in the vehicle, to which the Defendant said, "No." Sergeant Hart then asked the Defendant in English if he had any illegal narcotics, marijuana, in the vehicle, and the Defendant again said, "No." Sergeant Hart then asked the Defendant in English if he had any large amounts of currency in the vehicle, and the Defendant said, "No." Sergeant Hart then asked the Defendant in English for permission to search the vehicle. The Defendant said, "Huh?" or "What?" Sergeant Hart asked, "Can I have permission to search the car?" The Defendant pointed at the rental vehicle and asked, "The car?" Sergeant Hart said, "Yes." The Defendant said, "Yes." Sergeant Hart asked, "No problem?" The Defendant said, "No problem." Sergeant Hart asked, "Are you sure?" The Defendant said, "No problem." The Defendant gave Sergeant Hart general consent to search the vehicle.

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The detention for the purpose of determining the validity of defendant's license was not unreasonable. *See State v. Munoz*, 141 N.C. App. 675, 682, 541 S.E.2d 218, 222, *cert. denied*, 353 N.C. 454, 548 S.E.2d 534 (2001).

"Once the original purpose of the stop has been addressed, there must be grounds which provide a reasonable and articulable suspicion in order to justify further delay." *State v. Falana*, 129 N.C. App. 813, 816, 501 S.E.2d 358, 360 (1998); *see State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999) ("In order to further detain a person after lawfully stopping him, an officer must have reasonable suspicion, based on specific and articulable facts, that criminal activity is afoot."). In determining whether further detention was reasonable, the trial court must consider the totality of the circumstances. *See Munoz*, 141 N.C. at 682, 541 S.E.2d at 222. "In its analysis, the court must view the facts through the eyes of a reasonable, cautious officer, guided by his experience and training at the time he determined to detain defendant." *Id.* (internal quotation marks omitted).

During the time legitimately required for Sergeant Hart to issue a warning ticket to defendant, he developed reasonable and articulable suspicion that defendant was involved in illegal drug activity. As the trial court found, Sergeant Hart noticed that defendant's hands "were very shaky, trembling, and real sweaty." After examining the rental agreement, Sergeant Hart

immediately noticed several indicators of criminal activity, particularly drug interdiction, from his training and experience. He noticed that the rental agreement was in the name of a third person allegedly not present at the scene, Fabian Loaiza. The vehicle had been rented on a short-term basis, having been rented on March 20, 2000 at La Guardia airport in New York, New York with a return date of March 23, 2000 in Miami, Florida. These facts were significant to Sergeant Hart because (1) people transporting narcotics prefer to distance themselves from the vehicle they are using to transport narcotics by using third party rentals, (2) Miami, Florida and New York, New York are source cities for narcotics to include cocaine, and (3) short-term rentals tend to negate the possibility that the people are on vacation or conducting regular business activities.

The evidence supports this finding. Further, after Deputy Bailer spoke with Ibarra, the officers determined that there were some discrepancies in what defendant and Ibarra told the officers. For exam-

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ple, defendant told Sergeant Hart that Ibarra was his wife and that they had spent three or four days in New York. Ibarra told Deputy Bailer that she and defendant were friends and that they had been in New York for only a day.

We hold that, based on the above, the trial court did not err in concluding that Sergeant Hart had reasonable suspicion that criminal activity was afoot. Therefore, Sergeant Hart was justified in asking for permission to search the vehicle, and defendant's further detention was not unconstitutional. *See State v. Aubin*, 100 N.C. App. 628, 632-33, 397 S.E.2d 653, 655-56 (1990), *disc. review denied*, 328 N.C. 334, 402 S.E.2d 433, *cert. denied sub nom. Aubin v. North Carolina*, 502 U.S. 842, 116 L. Ed. 2d 101 (1991); *State v. Morocco*, 99 N.C. App. 421, 427-29, 393 S.E.2d 545, 549 (1990).

Because defendant's original seizure was not unconstitutional, we reject his assertion that his consent to the search was "tainted" because it was "the result of the coercive effects of this unreasonable detention." In view of the fact that defendant's initial detention was not unlawful, "the State was required to show only that defendant's consent to the search was freely given, and was not the product of coercion." *Munoz*, 141 N.C. App. at 683, 541 S.E.2d at 223. Based on Sergeant Hart's testimony at the hearing, the trial court found that defendant consented to the search. The court concluded that "[u]nder the totality of the circumstances, the Defendant voluntarily gave Sergeant Hart general consent to search the vehicle. The consent was voluntary and not the product of duress or coercion, express or implied." The trial court's conclusion of law is supported by appropriate findings of fact, which are, in turn, supported by competent evidence. Therefore, we reject defendant's assertion that his consent was tainted.

[2] Finally, defendant argues that, even if his consent was voluntary, the officers' search exceeded the scope of that consent. In particular, defendant contends that the officers did not have the right to unscrew the back of the television set. We disagree.

Under the plain view doctrine, "police may seize contraband or evidence if (1) the officer was in a place where he had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) it was immediately apparent to the police that the items observed were evidence of a crime or contraband." *State v. Graves*, 135 N.C. App. 216, 219, 519 S.E.2d 770, 772 (1999). Here, the trial court found that defendant gave general consent to search the

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vehicle, which allowed the officers to search the trunk of the car. *See Aubin*, 100 N.C. App. at 634, 397 S.E.2d at 656. The trial court made the following finding of fact regarding the search of the trunk:

18. Sergeant Hart and Deputy Bailer began to search the rental vehicle. Deputy Bailer began his search in the trunk of the vehicle, and within about two minutes, he discovered what he believed to be illegal narcotics in saran wrap packaging inside a television set lying face down in the trunk of the vehicle. Both Sergeant Hart and Deputy Bailer observed the packaging inside the television through openings in the back of it. The packaging was plainly visible inside the television without the need to manipulate the television. In both deputies' training and experience, the packaging was consistent with the packaging of narcotics to include cocaine, heroin, and marijuana. Deputy Bailer also noted that the screws on the back of the television had previously been scratched. Deputy Bailer removed the back panel of the television and discovered two packages containing approximately 3,000 grams of cocaine.

This finding is supported by the evidence. Deputy Bailer testified at the suppression hearing regarding his search of the trunk as follows:

Q. What did you do? Just tell the Court how you proceeded to search the trunk of the vehicle.

A. Okay. I released the trunk release on the driver's side floorboard, walked back to the trunk. It was fully opened. I fully opened it to where I could look inside the trunk of the vehicle. While I looked inside the trunk of the vehicle, I noticed two luggage bags and a plastic bag with a paper bag inside of it containing two empty milk jugs and then a T.V. set, the screen of the television set face down to the trunk of the vehicle. I looked at the back of the T.V. set and saw a shiny glare coming off of the T.V. set inside of the back panel where the vents are on the television set. I looked into it very closely, thought I saw a package in the—inside of the back panel of the T.V. set. At that time, I took my fingers and spread the plastic vents a little further apart where I could look a little easier and I did locate a large package of saran wrap—a package wrapped in saran wrap. I notified Sergeant Hart at this time of what I located. . . .

. . . .

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Q. When you saw that package in this television set, had you ever seen anything similar to that in your training and experience as a law enforcement officer?

A. Yes.

Q. What types of packages would that be, sir?

A. Cocaine, marijuana, heroin, all illegal contraband are all commonly packaged with saran wrap or duct tape with a masking agent of some sort to deter the police canine dogs. If they are stopped and a canine is utilized, they do that specifically to try and draw the dog's attention off of the packages.

Thus, the officers discovered the saran-wrapped packages inadvertently and recognized immediately that they contained contraband. The officers were, therefore, justified in opening the set and seizing the cocaine.

We conclude that the officers did not unreasonably detain defendant, defendant voluntarily agreed to a search of his automobile, and the officers did not exceed the scope of the authorized search. Accordingly, the trial court's order denying defendant's motion to suppress is affirmed.

Affirmed.

Judges GREENE and BIGGS concur.

RANDALL VAN ENGEN, PLAINTIFF-APPELLANT v. QUE SCIENTIFIC, INC. D/B/A
PC SUPERSTORE, JOHN DEAN AND REGINA DEAN, DEFENDANT-APPELLEES

No. COA01-578

(Filed 6 August 2002)

1. Appeal and Error— appealability—denial of Rule 54(b) certification—underlying interlocutory order

Although plaintiff appeals from the trial court's denial of plaintiff's motion for an N.C.G.S. § 1A-1, Rule 54(b) certification in a 27 March 2001 order, this appeal is dismissed because the proper methods for appealing an underlying interlocutory order are to argue the interlocutory order affects a substantial right or

to petition the Court of Appeals for a writ of certiorari under N.C. R. App. P. 21(b).

2. Jurisdiction— personal—Rule 60(b) motion

The trial court did not abuse its discretion in its 5 January 2001 order granting the individual defendants' N.C.G.S. § 1A-1, Rule 60(b) motion to set aside the 18 August 1999 orders entered by the trial court after plaintiff was allowed to amend his complaint to add the individuals as defendants in an action originally brought against a corporation because the trial court did not have personal jurisdiction over the individual defendants where: (1) a summons was not served on the individual defendants by any statutory method; (2) there is no evidence in the record that defendants appeared in their individual capacities in this action; (3) although plaintiff argues defendants' Rule 60(b) motion was untimely since it was filed more than one year after the 18 August 1999 orders were entered, a void judgment is a legal nullity which may be attacked at any time; and (4) although plaintiff argues one superior court judge may not overrule the decisions of another superior court judge, a Rule 60(b) order does not overrule a prior order but instead relieves parties from the effect of an order.

Appeal by plaintiff from order dated 5 January 2001 by Judge Timothy J. Kincaid in Superior Court, Catawba County and order dated 27 March 2001 by Judge L. Oliver Noble in Superior Court, Catawba County. Heard in the Court of Appeals 12 March 2002.

Phyllis A. Palmieri for plaintiff-appellant.

Sigmon, Clark, Mackie, Hutton, Hanvey & Ferrell, P.A., by Stephen L. Palmer, for defendant-appellees.

McGEE, Judge.

Randall Van Engen (plaintiff) filed a complaint dated 17 August 1998 against Que Scientific Inc. d/b/a PC Superstore (Que Scientific) seeking damages for alleged unpaid overtime wages and discriminatory employment practices. The complaint and summons were served on Que Scientific by registered mail through its registered agent, Regina Dean, on 19 August 1998. Que Scientific filed an answer dated 13 October 1998. John Dean, as president of Que Scientific, filed an affidavit dated 30 September 1998 (R18) stating that Que Scientific was a North Carolina corporation with assets in North Carolina, and that Que Scientific had attempted to resolve matters with plaintiff

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because the company's Hickory store was being sold and Que Scientific did not want to have any outstanding debt. Que Scientific defended this action until 15 February 1999, when it notified plaintiff that it could no longer afford to defend the action and would not resist a judgment.

Plaintiff filed a motion for summary judgment dated 3 March 1999 against Que Scientific. Plaintiff filed a motion on 2 August 1999 to amend his complaint to add John Dean and Regina Dean (the Deans) as individual defendants in the original action against Que Scientific. The trial court heard and granted plaintiff's motion to amend his complaint in an order filed 18 August 1999. The trial court also granted summary judgment for plaintiff and entered judgment in the amount of \$41,748.30 against Que Scientific and the Deans in an order filed 18 August 1999.

The Deans filed a motion dated 1 September 2000 to set aside the 18 August 1999 orders pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b), stating the trial court did not have personal jurisdiction over the Deans. The Deans alleged in their motion that: (1) they never received notice of the 2 August 1999 hearing; (2) they never received a copy of plaintiff's motion to amend his complaint; (3) they never received a copy of plaintiff's amended complaint; (4) the amended complaint was never served on them in accordance with N.C. Gen. Stat. § 1A-1, Rule 4; (5) no notice of hearing was filed regarding plaintiff's motion to amend his complaint or his motion for summary judgment; (6) they had no knowledge the matter was set for hearing and therefore did not appear at the hearing; and (7) they never received copies of the orders filed on 18 August 1999.

Following a hearing on the Deans' Rule 60(b) motion, the trial court entered an order dated 5 January 2001 setting aside the 18 August 1999 orders with respect to the Deans. The trial court found as fact that the Deans were not served pursuant to N.C. Gen. Stat. § 1A-1, Rule 4 and that they did not consent to the trial court's exercise of personal jurisdiction over them. The trial court concluded as a matter of law that it did not have personal jurisdiction over the Deans and the orders entered against them were therefore void *ab initio*.

Plaintiff filed a motion dated 24 January 2001 seeking certification of the 5 January 2001 order for immediate appeal and to stay execution of the 5 January 2001 order. The trial court denied plaintiff's motion in an order filed 27 March 2001, stating that the 5 January

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2001 order was an interlocutory order and was not a final adjudication as to any claim raised in the action, or as to any party in the action. The trial court also denied plaintiff's motion to stay execution. Plaintiff appeals the order dated 5 January 2001 setting aside the judgment against the Deans and the 27 March 2001 order denying certification and stay of execution.

I.

[1] We must first determine if plaintiff's appeal of the 27 March 2001 order of the trial court is properly before our Court. An appeal of right lies from a final judgment. N.C. Gen. Stat. § 7A-27 (1999).

A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. . . . An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.

Veazey v. City of Durham, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950) (citations omitted). As a general rule, there is no right of immediate appeal from interlocutory orders or judgments, and they may be reviewed only upon appeal from a final judgment. *Sharpe v. Worland*, 351 N.C. 159, 161, 522 S.E.2d 577, 578-79 (1999). There are, however, two circumstances in which a party may appeal an interlocutory order: (1) if the order of the trial court is final as to some but not all of the claims or parties, and the trial court certifies the case for immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (1999), or (2) where the order appealed from affects a substantial right of the parties. N.C. Gen. Stat. § 7A-27(d)(1) (1999) and N.C. Gen. Stat. § 1-277 (1999).

In this case, the trial court determined that the 5 January 2001 order setting aside the 18 August 1999 orders was not a final order because it did not dispose of the case as to any party or claim in the action. See *First American Savings & Loan Assoc. v. Satterfield*, 87 N.C. App. 160, 359 S.E.2d 812 (1987). See also *Howze v. Hughes*, 134 N.C. App. 493, 518 S.E.2d 198 (1999). In an order dated 27 March 2001, the trial court denied plaintiff's motion for a Rule 54(b) certification. Plaintiff argues the trial court erred in denying his motion for certification.

Although a trial court's decision to grant a Rule 54(b) certification is not binding on our Court and is fully reviewable on appeal, *Giles v.*

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First Virginia Credit Services, Inc., 149 N.C. App. 89, 94-95, 560 S.E.2d 557, 561 (2002), a trial court's denial of a motion for a Rule 54(b) certification has not previously been directly reviewed by our Court in that our rules do not provide an appellant with relief from the denial of a motion for a Rule 54(b) certification. Rather, the proper methods for appealing an underlying interlocutory order are to argue the interlocutory order affects a substantial right, or to petition our Court for a writ of certiorari pursuant to N.C.R. App. P. 21(b). We therefore dismiss plaintiff's appeal of the 27 March 2001 order of the trial court.

II.

[2] By his first two assignments of error, plaintiff contends the trial court erred in its 5 January 2001 order granting the Deans' Rule 60(b) motion to set aside the 18 August 1999 orders.

The 5 January 2001 order of the trial court is interlocutory and thus not immediately appealable to this Court; nevertheless, we elect to treat plaintiff's appeal of this order as a petition for a writ of certiorari pursuant to N.C.R. App. P. 2 and grant the petition to review the merits of plaintiff's appeal. *Dawson v. Atlanta Design Assocs., Inc.*, 144 N.C. App. 716, 718, 551 S.E.2d 877, 879 (2001) and N.C. R. App. P. 2.

On appeal, "[a] trial court's ruling on a Rule 60(b) motion is reviewable only for an abuse of discretion." *Coppley v. Coppley*, 128 N.C. App. 658, 663, 496 S.E.2d 611, 616, *disc. review denied*, 348 N.C. 281, 502 S.E.2d 846 (1998). In its order setting aside the judgment against the Deans, the trial court concluded as a matter of law that the trial court did not have personal jurisdiction over the Deans and therefore the 18 August 1999 orders entered against them were void *ab initio*. We find the trial court did not abuse its discretion in setting aside the 18 August 1999 orders against the Deans.

Plaintiff argues the trial court erred because (a) the amended complaint did not require that a new summons be issued and defendants voluntarily appeared in the action, (b) the Deans' Rule 60(b) motion was not timely filed, and (c) one superior court judge may not overrule another superior court judge.

A.

"Jurisdiction of the court over the person of a defendant is obtained by service of process, voluntary appearance, or consent."

Grimsley v. Nelson, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) (citing *Hale v. Hale*, 73 N.C. App. 639, 641, 327 S.E.2d 252, 253 (1985)).

There is no evidence in the record, nor does plaintiff contend, that a new summons was issued as to the Deans upon the amendment of plaintiff's original complaint adding them as individual defendants in the action. Rather, plaintiff contends no new summons was required to be issued. We disagree.

In the original complaint, the Deans were not parties to the action and thus there was no claim against them as individual defendants. To obtain jurisdiction over them as individual defendants and bring them into the action, plaintiff was required to serve process on the Deans pursuant to N.C. Gen. Stat. § 1A-1, Rule 4 (1999) which "provides the methods of service of summons and complaint necessary to obtain personal jurisdiction over a defendant, and the rule is to be strictly enforced to insure that a defendant will receive actual notice of a claim against him." *Grimsley*, 342 N.C. at 545, 467 S.E.2d at 94 (citing *Guthrie v. Ray*, 31 N.C. App. 142, 144, 228 S.E.2d 471, 473 (1976), *rev'd on other grounds*, 293 N.C. 67, 235 S.E.2d 146 (1977)). Service upon a natural person, not under a disability is effected

- a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or
- b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.
- c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

N.C. Gen. Stat. § 1A-1, Rule 4(j)(1) (1999).

"The issuance and service of process is the means by which the court obtains jurisdiction. Where no summons is issued the court acquires jurisdiction over neither the persons nor the subject matter of the action.'" *Croom v. Department of Commerce*, 143 N.C. App. 493, 496, 547 S.E.2d 87, 90 (2001) (quoting *In re Mitchell*, 126 N.C. App. 432, 433, 485 S.E.2d 623, 624 (1997) (internal citations omitted)). In this case, a summons was not served on the Deans by any statutory

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method; thus, “this action is deemed never to have commenced” as to the Deans because they had no notice they were being sued in their individual capacity. *Charns v. Brown*, 129 N.C. App. 635, 638, 502 S.E.2d 7, 9 (1998).

Plaintiff argues, however, that the Deans made a voluntary appearance in this action and therefore the trial court acquired personal jurisdiction over them. There is no evidence in the record that the Deans appeared in their individual capacities in this action. Before 2 August 1999, there was no claim against the Deans as individuals. Plaintiff contends because John Dean was a shareholder in Que Scientific, filed an affidavit in this action, and executed a security agreement with plaintiff, he voluntarily appeared, thus subjecting himself to personal liability. We disagree. There is no evidence that John Dean took any of these actions other than as an agent of Que Scientific or that by taking these actions he accepted personal liability for Que Scientific. See *Air Traffic Conf. of America v. Marina Travel*, 69 N.C. App. 179, 316 S.E.2d 642 (1984).

Plaintiff also argues that Regina Dean voluntarily appeared in the action because she accepted service as the registered agent of Que Scientific. Again, we disagree. Like John Dean, Regina Dean accepted service of the original complaint in her capacity as registered agent of the corporation, not in an individual capacity.

B.

Plaintiff also argues the trial court erred in setting aside the 18 August 1999 orders because the Deans’ Rule 60(b) motion was not timely filed in that it was filed more than one year after the 18 August 1999 orders were entered. We disagree.

N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) (1999) allows the trial court to “relieve a party . . . from a final . . . order” if “[t]he judgment is void.” A Rule 60(b) motion must be made “within a reasonable time[.]” N.C. Gen. Stat. § 60(b). “[A] judgment or order . . . rendered without an essential element such as jurisdiction or proper service of process . . . is void.” *County of Wayne ex rel. Williams v. Whitley*, 72 N.C. App. 155, 157, 323 S.E.2d 458, 461 (1984). The 18 August 1999 orders in this case were entered without personal jurisdiction over the Deans, and the trial court correctly concluded that as a matter of law, the orders were void *ab initio*. “[B]ecause a void judgment is a legal nullity which may be attacked at any time[.]” the Deans’ motion was made within a reasonable time. *Allred v. Tucci*, 85 N.C. App. 138,

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141, 354 S.E.2d 291, 294, *disc. review denied*, 320 N.C. 166, 358 S.E.2d 47 (1987).

C.

Finally, plaintiff argues the trial court erred in setting aside the 18 August 1999 orders because one superior court judge may not overrule the decisions of another superior court judge. However, “[a] 60(b) order does not overrule a prior order but, consistent with statutory authority, relieves parties from the effect of an order.” *Charns*, 129 N.C. App. at 639, 502 S.E.2d at 10 (citing N.C. Gen. Stat. § 1A-1, Rule 60(b) (1990)). Plaintiff has failed to show the trial court abused its discretion in granting the Deans’ Rule 60(b) motion to set aside the 18 August 1999 orders.

Plaintiff’s first and second assignments of error are overruled. We affirm the trial court’s order setting aside the 18 August 1999 order.

In review, we dismiss plaintiff’s appeal of the 27 March 2001 order of the trial court; we affirm the 5 January 2001 order of the trial court setting aside the 18 August 1999 orders.

Dismissed in part; affirmed in part.

Judges GREENE and CAMPBELL concur.

IN RE: CRYSTAL GAIL BRODE, STEVEN W. BRODE, MATTHEW L. BRODE,
JUVENILES

No. COA01-214

(Filed 6 August 2002)

Child Support, Custody, and Visitation— custody—foreign judgment—emergency jurisdiction

Although the trial court in this state had emergency jurisdiction to enter a temporary order in a child custody case, the trial court’s order is vacated because: (1) the trial court’s order is not temporary as required by N.C.G.S. § 50A-204(a); (2) the trial court had notice of the existence of a prior custody decree from Texas awarding respondent father custody of the minor child; and (3) the trial court was required by the Parental Kidnapping Prevention Act to defer any further proceedings in the matter

IN RE BRODE

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pending a response from Texas as to whether that state was willing to assume jurisdiction to resolve the issues of neglect and dependency.

Appeal by respondent from order entered 16 November 2000 *nunc pro tunc* 25 September 2000, by the Honorable Pattie S. Harrison in Caswell County District Court. Heard in the Court of Appeals 6 December 2001.

Farmer & Watlington, LLP, by Stuart N. Watlington, for petitioner-appellee Caswell County Department of Social Services.

David G. Powell for respondent-appellant William Harvey.

BRYANT, Judge.

Steven W. Brode was born 19 August 1991 in the state of Texas to respondent William Harvey and Beverly Brode Owen. While other children were born to Harvey and Owen, these children are not the subject of this appeal.¹

Harvey and Owen lived together in Texas as domestic partners. In 1997, Children's Protection Services of Montgomery County, Texas, filed a petition in the district court to determine the parent-child relationship between Harvey, Owen and the Brode children. By order entered 31 July 1998, the District Court of Montgomery County appointed Harvey sole managing conservator of Steven, having all the incidents of sole legal custody. By that same order, Owen was appointed as Steven's possessory conservator with visitation as agreed to by Harvey. After entry of this order, Steven resided with Harvey at Harvey's parents' home in Barcarolle, Texas.

In or about August 1999, Owen made an unannounced visit to Harvey's home. She falsely told Harvey's father that visitation was permitted; thereafter, she abducted Steven and never returned him to Harvey. Owen subsequently moved to Caswell County, North Carolina, bringing Steven and the other children with her. Harvey made efforts to ascertain Owen's whereabouts, including seeking assistance from Texas officials. Harvey ceased efforts to locate Owen and the children after becoming discouraged that assistance would not be forthcoming from Texas officials.

1. Harvey and Owen are the parents of Crystal G. Brode, born 24 May 1990. Owen is also the mother of Matthew L. Brode, born 31 January 1994. Harvey is not the father of Matthew L. Brode.

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In August 2000, Caswell County Department of Social Services (DSS) filed a petition alleging Steven to be a neglected and dependent juvenile. The petition asserted that Steven Brode did not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; that he had been abandoned; and, that he lived in an environment injurious to his welfare. At an adjudication hearing held 25 September 2000, the trial court found Steven to be a neglected and dependent juvenile and placed Steven in DSS custody. Harvey appeals.

Respondent-Appellant Harvey assigns as error the trial court's failure to grant full faith and credit to the Texas order granting custody of Steven Brode to respondent-appellant Harvey.

At the outset, this appeal requires that we examine the interplay of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),² the North Carolina Juvenile Code,³ and the Parental Kidnapping Prevention Act (PKPA).⁴

UCCJEA and Juvenile Code

The UCCJEA, formerly UCCJA, is a jurisdictional statute relating to child custody disputes and expressly includes proceedings in abuse, dependency, and/or neglect. *See In re Van Kooten*, 126 N.C. App. 764, 768, 487 S.E.2d 160, 162-63 (1997). The jurisdictional requirements of the UCCJEA must be satisfied for a court to have authority to adjudicate abuse, neglect, and dependency petitions filed pursuant to our Juvenile Code, *see id.* at 764, 487 S.E.2d at 163, even though the Juvenile Code provides that the district courts of North Carolina have "exclusive, original jurisdiction over any case involving a juvenile who is alleged to be . . . abused, neglected, or dependent." *In re Malone*, 129 N.C. App. 338, 342, 498 S.E.2d 836, 838 (1998) (alteration in original) (citation omitted). *See also In re Van Kooten* at 768, 487 S.E.2d at 162.

Prior to the 1999 revisions to the UCCJEA, a district court in North Carolina could exercise jurisdiction under the UCCJEA to

2. Adopted by North Carolina and codified in Chapter 50A of the North Carolina General Statutes.

3. Chapter 7B of the North Carolina General Statutes.

4. 28 U.S.C.A. § 1738A. We note that on one instance we cite to the 1994 hard bound version of § 1738A. Section 1738A has since been amended. *See* 28 U.S.C.A. § 1738A (West Supp. 2002).

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make child custody determinations if: (1) this State was the home state of the child; (2) it was in the best interest of the child because the child and the child's parents had a significant connection with this State; (3) the child was physically present in this State and it was necessary in an emergency to protect the child because the child had been subjected to or threatened with mistreatment or abuse; or (4) it appeared that no other state would have jurisdiction or another state had declined to exercise jurisdiction. See *In re Malone* at 343, 498 S.E.2d at 839 (citing N.C.G.S. § 50A-3(a) (1989)). See also *In re Van Kooten* at 769, 487 S.E.2d at 163; *In re Bean*, 132 N.C. App. 363, 366, 511 S.E.2d 683, 686 (1999). In 1999, the emergency jurisdiction provision (N.C.G.S. § 50A-3(a)) was moved to a new and separate section, N.C.G.S. § 50A-204. See 1999 N.C. Sess. Laws 223, s. 15.

Under N.C.G.S. § 50A-204(a), temporary emergency jurisdiction may be invoked by a court if a "child is present in this State and the child has been abandoned or it is necessary in an emergency to protect the child because the child . . . is subjected to or threatened with mistreatment or abuse." N.C.G.S. § 50A-204(a) (2001). The statute further provides in N.C.G.S. § 50A-204(c)-(d):

(c) If there is a previous child-custody determination that is entitled to be enforced under this Article, . . . any order issued by a court of this State under this section must specify in the order a period that the court considers adequate to allow the person seeking an order to obtain an order from the state having jurisdiction The order issued in this State remains in effect until an order is obtained from the other state within the period specified or the period expires.

(d) A court of this State which has been asked to make a child-custody determination under this section, upon being informed that a . . . child-custody determination has been made by, a court of [another] state . . . shall immediately communicate with the other court.

N.C.G.S. § 50A-204(c)-(d) (2001).

When a court invokes emergency jurisdiction, any orders entered shall be temporary protective orders only. *In re Malone* at 343, 498 S.E.2d at 839; see also *Nadeau v. Nadeau*, 716 A.2d 717, 723-24 (R.I. 1998) (stating that assumption of emergency jurisdiction under the UCCJA is temporary jurisdiction only and confers authority only to make temporary orders); *In re A.L.H.*, 630 A.2d 1288, 1291 (Vt. 1993)

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(concluding that most all courts agree that emergency jurisdiction does not authorize courts to make permanent custody orders); *In re Interest of L.W.*, 486 N.W.2d 486, 498 (Neb. 1992) (stating the power of emergency jurisdiction does not include making permanent custody determinations or modifications of another court's custody decree).

PKPA

Our State's jurisdiction over child custody matters is also governed by the PKPA. See *In re Bean* at 366, 511 S.E.2d at 686. The PKPA represents Congress's attempt to create a uniform standard among the states in their exercise of jurisdiction over interstate custody disputes. See *In re Malone* at 342, 498 S.E.2d at 838-39. The PKPA provides that "every State shall enforce . . . and shall not modify . . . any custody determination or visitation determination made . . . by a court of another State." 28 U.S.C.A. § 1738A(a) (2002). The act further provides that "[t]he jurisdiction of a court of a State which has made a child custody determination or visitation determination . . . continues as long as . . . such State remains the residence of the child or of any contestant." 28 U.S.C.A. § 1738A(d) (2002). Modifications of another state's custody determination may only be made if the modifying state "has jurisdiction to make such a child custody determination; and [] the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination." 28 U.S.C.A. § 1738A(f) (1994) (emphasis added). To the extent a state custody statute conflicts with the PKPA, the federal statute controls. *In re Bean* at 366, 511 S.E.2d at 686.

"Although the PKPA does not include within its definition section any reference to neglect, abuse, or dependency proceedings," our court has previously held that the PKPA does apply "to all interstate custody proceedings affecting a prior custody award by a different State, including [abuse,] neglect and dependency proceedings." *In re Malone* at 342, 498 S.E.2d at 839 (alteration in original) (citations omitted).

We note that the trial court order in the instant case is silent as to the basis for its jurisdiction to adjudicate this case. The petition filed by DSS alleges that Steven Brode is a neglected and dependent juvenile.⁵ It appears that the court proceeded under the general juris-

5. Specifically, the petition asserts that Steven Brode is neglected in that he (1) "does not receive proper care, supervision, or discipline from the juvenile's parent,

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diction of the Juvenile Code; however, when a prior custody order exists, a court cannot ignore the provisions of the UCCJEA and the PKPA.

The order of the trial court does state that in placing the juveniles in the protection of social services “DSS was precluded from making reasonable efforts [to return juveniles to their parents] due to the threat of immediate harm to said juveniles; that the failure to make such reasonable efforts was reasonable under the circumstances, and to do otherwise would have been contrary to the health, safety and welfare of said juveniles.” Even in the absence of explicit language that the trial court invoked the emergency jurisdictional parameters of N.C.G.S. § 50A-204, we find that the language used by the court indicated an immediate need necessitating protection of the juveniles; therefore, the trial court was within its power to invoke the exercise of emergency jurisdiction to protect the children and we find that further evaluation of the order will proceed under this determination.

As noted in our discussion above, when a trial court invokes emergency jurisdiction under the UCCJEA, such jurisdiction is only temporary in nature and does not empower the trial court to enter a permanent custody order. Further, when it is discovered that a previous child custody determination has been made by another court, the provisions of N.C.G.S. § 50A-204(c)-(d), and the PKPA, set the parameters for addressing any custody determination. We find that the order entered by the trial court in the instant case does not comply with our statutory framework.

First, the order entered by the trial court is not a temporary order as required by N.C.G.S. § 50A-204(a). The heading of the judgment is titled “Order” and the directives are noted to be “Ordered, Adjudged and Decreed.” The order is void of any language to indicate that it is temporary in nature. Second, the trial court had notice of the existence of a prior custody decree awarding Harvey custody of Steven Brode. The custody order entered in Texas outlines the rights and

guardian, custodian, or caretaker;” (2) “has been abandoned;” and (3) “lives in an environment injurious to the juvenile’s welfare.”

The petition asserts that he is dependant in that he “needs assistance or placement because the juvenile has no parent, guardian, or custodian responsible for the juvenile’s care or supervision.”

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duties of a sole managing conservator, which appear to encompass those duties that would award sole legal custody of the juvenile.⁶

Pursuant to N.C.G.S. § 50A-204(d), after having notice of the prior custody order, and upon entry of a temporary custody order, the trial court should have immediately contacted the Texas court to determine their willingness to assume jurisdiction. "While the trial court in this state did have emergency jurisdiction to enter the temporary . . . order, at the point in which the order was entered 'the trial court was required to defer any further proceedings in the matter pending a response from [Texas] as to whether that state was willing to assume jurisdiction to resolve the issues of [neglect and dependency].'" *In re Malone* at 344, 498 S.E.2d at 840 (citation omitted).

Likewise, with respect to the parameters of the PKPA, we noted above that the act precludes states from modifying child custody orders of other states unless the court of the other State no longer has jurisdiction, or it has declined to exercise its jurisdiction. The trial court's order is inconsistent with the requirements of the PKPA. The order does not defer adjudication on the merits pending notice from Texas concerning whether it will exercise jurisdiction in the matter.

6. According to the custody order, a sole managing conservator has the following rights and duties:

- (1) the right to have physical possession and to direct the moral and religious training of the child;
- (2) the duty of care, control, protection, and reasonable discipline of the child;
- (3) the duty to provide the child with clothing, food, shelter, education, and medical, psychological, and dental care;
- (4) the right to consent for the child to medical, psychiatric, psychological, dental, and surgical treatment;
- (5) the right to receive and give receipt for payments for the support of the child and to hold or disburse funds for the benefit of the child;
- (6) the right to the services and earnings of the child;
- (7) the right to consent to marriage and to enlistment in the armed forces of the United States;
- (8) the right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child;
- (9) the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government; and
- (10) the right to establish the primary residence of the child and to make decisions regarding the child's education.

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In light of the foregoing, we vacate the judgment of the trial court. On remand, the trial court is directed to contact the Texas court to determine whether that court desires to exercise jurisdiction in this matter. Should the Texas court decline to exercise jurisdiction, the trial court may then proceed on the merits of the DSS petition and issue a final custody determination.

VACATED and REMANDED for findings consistent with this opinion and dictates of the UCCJEA and PKPA.

Judges McGEE and HUNTER concur.

DANIEL B. CARTIN, SR., PLAINTIFF V. SHUFORD EDWARD HARRISON AND WIFE,
RENEE EDMISTON HARRISON, DEFENDANTS

No. COA01-820

(Filed 6 August 2002)

1. Real Property— chain of title—1880 partition report

The trial court did not err in a non-jury trial to determine ownership of land by holding that plaintiffs proved an unbroken chain of title where defendants pointed to an 1880 partition report that did not indicate whether all of the relevant heirs were included in the proceeding. The partition proceeding connected the relevant parties in the chain of title, and plaintiff's expert testified that the deeds and documents established a complete chain of title with little chance of a challenge to the partition.

2. Real Property— findings—location—within chain of title descriptions

In a non-jury trial to determine ownership of a tract of land, competent evidence supported the trial court's findings that the disputed property could be located within the description of plaintiff's property going back through plaintiffs' chain of title. Those findings support the conclusion that the location of the property is as shown in surveys.

Appeal by defendants from judgment entered 21 June 1998 by Judge William A. Leavell in Watauga County District Court. Heard in the Court of Appeals 28 March 2002.

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[151 N.C. App. 697 (2002)]

Di Santi Watson & Capua, by Anthony S. di Santi and Andrea N. Capua, for plaintiff-appellees.

McElwee Firm, PLLC, by John M. Logsdon, for defendant-appellants.

MARTIN, Judge.

This appeal arises out of a real property boundary dispute originally between Daniel B. Cartin and defendants Shuford Edward Harrison and Renee Edmiston Harrison, each of whom claimed superior title to approximately seven acres of land. Cartin filed a complaint on 19 May 1995, seeking a judgment declaring him owner of the property, “free from the claim of the Defendants.” Defendants filed an answer, counterclaim, and cross-claim, seeking a declaration that they were the owners of the disputed property. On 3 March 1998, the trial court granted Cartin’s motion to join Donald and Ann Smart, who purchased the property from plaintiff and who are now the real parties in interest (hereinafter, “plaintiffs”). Following a pre-trial conference, the trial court entered a consent order which provided that the court “shall hear only issues related to plaintiffs’ assertion that it has superior record title to the property in dispute by reason of a connected chain of title to the State of North Carolina.” The parties agreed to bifurcate the trial, allowing defendants “the opportunity, if necessary, to prosecute their counterclaims at a future jury session of Watauga County District Court,” and, if necessary, to pursue defendants’ cross-claim against third-party defendants.

After the parties waived their rights to a jury trial on the issue of whether plaintiffs could establish a connected chain of title to the State of North Carolina, the trial court heard evidence at a bench trial. Plaintiffs based their claim of superior title upon a series of conveyances originating in three grants from the State of North Carolina. Defendants acknowledge that plaintiffs proved a connected chain of title from themselves back to John Storie and from William Storie to the State; however, defendants challenge plaintiffs’ proof that a valid connection in the chain of title was established between William Storie and John Storie. With respect to that link in the chain, plaintiffs offered evidence of a proceeding to partition the “landed estate of Wm. A. Storie.” The evidence included a document which stated that it was “[t]he foregoing Reports of the Jurors who laid and partitioned real estate of Wm. Storie Dec. [deceased] among his heirs at law on 15th day of June 1880 . . .” and it allotted to John Storie a parcel of

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land from the William A. Storie property, and provided a legal description of that parcel. Plaintiffs' expert, Joseph M. Parker, Jr., testified that all deeds in plaintiffs' chain of title were valid deeds, and that the documents, taken together, established a complete chain of title. Parker stated the partition proceeding report "does include the property in question. And although it may not be a deed, it does, I think, convey, pass on the title." On cross-examination, Parker admitted that the partition proceeding documents do not indicate whether all heirs of William Storie were included in the partition proceeding, and that if an individual heir was not included in the proceeding, the partition proceeding would not be effective. Nevertheless, Parker stated that the possibility of a challenge to the partition was "remote," and that he "would pass on titles where you may not have all the heirs but you feel reasonably assured that you did, particularly if it's this old." Parker stated that plaintiffs had established "good title." Following completion of the plaintiffs' evidence, defendants presented evidence, including the testimony of two licensed surveyors, Lewis Cox and James Murray Gray; neither surveyor, however, conducted surveys of the parties' respective properties.

The trial court found facts, concluded that plaintiffs had established "a legally sufficient chain of title back to the State of North Carolina, and Plaintiffs' title to the disputed property is superior to Defendants;" and entered judgment declaring plaintiffs to be the owners in fee simple of the property. Defendants submitted to a voluntary dismissal without prejudice as to their counter-claim and gave notice of appeal.

The standard of review on appeal from a judgment entered after a non-jury trial is "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001).

[1] Defendants first contend the trial court erred in holding that plaintiffs proved an unbroken chain of title from the State of North Carolina. A party may establish good title to real property by several methods, one of which involves proof of a connected chain of title from the party to the State of North Carolina. *Mobley v. Griffin*, 104 N.C. 112, 10 S.E. 142 (1889). Defendants concede in their brief to this Court that plaintiffs have proved a connected chain of title from themselves back to John Storie and from William Storie to the State.

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Defendants argue, however, that plaintiffs did not establish a valid connection in the chain of title between William Storie and John Storie.

The documentary evidence offered by plaintiffs included a “decree for partition,” signed by “J.H. Hardin, CSC, Probate Judge”; a “partition” of the “landed estate of Wm. A. Storie,” which specifically allotted to John Storie a parcel of land from the Wm. A. Storie property, and described that parcel; and a report of the partition by the “duly appointed” commissioners, which stated,

The foregoing Reports of the Jurors who laid and *partitioned real estate of Wm. Storie Dec. [deceased] among his heirs at law* on 15th day of June 1880 is enrolled and together with the Judgment and decree confirming the same is hereby certified to the Register of Deeds of Watauga County and ordered to be registered in the Register’s office of said county (emphasis added).

The report was dated 29 June 1880 and signed by “J.H. Hardin, CSC, Probate Judge.” Plaintiffs’ expert, Joseph M. Parker, Jr., testified that all deeds in plaintiffs’ chain of title were valid deeds, and that the documents established a complete chain of title. Parker also testified regarding the connection in the chain from William Storie to John Storie. Parker stated that the Commissioner’s report “does include the property in question. And although it may not be a deed, it does, I think, convey, pass on the title.” In fact, pressed on cross-examination about whether the documents from the partition proceeding indicated that all heirs of William Storie had been included, Parker stated that the chances of a challenge to the partition were “remote,” and that plaintiffs had established “good title” on the basis of “this document and the full chain of title.” Parker explained,

if you go back into the 1880s and 1890s and you worry about every time something may not have been procedurally correct in accordance with the procedural rules at that time and there may have been a missing heir, we wouldn’t have many good titles.

Plaintiffs’ chain of title is distinguishable from the title found defective in *McDonald v. McCrummen*, 235 N.C. 550, 70 S.E.2d 703 (1952), cited by defendants in support of their contention that plaintiffs’ chain was incomplete. In *McDonald*, land was granted by the State of North Carolina to Aaron Murchison, and years later an “O.B. Murchison” purported to convey this same land through a deed to the plaintiff. There was no evidence, however, that O.B. Murchison was

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an heir to Aaron Murchison or that he otherwise acquired title from Aaron Murchison:

It may be that O. B. Murchison is the heir, or an heir of the first, and as such could maintain an action against a third party to recover the land, [citation omitted] but the testimony of plaintiff is that “I do not know what kin O. B. Murchison was to A. A. Murchison,—they were some of my own people.” Titles to land may not rest in so thin veil of uncertainty.

Id. at 553, 70 S.E.2d at 706. In *McDonald*, because the plaintiff provided no documentation of a conveyance from Aaron Murchison to O.B. Murchison, there was an actual break in the chain from the State to the plaintiff. As the Supreme Court explained, “the trouble with this effort is that it does not connect.” *Id.* at 553, 70 S.E.2d at 705.

In the present case, by contrast, the partition proceeding is one of a series of documents conveying the land originally owned by the State and currently owned by plaintiffs. The partition proceeding states that the landed estate of William Storie, deceased, was to be divided among his heirs at law, which included John Storie. The trial court found facts establishing the chain of title and concluded as a matter of law: “Plaintiffs’ [sic] have a legally sufficient chain of title back to the State of North Carolina, and Plaintiffs’ title to the disputed property is superior to Defendants.” Unlike the plaintiff’s chain in *McDonald*, the partition proceeding conveyance in the present plaintiffs’ chain connected the title from William Storie to his heir at law, John Storie. Defendants concede plaintiffs in the present case provided a connected chain from the State to William Storie, and from John Storie to plaintiffs. Thus, we affirm the trial court’s conclusion that plaintiffs have established a connected chain of title to an original grant from the State of North Carolina, superior to defendants’ title, *Mobley v. Griffin*, *supra*, and defendants assignments of error to the contrary are overruled.

[2] In their second argument, defendants assert the trial court erred in holding that plaintiffs proved that the property described in their current deed is included within the descriptions in each of the documents comprising their chain of title. Where title to land is in dispute, the “claimant must show that the area claimed lies within the area described in each conveyance in his chain of title and he must fit the description contained in his deed to the land claimed.” *Cutts v. Casey*, 271 N.C. 165, 167, 155 S.E.2d 519, 521 (1967) (citations omitted). Nevertheless,

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[t]he fact that the descriptions in deeds forming the chain of title are not identical is not material if the differing language may in fact fit the same body of land, and if it is apparent from an examination of the descriptions in the several deeds that the respective grantors intended to convey the identical land, effect will be given to the intent.

E. I. Du Pont De Nemours & Co. v. Moore, 57 N.C. App. 84, 88, 291 S.E.2d 174, 176, *cert. denied*, 306 N.C. 383, 294 S.E.2d 207 (1982) (citation omitted).

The trial court made the following findings of fact:

29. Plaintiffs' expert witness, surveyor Frank Hayes, has located the subject property and all of the properties within Plaintiffs' chain of title on the earth's surface by reliance, inter alia, on the following:

a. All documents in Plaintiffs [sic] chain of title as reflected in the public records;

b. Various documents in the chains of title of surrounding property owners;

c. Various unrecorded maps relating to the subject property;

d. Location of physical monuments on the ground, being those reflected on the various surveys, maps and charts entered into evidence;

e. Location of a ridge (as described in Grant 1050);

f. Location of Grants 119 on the ground (adjacent to Plaintiffs' property on the western boundary), and reliance on consistent calls between Grant 119 and Plaintiffs' Grants;

g. Use of aerial photographs depicting use of Plaintiffs' property in the 1940's and 1950's; h. Location of marked trees along the northern boundaries of Grant 33;

In addition, the trial court found that all of the disputed property "is included in Plaintiffs' Property," but that the legal description of defendants' property does not include "all of the disputed land."

Frank Hayes, who was permitted to testify as an expert witness in the field of land surveying, testified that he was familiar with every legal description in plaintiffs' chain of title. First, Hayes testified that

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the three most recent deeds in plaintiffs' chain of title had the same legal description. The 1885 deed, conveying the parcel of land from John Storie to J.B. Storie, was "very similar" to the later descriptions, according to Hayes. Referring to the deed, dated 9 December 1885, Hayes stated, "It is my opinion that it is the intent of the Cartin deed to convey the same property that is shown here." Hayes testified that he discovered a "very good description" in the partition proceeding documents from William Storie to John Storie. Hayes also reviewed the description in Grant 1050 from the State of North Carolina, dated 27 November 1880, as well as the deed from Joshua Storie to William Storie. Joshua Storie acquired his land from two grants from the State of North Carolina, Grant 33 and Grant 3676, which is referred to as the "Rich Hillside Tract." Hayes testified that he was able to use the description of Grant 3676 to locate the Rich Hillside Tract on the ground, in spite of the fact that he did not find corners in the Tract based on specific existing "monumentation":

Now, you've got to understand that the Rich Hillside Tract was laid out in—there are stumps in the woods and to say that there's not a stump close to the northeast corner of the Rich Hillside Tract—there are stumps, but again, these are monuments that were in existence in 1833 and/or 1835—anyway, in the 1830s. That would [sic]—165 years plus.

Hayes testified that the description in plaintiffs' deed "fits into the composite of the deeds of the back title."

Defendants' evidence included the testimony of Lewis Cox, a licensed surveyor. Cox did not undertake a survey of the parties' respective properties; instead, Cox merely reviewed existing surveys prepared by the parties. Further, James Murray Gray, also a licensed surveyor employed by defendants, testified that he did not conduct a survey of either plaintiffs' property or defendants' property, but rather conducted surveys of adjoining properties. In fact, Gray stated that he had no opinion as to who owned the overlapping area which was the subject of the cause of action.

The weight and credibility to be accorded the testimony of each of these witnesses was for the trial court as fact finder. *Scott v. Scott*, 336 N.C. 284, 442 S.E.2d 493 (1994). The trial court's findings that the disputed property could be located within the description of plaintiffs' property going back through plaintiffs' chain of title is supported by competent evidence and those findings support its conclusion that the location of the disputed property on the ground is as reflected on

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the surveys done by Walter McCracken and Frank Hayes. Defendants' assignments of error are overruled.

Because we determine plaintiffs have established superior chain of title using the traditional method of connecting the chain to a grant from the State of North Carolina, and have presented sufficient evidence to locate the property on the ground, we need not reach defendants' remaining assignments of error.

Affirmed.

Judges TYSON and THOMAS concur.

SAMUEL JAMES THOMPSON, PLAINTIFF V. FIRST CITIZENS BANK & TRUST
COMPANY (A NORTH CAROLINA CORPORATION), DEFENDANT

No. COA01-973

(Filed 6 August 2002)

1. Appeal and Error— perfection of appeal—failure to file brief

An appeal was dismissed for failure to file a brief.

2. Negotiable Instruments; Evidence— action on CD—not a negotiable instrument—parol evidence rule

The trial court did not err by granting summary judgment for plaintiff in an action alleging that a CD was wrongfully dishonored where the CD was not a negotiable instrument within the provisions of the UCC because the CD confirmation clearly says "NON-TRANSFERABLE." There was a valid contract between the parties; defendant's contradictory affidavit violated the parol evidence rule because it directly contradicted the clear language in the contract between the parties, and defendant did not demonstrate that the CD was only to become effective upon the occurrence of some future contingency.

Appeal by defendant from judgment entered 15 May 2001 by Judge Loto G. Caviness in Henderson County Superior Court. Heard in the Court of Appeals 14 May 2002.

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[151 N.C. App. 704 (2002)]

*Timothy R. Cosgrove, for plaintiff-appellant.**Ward and Smith, P.A., by Eric J. Remington and Cheryl A. Marteney for defendant-appellant.*

BIGGS, Judge.

Defendant (First Citizens Bank) appeals from summary judgment in favor of plaintiff (Samuel James Thompson), entered 15 May 2001. We affirm the trial court.

On 5 November 1998, plaintiff borrowed \$10,500 from defendant. As collateral for the loan, defendant required plaintiff to purchase a \$10,000 certificate of deposit (CD). Plaintiff met with Catherine Huggins (Huggins), defendant's employee, to execute the documents associated with the loan and with the purchase of the CD. Huggins gave plaintiff a CD confirmation form with her signature, acknowledging that plaintiff had opened a CD account with an initial deposit of \$10,000. On the same day, plaintiff executed an "Assignment of Deposit Account," assigning the CD to defendant as collateral for his loan. In November, 1999, plaintiff paid off the \$10,000 loan from defendant, and presented the CD confirmation for payment. Defendant refused to pay the amount due on the CD and claimed that, notwithstanding the signed CD confirmation, plaintiff had not deposited \$10,000 to purchase a CD.

On 13 January 2000, plaintiff filed this action against defendant, claiming that defendant had wrongfully dishonored the CD, and had engaged in unfair and deceptive trade practices. He sought damages in the amount of the CD plus interest, attorney's fees, and a declaration that the defendant had engaged in unfair or deceptive trade practices. Plaintiff moved for summary judgment on 5 April 2001. Defendant moved for partial summary judgment on the issue of unfair and deceptive trade practices on 18 April 2001. On 15 May 2001, the trial court granted summary judgment for plaintiff on his claim that defendant wrongfully dishonored the CD, and ordered defendant to pay plaintiff the amount of the CD, with interest. The court also granted summary judgment for defendant on plaintiff's claim of unfair or deceptive trade practices, and denied plaintiff's request for attorneys' fees. Defendant appealed from the court's summary judgment order in favor of plaintiff regarding the CD; plaintiff appealed from the denial of attorney's fees.

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[151 N.C. App. 704 (2002)]

Plaintiff's Appeal

[1] Plaintiff has failed to perfect his appeal from the denial of his motion for attorneys' fees. Although he gave notice of appeal, he has not filed an appellant's brief. The failure to file a brief with this Court is a violation of the Rules of Appellate Procedure, *see* N.C. R. App. P. 13 (brief must be filed within 30 days of mailing record on appeal); N.C.R. App. P. 28(b) (setting out required contents of brief), and subjects his appeal to dismissal. *In re Church*, 29 N.C. App. 511, 224 S.E.2d 697 (1976) (dismissing appeal for failure to file brief). "The appellate courts of this state have long and consistently held that the rules of appellate practice, now designated the Rules of Appellate Procedure, are mandatory and that failure to follow these rules will subject an appeal to dismissal." *Steingress v. Steingress*, 350 N.C. 64, 65, 511 S.E.2d 298, 299 (1999). Accordingly, plaintiff's appeal is dismissed for failure to file an appellant's brief.

Standard of Review

Defendant appeals from a summary judgment order. Summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (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). "The moving party bears the burden of establishing the lack of a triable issue of fact." *Sykes v. Keiltex Industries, Inc.*, 123 N.C. App. 482, 484-85, 473 S.E.2d 341, 343 (1996) (citing *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985)). If the movant meets its burden, the nonmovant is then required to "produce a forecast of evidence demonstrating that the [nonmoving party] will be able to make out at least a *prima facie* case at trial." *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). 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).

"Evidence which may be considered under Rule 56 includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file whether obtained under Rule 36 or

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[151 N.C. App. 704 (2002)]

in any other way, affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). See also *PNE AOA Media, L.L.C. v. Jackson Cty.*, 146 N.C. App. 470, 554 S.E.2d 657 (2001) (citing rule).

[2] Defendant argues that the trial court erred in granting summary judgment for plaintiff, and contends that the evidence raised a genuine issue of material fact regarding whether there was consideration for the CD. The resolution of this issue requires us to examine several features of the commercial transaction at issue.

First, plaintiff and defendant disagree about whether the CD is a negotiable instrument as defined by the Uniform Commercial Code (UCC). We conclude that the CD at issue in the present case is not a negotiable instrument, and therefore is not governed by the negotiable instrument provisions of the UCC.

The UCC applies only to negotiable instruments. N.C.G.S. § 25-3-102. A "negotiable instrument" is "an unconditional promise or order to pay a fixed amount of money[.]" N.C.G.S. § 25-3-104(a). Negotiable instruments, also called simply "instruments," may include, *e.g.*, a personal check, cashier's check, traveler's check, or CD. N.C.G.S. § 25-3-104. However, N.C.G.S. § 25-3-104(d) provides that a financial document such as a CD "is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this Article." See *Holloway v. Wachovia Bank & Trust Co.*, 333 N.C. 94, 99-100, 423 S.E.2d 752, 755 (1992) (CD that included "terms precluding transfer" held not a negotiable instrument, as it "lacks the essential words of negotiability").

In the instant case, the CD confirmation clearly states, in upper case type, "NON-TRANSFERABLE." We conclude that this qualifies as "a conspicuous statement . . . that the promise or order is not negotiable," and, thus, that the CD does not fall within the purview of the negotiable instrument provisions of the UCC.

"Because the certificate of deposit at issue does not fall under the UCC, we must turn to the common law." *Holloway* at 100, 423 S.E.2d at 755. The CD confirmation is a contract between plaintiff and defendant, and its interpretation is governed by principles of contract law. *Holloway, id.* (CD represents a contract between bank and

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depositor, evidenced by the CD); *In re Estate of Heffner*, 99 N.C. App. 327, 329, 392 S.E.2d 770, 771 (1990) (CD requires signature, as the “only writing purporting to serve as a contract”).

The CD in the case *sub judice* is a contract whereby plaintiff agrees to deposit \$10,000 with defendant for a period of 24 months in return for a guaranteed interest rate of 4.65%. The CD confirmation states:

This confirmation acknowledges that the Depositor named below has opened a CD account with this bank, with an opening deposit in the amount of \$10,000.

The CD confirmation lists plaintiff as the depositor, and sets forth other details regarding the CD’s maturity date, interest rate, account number, date opened, and taxpayer ID number. The CD confirmation is signed by Huggins on the line titled “Authorized Bank Signature.” Defendant has not contested the authenticity of Huggins’ signature, denied that she acted as defendant’s agent, or alleged any defect in the CD confirmation itself, or fraud in its execution. We conclude that the CD confirmation represents a valid contract between the parties and that, absent evidence that warrants reform of the CD confirmation, it entitles plaintiff to the amount stated on its face.

Defendant argues that the sworn affidavit of Huggins raises a genuine issue of material fact as to whether plaintiff provided consideration (\$10,000) for the CD. In her affidavit, Huggins acknowledges that plaintiff obtained a loan from defendant, that defendant required plaintiff to purchase a CD to secure the loan, and that Huggins completed the documents involved in the transaction and delivered them to plaintiff. She further concedes that she gave plaintiff the CD confirmation with her signature. The affidavit contains no allegations of fraud, undue influence, misrepresentation, or mutual mistake. Rather, the affidavit states that “[plaintiff] was mistakenly given a CD confirmation form which acknowledged the opening of the CD account in the amount of \$10,000,” and that “[t]he CD confirmation form and Deposit Account Agreement booklet should not have been given to [plaintiff.]” In essence, Huggins asserts that she gave plaintiff the CD confirmation “by mistake.”

Defendant contends that Huggins’ affidavit is admissible to show lack of consideration for the CD, and thus creates an issue of fact. Plaintiff, however, argues that the parol evidence rule bars admission of Huggins’ affidavit. “The parol evidence rule is not a rule of evi-

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dence but of substantive law. . . . It prohibits the consideration of evidence as to anything which happened prior to or simultaneously with the making of a contract which would vary the terms of the agreement.” *Harrell v. First Union Nat. Bank*, 76 N.C. App. 666, 667, 334 S.E.2d 109, 110 (1985), *aff’d*, 316 N.C. 191, 340 S.E.2d 111 (1986). “Generally, the parol evidence rule prohibits the admission of evidence to contradict or add to the terms of a clear and unambiguous contract.” *Hansen v. DHL Laboratories*, 316 S.C. 505, 508, 450 S.E.2d 624, 626 (1994), *aff’d*, 319 S.C. 79, 459 S.E.2d 850 (1995). Thus, it is “assumed the [parties] signed the instrument they intended to sign[,] . . . [and, absent] evidence or proof of mental incapacity, mutual mistake of the parties, undue influence, or fraud[,] . . . the court [does] not err in refusing to allow parol evidence[.]” *Rourk v. Brunswick County*, 46 N.C. App. 795, 797, 266 S.E.2d 401, 403 (1980).

Defendant correctly states the common law principle of contract law, that parol evidence of a failure of consideration may be admissible to elucidate the terms of a contract. *Stachon & Assoc. v. Broadcasting Co.*, 35 N.C. App. 540, 241 S.E.2d 884 (1978). However, in *Stachon*, and other cases wherein parol evidence was admitted to show lack of consideration, the evidence pertained to a condition precedent that was not stated on the face of the contract, but which was a condition on which the validity of the contract depended. Therefore, the parol evidence did not contradict the contract, but merely set out the full understanding between the parties. *See Bailey v. Westmoreland*, 251 N.C. 843, 112 S.E.2d 517 (1960) (admitting evidence that promissory note was not to become binding obligation unless plaintiff received certain sum from sale or collection of another note); *Perry v. Trust Co.*, 226 N.C. 667, 40 S.E.2d 116 (1946) (notes executed upon understanding among parties, that plaintiff’s uncle would pay back taxes on a certain parcel of land); *Stachon & Assoc. v. Broadcasting Co.*, 35 N.C. App. 540, 241 S.E.2d 884 (1978) (notes executed on unstated condition that plaintiff would perform certain work for defendant). In each of these cases, the parol evidence was necessary to explain the terms of the contract. However, parol evidence is not admissible to contradict the language of the contract. *Harrell v. First Union Nat. Bank*, 76 N.C. App. 666, 667, 334 S.E.2d 109, 110 (1985) (barring testimony that, notwithstanding unambiguous language in ‘Letter of Consent,’ an unwritten agreement modified its terms); *Rourk v. Brunswick County*, 46 N.C. App. 795, 797, 266 S.E.2d 401, 403 (1980) (evidence “in direct conflict with the

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[contract] is incompetent”). In the instant case, the CD confirmation unambiguously states that plaintiff had deposited \$10,000 in a CD account, and the affidavit flatly contradicts this language.

Notwithstanding the language of the CD confirmation, defendant contends that language in its “Deposit Account Agreement” booklet establishes that the CD confirmation was issued subject to a condition precedent. This document states that an account “is not opened or valid until we receive . . . the initial deposit in cash or collectible funds.” The CD confirmation is, however, the document that verifies or acknowledges that this condition precedent (deposit of money) has already occurred. Therefore, the bank booklet does not raise an issue of fact.

Nor is evidence of a unilateral mistake admissible to contradict the terms of a contract. *Goodwin v. Cashwell*, 102 N.C. App. 275, 277, 401 S.E.2d 840, 840 (1991) (citation omitted) (parol evidence rule excludes consideration of unilateral error made by one party in calculations pertaining to settlement agreement; Court notes that a “unilateral mistake, unaccompanied by fraud, imposition, undue influence, or like oppressive circumstances, is not sufficient to void a contract”).

We conclude that defendant’s affidavit (1) directly contradicts the clear language in the contract between the parties; (2) does not demonstrate that the CD was only to become effective upon the occurrence of some future contingency; (3) alleges a unilateral mistake by defendant; and (4) is therefore inadmissible as a violation of the parol evidence rule, and thus is not proper for consideration by the Court in ruling on plaintiff’s summary judgment motion. We further conclude that defendant produced no competent evidence raising a genuine issue of material fact, and that the trial court did not err in granting summary judgment in favor of plaintiff. Accordingly, the trial court’s entry of summary judgment is

Affirmed.

Judges GREENE and HUDSON concur.

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[151 N.C. App. 711 (2002)]

STATE OF NORTH CAROLINA v. MICHAEL ANTHONY DUDLEY

No. COA01-1172

(Filed 6 August 2002)

1. Homicide— felony murder—shooting by accomplice—common purpose and natural consequences

The trial court did not err in a prosecution for felony murder during a robbery and assault by denying defendant's motion to dismiss where defendant and the other intruders were in pursuit of a common purpose (burglary and attempted robbery), the victim was shot by defendant's accomplice, and there was also substantial evidence that the murder was a natural and probable consequence of the burglary and attempted robbery.

2. Homicide— felony murder—acting in concert—instructions—motion to dismiss

There was no error in a prosecution for felony murder where defendant contended that the trial court erred by denying his motion to dismiss when it defined acting in concert as to burglary and attempted robbery charges, but not as to the murder charge. Jury instructions have no logical relationship to dismissing a case at the close of the evidence; moreover, reading these instructions in their entirety, there was no error.

3. Homicide— short form murder indictment—sufficient

A short form murder indictment sufficiently conferred jurisdiction on the trial court where it alleged that defendant "unlawfully, willfully, and feloniously did of malice aforethought kill and murder" the victim. The indictment met the requirements of N.C.G.S. § 15-144.

4. Homicide— felony murder—two underlying convictions—jury not required to decide predicate

The trial court did not err in a prosecution for burglary, attempted robbery, and felony murder by not requiring the jury to unanimously decide which felony was the predicate for the felony murder. Defendant was unanimously convicted of both potential underlying felonies, either of which could have been the basis for the felony murder conviction.

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5. Sentencing—felony murder—two underlying convictions—merger

Convictions for first-degree felony murder, burglary, and attempted robbery was remanded for resentencing where defendant was sentenced for murder and both underlying charges, but there was no indication of which felony was unanimously determined to be the underlying felony. The merger rule requires the trial court to arrest judgment on at least one of the underlying convictions.

Appeal by defendant from judgment entered 30 November 2000 by Judge Henry E. Frye, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 12 June 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Edwin W. Welch, for the State.

Miles and Montgomery, by Lisa Miles, for defendant-appellant.

CAMPBELL, Judge.

Defendant was indicted on 7 February 2000 by the Guilford County Grand Jury for murder, assault with a deadly weapon inflicting serious injury, robbery with a firearm, attempted robbery with a firearm, and first-degree burglary. Defendant pled not guilty and was tried before a jury at the 27 November 2000 Criminal Session of the Guilford County Superior Court, Judge Henry E. Frye, Jr. presiding.

Defendant's confession and other evidence offered by the State at trial tended to show that defendant, accompanied by DeAndre Dudley ("DeAndre") and Robert Adams ("Adams"), kicked in the door of a two-story home occupied by Adonnis R. Whitfield ("Whitfield") and Eric Terrell Fowler ("Fowler") during the early morning of 7 December 1999. All three intruders entered the home wearing masks and carrying guns while both residents were asleep. Whitfield, who was sleeping on the ground floor, awoke to find a shotgun pointed in his face. Shortly thereafter, one of the intruders brought Fowler downstairs. While DeAndre held the residents at gunpoint, defendant and Adams searched the upstairs.

Following an unsatisfying search of the upstairs, Adams went downstairs and demanded that the residents disclose the location of their money. When neither resident complied with this demand, Adams shot Whitfield in the leg. A few minutes later, he shot Fowler

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once in the buttocks. Fowler fell into the kitchen and died later that day as a result of the gunshot wound. During both shootings, defendant continued searching for valuables upstairs. After gathering jewelry, money, drugs, and other things of value, the intruders left. They were subsequently arrested and tried.

Once the State rested its case, defendant presented no evidence on his own behalf. Thereafter, on 30 November 2000, the jury found defendant guilty of first-degree murder under the felony murder rule. He was sentenced to life imprisonment without parole (99 CRS 110602). Defendant was also found guilty of assault with a deadly weapon inflicting serious injury (sentenced to 17 to 30 months) (99 CRS 111389), robbery with a firearm and attempted robbery with a firearm (sentenced to 42 to 60 months, running concurrently with the murder conviction) (99 CRS 111390-91), and first-degree burglary (sentenced to 42 to 60 months) (99 CRS 111392). Defendant appeals.

[1] By defendant's first assignment of error he argues the trial court erred in denying his motion to dismiss at the close of the evidence. Defendant bases this argument on (1) insufficient evidence demonstrating that Fowler's murder was in pursuance of a common purpose or a natural and probable consequence of the burglary and attempted robbery and (2) improper jury instructions. We disagree.

When ruling on a defendant's motion to dismiss a criminal action, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982) (citing *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971)). 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, 433 (1956). 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).

In the present case, substantial evidence exists showing defendant and the other intruders were in pursuance of a common purpose, i.e., the burglary and attempted robbery of the home occupied by Whitfield and Fowler. When parties agree to do an unlawful act, each party is responsible for the act of the other, provided the act was done

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in furtherance of the common purpose or in pursuance of the original understanding. *State v. Barnes*, 345 N.C. 184, 232, 481 S.E.2d 44, 70 (1997). The evidence shows that defendant and the other two intruders conceived and planned the robbery together. Defendant kicked in the door of the residence and searched the home for items of value. After the crime, the intruders divided the stolen money and valuables among themselves. Thus, there is substantial evidence showing that defendant and the other intruders were in pursuance of a common purpose.

There is also substantial evidence that Fowler's murder was a natural and probable consequence of the burglary and attempted robbery. Our Supreme Court has held that a co-conspirator does not have to participate in the actual killing to be guilty of first-degree murder under the felony murder rule. *State v. Barts*, 316 N.C. 666, 689, 343 S.E.2d 828, 843 (1986). Here, although defendant did not shoot Fowler, he was aware that all three intruders entered the house wearing masks and carrying guns. Defendant was also aware that Whitfield and Fowler were being held at gunpoint while he searched the upstairs. Therefore, the trial court's denial of defendant's motion to dismiss the charges against him is supported by substantial evidence demonstrating that murder was a natural and probable consequence of the intruders' actions.

[2] Next, defendant argues that the trial court erred in denying his motion to dismiss when the trial judge defined "acting in concert" as to the burglary and attempted robbery charges but not as to the charge for the first-degree murder of Fowler. However, jury instructions have no logical relationship to dismissing a case at the close of the evidence. Jury instructions take place *after* the evidence is closed and in a separate phase of the trial. Thus, even if the jury instructions were improper, it would not support defendant's argument that the trial court erred in denying his motion to dismiss. Nevertheless, after reading the jury instructions "in their entirety, and not in detached fragments," we conclude that there was no error by the trial court. *State v. Wright*, 302 N.C. 122, 127, 273 S.E.2d 699, 703 (1981) (citations omitted).

[3] Secondly, we address defendant's third assignment of error in which he argues the trial court did not have jurisdiction over him because he was indicted using a short-form murder indictment. Specifically, defendant contends that the indictment for first-degree murder did not indicate whether the grand jury charge was for first-

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degree or second-degree murder, and if first-degree murder, which theory or theories the grand jury found were supported by the evidence presented. This argument is without merit.

Section 15-144 of the General Statutes of North Carolina provides that an indictment for murder is sufficient if it alleges the accused person “feloniously, willfully, and of his malice aforethought, did kill and murder” the victim. N.C. Gen. Stat. § 15-144 (2001). Our Supreme Court has held that such an indictment will support a conviction of either first-degree or second-degree murder because Section 15-144 contains no requirement that the indictment specify the degree of murder sought. *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). In the case *sub judice*, the murder indictment *did* state that it was for first-degree murder and also stated that defendant “unlawfully, willfully, and feloniously did of malice aforethought kill and murder” Fowler. Since the short-form indictment met the requirements of Section 15-144, it sufficiently conferred jurisdiction over this case to the trial court.

[4] Finally, by defendant’s second assignment of error he argues the trial court erred by not requiring the jury to unanimously decide which felony was the predicate for first-degree felony murder. We disagree.

This Court has held that a trial court’s disjunctive phrasing of a jury instruction does not deprive the defendant of the right to be convicted by a unanimous jury. *State v. Galloway*, 145 N.C. App. 555, 568, 551 S.E.2d 525, 534 (2001). “[I]f the trial court merely instructs the jury disjunctively as to various alternative acts *which will establish an element of the offense*, the requirement of unanimity is satisfied.” *State v. Lyons*, 330 N.C. 298, 303, 412 S.E.2d 308, 312 (1991) (emphasis in original). In the present case, the instructions given to the jury regarding the felony murder charge were, in pertinent part, as follows: “[I]f while committing or attempting to commit burglary *or* robbery the defendant killed the victim and the defendant’s act was a proximate cause of the victim’s death, it would be your duty to return a verdict of guilty of first degree murder.” (Emphasis added.) Defendant was unanimously convicted of both potential underlying felonies, and first-degree murder even though only one conviction was necessary to support the felony murder conviction. Since either burglary or robbery could have been the basis for defendant’s felony murder conviction, the trial court did not err.

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[5] Although not raised by defendant, this Court does take issue with the trial court imposing sentences on defendant for both underlying felonies, and we raise this issue on our own initiative to prevent manifest injustice. *See* N.C. R. App. P. Rule 2.

In a felony murder case, the State is not required to secure a separate indictment for the underlying felony. *State v. Carey*, 288 N.C. 254, 274, 218 S.E.2d 387, 400 (1975), *vacated in part by* 428 U.S. 904, 49 L. Ed. 2d 1209 (1976). However, if the State secures an indictment for the underlying felony and a defendant is convicted of both the underlying felony and felony murder, the defendant will only be sentenced for the murder. The underlying felony must be arrested under the merger rule. *State v. Bartlowe*, 337 N.C. 371, 380, 446 S.E.2d 352, 358 (1994); *Carey*, 288 N.C. at 274, 218 S.E.2d at 400.

Here, in addition to other charges, defendant was sentenced for first-degree felony murder and for both potential underlying felonies. The merger rule requires the trial court to arrest judgment on at least one of the underlying felony convictions if two separate convictions supported the conviction for felony murder. *Id.* Since there is no evidence in the record indicating which felony the jury unanimously determined was the underlying felony for felony murder, we remand this case to the trial court. The trial court is instructed to arrest either the burglary or robbery felony in such a manner that would not subject defendant to a greater punishment.

Accordingly, for the aforementioned reasons we find no error in the decision of the trial court, except for the court's failure to arrest the underlying felony under the merger rule with respect to defendant's first-degree felony murder conviction.

Affirmed in part and remanded in part for re-sentencing.

Judges WYNN and HUDSON concur.

WARD v. LONG BEACH VOL. RESCUE SQUAD

[151 N.C. App. 717 (2002)]

JILL ANN WARD, PLAINTIFF-EMPLOYEE v. LONG BEACH VOLUNTEER RESCUE SQUAD,
AND TOWN OF OAK ISLAND, DEFENDANT-EMPLOYER, SELF-INSURED THROUGH THE
NORTH CAROLINA INTERLOCAL RISK MANAGEMENT AGENCY

No. COA01-1300

(Filed 6 August 2002)

1. Workers' Compensation— injury to Rescue Squad volunteer—membership in Rescue Squad

The Industrial Commission did not err in a workers' compensation action by finding and concluding that plaintiff was a volunteer member of the Rescue Squad where plaintiff began as a volunteer member of the Long Beach Volunteer Rescue Squad, became a paid member of the Oak Island EMS, became an honorary member of the Long Beach squad who could return to active duty during extenuating circumstances, and she was injured during Hurricane Floyd relief efforts when she completed her Oak Island shift and volunteered at Long Beach. Extenuating circumstances existed.

2. Workers' Compensation— emergency management volunteer—injury compensable

The Industrial Commission did not err by finding and concluding that plaintiff's claim was compensable pursuant to the N.C. Emergency Management Act where plaintiff volunteered during Hurricane Floyd relief efforts and was injured while on patrol. Although the record reveals that plaintiff was bored and wanted to ride in the Humvee because it was fun, help was needed on a continuous basis and it is irrelevant whether plaintiff was responding to a call at the time of her injuries.

3. Appeal and Error— offer of proof—included in record

The Industrial Commission did not abuse its discretion in a workers' compensation action by including plaintiff's offer of proof in the record. Although defendant contended on appeal that the report had never been admitted, the Commissioner who settled the record stated that plaintiff's offer of proof was tendered and accepted by the Deputy Commissioner.

Appeal by defendant from opinion and award entered 26 June 2001 by the Industrial Commission. Heard in the Court of Appeals 12 June 2002.

WARD v. LONG BEACH VOL. RESCUE SQUAD

[151 N.C. App. 717 (2002)]

The Slaughter Law Firm, PC, by M. Troy Slaughter, for plaintiff.

Christopher L. Mewborn, PA, by Christopher L. Mewborn, for defendant.

BRYANT, Judge.

Procedural history

This matter was heard on 7 June 2000 in Wilmington, North Carolina, with Deputy Commissioner John A. Hedrick presiding. At that hearing, plaintiff Jill Ann Ward dismissed with prejudice her claim for workers' compensation benefits against Yaupon Beach Volunteer Fire Department. An order allowing the dismissal was filed on 12 June 2000.

By opinion and award filed 31 August 2000, Deputy Commissioner Hedrick denied plaintiff's claim for workers' compensation benefits. On 13 September 2000, plaintiff filed notice of appeal with the Full Commission, and on 15 September 2000, defendant filed a cross appeal.

By opinion and award filed on 26 June 2001, the Full Commission reversed the opinion and award of the Deputy Commissioner, and awarded workers' compensation benefits to plaintiff. Defendant gave notice of appeal to the Court of Appeals on 25 July 2001.

Facts

On the night of 22 September 1999, while patrolling Caswell Beach, plaintiff sustained serious bodily injuries when the Humvee vehicle in which she was riding overturned. Plaintiff was thrown from the Humvee and sustained a fractured vertebrae, severe lacerations to her skull and body, a fractured tailbone, and bruises and contusions throughout her entire body. Plaintiff has been unable to return to work since the date of the accident.

At the time of the accident, plaintiff was employed as an emergency medical technician (EMT) with the Town of Oak Island Emergency Medical Services (Oak Island EMS). In addition, plaintiff was a honorary member of the Long Beach Volunteer Rescue Squad (Rescue Squad), which was the volunteer component of the Oak Island EMS. Volunteer members with the Rescue Squad assumed the

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duties of paid members when the paid members of the Oak Island EMS went off duty.

Before becoming a paid member of the Oak Island EMS, plaintiff had been a volunteer member of the Rescue Squad. Upon becoming a paid EMT, plaintiff was required to resign from her position with the Rescue Squad. After plaintiff's resignation from the Rescue Squad, plaintiff was adorned with the status of honorary member of the Rescue Squad. Honorary members were not required to respond to emergency calls and did not engage in active duty. However, honorary members were allowed to return to active duty under extenuating circumstances. At oral argument, counsel for plaintiff stated that at times when plaintiff was functioning as a volunteer member of the Rescue Squad, she would be paid as an EMT.

In 1999, Hurricane Floyd caused extreme damage to the coastline of Brunswick County, North Carolina (including Caswell Beach and the Town of Oak Island). On 14 September 1999, the Governor of North Carolina issued a "Proclamation of the State of Disaster," and ordered all state and local government entities and agencies to cooperate in the implementation of an emergency operations plan.

Volunteers and paid emergency management workers performed a variety of tasks including: manning checkpoints, preparing food, patrolling for looters, patrolling for curfew violators, manning roadblocks, delivering meals and water, attending coordination meetings, assisting other agencies, going on patrol with members of the North Carolina National Guard, and escorting outside agencies around the local areas. Volunteers reported to the Yaupon Beach Volunteer Fire Department (the unofficial headquarters of the relief effort) to determine in what areas needed assistance.

On the morning of 22 September 1999, plaintiff was ordered not to report to work (as an EMT). Thereafter, plaintiff spent a portion of the afternoon assisting (as a volunteer) at the fire department. Plaintiff went home but later returned to the fire department. Plaintiff stated that she was bored because there was nothing to do at the fire department; thereafter, she and three other emergency workers patrolled Caswell Beach while riding in a Humvee vehicle.

During the patrol, one of the workers spotted some persons on the beach in violation of curfew. The persons were told to leave the beach area. As the driver backtracked in the direction from which he had come, the driver began to increase speed. Shortly thereafter, the

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[151 N.C. App. 717 (2002)]

driver lost control of the Humvee, and the vehicle overturned. Plaintiff sustained several injuries as a result of being thrown from the vehicle.

Standard of review

Opinions and awards of the Commission are reviewed to determine whether competent evidence exists to support the Commission's findings of fact, and whether the findings of fact support the Commission's conclusions of law. *See Deese v. Champion Int'l Corp.*, 352 N.C. 109, 114, 530 S.E.2d 549, 552 (2000). If supported by competent evidence, the Commission's findings are binding on appeal even when there exists evidence to support findings to the contrary. *Allen v. Roberts Elec. Contr'rs*, 143 N.C. App. 55, 60, 546 S.E.2d 133, 137 (2001); *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). The Commission's conclusions of law are reviewed *de novo*. *Allen*, 143 N.C. App. at 63, 546 S.E.2d at 139.

I.

[1] First, defendant argues that the Commission erred by finding and concluding that plaintiff was a volunteer member of the Rescue Squad. We disagree.

The record reveals that prior to becoming a paid member of the Oak Island EMS, plaintiff was a volunteer member of the Rescue Squad. After joining the Oak Island EMS as a paid member, plaintiff resigned from her position with the Rescue Squad. Following this resignation, the Rescue Squad adorned plaintiff with the status of honorary member. Although honorary members did not engage in active duty, honorary members were allowed to return to active duty during extenuating circumstances.

In the instant case, extenuating circumstances existed as the presence of Hurricane Floyd caused severe damage to the Brunswick County coastline. Due to the damages caused by Hurricane Floyd, the Governor declared the region a disaster area.

The record reveals that plaintiff was allowed to engage in active duty during the Hurricane Floyd relief efforts. Specifically, the record reveals that "[e]very evening after completing her shift for the Town of Oak Island, plaintiff would go to the Yaupon Beach Fire Station to work as a volunteer." The record is replete with evidence that plaintiff had been allowed to engage in and accepted for active volunteer

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duty during the Hurricane Floyd relief effort. Therefore, we overrule this assignment of error.

II.

[2] Second, defendant argues that the Commission erred by finding and concluding that plaintiff's claim is compensable pursuant to the North Carolina Emergency Management Act. We disagree.

Defendant points this Court's attention to sections 166A-14(d)-(e), and 166A-4(1) of the North Carolina General Statutes in support of its argument that plaintiff was not acting in the course of her volunteer duties when she was injured on 22 September 1999. N.C.G.S. § 166A-14(d)-(e) (2001) provide:

(d) As used in this section, the term "emergency management worker" shall include any full or part-time paid, volunteer or auxiliary employee of this State or other states, territories, possessions or the District of Columbia, of the federal government or any neighboring country or of any political subdivision thereof or of any agency or organization performing emergency management services at any place in this State, subject to the order or control of or pursuant to a request of the State government or any political subdivision thereof.

(e) Any emergency management worker, as defined in this section, performing emergency management services at any place in this State pursuant to agreements, compacts or arrangements for mutual aid and assistance to which the State or a political subdivision thereof is a party, shall possess the same powers, duties, immunities and privileges he would ordinarily possess if performing his duties in the State, or political subdivision thereof in which normally employed or rendering services.

N.C.G.S. § 166A-4(1) (1999) (current version at N.C.G.S. § 166A-4(4) (2001)) provides: "Emergency Management.—Those measures taken by the populace and governments at federal, State, and local levels to minimize the adverse effect of any type disaster, which includes *the never-ending preparedness cycle of prevention*, mitigation, warning, movement, shelter, emergency assistance, and recovery." (Emphasis added.)

Defendant argues that, as required by the applicable provisions of Chapter 166A, plaintiff's injury did not arise out of and in the course of her employment (volunteer service) with the Rescue Squad; that

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when the injuries occurred, plaintiff was not engaged in emergency management services designed to minimize the adverse effects of a disaster; that plaintiff's activities did not occur in the time, place or circumstances of her employment nor did her activities provide an appreciable benefit to the Rescue Squad; but rather, her injuries were the result of her joy riding. We disagree.

At oral argument, defendants conceded that extenuating circumstances existed. A review of the record reveals that on the evening of 22 September 1999, plaintiff went to the Yaupon Beach Fire Station and made herself available to do whatever was necessary to assist in the continuing relief effort. At the time of the accident, plaintiff was on patrol with a lieutenant and a captain of the Yaupon Beach Volunteer Fire Department, and with a member of the North Carolina National Guard. Plaintiff made herself available during the patrol to assist in the event that emergency management services were needed. By virtue of her status as an honorary member, plaintiff was accepted for active duty in the wake of extenuating, emergency circumstances. By participating in active patrol duty, plaintiff was performing in accordance with the Rescue Squad mission, and in furtherance of minimizing the effects of the disaster.

Although the record reveals that plaintiff was bored at the fire department and wanted to ride on the Humvee vehicle because it was fun, competent evidence exists to show that plaintiff's injuries were sustained while engaged in emergency management services in accordance with provisions of the North Carolina Emergency Management Act. Specifically, plaintiff was engaged in "*the never-ending preparedness cycle of prevention*" as referenced pursuant to N.C.G.S. § 166A-4(1). Moreover, the circumstances of the disaster were such that there was a continuous need for relief efforts. Therefore, it is irrelevant whether plaintiff was responding to a call for help at the time of her injuries, because the need for help existed on a continuous basis.

Because competent evidence exists to support the Commission's findings, and these findings support their conclusions, we overrule this assignment of error.

III.

[3] Third, defendant argues that the Commission abused its discretion by including plaintiff's offer of proof in the record on appeal. We disagree.

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The Commission is vested with the authority to settle the record on appeal, and its decisions in that regard will not be overturned absent abuse of discretion. *Porter v. Fieldcrest Cannon, Inc.*, 133 N.C. App. 23, 27, 514 S.E.2d 517, 521 (1999).

Defendant argues that “[i]nclusion of a report, never admitted into evidence, containing statements from witnesses not subject to cross-examin[ation], and where there is no cross-assignment of error by the Plaintiff that the document should be admitted constitutes a manifest abuse of discretion.” We, however, are unpersuaded by defendant’s argument.

By order settling the record filed on 8 October 2001, Commissioner Renee C. Riggsbee stated “Upon review of the transcript of the Deputy Commissioner’s hearing, particularly at page 89, it is apparent that the Offer of Proof Number 1 [plaintiff’s offer of proof] was tendered and accepted by the Deputy Commissioner and thereby should be part of the record of this action.” Based on the above referenced deliberation, it does not appear the Commission abused its discretion in including plaintiff’s offer of proof in the record on appeal. Therefore, this assignment of error is overruled.

AFFIRMED.

Judges TIMMONS-GOODSON and McCULLOUGH concur.



LEOLA BOYD SOWELL v. KRISTOPHER LYNN CLARK AND WILLIAM EDDIE CLARK

No. COA01-1110

(Filed 6 August 2002)

1. Process and Service— sufficiency of service—grounds raised in motion binding

The trial court did not err by denying a motion to dismiss for insufficient service in a personal injury action where the ground for the motion was that defendant did not reside at the address listed on the summons and the person served was not authorized to accept service, but defendant admitted in a deposition that he lived at the listed address with his father, who was a healthy adult with no mental infirmities. Defendant was constrained by the

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grounds set forth in his pleading and could not raise on appeal a question about the copy of the summons left at his residence.

2. Costs— attorney fees awarded by court—statutory limit— damages and costs distinct

The trial court did not abuse its discretion by awarding attorney fees to the plaintiff in a personal injury action where defendant's offer of judgment occurred when the answer was filed, the judgment was more favorable than the offer, and plaintiff's damages were less than \$10,000, even though the total with costs was over the \$10,000 limit of N.C.G.S. § 6-21.1. Damages and costs are separate items.

Appeal by defendant Kristopher Lynn Clark from judgments entered 12 April 2001 and 25 June 2001 by Judges Raymond Warren and Ronald K. Payne, respectively, in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 May 2002.

Thomas D. Windsor for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, LLP, by Allen C. Smith and C. J. Childers for defendant-appellant.

THOMAS, Judge.

Defendant Kristopher Lynn Clark (defendant) appeals an order denying his motion to dismiss and an order awarding attorney fees to plaintiff, Leola Boyd Sowell, in this personal injury action. For the reasons discussed herein, we find no error.

The pertinent facts are as follows: On 20 October 1997, the vehicle defendant was operating rear-ended the vehicle operated by plaintiff on Providence Road in Charlotte, North Carolina. Plaintiff filed a complaint on 7 May 1999, alleging injuries to her neck, back, and spine as a result of defendant's negligence. She requested compensation for medical expenses, lost income, and pain and suffering.

On 29 June 1999, defendant filed an answer, including a motion to dismiss for insufficiency of service of process, and an offer of judgment in the amount of \$1,000. Plaintiff refused the offer.

On 21 February 2001, defendant filed a motion to dismiss based on insufficiency of service of process. The ground for the motion was the same as the first, that defendant did not live at the address listed with the person served not authorized to accept it for defendant. The

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trial court denied the motion, finding, *inter alia*, that: (1) the summons included the names of both defendant and his father, defendant William Eddie Clark; (2) the Mecklenburg County Sheriff delivered a copy of the complaint and summons to William Clark on 6 June 1999 at his residence; (3) defendant lived with William Clark and his mother at the time of service of process; (4) William Clark was sixty-one or sixty-two at the time of defendant's deposition (2 April 2001); (5) William Clark was a responsible person, in good health, and did not suffer from any mental disability; and (6) William Clark informed defendant that the summons and complaint had been served. The trial court concluded that service was properly made to defendant's usual place of abode and that the Sheriff left a copy of the summons and complaint with a person of suitable age and discretion who resided there.

Plaintiff dismissed all claims as to William Clark on 11 April 2001.

At trial, the jury found that plaintiff was injured as a result of defendant's negligence and was entitled to recover \$4,950 from defendant. Plaintiff's counsel then filed a motion for attorney fees as part of costs pursuant to N.C. Gen. Stat. § 6-21.1. The trial court granted the motion and ordered defendant to pay \$5,445 in attorney fees. Defendant appeals this order and the order denying his motion to dismiss.

[1] By defendant's first assignment of error, he argues the trial court erred in denying his Rule 12(b)(5) motion to dismiss based on insufficiency of service of process. We disagree.

The North Carolina Rules of Civil Procedure provide that service upon a natural person may be made:

a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

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N.C. Gen. Stat. § 1A-1, Rule 4(j)(1) (2001). In his answer, defendant moved to dismiss the claim based on insufficiency of service of process. He stated that: "The ground for this Motion is that [defendant] does not reside at the address listed on the Summons and the person served is not authorized to accept service of process for [defendant]." He stated the same in a separate motion to dismiss filed on 21 February 2001. However, in his deposition, defendant admitted he lived with his father at 411 Boyce Street, which is the address listed on the summons, and did so at the time of service. He testified his father was healthy and had no mental infirmities and was an adult.

Because the trial court properly found that defendant did live with his father at the time service was attempted, defendant now argues service was insufficient because the sheriff did not leave a copy of the summons and complaint for him at his residence. The only copy actually left at the residence was originally intended for William Clark. The copy originally intended for defendant was marked "unserved" and returned because William Clark told the deputy that his son did not live there.

However, we hold that defendant must be constrained by the grounds set forth in his pleading, i.e., that service was not sufficient because he did not live at 411 Boyce Street. *See* N.C. R. Civ. P. 7(b)(1); *Hunt v. Hunt*, 117 N.C. App. 280, 450 S.E.2d 558 (1994); *Little v. Rose*, 285 N.C. 724, 208 S.E.2d 666 (1974). Every defense can be raised by a responsive pleading. *Lehrer v. Edgcombe Mfg. Co.*, 13 N.C. App. 412, 185 S.E.2d 727 (1972). A defendant waives his right to raise a Rule 12(b)(2) defense if it was not raised in his answer, but presented for the first time on appeal. *See Shores v. Shores*, 91 N.C. App. 435, 371 S.E.2d 747 (1988). Likewise, although defendant raised a Rule 12(b)(5) defense in his answer, he limited the basis of that defense to the singular ground that he did not live at 411 Boyce Street with his father. His admission to the falsity of both his own defense and the statement by his father as to residency provided a sufficient basis for the trial court's findings. If the trial court's findings of fact are supported by competent evidence, and they support its conclusions, they are binding on appeal. *Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999). We therefore reject defendant's argument.

[2] By his second assignment of error, defendant argues the trial court abused its discretion in awarding attorney fees to plaintiff. We disagree.

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The North Carolina General Statutes provide:

In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars (\$10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

N.C. Gen. Stat. § 6-21.1 (1999). Under this statute, the trial court is given the discretion to award attorney fees to the prevailing party. *See Tew v. West*, 143 N.C. App. 534, 546 S.E.2d 183 (2001); *Porterfield v. Goldkuhle*, 137 N.C. App. 376, 528 S.E.2d 71 (2000). The ruling will not be disturbed on appeal absent a showing of abuse of discretion. *West v. Tilley*, 120 N.C. App. 145, 461 S.E.2d 1 (1995). An abuse of discretion occurs when the trial court's ruling "is so arbitrary that it could not have been the result of a reasoned decision." *Chicora Country Club, Inc. v. Town of Erwin*, 128 N.C. App. 101, 109, 493 S.E.2d 797, 802 (1997), *disc. review denied*, 347 N.C. 670, 500 S.E.2d 84 (1998) (citations omitted).

When determining whether to award attorney fees, the trial court must consider the entire record, including the following factors: (1) settlement offers made prior to institution of the action; (2) offers of judgment made pursuant to Rule 68 and whether the judgment finally obtained was more favorable than such offers; (3) whether defendant unjustly exercised superior bargaining power; (4) in a case of unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of settlement offers; and (6) the amounts of settlement offers as compared to jury verdict. *Washington v. Horton*, 132 N.C. App. 347, 351-52, 513 S.E.2d 331, 334-35 (1999). We now, in the aggregate, review these factors.

There was no settlement offer made prior to the filing of the complaint. Defendant's offer of judgment pursuant to Rule 68 in the amount of \$1,000 occurred when the answer was filed. Because the judgment finally obtained was \$4,950 for damages and \$5,445 in attorney fees, it was more favorable than the \$1,000 offer of judgment.

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Defendant next argues that because the total amount of the judgment, with interest, is \$11,130.23, it is beyond the parameters of section 6-21.1. However, the statute provides that the “judgment for recovery of damages [be] ten thousand dollars (\$10,000) or less” to receive attorney fees. *See* N.C. Gen. Stat. § 6-21.1. Plaintiff’s *damages* were \$4,950 and her *costs* were \$6,180.23.

Damages and costs are legally separate items. Damages comprise compensation for injuries through the negligence of another. *Black’s Law Dictionary* 389 (6th ed. 1990). Costs are the expenses a party incurs for prosecuting or defending an action. *Black’s Law Dictionary* 346 (6th ed. 1990). *See also Perkins v. American Mut. Fire Ins. Co.*, 4 N.C. App. 466, 167 S.E.2d 93 (1969) (holding that generally, in absence of any contractual or statutory obligation, plaintiff’s costs for his claim against defendant are not recoverable as item of damages, either in contract or tort action).

Accordingly, we hold that, as compared with the jury verdict, plaintiff’s judgment finally obtained was within the parameters of section 6-21.1 and was more favorable than defendant’s offer of judgment. The trial court did not abuse its discretion and we reject defendant’s argument.

NO ERROR.

Judges WYNN and HUNTER concur.

IN THE MATTERS OF: TASHA JOHNSTON, JESSICA JOHNSTON, AND
PAUL ALEXANDER

No. COA01-1440

(Filed 6 August 2002)

**1. Termination of Parental Rights— findings of fact—sup-
porting evidence**

There was sufficient evidence in a proceeding to terminate a mother’s parental rights, including testimony by a social worker, to support the trial court’s findings that the mother made little progress in the practical application of instructions to supervise her children and that the mother was not able to put into practice what she had learned in parenting classes.

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2. Termination of Parental Rights— special needs of another child in home—treatment of other children

The trial court did not err in a termination of parental rights case by admitting evidence of and making findings of fact concerning the special needs of one of respondent mother's children, respondent's inability to deal with that child's issues, and her subsequent voluntary surrender of her parental rights to him, because: (1) it is of critical importance for the trial court to have a thorough understanding of any circumstance that reasonably impacts the children and is related to the grounds for termination; and (2) how another child in the same home has been treated and the current status of that child are relevant.

3. Termination of Parental Rights— willfully leaving children in foster care for more than twelve months—best interests of child

The trial court did not err by terminating respondent mother's parental rights to three of her children, because: (1) the trial court found that respondent willfully left the children in foster care for more than twelve months without showing reasonable progress to correct the conditions which led to the children's removal, N.C.G.S. § 7B-1111(a)(2); and (2) the finding of any of the factors listed in N.C.G.S. § 7B-1111 is sufficient to support a termination based on the best interests of the child.

Appeal by respondent from judgment entered 9 January 2001 by Judge Lisa C. Bell in Mecklenburg County District Court. Heard in the Court of Appeals 13 June 2002.

Leslie C. Rawls for respondent-appellant.

Alan B. Edmonds for petitioner-appellee.

THOMAS, Judge.

Respondent, Jacqueline Johnston, appeals an order terminating her parental rights to her children, Tasha Johnston, Jessica Johnston, and Paul Alexander. She sets forth three assignments of error. For the reasons discussed herein, we affirm.

Tasha was born on 28 February 1987, Jessica on 15 April 1989, and Paul on 4 January 1995.

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The Departments of Social Services of Mecklenburg, Iredell, and Gaston counties have at various times been involved with Johnston's family since 1992. Neglect of Tasha, Jessica, and another child, Q DJ Johnston, who is not a part of this appeal, was first substantiated in 1992 due to unsanitary living conditions in the home and Johnston's history of mental illness and drug use. Tasha and Jessica were temporarily placed with their aunt in Arizona and Q DJ was placed in the legal custody of the Youth and Family Services (YFS) in Mecklenburg County.

In 1995, after Paul was born, neglect was again substantiated due to "filthy living conditions in the family home." In 1997, Tasha, who was then ten years old, had been left in charge of her siblings. A complaint was made to YFS based on inappropriate supervision. The children remained in the home and their behavior deteriorated even while a social worker was involved with them.

A new petition based on neglect and dependency was filed on 6 November 1997, alleging that: (1) the children are poorly supervised, with specific instances of extremely inappropriate conduct by the children noted; (2) the housekeeping has remained in poor shape or worse; (3) the children are neglected because they live in an environment injurious to their health and do not receive proper care, supervision or discipline and are denied necessary medical or remedial care; and (4) the children are dependent because they are in need of placement or assistance. The trial court adjudicated the children dependent and concluded it was in their best interests to be placed in the custody of YFS.

Petitions for termination of Johnston's parental rights to Tasha, Jessica, and Paul were filed in December 1999, alleging, *inter alia*, that the children were: (1) neglected; (2) willfully left in foster care for more than twelve months without a satisfactory showing of progress; and (3) not supported by their parents, despite the parents being physically and financially able to do so.

On 9 January 2001, Johnston's parental rights to Tasha, Jessica, and Paul, and Larry Alexander's rights to Paul, were terminated. Johnston appeals. Tasha's father, Leon Beisner, executed a surrender of his parental rights and is not a party to this appeal. Jessica's father, Jeff Martin, was not served and is not a party to this appeal. Paul's father, Larry Alexander, did not appeal the ruling terminating his parental rights and therefore is also not a party to this appeal.

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There is a two-step process in a termination of parental rights proceeding. In the adjudicatory stage, the trial court must determine whether at least one ground for the termination of parental rights listed in N.C. Gen. Stat. § 7B-1111 exists. N.C. Gen. Stat. § 7B-1109. *See also In re Matherly*, 149 N.C. App. 452, 562 S.E.2d 15 (2002). 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 Matherly*, 149 N.C. App. 452, 562 S.E.2d 15 (2002). 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. *Id.*; N.C. Gen. Stat. § 7B-1110(a).

[1] By her first and second assignments of error, Johnston argues the trial court erred in that the trial court's findings of facts were not supported by the evidence and thus did not support the conclusions of law. She also contends the trial court made findings of facts that were technically conclusions of law and vice-versa. We disagree.

If the trial court's findings of fact are supported by competent evidence, and they support its conclusions, they are binding on appeal. *Sain v. Sain*, 134 N.C. App. 460, 517 S.E.2d 921 (1999). "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. R. Civ. P. 52(a)(1). Findings of fact are defined as "[d]eterminations from the evidence of a case . . . concerning facts averred by one party and denied by another." *Black's Law Dictionary* 632 (6th ed. 1990). Conclusions of law are defined as "[f]inding[s] by [a] court as determined through [the] application of rules of law." *Id.* at 290.

In the instant case, Johnston contends there was no evidence to support the trial court's finding that:

12. The mother made little progress in the practical application of instructions to supervise her children. The mother could articulate what she was to do, but could not put what she was taught by social workers into practice. A specific example of this was a disastrous series of overnight visits which occurred in July, 1999.

13. Similarly, the mother was not able to put into practice what she had learned in the parenting classes. The mother could articulate what she was taught in the parenting class, but during the

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overnight visits in July 1999, she used corporal punishment on Paul and curse words with Jessica.

However, Angenette S. Stephenson, a social worker with YFS, testified that:

[Johnston] could probably teach a parenting class. She has a lot of knowledge about the subject. But when it actually came down to parenting the children as demonstrated in the visits, she was not so skilled. Specifically, although she had learned timeout skills and had learned how to distract children when they're doing inappropriate behaviors with more positive things and she had learned a lot of different techniques. When she actually had a chance to parent them in the first visit, she used corporal punishment and she used a curse word while yelling at Jessica.

Therefore, there was evidence to support these findings of the trial court. The trial court complies with the requirement to make specific findings of fact and conclusions of law so long as it distinguishes the findings of fact from the conclusions of law in some recognizable fashion. *Highway Church of Christ v. Barber*, 72 N.C. App. 481, 325 S.E.2d 305 (1985). See also *Matter of Wills of Jacobs*, 91 N.C. App. 138, 370 S.E.2d 860 (1988). After a careful review of the record in this case, we hold the trial court's findings of fact are supported by the evidence and support the trial court's conclusions of law. Accordingly, we reject Johnston's arguments.

[2] By Johnston's third assignment of error, she argues the trial court prejudicially erred by admitting evidence of and making findings of fact concerning Q DJ's special needs, Johnston's inability to deal with his issues, and her subsequent voluntary surrender of her parental rights to him. We disagree.

Under the statutory definition of "neglected juvenile," the trial court is allowed to consider as relevant evidence "whether [the] juvenile lives in a home . . . where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B-101(15) (2001). One of the allegations in the petition for termination here is neglect and another is unsatisfactory progress. It is of critical importance for the trial court to have a thorough understanding of any circumstance that reasonably impacts the children and is related to the grounds for termination. How another child in the same home has been treated, and the current status of that child, are clearly relevant. This assignment of error is rejected.

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[151 N.C. App. 733 (2002)]

[3] By Johnston's final assignment of error, she argues the trial court erred in terminating her parental rights to Tasha, Jessica, and Paul. We disagree.

We have held that the trial court's findings of fact are supported by competent evidence and the conclusions of law are supported by the findings of fact. The trial court found, *inter alia*, that Johnston wilfully left the children in foster care for more than twelve months without showing reasonable progress to correct the conditions which led to the children's removal. *See* N.C. Gen. Stat. § 7B-1111(a)(2) (2001). The finding of any of the factors listed in section 7B-1111 is sufficient to support a termination based on the best interests of the child. *Matherly*, 149 N.C. App. at 453-54, 562 S.E.2d at 17 (2002); *In re Hardesty*, 150 N.C. App. 380, 385, 563 S.E.2d 79, 83 (2002); *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). Accordingly, we reject Johnston's argument and affirm the trial court.

AFFIRMED.

Judges MARTIN and TYSON concur.

IN THE MATTER OF: PAUL JONAS ROBINSON

No. COA01-817

(Filed 6 August 2002)

1. Juveniles— capacity to proceed—evaluations

The trial court did not err by finding a juvenile capable of proceeding where 2 doctors from Dorothea Dix found the juvenile capable, a private psychologist found him incapable, and the trial court ordered an evaluation by the chief of forensic psychiatry at Dorothea Dix, who found the juvenile capable of proceeding. There was no merit to the juvenile's contention that the chief psychiatrist's evaluation was inherently unreliable or biased because it was based in part on information gathered by one of his employees.

2. Juveniles— commitment—not an abuse of discretion

The trial court did not abuse its discretion by committing a juvenile to the Department of Juvenile Justice and Delinquency

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Prevention where the court had before it assessments of needs and risks and the court found that it was in the juvenile's best interest to be committed given the severity of the case, the lack of progress, and the alternatives available in the community.

Appeal by respondent from judgment entered 11 December 2000 by Judge Lisa Thacker in Union County District Court. Heard in the Court of Appeals 18 April 2002.

Donna B. Stepp, attorney for respondent-appellant.

Roy Cooper, Attorney General, by Lisa Granberry Corbett, Assistant Attorney General, for the State.

THOMAS, Judge.

Juvenile respondent, Paul Jonas Robinson, was adjudicated delinquent after admitting to the following offenses: (1) assault with a deadly weapon with intent to kill inflicting serious injury; (2) robbery with a dangerous weapon; and (3) felonious larceny. He was committed to the Department of Juvenile Justice and Delinquency Prevention (the Department) for a period not to exceed his nineteenth birthday.

The juvenile appeals, contending the trial court erred: (1) in finding him capable of proceeding; and (2) by committing him to the Department. Based on the reasons herein, we affirm.

The State's evidence tends to show the following: On 7 February 2000, the fourteen-year-old juvenile shot his mother with a .12 gauge shotgun through the bathroom door at home. She was hit in the right arm and chest, resulting in serious injuries. The juvenile then took \$20.00 from her and drove his father's car to South Carolina before finally wrecking.

The juvenile was taken into custody and returned to North Carolina. During questioning by Union County Sheriff's Department Detective Robert Rollins, the juvenile said "the devil" made him shoot his mother. He further claimed the shotgun he used was similar to Detective Rollins's handgun, and that after the shooting he threw the weapon into the water behind his home.

At the juvenile's first appearance, his counsel moved to commit him to Dorothea Dix Hospital for an examination to determine capacity to proceed. Doctors Manuel Versola, M.D., and Tricia Hahn, Ph.D., L.P., conducted exams and concluded that the juvenile suffered from

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no mental illness or retardation. They found him capable of proceeding. The juvenile then applied for and received an evaluation by a private psychologist, Dr. Frank Gaskill, Ph.D. Gaskill determined that the juvenile suffers from moderate mental retardation and schizophreniform disorder. As a result, Gaskill found him incapable of proceeding.

At a subsequent hearing, the trial court ruled that due to conflicting testimonies it could not make a determination as to capacity to proceed. The trial court then ordered an evaluation by Dr. Robert Rollins, M.D., Chief of Forensic Psychiatry at Dorothea Dix. Rollins found the juvenile capable of proceeding to trial. He based his evaluation on interviews with the juvenile and a review of the evaluations by Gaskill and Versola, a state employee at Dorothea Dix under Rollins's supervision.

The trial court concluded that the juvenile was competent to proceed in that the juvenile was able to understand the nature of the proceedings and to assist his attorney. There is no indication in the record of a probable cause hearing, a waiver of probable cause, or a transfer hearing in accordance with Article 22 of the Juvenile Code. There is a Transcript of Plea, however, with the juvenile entering admissions to the offenses and expressly reserving the right to appeal the issue of competency. The trial court then adjudicated the juvenile delinquent.

At the dispositional hearing, assessments by a juvenile court counselor indicated a medium risk of re-offending with the juvenile's needs level being high. The trial court found the juvenile to be at a Level 2 or Level 3 Disposition under N.C. Gen. Stat. § 7B-2508 (2001), and ordered a Level 3 Disposition. He was committed to the Department for a term not to exceed his nineteenth birthday.

[1] By his first assignment of error, the juvenile contends the trial court erred in finding him capable of proceeding. We disagree.

Section 7B-2401 of the North Carolina Juvenile Codes states that the provisions of sections 15A-1001 to 15A-1003 apply to all cases in which a juvenile is alleged to be delinquent. N.C. Gen. Stat. § 7B-2401 (2001). Sections 15A-1001 to 15A-1003 of the North Carolina Criminal Procedure Act relate to a defendant's capacity to proceed. N.C. Gen. Stat. §§ 15A-1001 to 15A-1003 (2001). Under section 15A-1001:

(a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is

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unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner.

N.C. Gen. Stat. § 15A-1001. Under section 15A-1002, the issue of capacity is within the trial court's discretion, and "[the] determination thereof, if supported by the evidence, is conclusive on appeal." *State v. Reid*, 38 N.C. App. 547, 548-49, 248 S.E.2d 390, 391 (1978), *disc. review denied*, 296 N.C. 588, 254 S.E.2d 31 (1979).

The juvenile's primary contention is that the method used by the trial court in determining capacity constituted error. Rather than appoint Rollins to conduct a third evaluation, the juvenile argues, the trial court should have appointed an independent psychiatrist with no affiliation to either Versola or Gaskill. The juvenile maintains that Rollins's report was unreliable and biased because the conclusions in it were based in part on information previously gathered by Versola, one of his employees.

In his evaluation, Rollins sets forth the following bases for his opinions: (1) interviews with the patient; (2) observation of ward behavior; (3) routine laboratory and medical studies; (4) review of Versola's evaluation; (5) review of Gaskill's evaluation; (6) repeat psychological testing; and (7) contact with the juvenile's attorney and court counselor. We find no merit to the juvenile's contention that Rollins's evaluation was inherently unreliable or biased. The evidence presented by the State was sufficient to support the trial court's finding. Accordingly, we reject this assignment of error.

[2] By his second assignment of error, the juvenile contends the trial court erred in committing him to the Department. We disagree.

Juvenile dispositions in delinquency proceedings are controlled by N.C. Gen. Stat. § 7B-2500 *et seq.* For offenses occurring on or after 1 July 1999, courts are no longer bound by the language of former N.C. Gen. Stat. § 7A-646 (1998). Under the new Code, the directives found in former section 7A-646 that the trial court "select the least restrictive disposition" which is appropriate and that "[a] juvenile should not be committed to training school or to any other institution if he can be helped through community-level resources" have been deleted. *See* N.C. Gen. Stat. § 7B-2501(c) (2001). The trial court is now required to "select the most appropriate disposition," one that is

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designed to “protect the public and to meet the needs and best interests of the juvenile,” based on a list of enumerated factors. *Id.* A textual analysis shows a more balanced statutory design emphasizing appropriate dispositions, with some limitations, rather than what had been interpreted as a mandate for the least restrictive alternative under the circumstances. *See In re Bullabough*, 89 N.C. App. 171, 185-86, 365 S.E.2d 642, 650 (1988).

Upon an adjudication of delinquency, a juvenile now is placed in a level of punishment, 1, 2, or 3, depending on the juvenile’s delinquency history and the type of offense committed. Here, the juvenile was found delinquent for two offenses classified as violent, and one classified as serious. *See* N.C. Gen. Stat. § 7B-2508(a) (2001). He has a “low” delinquency history level. *See* N.C. Gen. Stat. § 7B-2507 (2001). Accordingly, under section 7B-2508(f), the disposition may be at either Level 2 or Level 3. N.C. Gen. Stat. § 7B-2508(f) (2001). Level 2 is an intermediate disposition, primarily community based, while Level 3 carries a commitment to the Department. *Id.*

Once a juvenile is placed in a dispositional level, the statutes provide dispositional alternatives which may be utilized by the trial court. However, in those instances where there is a choice of level, there are no specific guidelines solely directed at resolving that issue. Accordingly, choosing between two appropriate dispositional levels is within the trial court’s discretion. Absent an abuse of discretion, we will not disturb the trial court’s choice. “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)).

There are overall guidelines for the trial court within the Juvenile Code, however, including but not limited to, section 7B-2501(c) as well as section 7B-2500, titled “Purpose,” which provides:

The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction, including the protection of the public. The court should develop a disposition in each case that:

- (1) Promotes public safety;

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(2) Emphasizes accountability and responsibility of both the parent, guardian, or custodian and the juvenile for the juvenile's conduct; and

(3) Provides the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community.

N.C. Gen. Stat. § 7B-2500 (2001).

The trial court here had before it both a risk of future offending assessment and a needs assessment. The record reveals the juvenile's risk level of future offending, 14, is at the top of the medium risk range. His total needs score was 23, the bottom of the high range. Further, the trial court found that: "Given the severity of the case, the lack of progress thus far, and the alternatives that appear to be available here in the community, [the] Court finds it is in the juvenile's best interest" to be committed. The trial court's order for a Level 3 disposition is the result of a reasoned decision. Accordingly, the trial court did not abuse its discretion and we reject this assignment of error.

AFFIRMED.

JUDGES MARTIN and TYSON concur.

GODFREY LUMBER COMPANY, INC., PLAINTIFF-APPELLANT v. A. PRESTON HOWARD, JR., DIRECTOR OF THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WATER QUALITY IN HIS INDIVIDUAL CAPACITY AND IN HIS OFFICIAL CAPACITY, AND KERR "TOMMY" STEVENS, DIRECTOR OF THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WATER QUALITY IN HIS OFFICIAL CAPACITY; NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES; AND NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION, DEFENDANT-APPELLEES

No. COA01-1016

(Filed 6 August 2002)

Constitutional Law— due process—revocation of stormwater permit

Plaintiff was not deprived of a stormwater permit unconstitutionally where the permit was issued, construction began on plaintiff's chip mill, the permit was revoked for non-compliance

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with regulations, plaintiff requested a contested case hearing, the revocation was reversed, plaintiff filed this action for damages incurred during the revocation, and the trial court granted defendants' motion for summary judgment. Defendants provided due process through the contested case hearing, plaintiff eventually had the permit restored, and plaintiff did not petition for a stay during the contested case hearing.

Appeal by plaintiff from an order entered 26 January 2001 by Judge Howard E. Manning, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 24 April 2002.

Harris & Winfield, LLP, by R. Sarah Compton, for plaintiff-appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General David Roy Blackwell and Assistant Attorney General Jill B. Hickey, for defendant-appellees.

McGEE, Judge.

Godfrey Lumber Company, Inc. (plaintiff) is a North Carolina corporation which operates a lumber mill and a wood chip mill in Statesville, North Carolina. In late 1994, plaintiff decided to construct another wood chip mill in Stokes County, North Carolina and began making preparations for this construction, including meeting in March 1995 with representatives of the Division of Water Quality (DWQ) of the N.C. Department of Environment and Natural Resources. DWQ told plaintiff that the only permit plaintiff would need for the new facility was a general stormwater permit. Plaintiff submitted an application to DWQ for a stormwater permit on 4 April 1995. DWQ, through A. Preston Howard (Howard), issued the permit on 14 July 1995.

Plaintiff began construction of its new chip mill in January 1997. Plaintiff had contacts with DWQ during the construction of the mill. DWQ inspected plaintiff's mill on 21 November 1997. After the inspection, Howard signed a letter revoking plaintiff's permit on 24 November 1997 and cited non-compliance with the conditions of applicable regulations and permits as the reason for the revocation. Howard stated that the spraying of logs on plaintiff's site would result in a wastewater flow that would reach the area wetlands. The letter stated in order for plaintiff to discharge wastewater into the wet-

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lands, plaintiff needed to apply for an individual permit. The letter provided appeal remedies if plaintiff chose to dispute the revocation.

Plaintiff filed a petition for a contested case hearing on 22 December 1997. An administrative law judge issued a recommended decision on 17 July 1998, determining the revocation was erroneous and should be reversed. The Environmental Management Commission adopted the recommended decision on 18 December 1998 and ordered that the revocation be reversed. Plaintiff filed suit in this case alleging a violation of due process and seeking to recover damages incurred during the period its permit was revoked and was being reviewed through the contested case hearing. On 18 September 2000, plaintiff filed a motion for partial summary judgment and defendants filed a motion for summary judgment. The trial court granted defendants' motion for summary judgment on 26 January 2001. Plaintiff appeals from this order.

I.

Plaintiff first argues the trial court erred in granting defendants' motion for summary judgment because the trial court's conclusions of law were not supported by its findings of fact. Plaintiff contends that when Howard revoked the permit, this was a final deprivation of the permit. Plaintiff contends the trial court's conclusion that there was "no final deprivation" of plaintiff's permit is not supported by the trial court's findings, since the court found as a fact that Howard sent a letter to plaintiff which stated, "I am hereby revoking" the permit. The trial court concluded as a matter of law "that the safeguards of [N.C. Gen. Stat. § 150B] provided [plaintiff] constitutionally adequate due process of law and that there was no final deprivation of [plaintiff's] Certificate of Coverage."

"While the United States Supreme Court has consistently held that some form of hearing is required prior to a final deprivation of a 'protected' property interest, the exact nature and mechanism of the required procedure will vary based upon the unique circumstances surrounding the controversy." *Peace v. Employment Sec. Comm'n*, 349 N.C. 315, 322, 507 S.E.2d 272, 278 (1998). The due process clause encompasses

a guarantee of fair procedure. A § 1983 action may be brought for a violation of procedural due process, but here the existence of state remedies is relevant in a special sense. In procedural due process claims, the deprivation by state action of a constitution-

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ally protected interest in “life, liberty, or property” is not in itself unconstitutional; *what is unconstitutional is the deprivation of such an interest without due process of law*. . . . The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; *it is not complete unless and until the State fails to provide due process*. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

Zinermon v. Burch, 494 U.S. 113, 125-26, 108 L. Ed. 2d 100, 114 (1990) (citations omitted) (emphasis added). Applying *Zinermon* to the case before us, we must determine if defendants provided due process to plaintiff, and if that due process was adequate for constitutional purposes. We determine that through its contested case hearing, defendants did provide adequate constitutional due process to plaintiff.

While plaintiff argues it was “deprived” of its permit when Howard sent the revocation letter, we look to the language of *Zinermon* and see that in the present case DWQ could not have completed an unconstitutional violation at the moment the revocation or “deprivation occur[ed].” *Id.* Under *Zinermon*, DWQ could only have committed an unconstitutional deprivation if it failed to provide due process to plaintiff. In the case before us, Howard explained the remedies available to plaintiff in the revocation letter. Plaintiff followed the proper procedures in making its appeal, and eventually had its permit reinstated.

Furthermore, we note the record does not indicate that plaintiff petitioned the administrative law judge for a stay of the contested revocation pending the outcome of the contested case hearing. N.C. Gen. Stat. § 150B-33(6) (1999) provides that the administrative law judge may “[s]tay the contested action by the agency pending the outcome of the case, upon such terms as [the administrative law judge] deems proper, and subject to the provisions of G.S. 1A-1, Rule 65[.]” Any additional remedies to be afforded a party such as plaintiff should be addressed by the legislature.

Therefore, plaintiff was never unconstitutionally deprived of its permit as a result of DWQ failing to provide proper due process. In

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fact, it was through due process provided by N.C. Gen. Stat. § 150B that plaintiff's permit was reinstated. We overrule this assignment of error.

II.

Plaintiff next argues that in the interest of judicial economy, this Court should rule that defendants are not entitled to qualified immunity. However, as we have determined the trial court was correct in dismissing plaintiff's claim, we need not reach this issue. We dismiss this assignment of error.

We affirm the trial court's grant of summary judgment for defendants.

Affirmed.

Judges WALKER and CAMPBELL concur.



STATE OF NORTH CAROLINA v. TROY GENE McCARN, DEFENDANT, JUDGMENT
CREDITOR: WATAUGA COUNTY BOARD OF EDUCATION, SURETY/BONDSMAN:
RAYBURN E. FARMER

No. COA01-1462

(Filed 6 August 2002)

1. Bail and Pretrial Release— forfeiture—defendant incarcerated out of state

The trial court did not abuse its discretion by not remitting an appearance bond for extraordinary cause where the surety knew that defendant was incarcerated in Georgia and requested assistance from the clerk of court and the district attorney but the Georgia authorities were not advised of outstanding warrants and did not place a hold on defendant. The surety had the responsibility to produce defendant and its efforts do not appear to be extraordinary; the State does not have an affirmative duty to aid a surety in locating a defendant who has not appeared.

2. Appeal and Error— cross-assignment of error—trial court error

A cross-assignment of error which alleged that the trial court had erred by not dismissing the appeal did not present an alter-

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native basis in law for supporting the judgment and was not properly before the Court of Appeals.

Appeal by surety from order entered 6 July 2001 by Judge Alexander Lyerly in Watauga County District Court. Heard in the Court of Appeals 29 July 2002.

Steven M. Carlson for Rayburn E. Farmer, surety-appellant.

Miller & Johnson, P.L.L.C, by Paul E. Miller, Jr. and Linda L. Johnson for appellee, Watauga County Board of Education, judgment creditor-appellee.

BIGGS, Judge.

Surety-bondsman Rayburn E. Farmer (Surety Farmer), the agent for Frontier Insurance, appeals the district court's order denying his motion to remit judgment of bond forfeiture. The Watauga County Board of Education (Judgment Creditor) is the judgment creditor and appellee in the present case by virtue of its opportunity to be heard pursuant to N.C.G.S. § 15A-544 (1999) (repealed Jan. 1, 2001).

On 3 October 1999, Troy Gene McCarn (McCarn) was arrested for obtaining property by false pretenses. On 6 October 1999, Surety Farmer posted an appearance bond in the amount of \$7000 and McCarn was released. On 23 February 2000, the trial court entered an Order of Bond Forfeiture and Notice when McCarn failed to appear in court. The trial court entered a Judgment of Forfeiture on 29 November 2000.

On 15 February 2001, Mountaineer Bail Bonds filed a motion to remit bond under N.C.G.S. § 15A-544(e) (2001). On 7 March 2001, the trial court entered an order denying remission of the bond, and on 8 March 2001, a writ of execution was entered on the bond forfeiture. On 16 March 2001, Mountaineer Bail Bonds appealed. Judgment Creditor moved to dismiss the appeal on the grounds that Surety Farmer, agent for Frontier Insurance Company, was the proper party in interest, who signed for McCarn's appearance bond, and not Mountaineer Bail Bonds. Mountaineer Bail Bonds subsequently withdrew its appeal.

On 7 June 2001, Surety Farmer, filed a motion to remit bond pursuant to N.C.G.S. § 15A-544(h) (2001). In his motion, Surety Farmer asserted that he made diligent efforts to locate McCarn, including advising the 24th Judicial District Attorney's office, the Kannapolis

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Police Department and the Watauga County Clerk of Superior Court that McCarn was incarcerated in Augusta, Georgia. Surety Farmer asserted that despite contacting the above agencies, the Augusta, Georgia Sheriff's Department was not advised of the outstanding warrants for defendant's arrest and a hold was not placed on McCarn. Judgment Creditor moved to dismiss the motion to remit based on *res judicata*. The trial court denied the motion to dismiss on the grounds that the 15 February and 7 June 2001 motions to remit bond requested relief under two separate and distinct grounds.

On 6 July 2001, the trial court denied Surety Farmer's motion to remit. In its order, the trial court found as fact:

7. That while each verified Motion indicated that the Surety knew of the Georgia location of the Defendant and that the Surety made phone calls and requests for assistance from the Watauga County Clerk of Court and District Attorney's offices, neither verified Motion indicated that the Surety or any of his agents made any trips to Georgia to the known location of the Defendant to pick him up and return him to the North Carolina authorities, nor did the Surety provide any other reasons or show any other efforts or excess expenses of the Surety to recover the Defendant or circumstances which indicated extraordinary cause or which made it impossible for the Surety to surrender the Defendant.

On 17 July 2001, Mountaineer Bail Bonds appealed. Judgment Creditor again moved to dismiss the appeal because Mountaineer Bail Bonds was not the real party in interest. Surety Farmer moved to substitute himself as the appealing party and gave notice of appeal from the 6 July 2001 order. On 14 November 2001, the trial court denied Judgment Creditor's motion to dismiss the appeal. From the order entered 6 July 2001, Surety Farmer appeals.

[1] Surety Farmer contends the trial court abused its discretion by failing to remit the bond for extraordinary cause. He argues that "[t]he failure of the North Carolina agencies to contact the Augusta County Sheriff's Department coupled with the Surety/Bondsman's efforts to successfully locate Defendant, constitutes such unusual and extraordinary circumstances that remission of the bond is required."

After careful review of the record, briefs and contentions of the parties, we affirm. This Court has stated:

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it is within the court's discretion to remit judgment for extraordinary cause, and we therefore review the court's decision pursuant to section 15A-544(h) for abuse of discretion. Extraordinary cause, under section 15A-544(h), is cause going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee. In determining whether the facts of a particular case constitute extraordinary cause, the trial court must make brief, definite, pertinent findings and conclusions.

State v. Coronel, 145 N.C. App. 237, 243, 550 S.E.2d 561, 566 (2001) *disc. review denied*, 355 N.C. 217, 560 S.E.2d. 144 (2002) (citations omitted). An abuse of discretion results when an act is "not done according to reason or judgment, but depending upon the will alone" and "done without reason." *Dare County Bd. of Education v. Sakaria*, 118 N.C. App. 609, 616, 456 S.E.2d 842, 847 (1995) (quoting *In re Housing Auth.*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 1982)), *aff'd per curiam*, 342 N.C. 648, 466 S.E.2d 717 (1996) (citations omitted).

We find no abuse of discretion in the instant case. The Surety had the responsibility to produce defendant for all his required court appearances. The efforts expended by Surety Farmer did not lead to defendant's appearance in Watauga County Superior Court, "the primary goal of the bonds." *State v. Vikre*, 86 N.C. App. 196, 199, 356 S.E.2d 802, 804 (1987), *disc. review denied*, 320 N.C. 637, 360 S.E.2d 103 (1987) (citations omitted). Furthermore, Surety Farmer's efforts to locate defendant do not appear to be "extraordinary," within the meaning of N.C.G.S. § 15A-544(h). The trial court specifically found that Surety Farmer did not make any trips to Georgia to pick up defendant nor did the Surety show "any other efforts or excess expenses of the Surety to recover the [d]efendant or circumstances which indicated extraordinary cause." Finally, we do not believe the State has an affirmative duty to aid a surety in its effort to locate a defendant who has not appeared in court as required. Thus, we cannot say, as a matter of law, that the trial court erred in concluding that Surety demonstrated extraordinary cause justifying remission of the bond. Accordingly, we affirm.

[2] Judgment Creditor cross assigns as error the trial court's denial of its motion to dismiss the appeal. North Carolina Rules of Appellate Procedure, Rule 10(d) states in part:

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Without taking an appeal an appellee may cross-assign as error any action or omission of the trial court which was properly preserved for appellate review and which deprived the appellee of an alternative basis in law for *supporting* the judgment, order, or other determination from which appeal has been taken.

(Emphasis added). In its cross-assignment of error, Judgment Creditor does not present an alternative basis in law for supporting the order. Instead, Judgment Creditor contends that the trial court erred in refusing to dismiss the appeal. Therefore, Judgment Creditor's contention is not properly before this Court and the cross-assignment of error is overruled.

Affirmed.

Judges WALKER and THOMAS concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 6 AUGUST 2002

ALDRIDGE v. N.C. DEPT OF CORR. No. 01-13	Ind. Comm. (827311)	Affirmed
BOYD v. EDMUND No. 01-903	Iredell (00CVS2499)	Appeal dismissed
CARDINAL EXTENSION CO. v. PLEASANT No. 01-1045	Wake (99SP438)	No error
CARNES v. DEPARTMENT OF HUMAN RES. No. 01-1160	Wake (98CVS6123) (98CVS8514)	Reversed
COFFEY v. SAVERS LIFE INS. CO. No. 01-741	Forsyth (98CVS6848)	Appeal dismissed
CRAWFORD v. GREENSBORO INNKEEPER No. 01-346	Ind. Comm. (624829)	Affirmed
CROWFIELDS CONDOMINIUM ASS'N v. SMITH No. 01-854	Buncombe (99CVS4918)	Affirmed
DAVIS v. HARTFORD ACCIDENT & INDEM. CO. No. 01-1309	Person (95CVS45)	Affirmed
EASTERN OUTDOOR, INC. v. McCOY No. 01-827	Wake (00CVS3194)	Affirmed
GREINER v. GREINER No. 01-1190	Brunswick (00CVD655)	Reversed and remanded
HARRIS v. STAMEY No. 01-1475	Haywood (00CVS1203)	Affirmed
HUANG v. HUANG No. 01-1426	Wake (95CVD1078)	Affirmed
IN RE DEGUZMAN No. 01-1280	Caldwell (00J16)	Affirmed
IN RE GOMEZ No. 01-1335	Wake (00J746)	Affirmed
IN RE JACKSON No. 01-1410	Johnston (98J61)	Affirmed

IN RE KENNEDY No. 01-1107	Sampson (94J30) (94J31) (00J23)	Affirmed
IN RE KILLIAN No. 01-881	Mecklenburg (00J528) (00J529) (00J530) (00J531) (00J589) (00J590)	Affirmed
IN RE WILLIAMSON No. 01-905	Buncombe (00J99) (00J100) (00J101)	Affirmed
JACOB v. ONSLOW CTY. BD. OF HEALTH No. 01-804	Onslow (00CVS2978)	Affirmed
JOHNSTON v. GALLIMORE No. 01-1019	Iredell (99CVS2488)	No error
KELLY v. KELLY No. 01-1140	Wake (94CVD1377)	Reversed and remanded
LEDFORD v. SMOKY MOUNTAIN HEALTHCARE ASSOCS., P.A. No. 01-1042	Macon (00CVS522)	Dismissed
LEE v. O'BRIEN No. 01-1231	Wake (00CVD2269)	Affirmed
LESCRINIER v. NORTH POINT PARTNERS, II, L.L.C. No. 01-1321	Guilford (00CVS2838)	Affirmed
McCORMICK v. MORRIS No. 01-1259	Carteret (00CVS754)	Vacated and remanded
NORRIS v. ALEXANDER No. 01-1294	Duplin (98CVS169)	Affirmed
NUNNALLY v. WAL-MART STORES No. 01-869	Ind. Comm (881100)	Affirmed
PERKINS v. PERKINS No. 01-493	Alamance (00CVD1448)	Affirmed
PERRY v. OWENS No. 01-1006	Nash (00CVS2291)	Affirmed
PFAFF v. BLUE RHINO CORP. No. 01-1373	Forsyth (01CVS3617)	Appeal dismissed

SMITH v. KEN NOWLIN TRUCKING No. 01-1507	Ind. Comm. (935400)	Affirmed
STATE v. ARTIS No. 01-1308	Pitt (00CRS67006) (00CRS4854)	No error
STATE v. BERROW No. 01-1314	Forsyth (01CRS4427) (01CRS9289)	No error
STATE v. BILLUPS No. 01-499	New Hanover (00CRS52513)	No error
STATE v. BRACEY No. 01-953	Halifax (00CRS2809)	No error
STATE v. CAMPBELL No. 01-1301	Guilford (00CRS92570) (00CRS92571) (00CRS92573) (00CRS92575) (00CRS92576) (00CRS93186) (00CRS93195) (00CRS93197)	Affirmed in part; no error in part
STATE v. COVINGTON No. 02-131	Richmond (00CRS3363) (00CRS3364) (00CRS7864)	No error
STATE v. DAVIS No. 01-898	Caswell (99CRS2467) (99CRS2468)	No error
STATE v. DAVIS No. 01-1551	Forsyth (00CRS54126) (00CRS54127) (01CRS58)	No error
STATE v. DUDLEY No. 01-939	Cabarrus (00CRS50763)	Reversed
STATE v. DUNN No. 01-800	Wayne (99CRS55272) (00CRS1312)	No error
STATE v. DUNN No. 01-1510	Mecklenburg (00CRS51061)	Affirmed
STATE v. FOUNTAIN No. 01-1355	Buncombe (99CRS61001) (99CRS61002)	No error
STATE v. GARVIN No. 01-791	Gaston (99CRS23208)	No error

STATE v. GOINS No. 01-1234	Robeson (95CRS5117) (95CRS5118)	No error
STATE v. GOODSON No. 01-1587	Cleveland (01CRS3375)	No error
STATE v. GRAY No. 01-1573	Northampton (00CRS454)	Affirmed
STATE v. HAGANS No. 01-853	Wilson (99CRS55786)	No error
STATE v. HUNTER No. 01-1126	Rowan (99CRS15577) (99CRS15578)	No error
STATE v. MASSEY No. 01-1442	Union (00CRS53945) (00CRS14204)	No error
STATE v. McGINNIS No. 01-1029	Pender (99CRS50651)	No error
STATE v. McPHERSON No. 01-552	Columbus (98CRS3368)	No error
STATE v. MYERS No. 01-691	Forsyth (00CRS43722) (00CRS56987)	No error
STATE v. PITTMAN No. 01-1471	Edgecombe (99CRS5674)	No error
STATE v. PLAYER No. 01-1173	Randolph (99CRS59) (99CRS5029) (99CRS5030) (99CRS5031) (99CRS11330) (99CRS11331)	No error
STATE v. RICE No. 01-946	Buncombe (00CRS52009)	No error
STATE v. ROBINSON No. 01-1074	Buncombe (00CRS8254) (00CRS8255) (00CRS8285) (00CRS8286) (00CRS55503)	No error
STATE v. SCOTT No. 01-1404	Cumberland (00CRS60709)	No error

STATE v. SCURLOCK No. 01-1221	Harnett (00CRS4153) (00CRS10294)	No error in the trial. Remand for correction of judgment
STATE v. SHAW No. 02-42	Caldwell (99CRS9658) (99CRS9659) (99CRS9638) (99CRS9648)	Vacated and remanded for hearing
STATE v. SMITH No. 01-1474	Iredell (99CRS21376) (99CRS21896) (99CRS21897)	No error
STATE v. SMITH No. 01-1185	Henderson (99CRS54422) (99CRS54423) (99CRS54425) (00CRS2162) (00CRS2163)	No error
STATE v. STRANGE No. 01-332	Gaston (99CRS1198) (99CRS1199) (99CRS1201) (99CRS1203)	No error; remanded for resentencing
STATE v. SUTTON No. 02-31	New Hanover (99CRS9892) (99CRS19352)	No error
STATE v. TART No. 01-1423	Alamance (00CRS12247) (00CRS12246)	No error
STATE v. THORNTON No. 01-352	Cumberland (99CRS4685)	No error
STATE v. WALKER No. 01-1038	Person (00CRS5420)	No error
STATE v. WIGGINS No. 01-1584	Wake (99CRS63089) (99CRS63090)	No error
STATE v. WILT No. 01-538	Wake (98CRS107849) (98CRS107850) (99CRS31524)	No error
SWEENEY v. PENN No. 01-1332	Mecklenburg (00CVS19879)	Dismissed

TOMBRELLO v. HUANG No. 01-1174	Wake (95CVD1078)	Affirmed
WAKE CTY. ex rel. ISGETT v. BEECHAM No. 01-698	Wake (99CVS11006)	Dismissed
WARD v. FLOORS PERFECT No. 01-568	Ind. Comm. (816964)	Affirmed
WELLS v. BROWN INV. PROPS., INC. No. 01-799	Catawba (00CVS2300)	Affirmed
WORSHAM v. TRIONES PLASTICS, L.L.C. No. 01-1195	Guilford (99CVS4334)	Affirmed

APPENDIXES

**ORDER ADOPTING AMENDMENTS TO THE
NORTH CAROLINA RULES
OF APPELLATE PROCEDURE**

**ORDER ADOPTING AMENDMENT TO
RULE 25 OF THE GENERAL RULES OF
PRACTICE FOR THE SUPERIOR AND
DISTRICT COURTS**

**Order Adopting Amendments to the
North Carolina Rules of Appellate Procedure**

Rules 26, 28, and 30 and Appendix B of the North Carolina Rules of Appellate Procedure are hereby amended as described below:

Rule 26(g) is amended to read as follows:

(g) Documents Filed with Appellate Courts.

(1) Form of Papers; ~~Copies~~. Papers presented to either appellate court for filing shall be letter size (8-1/2 8½ x 11") with the exception of wills and exhibits. All printed matter must appear in at least 12-point type on unglazed white paper of 16-20 pound substance so as to produce a clear, black image, leaving a margin of approximately one inch on each side. The body of text shall be presented with double spacing between each line of text. No more than 27 lines of double-spaced text may appear on a page, even if proportional type is used. Lines of text shall be no wider than 6½ inches. The format of all papers presented for filing shall follow the additional instructions found in the Appendixes to these Appellate Rules. The format of briefs shall follow the additional instructions found in Appellate Rule 28(j).

(2) Index required. All documents presented to either appellate court other than records on appeal, which in this respect are governed by Appellate Rule 9, shall, unless they are less than 10 pages in length, be preceded by a subject index of the matter contained therein, with page references, and a table of authorities, i.e., cases (alphabetically arranged), constitutional provisions, statutes, and text books cited, with references to the pages where they are cited.

(3) Closing. The body of the document shall at its close bear the printed name, post office address, and telephone number of counsel of record, and in addition, at the appropriate place, the manuscript signature of counsel of record. If the document has been filed electronically by use of the official web site at www.ncappellatecourts.org, the manuscript signature of counsel of record is not required.

Rule 28(j) is amended to read as follows:

(j) *Page Limitations Applicable to Briefs Filed in the Court of Appeals.* ~~Principal briefs~~ Each brief filed in the North Carolina Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, formatted according to Rule 26 and the Appendixes to these Rules, ~~shall be limited to 35 pages of text, exclusive of subject index, tables of authorities, and appendixes. Reply briefs, if permitted by this Rule shall be limited to 15 pages of text.~~ have either a page limit or a word-count limit, depending on the type style used in the brief:

(1) *Type.*

(A) *Type style.* Documents must be set in a plain roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined. Documents may be set in either proportionally spaced or nonproportionally spaced (monospaced) type.

(B) *Type size.*

1. Nonproportionally spaced type (e.g., Courier or Courier New) may not contain more than 10 characters per inch (12-point).
2. Proportionally spaced type (e.g., Times New Roman), must be 14-point or larger.
3. Documents set in Courier New 12-point type, or Times New Roman 14-point type will be deemed in compliance with these type-size requirements.

(2) *Document length.*

(A) *Length limitations on briefs filed in the Court of Appeals.* Every brief filed in the Court of Appeals, whether filed by an appellant, appellee, or amicus curiae, shall be subject to either a page limit or a word-count limit, depending on the type style used in the brief.

1. Page limits for briefs using nonproportional type. The page limit for a principal brief that uses nonproportional (e.g., Courier) type is 35 pages, and the page limit for a reply brief (if permitted by Appellate Rule 28(h)) is 15 pages. A page shall contain no more than 27 lines of double-spaced text of no more than 65 characters per line.

Covers, indexes, tables of authorities, certificates of service, and appendixes do not count toward these page limits. The Court may strike or require resubmission of briefs with excessive single-spaced passages or footnotes that are used to circumvent these page limits.

2. Word-count limits for briefs in proportional type. A principal brief that uses proportional type may contain no more than 8,750 words, and a reply brief (if permitted by Appellate Rule 28(h)) may contain no more than 3,750 words. Covers, indexes, tables of authorities, certificates of service, certificates of compliance with this rule, and appendixes do not count against these word-count limits. Footnotes and citations in the text, however, do count against these word-count limits. Parties who file briefs in proportional type shall submit along with the brief, immediately before the certificate of service, a certification, signed by counsel of record, or, in the case of parties filing briefs pro se, by the party, that the brief contains no more than the number of words allowed by this rule. For purposes of this certification, counsel and parties may rely on word counts reported by word-processing software, as long as footnotes and citations are included in those word counts.

Rule 30(e)(3) is revised to read as follows:

- ~~(3) A decision without a published opinion is authority only in the case in which such decision is rendered and should not be cited in any other case in any court for any purpose, nor should any court consider any such decision for any purpose except in the case in which such decision is rendered.~~
- (3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue

in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to whom the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum. A party who cites an unpublished opinion for the first time at a hearing or oral argument must attach a copy of the unpublished opinion relied upon pursuant to the requirements of Rule 28(g) ("Additional Authorities"). When citing an unpublished opinion, a party must indicate the opinion's unpublished status.

Appendix B, Paragraph 2, is amended to incorporate technical changes as follows:

Papers shall be prepared using at least 12-point type ~~and spacing~~, so as to produce a clear, black image. Documents shall be set either in nonproportional type or in proportional type, defined as follows: Nonproportional type is defined as 10-character-per-inch Courier (or an equivalent style of Pica) type that devotes equal horizontal space to each character. Proportional type is defined as any non-italic, non-script font, other than nonproportional type, that is 14-point or larger. Under Appellate Rule 28(j), briefs in nonproportional type are governed by a page limit, and briefs in proportional type are governed by a word-count limit. To allow for binding of documents, a margin of approximately one inch shall be left on all sides of the page. The formatted page should be approximately 6½ inches wide and 9 inches long. Tabs are located at the following distances from the left margin: ½", 1", 1½", 2", 4¼" (center), and 5".

These amendments to the North Carolina Rules of Appellate Procedure shall be effective on the 7th day of October, 2002.

Adopted by the Court in Conference this the 3rd day of October, 2002. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (<http://www.nccourts.org>).

Edmunds, J.
For the Court

IN THE SUPREME COURT OF NORTH CAROLINA

**Order Adopting Amendment to Rule 25 of the General Rules
of Practice for the Superior and District Courts**

Rule 25 of the General Rules of Practice for the Superior and District Courts is hereby amended to read as follows:

**RULE 25. MOTIONS FOR APPROPRIATE RELIEF AND
HABEAS CORPUS APPLICATIONS IN CAPITAL CASES**

When considering motions for appropriate relief and/or applications for writs of habeas corpus in capital cases, the following procedures shall be followed:

(1) All appointments of defense counsel should be made by the senior resident superior court judge in each district or the senior resident superior court judge's judicial designee;

(2) All requests for experts, *ex parte* matters, interim attorney fee awards, and similar matters arising prior to the filing of a motion for appropriate relief should be ruled on by the senior resident superior court judge or the senior resident superior court judge's designee;

(3) All motions for appropriate relief, when filed, should be referred to the senior resident superior court judge or the senior resident superior court judge's designee for that judge's review and administrative action, including, as may be appropriate, dismissal, calendaring for hearing, entry of a scheduling order for subsequent events in the case, or other appropriate actions; and

(4) Subsequent to direct appeal, an application for writ of habeas corpus shall not be used as a substitute for appeal and/or a motion for appropriate relief and is not available as a means of reviewing and correcting non-jurisdictional legal error. If the applicant has been sentenced pursuant to a final judgment issued by a competent tribunal of criminal jurisdiction (*i.e.*, by a trial court having subject matter jurisdiction to enter the sentence), the application for writ of habeas corpus shall be denied. In the event the application for writ of habeas corpus raises a meritorious challenge to the original jurisdiction of the sentencing court, and the writ is granted, the judge shall make the writ returnable before the senior resident superior court judge of the judicial district where the applicant was sentenced or the senior resident superior court judge's designee. In the event the application for writ of habeas corpus raises a meritorious non-jurisdictional challenge to the applicant's conviction and sentence, the judge shall immediately refer the matter to the senior resident superior court

judge of the judicial district where the applicant was sentenced or the senior resident superior court judge's designee for disposition as a motion for appropriate relief.

Adopted by the Court in Conference and effective this the 19th day of December 2002. This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. This amendment shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (<http://www.nccourts.org>).

Butterfield, J
For the Court

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ADMINISTRATIVE LAW

Physical therapist—professional standards—personal knowledge of board members—The trial court did not err by allowing the members of the Board of Physical Therapy Examiners to determine from their own knowledge as physical therapists that petitioner knew or should have known that having a sexual relationship with a patient would violate statutory standards. There was evidence in the record on which the Board could base its decision. **Sibley v. N.C. Board of Therapy Exam'rs, 367.**

Physical therapist—sexual relationship with patient—no specific standard prohibiting—The trial court did not err by upholding a decision of the Board of Physical Therapy Examiners to suspend petitioner's license for having a sexual relationship with a patient even though petitioner contended that the evidence failed to establish the appropriate standards of practice for the time when the relationship occurred. The Board's findings that petitioner knew or should have known that his actions were wrong is supported by testimony from an expert witness and petitioner's own acknowledgment. **Sibley v. N.C. Board of Therapy Exam'rs, 367.**

ADOPTION

Best interests of the children—physical discipline and verbal abuse—On a petition for adoption, the evidence supported the trial court's findings of verbal abuse and physical discipline, and the findings supported the court's conclusions that adoption would not be in the best interests of the children. **In re Adoption of Cunningham, 410.**

Denial—propriety of certain evidence—sufficiency of other evidence—Even assuming that evidence of the abuse of other children should not have been admitted in an adoption proceeding, other testimony fully supported the critical findings and the court's ultimate denial of the petitions. **In re Adoption of Cunningham, 410.**

DSS consent—not acknowledged or filed—The trial court's conclusion that DSS had not consented to adoptions was supported by the findings. Although there was conflicting evidence as to whether consent forms had been prepared and signed, there was no evidence that they had been acknowledged under oath or filed as required by statute. **In re Adoption of Cunningham, 410.**

Petitions—court's authority to dismiss—best interests of child—The trial court had full statutory authority to dismiss petitions for adoption based on the best interests of the children regardless of whether DSS had previously consented to the adoptions. **In re Adoption of Cunningham, 410.**

APPEAL AND ERROR

Appealability—child custody—safety of child—A substantial right was affected and an interlocutory appeal was heard where plaintiff appealed from a child custody and support order that did not address claims for alimony or equitable distribution but the physical well being of the child was at issue. **McConnell v. McConnell, 622.**

Appealability—denial of Rule 54(b) certification—underlying interlocutory order—Plaintiff's appeal from the trial court's denial of plaintiff's motion

APPEAL AND ERROR—Continued

for an N.C.G.S. § 1A-1, Rule 54(b) certification in a 27 March 2001 order is dismissed. **Van Engen v. Que Scientific, Inc.**, 683.

Appealability—judgment entered consistent with guilty plea—writ of certiorari—A defendant's appeal from a judgment dated 2 April 2001 entered consistent with his plea of guilty to impaired driving and from an order filed 4 June 2001 denying his motion to dismiss is dismissed, because defendant does not have a right to appeal and the Court of Appeals is without authority to grant a writ of certiorari. **State v. Dickson**, 136.

Appealability—jurisdiction—An interested party shall have the right of immediate appeal from an adverse ruling as to jurisdiction over the person or property. **Wyatt v. Walt Disney World Co.**, 158.

Appealability—motion to dismiss—substantial right—Although an appeal from the grant of a motion to dismiss is generally an appeal from an interlocutory order, the right to avoid the possibility of two trials on the same issues affects a substantial right and allows an immediate appeal of an order allowing a motion to dismiss defendants' third-party claim against a third-party defendant. **Bowman v. Alan Vester Ford Lincoln Mercury**, 603.

Assignment of error—required—An argument not set out as an assignment of error was not preserved for appellate review. **Singleton v. Haywood Elec. Membership Corp.**, 197.

Cross-assignment of error—required—Arguments which would have provided an alternative basis for upholding a premarital agreement were not preserved for appellate review where plaintiff did not cross-assign error pursuant to Rule 10(d) to the trial court's failure to enter judgment on these alternative grounds. Moreover, this is not a case in which suspending the appellate rules would prevent manifest injustice or benefit the public interest. **Harllee v. Harllee**, 40.

Cross-assignment of error—trial court error—A cross-assignment of error which alleged that the trial court had erred by not dismissing the appeal did not present an alternative basis in law for supporting the judgment and was not properly before the Court of Appeals. **State v. McCarn**, 742.

Insanity recommitment—reviewed as commitment order—A recommitment order for a respondent who had been found not guilty of murder and assault by reason of insanity was reviewed on appeal as a commitment order; thus, there is a determination of whether there is competent evidence to support the trial court's findings and whether the findings support the conclusion that respondent still has a mental illness and is dangerous to others. **In re Hayes**, 27.

Mootness—capable of repetition yet evading review—Although plaintiff's appeal from the denial of its request for disclosure of information revealed in a closed city council meeting regarding the purchase of real property is technically moot since the information sought by plaintiff has been fully disclosed, a case which is capable of repetition yet evading review may present an exception to the mootness doctrine. **Boney Publishers, Inc. v. Burlington City Council**, 651.

Offer of proof—included in record—The Industrial Commission did not abuse its discretion in a workers' compensation action by including plaintiff's offer of proof in the record. Although defendant contended on appeal that the report had

APPEAL AND ERROR—Continued

never been admitted, the Commissioner who settled the record stated that plaintiff's offer of proof was tendered and accepted by the Deputy Commissioner. **Ward v. Long Beach Vol. Rescue Squad, 717.**

Partial summary judgment—declaration of positions in corporation—no immediate appeal—An appeal was dismissed as interlocutory where plaintiffs were seeking a declaration of the status of the individual parties as to their positions in a small corporation, the trial court granted plaintiffs' motion for partial summary judgment, and the court then entered an order of certification of immediate appeal. Based on the facts in the case, no substantial right was affected; while a shareholder's ability to manage a closely held corporation is significant, that right in this case will not be potentially injured before a final ruling, and defendant has available remedies such as dissolution and the appointment of a receiver. **Action Cmty. Television Broadcasting Network, Inc. v. Livesay, 125.**

Perfection of appeal—failure to file brief—An appeal was dismissed for failure to file a brief. **Thompson v. First Citizens Bank and Tr. Co., 704.**

Prejudice—court unable to determine—new trial—It is likely that an erroneous instruction on the burden of proof in a contract action misled the jury; in any event, the plaintiff is entitled to a new trial if the appellate court is unable to determine whether an erroneous instruction prejudiced a plaintiff. **Orthodontic Centers of Am., Inc. v. Hanachi, 133.**

Prayer for judgment continued—not a final judgment—assignment of error not addressed—An issue involving amendment of an indictment for felonious larceny was not considered where defendant was convicted of felonious breaking and entering, felonious larceny, and felonious possession of stolen goods, and prayer for judgment continued was granted on the felonious larceny conviction. No final judgment was entered as to felonious larceny and the Court of Appeals could not address the assignment of error. **State v. Jones, 317.**

Preservation of issues—constitutionality of statute—motion to dismiss—no objection—The issue of whether N.C.G.S. § 15A-1001 was unconstitutional as applied to a juvenile was not preserved for appellate review where the trial judge denied the juvenile's motion to dismiss on this ground and no objection was raised. **In re Pope, 117.**

Preservation of issues—failure to cite authority—Although a defendant in a first-degree statutory sexual offense case contends the trial court erred by its instruction to the jury regarding its failure to reach a verdict and by failing to grant a mistrial, this assignment of error is deemed abandoned because defendant failed to cite any legal authority in support of his arguments as required by N.C. R. App. P. 28(b)(5). **State v. Maney, 486.**

Preservation of issues—failure to make offer of proof—Although defendant contends the trial court erred in a robbery with a dangerous weapon case by excluding testimony of the victim's reputation for untruthfulness, defendant did not preserve this issue for appellate review because he failed to make an offer of proof of the answers to excluded questions. **State v. Gay, 530.**

APPEAL AND ERROR—Continued

Preservation of issues—failure to renew motion—The trial court did not err in a prosecution for first-degree statutory rape and other sexual offenses against a six-year-old girl by denying defendant's motion to introduce evidence of prior sexual activity by the victim. The court denied the motion with leave to renew, but defendant did not do so and the issue was not preserved for appeal. **State v. Brothers, 71.**

Preservation of issues—failure to support with reason or legal argument—The North Carolina State Bar Disciplinary Hearing Commission (DHC) did not err by entering an order of discipline containing what defendant attorney characterizes as erroneous and grossly misleading findings of fact where defendant has failed to direct the Court of Appeals to those findings which he claims are not supported by evidence and has not provided an argument supporting his contentions. **N.C. State Bar v. Gilbert, 299.**

Preservation of issues—motion to suppress—waiver after guilty plea—Although defendant contends the trial court erred by finding probable cause to support the search of his person on 28 October 2000 and by denying defendant's motion to suppress, defendant failed to preserve this issue for appellate review where he pled guilty without notifying the State and the trial court of his intention to appeal the denial of his motion to suppress. **State v. Stevens, 561.**

Preservation of issues—no objection at trial—plain error—not raised in assignments of error—The issue of whether the trial court erred by ruling a juvenile capable to proceed in a delinquency proceeding was not preserved for appeal where there was no objection to the ruling at the hearing and no assignment of error alleging plain error. **In re Pope, 117.**

Preservation of issues—right to appeal juvenile transfer order—Although defendant juvenile appeals from the validity of evidence received at a transfer hearing and the ensuing transfer order to superior court in an assault with a deadly weapon with intent to kill inflicting serious injury case, defendant failed to preserve the right to appeal the transfer order because he failed to appeal the transfer order and issues arising from it to superior court. **State v. Wilson, 219.**

ARBITRATION AND MEDIATION

Denial of arbitration—initial finding that agreement existed—required—The trial court erred by denying defendant's motion to stay the proceeding pending arbitration in an action arising from the sale of stock where the court did not first determine whether an agreement to arbitrate existed. **Barnhouse v. American Express Fin. Advisors, Inc., 507.**

ARREST

Traffic stop—25 minute detention—slow computer—developing suspicion—A traffic stop did not constitute an illegal seizure where defendant contended that a 25 minute detention for a warning ticket was unreasonable, but the officer developed a reasonable suspicion that criminal activity was afoot while he waited for his computer to function, he was justified in asking for permission to search the vehicle, and defendant voluntarily consented to the search. **State v. Castellon, 675.**

ASSAULT

Deadly weapon inflicting serious injury—assault inflicting serious bodily injury—instruction not given—The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury by not giving an instruction on assault inflicting serious bodily injury. Assault inflicting serious bodily injury is not a lesser included offense of assault with a deadly weapon inflicting serious injury because “serious injury” does not necessarily rise to the level of “serious bodily injury.” *State v. Uvalle*, 446.

Deadly weapon inflicting serious injury—lesser included offenses—instruction not given—The trial court did not err in a prosecution for assault with a deadly weapon inflicting serious injury by not giving instructions on the lesser included offenses of assault with a deadly weapon, assault inflicting serious injury, or simple assault where the uncontroverted evidence indicated that the victim sustained several deep knife wounds resulting in permanent debilitating injuries and that the injuries (however they occurred) were inflicted with a butcher knife with a blade about a foot long. *State v. Uvalle*, 446.

Instructions—misdemeanor assault—use of weapon—The trial court did not err by not instructing on misdemeanor simple assault in an action for assault with a deadly weapon inflicting serious injury where defendant testified that he picked up a knife and a struggle ensued. Even if the knife were introduced by an accident such as falling out from under a pillow, there was no evidence to dispute that defendant used it. *State v. Uvalle*, 446.

ASSOCIATIONS

Homeowners—violating declaration of covenants—authority to charge reasonable fines—The trial court did not err in a declaratory judgment action by concluding that N.C.G.S. § 47F-3-102(12) of the North Carolina Planned Community Act (PCA) granted defendant homeowners’ association formed prior to 1 January 1999 the authority to charge reasonable fines against its members without the subdivision’s declaration of covenants expressly providing for such power. *Wise v. Harrington Grove Cmty. Ass’n*, 344.

ATTORNEYS

Disciplinary Hearing Commission—jurisdiction—violation of Industrial Commission order—attorney fees—Even though defendant attorney contends the North Carolina State Bar Disciplinary Hearing Commission (DHC) lacked jurisdiction to decide whether defendant violated an order of the North Carolina Industrial Commission, DHC did not err by denying defendant’s motion to dismiss the State Bar’s claim alleging that defendant violated the Revised Rules of Professional Conduct by retaining \$45,000 of the \$60,000 lump settlement in his client’s workers’ compensation case in violation of the 14 October 1998 order of the North Carolina Industrial Commission where a deputy commissioner had only authorized defendant to receive \$15,000 from the lump sum award. *N.C. State Bar v. Gilbert*, 299.

Malpractice—conflict of interest—grievance not filed by clients—The North Carolina State Bar Disciplinary Hearing Commission (DHC) did not err by failing to dismiss the State Bar’s claim alleging that defendant violated Rules 1.7(b) and 8.4(g) of the Revised Rules of Professional Conduct by engaging in a

ATTORNEYS—Continued

conflict of interest by his representation of two of his clients even though those clients had not filed a grievance. **N.C. State Bar v. Gilbert, 299.**

Malpractice—disciplinary hearing—aggravating factors—mitigating factors—A review of the whole record reveals that the North Carolina State Bar Disciplinary Hearing Commission (DHC) did not err by finding the aggravating factors that defendant attorney was motivated by a dishonest or selfish motive, defendant engaged in a pattern of misconduct, defendant engaged in multiple violations of the Revised Rules of Professional Conduct, and by failing to find the mitigating factors of absence of a dishonest or selfish motive, timely good faith efforts at restitution, full and free disclosure, and remorse. **N.C. State Bar v. Gilbert, 299.**

Malpractice—disciplinary hearing—findings of fact—conclusions of law—The whole record test reveals that the North Carolina State Bar Disciplinary Hearing Commission (DHC) did not err by entering an order of discipline containing several conclusions of law that were allegedly not supported by findings of fact or clear, cogent, and convincing evidence. **N.C. State Bar v. Gilbert, 299.**

Suspension of license—jurisdiction of trial court to enter consent order—The trial court had jurisdiction to enter a third interim consent order between the parties suspending petitioner's law license for one year for alcohol abuse and also had the authority to deny petitioner attorney's request for the reinstatement of his license to practice law. **In re Beasley, 569.**

BAIL AND PRETRIAL RELEASE

Forfeiture—defendant incarcerated out of state—The trial court did not abuse its discretion by not remitting an appearance bond for extraordinary cause where the surety knew that defendant was incarcerated in Georgia and requested assistance from the clerk of court and the district attorney but the Georgia authorities were not advised of outstanding warrants and did not place a hold on defendant. The surety had the responsibility to produce defendant and its efforts do not appear to be extraordinary; the State does not have an affirmative duty to aid a surety in locating a defendant who has not appeared. **State v. McCarn, 742.**

BROKERS

Commission—actual execution of lease required—Plaintiff broker was not entitled to a commission on a commercial real estate lease pursuant to the language of the listing agreement where the undisputed facts established that the lease which was eventually executed was the direct and proximate result of plaintiff's efforts, but the listing agreement indicated that the parties intended to condition the commission upon the actual execution of a lease or the formation of a binding agreement to execute the lease by the expiration of the exclusive listing period plus a grace period, and the lease was not executed and no binding contract to enter the lease was made within that time. **Carolantic Realty, Inc. v. Matco Grp., Inc., 464.**

Commission—listing agreement—waiver of termination date—Summary judgment was improperly granted for defendant in plaintiff broker's action for

BROKERS—Continued

the commission on a commercial real estate lease where there was a genuine issue of fact as to whether defendants waived the listing agreement's termination date. Plaintiff alleged and presented evidence that he continued to work on the lease through the signing date and that the parties agreed to but never signed an extension of the termination date. **Carolantic Realty, Inc. v. Matco Grp., Inc., 464.**

Commission—services during grace period—quantum meruit—There was a genuine issue of material fact as to whether a real estate broker was entitled to recovery of a commission on quantum meruit for a lease executed after the listing period expired. No contract will be implied where an express contract exists, but the express contract here was applicable only if services during the listing period resulted in a sale during the grace period. There was no contract concerning services rendered subsequently. **Carolantic Realty, Inc. v. Matco Grp., Inc., 464.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Sufficiency of evidence—lack of authority to enter—The trial court did not err by denying defendant's motion to dismiss a charge of breaking and entering where defendant contended that there was nothing in the evidence inconsistent with the owner giving defendant permission to come and borrow the property, but, viewed in the light most favorable to the State, the evidence at trial was sufficient to support an inference that defendant had no legal authority to enter the apartment. **State v. Jones, 317.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Child support—modification—voluntary unemployment—The trial court did not err by failing to reduce, modify, or eliminate plaintiff husband's child support and postseparation support payments, because there was sufficient evidence in the record to show that plaintiff's unemployment was voluntary. **Wolf v. Wolf, 523.**

Custody—changed circumstances—effect on the child—An order changing child custody sufficiently set forth changed circumstances affecting the welfare of the child where there was a direct threat of sexual molestation. The order must demonstrate consideration of the effect on the child's welfare, which was clearly done here, but the court is not required to wait for the adverse effects to manifest themselves or for harm to come to the minor before it can alter custody. **McConnell v. McConnell, 622.**

Custody—changed circumstances—remarriage to convicted molester—An order changing the custody of a child was justified by a change of circumstances, and the court did not abuse its discretion in concluding that it was in the child's best interest to change custody to defendant, where plaintiff indicated her intention to marry a man convicted of molesting a 14 year old female and who admitted to continued sexual urges for postpubescent females. **McConnell v. McConnell, 622.**

Custody—foreign judgment—emergency jurisdiction—Although the trial court in this state had emergency jurisdiction to enter a temporary order in a child custody case, the trial court's order is vacated because the order was not

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

temporary and the court was required by the PKPA to defer proceedings pending a response from Texas which had entered a custody order. **In re Brode, 690.**

Findings—no assignment of error or exception—conclusive—The trial court's findings were conclusive on appeal in a child custody action where plaintiff did not assign error or except to any of the court's findings. **McConnell v. McConnell, 622.**

Modification—final order—substantial change of circumstances test—The trial court erred in a child custody and child support case by applying a best interests analysis rather than the substantial change of circumstances test to the issue of modification of custody although inclusion of "without prejudice" in the custody order supports a determination that the order was temporary where it was converted into a final order when neither party requested the calendaring of the matter for a hearing within a reasonable time. **LaValley v. LaValley, 290.**

Support—modification by parties—later action for arrears—The trial court correctly ordered payment of child support arrears where the parties had agreed between themselves to a reduction, but there was no judicial modification of the earlier order. **Baker v. Showalter, 546.**

CITIES AND TOWNS

Railroad crossing—duty to maintain clear view—The trial court did not err in an action arising from a railroad crossing accident by granting summary judgment for Durham on the issues of whether the City had and neglected a duty to keep foliage and other obstructions from blocking drivers' views of oncoming trains where the obstructions complained of were not on City property, the City did not have authority over the area, and the City did not have a duty to keep the area clear. **Wilkerson v. Norfolk S. Ry. Co., 332.**

Railroad crossing—safety improvement project—authority and control—The trial court did not err in an action arising from a railroad crossing accident by finding that Durham had not exercised authority and control over a street regarding a safety improvement project where plaintiff asserted that the street was within municipal limits, that the City had asserted ownership and control during the project, and that the DOT had asked the City for permission to act on the project. The fact that the City has the authority to make certain decisions does not mean that the City is under an obligation to do so, and the City in this case had no duty to have the warning or safety devices in place. **Wilkerson v. Norfolk S. Ry. Co., 332.**

CIVIL PROCEDURE

Failure to include requested findings of fact and conclusions of law in order—out-of-state-judgment—Although a defendant contends the trial court erred by its enforcement of an out-of-state judgment for past due rent, this issue is not reached and the case is remanded for appropriate findings because the trial court's order does not contain requested findings of facts and conclusions of law as required by N.C.G.S. § 1A-1, Rules 52(a)(1) and (a)(2). **J.M. Dev. Grp. v. Glover, 584.**

Rule 52—mixed findings of fact and conclusions of law—A claim for retaliatory employment discrimination was remanded where the trial court dismissal

CIVIL PROCEDURE—Continued

of the claim violated N.C.G.S. § 1A-1, Rule 52 by making mixed findings of fact and conclusions of law. **Pineda-Lopez v. N.C. Growers Ass'n, 587.**

Rule 60 motion—notice—The trial court did not abuse its discretion by setting aside the 1 September 1998 order for permanent alimony and equitable distribution under N.C.G.S. § 1A-1, Rule 60(b) even though defendant contends plaintiff was required to give defendant five days' notice of a hearing for a Rule 60 motion pursuant to N.C.G.S. § 1A-1, Rule 6(d) since defendant waived notice, and notice was not required for this motion. **Sloan v. Sloan, 399.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Res judicata—motion to dismiss—sufficiency of evidence—The trial court erred in a negligence case by denying a motion by defendant county and defendant department of social services to dismiss the pleadings based on res judicata where a dismissal of plaintiff's prior action against defendants operated as an adjudication on the merits since the court did not specify that the dismissal was without prejudice. **Clancy v. Onslow Cty., 269.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Marijuana found in trash can—subsequent voluntary statement—The trial court did not err in a marijuana prosecution by admitting defendant's confession where an informant signaled that he had completed a transaction involving marijuana left in defendant's trash can; officers seized the marijuana, knocked on defendant's door and told defendant that they knew about the transaction; and defendant invited them in and confessed. **State v. Rhodes, 208.**

CONSTITUTIONAL LAW

Double jeopardy—financial transaction card theft—robbery with a dangerous weapon—A defendant's conviction for financial transaction card theft was not required to be vacated on double jeopardy grounds even though defendant contends he was subject to multiple punishment for the same act when he was also convicted for robbery with a dangerous weapon. **State v. Reid, 379.**

Due process—revocation of stormwater permit—Plaintiff was not deprived of a stormwater permit unconstitutionally where the permit was issued, construction began on plaintiff's chip mill, the permit was revoked for non-compliance with regulations, plaintiff requested a contested case hearing, the revocation was reversed, plaintiff filed this action for damages incurred during the revocation, and the trial court granted defendants' motion for summary judgment. Defendants provided due process through the contested case hearing, plaintiff eventually had the permit restored, and plaintiff did not petition for a stay during the contested case hearing. **Godfrey Lumber Co. v. Howard, 738.**

Due process—sign control ordinance—not arbitrary or unreasonable—legitimate state objective—A sign control ordinance was not arbitrary and unreasonable in violation of due process where aesthetics was only one of the listed purposes of the ordinance, there was nothing arbitrary or unreasonable about the restrictions, and the ordinance was reasonably related to the legitimate

CONSTITUTIONAL LAW—Continued

state objective of protecting the health, welfare and safety of the county's citizens. **Transylvania County v. Moody, 389.**

Right to self-representation—statutory requirements for waiver of counsel—Defendant is not entitled to a new trial in a robbery with a dangerous weapon, financial transaction card theft, and financial transaction card fraud case even though defendant contends the trial court unconstitutionally denied his request to represent himself because statutory requirements for waiver of counsel were not established. **State v. Reid, 379.**

Sign control ordinance—equal protection—legitimate state interest—restrictions rationally related to state interest—A sign control ordinance did not violate equal protection because the health, welfare and safety of citizens is a legitimate state interest and the restrictions in the ordinance are rationally related to that interest. **Transylvania County v. Moody, 389.**

Vagueness—physical therapy licensing statutes—Statutory language concerning disciplinary action against physical therapists is not unconstitutionally vague and is sufficiently specific to provide the Board of Physical Therapy Examiners with the authority to determine that petitioner violated acceptable standards of practice by having a sexual relationship with a patient. **Sibley v. N.C. Board of Therapy Exam'rs, 367.**

CONTEMPT

Civil—child support—postseparation support—failure to pay bonus or relocation expense—The trial court did not err in an action for child support and postseparation support by holding plaintiff husband in civil contempt for his failure to pay defendant wife twenty percent and fifteen percent of the gross amount of his hiring bonus of \$5,769.24 when the trial court's order required plaintiff to pay this percentage of his bonuses where plaintiff willfully relabeled the bonus a relocation expense. **Wolf v. Wolf, 523.**

Civil—child support—postseparation support—failure to pay—willfulness—The trial court did not err by failing to find plaintiff husband in civil contempt for willful failure to pay his child support obligation in the amount of \$1,129.00 per month and his postseparation support obligation of \$609.00 per month where the trial court did not find that defendant had the ability to pay or that his failure to pay was willful. **Wolf v. Wolf, 523.**

Civil—willfulness—competent evidence—The trial court did not err by finding defendant husband in willful contempt in its order filed 15 May 2001 based on defendant's failure to pay the equity line debt to BB&T as alimony pendente lite. **Sloan v. Sloan, 399.**

CONTRACTS

Acquisition of real estate—apparent authority of realtor—The trial court properly granted defendants' motion for judgment notwithstanding the verdict as to plaintiff's claim for breach of contract in an action arising from an attempt to buy real estate where a realtor with defendant High Rock orally agreed to attempt to facilitate plaintiff's purchase of certain property; the realtor was acting within the scope of his apparent authority when he did so and the principal's

CONTRACTS—Continued

liability is determined by the authority which a person exercising reasonable care would believe had been conferred on the agent; plaintiff knew or should have known that the realtor could no longer act for High Rock after he left to form his own agency; and there was no evidence that plaintiff ever entered into any agreement with another High Rock realtor who eventually sold the property to a third-party. **Branch v. High Rock Lake Realty, Inc., 244.**

Legality—burden of proof—instructions—The trial court erred in an action on a partnership agreement for orthodontic services by erroneously instructing the jury that plaintiffs had the burden of proving that the contract they sought to enforce was legal. The contract was presumed to be legal; illegality was an affirmative defense which defendants had the burden of proving. **Orthodontic Centers of Am., Inc. v. Hanachi, 133.**

CORPORATIONS

Defunct—liability of shareholders—The trial court did not err in a nuisance action arising from the closing of a drainage ditch by granting summary judgment for the third party defendants where the defendants were the principals in a defunct corporation. Except under circumstances not applicable here, shareholders are not personally liable for the acts of the corporation. **BNT Co. v. Baker Precythe Dev. Co., 52.**

Dissolution—right to request—A defendant in an action to determine the status of the individual parties as to their positions in a corporation was entitled to bring a request for dissolution and have that request evaluated by the trial court regardless of whether defendant has voting power or whether there is actual deadlock among the managing shareholders. North Carolina courts have determined that a minority shareholder can bring a request for dissolution or other equitable relief if the reasonable equitable expectations of the shareholder have been frustrated. **Action Cmty. Television Broadcasting Network, Inc. v. Livesay, 125.**

COSTS

Attorney fees awarded by court—statutory limit—damages and costs distinct—The trial court did not abuse its discretion by awarding attorney fees to the plaintiff in a personal injury action where defendant's offer of judgment occurred when the answer was filed, the judgment was more favorable than the offer, and plaintiff's damages were less than \$10,000, even though the total with costs was over the \$10,000 limit of N.C.G.S. § 6-21.1. Damages and costs are separate items. **Sowell v. Clark, 723.**

Attorney fees—sanction—error to award—The trial court erred by awarding attorney fees to third party defendant as a sanction against defendants. **Bowman v. Alan Vester Ford Lincoln Mercury, 603.**

CREDIT CARD CRIMES

Financial transaction card theft—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of financial transaction card theft because the State presented sufficient

CREDIT CARD CRIMES—Continued

evidence under the recent possession doctrine that defendant stole the victim's purse containing her credit cards. **State v. Reid, 379.**

CRIMINAL LAW

Bill of particulars—evidence not inconsistent—There was no error in a prosecution for first-degree rape where defendant contended that he was denied a fair trial because the bill of particulars and the evidence at trial did not precisely establish the date and time of the alleged rape. The purpose of a bill of particulars is to inform defendant of specific occurrences intended to be investigated at trial and to limit the course of the evidence to a particular scope of inquiry; the testimony in this case was not inconsistent with the bill of particulars. **State v. Brothers, 71.**

Defendant's removal from courtroom during closing arguments—harmless error—Defendant is not entitled to a new trial in a robbery with a dangerous weapon, financial transaction card theft, and financial transaction card fraud case even though the trial court removed defendant from the courtroom during closing arguments. **State v. Reid, 379.**

Instruction on flight—sufficiency of evidence—The trial court did not err in a murder prosecution by instructing the jury on flight where defendant provided no assistance to the victim after shooting him; fled the scene of the shooting and disposed of his gun; and did not voluntarily contact the police or turn himself in, but merely cooperated once he was contacted by the police. **State v. Eubanks, 499.**

Instructions—rape and sexual offenses—unanimity—no federal constitutional violation—The trial court's instructions in a prosecution for first-degree statutory rape and sexual offense did not violate federal constitutional law; *Richardson v. United States*, 526 U.S. 813, is limited to federal prosecutions for continuing criminal enterprises and does not apply to this case. **State v. Brothers, 71.**

Testimony through translator—no plain error—There was no plain error in an assault prosecution where defendant testified through an interpreter. There may be circumstances in which translation difficulties could violate a non-English speaking defendant's constitutional rights, but those issues were not raised here, and the difficulties with court interpreters in this case did not impede the defense from confronting and cross-examining the state's witnesses or from presenting its evidence. **State v. Uvalle, 446.**

DISCOVERY

Violation—no sanctions—The trial court did not abuse its discretion in a prosecution for breaking and entering and other offenses by not imposing sanctions for the State's violation of a discovery order in its production of photographs. **State v. Jones, 317.**

DIVORCE

Alimony—modification—notice—change of circumstances—The trial court did not err by modifying the 1 May 1988 order for alimony pendente lite even

DIVORCE—Continued

though defendant contends that there was no motion to modify the alimony and that he never received notice of a hearing for a motion to modify alimony or alimony pendente lite, because: (1) defendant had constructive notice of plaintiff's motion for modification of the alimony pendente lite, actual notice was not required, and defendant's assignment of error based on lack of notice is deemed waived; (2) defendant's debt and subsequent discharge in bankruptcy constitutes a change in circumstances warranting modification; and (3) the trial court may direct payments to a third party as an award of alimony or alimony pendente lite. **Sloan v. Sloan, 399.**

Living separate and apart—knowledge of parties—The trial court did not err by entering a decree of absolute divorce under N.C.G.S. § 50-6 based on plaintiff husband's intent to separate from defendant on 21 January 1999 even though defendant wife contends she had no knowledge of plaintiff's intention to live separate and apart and ultimately end their marriage until September 1999. **Smith v. Smith, 130.**

Postseparation support—modification—voluntary unemployment—The trial court did not err by failing to reduce, modify, or eliminate plaintiff husband's child support and postseparation support payments, because there was sufficient evidence in the record to show that plaintiff's unemployment was voluntary. **Wolf v. Wolf, 523.**

DRUGS

Cocaine trafficking by possession—sufficiency of evidence—There was sufficient evidence that defendant possessed cocaine and was guilty of trafficking by possession where defendant was aware of and present during all conversations related to the purchase, he rode in a car from Goldsboro to Wilmington knowing that the cocaine was in the car, he accompanied the informant into an apartment in Wilmington and remained inside while the informant returned to the car for the cocaine, watched as the informant opened the package and placed the cocaine on the scales, and actively assisted the informant in weighing the cocaine on the scales. **State v. Siriguanico, 107.**

Felonious possession of drug paraphernalia—motion to dismiss—State's concession of error—Although defendant contends the trial court erred by denying defendant's motion to dismiss the charge of felonious possession of drug paraphernalia under N.C.G.S. § 90-95(e)(3) since this offense is not a substantive charge but merely a status for sentence enhancement, this argument does not need to be addressed because defendant's conviction is vacated based on the State's concession that defendant was improperly indicted for this charge. **State v. Stevens, 561.**

Trafficking by possession of cocaine—instruction on lesser included offense of trafficking by possession of less than twenty-eight grams of cocaine—The trial court did not err in a trafficking by possession of cocaine case by denying defendant's request to instruct the jury on the lesser included offense of trafficking by possession of less than twenty-eight grams of cocaine even though defendant contends the cocaine was not fully dry when weighed after its submersion in the toilet. **State v. Reid, 420.**

DRUGS—Continued

Trafficking by possession of cocaine—jury instruction on acting in concert—The trial court did not err in a trafficking by possession of cocaine case by instructing the jury on the theory of acting in concert. **State v. Reid, 420.**

EASEMENTS

Appurtenant—subdivision road—standing to enjoin use—Homeowners in a subdivision have an easement appurtenant to a road in the subdivision which gives them standing to seek to enjoin use of the road by an owner of an adjacent tract of land. **Connolly v. Robertson, 613.**

By prescription—use of roads in subdivision—The trial court did not abuse its discretion by granting a directed verdict in favor of plaintiff homeowners on defendant's claim of right to the roads in the pertinent subdivision even though defendant alleges the acquisition of an easement by prescription because defendant's use of the road was permissive and defendant failed to show continuous use of the property. **Connolly v. Robertson, 613.**

Express grant—use of roads in subdivision—The trial court did not abuse its discretion by granting a directed verdict in favor of plaintiff homeowners on defendant's claim of right to the roads even though defendant alleges he had an easement by express grant provided in a 1927 agreement where the agreement grants an express easement only after a condition precedent of platting both pertinent properties is met and there was insufficient evidence that the platting was done. **Connolly v. Robertson, 613.**

ELECTIONS

Restricting vote in primary—nonpartisan elections of district court judges—motion to dismiss—The trial court did not err by dismissing appellants' complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) in a declaratory judgment action seeking to have N.C.G.S. § 163-59 declared unconstitutional as applied to primary elections of district court judges and seeking a declaration that district court judges should be elected in nonpartisan elections based on the fact that plaintiff registered Republican was prevented from voting in the Democratic primary while registered Democrats and unaffiliated voters were allowed to vote since the Democratic party was the only party fielding candidates for the district court in the election at issue. **Neier v. State of N.C., 228.**

EMOTIONAL DISTRESS

Negligent infliction—directed verdict—judgment notwithstanding verdict—The trial court erred by denying defendant nursing home operator's motions for directed verdict and judgment notwithstanding the verdict as to plaintiff individuals' claims for negligent infliction of emotional distress arising from decedent's accidental strangulation at a nursing home when decedent got caught between the mattress and side rails on her bed. **Estate of Hendrickson v. Genesis Health Venture, Inc., 139.**

ESTATES

Administration—statute of limitations—The three year statute of limitations for contract actions bars an action seeking specific performance of a contract by

ESTATES—Continued

Wright, Sr. to convey land at his death to Wright, Jr. where Wright, Sr. died intestate in 1978; Wright, Jr. died intestate in 1989; Wright, Sr.'s wife conveyed the disputed tract to her daughter, defendant Burleson, in 1991; an administrator was appointed for Wright, Sr.'s estate in 1998; and plaintiff brought this action in 1998. **Wright v. Smith, 121.**

Statute of limitations—claim against deceased—no personal representative appointed—The trial court did not err by dismissing a negligence claim which arose from an automobile collision where plaintiff was not aware that defendant had died, plaintiff filed a complaint against defendant, and the trial court concluded both that the correct party was the estate and that any action against the estate was barred by the statute of limitations. Although N.C.G.S. § 1-22 allows for a suspension of the statute of limitations between the period from the death of the decedent to the appointment of an administrator, no suspension can occur until a personal representative is appointed. **Shaw v. Mintz, 82.**

ESTOPPEL

Child support modification—detrimental reliance not shown—The trial court did not err in a child support case in which the parties agreed between themselves to reduce the support by concluding that equitable estoppel did not apply. Although defendant may have relied on the oral agreement and letter to reduce her payment, she did not demonstrate that such reliance was to her detriment. **Baker v. Showalter, 546.**

EVIDENCE

Adoption—juvenile and mental health files of other children—There was no error in an adoption proceeding in the exclusion of the juvenile and mental health files of foster children who were verbally abused and physically disciplined by petitioners where petitioners failed to show precisely how such evidence would have influenced the trial court's decision. Evidence of favorable treatment of the children would not have negated the plenary evidence of neglect offered during the hearing, and speculation that the files might contain evidence pertaining to veracity is insufficient to require admission of the files. **In re Adoption of Cunningham, 410.**

Defendant's statements to psychologist—motion to suppress—effective assistance of counsel—prejudicial effect—The trial court did not err in a first-degree statutory sexual offense case by denying defendant's motion to suppress statements he made to a psychologist during a sex offender evaluation conducted as a condition of a plea agreement in an indecent liberties case in another county even though defendant contends he received ineffective assistance of counsel and that the admission violated N.C.G.S. § 8C-1, Rule 403. **State v. Maney, 486.**

Driving while impaired—blood test—motion in limine—motion to suppress—The trial court did not abuse its discretion in a second-degree murder, assault with a deadly weapon inflicting serious injury, driving while impaired, failure to stop at a stop sign, driving left of center, and consumption of alcohol by an individual less than twenty-one years of age case by denying defendant's

EVIDENCE—Continued

motion in limine and motion to suppress the results of a blood test even though defendant's blood sample was left in a box in an officer's patrol car for three days before being tested. **State v. McDonald, 236.**

Expert testimony—nursing homes—standard of care—safety measures—The trial court did not abuse its discretion in a wrongful death case by allowing the testimony of an expert witness in the field of registered nursing that defendant nursing home operator's care and treatment did not meet the applicable standard of care and her opinion that defendant's failure to provide an alternative mechanism for decedent's safety increased the risk of decedent's strangling to death, and by allowing an expert with respect to the proper care in nursing to testify that there were other safety measures that could have been used such as bed alarms. **Estate of Hendrickson v. Genesis Health Venture, Inc., 139.**

Hearsay—medical diagnosis exception—double hearsay—child sexual abuse victim—There was no prejudicial error in a prosecution for first-degree statutory rape and other sexual offenses against a six-year-old victim where the court admitted as substantive evidence a doctor's testimony regarding statements made by the victim's mother and a social worker that related statements by the victim. This question as to whether out-of-court statements of a parent recounting out-of-court statements of a child victim may be admitted pursuant to the medical diagnosis exception to the hearsay rule has not been addressed in North Carolina, and was not addressed here because defendant did not show prejudice. **State v. Brothers, 71.**

Hearsay—murder victim's state of mind—The trial court did not err in a first-degree domestic murder prosecution by admitting testimony that the victim had moved in with the witness because the victim was fed-up with defendant's alleged infidelities, that altercations occurred between the victim and defendant, and that the victim had said to come and check on her if she did not return from her last meeting with defendant within thirty minutes. The testimony was probative of the victim's state of mind, and the court admitted the testimony only after conducting a voir dire hearing and concluding that the probative value outweighed any prejudicial effect. **State v. Williams, 535.**

Hearsay—911 call identifying defendant as shooter of victim—personal knowledge—excited utterance exception—The trial court did not err in a second-degree murder case by admitting evidence of the exchange between defendant's son and the 911 operator including statements that defendant shot the victim. **State v. Wright, 493.**

Hearsay—out-of-court statement—failure to object—The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury case by admitting into evidence an out-of-court statement by defendant's brother telling bystanders that they might want to leave the park since he was about to "light the place up" where other similar testimony was presented to the jury without objection. **State v. Wilson, 219.**

Informant's statements—other evidence to same effect—There was no plain error in a cocaine trafficking prosecution where the trial court admitted statements from an informant who did not testify at trial. The essential evidence regarding defendant's knowledge and participation in the drug deal came from witnesses who testified at trial and not from the statements of the informant. **State v. Siriguanico, 107.**

EVIDENCE—Continued

Intercepted telephone conversation—protection of minor—The trial court did not err in a prosecution for statutory rape and indecent liberties by admitting evidence of an intercepted telephone conversation where the listening was not done with bad purpose or without justifiable excuse but with concern for the welfare of a minor. **State v. McGriff, 631.**

Medical testimony—basis—The trial court did not err by admitting medical testimony to establish that a six-year-old victim had been sexually abused where defendant alleged that the testimony was based solely on the victim's history, but the doctor explicitly stated that her conclusion was based in part on the physical evidence of sexual abuse. **State v. Brothers, 71.**

Motion in limine—prior judgment acquitting defendant of first-degree statutory rape of same victim—The trial court did not err in a first-degree statutory sexual offense case by granting the State's motion in limine forbidding defendant from presenting evidence of a prior judgment acquitting him on the charge of first-degree statutory rape of the same victim. **State v. Maney, 486.**

Other offenses—details of conviction—The trial court did not abuse its discretion in a marijuana prosecution by excluding the details of an informant's prior conviction for assault on a female after evidence of the conviction was allowed. **State v. Rhodes, 208.**

Other offenses—identity, pattern, common plan—The trial court did not err in a prosecution for first-degree statutory rape and other sexual offenses against a six-year-old girl by admitting testimony from her sister as to other sexual acts committed by defendant. The prior acts showed identity, pattern, and a common plan or scheme. **State v. Brothers, 71.**

Other offenses—similar testimony elicited by defendant—no prejudice—There was no prejudicial error in a murder prosecution where the court admitted testimony on direct examination tending to show that defendant had used and supplied drugs and that defendant had orchestrated a scheme to obtain refunds by returning stolen clothing. Defendant elicited similar testimony on cross-examination. **State v. Eubanks, 499.**

Tax records—credibility—impeachment—The North Carolina State Bar Disciplinary Hearing Commission did not abuse its discretion by failing to order defendant attorney's client to produce certain personal income tax records from the 1980's in order for defendant to impeach the client's credibility and to show the lengths to which the client would allegedly go to obtain money. **N.C. State Bar v. Gilbert, 299.**

Victim's statement—previous shooting—opening the door to testimony—The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury case by admitting into evidence a statement by the victim regarding a previous shooting of the victim by defendant's brother because defendant opened the door to this testimony by asking the victim an open-ended question about the length of the victim's high school education, to which the victim responded that he stopped in the tenth grade when he was shot by defendant's brother. **State v. Wilson, 219.**

Wife did not know where husband buried—credibility—impeachment—The North Carolina State Bar Disciplinary Hearing Commission did not err by

EVIDENCE—Continued

refusing to permit defendant attorney to introduce evidence that allegedly would show defendant's client did not know where her husband was buried in an effort to impeach the client's credibility by showing that the client hid the fact that she and her husband had been estranged while defendant was pursuing the client's workers' compensation and wrongful death claims. **N.C. State Bar v. Gilbert, 299.**

FIDUCIARY RELATIONSHIPS

Acquisition of real estate—insufficient evidence—The trial court properly granted defendants' motion for judgment notwithstanding the verdict on a breach of fiduciary duty claim arising from an alleged agreement with a realtor for the acquisition of real estate where there was no evidence of a fiduciary relationship between plaintiff and defendants. **Branch v. High Rock Lake Realty, Inc., 244.**

HIGHWAYS AND STREETS

Right to use of roads in subdivision—fee simple ownership—directed verdict—The trial court did not abuse its discretion by granting a directed verdict in favor of plaintiff homeowners on defendant's claim of right to the roads in the pertinent subdivision even though it excluded an attorney witness's testimony regarding defendant's alleged fee simple ownership of the roads because the attorney based his expert opinion on inadequate facts and data. **Connolly v. Robertson, 613.**

HOMICIDE

Felony murder—acting in concert—instructions—motion to dismiss—There was no error in a prosecution for felony murder where defendant contended that the trial court erred by denying his motion to dismiss when it defined acting in concert as to burglary and attempted robbery charges, but not as to the murder charge. Jury instructions have no logical relationship to dismissing a case at the close of the evidence; moreover, reading these instructions in their entirety, there was no error. **State v. Dudley, 711.**

Felony murder—shooting by accomplice—common purpose and natural consequences—The trial court did not err in a prosecution for felony murder during a robbery and assault by denying defendant's motion to dismiss where defendant and the other intruders were in pursuit of a common purpose (burglary and attempted robbery), and there was also substantial evidence that the murder was a natural and probable consequence of the burglary and attempted robbery. **State v. Dudley, 711.**

Felony murder—two underlying convictions—jury not required to decide predicate—The trial court did not err in a prosecution for burglary, attempted robbery, and felony murder by not requiring the jury to unanimously decide which felony was the predicate for the felony murder. Defendant was unanimously convicted of both potential underlying felonies, either of which could have been the basis for the felony murder conviction. **State v. Dudley, 711.**

First-degree murder—evidence of premeditation and deliberation—A first-degree murder defendant's motion to dismiss for insufficient evidence of

HOMICIDE—Continued

premeditation and deliberation was correctly denied where defendant brought a .357 revolver to a meeting with the victim, stated to an officer that he shot the victim because "she was going to take my kids," and there was no evidence of provocation on the victim's part. **State v. Williams, 535.**

First-degree murder—short-form indictment—constitutionality—The short-form indictment used to charge defendant with first-degree murder did not violate defendant's Fourth Amendment Due Process rights even though it failed to allege any aggravating circumstances. **State v. Phillips, 185.**

Murder—old firearm—no evidence of unintentional firing—no instruction on involuntary manslaughter—The trial court did not err in a murder prosecution by not submitting involuntary manslaughter to the jury where defendant contended that the shooting occurred through the mishandling of an old firearm, but there was no evidence tending to show that this particular firing of the gun was unintentional. In fact, there was evidence that defendant fired the gun intentionally. **State v. Eubanks, 499.**

Second-degree murder—jury instruction on flight—The trial court did not commit plain error in a second-degree murder case by instructing the jury that it could consider defendant's flight as circumstantial evidence of her guilt. **State v. Wright, 493.**

Second-degree murder—malice—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of second-degree murder at the close of all evidence based on alleged insufficient evidence of malice because there was evidence of malice by driving in a reckless manner with a blood alcohol level almost twice the legal limit. **State v. McDonald, 236.**

Short form murder indictment—sufficient—A short form murder indictment sufficiently conferred jurisdiction on the trial court where it alleged that defendant "unlawfully, willfully, and feloniously did of malice kill and murder" the victim. The indictment met the requirements of N.C.G.S. § 15-144. **State v. Dudley, 711.**

IMMUNITY

Governmental—improvement of railroad crossing—The trial court did not err by finding that Durham had immunity in an action arising from an accident at a railroad crossing where plaintiff conceded that the City performed a governmental function in agreeing with the State to work on the crossing improvement, but argued that carrying out the decision was a ministerial undertaking. Plaintiff did not file suit against individual City employees and the distinction between discretionary and ministerial acts is important only when an individual pleads qualified or public officer immunity. **Wilkerson v. Norfolk S. Ry. Co., 332.**

Governmental—medical school employees—The trial court erred by dismissing a wrongful death action against employees of East Carolina School of Medicine who claimed sovereign immunity as employees of the State of North Carolina. There is nothing in the complaint suggesting that defendants were sued in their official capacity. **Urquhart v. University Health Sys., 590.**

IMMUNITY—Continued

Governmental—mental health authority—motion to dismiss—The trial court erred in a negligence case by denying defendant mental health area authority's motion to dismiss the pleadings based on governmental immunity because plaintiff's allegation that defendant county waived its immunity by the purchase of insurance is insufficient to constitute a waiver of immunity by defendant area authority. **Clancy v. Onslow Cty.**, 269.

Governmental—railroad crossing—Durham was not liable in an action arising from a railroad crossing accident where the City did not own, operate or maintain the crossing and did not waive its immunity through the purchase of insurance or participation in a local government risk pool. **Wilkerson v. Norfolk S. Ry. Co.**, 332.

INDEMNITY

Contribution—motion to dismiss—failure to state claim—The trial court did not err by granting third party defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) the third party complaint by defendants for indemnity and contribution under N.C.G.S. § 20-71.4(a) and N.C.G.S. § 20-348(a) based on third party defendant's failure to disclose the fact that a car it sold to defendants had been involved in a collision. **Bowman v. Alan Vester Ford Lincoln Mercury**, 603.

INDECENT LIBERTIES

Instructions—touching—The trial court did not err in an indecent liberties prosecution by making explicit that a conviction required that the jury find that defendant touched the victim in an improper or indecent way, induced the victim to touch him in an indecent way, or attempted to commit a lewd or lascivious act upon the child. **State v. Brothers**, 71.

INDIANS

Gaming on Cherokee lands—failure to pay jackpot—non-Indian management company—infringement on Cherokee self-governance—remand for determination—An action instituted by a non-Indian against a non-tribal management company operating a gaming facility on Cherokee Indian lands which arose from defendant's refusal to pay a jackpot that plaintiff allegedly won from a gaming machine in the facility must be remanded for the trial court to determine, pursuant to the criteria set forth in *Jackson County v. Swaney*, 319 N.C. 52, whether the exercise of state court jurisdiction would unduly infringe on the self-governance of the Eastern Band of Cherokee Indians. In particular, the trial court should determine the nature of the activities in which plaintiff engaged and whether those activities are consistent with the public policy of this State. **Hatcher v. Harrah's N.C. Casino Co.**, 275.

Gaming on Cherokee lands—failure to pay jackpot—non-Indian management company—state court jurisdiction—no preemption by federal act—The Indian Gaming Regulatory Act did not preempt state court jurisdiction of an action brought by a non-Indian against a non-tribal management company operating a gaming facility on Cherokee Indian lands for fraud and unfair trade practices arising from defendant's refusal to pay a jackpot that plaintiff

INDIANS—Continued

allegedly won from a gaming machine in the facility because plaintiff's claims neither affect the Cherokee Tribe's internal governmental decisions nor directly relate to the regulation of gaming. **Hatcher v. Harrah's N.C. Casino Co.**, 275.

INDICTMENT AND INFORMATION

Amendment—dates of sexual offenses—The trial court did not err during a trial for statutory rape and indecent liberties by allowing the State to amend the indictment to conform to the evidence of dates. Changing the dates in the indictment to expand the time frame did not substantially alter the charge set forth in the indictment. **State v. McGriff**, 631.

Variance with evidence—date of sexual abuse of child—There was not a fatal variance between the indictments and the evidence in a prosecution for statutory rape and indecent liberties where defendant took issue with the dates, but courts are lenient in child abuse cases where there are differences between the dates alleged in the indictment and those proven at trial if they do not prejudice a defendant's opportunity to present an adequate defense. This defendant offered no alibi defense; in fact, defendant offered no evidence at all. **State v. McGriff**, 631.

INJUNCTION

Antisuit—findings—form and substance—The trial court's findings succinctly stated the reasons for the issuance of an antisuit injunction as required by Rules 65 and 52 of the North Carolina Rules of Civil Procedure, and the findings were sufficient to invoke the court's power to issue the order under Rule 65 and N.C.G.S. § 1-485. **Staton v. Russell**, 1.

Antisuit—findings—sufficiency—The trial court did not abuse its discretion in its findings when issuing an antisuit injunction where sufficient evidence was adduced to support each of the findings and the findings supported the conclusions. **Staton v. Russell**, 1.

Antisuit—Florida declaratory judgment action—specific property in North Carolina—The trial court possessed the equitable power to enjoin appellants from pursuing a declaratory judgment action in Florida where appellants sought to define the validity of documents and trusts and the right to money held in those trusts in North Carolina. When a suit deals with specific property, a court is authorized to enjoin a party from bringing a new action in another court where the other action has the potential to delay or interfere with adjudication of rights affecting the property. **Staton v. Russell**, 1.

Antisuit—jurisdiction—out-of-state residents—The trial court did not err in a complex action involving trusts, a stock sale, and money held in North Carolina by issuing an antisuit injunction prohibiting the prosecution of a Florida declaratory judgment claim in the same matter. Although a court of one state may not restrain an action in another state by an order directed to a court of that state, it may enjoin the parties from proceeding in another state if it has acquired jurisdiction. The appellants in this case subjected themselves to the North Carolina judicial system when they chose North Carolina as the forum for their actions. **Staton v. Russell**, 1.

INJUNCTION—Continued

Antisuit—security—not required—The trial court did not err by issuing an antisuit injunction without requiring that security be posted. **Staton v. Russell, 1.**

Antisuit—sufficiency of grounds—Sufficient equitable grounds existed for an antisuit injunction where a Florida action was filed which was duplicative of North Carolina cases; the Florida action was vexatious and harassing; and appellants' continued prosecution of the Florida action threatened the North Carolina court's jurisdiction over issues that affect the rights of parties not represented in the North Carolina system. **Staton v. Russell, 1.**

INSURANCE

Uninsured motorist coverage—addition of person to policy with rejected coverage—Summary judgment was correctly granted for Farm Bureau Mutual Insurance Company in an action which sought uninsured motorist coverage for the death of Mrs. Weaver where Mrs. Weaver was added to a policy originally issued to Mr. Weaver as sole named insured with uninsured motorist coverage expressly rejected. Although plaintiff contended that the rejection of uninsured motorist coverage was not valid for Mrs. Weaver because she did not sign the rejection form, the addition of Mrs. Weaver as a named insured constituted an amendment to an existing policy rather than the issuance of a new policy and a new rejection form was not required. Moreover, the addition of an "M" in the policy number to distinguish these policies from those of a separate stock company did not constitute issuance of a new policy. **Weaver v. O'Neal, 556.**

Uninsured motorist coverage—normal or ordinary use of motor vehicle—shooting at another car—The trial court correctly granted summary judgment for plaintiff insurer in a declaratory judgment action to determine coverage under an uninsured motorist policy where defendant's daughter (Audrey) was a passenger in a car when the driver (Gregory) held a gun out his window, the gun discharged, and Audrey was killed by the ricochet. Even accepting Gregory's claim that the discharge was accidental, intentionally pointing a gun out the window of a moving automobile towards the occupants of another moving automobile does not constitute normal or ordinary use of a motor vehicle. **Integon Specialty Ins. Co. v. Austin, 593.**

JUDGES

One judge overruling another—summary judgment after Rule 12 ruling—different questions—A second judge had the authority to hear and decide defendant City's motion for summary judgment where another judge had denied in part defendant's motion to dismiss under N.C.G.S. § 1A-1, Rules 12(b)(6) and 12(c). **Wilkerson v. Norfolk S. Ry. Co., 332.**

Oral adjudication while in office—written order after leaving—void—An order adjudicating a child to be a neglected juvenile and ordering disposition of custody was vacated and remanded where the judge entered an oral adjudication at the conclusion of the hearing on 2 November 2000, she was subsequently defeated in an election, her replacement was sworn in on 4 December 2000, and she signed the order on 16 January 2001. She was no longer a judicial official when she signed the order and it is absolutely void. **In re Pittman, 112.**

JUDGMENTS

Uniform Enforcement of Foreign Judgments Act—North Carolina Foreign Money Judgments Recognition Act—The trial court's order denying plaintiff creditor's motion to enforce a foreign judgment under the Uniform Enforcement of Foreign Judgments Act is vacated because plaintiff complied with procedural requirements of the Act, and provisions of the Foreign Money Judgments Recognition Act may be relevant to require recognition of the foreign judgment. *HCA Health Servs. of Texas, Inc. v. Reddix*, 659.

JURISDICTION

Action against Disney—burden of litigation—Plaintiffs' assertions were not supported by competent evidence where plaintiffs contended that their burden of litigation in Florida would be severe while the burden on Walt Disney World and others to contest the suit in North Carolina would be marginal. *Wyatt v. Walt Disney World Co.*, 158.

Disney—separate companies—advertising in North Carolina—not sufficient for jurisdiction—The trial court's findings of fact support its conclusion that Walt Disney World Company (WDWCO) and Walt Disney World Hospitality and Recreation Corporation (HRC) did not maintain such continuous and systematic contacts with North Carolina as to satisfy general jurisdiction requirements. There were uncontradicted affidavits that WDWCO, HRC, and the Disney Store are separate entities and that WDWCO and HRC do not advertise or otherwise conduct business in North Carolina. While travel agents, retail stores, and advertisers might attempt to capitalize on the popularity of Disney World, these enterprises are entirely separate from WDWCO and HRC. Moreover, plaintiffs' claims of tens of thousands of fliers advertising vacations at WDWCO do not, absent more, subject WDWCO to jurisdiction in North Carolina. *Wyatt v. Walt Disney World Co.*, 158.

Florida accident—firm hired to investigate in North Carolina—independent contractor—The trial court did not err by granting defendants' motion to dismiss a negligence action for lack of personal jurisdiction where plaintiffs maintained that the Florida defendants had engaged in acts in North Carolina giving rise to jurisdiction through the actions of a firm hired by defendants to investigate the accident, but the firm acted as an independent contractor and its actions are not attributable to defendants. *Wyatt v. Walt Disney World Co.*, 158.

Minimum contacts—Disney advertising—Three federal district court decisions from Pennsylvania did not support plaintiffs' minimum contacts arguments in a suit against Walt Disney Company and others where those cases were in stark contrast to numerous rulings by state and federal courts in other jurisdictions. *Wyatt v. Walt Disney World Co.*, 158.

Personal—process of challenge—Upon a defendant's personal jurisdiction challenge, the plaintiff has the burden of proving prima facie that a statutory basis for jurisdiction exists. Where unverified allegations in the plaintiff's complaint meet plaintiff's initial burden and defendant does not contradict plaintiff's allegations, such allegations are accepted as true. However, when a defendant supplements its motion with affidavits or other supporting evidence, plaintiff cannot rest on the allegations of the complaint and must respond by setting forth specific facts showing that the court has jurisdiction. If the trial court's findings

JURISDICTION—Continued

of fact resolving the defendant's jurisdictional challenge are not assigned as error, the court's findings are presumed to be correct. **Wyatt v. Walt Disney World Co.**, 158.

Personal—Rule 60(b) motion—The trial court did not abuse its discretion in its 5 January 2001 order granting the individual defendants' N.C.G.S. § 1A-1, Rule 60(b) motion to set aside the 18 August 1999 orders entered by the trial court after plaintiff was allowed to amend his complaint to add the individuals as defendants in an action originally brought against a corporation because the trial court did not have personal jurisdiction over the individual defendant. **Van Engen v. Que Scientific, Inc.**, 683.

Traditional notions of fair play and substantial justice—action in North Carolina against Disney—The "traditional notions of fair play and substantial justice" test of *International Shoe Company v. Washington* did not dictate that personal jurisdiction should be exercised in North Carolina where plaintiff was injured at Disney World. **Wyatt v. Walt Disney World Co.**, 158.

Subject matter—domestic relations—bankruptcy—The trial court did not lack subject matter jurisdiction to order defendant to pay the equity line secured against the marital residence in its alimony and equitable distribution order filed 24 May 2002 even though defendant filed a Chapter 7 proceeding in bankruptcy court on 25 August 1999. **Sloan v. Sloan**, 399.

JURY

Deliberations—unanimous verdict—coercive surrounding circumstances—Defendants in an attempted robbery with a firearm, robbery with a firearm, first-degree kidnapping, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious larceny case are entitled to a new trial based on the coercive circumstances surrounding jury deliberations. **State v. Dexter**, 430.

Selection—excusal for cause—The trial court did not err in a prosecution for breaking and entering and other offenses by excusing for cause ex mero motu a juror who had indicated in another trial that she would not follow the law if it did not align with the Bible. **State v. Jones**, 317.

JUVENILES

Assault on government official—delinquency—The trial court did not err by not finding that a juvenile acted in self-defense where a middle school principal carried the juvenile to the office to keep him from leaving the building, with the student grabbing a doorframe and scratching the principal in the process. The juvenile engaged in and continued a difficulty with the principal when he refused to heed warnings not to leave the building; the principal was required to undertake reasonable force to protect the juvenile's safety and to prevent him from leaving school premises. **In re Pope**, 117.

Capacity to proceed—evaluations—The trial court did not err by finding a juvenile capable of proceeding where two doctors from Dorothea Dix found the juvenile capable, a private psychologist found him incapable, and the trial court ordered an evaluation by the chief of forensic psychiatry at Dorothea Dix, who

JUVENILES—Continued

found the juvenile capable of proceeding. There was no merit to the juvenile's contention that the chief psychiatrist's evaluation was inherently unreliable or biased because it was based in part on information gathered by one of his employees. **In re Robinson, 733.**

Commitment—not an abuse of discretion—The trial court did not abuse its discretion by committing a juvenile to the Department of Juvenile Justice and Delinquency Prevention where the court had before it assessments of needs and risks and the court found that it was in the juvenile's best interest to be committed given the severity of the case, the lack of progress, and the alternatives available in the community. **In re Robinson, 733.**

Dependency adjudication—summons to both parents required—An order adjudicating a child dependent and awarding custody to her aunt and uncle was vacated where a summons was not issued to nor served on the father. Earlier cases holding that it was not necessary to serve a dependency petition on both parents were based on a statute which has now been changed. Moreover, the Uniform Child Custody Jurisdiction and Enforcement Act applies to all child custody determinations arising out of child custody proceedings and requires notice to both parents. **In re Poole, 472.**

Transfer hearing—failure to preserve right to appeal transfer order—Although defendant juvenile appeals from the validity of evidence received at a transfer hearing and the ensuing transfer order to superior court in an assault with a deadly weapon with intent to kill inflicting serious injury case, defendant failed to preserve the right to appeal the transfer order because he failed to appeal the transfer order and issues arising from it to superior court. **State v. Wilson, 219.**

LACHES

Administrative hearing—no prejudice—The trial court did not err by denying petitioner's motion to dismiss for laches a disciplinary proceeding which led to suspension of petitioner's license to practice physical therapy where the charges were based on events which occurred in 1990 and 1991 but petitioner did not receive notice from the Board of any complaint until 1996 and did not receive notice of a hearing until August of 1998. Petitioner did not show prejudice resulting from the delay. **Sibley v. N.C. Board of Therapy Exam'rs, 367.**

MARRIAGE

Premarital agreement—condition precedent—The trial court erred by concluding as a matter of law that defendant's obligation to pay plaintiff \$10,000 on the day of the marriage was a condition precedent to the effectiveness of the parties' premarital agreement. Absent clear and plain language, provisions of a contract will ordinarily not be construed as conditions precedent. **Harlee v. Harlee, 40.**

Premarital agreement—consideration—Defendant's failure to pay plaintiff \$10,000 upon their marriage did not render their premarital agreement ineffective for lack of consideration. Marriage itself is sufficient consideration for a premarital agreement; the additional consideration recited in the agreement, including

MARRIAGE—Continued

the payment of \$10,000, constituted a promise to render some performance in the future and the failure to perform that promise did not invalidate the agreement. **Harllee v. Harllee, 40.**

MEDICAL MALPRACTICE

Injury during birth—proximate cause—sufficiency of evidence—The plaintiffs in a medical malpractice action arising from an injury during birth presented sufficient evidence as to proximate cause to overcome a motion for directed verdict where defendant contended that the testimony of plaintiffs' expert was not supported by the relevant medical literature, but the record shows that the expert reviewed the medical records and deposition testimony and based his opinion as to the cause of the injury on his training and extensive experience with these injuries. His testimony clearly demonstrates that his opinion was based on more than speculation and was sufficiently reliable to be submitted to the jury. **Leatherwood v. Ehlinger, 15.**

Obstetrician—qualified as expert—The trial court did not err in a medical malpractice action arising from a birth by denying defendant's motion to strike the testimony of plaintiffs' expert on the ground that plaintiffs' expert was not of the same or similar specialty as defendant and did not actively practice as an obstetrician in the year prior to the delivery in question. The record shows that both doctors belong to the American College of Obstetrics and Gynecology; the expert, a perinatologist, testified that all perinatologists are first obstetrician gynecologists; that perinatology, like obstetrics, includes the management of this injury; and that he continued to practice as an obstetrician gynecologist with the majority of his time in the year preceding this birth being devoted to the clinical practice of obstetrics and gynecology. **Leatherwood v. Ehlinger, 15.**

Standard of care—injury during birth—directed verdict—The trial court erred by granting a directed verdict for defendant in a medical malpractice action arising from a birth on the ground that plaintiffs had been unable to establish breach of the applicable standard of care where plaintiffs' expert concluded that defendant had not properly performed the procedures utilized in resolving this emergency and that defendant had used excessive traction. Although the expert was unable to articulate precisely the amount of lateral traction he considered excessive, the record shows that he visually demonstrated his testimony with models and illustrated the amount of pressure to be applied. **Leatherwood v. Ehlinger, 15.**

Standard of care—obstetrics—familiarity of expert—Defendant was not entitled to a directed verdict in a medical malpractice action on the ground that plaintiffs failed to establish the applicable standard of care in Asheville where plaintiff's expert specifically testified that he had knowledge of the standards of practice among obstetricians with similar training and experience in Asheville and similar communities; he had attended rounds as a medical student in the hospital in which this delivery occurred; he had practiced in communities similar in size to Asheville; and he specifically testified that Asheville and other communities of that size practice the same national standards with respect to this condition. **Leatherwood v. Ehlinger, 15.**

MENTAL ILLNESS

Due process—unsupervised passes within hospital grounds—no protected interest—Respondent does not have a protected liberty interest in obtaining unsupervised passes within the grounds of a mental hospital. *In re Williamson*, 260.

Insanity acquittal—recommitment—dangerous to others—The statutory definition of “dangerous to others” does not make it impossible for a person who has been acquitted of homicide by reason of insanity to prove that he is no longer dangerous to others in a recommitment hearing. Such a person will be presumed dangerous to others and has the burden of rebutting that presumption, but the court may find that he is no longer dangerous to others if that burden is carried. *In re Hayes*, 27.

1989 insanity acquittal—current mental illness and danger to others—findings—Findings that a defendant who was found not guilty of murder and assault by reason of insanity in 1989 currently suffers from mental illness and presents a danger to others were supported by competent evidence. *In re Hayes*, 27.

Not guilty by reason of insanity—unsupervised passes within hospital—The trial court had jurisdiction to decide whether a respondent who had been found not guilty of murder by reason of insanity should be granted unsupervised passes on the premises of Dorothea Dix Hospital. *In re Williamson*, 260.

Patients not guilty by reason of insanity and others involuntarily committed—rational basis for distinction—The trial court’s exercise of jurisdiction in determining whether a respondent found not guilty of murder by reason of insanity should have unsupervised passes on the premises of Dorothea Dix Hospital did not violate equal protection. The statutory distinction between patients found not guilty by reason of insanity and other classes of involuntarily committed patients is not a suspect classification, nor does it involve a fundamental right subject to strict scrutiny, and respondent has not shown the lack of a rational basis for the distinction. There is a need to keep the public safe from individuals who have committed violent, dangerous, or other criminal acts resulting in their involuntary commitment. *In re Williamson*, 260.

Separation of powers—approval of therapeutic treatments by courts—The trial court did not violate separation of powers in determining whether a respondent who had been found not guilty of murder by reason of insanity should have unsupervised passes on the premises of Dorothea Dix Hospital. *In re Williamson*, 260.

MOTOR VEHICLES

Commercial driver’s license—restriction—superior court jurisdiction—The trial court erred by granting the Department of Motor Vehicle’s (DMV’s) motion to dismiss petitioner’s claim that DMV placed a restriction on petitioner’s commercial driver’s license without due process of law based on lack of subject matter jurisdiction and the case is remanded for further proceedings, because: (1) the legislature has not provided by statute an effective administrative remedy, and the fact that DMV as a matter of policy allows individuals with restrictions on their licenses to request a hearing before the Medical Review Board does not constitute an effective administrative remedy sufficient to preclude jurisdic-

MOTOR VEHICLES—Continued

tion in superior court; and (2) the superior court would have subject matter jurisdiction over this action on a writ of certiorari. **Craig v. Faulkner, 581.**

Driving while impaired—appreciable impairment—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired at the close of all the evidence based on alleged insufficient evidence that defendant was appreciably impaired where defendant's blood-alcohol level at the relevant time was 0.156. **State v. McDonald, 236.**

Driving while impaired—blood test—motion in limine—motion to suppress—The trial court did not abuse its discretion in a second-degree murder, assault with a deadly weapon inflicting serious injury, driving while impaired, failure to stop at a stop sign, driving left of center, and consumption of alcohol by an individual less than twenty-one years of age case by denying defendant's motion in limine and motion to suppress the results of a blood test even though defendant's blood sample was left in a box in an officer's patrol car for three days before being tested. **State v. McDonald, 236.**

Negligence—.068 alcohol level—no evidence of causation—The trial court correctly granted summary judgment for defendant in an action arising from an automobile collision at an intersection where the driver of the car in which plaintiff's decedent was driving ran a stop sign and defendant's blood alcohol level was 0.068. Plaintiff did not forecast any evidence of a causal relationship between defendant's blood alcohol level and the accident. **Efird v. Hubbard, 577.**

NEGOTIABLE INSTRUMENTS

Action on CD—not a negotiable instrument—The trial court did not err by granting summary judgment for plaintiff in an action alleging that a CD was wrongfully dishonored where the CD was not a negotiable instrument within the provisions of the UCC because the CD confirmation clearly says "NON-TRANSFERABLE." **Thompson v. First Citizens Bank and Tr. Co., 704.**

NUISANCE

Closing drainage ditch—contributory negligence instruction—not applicable—The court did not err in a nuisance action arising from the closing of a drainage ditch by not giving defendant's requested instruction on plaintiffs' acquiescence in a third party defendant's alleged illegal extension of the ditch. The requested instruction was tantamount to a contributory negligence instruction, but neither the allegations nor the evidence supported a negligence theory of liability. The case was tried on violation of the reasonable use doctrine. **BNT Co. v. Baker Precythe Dev. Co., 52.**

Closing drainage ditch—damages—The trial court did not err in a nuisance action which arose from the closing of a drainage ditch by denying defendant's motion for a judgment n.o.v. for insufficient evidence of damages. **BNT Co. v. Baker Precythe Dev. Co., 52.**

Closing drainage ditch—flooding—lay opinion—sufficiency of evidence—The trial court did not err by denying defendant's motions for a directed verdict

NUISANCE—Continued

and a judgment *n.o.v.* in a nuisance action which arose from the closing of a drainage ditch where there was sufficient evidence from which a layperson could form an opinion about whether the flooding was caused by closing the ditch. **BNT Co. v. Baker Precythe Dev. Co., 52.**

Damages—gross rentals—The plaintiff was not limited to recovery of net rentals in a nuisance action which arose from the closing of a drainage ditch where plaintiff continued to accrue and pay expenses after it was unable to rent its houses as a result of defendant's act. **BNT Co. v. Baker Precythe Dev. Co., 52.**

OPEN MEETINGS

Closed session—identity of owners of real property—The trial court erred by determining that defendant city council members were not required under the Open Meetings Law to reveal the identity of the owners of the real property proposed for acquisition. **Boney Publishers, Inc. v. Burlington City Council, 651.**

Closed session—location of real property and intended use—The trial court did not err by determining that defendant city council members violated the Open Meetings Law by going into closed session to discuss the potential purchase of real property without first disclosing, in open session, the location of the property and the intended use of the property. **Boney Publishers, Inc. v. Burlington City Council, 651.**

Closed session—minutes—location of real property and intended use—price—The trial court erred by determining that defendants were entitled to withhold the minutes of the 6 November 2000 closed session relating to the proposed real property acquisition but did not err as to the portion of the minutes regarding the discussions with respect to price. **Boney Publishers, Inc. v. Burlington City Council, 651.**

PHYSICAL THERAPY

Penalty for sexual contact with patient—not excessive—The Board of Physical Therapy Examiners did not act arbitrarily or capriciously in suspending the license of a physical therapist who had sex with a patient where was no indication that the Board acted in bad faith, unfairly, or without judgment. **Sibley v. N.C. Board of Therapy Exam'rs, 367.**

Sexual contact with patient—consensual—There was substantial evidence in a disciplinary proceeding against a physical therapist that the therapist knew or should have known that a consensual sexual relationship with a patient was prohibited, even outside the confines of his office. **Sibley v. N.C. Board of Therapy Exam'rs, 367.**

POLICE OFFICERS

Negligence—collision during chase—The Industrial Commission did not err in a Tort Claims action by determining that a Highway Patrol trooper was not grossly negligent and did not show reckless disregard for the safety of others while in pursuit of another vehicle. Plaintiff's distinctions from earlier cases did

POLICE OFFICERS—Continued

not justify reversal of the Commission's conclusion. **Bray v. N.C. Dep't of Crime Control and Pub. Safety, 281.**

POSSESSION OF STOLEN PROPERTY

Indictment—ownership of property—not an essential element—The trial court did not err by denying defendant's motion to dismiss the charge of felonious possession of stolen goods where Salvador Santos initially told officers that the items recovered belonged to "us"; Santos later clarified that the property belonged to his 17 year old stepson, Ever Antonio Hernandez; and the court allowed the State to amend the indictment accordingly. The name of the person from whom the goods were stolen is not an essential element of the indictment and a variance between the allegations of ownership and proof is not fatal. **State v. Jones, 317.**

PROCESS AND SERVICE

Foreign corporation—motion to dismiss—sufficiency of service of process—personal jurisdiction—estoppel—The trial court did not err in a negligence and breach of contract case by granting defendant foreign corporations's motion to dismiss based on insufficient service of process and resulting lack of personal jurisdiction even though plaintiff served defendant's agent in Texas where the agent was improperly served and no service was made upon the registered agent for North Carolina. **Thomas & Howard Co. v. Trimark Catastrophe Servs., Inc., 88.**

Sufficiency of service—grounds raised in motion binding—The trial court did not err by denying a motion to dismiss for insufficient service in a personal injury action where the ground for the motion was that defendant did not reside at the address listed on the summons and the person served was not authorized to accept service, but defendant admitted in a deposition that he lived at the listed address with his father, who was a healthy adult with no mental infirmities. Defendant was constrained by the grounds set forth in his pleading and could not raise on appeal a question about the copy of the summons left at his residence. **Sowell v. Clark, 723.**

PUBLIC OFFICERS AND EMPLOYEES

Highway patrolman—demotion—just cause—unbecoming conduct—A de novo review reveals that the trial court did not err by affirming the State Personnel Commission's decision and order upholding petitioner highway patrolman's demotion based on just cause for personal misconduct including proceeding to drive after drinking three beers and speeding. **Davis v. N.C. Dep't of Crime Control & Pub. Safety, 513.**

REAL PROPERTY

Chain of title—1880 partition report—The trial court did not err in a non-jury trial to determine ownership of land by holding that plaintiffs proved an unbroken chain of title where defendants pointed to an 1880 partition report that did not indicate whether all of the relevant heirs were included in the proceeding. The partition proceeding connected the relevant parties in the chain of title,

REAL PROPERTY—Continued

and plaintiff's expert testified that the deeds and documents established a complete chain of title with little chance of a challenge to the partition. **Cartin v. Harrison, 697.**

Findings—location—within chain of title descriptions—In a non-jury trial to determine ownership of a tract of land, competent evidence supported the trial court's findings that the disputed property could be located within the description of plaintiff's property going back through plaintiffs' chain of title. **Cartin v. Harrison, 697.**

ROBBERY

Dangerous weapon—motion to dismiss—sufficiency of evidence—The trial court did not err by failing to dismiss the charge of robbery with a dangerous weapon even though defendant contends that use of a stun gun was not a dangerous weapon that threatened or endangered the victim's life. **State v. Gay, 530.**

Dangerous weapon—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of robbery with a dangerous weapon although the State failed to present evidence of the exact weapon used to hit the victim during the robbery. **State v. Reid, 379.**

SEARCH AND SEIZURE

Consent to search car—packages seen inside television—removal of television panel—Officers did not exceed the scope of defendant's consent to search a car where they found a television set in the trunk, saw saran-wrapped packages through openings in the back of the television, and removed the back panel of the television. The officers discovered the packages inadvertently, recognized that they contained contraband, and were justified in opening the television and seizing the cocaine in the packages. **State v. Castellon, 675.**

Drug dog alerting—no marijuana found—admissible—The trial court did not err in a marijuana prosecution by admitting evidence that a drug dog alerted to the dresser in defendant's bedroom (in which no marijuana was found) because defendant consented to the search where an informant signaled that he had completed a transaction involving marijuana left in defendant's trash can, officers seized the marijuana, knocked on defendant's door, and told defendant that they knew about the transaction, defendant invited them in, confessed, and told officers that they could search his house, and the drug dog was brought in. **State v. Rhodes, 208.**

Improper search of trash can—no prejudicial error—There was no prejudicial error in the denial of a motion to suppress marijuana seized in an improper search of a trash can where there was overwhelming evidence of defendant's guilt. **State v. Rhodes, 208.**

Search warrant—apartment—motion to suppress—An officer's affidavit was sufficient to establish probable cause for the issuance of a warrant to search an apartment leased by defendant for narcotics based upon a controlled buy of cocaine at the apartment by a confidential informant, although the affidavit did

SEARCH AND SEIZURE—Continued

not indicate the identity of the specific person from whom the informant had purchased cocaine. **State v. Reid, 420.**

Search warrant—knock and announce—forcible entry—delay of six to eight seconds—A delay of only six to eight seconds between the time officers knocked on the door of defendant's apartment and announced "Sheriff's Office, search warrant" and their forcible entry into the apartment by breaking down the door with a battering ram did not violate defendant's statutory or constitutional rights so as to render inadmissible cocaine discovered in a search of the apartment where the officers were executing a warrant to search for narcotics which could have been easily disposed of by persons in the apartment. **State v. Reid, 420.**

Trash can—warrantless search apart from collection—The trial court erred by denying defendant's motion to suppress marijuana seized without a warrant from his trash can where the contents were not placed there for collection in the usual and routine manner and the trash can was within the curtilage of defendant's home. Defendant maintained an objectively reasonable expectation of privacy. **State v. Rhodes, 208.**

Warrantless search—plain view doctrine—The trial court did not err in a first-degree murder case by allowing the admission of evidence seized by law enforcement officers during their warrantless search of the residence where decedent wife remained with her three daughters after the couple separated because the only evidence seized was evidence observed in plain view during a protective sweep of the house after decedent's body was discovered in the doorway, and the subsequent entry by a detective and a lab technician after the area was secured was not a separate search. **State v. Phillips, 185.**

SENTENCING

Aggravating factor—abuse of trust—The trial court did not abuse its discretion when sentencing defendant for statutory rape and indecent liberties by finding as an aggravating factor that defendant took advantage of a position of trust or confidence where the fourteen-year-old victim knew defendant because defendant was living with a friend's sister; the friend and the victim visited everyday to babysit, often with no adult but defendant present; and the victim had known defendant for about two months when he began calling her, touching her, and writing to her. **State v. McGriff, 631.**

Aggravating factor—sleep—victim more vulnerable—The trial court properly aggravated sentences for first-degree burglary, attempted second-degree rape, and conspiracy to commit burglary on the grounds that the victims were asleep and thus more vulnerable. Sleep will constitute a proper basis for an aggravating factor if it impaired the victim's ability to flee, fend off an attack, or otherwise avoid being victimized. **State v. Norman, 100.**

Determination of prior record level—State's worksheet—construed stipulation by defendant—There was no error in a second-degree murder sentencing proceeding where the court determined defendant's prior record level from a worksheet prepared by the State. Although a worksheet prepared by the State is insufficient to satisfy the State's burden, statements by defendant's attorney here may be construed as a stipulation that defendant had been convicted of the charges listed on the worksheet. **State v. Eubanks, 499.**

SENTENCING—Continued

Felony murder—two underlying convictions—merger—A conviction for first-degree felony murder, burglary, and attempted robbery was remanded for resentencing where defendant was sentenced for murder and both underlying charges, but there was no indication of which felony was unanimously determined to be the underlying felony. The merger rule requires the trial court to arrest judgment on at least one of the underlying convictions. **State v. Dudley, 711.**

Firearms enhancement—indictment—On remand, a 60 month firearm enhancement penalty was vacated and remanded where the indictment failed to allege that defendant used, displayed, or threatened to use or display a firearm at the time of the felony and this factor was not submitted to the jury. **State v. Guice, 293.**

Habitual felon—dismissal of underlying felony—Defendant's habitual felon conviction is vacated because there is no felony conviction to which the habitual felon indictment attaches. **State v. Stevens, 561.**

Habitual felon—no contest plea—The trial court did not err by accepting defendant's no contest plea to being an habitual felon after complying with the statutory guidelines for accepting a no contest plea. **State v. Jones, 317.**

Mitigating factor—accepting responsibility for conduct—apology not sufficient—The trial court did not err when sentencing defendant for first-degree burglary, attempted second-degree rape, and conspiracy to commit burglary by not finding as a mitigating factor that he accepted responsibility for his criminal conduct based on his apology at the sentencing hearing. Defendant was remorseful, but his statement does not lead to the sole inference that he accepted that he was responsible for the result of his criminal conduct. **State v. Norman, 100.**

Mitigating factor—child support—evidence insufficient—The trial court did not err when sentencing defendant for first-degree burglary, attempted second-degree rape, and conspiracy to commit burglary by not finding as a mitigating factor that he supports his family where comments were made by his attorney at the hearing about defendant providing child support, but no specific evidence was offered. **State v. Norman, 100.**

Possessing stolen goods—felonious larceny—prayer for judgment continued on larceny—The trial court did not err by not arresting judgment on a larceny charge upon entering judgment to the charge of possession of stolen goods where prayer for judgment continued was granted on the larceny charge. Defendant was not punished for both convictions. **State v. Jones, 317.**

Weighting aggravating and mitigating factors—each aggravating factor outweighing all mitigating factors—The trial court did not err when sentencing defendant for the conspiracy to commit burglary, first-degree burglary, and attempted second-degree rape by finding that each aggravating factor was sufficient in and of itself to outweigh all mitigating factors. As the court's discretion includes the power to find that one aggravating factor outweighs several mitigating factors, the court may also properly determine that each of several aggravating factors is by itself sufficient to outweigh all mitigating factors. Furthermore, the court eliminated the need for remand if there was error in finding an aggravating factor. **State v. Norman, 100.**

SEXUAL OFFENSES

Bill of particulars—non-unanimous verdict—The trial court did not err in a prosecution for sexual offenses committed against a six-year old child by refusing defendant's motion to require the jury to convict him on the specific acts set out in the bill of particulars. The threat of a non-unanimous verdict does not arise in indecent liberties cases because the indecent liberties statute does not list discrete criminal acts in the disjunctive. A defendant may be convicted of first-degree sexual offense even if the trial court instructs the jury that more than one sexual act may comprise an element of the offense. **State v. Brothers, 71.**

Instructions—penetration—The trial court did not err when instructing the jury on first-degree sexual offense by defining a sexual act as any penetration, however slight, by an object into the genital opening of a person's body. **State v. Brothers, 71.**

Short form indictment—constitutional—The short form indictment for sexual offense and indecent liberties was constitutional. **State v. Brothers, 71.**

STATUTE OF LIMITATIONS AND REPOSE

1994 Disney world accident—1997 action—Florida statute of limitations—Although plaintiffs in a negligence action against Disney and others contended that the Florida statute of limitations may have precluded filing the suit in Florida, the applicability of the Florida statute was not a valid consideration in light of the 1994 occurrence of the accident and the initiation of litigation in 1997. **Wyatt v. Walt Disney World Co., 158.**

Trespass—flooding from blocked drainage ditch—Even if the shareholders of a defunct corporation could be held personally liable for the acts of the corporation in an action arising from the closing of a drainage ditch, that claim is barred by the statute of limitations. The acts of trespass occurred no later than the early 1980s and the statute of limitations is three years from the original trespass. Even if the flooding is an intermittent trespass, the party charged with liability must have had control over the conditions causing the trespass within three years preceding the injury. **BNT Co. v. Baker Precythe Dev. Co., 52.**

TAXATION

Property—present-use value classification—agricultural—The Property Tax Commission did not err by denying a taxpayer present-use value classification of his property in Onslow County as agricultural even though the taxpayer contends the land is part of his larger Harnett County farm unit. **In re Appeal of Frizzelle, 552.**

TERMINATION OF PARENTAL RIGHTS

Findings—insufficient—The trial court's findings were insufficient to terminate parental rights under Chapter 7A where the court failed to specifically list the conditions which the parent had not met, failed to find that the parent had the ability to pay support, failed to find that the parent had failed to address the concerns which led to her child's removal, and attempted to incorporate by reference another order which was not included in the record, made some findings which were not adequately specific, and made some findings in the double negative. **In re Locklear, 573.**

TERMINATION OF PARENTAL RIGHTS—Continued

Findings—mere allegations—An order terminating parental rights was reversed where the court's findings were mere recitations of allegations. Moreover, the findings were insufficient in that they did not adequately address respondent's ability to pay, the children's reasonable needs, willfulness, or lack of reasonable progress under the circumstances following the removal of the children. **In re Anderson, 94.**

Findings—supporting evidence—There was sufficient evidence in a proceeding to terminate a mother's parental rights, including testimony by a social worker, to support the trial court's findings that the mother made little progress in the practical application of instructions to supervise her children and that the mother was not able to put into practice what she had learned in parenting classes. **In re Johnston, 728.**

Incarcerated parent—failure to pay support—ability to care for child—The trial court erred by terminating the parental rights of an incarcerated parent based upon conclusions that he had willfully failed to pay a reasonable portion of child care and was incapable of providing for his daughter's care where there was no clear and convincing evidence that respondent had any ability to pay any amount and no clear and convincing evidence that respondent was incapable of arranging for appropriate supervision for the child, although he may be temporarily incapable of personally caring for the child due to his present incarceration. **In re Clark, 286.**

Second hearing—no evidence presented—prior ruling unchanged—The trial court did not err in a termination of parental rights proceeding by requiring the father to present evidence where an initial order had terminated parental rights and the parties had agreed in a consent order to set aside the first order and to hold a new dispositional hearing. Since the consent order states that the reason for setting aside the prior disposition was to allow the parties to present additional evidence, the second hearing was in effect a continuation hearing and it was not error for the trial court to decide that the prior ruling should be left unchanged because no new evidence was presented. **In re Anderson, 94.**

Special needs of another child in home—treatment of other children—The trial court did not err in a termination of parental rights case by admitting evidence of and making findings of fact concerning the special needs of one of respondent mother's children, respondent's inability to deal with that child's issues, and her subsequent voluntary surrender of her parental rights to him. **In re Johnston, 728.**

Willfully leaving children in foster care for more than twelve months—best interests of child—The trial court did not err by terminating respondent mother's parental rights to three of her children where the trial court found that respondent willfully left the children in foster care for more than twelve months without showing reasonable process to correct conditions which led to the children's removal. **In re Johnston, 728.**

UTILITIES

Installation of new lines and poles—trespass—The trial court did not err by granting partial summary judgment for plaintiff (with the issue of damages tried later) in an action for trespass which arose when an electric cooperative repaired

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a downed power line with new power poles and new lines, cutting apple trees in the process. **Singleton v. Haywood Elec. Membership Corp., 197.**

VENUE

Motion to dismiss—contract provision—exclusive language required for mandatory selection clause—The trial court did not abuse its discretion in a breach of contract, breach of fiduciary duty, and constructive fraud case by denying defendants' motion to dismiss based on improper venue even though the contract of the parties stated that disputes "shall finally be settled, and the undersigned hereby submits itself to the jurisdiction of the 13th Judicial District Court of Hillsborough County Florida U.S.A. in order to resolve any such dispute." **Mark Grp. Int'l, Inc. v. Still, 565.**

WORKERS' COMPENSATION

Alleged deteriorated physical condition—additional compensation denied—The Industrial Commission did not err by denying plaintiff's claim for additional compensation in a workers' compensation action where plaintiff claimed that his physical condition had deteriorated since he returned to work and that he is now incapable of earning wages, but there was competent evidence to support the Commission's findings that plaintiff was working prior to being unemployed and that plaintiff certified when applying for unemployment benefits that he did not have any medical condition that would hinder his return to work. **Pomeroy v. Tanner Masonry, 171.**

Attorney fees—limited—appeal procedure not followed—The Court of Appeals did not have jurisdiction in a workers' compensation action to consider whether the Industrial Commission erred by limiting plaintiff's attorney fees where plaintiff did not follow statutory procedures for appealing the Commission's failure to approve plaintiff's fee agreement. **Russell v. Laboratory Corp. of Am., 63.**

Change in condition—additional medical compensation—notice—Form 18—Even though a plaintiff in a workers' compensation action did not specifically allege a change in condition under N.C.G.S. § 97-47 or specifically state a claim for additional medical compensation under N.C.G.S. § 97-25, plaintiff's filing of a Form 18 was sufficient to give the Industrial Commission the requisite written notice. **Pomeroy v. Tanner Masonry, 171.**

Compensable brain injury—evidence not sufficient—The Industrial Commission did not err in a workers' compensation action by concluding that the evidence did not show a compensable brain injury where the Commission found that all of the physical examinations and testing showed no physical damage to the brain and made further findings pertaining to plaintiff's physically active lifestyle, her enrollment in college, and her articulate, alert demeanor at the hearing. **Russell v. Laboratory Corp. of Am., 63.**

Competency of doctor's testimony—law of the case doctrine inapplicable—A plaintiff in a workers' compensation case was not barred by the doctrine of the law of the case and could present the issue of the competency of a doctor's testimony as a lawful basis for the Industrial Commission's denial of disability compensation where the Court of Appeals failed to consider the competency of

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the doctor's testimony in a prior appeal and the statement in the prior opinion that the Commission might lawfully have based its denial of disability compensation on the doctor's treatment plan was dicta. **Kanipe v. Lane Upholstery, 478.**

Disability—burden of proof—The Industrial Commission did not err in a workers' compensation action by determining that plaintiff suffered a compensable injury and awarding temporary total disability and temporary partial disability where plaintiff presented evidence that he had returned to work at diminished earnings since his injury, there were no findings that defendant presented any evidence that plaintiff was offered vocational rehabilitation or employment with defendant, and there was no finding that defendant presented any evidence that plaintiff was capable of earning higher wages. Plaintiff met his burden of proving employment at a diminished capacity, shifting the burden to defendant to prove that he was capable of earning high wages, and defendant failed to meet that burden. **Osmond v. Carolina Concrete Specialties, 541.**

Disfigurement of teeth—evidence not sufficient—The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff was not entitled to compensation for disfigurement to her teeth where the teeth were restored with composite resin and a root canal and the Commission held defendant responsible for that treatment. Plaintiff did not need extractions or crowns and it does not appear from the record that plaintiff presented evidence that the injury was so marring that she would suffer diminution of her future earning capacity. **Russell v. Laboratory Corp. of Am., 63.**

Doctor's generalized statements concerning treatment—speculation—The Industrial Commission erred in a workers' compensation case by denying plaintiff's claim for total disability benefits and by subsequently concluding that plaintiff was not entitled to any disability benefits based on a doctor's general statements as to the treatment plan of his patients and the time line under which he operates to return them to work. **Kanipe v. Lane Upholstery, 478.**

Doctor's relationship with defendant—motion to compel accounting—Any error was harmless where a workers' compensation plaintiff contended that the Industrial Commission erred by failing to rule on her motion to compel an accounting of defendant's financial transactions with a doctor, but plaintiff did not seek a ruling on her motion and was allowed to thoroughly cross-examine the doctor. Plaintiff could have presented any issues concerning the doctor's fees even without the accounting. **Pitillo v. N.C. Dep't of Env'tl Health & Natural Res., 641.**

Emergency management volunteer—injury compensable—The Industrial Commission did not err by finding and concluding that plaintiff's claim was compensable pursuant to the N.C. Emergency Management Act where plaintiff volunteered during Hurricane Floyd relief efforts and was injured while on patrol. Although the record reveals that plaintiff was bored and wanted to ride in the Humvee because it was fun, help was needed on a continuous basis and it is irrelevant whether plaintiff was responding to a call at the time of her injuries. **Ward v. Long Beach Vol. Rescue Squad, 717.**

Employer's failure to admit liability for claim-entitlement to direct medical treatment—The Industrial Commission did not err by concluding that

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defendant employer failed to properly admit liability for plaintiff employee's workers' compensation claim and thus was not entitled to direct plaintiff's medical treatment. **Bailey v. Western Staff Servs.**, 356.

Failure to remand case—abuse of discretion standard—The Industrial Commission's failure to remand a workers' compensation case to the deputy commissioner to clarify or take additional evidence did not constitute an abuse of discretion. **Futrell v. Resinall Corp.**, 456.

Findings—reasonably necessary medical treatment—A workers' compensation action was remanded for further findings where the Industrial Commission found that plaintiff was entitled to compensation for reasonably necessary medical treatment under N.C.G.S. § 97-25 as it then existed but left unresolved plaintiff's claim for specific medical treatment. **Pomeroy v. Tanner Masonry**, 171.

Hyperactive airways disease—personal sensitivity—The Industrial Commission correctly found and concluded in a workers' compensation action that plaintiff had not sustained a compensable occupational disease where plaintiff contended that he had contracted hyperactive airways disease through his work as a chemist, but the Commission concluded that his condition was caused by his personal, unusual sensitivity to small amounts of certain chemicals and denied benefits. The role of the court is limited; there was competent evidence to support the Commission's findings and the conclusions are supported by the facts. **Nix v. Collins & Aikman Co.**, 438.

Injury to Rescue Squad volunteer—membership in Rescue Squad—The Industrial Commission did not err in a workers' compensation action by finding and concluding that plaintiff was a volunteer member of the defendant Rescue Squad where plaintiff began as a volunteer member of the Long Beach Volunteer Rescue Squad, became a paid member of the Oak Island EMS, became an honorary member of the Long Beach squad who could return to active duty during extenuating circumstances, and was injured during Hurricane Floyd relief efforts when she completed her Oak Island shift and volunteered at Long Beach. Extenuating circumstances existed. **Ward v. Long Beach Vol. Rescue Squad**, 717.

Introduction of medical records—doctors not deposed—The Industrial Commission did not err in a workers' compensation action by sustaining defendant's objections to the introduction of medical records from doctors plaintiff saw after she moved to Florida where plaintiff offered the records during the deposition of the doctor who first saw plaintiff in the emergency room. **Russell v. Laboratory Corp. of Am.**, 63.

Job stress—not an occupational disease—The Industrial Commission did not err in a workers' compensation action by concluding that plaintiff did not suffer from an occupational disease where plaintiff sought compensation for stress induced anxiety after a meeting to discuss a performance evaluation, but no evidence was presented that plaintiff's condition was characteristic of and peculiar to her particular occupation; that it was not an ordinary disease of life to which the public is equally exposed; or that there was a causal connection between the disease and plaintiff's employment. **Pitillo v. N.C. Dep't of Env'tl Health & Natural Res.**, 641.

WORKERS' COMPENSATION—Continued

Job stress—significant causal factor—not accidental—A workers' compensation plaintiff did not suffer a compensable injury as a result of a meeting to discuss her performance evaluation where there was competent evidence to support a finding that the meeting was a significant causal factor in the development of plaintiff's psychological condition, but the meeting was not an accident. **Pitillo v. N.C. Dep't of Env'tl Health & Natural Res.**, 641.

Occupational disease—asbestos tainted building—The Industrial Commission did not err by concluding that plaintiff sustained a compensable occupational disease when she developed mesothelioma from working within a building with high levels of asbestos. While the record may contain evidence supporting contrary findings, the Commission's findings were sufficiently supported by competent evidence to be deemed conclusive. **Robbins v. Wake Cty. Bd. of Educ.**, 518.

Occupational disease—asbestosis—insurance carrier at time of risk—The Industrial Commission did not err in a workers' compensation case by its determination that the proper insurance carrier on the risk at the time of plaintiff retired employee's last injurious exposure to asbestos was the defendant carrier for defendant employer from 31 October 1991 until plaintiff's retirement on 30 June 1993. **Abernathy v. Sandoz Chems./Clariant Corp.**, 252.

Occupational disease—carpal tunnel syndrome—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee's carpal tunnel syndrome was not a compensable occupational disease. **Futrell v. Resinall Corp.**, 456.

Occupational disease—hepatitis C virus—The Industrial Commission did not err by rejecting plaintiff employee's claim for workers' compensation benefits under N.C.G.S. § 97-53(13) as a result of her contracting the hepatitis C virus allegedly by coming into contact with blood of patients during her employment with the Tammy Lynn Center, a facility serving persons with severe developmental disabilities and mental retardation. **Poole v. Tammy Lynn Ctr.**, 668.

Retired employee—average weekly wage—The Industrial Commission erred in a workers' compensation case by its calculation of plaintiff retired employee's average weekly wage based on the parties' alleged stipulation when the parties did not in fact stipulate to an amount. **Abernathy v. Sandoz Chems./Clariant Corp.**, 252.

Retired employee—occupational disease—asbestosis—entitlement to compensation—The Industrial Commission erred in a workers' compensation case by concluding that plaintiff retired employee is entitled to 104 weeks of compensation under N.C.G.S. § 97-61.5 for asbestosis that was diagnosed after he was no longer employed. **Abernathy v. Sandoz Chems./Clariant Corp.**, 252.

Return to work—pre-injury wages—The Industrial Commission did not err in a workers' compensation action by finding that plaintiff had returned to work at his pre-injury wages and concluding that the Form 21 presumption of disability had been rebutted. There is no indication in the record that plaintiff returned to work at wages less than he was receiving prior to the accident; although the Form 28B does not indicate the weekly wage at which plaintiff returned to work,

WORKERS' COMPENSATION—Continued

the record does not show that plaintiff objected to the Form 28B or otherwise asserted that he had returned to work at wages less than he was receiving prior to the accident. **Pomeroy v. Tanner Masonry, 171.**

Special errand rule—sufficiency of evidence—There was competent evidence to support the Industrial Commission's ruling in a workers' compensation case that plaintiff's injury was compensable under the special errand exception to the coming and going rule where plaintiff was injured while riding to work and, on this day, he had been told to be ready an hour and a half earlier than in the past so that a dump truck could be picked up and driven to the work site. **Osmond v. Carolina Concrete Specialties, 541.**

Stressful performance evaluation—not an injury by accident—The Industrial Commission did not err in a workers' compensation proceeding by concluding that plaintiff did not suffer an injury by accident where plaintiff alleged that a meeting to discuss her performance evaluation led to her nervous breakdown, but the meeting was called at plaintiff's request. Her contention that the people present, the subject matter, and the participants' behavior were unexpected and traumatic was contradicted by others who attended the meeting. **Pitillo v. N.C. Dep't of Env'tl Health & Natural Res., 641.**

Suitable employment—makeshift positions—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee was not barred by N.C.G.S. § 97-32 from receiving wage compensation even though she refused defendant employer's alleged offer of suitable employment where the job offered was "make work," and plaintiff's refusal of the work was reasonable. **Bailey v. Western Staff Servs., 356.**

Temporary total disability—competent evidence—The Industrial Commission did not err in a workers' compensation case by determining that plaintiff employee was entitled to temporary total disability compensation. **Bailey v. Western Staff Servs., 356.**

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Jury instructions—damages recoverable by estate—loss of net income—The trial court erred in a wrongful death case by its jury instructions regarding the issue of damages recoverable by decedent's estate for loss of decedent's net income. **Estate of Hendrickson v. Genesis Health Venture, Inc., 139.**

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Jury instructions—negligence—standard of care—damages—The trial court did not err in a wrongful death case by giving its jury instructions on three issues including negligence, the standard of care, and defendant nursing home operator's failure to follow its own policies with regard to the use of restraints. **Estate of Hendrickson v. Genesis Health Venture, Inc., 139.**

Nursing home operator—directed verdict—judgment notwithstanding verdict—sufficiency of evidence—The trial court did not err by denying defendant nursing home operator's motion for directed verdict and motion for judgment notwithstanding the verdict with respect to the claim of plaintiff administrator for decedent's wrongful death from accidental strangulation when she got caught between the mattress and side rails on her bed at a nursing home. **Estate of Hendrickson v. Genesis Health Venture, Inc., 139.**

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Sign control ordinance—general police power—Transylvania County had the statutory authority to enact a sign control ordinance under the general police power granted in N.C.G.S. § 153A-12. **Transylvania County v. Moody, 389.**

Sign control ordinance—public safety purpose—Transylvania County did not exceed its authority by imposing its aesthetic tastes on the county in enacting a sign control ordinance where the ordinance stated that one purpose was to insure motorist safety by reducing distractions. Public safety is well within the authority granted by N.C.G.S. § 153A-121(a). **Transylvania County v. Moody, 389.**

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