NORTH CAROLINA COURT OF APPEALS REPORTS

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TABLE OF CONTENTS

Judges of the Court of Appeals v

Superior Court Judges vii

District Court Judges xi

Attorney General xvii

District Attorneys xix

Public Defenders xx

Table of Cases Reported xxi

Table of Cases Reported Without Published Opinions xxiv

General Statutes Cited xxviii

Rules of Evidence Cited xxix

Rules of Civil Procedure Cited xxx

United States Constitution Cited xxx

North Carolina Constitution Cited xxx

Rules of Appellate Procedure Cited xxx

Opinions of the Court of Appeals 1-813

Headnote Index 815

Word and Phrase Index 863

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2. Deceased 17 September 2003.
3. Resigned 19 August 2003.

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1. Appointed Chief Judge effective 1 October 2003 to replace William L. Daisy who resigned as Chief Judge.
2. Appointed and sworn in 15 September 2003.

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	PAGE
Adams, State ex rel. Davis v.	512
Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs	527
Appeal of Lane Co., In re	119
Apple Gold, Inc., Devlin v.	442
Bankers Wholesale Mortgage, LLC, First Union Nat'l Bank of Del. v.	248
Barbour, State v.	500
Barefoot, Electronic World, Inc. v.	387
Bartlett, State v.	680
Beck, Price v.	763
Bee Tree Missionary Baptist Church v. McNeil	797
Belverd v. Miles	169
BioSIGNIA, Inc., Whitacre P'ship v.	608
Blymyer, State v.	516
Board of Adjust. of City of Raleigh, Raleigh Rescue Mission, Inc. v.	737
Boone, Holden v.	254
Boyce & Isley, PLLC v. Cooper	25
Branham, State v.	91
Branson, Clayton v.	488
Burr v. Burr	504
Campbell v. N.C. Dep't of Human Res.	305
Canady, State v.	455
Carolina Constr. Corp., Rich, Rich & Nance v.	149
Carter, State v.	756
City of Asheville, Donoho v.	110
City of Durham, Gordon v.	782
City of Shelby, Lovelace v.	378
Civil Serv. Bd. of Charlotte, Jordan v.	691
Clayton v. Branson	488
Coastal Painting, Rackley v.	469
Coffman v. Roberson	618
Colonial Assocs., L.L.C., Holcomb v.	413
Cooper, Whitmire v.	730
Cooper, Boyce & Isley, PLLC v.	25
Currituck Cty., Huntington Props., LLC v.	218
Curry, State v.	260

	PAGE
Daniel Int'l Corp., Hatcher v.	776
David v. Ferguson	482
Deaton, Fender v.	187
Decision of the State Bd. of Elections, In re	804
Department of Health & Human Servs., Kea v.	595
Devlin v. Apple Gold, Inc.	442
Dockery v. Hocutt	744
Dollar v. Town of Cary	309
Donoho v. City of Asheville	110
Duncan Contr'rs, Inc., Vanhoy v.	320
Edgerton, Purchase Nursery, Inc. v.	156
Egbert, Wilson Cty. ex rel. Egbert v.	283
Electronic World, Inc. v. Barefoot	387
Erie Ins. Exch. v. St. Stephen's Episcopal Church	709
Evans v. Evans	54
Evans, State v.	313
Faircloth, In re	565
Farber v. N.C. Psychology Bd.	1
Fender v. Deaton	187
Ferguson, David v.	482
First Union Corp., Gaynoe v.	750
First Union Nat'l Bank of Del. v. Bankers Wholesale Mortgage, LLC	248
Franks v. Franks	793
Frierson, State v.	242
Gant, State v.	136
Gaynoe v. First Union Corp.	750
Gordon v. City of Durham	782
Gore v. Nationsbanc Ins. Co.	520
Green, Parks v.	405
Hale v. Novo Nordisk Pharm. Indus., Inc.	272
Hartwell v. Mahan	788
Harvey Fertilizer & Gas Co. v. Pitt Cty.	81
Hatcher v. Daniel Int'l Corp.	776
Hedgepeth v. N.C. Div. of Servs. for the Blind	652

	PAGE
Hemphill-Nolan v. Town of Weddington	144
Hill, State v.	716
Hocutt, Dockery v.	744
Hodge, In re	102
Holcomb v. Colonial Assocs., L.L.C.	413
Holden v. Boone	254
Howie, State v.	801
Hunt, State v.	316
Hunt v. Tender Loving Care Home Care Agency, Inc.	266
Huntington Props., LLC v. Currituck Cty.	218
Hyman, State v.	396
In re Appeal of Lane Co.	119
In re Decision of the State Bd. of Elections	804
In re Faircloth	565
In re Hodge	102
In re May	299
In re MEB	278
In re Stratton	428
In re Wilson	196
Jones, State v.	358
Jordan v. Civil Serv. Bd. of Charlotte	691
Kea v. Department of Health & Human Servs.	595
Keitt, State v.	671
Kemp, State v.	231
King v. King	181
Lee Ray Bergman Real Estate Rentals v. N.C. Fair Housing Ctr.	176
Lewis v. N.C. Dep't of Corr.	449
Lovelace v. City of Shelby	378
Mahan, Hartwell v.	788
Marshall v. Williams	128
May, In re	299
McConico, State v.	723
McKinney, State v.	369
McNeil, Bee Tree Missionary Baptist Church v.	797
MEB, In re	278
Miles, Belverd v.	169
Miller v. Miller	40
Miller v. Miller	40
Motley, State v.	701
National Travel Servs., Inc. v. State ex rel. Cooper	289
Nationsbanc Ins. Co., Gore v.	520
N.C. Dep't of Corr., Lewis v.	449
N.C. Dep't of Health & Human Servs., Okale v.	475
N.C. Dep't of Human Res., Campbell v.	305
N.C. Div. of Servs. for the Blind, Hedgepeth v.	652
N.C. Fair Housing Ctr., Lee Ray Bergman Real Estate Rentals v.	176
N.C. Psychology Bd., Farber v.	1
N.C. State Bd. of Dental Exam'rs, Affordable Care, Inc. v.	527
Norfolk S. Ry. Co., Pinczkowski v.	435
Novo Nordisk Pharm. Indus., Inc., Hale v.	272
O'Hanlan, State v.	546
Okale v. N.C. Dep't of Health & Human Servs.	475
Parks v. Green	405
Pieper, Redlee/SCS, Inc. v.	421
Pimental, State v.	69
Pinczkowski v. Norfolk S. Ry. Co.	435
Pitt Cty., Harvey Fertilizer & Gas Co. v.	81
Price v. Beck	763
Priest v. Sobeck	662
Purchase Nursery, Inc. v. Edgerton	156
Rackley v. Coastal Painting	469
Raleigh Rescue Mission, Inc. v. Board of Adjust. of City of Raleigh	737
Redlee/SCS, Inc. v. Pieper	421

	PAGE
Reed, State v.	462
Revels, State v.	163
Rich, Rich & Nance v. Carolina Constr. Corp.	149
Roberson, Coffman v.	618
Rogers, State v.	203
Royal v. State	495
RPR & Assocs. v. University of N.C.-Chapel Hill	342
Russell, State v.	508
Sexton, State v.	641
Simpson, State v.	807
Sobeck, Priest v.	662
St. Stephen's Episcopal Church, Erie Ins. Exch. v.	709
State v. Barbour	500
State v. Bartlett	680
State v. Blymyer	516
State v. Branham	91
State v. Canady	455
State v. Carter	756
State v. Curry	260
State v. Evans	313
State v. Frierson	242
State v. Gant	136
State v. Hill	716
State v. Howie	801
State v. Hunt	316
State v. Hyman	396
State v. Jones	358
State v. Keitt	671
State v. Kemp	231
State v. McConico	723
State v. McKinney	369
State v. Motley	701
State v. O'Hanlan	546
State v. Pimental	69
State v. Reed	462
State v. Revels	163
State v. Rogers	203
State, Royal v.	495
State v. Russell	508
State v. Sexton	641
State v. Simpson	807
State v. Strickland	581
State v. Stukes	770
State v. Thomas	326
State v. Tisdale	294
State v. Trull	630
State v. Williams	192
State ex rel. Cooper, National Travel Servs., Inc. v.	289
State ex rel. Davis v. Adams	512
Stratton, In re	428
Strickland, State v.	581
Stukes, State v.	770
Tender Loving Care Home Care Agency, Inc., Hunt v.	266
Thomas, State v.	326
Tisdale, State v.	294
Town of Cary, Dollar v.	309
Town of Weddington, *Hemphill-Nolan v.*	144
Trull, State v.	630
University of N.C.-Chapel Hill, RPR & Assocs. v.	342
Vanhoy v. Duncan Contr'rs, Inc.	320
Whitacre P'ship v. BioSIGNIA, Inc.	608
Whitmire v. Cooper	730
Williams, Marshall v.	128
Williams, State v.	192
Wilson, In re	196
Wilson Cty. ex rel. Egbert v. Egbert	283

	PAGE
Abrams v. Feagans	200
Allah, State v.	524
Allen, State v.	323
Anderson, State v.	323
Anderson, In re	200
Austin, In re	811
Barnes, State v.	524
Barnes, State v.	811
Barry v. Carpenter	200
Bogle, England v.	523
Brian Ctr., Lee v.	200
Brown v. High Point Reg'l Hosp.	811
Buckeye Fire Equip. Co. v. Gibby	523
Calloway, State v.	524
Carpenter, Barry v.	200
Carter, State v.	200
Chestnut, State v.	524
City of Bessemer City, F&H Mortgage Investors, Inc. v.	523
Claiborne v. Koons	811
Clement, Iredell Cty. ex rel. Campbell v.	811
Cole, Southern States Coop., Inc. v.	811
Colt, State v.	324
Comprehensive Bus. Servs., Inc. v. Hageman	323
Cooper, State v.	524
Coston, State v.	200
Council v. Slack	811
County of Durham ex rel. Harris v. Mangum	523
County of Vance, Jefferson v.	523
Cross v. Hines	811
Cross, State v.	324
Cruz, State v.	524
Curtis, State v.	524
Dammons, State v.	812
Daniel, Elliott v.	200
Dilworth, State v.	200
Dinger, State ex rel. Dinger v.	813
Dixon, State v.	524
Doswell, State v.	812
Dove, State v.	524
Dunlap, State v.	201
Durand, State v.	324
Elliott v. Daniel	200
England v. Bogle	523
Enmark Station, Inc., Harris v.	523
Esquivel, State v.	812
Evans v. Rutherford Hosp., Inc.	323
Ewing v. Ewing	523
F&H Mortgage Investors, Inc. v. City of Bessemer City	523
Farrington, Pope v.	323
Feagans, Abrams v.	200
Fisher, State v.	812
Forbes, State v.	524
Forner v. Gabriel	523
Franco-Favela v. Wester	811
Furman, Howell v.	200
Gabriel, Forner v.	523
Gibbs, State v.	524
Gibby, Buckeye Fire Equip. Co. v.	523
Gillespie, In re	523
Glass v. Glass	200
Gomez, State v.	324
Graham, In re	323
Grimes, State v.	524
Hageman, Comprehensive Bus. Servs., Inc. v.	323
Hall, In re	323
Hall-Alston v. Smith	523
Harris v. Enmark Station, Inc.	523
Harris, State v.	524
Harvey, State v.	324
Harvey, In re	523
Hendrix, State v.	812
Hicks, State v.	324
High Point Reg'l Hosp., Brown v.	811
Hill, State v.	812
Hines, Cross v.	811
Howell v. Furman	200
Hunt, State v.	201
In re Anderson	200
In re Austin	811

	PAGE
In re Gillespie	523
In re Graham	323
In re Hall	323
In re Harvey	523
In re Lacey	811
In re Lawson	323
In re McBroom	523
In re McNeil	523
In re Oxendine	200
In re S.M.	523
In re Whitley	811
Ingle, State v.	201
Iredell Cty. ex rel. Campbell v. Clement	811
Jefferson v. County of Vance	523
Jenkins, State v.	201
Johnson, State v.	812
Johnson, State v.	812
Johnson v. Wilder	811
Jones, State v.	524
Jones, State v.	812
Jones, State v.	812
Kelly, State v.	524
Keys, State v.	525
Koons, Claiborne v.	811
Kornegay, State v.	201
Lacey, In re	811
Laughter v. Shields	523
Lawson, In re	323
Leak, State v.	525
Lee v. Brian Ctr.	200
Lee, State v.	525
Locklear, State v.	812
Love, State v.	324
Malloy, State v.	324
Mangum, County of Durham ex rel. Harris v.	523
Marmor, State v.	201
Massey, State v.	324
McAdoo, State v.	525
McAfee, State v.	813
McBroom, In re	523
McCluney, State v.	813
McDaniel, State v.	525

	PAGE
McDaniel, State v.	525
McDowell, Williams v.	813
McGilberry, State v.	525
McNeil, In re	523
Mize v. Mize	811
O'Reilly, State v.	325
Oxendine, In re	200
Pasour, State v.	325
Peche, State v.	325
Perry, State v.	201
Perry, State v.	325
Perry, State v.	813
Person, State v.	325
Phillips, State v.	201
Pickard v. Pickard	811
Pierce, State v.	525
Pitt & Greene Elec. Membership Corp. v. Rasberry	200
Pittman, State v.	525
Pope v. Farrington	323
Price, State v.	525
Provenzano v. Provenzano	811
Rangel, State v.	325
Rasberry, Pitt & Greene Elec. Membership Corp. v.	200
Robinson, State v.	325
Robinson, State v.	525
Robinson, State v.	813
Robinson, State v.	813
Ross, State v.	525
Rutherford Hosp., Inc., Evans v.	323
Salomon, Stamm v.	323
Salomon, Stamm v.	323
Sanchez, State v.	813
Sara Lee Corp., Williams v.	813
Shehadeh, State v.	526
Shields, Laughter v.	523
Shipman, Smith v.	200
Slack, Council v.	811
S.M., In re	523
Smith v. Shipman	200
Smith, State v.	202
Smith, State v.	325

	PAGE
Smith, State v.	813
Smith, Hall-Alston v.	523
Southern States Coop., Inc. v. Cole	811
Stamm v. Salomon	323
Stamm v. Salomon	323
State v. Allah	524
State v. Allen	323
State v. Anderson	323
State v. Barnes	811
State v. Barnes	524
State v. Calloway	524
State v. Carter	200
State v. Chestnut	524
State v. Colt	324
State v. Cooper	524
State v. Coston	200
State v. Cross	324
State v. Cruz	524
State v. Curtis	524
State v. Dammons	812
State v. Dilworth	200
State v. Dixon	524
State v. Doswell	812
State v. Dove	524
State v. Dunlap	201
State v. Durand	324
State v. Esquivel	812
State v. Fisher	812
State v. Forbes	524
State v. Gibbs	524
State v. Gomez	324
State v. Grimes	524
State v. Harris	524
State v. Harvey	324
State v. Hendrix	812
State v. Hicks	324
State v. Hill	812
State v. Hunt	201
State v. Ingle	201
State v. Jenkins	201
State v. Johnson	812
State v. Johnson	812
State v. Jones	524
State v. Jones	812
State v. Jones	812
State v. Kelly	524
State v. Keys	525

	PAGE
State v. Kornegay	201
State v. Leak	525
State v. Lee	525
State v. Locklear	812
State v. Love	324
State v. Malloy	324
State v. Marmor	201
State v. Massey	324
State v. McAdoo	525
State v. McAfee	813
State v. McCluney	813
State v. McDaniel	525
State v. McDaniel	525
State v. McGilberry	525
State v. O'Reilly	325
State v. Pasour	325
State v. Peche	325
State v. Perry	201
State v. Perry	325
State v. Perry	813
State v. Person	325
State v. Phillips	201
State v. Pierce	525
State v. Pittman	525
State v. Price	525
State v. Rangel	325
State v. Robinson	325
State v. Robinson	525
State v. Robinson	813
State v. Robinson	813
State v. Ross	525
State v. Sanchez	813
State v. Shehadeh	526
State v. Smith	202
State v. Smith	325
State v. Smith	813
State v. Stepps	325
State v. Valladares	526
State v. Waddell	202
State v. Webb	325
State v. West	813
State v. Williams	202
State v. Williams	526
State v. Williams	526
State v. Williamson	526
State v. Wright	325
State ex rel. Dinger v. Dinger	813
Stepps, State v.	325

	PAGE
Valladares, State v.	526
Viera v. Viera	813
Waddell, State v.	202
Webb, State v.	325
Webb v. Webb	813
West, State v.	813
Wester, Franco-Favela v.	811
Whitley, In re	811
Wilder, Johnson v.	811
Williams v. McDowell	813
Williams v. Sara Lee Corp.	813
Williams, State v.	202
Williams, State v.	526
Williams, State v.	526
Williamson, State v.	526
Williamson v. Williamson	813
Wright, State v.	325

G.S.	
1-15(c)	Fender v. Deaton, 187
1-75.4	First Union Nat'l Bank of Del. v. Bankers Wholesale Mortgage, L.L.C., 248
1-567.10	Vanhoy v. Duncan Contr'rs, Inc., 320
1A-1	See Rules of Civil Procedure, infra
6-20	Coffman v. Roberson, 618
7A-245(a)(4)	Royal v. State, 495
7A-305	Coffman v. Roberson, 618
7B-2101	In re Hodge, 102
7B-2101(d)	State v. Branham, 91
7B-2510(b)(5)	In re MEB, 278
7B-3001(b)	In re MEB, 278
8C-1	See Rules of Evidence, infra
14-7.4	State v. Gant, 136
14-27.2(a)(2)(b)	State v. Rogers, 203
14-33(a)	In re Wilson, 196
14-34.5(a)	State v. Thomas, 326
14-49.1	State v. Sexton, 641
15-11.1	State v. Hill, 716
15-144.1	State v. Rogers, 203
15A-830	State v. Kemp, 231
15A-928(b)	State v. Williams, 192
15A-941(d)	State v. Trull, 630
15A-943(b)	State v. Trull, 630
15A-975	State v. Howie, 801
15A-980	State v. Rogers, 203
15A-1242	State v. Evans, 313
15A-1334(a)	State v. Gant, 136
15A-1354(b)(2)	Price v. Beck, 763
15A-1444(e)	State v. Pimental, 69
15A-1346	State v. Canady, 455
18B-304(a)	State v. Reed, 462
18B-304(b)	State v. Reed, 462
49-10	David v. Ferguson, 482
49-14	David v. Ferguson, 482
50A-102(7)	David v. Ferguson, 482
50A-201	David v. Ferguson, 482
75-1.1	Gaynoe v. First Union Corp., 750
90-41	Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527

G.S.

90-113.5	State v. Hill, 716
90-270.9	Farber v. N.C. Psychology Bd., 1
90-270.15	Farber v. N.C. Psychology Bd., 1
90-270.15(a)(10)	Farber v. N.C. Psychology Bd., 1
90-270.15(a)(11)	Farber v. N.C. Psychology Bd., 1
90-270.15(a)(20)	Farber v. N.C. Psychology Bd., 1
97-2(9)	Devlin v. Apple Gold, Inc., 442
97-10.2(j)	Holden v. Boone, 254
97-17	Holden v. Boone, 254
97-88	Rackley v. Coastal Painting, 469
97-88.1	Rackley v. Coastal Painting, 469
99B-6(a)	Evans v. Evans, 54
108A-57	Campbell v. N.C. Dep't of Human Res., 305
108A-59	Campbell v. N.C. Dep't of Human Res., 305
110-132(a)	State ex rel. Davis v. Adams, 512
126-35	Kea v. Department of Health & Human Servs., 595
130A-157	In re Stratton, 428
143-32	Whitmire v. Cooper, 730
143-134.1	RPR & Assocs. v. University of N.C.-Chapel Hill, 342
148-13(b)	Price v. Beck, 763
150B-4	Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527
150B-20	Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527
150B-40(a)	Farber v. N.C. Psychology Bd., 1
160A-388(b)	Raleigh Rescue Mission, Inc. v. Board of Adjust. of City of Raleigh, 737
160A-388(e)	Hemphill-Nolan v. Town of Weddington, 144
163-171	In re Decision of the State Bd. of Elections, 804

RULES OF EVIDENCE CITED

Rule No.

404(b)	State v. Curry, 260
	State v. Strickland, 581
410	State v. Curry, 260
609(a)	State v. McConico, 723
702	Coffman v. Roberson, 618
803(4)	State v. Carter, 756
803(6)	State v. Frierson, 242
806	State v. McConico, 723

RULES OF CIVIL PROCEDURE CITED

Rule No.	
12(b)(6)	Boyce & Isley, PLLC v. Cooper, 25
	Hunting Props., L.L.C. v. Currituck Cty., 218
	National Travel Servs., Inc. v. State ex rel. Cooper, 289
12(c)	Lovelace v. City of Shelby, 378
24(a)(2)	Harvey Fertilizer & Gas Co. v. Pitt Cty., 81
26(f1)	Coffman v. Roberson, 618
54(b)	Priest v. Sobeck, 662
55	Hartwell v. Mahan, 788
60	State ex rel. Davis v. Adams, 512

UNITED STATES CONSTITUTION CITED

Amend. VI	State v. Strickland, 581

NORTH CAROLINA CONSTITUTION CITED

Art. I, § 18	State v. Strickland, 581
Art. IX, § 7	Donoho v. City of Asheville, 110

RULES OF APPELLATE PROCEDURE CITED

Rule No.	
10(b)(1)	Lovelace v. City of Shelby, 378
	State v. Trull, 630

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JONATHAN FARBER, PH.D., PETITIONER v. NORTH CAROLINA PSYCHOLOGY BOARD, RESPONDENT

No. COA01-725

(Filed 17 September 2002)

1. Psychologists and Psychiatrists— disciplinary hearing—ex parte communications—bias—administrative and investigative functions

The trial court erred in its review of a psychology board's disciplinary hearing by concluding that respondent board violated petitioner psychologist's statutory and constitutional rights based on the facts that the board excluded petitioner and his counsel from the initial probable cause hearing, the board subsequently denied the petition for disqualification of board members based on allegations of bias, and the board allegedly improperly commingled its prosecutorial, investigative, and adjudication functions, because: (1) the plain language of N.C.G.S. § 150B-40(a) provides that the prohibition of ex parte communication by agency members begins at the time of the notice of hearing, and the probable cause hearing took place two months before respondent issued its statement of charges and nine months before it issued the notice of hearing; (2) petitioner offered no specific facts or evidence of actual bias on the part of board members, and the board's mere exposure to an anonymous report presented in nonadversary investigative procedures is insufficient to establish bias or unfair prejudice; and (3) the board is empowered under N.C.G.S. §§ 90-270.9 and 90-270.15

to investigate as well as to adjudicate complaints against its licensees.

2. Costs— psychologist disciplinary hearing—calculation

The trial court erred by reversing the assessment of costs under N.C.G.S. § 90-270.15 to petitioner psychologist for a psychology disciplinary hearing, because: (1) there was no dispute as to the number of hours spent on the disciplinary proceeding; (2) no grounds existed for cross-examination concerning the basis or accuracy of the costs since the costs are controlled by the North Carolina Administrative Code; and (3) the evidence for the calculation of costs appeared in the record.

3. Psychologists and Psychiatrists— disciplinary hearing—inappropriate personal relationship

The trial court did not err in its review of a psychology board's disciplinary hearing by concluding that respondent psychology board's final decision regarding petitioner psychologist's inappropriate relationship with a patient was supported by substantial evidence, because: (1) the evidence as found by the board tended to show that petitioner entered into a personal relationship with a present patient in order to meet his emotional needs which is in violation of N.C.G.S. § 90-270.15(a)(10); (2) there was competent evidence that petitioner allowed the patient to end her therapy in order to pursue a personal relationship with him and that such behavior ultimately caused the patient to suffer severe depression which endangered her welfare in violation of N.C.G.S. § 90-270.15(a)(11); (3) the evidence as found by the board tended to show that petitioner entered into the relationship with his patient to gratify his own personal needs in violation of N.C.G.S. § 90-270.15(a)(20) and that the patient would not have ended her therapy but for her relationship with petitioner; (4) there was competent evidence that petitioner violated sections 1.13(a)-(c) of the psychologists' ethical standards since petitioner did not obtain professional consultation on his relationship but merely casually broached the subject with a colleague; (5) there was competent evidence that petitioner violated sections 1.14 and 1.15 of the psychologists' ethical standards since petitioner's actions resulted in foreseeable harm to his patient and petitioner's influence over his patient caused her to end her therapy; and (6) there was competent evidence that petitioner violated section 1.17(a) of the psychologists' ethical standards since petitioner inappropriately pursued a dual relationship with his

patient and continued to treat his patient in group therapy sessions while simultaneously exploring a social relationship with the patient.

4. Declaratory Judgments— constitutionality of statute— conduct of licensed psychologists

The trial court did not abuse its discretion in its review of a psychology board's disciplinary hearing by declining to issue a declaratory judgment regarding the constitutionality of N.C.G.S. § 90-270.15(a)(10) which sets forth governing principles for the conduct of the American Psychological Association's licensees, and the statute contains no unconstitutional delegation of legislative authority.

Judge GREENE concurring in part and dissenting in part.

Appeal by petitioner and respondent from order entered 21 March 2001 by Judge Wade Barber in Wake County Superior Court. Heard in the Court of Appeals 26 March 2002.

Allen & Pinnix, P.A., by M. Jackson Nichols and Angela Long Carter, for petitioner appellee-appellant.

Attorney General Roy Cooper, by Assistant Attorneys General Sondra C. Panico and Robert M. Curran, for respondent appellee-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Thomas R. Miller and Pamela Vesper Millward, for the North Carolina Real Estate Commission, amicus curiae.

TIMMONS-GOODSON, Judge.

Dr. Jonathan Farber ("petitioner" or "Dr. Farber") and the North Carolina Psychology Board ("respondent" or "the Board") appeal from an order of the trial court vacating a final decision by the Board. For the reasons stated herein, we reverse in part the order of the trial court.

The facts pertinent to this appeal are as follows: Dr. Farber is a licensed psychologist practicing in Durham, North Carolina. On 28 April 1998, a former patient of Dr. Farber filed a complaint against him with the Board. The complaint alleged that Dr. Farber had engaged in an improper relationship of a romantic nature with the patient while she was under his care. The Board thereafter notified

Dr. Farber of the complaint and assigned a staff psychologist, Randy Yardley ("Yardley"), to investigate the matter and prepare a report.

On 1 and 2 October 1998, Yardley presented his report to the Board for its determination as to whether sufficient grounds existed for a statement of charges against Dr. Farber or for a formal hearing on the issues raised in the complaint. As per standard Board practice, the report was anonymous, with proper names redacted. Based on the report, the Board found that Dr. Farber's alleged conduct, if proven, would constitute a violation of several statutes and ethical standards. Accordingly, the Board issued a statement of charges against Dr. Farber and scheduled a formal hearing on the matter for 4 November 1999.

On 4 October 1999, counsel for Dr. Farber filed a petition for disqualification of certain Board members, alleging that they had improperly drawn conclusions concerning Dr. Farber's conduct based on Yardley's report submitted at the October meeting of the prior year. The petition set forth no specific facts to support the allegations of bias, but instead stated that the Board members' review of the anonymous report potentially created "irrevocabl[e] bias[] such that [the Board members] cannot provide a fair and impartial hearing[.]" The petition therefore requested that the matter be removed to the Office of Administrative Hearings. The petition further recited that the Board's procedure had deprived Dr. Farber of due process, in that neither he nor his counsel were allowed to attend the probable cause hearing. In addition to calling for the recusal of the allegedly biased Board members, the petition requested that counsel for Dr. Farber "be permitted to participate in separate examination of each Board member[.]"

The Board addressed Dr. Farber's petition at its 14 and 15 October 1999 meetings. An independent attorney, Assistant Attorney General Richard Slipsky, polled Board members, who responded that they had had no further communication regarding Dr. Farber's case following the report by Yardley during the previous year. Further, Board members stated that they had no written materials regarding the matter. Concluding that the petition failed to state sufficient grounds to initiate the procedures for determining disqualification of Board members or for due process violations, the Board denied Dr. Farber's petition.

The Board's formal hearing on the complaint filed against Dr. Farber took place on 4 and 5 November 1999 as scheduled. Dr. Farber

was present and represented by counsel, who presented evidence and conducted cross-examination of the witnesses. The evidence, as found by the Board, included the following facts: During an individual therapy session with his patient, Dr. Farber disclosed that he and his wife had separated. Dr. Farber thereafter "said or did things that started making [his patient] think that a romantic relationship [with Dr. Farber] could be possible[.]" These disclosures and further behavior by Dr. Farber led the patient to end her individual therapy because she believed her treatment had been compromised. The Board found that the patient "would not have ended therapy with [Dr. Farber] if there had been no thought of a relationship with him outside of therapy." Dr. Farber and the patient subsequently began a relationship outside of therapy with the intent of "get[ting] to know one another, to see if they would be a good match romantically[.]" The patient then ended her participation in group therapy because of her relationship with Dr. Farber. The Board also found that Dr. Farber "did not consult with a psychologist about the circumstances of the relationship[,]" but that he did discuss the situation informally with a colleague, who advised him that such an arrangement was "hazardous" and that Dr. Farber "ought to be careful about it."

Based on these and other findings, the Board concluded that Dr. Farber had violated several statutes and ethical standards regulating the professional conduct of psychologists. The Board therefore suspended Dr. Farber's professional license for a period of two years, thirty days of which were active, with the remaining period subject to probation. The Board also ordered Dr. Farber to pay the costs of the disciplinary proceeding, which were "calculated by the Board's Executive Director as $4,050.00."

On 27 March 2000, Dr. Farber filed a petition for declaratory judgment and judicial review of the Board's decision. The petition requested that the court vacate the Board's decision and declare a certain section of the Psychology Practice Act unconstitutional. The matter came before the trial court on 7 September 2000, at which time the trial court concluded that, although the decision was supported by substantial evidence, the Board's actions had violated Dr. Farber's due process and statutory rights. Specifically, the trial court concluded that the petition filed by Dr. Farber for disqualification of the Board members set forth "sufficient allegations of bias such that Petitioner should have been afforded the opportunity to examine the Board members for possible bias." The trial court further concluded that Yardley's report to the Board constituted an *ex parte* communi-

cation that, while "not a technical violation" of the North Carolina General Statutes, nevertheless "constituted a violation of the spirit of the statutory prohibition" against *ex parte* communications. The trial court also concluded that the Board had improperly commingled investigative and adjudicative functions in violation of statutory law. Based on these conclusions, the trial court vacated the decision of the Board. Finally, the trial court declined to issue a declaratory judgment regarding the constitutionality of the Psychology Practice Act. It is from this order that the Board ("respondent") and Dr. Farber ("petitioner") now appeal.

Respondent presents two issues for review on appeal, arguing that the trial court erred in (1) concluding that respondent violated petitioner's statutory and constitutional rights and (2) reversing the assessment of costs to petitioner. Petitioner argues that the trial court erred in (1) determining that respondent's final decision was supported by substantial evidence and (2) declining to issue a declaratory judgment regarding the constitutionality of section 90-270.15(a)(10) of the North Carolina General Statutes. We address these issues in turn.

I. Respondent's Appeal

[1] Respondent first argues that the trial court erred in concluding that its actions violated petitioner's statutory and due process rights. On appeal, we review the record to determine if competent evidence exists to support the trial court's findings of fact and, in light of those findings, whether the conclusions of law are proper. *See Lewis v. Edwards*, 147 N.C. App. 39, 48, 554 S.E.2d 17, 23 (2001). This Court is bound by the trial court's findings of fact, if they are based on competent evidence. *See Wright v. Auto Sales, Inc.*, 72 N.C. App. 449, 452, 325 S.E.2d 493, 495 (1985). Conclusions of law, however, are fully reviewable on appeal. *See id.*

Article 18A of Chapter 90 of the North Carolina General Statutes is entitled the "Psychology Practice Act." *See* N.C. Gen. Stat. § 90-270.1(a) (2001). The practice of psychology in North Carolina is regulated under this Act in order "to protect the public from the practice of psychology by unqualified persons and from unprofessional conduct by persons licensed to practice psychology." N.C. Gen. Stat. § 90-270.1(b) (2001). The North Carolina Psychology Board is responsible for overseeing licensed psychologists practicing in this State, and it may discipline licensees who violate ethical or professional

standards. *See* N.C. Gen. Stat. § 90-270.15(a) (2001). Disciplinary actions by the Board are governed by the Administrative Procedure Act. *See* N.C. Gen. Stat. § 90-270.15(e) (2001). "The Board is required to provide the opportunity for a hearing under Chapter 150B to any . . . licensee before revoking, suspending, or restricting a license . . . or imposing any other disciplinary action or remediation." *Id.* Notice of the hearing must be given not less than fifteen days before the hearing. *See* N.C. Gen. Stat. § 150B-38(b) (2001). Such "[h]earings shall be conducted in a fair and impartial manner" and

> the parties shall be given an opportunity to present evidence on issues of fact, examine and cross-examine witnesses, including the author of a document prepared by, on behalf of or for the use of the agency and offered into evidence, submit rebuttal evidence, and present arguments on issues of law or policy.

N.C. Gen. Stat. § 150B-40(a) (2001).

In the case at bar, there is no dispute that the Board complied with the above-stated statutory requirements, providing proper notice and an opportunity for petitioner to be heard at the formal hearing. Petitioner presented evidence and had the opportunity to cross-examine witnesses, including Yardley, who was present at the hearing. The trial court nevertheless concluded that petitioner's rights had been violated, in that the Board: (1) excluded petitioner and his counsel from the initial probable cause hearing; (2) subsequently denied the petition for disqualification of Board members based on allegations of bias; and (3) improperly commingled its prosecutorial, investigative and adjudicative functions in violation of statutory law. We examine these actions by the Board and the trial court's conclusions regarding such actions in turn.

A. Ex Parte Communications

The trial court determined that respondent violated petitioner's due process and statutory rights by holding the initial probable cause hearing outside the presence of petitioner or petitioner's counsel. Section 150B-40 of the North Carolina General Statutes provides, in pertinent part, that:

> Unless required for disposition of an ex parte matter authorized by law, a member of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case under this Article shall not communicate, directly or indirectly, in connection with any issue of fact or question of law, with any per-

> son or party or his representative, except on notice and opportunity for all parties to participate. *This prohibition begins at the time of the notice of hearing.* An agency member may communicate with other members of the agency and may have the aid and advice of the agency staff other than the staff which has been or is engaged in investigating or prosecuting functions in connection with the case under consideration or a factually-related case.

N.C. Gen. Stat. § 150B-40(d) (2001) (emphasis added).

In the instant case, respondent excluded petitioner from participating in the 1-2 October 1998 probable cause hearing. Respondent issued its statement of charges against petitioner on 11 December 1998, and a notice of hearing was given on 20 July 1999. Although the trial court recognized that petitioner's exclusion from the hearing was "not a technical violation" of section 150B-40(d), it nonetheless concluded that such action was a "violation of the spirit of the statutory prohibition." We disagree.

Under the plain language of section 150B-40(d), the prohibition on *ex parte* communication by agency members "begins at the time of the notice of hearing." N.C. Gen. Stat. § 150B-40(d). The probable cause hearing took place two months before respondent issued its statement of charges, and nine months before it issued the notice of hearing. As the probable cause hearing occurred well before the statutory prohibition on *ex parte* communications arose, the trial court erred in concluding that respondent violated section 150B-40(d), all "spirit" notwithstanding. Moreover, the trial court specifically found that, "[b]ased upon the evidence of Record, no *ex parte* contact between Board staff and Board members occurred after the Board issued its Notice of Hearing." We therefore conclude that respondent conducted no impermissible *ex parte* communication, and the trial court erred in concluding otherwise. We now turn to respondent's denial of the petition for disqualification of Board members for bias.

B. Disqualification for Bias

The trial court concluded that the petition for disqualification set forth "sufficient allegations of bias such that Petitioner should have been afforded the opportunity to examine the Board members for possible bias. The Board's failure to afford him that opportunity to examine for bias violated Petitioner's statutory and constitutional rights." Respondent contends that the trial court erred in so concluding. We agree.

A fair trial before an impartial tribunal is a fundamental requirement of due process. *See Withrow v. Larkin*, 421 U.S. 35, 46, 43 L. Ed. 2d 712, 723 (1975). "This applies to administrative agencies which adjudicate as well as to courts." *Id.* When performing their quasi-judicial functions, agency members "must be able to set aside their prior knowledge and preconceptions concerning the matter at issue, and base their considerations solely upon the evidence adduced at the hearing." *Crump v. Bd. of Education*, 326 N.C. 603, 616, 392 S.E.2d 579, 586 (1990). There is a crucial distinction, however, between a Board member's disqualifying *bias* against a particular petitioner and permissible pre-hearing *knowledge* about a petitioner's case. *See id.* "[M]ere familiarity with the facts of a case gained by an agency in the performance of its statutory duties does not disqualify it as a decisionmaker." *Thompson v. Board of Education*, 31 N.C. App. 401, 412, 230 S.E.2d 164, 170 (1976), *reversed on other grounds*, 292 N.C. 406, 233 S.E.2d 538 (1977).

Regarding bias in the context of an administrative agency, the United States Supreme Court has cautioned that

> [t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Withrow, 421 U.S. at 47, 43 L. Ed. 2d at 723-24. This Court has echoed the Supreme Court's warning, stating that "there is no per se violation of due process when an administrative tribunal acts as both investigator and adjudicator on the same matter." *Hope v. Charlotte-Mecklenberg Bd. of Education*, 110 N.C. App. 599, 603-04, 430 S.E.2d 472, 474-75 (1993). Thus, "[a]bsent a showing of actual bias or unfair prejudice petitioner cannot prevail." *Id.* at 604, 430 S.E.2d at 475.

In the case *sub judice*, petitioner offered no specific facts or evidence of actual bias on the part of Board members. The petition for disqualification instead rested entirely on petitioner's assertions that his case related to "specific and unique events" which "the Board members will remember when this case is heard." Because of the

allegedly singular quality of the events in question, petitioner declared that "the Board members . . . are likely to have already drawn conclusions and opinions" such that they were "irrevocably biased" and incapable of providing a fair and impartial hearing.

We conclude that petitioner failed to meet his burden of demonstrating bias by the Board members. *See Crump*, 326 N.C. at 617, 392 S.E.2d at 586 (noting that, "because of their multi-faceted roles as administrators, investigators and adjudicators, school boards are vested with a presumption that their actions are correct, and the burden is on a contestant to prove otherwise"). Petitioner presented no evidence, other than his own presumptions, that the Board members had any preconceptions regarding the matter or would be incapable of basing their consideration of petitioner's case solely on the evidence adduced at the formal hearing. Indeed, all evidence was to the contrary. Yardley's report, submitted to the Board more than a year before the formal hearing, was anonymous, containing no proper names or other identifying information. When polled, Board members stated that they had no communication concerning petitioner's case after the initial probable cause hearing, nor possessed any written materials concerning the meeting or the case. Moreover, contrary to petitioner's assertions, we perceive nothing particularly salacious or unusual in the events surrounding petitioner's case such as to render the matter unique or memorable. In fact, when specifically questioned about petitioner's case, Board members denied having any memory of the original review of the facts that would prevent a fair and impartial decision.

Because petitioner failed to present sufficient grounds for bias, the Board was not obligated to grant petitioner's request for *voir dire* or to exclude Board members from consideration of petitioner's case. To decide that the Board's mere exposure to an anonymous report is "sufficient to establish bias or unfair prejudice would amount to a per se rule of unconstitutionality, completely disregarding the presumption that the Board acted correctly and the presumption of honesty and integrity in those serving as adjudicators." *Hope*, 110 N.C. App. at 603, 430 S.E.2d at 474; *see also Withrow*, 421 U.S. at 55, 43 L. Ed. 2d at 728 (stating that, "[t]he mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing"). The trial court therefore erred in concluding that the Board violated petitioner's statutory or due process rights by denying his petition for disqualification. We now examine the trial court's conclu-

sion that respondent impermissibly commingled prosecutorial, investigative, and adjudicative functions.

C. Administrative and Investigative Functions by the Board

The trial court concluded that the Board's procedure of conducting its initial probable cause hearing *ex parte*, with the same Board members later adjudicating petitioner's case, unlawfully "commingl[ed] the prosecutorial, investigative and adjudicative functions, contrary to N.C.G.S. § 150B-1(a)[.]" Respondent argues that its procedure adequately protected petitioner's due process and statutory rights. We agree.

Section 150B-1(a) of the North Carolina General Statutes sets forth the general purpose behind the Administrative Procedure Act, which is to "establish[] a uniform system of administrative rule making and adjudicatory procedures for agencies" in order to "ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process." N.C. Gen. Stat. § 150B-1(a) (2001). Neither the Administrative Procedure Act nor due process, however, requires strict separation between agency functions. *See Withrow*, 421 U.S. at 58, 43 L. Ed. 2d at 730 (noting that, "the combination of investigative and adjudicative functions does not, without more, constitute a due process violation"); *Harrell v. Wilson County Schools*, 58 N.C. App. 260, 266, 293 S.E.2d 687, 691 (noting that the fact that an administrative tribunal acts in the triple capacity of complainant, prosecutor and judge does not violate due process), *disc. review denied*, 306 N.C. 740, 295 S.E.2d 759 (1982), *cert. denied*, 460 U.S. 1012, 75 L. Ed. 2d 481 (1983). Rather, the "sufficiency of the procedures employed must be evaluated in light of the parties, the subject matter, and the circumstances involved." *Presnell v. Pell*, 298 N.C. 715, 723, 260 S.E.2d 611, 616 (1979).

In *Withrow*, the United States Supreme Court addressed the issue of procedural due process requirements in the context of hearings before occupational licensing boards. Specifically, the question before the Court was whether the Wisconsin Medical Board's procedure of determining probable cause in an investigatory hearing and later adjudicating those charges violated the physician-licensee's due process rights. The Court noted that it is

> very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of

> charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.

Withrow, 421 U.S. at 56, 43 L. Ed. 2d at 729. Accordingly, the Court held that the Medical Board's procedure did not violate the physician's constitutional or statutory rights.

We conclude that respondent did not violate petitioner's statutory or due process rights in the instant case. The Board is statutorily empowered to investigate as well as to adjudicate complaints against its licensees. *See* N.C. Gen. Stat. §§ 90-270.9, 90-270.15 (2001). Here, the Board employed a staff psychologist to investigate the complaint and submit an anonymous report in order to determine whether sufficient grounds existed to issue charges against petitioner. A hearing was not held on the matter until a year later, at which time petitioner presented evidence and cross-examined witnesses. In accordance with *Withrow*, we determine that the trial court erred in concluding that respondent violated petitioner's due process and statutory rights by impermissibly commingling its investigative, adjudicative and prosecutorial functions. We turn, therefore, to respondent's second assignment of error.

[2] By respondent's second assignment of error, respondent argues that the trial court erred in reversing the Board's assessment of costs against petitioner. In its final decision, the Board fined petitioner $4,050.00, which represented the costs of the disciplinary proceeding as calculated by the Board's Executive Director. The trial court found, however, that there was no evidence in the record to support this calculation, and that petitioner "was never afforded the opportunity to cross-examine the basis or accuracy of such costs." Respondent contends that, as there is no dispute as to the number of hours spent on the disciplinary proceeding, and because the costs of the proceeding is controlled by the North Carolina Administrative Code, no grounds existed for cross-examination. Further, respondent asserts that the evidence for the calculation of costs appears in the record. We agree with respondent.

Section 90-270.15 of the North Carolina General Statutes provides that "[t]he Board may assess costs of disciplinary action against an applicant or licensee found to be in violation of this Article." N.C. Gen. Stat. § 90-270.15(c) (2001). The North Carolina Administrative Code sets the hourly rate for such disciplinary proceedings as "three

hundred dollars ($300.00) per hour for a hearing which results in disciplinary action, with a minimum charge of three hundred dollars ($300.00) for the first hour or portion thereof, and then prorated thereafter for each half-hour[.]" N.C. Admin. Code tit. 21, r. 54.1605(11)(c) (June 2002). In the instant case, the transcript reflects that the disciplinary proceeding against petitioner lasted for thirteen hours and three minutes. When multiplied by the rate set forth in the Administrative Code, the costs of the proceeding totals $4,050.00, the amount assessed against petitioner.

We conclude that the trial court erred in finding that there was no evidence in the record to support respondent's assessment of costs. The transcript clearly and undisputedly recites the total number of hours spent on the disciplinary proceeding, the costs of which are mandated by the Administrative Code. Moreover, as the Board adhered to the statutory guidelines, and properly applied the mathematical formula in determining the costs, petitioner suffered no prejudice in being denied the opportunity to cross-examine the basis or accuracy of such costs. Thus, the trial court erred in reversing respondent's assessment of costs against petitioner.

We now address petitioner's assignments of error on appeal.

II. Petitioner's Appeal

[3] Petitioner argues that the trial court erred in determining that respondent's final decision was supported by substantial evidence of record. Petitioner asserts that his actions violated neither statutory nor ethical standards, and that the Board's findings of fact are not based on substantive evidence. Petitioner further contends that the Board's conclusions of law, based upon improper findings of fact, are likewise invalid.

In an adjudicatory proceeding, an administrative body's responsibility is "to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence." *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980). "An agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence presented to it." N.C. Gen. Stat. § 150B-41(d) (2001). "One of the purposes behind the creation of administrative agencies was the necessity for the supervision and experience of specialists in difficult and complicated fields." *Lackey v. Dept. of Human Resources*, 306 N.C. 231, 237, 293 S.E.2d 171, 176 (1982).

Upon judicial appeal from an agency, the trial court may reverse or modify an agency's decision if it is "[u]nsupported by substantial evidence . . . in view of the entire record as submitted[.]" N.C. Gen. Stat. § 150B-51(b)(5) (2001). The "whole record" test requires the reviewing court to examine all competent evidence to determine whether the agency decision is supported by substantial evidence. *See N.C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 441, 462 S.E.2d 824, 826-27 (1995), *affirmed per curiam*, 344 N.C. 626, 476 S.E.2d 364 (1996). The administrative findings of fact, if supported by substantial evidence in view of the entire record, are conclusive upon a reviewing court. *See In re Berman*, 245 N.C. 612, 616-17, 97 S.E.2d 232, 235 (1957). Notably, "[t]he 'whole record' test does not allow the reviewing court to replace the Board's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result." *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

Petitioner argues that there was no substantial evidence to support respondent's findings of fact that an improper relationship existed between patient and petitioner. We disagree. According to patient's testimony, when petitioner first informed patient about his divorce, "we spent a lot of time in my sessions talking about what he was going through." Patient testified that prior to these discussions, she had not contemplated terminating her therapy with petitioner, but she did so

> after things that he said to me that started making me think that a romantic relationship could be possible. . . . [W]e had . . . eye contact for awhile. And he said . . . "I wish this moment could last forever." At one point, he told me how much his, you know, parents and kids would like me.

Patient further testified that after a "series of provocative remarks and after me talking about my feelings . . . I just said, 'Please, just tell me once and for all that a relationship between you and me is not possible.' " Petitioner testified that he responded, "I can't. I need time to think about it." After this, patient and petitioner met outside of therapy and established a schedule for their personal relationship, even though patient continued to attend group therapy with petitioner.

Eventually, patient informed petitioner in writing that she would stop attending group therapy as well, because

> discontinuing group is the only right thing to do. It makes me very sad. But the bottom line (and you hit on this most recently) is that even if it would upset just one member that's too much. So, primarily in the name of morality, but also to protect any future repercussions to your situation, this is what I'm going to do.

Petitioner does not deny these events, merely their characterization. Petitioner conceded that he "exercised bad judgment in this case" and testified that, "I wouldn't do it again. It is too risky for the client and too risky for me too." Based on our review of the record, we conclude there was competent evidence in the record to support the Board's findings.

We further conclude that the Board's findings of fact supported its conclusions of law. The Board concluded that petitioner's conduct violated sections 90-270.15(a)(10), 90-270.15(a)(11), and 90-270.15(a)(20) of the North Carolina General Statutes. Section 90-270.15(a)(10) provides that a psychologist violates the Code of Conduct when the psychologist "[h]as been guilty of immoral, dishonorable, unprofessional, or unethical conduct as defined in this subsection, or in the then-current code of ethics of the American Psychological Association[.]" N.C. Gen. Stat. § 90-270.15(a)(10) (2001). The evidence, as found by the Board, tended to show that petitioner entered into a personal relationship with a present patient in order to meet his own emotional needs. Such evidence supports the Board's conclusion that petitioner violated section 90-270.15(a)(10).

Section 90-270.15(a)(11) provides that a psychologist violates the Code of Conduct when he "[h]as practiced psychology in such a manner as to endanger the welfare of clients or patients[.]" N.C. Gen. Stat. § 90-270.15(a)(11) (2001). There was competent evidence before the Board, and the Board so found, that petitioner allowed the patient to end her therapy in order to pursue a personal relationship with him, and that such behavior ultimately caused the patient to suffer severe depression, thereby endangering her welfare. We determine that these findings support the Board's conclusion that petitioner violated section 90-270.15(a)(11).

Section 90-270.15(a)(20) of the North Carolina General Statutes provides that a psychologist violates the Code of Conduct when he "[h]as exercised undue influence in such a manner as to exploit the client . . . for the financial or other personal advantage or gratification of the psychologist[.]" N.C. Gen. Stat. § 90-270.15(a)(20) (2001). As stated above, the Board found that petitioner entered into the rela-

tionship with his patient to gratify his own personal needs, and that the patient would not have ended her therapy but for her relationship with petitioner. We conclude that these findings support the Board's conclusion that petitioner violated section 90-270.15(a)(20).

Petitioner further argues that the Board improperly concluded that petitioner violated ethical standards 1.13(a)-(c), 1.14, 1.15, and 1.17(a) of the *Ethical Principles of Psychologists and Code of Conduct.* Standard 1.13 provides, in pertinent part, that:

> (a) Psychologists recognize that their personal problems and conflicts may interfere with their effectiveness. Accordingly, they refrain from undertaking an activity when they know or should know that their personal problems are likely to lead to harm to a patient, client . . . or other person to whom they may owe a professional or scientific obligation.
>
> (b) In addition, psychologists have an obligation to be alert to signs of, and to obtain assistance for, their personal problems at an early stage, in order to prevent significantly impaired performance.
>
> (c) When psychologists become aware of personal problems that may interfere with their performing work-related duties adequately, they take appropriate measures, such as obtaining professional consultation or assistance, and determine whether they should limit, suspend, or terminate their work-related duties.

American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, ethical standard 1.13 (1992). The Board concluded that petitioner violated these ethical principles by entering into a destructive personal relationship with his patient while she was still undergoing therapy. Petitioner did not obtain professional consultation on his relationship, but merely "casually broached the subject" with a colleague, who advised petitioner that such a situation was "hazardous." We determine that the Board did not err in concluding that petitioner violated sections 1.13(a)-(c) of the ethical standards.

The Board further concluded that petitioner violated ethical standard 1.14, which admonishes psychologists to "take reasonable steps to avoid harming their patients or clients . . . and to minimize harm where it is foreseeable and unavoidable[,]" and also violated ethical standard 1.15, which recites that, "[b]ecause psychologists'

scientific and professional judgments and actions may affect the lives of others, they are alert to and guard against personal, financial, social, organizational, or political factors that might lead to misuse of their influence." *Id.*, ethical standards 1.14, 1.15. The Board found that petitioner's relationship with his patient had violated these standards in that petitioner's actions resulted in foreseeable harm to his patient, and that petitioner's influence over his patient caused her to end her therapy. We conclude that the Board's findings properly support its conclusion that petitioner violated ethical standards 1.14 and 1.15.

Finally, the Board concluded that petitioner violated ethical standard 1.17(a), which provides, in pertinent part, as follows:

> A psychologist refrains from entering into or promising another personal . . . relationship . . . if it appears likely that such a relationship reasonably might impair the psychologist's objectivity or otherwise interfere with the psychologist's effectively performing his or her functions as a psychologist, or might harm or exploit the other party.

Id., ethical standard 1.17(a). The evidence and the Board's findings clearly showed that petitioner inappropriately pursued a dual relationship with his patient. Petitioner continued to treat his patient in group therapy sessions while simultaneously exploring a social relationship with the patient. We therefore conclude that the Board's findings support its conclusion that petitioner violated ethical standard 1.17(a).

Because there was substantial evidence of record to support the Board's findings of fact, which in turn supported its conclusions of law, the trial court did not err in concluding that the Board's decision was supported by substantial evidence. We therefore overrule petitioner's first assignment of error.

[4] By his second assignment of error, petitioner argues that the trial court erred when it refused to render a declaratory judgment regarding the constitutionality of section 90-270.15(a)(10) of the North Carolina General Statutes. We disagree. "The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding[.]" N.C. Gen. Stat. § 1-257 (2001). The trial court's decision to grant or deny such relief will be reversed only upon a showing of abuse of discretion. *See Coca-Cola*

Bottling Co. Consol. v. Durham Coca-Cola Bottling Co., 141 N.C. App. 569, 577-78, 541 S.E.2d 157, 163 (2000), *disc. review denied*, 353 N.C. 370, 547 S.E.2d 433 (2001).

In the instant case, it is clear that a declaration by the trial court regarding the constitutionality of section 90-270.15(a)(10) would not have terminated the controversy between petitioner and respondent. Respondent concluded in its decision that petitioner violated numerous statutory sections, not merely section 90-270.15(a)(10). Moreover, the trial court granted petitioner substantial relief in its order by vacating the decision of respondent. Having granted petitioner this relief on the basis of due process violations, the trial court obviously decided that further grounds for relief were unnecessary and would serve no useful purpose. *See Coca-Cola Bottling Co. Consol.*, 141 N.C. App. at 578-79, 541 S.E.2d at 163. Petitioner has advanced no grounds for abuse by the trial court of its discretion in this matter, nor do we perceive such. We therefore overrule this assignment of error.

Although we conclude that the trial court did not abuse its discretion in declining to issue a declaratory judgment regarding the constitutionality of section 90-270.15(a)(10), we nevertheless consider petitioner's contention that the section is unconstitutional. Petitioner asserts that the statutory section, which incorporates the code of ethics of the American Psychological Association ("APA"), is an unconstitutional delegation of legislative authority. Petitioner therefore contends that the application of the APA's code of ethics violated his due process rights.

In determining the constitutionality of section 90-270.15(a)(10), we begin with the well-established principle that a statute enacted by the General Assembly is presumed to be constitutional. *See Wayne County Citizens Assn. v. Wayne County Bd. of Comrs.*, 328 N.C. 24, 29, 399 S.E.2d 311, 314-15 (1991). "A statute will not be declared unconstitutional unless this conclusion is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground." *Id.* at 29, 399 S.E.2d at 315. The wisdom and expediency of an enactment is a legislative and not a judicial decision. *See In re Housing Bonds*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982). "Where a statute is susceptible of two interpretations, one of which is constitutional and the other not, the courts will adopt the former and reject the latter." *Wayne County Citizens Assn.*, 328 N.C. at 29, 399 S.E.2d at 315.

Section 90-270.15(a)(10) authorizes the Board to discipline licensees whose conduct violates either the statutorily-defined Code of Conduct, or the "then-current code of ethics of the American Psychological Association, except as the provisions of such code of ethics may be inconsistent and in conflict with the provisions of this Article, in which case, the provisions of this Article control[.]" N.C. Gen. Stat. § 90-270.15(a)(10). Petitioner asserts that this section improperly delegates authority over standards for ethical behavior of psychologists to a private agency. Petitioner argues that, as the APA may revise such standards without notice or opportunity to be heard, the incorporation of such standards in the General Statutes violates petitioner's procedural and substantive due process rights. We disagree.

We do not conclude that discretionary reference to the ethical code of the American Psychology Association for purposes of determining improper behavior by a licensee to be a delegation of legislative authority to the APA. "When a legislature adopts the standards of a private organization into a statutory scheme . . . the incorporation is not always a delegation of legislative power." *Madrid v. St. Joseph Hosp.*, 122 N.M. 524, 530, 928 P.2d 250, 256 (1996). Courts in other jurisdictions that have addressed the adoption of private standards by their legislatures have articulated numerous compelling rationales for permitting such adoptions. As noted by the Supreme Court of Maryland:

> [C]ourts have sometimes upheld legislative adoption of private organizations' standards which are periodically subject to revision, in limited circumstances such as where the standards are issued by a well-recognized, independent authority, and provide guidance on technical and complex matters within the entity's area of expertise. These cases usually involve accreditation or similar programs by established professional organizations.

Board of Trustees v. City of Baltimore, 317 Md. 72, 96-97, 562 A.2d 720, 731 (1989), *cert. denied*, 493 U.S. 1093, 107 L. Ed. 2d 1069 (1990). The Maryland Court held that where the statutory adoption of private standards is merely advisory, rather than mandatory upon the agency applying the standards, there is no delegation of legislative authority. *See id.* at 98, 562 A.2d at 732.

Further, where a private organization's standards have significance independent of a legislative enactment, they may be incorporated into a statutory scheme without offending constitutional

restrictions on delegation of legislative powers. This is because "[a] private entity's standards cannot be construed as a deliberate law-making act when their development of the standards is guided by objectives unrelated to the statute in which they function." *Madrid*, 122 N.M. at 531, 928 P.2d at 257; *see also Lucas v. Maine Com'n of Pharmacy*, 472 A.2d 904, 909 (Me. 1984) (applying the principle that, " 'statutes whose operation depends upon private action which is taken for purposes which are independent of the statute' usually pass constitutional muster") (quoting Kenneth C. Davis, *Administrative Law Treatise* § 3:12 (2d ed. 1978)).

The above-stated grounds for incorporating the standards of a private entity without finding a delegation of legislative authority are applicable to the incorporation of the APA's ethical code in section 90-270.15(a)(10). This section permits the Board to apply the ethical standards of a well-recognized, independent authority, whose standards were developed in order to provide guidance on complex issues of morality and professional behavior among psychologists. There is no evidence that the APA's objective in developing its standards was in any way guided by legislative considerations. Moreover, application of the APA's standards is left to the discretion of the Board "except as the provisions of [the APA] may be inconsistent and in conflict with the provisions of this Article, in which case, the provisions of this Article control[.]" N.C. Gen. Stat. § 90-270.15(a)(10).

Our Supreme Court has held that:

> [w]hen there is an obvious need for expertise in the achievement of legislative goals the General Assembly is not required to lay down a detailed agenda covering every conceivable problem which might arise in the implementation of the legislation. It is enough if general policies and standards have been articulated which are sufficient to provide direction to an administrative body possessing the expertise to adapt the legislative goals to varying circumstances.

Adams v. Dept. of N.E.R. and Everett v. Dept. of N.E.R., 295 N.C. 683, 698, 249 S.E.2d 402, 411 (1978). Section 90-270.15(a)(10) authorizes the Board to utilize the principles set forth by the APA to govern the conduct of its licensees, which principles this Court has specifically held to be constitutional. *See White v. N.C. Bd. of Examiners of Practicing Psychologists*, 97 N.C. App. 144, 152, 388 S.E.2d 148, 153, *disc. review denied*, 326 N.C. 601, 393 S.E.2d 891 (1990). We further note that petitioner testified that he was aware of and had personally

reviewed the guidelines established by the APA. We therefore hold that section 90-270.15(a)(10) contains no unconstitutional delegation of legislative authority, and that petitioner's due process rights were not violated therefrom.

In conclusion, we hold that the trial court erred in concluding that respondent violated petitioner's constitutional or statutory rights, and in reversing respondent's assessment of costs against petitioner. We further hold that the trial court correctly concluded that respondent's decision was supported by substantial evidence of record. Moreover, we hold that the trial court did not abuse its discretion in declining to render declaratory judgment as to the constitutionality of section 90-270.15(a)(10) of the Psychology Practice Act. Finally, we hold that section 90-270.15(a)(10) does not constitute an improper delegation of legislative authority. We therefore reverse in part the order of the trial court and remand this matter for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judge HUNTER concurs.

Judge GREENE concurs in part and dissents in part.

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

I agree with the majority that N.C. Gen. Stat. § 90-270.15(a)(10) does not constitute an improper delegation of legislative authority. I further agree that "there is no per se violation of due process when an administrative tribunal acts as both investigator and adjudicator on the same matter." *Hope v. Charlotte-Mecklenburg Bd. of Educ.*, 110 N.C. App. 599, 603-04, 430 S.E.2d 472, 474-75 (1993). The actions of the Board in this case, however, constituted a violation of N.C. Gen. Stat. § 150B-40(d) and section 54.2308(e)(3) of the North Carolina Administrative Code. Accordingly, I respectfully dissent in part.

I

Overlap of Investigative and Adjudicative Roles

Pursuant to the Psychology Practice Act, the procedures for suspension of a psychologist's license or other disciplinary actions must be "in accordance with the provisions of Chapter 150B," the Administrative Procedure Act. N.C.G.S. § 90-270.15(e) (2001). The

procedures established by Chapter 150B "ensure that the functions of rule making, investigation, advocacy, and adjudication are not all performed by the same person in the administrative process." N.C.G.S. § 150B-1(a) (2001). One provision that serves to facilitate the requisite division of power within an administrative agency is N.C. Gen. Stat. § 150B-40(d). It states:

> Unless required for disposition of an ex parte matter authorized by law, a member of an agency assigned to make a decision or to make findings of fact and conclusions of law in a contested case under this Article shall not communicate, directly or indirectly, in connection with any issue of fact or question of law, with any person or party or his representative, except on notice and opportunity for all parties to participate. This prohibition begins at the time of the notice of hearing. *An agency member may communicate with other members of the agency* and may have the aid and advice of the agency staff *other than the staff which has been or is engaged in investigating or prosecuting functions* in connection with the case under consideration or a factually-related case.

N.C.G.S. § 150B-40(d) (2001) (emphasis added). This section breaks down into two parts: (1) An agency member involved in the decision-making process may only communicate with another "person or party or his representative" after the notice of hearing has been issued if that member provides all parties with notice and an opportunity to participate in the communication; and (2) regardless of whether a notice of hearing has been issued or the parties have received notice of the intended communication, a decision-making member may communicate with other members of the agency at any time unless those other members are or were engaged in the investigation or prosecution of the case or a factually-related case. In other words, the decision-making member is prohibited from having any communications with the investigating or prosecuting members of the agency before and after the notice of hearing.[1]

In this case, the Board met with the investigator prior to the issuance of the notice of hearing to discuss his findings and conclusions in respect to this case. This communication was in direct viola-

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1. Any interpretation of section 150B-40(d) prohibiting communications with an investigating or prosecuting member of the agency only after issuance of the notice of hearing would be nonsensical as there is no justification for allowing communications with those agency members before a notice of hearing has been issued but not thereafter.

tion of section 150B-40(d) and thus requires the Board's decision to be reversed.[2]

II

Disqualification Procedure

In any event, the Board's failure to comply with the proper disqualification procedure mandates reversal of its decision. Petitioner filed a verified petition for disqualification of the Board members. In his petition, petitioner alleged the Board had met with the investigator in October 1998 to discuss the investigator's report. While a copy of the minutes of this meeting reflected the Board's decision to proceed with the charges against petitioner, it revealed nothing about the content of the Board's communication with the investigator. Petitioner further alleged "[t]here [were] specific and unique events related to this case and discussed with the Board which the Board members [would] remember when this case [was] heard." Moreover, "the Board members . . . [were] likely to have already drawn conclusions and opinions as to what [were] and [were] not the facts and circumstances surrounding . . . the alleged conduct in this matter and [were] irrevocably biased such that they [could not] provide a fair and impartial hearing." In order to explore the alleged bias of the Board, petitioner requested an opportunity to *voir dire* the Board. The Board considered the petition and, after having been polled for bias by an appointed investigator, denied the petition without affording petitioner an opportunity to *voir dire* the individual members of the Board.

Pursuant to section 54.2308 of the North Carolina Administrative Code, a party may petition for the disqualification of a Board member upon belief that the Board member "is personally biased or otherwise unable to conduct or participate in the hearing and perform all duties in an impartial manner." 21 N.C.A.C. 54.2308(b) (2002); N.C.G.S. § 150B-40(b) (2001) (a party must "file[] in good faith a timely and sufficient affidavit of the personal bias or other reason for disqualification of any member of the agency"). The party alleging bias "must state all facts [he] deems relevant to the disqualification of a Board member." 21 N.C.A.C. 54.2308(c) (2002). The Board then "shall decide whether to disqualify the challenged individual"; however, "[t]he person whose disqualification is to be determined will not

2. This opinion does not prohibit administrative agencies from appointing a Board member to engage in the investigation or prosecution of a case so long as that member recuses himself from any participation in the adjudicative process.

participate in the decision." 21 N.C.A.C. 54.2308(e)(2)-(3) (2002). Accordingly, the procedure set forth in section 54.2308 is inoperable if bias of every member of the Board is alleged. When the Board is presented with such a scenario, the matter must be referred to an administrative law judge. *See* N.C.G.S. § 150B-40(e) (2001) ("[w]hen a majority of an agency is unable . . . to hear a contested case, the agency shall apply to the Director of the Office of Administrative Hearings for the designation of an administrative law judge to preside at the hearing"). Thus, the Board erred in failing to refer the determination of bias of the whole Board to an administrative law judge.

I would further note that upon review by an administrative law judge, petitioner, having in good faith alleged the facts leading to the potential bias of the Board, has the right to *voir dire* the individual Board members. *See* N.C.G.S. § 150B-40(a) (2001) ("[h]earings shall be conducted in a fair and impartial manner"); *Crump v. Bd. of Educ.*, 326 N.C. 603, 624, 392 S.E.2d 579, 590 (1990) (it is a fundamental aspect of due process that " 'both unfairness and the appearance of unfairness should be avoided' "). While it has been held that an administrative agency's involvement in both the investigation and the adjudication of a case does not *per se* violate due process, *see Hope*, 110 N.C. App. at 603-04, 430 S.E.2d at 474-75, a petitioner, if his factual allegations are made in good faith, must be allowed to explore the potential for bias that is inherent in the conflicting roles often assumed by administrative agencies, *see Withrow v. Larkin*, 421 U.S. 35, 58, 43 L. Ed. 2d 712, 730 (1975) (substantial due process question raised if a "fair and effective consideration at a subsequent adversary hearing leading to [the agency's] ultimate decision" is "as a practical or legal matter foreclosed"); N.C.G.S. § 150B-40(b). The subsequent determination of actual bias must necessarily involve an opportunity to *voir dire* the individual Board members, as the party alleging bias will be essentially barred from meeting his burden of proof if he is prevented from engaging in such an examination.[3] *See Crump*, 326 N.C. at 617, 392 S.E.2d at 586 (holding that "because of their multi-faceted roles as administrators, investigators and adjudicators, school boards are vested with a presumption that their actions are correct, and the burden is on a contestant to

3. The majority finds significance in the fact that the Board, when polled by the appointed investigator, denied having any memory of the original review of the facts that would prevent a fair and impartial decision. Petitioner, however, alleged "the Board members . . . [were] likely to have already drawn conclusions and opinions as to what [were] and [were] not the facts and circumstances surrounding . . . the alleged conduct in this matter." This issue was not addressed by the polling of the Board and petitioner should have been given an opportunity to explore it.

prove otherwise"). This is especially true if, as in this case, no transcript or record exists of the communication that allegedly led to the Board members' bias.

Conclusion

As the Board's communication with the investigator in October 1998 was in violation of section 150B-40(d), I would affirm the trial court's order reversing the Board's decision. Even if section 150B-40(d) did not mandate reversal of the Board's decision, the Board's failure to refer petitioner's allegations of the bias of the whole Board to an administrative law judge constitutes an alternative error warranting reversal of its decision.

BOYCE & ISLEY, PLLC, EUGENE BOYCE, R. DANIEL BOYCE, PHILIP R. ISLEY, AND LAURA B. ISLEY, PLAINTIFFS v. ROY A. COOPER, III, THE COOPER COMMITTEE, JULIA WHITE, STEPHEN BRYANT, AND KRISTI HYMAN, DEFENDANTS

No. COA01-880

(Filed 17 September 2002)

1. Libel and Slander— political ads—claim sufficiently stated

The trial court erred by granting a Rule 12(b)(6) dismissal on a defamation claim arising from television ads during a political campaign where plaintiffs' complaint properly set forth the elements of a defamation claim in that there was no dispute that the statements were intentionally published to the public at large; the stated facts, if proven, would show that the advertisements contained several central errors of fact which tended to falsely imply that plaintiffs had sued the state and charged excessive fees for their work at the expense of taxpayers; these statements, viewed through the eyes of the average person and in context, are defamatory per se; the law firm of Boyce & Isley, PLLC was readily ascertainable from the reference to "Dan Boyce's law firm"; although Daniel Boyce is a public figure due to his candidacy for public office, there is no evidence that all of the plaintiffs are pubic figures; and plaintiffs alleged that defendants acted with actual malice.

2. Unfair Trade Practices— political ads—claim sufficiently stated

The trial court erred by granting a Rule 12(b)(6) dismissal on an unfair and deceptive practices claim arising from television ads during a political campaign where plaintiffs properly pled all of the elements for a libel per se claim and the alleged libel impugned plaintiffs in their profession by accusing them of unethical business practices. There are no compelling grounds to distinguish defamatory remarks concerning one's trade or profession made during the course of a political campaign from those made in some other forum. It will be plaintiff's burden to show actual injury as the case progresses.

3. Evidence— judicial notice—state board action—newspaper articles

The trial court did not err in an action for defamation and unfair trade practices arising from a political campaign by declining to take judicial notice of an order by the Board of Elections dismissing plaintiffs' complaint or of certain newspaper articles. Even if judicial notice of the Board's action was proper, the Board's conclusion that defendants' political advertisement did not constitute criminal election activity did not provide a bar to plaintiffs' tort claims against defendants. None of the newspaper advertisements were relevant to testing the legal sufficiency of plaintiffs' complaint or provided the basis for a complete defense.

Appeal by plaintiffs from order entered 6 April 2001 by Judge James C. Spencer, Jr., in Wake County Superior Court. Heard in the Court of Appeals 23 April 2002.

Boyce & Isley, PLLC, by G. Eugene Boyce, R. Daniel Boyce, Philip R. Isley, and Laura B. Isley, pro se, plaintiff appellants.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Jim W. Phillips, Jr., and David Kushner, and Smith Helms Mulliss & Moore, L.L.P., by Alan W. Duncan, for defendant appellees.

TIMMONS-GOODSON, Judge.

The law firm of Boyce & Isley, PLLC, and its member attorneys G. Eugene Boyce, R. Daniel Boyce, Philip R. Isley and Laura B. Isley (collectively, "plaintiffs") appeal from an order of the trial court dis-

missing plaintiffs' complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. For the reasons set forth herein, we reverse in part the order of the trial court.

The facts relevant to this appeal are as follows: On 2 November 2000, plaintiffs filed a complaint with the State Board of Elections. The complaint alleged that a political advertisement sponsored by the campaign of Roy Cooper, the Democratic nominee for the Office of Attorney General of North Carolina, violated section 163-274(8) of the North Carolina General Statutes, which prohibits "any person to publish . . . derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity[.]" N.C. Gen. Stat. § 163-274(8) (2001).

During the pendency of the action before the State Board of Elections, plaintiffs filed a similar complaint in Wake County Superior Court alleging that Roy Cooper, along with the Cooper Committee (collectively, "defendants") published a false and fraudulent political television advertisement during the North Carolina election campaign for the Office of Attorney General. Plaintiffs alleged that the advertisement defamed R. Daniel Boyce ("Dan Boyce"), the Republican nominee for the Office of Attorney General, as well as the member attorneys of the Boyce & Isley law firm. The complaint recited verbatim the content of the advertisement at issue, the audio portion of which is reproduced here as follows:

> I'm Roy Cooper, candidate for Attorney General, and I sponsored this ad.
>
> . . . .
>
> Dan Boyce—his law firm sued the state, charging $28,000 an hour in lawyer fees to the taxpayers.
>
> The Judge said it shocks the conscience.
>
> Dan Boyce's law firm wanted more than a police officer's salary for each hour's work.
>
> Dan Boyce, wrong for Attorney General.

Plaintiffs alleged that defendants' publication of the above-stated advertisement was defamatory *per se* and constituted unfair and deceptive trade practices. Further, plaintiffs accused defendants of conspiring to violate statutory section 163-274(8), referenced *supra*,

and requested a declaratory judgment regarding defendants' alleged violation of such statute.

On 20 December 2000, the State Board of Elections dismissed plaintiffs' complaint. On 6 April 2001, the trial court also granted defendants' motion to dismiss plaintiffs' complaint on all claims pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. From this order, plaintiffs appeal.

On appeal, plaintiffs bring forth two assignments of error, arguing that the trial court erred in dismissing their claims against defendants for defamation and for unfair and deceptive trade practices. By cross-appeal, defendants assign error to the trial court's refusal to take judicial notice of the order of the State Board of Elections dismissing plaintiffs' complaint. We examine plaintiffs' and defendants' arguments in turn.

I. Plaintiffs' Appeal

[1] In their first assignment of error, plaintiffs contend that the trial court erred by dismissing their claim for defamation. Plaintiffs argue that their complaint states a valid claim for defamation against defendants upon which relief may be granted. We agree.

A motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure tests the legal sufficiency of the complaint. *See* N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2001); *Fuller v. Easley*, 145 N.C. App. 391, 397-98, 553 S.E.2d 43, 48 (2001). When ruling on a motion to dismiss, "the trial court must take the complaint's allegation[s] as true and determine whether they 'are sufficient to state a claim upon which relief may be granted under some legal theory.' " *Id.* (quoting *Taylor v. Taylor*, 143 N.C. App. 664, 668, 547 S.E.2d 161, 164 (2001)). The ultimate issue on a motion to dismiss is not " 'whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.' " *Johnson v. Bollinger*, 86 N.C. App. 1, 4, 356 S.E.2d 378, 381 (1987) (quoting *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 681, 340 S.E.2d 755, 758, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986)). Thus, a claim should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See Garvin v. City of Fayetteville*, 102 N.C. App. 121, 123, 401 S.E.2d 133, 134-35 (1991).

In the instant case, plaintiffs' complaint set forth a claim for defamation against defendants, including libel *per se* and slander *per se*. In order to recover for defamation, a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person. *See Tyson v. L'eggs Products, Inc.*, 84 N.C. App. 1, 10-11, 351 S.E.2d 834, 840 (1987). There is no dispute in the instant case that the statements made by defendants were intentionally published to the public at large. Therefore, we address the first three elements of plaintiffs' defamation claim, namely that the statements were (1) false, (2) defamatory, and (3) of or concerning plaintiffs. We therefore turn to the facts as alleged in plaintiffs' complaint.

In support of the first element for defamation, that of falsity, plaintiffs argue that their complaint sets forth specific facts that, if true, demonstrate that defendants' advertisement misstated several fundamental facts. Specifically, the complaint alleged that, contrary to the stated facts of the advertisement, "Dan Boyce's law firm" did not exist in November of 1997, the time period during which, according to the advertisement, the law firm sued the state. Further, the complaint denied that "Dan Boyce's law firm" had ever "charg[ed] $28,000 an hour in lawyer fees[,]" as stated in the advertisement.

We conclude that plaintiffs set forth sufficient specific facts to support their claim that the statements made by defendants were false. If proven, the above-stated facts would show that defendants' advertisement contained several central errors of fact, publication of which tended to falsely imply that plaintiffs had sued the state and demanded excessive fees for their work at the expense of taxpayers. We next determine whether plaintiffs have set forth sufficient facts alleging defamation.

In North Carolina, the term defamation applies to the two distinct torts of libel and slander. Libel *per se* is "a publication which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace." *Phillips v. Winston-Salem/Forsyth County Bd. of Educ.*, 117 N.C. App. 274, 277, 450 S.E.2d 753, 756 (1994), *disc. review denied*, 340 N.C. 115, 456 S.E.2d 318 (1995). Slander *per se* is "an oral communication to a third party which amounts to (1) an accusation that the plaintiff committed a crime involving moral turpitude; (2) an allegation that impeaches the

plaintiff in his trade, business, or profession; or (3) an imputation that the plaintiff has a loathsome disease." *Id.* When the defamatory words are spoken with an intent that the words be reduced to writing, and the words are in fact written, the publication is both libelous and slanderous. *See Clark v. Brown*, 99 N.C. App. 255, 261, 393 S.E.2d 134, 137, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 675 (1990).

"[F]alse words imputing to a merchant or business man conduct derogatory to his character and standing as a business man and tending to prejudice him in his business are actionable, and words so uttered may be actionable *per se.*" *Badame v. Lampke*, 242 N.C. 755, 757, 89 S.E.2d 466, 468 (1955); *see also Ausley v. Bishop*, 133 N.C. App. 210, 214-15, 515 S.E.2d 72, 76 (1999) (holding that, where the plaintiff moved for summary judgment on the defendant's counterclaim for slander *per se*, there was sufficient evidence to support the defendant's claim where the defamatory statements made by the plaintiff had the capacity to adversely affect the defendant in his profession). In an action for libel or slander *per se*, malice and damages are deemed presumed by proof of publication, with no further evidence required as to any resulting injury. *See Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993).

Plaintiffs alleged in their complaint that the statements by defendants that "Dan Boyce's law firm" had "sued the state" and "charg[ed]" the taxpayers an hourly rate greater "than a police officer's salary" plainly and falsely accused plaintiffs of unethical billing practices in their profession. The complaint alleged that defendants' advertisement was defamatory *per se* in that it tended to "disparage Boyce & Isley, PLLC and its member attorneys' professional reputation and honesty in billing clients, and states that they engage in unethical conduct[,]" thereby depriving plaintiffs of the "respect, confidence and esteem essential to Plaintiffs' professional status in commerce and the business community." Further, plaintiffs alleged that such remarks were published in reckless disregard of their truth or falsity. Thus, argue plaintiffs, the complaint properly stated sufficient facts to support the claim that defendants' advertisement was defamatory.

Defendants argue that the advertisement was not defamatory in that the statements made therein are "reasonably susceptible of a non-defamatory interpretation." Defendants correctly note that, in order to be libelous *per se*, defamatory words "must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold

him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided." *Flake v. News Co.*, 212 N.C. 780, 786, 195 S.E. 55, 60 (1938). Whether a publication is libelous *per se* is a question of law for the court. *See Ellis v. Northern Star Co.*, 326 N.C. 219, 224, 388 S.E.2d 127, 130 (1990). When examining an allegedly defamatory statement, the court must view the words within their full context and interpret them "as ordinary people would understand" them. *Renwick v. News and Observer and Renwick v. Greensboro News*, 310 N.C. 312, 319, 312 S.E.2d 405, 409, *cert. denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984); *Flake*, 212 N.C. at 786, 195 S.E. at 60.

Defendants contend that the average person is familiar with the concept of contingency fees in the context of large class-action lawsuits and understands that attorneys are sometimes generously compensated for their participation in such suits. Defendants therefore argue that their assertion that "Dan Boyce's law firm" "charg[ed]" "more [per hour] than a policeman's salary" did not imply unethical conduct by plaintiffs or otherwise impugn them in their profession. On the contrary, defendants contend that such statements imply that plaintiffs are "highly-skilled, top-notch" attorneys who "play[] for big rewards[.]" According to defendants, plaintiffs' defamatory claim cannot stand without resorting to extrinsic facts and innuendo, thus rendering it "susceptible of a non-defamatory interpretation." We disagree.

Although we agree with defendants that "it is not libelous *per se* as a matter of law to state that an attorney sought a very large fee—not in the context of a $150 million class action lawsuit[,]" such is not the case here. Defendants' advertisement did not state that plaintiffs *sought* a very large fee—it stated that plaintiffs *charged* a very large fee. There is an important distinction between these two words, of which defendants, in crafting the text of their advertisement, were undoubtedly aware. The word "sought" or "seeking" indicates that plaintiffs submitted their request for compensation to the court. The fact that plaintiffs *sought* extraordinary compensation, moreover, does not imply that plaintiffs actually *received* such compensation. In contrast, the term "charged" or "charging" suggests that, not only did plaintiffs actually receive such compensation at the taxpayers' expense, they did so without deference to the court. Contrary to defendants' argument, we do not believe the average layperson to be so familiar with the intricacies of class-action lawsuits as to know that the courts must approve of attorney compensation in such suits.

Further, defendants' advertisement did not indicate that the case for which plaintiffs purportedly "charged" the taxpayers exorbitant fees was a large class-action lawsuit. Nor did it mention the term "contingency fees." Without this vital information to lend context to the facts as portrayed in the advertisement, the average viewer could not properly evaluate the claims being made by defendants against plaintiffs. Instead, the average viewer was left solely with the following information about plaintiffs: that they (1) sued the State; (2) charged (and therefore received) $28,000 per hour to taxpayers to do so; (3) that this sum represented more than a policeman's annual salary; and (4) that a judge had pronounced that plaintiffs' behavior "shocked the conscience." One does not have to "read between the lines" to discover the advertisement's defamatory content. *See Renwick*, 310 N.C. at 318, 312 S.E.2d at 409.

We hold that the allegedly false statements, when viewed through the eyes of an average person and in the context of the advertisement as a whole, are defamatory *per se*. Defendants' statements directly maligned plaintiffs in their profession by accusing them of unscrupulous and avaricious billing practices. Contrary to defendants' contentions, no innuendo or reference to ethical rules governing attorney conduct is necessary to conclude that the advertisement charged plaintiffs with committing contemptible business practices. *See Ellis*, 326 N.C. at 224, 388 S.E.2d at 130 (holding that the language in a letter by the defendant company, taken in the context of the entire letter, was defamatory, in that it accused the plaintiff company of committing an unauthorized act and so impeached the plaintiff company in its trade). Nor do we conclude that such accusations were ambiguous. We doubt that defendants intended their advertisement as a compliment to plaintiffs' skills and abilities as "top-notch" attorneys, and we do not conclude that the average person would otherwise interpret the advertisement in a non-derogatory fashion. *See McKimm v. Ohio Elections Comm.*, 89 Ohio St. 3d 139, 146, 729 N.E.2d 364, 372 (2000) (holding that, where a cartoon published by a candidate for political office unambiguously depicted the opposing candidate engaging in unlawful and unethical activity, such cartoon was not reasonably susceptible to more than one meaning and was thus defamatory), *cert. denied*, 531 U.S. 1078, 148 L. Ed. 2d 674 (2001).

Having determined that plaintiffs' complaint properly pled specific facts supporting the first two elements of defamation, we now examine whether the complaint supports the third element, namely that the defamatory statement was "of or concerning the plaintiffs." It

is well established that "[i]n order for defamatory words to be actionable, they must refer to some ascertained or ascertainable person and that person must be the plaintiff. If the words used contain no reflection on any particular individual, no averment can make them [defamatory]." *Arnold v. Sharpe*, 296 N.C. 533, 539, 251 S.E.2d 452, 456 (1979). For example, a defamatory statement accusing "someone" in a group of nine persons of misconduct will not support an action for defamation by a member of that group. *See Chapman v. Byrd*, 124 N.C. App. 13, 17, 475 S.E.2d 734, 737 (1996), *disc. review denied*, 345 N.C. 751, 485 S.E.2d 50 (1997). Where a statement defames a small group or class of persons in its entirety, however, any member of that class may pursue an action for defamation, despite the fact that the statement fails to specifically identify that particular individual. *See Carter v. King*, 174 N.C. 549, 553, 94 S.E. 4, 6 (1917) (holding that one of the members of an eleven-member jury could maintain a cause of action for libel where the defamatory statement imputed misconduct to the entire group); *see generally* Debra T. Landis, Annotation, *Defamation of Class or Group as Actionable by Individual Member*, 52 A.L.R. 4th 618 (1987) (discussing claims brought by individual members of a defamed group or class).

In the instant case, there is no dispute that the political advertisement reproduced in plaintiffs' complaint specifically identified the individual plaintiff R. Daniel Boyce. Defendants contend, however, that the reference to "Dan Boyce's law firm" in the advertisement does not identify the law firm of Boyce & Isley or its member attorneys. Thus, argue defendants, any defamatory statements contained in the advertisement did not concern plaintiffs other than R. Daniel Boyce. We disagree. The fact that the advertisement did not specifically name each present plaintiff does not bar their suit. *See Carter*, 174 N.C. at 552, 94 S.E. at 6. By claiming that "Dan Boyce's law firm" had committed unethical business practices, defendants maligned each attorney in the firm, of which there are only four. Moreover, we conclude that identification of the law firm of Boyce & Isley, PLLC, was readily ascertainable from the reference to "Dan Boyce's law firm." We therefore conclude that plaintiffs' complaint properly supported the fact that the defamatory statements were "of or concerning" plaintiffs.

Defendants argue that plaintiffs cannot succeed on their claim for defamation because they are public figures, and because defendants published their statements in the course of a political campaign. Defendants correctly note that a public figure may not prevail on a

claim for defamation unless he proves that the defamatory statements were made with actual malice. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 11 L. Ed. 2d 686, 706 (1964); *Gaunt v. Pittaway*, 139 N.C. App. 778, 785, 534 S.E.2d 660, 664-65 (2000), *cert. denied*, 534 U.S. 950, 151 L. Ed. 2d 261 (2001). A statement is made with actual malice where it is published "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.*, 376 U.S. at 279-80, 11 L. Ed. 2d at 706. "Under North Carolina law, an individual may become a limited purpose public figure 'by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy.' " *Gaunt*, 139 N.C. App. at 786, 534 S.E.2d at 665 (quoting *Taylor v. Greensboro News Co.*, 57 N.C. App. 426, 435, 291 S.E.2d 852, 857 (1982), *disc. review denied*, 307 N.C. 459, 298 S.E.2d 385 (1983)). Defendants offer no conclusive evidence, however, that all of the present plaintiffs are public figures, limited purpose or otherwise.

Furthermore, although plaintiff R. Daniel Boyce certainly qualifies as a public figure due to his candidacy for public office, plaintiffs alleged in their complaint that defendants acted with actual malice. Among other allegations, plaintiffs stated that they repeatedly informed defendants as to the alleged falsity of their statements, but that defendants continued to publish the offending advertisement. Moreover, contrary to defendants' arguments, "the actual-malice standard is not an impenetrable shield for the benefit of those who engage in false speech about public figures." *McKimm*, 89 Ohio St. 3d at 147, 729 N.E.2d at 373 (holding that there was sufficient evidence of record at trial to support a decision by the Ohio Elections Commission reprimanding a successful candidate for political office for his false and misleading political cartoon depicting the opposing candidate engaging in unethical behavior). The context of a political campaign does not alter the fact that

> "false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth." "The use of a known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

Id. (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75, 13 L. Ed. 2d 125, 133 (1964)) (citations omitted).

The allegations in plaintiffs' complaint sufficiently pled their claim of defamation by defendants to overcome a Rule 12(b)(6) motion to dismiss. *See Dockery v. Florida Democratic Party*, 719 So.2d 9, 11 (Fla. Dist. Ct. App. 1998) (holding that, where the husband of a candidate for political office filed a claim for defamation based on remarks made by the opposing candidate during the campaign, such complaint sufficiently alleged a cause of action for defamation such as to survive the defendants' motion to dismiss); *see also Pritt v. Republican National Committee*, 210 W. Va. 446, 453, 557 S.E.2d 853, 863 (2001) (holding that the plaintiff, an unsuccessful candidate for the office of governor, presented sufficient evidence to support her defamation claim for statements made about the plaintiff during the political campaign such that the trial court erred in granting summary judgment to the defendants). Whether or not plaintiffs may ultimately prevail on these claims is not a matter before this Court. *See Johnson*, 86 N.C. App. at 4, 356 S.E.2d at 381; *see also Dockery v. Florida Democratic Party*, 799 So.2d 291, 297 (Fla. Dist. Ct. App. 2001) (holding that the trial court correctly granted summary judgment to the defendants where the plaintiff failed to present sufficient evidence of his defamation claim). Because plaintiffs' complaint properly set forth the elements of a defamation claim, the trial court erred in dismissing this claim. *See Andrews*, 109 N.C. App. at 275, 426 S.E.2d at 432. We therefore turn to plaintiffs' next assignment of error.

[2] In their second assignment of error, plaintiffs contend that the trial court erred by dismissing their claim for unfair and deceptive trade practices. Plaintiffs argue that their defamation claim, if proven, properly supports a claim for unfair and deceptive trade practices by defendants. We agree.

At the outset, we note again the standard for granting a motion to dismiss. Plaintiffs' complaint would only be properly dismissed if it "[f]ail[ed] to state a claim upon which relief can be granted[.]" N.C. Gen. Stat. § 1A-1, Rule 12(b)(6).

A claim under section 75-1.1 of the North Carolina General Statutes requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant. *See Rawls & Assocs. v. Hurst*, 144 N.C. App. 286, 293, 550 S.E.2d 219, 224, *disc. review denied*, 354 N.C. 574, 559 S.E.2d 183 (2001). "[A] libel *per se* of a type impeaching a party in its business activities is an unfair or deceptive act in or affecting commerce in violation of N.C.G.S. § 75-1.1, which will justify

an award of damages . . . for injuries proximately caused." *Ellis*, 326 N.C. at 226, 388 S.E.2d at 131. Similarly, slander *per se* may constitute a violation of section 75-1.1. *See Ausley*, 133 N.C. App. at 216, 515 S.E.2d at 77. To recover, a plaintiff must have suffered actual injury as a proximate result of the deceptive statement or misrepresentation. *See Ellis*, 326 N.C. at 226, 388 S.E.2d at 131; *Ausley*, 133 N.C. App. at 216-17, 515 S.E.2d at 77.

We observe that, under section 75-1.1(b), the term "commerce" "includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession." N.C. Gen. Stat. § 75-1.1(b) (2001). Thus, professional services rendered by an attorney in the course of his business are exempt under the statute and may not form the basis of an unfair or deceptive trade practices claim. *See Sharp v. Gailor*, 132 N.C. App. 213, 217, 510 S.E.2d 702, 704 (1999). We do not read section 75-1.1(b), however, to preclude an attorney from *pursuing* an unfair and deceptive trade practices claim. Thus, the mere fact that plaintiffs are learned professionals whose business activities defendants maligned does not remove plaintiffs' claim for defamation outside of the scope of section 75-1.1.

As we have determined, plaintiffs in the instant case properly pled all of the elements for a libel *per se* claim. Moreover, the alleged libel impugned plaintiffs in their profession by accusing them of unethical business practices. Plaintiffs' complaint alleged that such behavior by defendants constituted unfair and deceptive trade practices and caused actual injury to plaintiffs. Thus, plaintiffs' complaint stated a claim for unfair and deceptive trade practices upon which relief may be granted. *See Ellis*, 326 N.C. at 226, 388 S.E.2d at 131 (holding that there was sufficient evidence presented to the jury to properly support an unfair and deceptive trade practices claim where such claim was based on libel *per se* impeaching the plaintiff in its business); *Ausley*, 133 N.C. App. at 216, 515 S.E.2d at 77 (holding that there was a sufficient forecast of evidence at summary judgment to properly support a claim under Chapter 75 where such claim was based upon slander *per se*).

Defendants argue that, as the objectionable statements were published during a political campaign, section 75-1.1 cannot apply. Defendants assert that such statements can have no effect on the consuming public, or the plaintiffs' business activities, and that the statements therefore are not within the purview of section 75-1.1. We do not agree.

We perceive no compelling grounds, nor do defendants advance such, to distinguish defamatory remarks concerning one's trade or profession made during the course of a political campaign from those made in some other forum. As noted *supra*, it is well established that a defamatory statement impeaching a business man in his trade or profession may constitute an unfair or deceptive act affecting commerce. *See Ellis*, 326 N.C. at 226, 388 S.E.2d at 131; *Ausley*, 133 N.C. App. at 216, 515 S.E.2d at 77. We disagree with defendants' argument that the context of a political campaign substantially alters the impact of such statements upon commerce. We note that the defamatory remarks published in *Ellis* and *Ausley* were published to a limited number of people. *See Ellis*, 326 N.C. at 222, 388 S.E.2d at 129 (defamatory letter published to "several buyers"); *Ausley*, 133 N.C. App. at 215, 515 S.E.2d at 76 (defamatory statement published to "several clients"). In contrast, plaintiffs alleged in the instant case that defendants' statements were published to "well over 1 million people[.]" If defamatory remarks concerning one's trade or profession affect commerce, as has been held, we fail to see how the context of a political campaign, with its wide-spread broadcast of such statements by multiple media, can *lessen* rather than *heighten* the impact upon commerce.

Because plaintiffs' complaint properly stated the elements of a claim for unfair and deceptive trade practices upon which relief may be granted, the trial court erred in dismissing this claim. It will be plaintiffs' substantial burden, as this case progresses, to provide sufficient evidence to support their claim that they have suffered actual injury as a result of defendants' actions. At this juncture, however, they are entitled to proceed with their claims.

We now examine defendants' assignment of error on appeal.

II. Defendants' Appeal

[3] By cross-appeal, defendants contend that the trial court erred by declining to take judicial notice of the order by the Board of Elections ("the Board") dismissing plaintiffs' complaint. Defendants also argue that the trial court should have taken judicial notice of various newspaper articles concerning the election campaign. Defendants argue that the findings and conclusions made by the Board, as well as the newspaper articles, provide an absolute defense to plaintiffs' claims. By failing to take judicial notice of such materials, argue defendants, the trial court deprived defendants of alternative bases supporting their motion to dismiss.

Rule 201 of the North Carolina Rules of Evidence governs judicial notice of adjudicative facts. *See* N.C. Gen. Stat. § 8C-1, Rule 201 (2001). Rule 201 does not address, however, judicial notice of legislative facts. *See id.*, commentary. Adjudicative facts are those involving the immediate parties, including "who did what, where, when, how, and with what motive or intent." *Id.*, commentary. "Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." *Id.* Legal conclusions are not the proper subject of judicial notice. *See Glenn-Robinson v. Acker*, 140 N.C. App. 606, 634, 538 S.E.2d 601, 620 (2000), *disc. review denied*, 353 N.C. 372, 547 S.E.2d 811 (2001).

In the instant case, defendants assert that, had the trial court taken judicial notice of the order of the Board of Elections, such order would have provided an unconditional affirmative defense to plaintiffs' claims. Specifically, defendants contend that the Board's order conclusively establishes that (1) defendants acted in good faith in publishing the advertisement and (2) the statements in the advertisement were true. We disagree.

The Board concluded that defendants' political advertisement did not "constitute criminal election activity under GS § 163-274(8)." As noted above, legal conclusions are legislative facts, and as such, are not properly subject to judicial notice under Rule 201. The trial court therefore correctly declined to take judicial notice of the Board's conclusion that plaintiffs did not violate section 163-274(8). Further, contrary to defendants' assertions, none of the Board's findings conclusively establishes an affirmative defense to plaintiffs' claims. Thus, even if judicial notice were proper, the Board's order, concluding that defendants did not commit criminal election activity, would not constitute an absolute bar to plaintiffs' tort claims against defendants. For example, the Board did not specifically find that defendants acted in good faith in publishing their advertisement. Rather, the Board found that defendants "asserted to the Board" that they acted in good faith. Similarly, the Board found that plaintiffs asserted that defendants acted "intentionally or recklessly." The Board's mere recital of arguments made by the parties before the Board does not resolve the issue of defendants' good faith such as to form the basis for collateral estoppel—it simply establishes that the parties made such arguments.

The Board's findings likewise fail to conclusively establish that defendants' advertisement, in its entirety, was true. The Board found

that, during the election campaign for the Office of Attorney General, "R. Daniel Boyce and others on his behalf had asserted that he was involved in all the tax cases that involved the Boyce family lawyers." The Board therefore concluded that, "[i]n view of R. Daniel Boyce's own campaign use of all the tax cases handled both by himself, G. Eugene Boyce, and other Boyce family members as positive campaign material[,]" defendants committed no illegal campaign activity. These findings by the Board suggest that it decided the case based on principles of fairness and estoppel rather than on the actual truth or falsity of the claims made in defendants' advertisement. Such findings and conclusions do not establish that all of the statements in defendants' advertisement were true. For example, plaintiffs alleged in their complaint that the Boyce & Isley law firm did not exist in 1997 and therefore could not have litigated the tax case for which, according to defendants' advertisement, it charged a fee of $28,000.00 per hour. Nothing in the Board's order addressed the existence or non-existence of the Boyce & Isley law firm. In fact, nothing in the Board's findings established that R. Daniel Boyce had litigated the tax case, only that he had asserted in his campaign materials that "he was involved" in such. Because the Board's findings do not conclusively establish that the statements in defendants' advertisement were true, such findings cannot serve as the basis for an absolute defense to plaintiffs' claims. We hold that the trial court did not err in declining to take judicial notice of the order by the Board of Elections.

We also conclude that the trial court did not err in refusing to take judicial notice of various newspaper articles submitted by defendants, none of which was relevant to testing the legal sufficiency of plaintiffs' complaint or provided the basis for a complete defense to plaintiffs' claims. We therefore overrule defendants' assignment of error.

In conclusion, plaintiffs' complaint presented a sufficient claim upon which relief could be granted for defamation and unfair and deceptive trade practices at the Rule 12(b)(6) stage. We therefore hold that the trial court erred in dismissing plaintiffs' complaint pursuant to Rule 12(b)(6). We further hold that the trial court did not err in declining to take judicial notice of extraneous matters. The order of the trial court is therefore

Affirmed in part and reversed in part.

Judges GREENE and McGEE concur.

MELANIE C. MILLER (NOW SIKES), PLAINTIFF v. TIMOTHY RAY MILLER, DEFENDANT

No. COA00-823

No. COA00-945

(Filed 17 September 2002)

1. **Child Support, Custody, and Visitation— support—unsigned consent order—prior signed memorandum of judgment—support not calculated**

   The trial court did not err in setting defendant's child support pursuant to a consent order that was not signed by defendant or his attorney where defendant had signed a prior memorandum of judgment which stated that the signatures of the parties on the formal judgment were not necessary. The prior memorandum of judgment settled the question of custody and provided that support was to be calculated according to the guidelines, but that amount had not been determined when the matter was heard for final judgment. A hearing was held and competent evidence was presented which supported the judge's use of the worksheets and his findings.

2. **Child Support, Custody, and Visitation— support—modification of temporary order—effective date of guidelines amount**

   The trial court properly followed the law in its 22 December 1999 order modifying a temporary child support order and did not abuse its discretion in setting 17 July 1998 as the effective date of increased child support pursuant to the child support guidelines where the temporary order provided for a certain amount of support to be paid until custody could be decided; the temporary order was terminated when the parties settled the issue of custody in a memorandum of judgment filed on 17 July 1988 which provided that child support was to be calculated pursuant to the child support guidelines; and the trial court held a hearing, determined that defendant father should pay a certain amount per week in child support under the guidelines, and set the date the memorandum of judgment was filed as the effective date of the guidelines amount of child support, with defendant being given credit for the payments made under the temporary order.

3. Child Support, Custody, and Visitation— support—contempt—findings supporting willfulness

The evidence fully supports the trial court's findings and conclusion that defendant was in willful contempt of a child support order where the court found that defendant had not made some payments, that defendant had and has the means to comply, and that defendant had presented no evidence as to why he should not be held in contempt.

4. Child Support, Custody, and Visitation— support—gainful employment ordered

A trial court did not err by ordering the defendant in a child custody action to remain gainfully employed where defendant requested that the child support payments be withheld from his wages.

Judge GREENE concurring in part and dissenting in part.

Appeal by defendant from judgment entered 22 December 1999 by Judge Mark S. Culler, and judgment entered 24 April 2000 by Judge Martin J. Gottholm in Davidson County District Court. Appeal by plaintiff from order of 16 November 1998. Plaintiff's appeal was dismissed on 2 October 2000 for failure to comply with Appellate Rule 12(b). The appeals were consolidated for hearing and are consolidated for purposes of this opinion. Heard in the Court of Appeals 14 August 2001.

No brief filed for the plaintiff-appellee.

C. Richard Tate, Jr. for defendant-appellant.

CAMPBELL, Judge.

Defendant appeals from two judgments of the trial court. COA00-823 is an appeal from the 22 December 1999 order for child support and counsel fees. COA00-945 is an appeal from the 24 April 2000 order finding defendant in contempt for not paying back child support in violation of the 22 December 1999 order. These appeals were consolidated for hearing.

COA00-823

As this appeal from the 22 December 1999 order is the last in a series of orders setting child custody and child support, it is necessary to set out the procedural history of this case so as to provide a clear understanding of defendant's argument.

Plaintiff and defendant were granted an absolute divorce on 24 April 1995. They had one child born of the marriage, Tyler Ray Miller, born 17 November 1989. On 24 February 1997, Judge Kimberly S. Taylor ("Judge Taylor") of the Davidson County District Court, issued an order for temporary child support. In her order, Judge Taylor stated: "no order has ever been entered regarding the custody of Tyler Ray Miller and an action is pending in Guilford County wherein defendant claims custody is to [be] determined." Judge Taylor went on to find the relative earnings of the parties, and using Worksheet A of the North Carolina Child Support Guidelines (which is used when the child is in the sole custody of one parent, here the plaintiff), determined that defendant should pay $124.00 per week in child support. In her order, Judge Taylor specifically stated that "[d]efendant shall pay $124.00 per week to the Plaintiff for the support and maintenance of Tyler Ray Miller as temporary child support until the custody of said child is determined in Guilford County." The action for child custody and child support that was pending in Guilford County was transferred to Davidson County, where, by agreement of the parties, it was then scheduled for court ordered mediation with R.B. Smith as the mediator.

The mediation conference was held on 7 July 1998. The mediator's report indicated that the parties had reached an agreement on all issues, and that a consent judgment was to be filed in the matter. The agreement reached by the parties during the mediation was embodied in a document entitled "Memorandum of Judgment/Order," also dated 7 July 1998, and set out the terms of custody agreement, granting each party joint custody and setting the schedule for when Tyler would be with each parent. In addition, there was a provision in paragraph 1, sub-paragraph (8) of the agreement which provided that the parties agreed that: "Child support to be calculated pursuant to child support guidelines." The agreement contained the following relevant stipulations, as set forth in paragraph 3 of AOC Form 220:

(a) With the signing of this Memorandum by the presiding judge, this Memorandum shall become a judgment/order of the court and shall be deemed entered pursuant to Rule 58 of the North Carolina Rules of Civil Procedure on the date filed with the Clerk;

(b) the provisions of this Memorandum are fair and reasonable and each party has had ample opportunity to obtain legal advice concerning the legal effect and terms of this Memorandum;

(c) this Memorandum is enforceable by the contempt powers of the court should any party not comply with its terms; [and]

. . . .

(f) signatures of the parties on the formal judgment/order are not necessary[.]

This agreement was signed by both plaintiff and defendant and their respective counsel. Both parties then acknowledged that they had read the agreement and stipulations, that they entered into the agreement voluntarily, and that they understood the legal effect of this agreement. The agreement was then signed by Judge Jack E. Klass ("Judge Klass") of the Davidson County District Court, and was filed on 17 July 1998.

Plaintiff's attorney subsequently drew up a proposed, formal consent order incorporating the custody provisions agreed to in the mediation. The issue of child support payments was left open as information regarding defendant's earnings was needed to complete the calculations. The proposed order and a request for defendant's financial information were mailed to defendant's attorney on or about 31 July 1998. There is nothing in the record to indicate that plaintiff's attorney received a response to the proposed order or to his request for defendant's financial information.

Plaintiff's attorney then issued a subpoena to defendant's employer to obtain defendant's wage information. After receiving this information, plaintiff's attorney drew up a revised formal consent order which included the calculations for child support pursuant to the child support guidelines. According to these calculations, defendant's child support payment was to be $170.00 per week.

Finally, after receiving no response to the revised order, plaintiff's attorney presented the revised order to the court with a request that the judge sign the order based on the Memorandum of Judgment/Order which had been filed 17 July 1998. On 10 September 1998, Judge James M. Honeycutt ("Judge Honeycutt") signed the revised consent order, but in response to a request from counsel for defendant, plaintiff's attorney delayed filing the revised agreement until defendant's counsel had an opportunity to review it. On 25 September 1998, having heard nothing further from defendant's counsel, plaintiff's attorney filed the revised order.

On 9 October 1998, defendant filed a motion to have the revised consent order set aside since the language of the order recited "and it appearing to the court from the signatures of the parties and their respective counsel subscribed below that the parties have reached an agreement at mediation on the matters [in] controversy and, with the consent of the parties," and that neither defendant nor his attorney had consented to the entry or filing of the order. Judge Honeycutt granted this motion with regard to the child support provisions in the order, but refused to set aside the provisions for child custody. Defendant then gave notice of appeal to this Court regarding the order, however, we held the appeal was interlocutory.

The final judgment regarding these issues, and the order from which defendant now appeals, was issued on 22 December 1999, by Judge Mark S. Culler ("Judge Culler"). Judge Culler held a hearing on the matter, wherein plaintiff testified and presented evidence of the parties' earnings, plaintiff's expenses, and the child's reasonable expenses (including medical and dental insurance).

After recounting the history of these proceedings in his order, Judge Culler made findings regarding the earnings and expenses of the parties. He also found that neither party had filed a motion to modify child support, and that the plaintiff was "still pursuing calculation of the child support based on the Child Support Guidelines effective as of the memorandum of judgment." In addition, Judge Culler found that defendant was continuing to make payments of $124.00 per week as required by the temporary child support order issued by Judge Taylor.

In his conclusions of law, Judge Culler stated that plaintiff was entitled to child support as calculated by the guidelines, and ordered defendant to pay $162.00 per week in child support. This figure was calculated by taking the figures presented at the hearing and by using Worksheet A from the child support guidelines, which indicated that defendant's support payment would be $701.99 per month. Judge Culler then took the $701.99 per month figure, multiplied it by twelve months, and then divided that number by 52 weeks to obtain the $162.00 weekly child support payment owed by defendant. However, in addition to setting defendant's existing child support payment at $162.00 per week, Judge Culler set the effective date as 17 July 1998—the filing date of the Memorandum of Judgment/Order. After giving defendant credit for the $124.00 per week payments he had made from 17 July 1998 to 22 December 1999, defendant was found to be approximately $4,148.00 in arrears.

[1] Although defendant lists thirty-eight separate assignments of error, all of these essentially constitute a single issue: whether under the 22 December 1999 order, the trial judge erred in setting defendant's child support payment at $162.00 per week.

Defendant contends that the "consent order" signed by Judge Honeycutt on 10 September 1998 was not signed by either defendant or his attorney, it lacked the necessary consent needed for a binding agreement (thereby making it void), and that for this reason, it should have been set aside in its entirety, leaving Judge Taylor's temporary child support order as the only order still in effect. Following this reasoning, and taking into consideration the fact that neither party filed a motion for a modification of child support, defendant concludes it was error for Judge Culler to hear evidence on the matter, and issue an order increasing defendant's child support and making the payments retroactive.

However, defendant ignores one crucial fact. Whereas we would agree with defendant that ordinarily "[a] consent judgment rendered without the consent of a party will be held inoperative in its entirety," *Overton v. Overton*, 259 N.C. 31, 37, 129 S.E.2d 593, 598 (1963), defendant's failure to sign the revised, formal consent order drafted by plaintiff's attorney and signed by Judge Honeycutt, does not obviate the fact that defendant did sign the Memorandum of Judgment/Order ("Memorandum") signed by Judge Klass. By signing the Memorandum, defendant agreed to all of the custody provisions which were then incorporated into the revised, formal consent order signed by Judge Honeycutt, as well as the provision in the Memorandum where defendant agreed that child support would be determined according to the child support guidelines.

Furthermore, the Memorandum stated that when signed by the presiding judge, it became an order of the court, and that the "*signatures of the parties on the formal judgment/order are not necessary.*" (Emphasis added.) Therefore, defendant had already consented to the custody portion of the order by virtue of consenting to the Memorandum.

This is not the case as to the portion of Judge Honeycutt's order requiring that defendant pay $170.00 per week in child support. Since defendant did not sign, and therefore did not consent to, the $170.00 per week child support payment stated in the revised, formal consent agreement signed by Judge Honeycutt, he was not bound by this provision. Furthermore, as no payment had been officially calculated in

the Memorandum of Judgment/Order, the only provision for child support in effect at the time was Judge Taylor's temporary support order requiring defendant pay $124.00 per week.

As pointed out above, however, Judge Taylor's order specifically stated that it was to remain in effect *until the custody of the child was determined.* (Emphasis supplied). Thus, when Judge Klass (based on defendant's consent) signed the Memorandum of Judgment/Order finally deciding the custody issue, it replaced Judge Taylor's temporary order as to custody.

Having resolved the issue of custody, the issue of child support remained to be decided. Under the provisions of the Memorandum, child support was to be calculated according to the child support guidelines, but no determination had been made. Therefore, when the matter came before Judge Culler, it was his duty to hear evidence on the issue, and to make a determination as to the amount of the child support. *See Crutchley v. Crutchley*, 306 N.C. 518, 524-25, 293 S.E.2d 793, 797-98 (1982). At the hearing on the matter of child support, there was evidence as to the parties' incomes, the expenses for the child, and plaintiff's expenses. Evidence of defendant's income was admitted in the form of a letter from defendant's employer, stating defendant's earnings, along with the cost of insurance for himself and the child. Judge Culler also heard testimony from plaintiff who stated that although the parties shared custody of the child, under their Memorandum of Judgment/Order, defendant had the child for fewer than 123 days out of the year.

Under the North Carolina Child Support Guidelines, three different worksheets are used in determining the amount of child support to be paid by each party. Worksheet A, entitled "Sole Custody," is to be used "when the obligee [plaintiff here] has physical custody of the child(ren) who are involved in the pending action for a period of time that is more than two-thirds of the year (more than 243 days per year)." N.C. Child Support Guidelines, 2001 Ann. R. N.C. 33, 47. Worksheet B, entitled "Joint or Shared Physical Custody," is to be used "when the parents share joint *physical* custody of the child(ren) for whom support is sought," and is limited to use where each parent has custody for more than one-third of the year, or in terms of days, where each parent has custody for more than 122 overnights per year. *Id.* at 49. Worksheet C, entitled "Split Custody," involves the situation where there is more than one child involved, and each parent has physical custody of at least one child. *Id.* at 51.

Therefore, in determining the amount of child support owed by defendant, the trial court was correct in using Worksheet A, since according to the evidence presented, defendant had physical custody of the child fewer than 123 days per year. Once child support is set in accordance with these worksheet guidelines, it "is conclusively presumed to be in such amount as to meet the reasonable needs of the child and commensurate with the relative abilities of each parent to pay support." *Buncombe County ex rel Blair v. Jackson*, 138 N.C. App. 284, 287, 31 S.E.2d 240, 243 (2000). This Court's review is limited to a consideration of whether there is sufficient competent evidence to support the findings of fact, and whether, based on these findings, the Court properly computed the child support obligations. *Hodges v. Hodges*, 147 N.C. App. 478, 482, 556 S.E.2d 7, 10 (2001). We conclude that there was competent evidence to support Judge Culler's findings.

[2] Defendant next contends that Judge Culler erred in awarding plaintiff a retroactive increase in the amount of child support payments by setting 17 July 1998 as the effective date of the application of the guidelines amount of child support. We disagree.

Retroactive child support consists either of "(1) child support awarded prior to the date a party files a complaint therefor, or (2) a retroactive increase in the amount provided in an existing support order." *Cole v. Cole*, 149 N.C. App. 427, 433, 562 S.E.2d 11, 14 (2002). As child support was not awarded prior to the date plaintiff filed her complaint, the present case deals only with the retroactive increase from the $124.00 child support payments ordered by Judge Taylor on 24 February 1997 to the $162.00 child support payments ordered by Judge Culler on 22 December 1999, which were held to be effective as of 17 July 1998.

Pursuant to N.C. Gen. Stat. 50-13.7(a), an "order of a court of this State for support of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested subject to the limitations of G.S. 50-13.10." Accordingly, a court does not have the authority to *sua sponte* modify an existing support order. *See Royall v. Sawyer*, 120 N.C. App. 880, 463 S.E.2d 578 (1995). In addition, "[m]odification of a support order cannot occur until the threshold issue of substantial change in circumstances has been shown." *Davis v. Risley*, 104 N.C. App. 798, 800, 411 S.E.2d 171, 173 (1991).

However, our Supreme Court has held that a district court may enter an interim order for child support which contemplates a per-

manent retroactive order will be entered at a later time and may require larger child support payments than required by the interim order. *Sikes v. Sikes*, 330 N.C. 595, 411 S.E.2d 588 (1992). The Court went further to hold that since no final determination had been made regarding the proper amount of child support, the child support order was temporary and was subsequently subject to modification. Finally, the Court held that the requisite showing of changed circumstances as set forth by *Ellenberger v. Ellenberger*, 63 N.C. App. 721, 306 S.E.2d 190, *rev'd on other grounds*, 309 N.C. 631, 308 S.E.2d 714 (1983), is not applicable until there is a determination of child support based upon the merits of the case. *Id.* at 599, 411 S.E.2d at 590.

In the case at bar, the order entered by Judge Taylor setting child support payments at $124.00 was temporary in nature. The language of the order identified it as a "temporary support order" and provided that the sum of $124.00 per week "should be paid as temporary child support until the custody of [Tyler Ray Miller] is heard and determined." It is evident from this language that the order was intended to be temporary. That is, rather than being a final determination as to the issue of child support, the order provided for a sum certain amount of support to be paid until custody could be decided. It is clear that Judge Taylor was contemplating the subsequent modification of child support, as the order provided that "[a]fter the custody of Tyler Ray Miller is heard and decided, if the parties cannot agree on child support in that action or if the Court does not decide on child support in that action, then in that event, either party shall have the right to seek modification of this order thereafter." The temporary nature of the order thus rendered it subject to subsequent modification by the court.

Furthermore, our Court has previously held that child support which is awarded "from the time a party files a complaint for child support to the date of trial is not 'retroactive child support,' but is in the nature of prospective child support representing that period from the time a complaint seeking child support is filed to the date of trial." *Taylor v. Taylor*, 118 N.C. App. 356, 361, 455 S.E.2d 442, 446 (1995), *rev'd on other grounds*, 343 N.C. 50, 468 S.E.2d 33 (1996). In the present case, the temporary child support order was terminated when the parties settled the issue of custody in the Memorandum of Judgment/Order filed 17 July 1998. Since the Memorandum failed to determine a sum certain amount of child support, the matter came before Judge Culler, who determined that under the guidelines

defendant owed $162.00 per week in child support. In setting 17 July 1998 as the effective date of the application of the guidelines amount of child support, Judge Culler was ordering prospective support, as the time period in question fell between the date plaintiff filed her complaint and the date of the hearing on the final determination of child support. Further, the judge credited defendant's payments of $124.00 per week from 17 July 1998 to 22 December 1999, against the $162.00 payment that should have been made during that period of time. We therefore conclude that the trial judge properly followed the law in modifying the temporary order for child support, and that he did not abuse his discretion in setting the effective date of the child support payments.

COA00-945

[3] In this appeal, defendant Timothy Ray Miller, appeals from judgment entered 24 April 2000, finding him in contempt for failure to pay child support as ordered by Judge Culler in the 22 December 1999 judgment.

Defendant first argues that since we should find the order appealed from in COA00-823 void (the 22 December 1999 order), we should accordingly find that the 24 April 2000 order finding him in contempt to be void. However, having found the prior order to be valid, we reject this contention.

Next, defendant asserts that the trial court did not make the findings of fact required by N.C. Gen. Stat. § 5A-23(e) (2001), entitled "Proceedings for civil contempt." N.C. Gen. Stat. § 5A-23 (e) reads in pertinent part: "[a]t the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a)." N.C. Gen. Stat. § 5A-21(a) (2001), in turn reads:

(a) Failure to comply with an order of a court is a continuing civil contempt as long as:

(1) The order remains in force;

(2) The purpose of the order may still be served by compliance with the order;

(2a) The noncompliance by the person to whom the order is directed is willful; and

> (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

Specifically, defendant argues that the trial court made no findings that defendant's conduct was "willful." In order to find that a defendant acted willfully, "the court must find not only failure to comply but that the defendant presently possesses the means to comply." *Teachey v. Teachey*, 46 N.C. App. 332, 334, 264 S.E.2d 786, 787 (1980) (quoting *Mauney v. Mauney*, 268 N.C. 254, 269, 150 S.E.2d 391, 394 (1966)). The standard of review we follow in a contempt proceeding is "limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law." *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288, 291 (1997).

Here, the trial court found that defendant was paying the $162.00 per week payment pursuant to the 22 December 1999 order, but that no payment had been made toward what the parties stipulated was the $3,108.00 in child support that would be owed from 17 July 1998 to 22 December 1999. Further, the trial court found that "defendant has had and presently has the means and ability to comply with the December 22, 1999 order." Defendant himself asked in open court that the trial court enter an order withholding the $162.00 per week child support from his wages. In addition, the trial court found "defendant presented no evidence as to why he should not be held in wilful [sic] contempt of court."

Based on the evidence and the trial court's findings, we conclude the record fully supports these findings and the trial court's conclusion that defendant was in willful contempt of the 22 December 1999 order.

We also find no merit in defendant's argument that the trial court's contempt order was unsupported by the evidence. The record is replete with evidence of defendant's income, his knowledge of the 22 December order, and his failure to comply with the portion of the child support order requiring defendant to pay $162.00 for the time period covering 17 July 1998 to 22 December 1999. This evidence fully supports the trial court's findings of fact and conclusions of law drawn therefrom, finding defendant in willful contempt.

[4] Defendant's final contention is that the trial court erred by ordering defendant to remain gainfully employed. Defendant argues that

"[f]or a parent who has been and is paying child support pursuant to our child support Guidelines or pursuant to an agreement or court order each week it is obviously none of the court's business whether or not such a parent is employed." Defendant contends the trial court does not have the authority to issue such an order. We disagree.

N.C. Gen. Stat. § 50-13.4(d1) (2001), specifically states that "[f]or child support orders initially entered on or after January 1, 1994, the immediate income withholding provisions of G.S. 110-136.5(c1) shall apply." In regards to immediate income withholding, N.C. Gen. Stat. § 110-136.5(c1) (2001), states that "[i]n non-IV-D cases in which a child support order is initially entered on or after January 1, 1994, an obligor is subject to income withholding immediately upon entry of the order." This is so, unless the trial court finds "good cause" not to require immediate income withholding, or the parties have reached a written agreement for an alternative arrangement. N.C. Gen. Stat. § 110-136.5(c1) (2001). Not only is there no finding of "good cause" which would allow defendant to be free from income withholding, but defendant in open court requested that the child support payments be withheld from his wages. In acceding to defendant's request without defendant making any showing of any other source of income from which these payments could be made, the trial court was within its prerogative to order defendant to remain gainfully employed to ensure payment of his child support obligation.

Affirmed.

Judge BRYANT concurs.

Judge GREENE concurs in the result in part and dissents in part in a separate opinion.

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

I agree with the majority's holding as to the validity of the memorandum of judgment/order (the memorandum) and the subsequent consent order (the formal order) and its decision to affirm Judge Culler's child support order but reach this conclusion using a different analysis. As to the majority's discussion of the trial court's contempt order, I dissent.

I

Temporary Order

In a recent opinion, this Court held that a temporary order for child custody may convert into a final order "when neither party request[s] the calendaring of the matter [addressed in the temporary order] for a hearing within a reasonable time after the entry of the [temporary] [o]rder." *LaValley v. LaValley*, — N.C. App. —, —, 564 S.E.2d 913, 915 (2002). In *LaValley*, this Court deemed the passage of twenty-three months between the entry of the temporary order and the filing of the plaintiff's motion in the cause seeking modification of the prior order unreasonable and concluded the temporary order had converted into a final order requiring the trial court to employ a substantial change of circumstances test. *Id.* at —, 564 S.E.2d at 915.

In this case, the temporary order was signed by Judge Taylor on 24 February 1997. In May 1998, the parties agreed to a mediated settlement conference on the issues of child custody and child support, and the trial court entered an order to this effect filed 8 May 1998. Subsequent to the mediated settlement conference, the parties and the trial court signed the memorandum, which was filed 17 July 1998. The formal order was filed 25 September 1998 and was followed by Judge Honeycutt's order filed 16 November 1998 granting defendant's Rule 60 motion as to child support and Judge Culler's order filed 22 December 1999 from which defendant appeals. The record thus reflects a reasonable effort by the parties to move the case along and resolve the issues of child custody and child support. Accordingly, the temporary nature of Judge Taylor's order was preserved, obviating the need to make any findings regarding a substantial change of circumstances prior to assessing child support.

II

Memorandum Issues

A

Interplay between Memorandum and Formal Order

The memorandum signed by the parties and the trial court and filed 17 July 1998 contemplated the entry of a subsequent formal order that was to reflect the agreement contained in the memorandum. If such a formal order is identical in its terms and provisions to the memorandum, it is deemed valid. *Buckingham v. Buckingham*,

134 N.C. App. 82, 87-88, 516 S.E.2d 869, 874, *disc. review denied*, 351 N.C. 100, 540 S.E.2d 353 (1999). While the formal order constitutes a valid order, it is, however, "merely surplusage" to the memorandum. *Id.* at 88, 516 S.E.2d at 874. The memorandum is the court document that represents the final judgment on the issues contained therein. *Id.* at 87, 516 S.E.2d at 874. In this case, the formal order was identical to the memorandum in respect to the issue of child custody and therefore valid as to this issue. As the formal order differed from the memorandum in respect to child support, the trial court properly set aside that part of the formal order upon motion by defendant.

B

Consent Requirement

Defendant argues the memorandum is invalid because the trial court never met with the parties and thus failed to examine the parties as required by *Tevepaugh v. Tevepaugh*, 135 N.C. App. 489, 521 S.E.2d 117 (1999). I disagree.

The memorandum includes a statement, signed by the trial court, attesting the trial court had read the terms of the agreement to the parties, inquired as to the voluntary nature of the parties' agreement and their understanding thereof, and informed the parties of the legal effect of the memorandum. There is no evidence in the record to refute this statement. Accordingly, defendant's argument is without merit.[1]

III

Contempt

Defendant further contends the trial court failed to make any findings that defendant's conduct was willful.

> In contempt proceedings, the trial court's findings of facts are conclusive on appeal when supported by competent evidence. The element of willfulness is required for a finding of civil contempt . . . . Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so.

Sowers v. Toliver, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002).

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1. The majority further discusses the calculation and the retrospective nature of the child support awarded by Judge Culler. As these issues were not argued in defendant's brief to this Court, I would not address them. *See* N.C.R. App. P. 28(a).

In this case, the trial court found "defendant has had and presently has the means and ability to comply with the [child support] order," but the trial court failed to make a finding as to whether defendant's failure to comply with the order was "deliberate and intentional." The trial court merely found "defendant [had] presented no evidence as to why he should not be held in wil[l]ful contempt of court." For the reasons stated in the dissent in *Shumaker v. Shumaker*, 137 N.C. App. 72, 527 S.E.2d 55 (2000) (Greene, J., dissenting in part), this constituted an improper assignment to defendant of the burden of proof on the issue of willfulness. Instead, it was the trial court's duty to make a finding whether defendant's failure to comply with the order was indeed "deliberate and intentional." Without such an additional finding there is no support for the trial court's conclusion that defendant was in willful contempt. *See Sowers*, 150 N.C. App. at 118, 560 S.E.2d at 596.[2]

In summary, I agree with the majority's decision to affirm (1) Judge Honeycutt's denial of defendant's motion to set aside the formal order as it relates to child custody and (2) Judge Culler's child support order but believe the contempt order must be reversed.

JONATHAN KEITH EVANS, PLAINTIFF v. JOSEPH S. EVANS AND HAROLD KEITH EVANS, D/B/A EVANS FARMS, WESTERN OIL FIELD SUPPLY COMPANY, D/B/A LAKE COMPANY, CUSTOM STAMPING & MFG. CO., BROCK TRACTOR & EQUIPMENT CO., INC., AND LEE TRACTOR CO., INC., D/B/A LEE TRACTOR OF ROCKY MOUNT, DEFENDANTS

No. COA01-1022

(Filed 17 September 2002)

1. Products Liability— failure to warn—directed verdict

The trial court did not err in a products liability case arising from injuries sustained from an alleged defective clamp used on an irrigation system by granting a directed verdict for defendant manufacturer on the issue of failure to warn, because plaintiff failed to proffer any evidence that defendant's failure to provide the warnings was the proximate cause of plaintiff's injuries.

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2. I would further note the trial court erred in ordering defendant to "remain gainfully employed." It is well established that a person can be found in contempt of a child support order for his failure to pay court-ordered support. *See id.* The trial court, however, cannot dictate the source of the funds from which child support is to be paid.

2. Products Liability; Warranties— breach of implied warranty of merchantability—directed verdict

The trial court did not err in a products liability case arising from injuries sustained from an alleged defective clamp used on an irrigation system by granting a directed verdict for defendant manufacturer on the issue of breach of implied warranty of merchantability, because: (1) plaintiff's evidence did not eliminate other possible causes of the accident and provided no basis for an inference that such an accident would not occur absent a manufacturing defect; and (2) there were no facts tending to show that a defect existed when the clamp left the manufacturer.

3. Products Liability— requested instruction—duty regarding design

The trial court did not err in a products liability case arising from injuries sustained from an alleged defective clamp used on an irrigation system by failing to give plaintiff's requested instruction on defendant manufacturer's duty to exercise reasonable care regarding the design of the clamp and instead instructing that a manufacturer is under a duty to make reasonable efforts to correct design defects about which it knows or should have known, because: (1) N.C.G.S. § 99B-6(a) does not impose a duty of design on the manufacturer, and plaintiff failed to proffer evidence that defendant was in fact the designer of the clamp as well as the manufacturer of the clamp; and (2) although a witness's testimony may show that the clamp's designer acted unreasonably in the design, it does not show that defendant was the clamp's designer.

Judge GREENE concurring in the result.

Appeal by plaintiff from judgment and order entered 17 May 2001 by Judge Cy A. Grant, Sr., in Nash County Superior Court. Heard in the Court of Appeals 14 May 2002.

Gibbons, Cozart, Jones, Hughes, Sallenger & Taylor, by W. Earl Taylor, Jr. and Andrew J. Whitley, for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Donald F. Lively, for defendant-appellee Custom Stamping & Mfg. Co.

HUDSON, Judge.

Jonathan Keith Evans ("plaintiff") appeals a judgment entered in favor of Custom Stamping and Manufacturing Company, Incorporated ("Custom"), and an order denying his motion for a new trial. For the reasons given below, we affirm.

Plaintiff was injured when a clamp failed on an irrigation system while he was working for Evans Farms, a farming business owned by his father and uncle. Some part of the irrigation assembly, or possibly water at high pressure, struck plaintiff in the face, causing serious, permanent injuries, including blindness in both eyes. Neither plaintiff's father nor his uncle, who were both working nearby when the accident occurred, saw what happened. Plaintiff does not remember anything about the incident.

Plaintiff filed a complaint against Evans Farms and Western Oil Field Supply, d/b/a Lake Company ("Lake Company"). Plaintiff later amended his complaint to add additional defendants, of which Custom is one. Custom manufactured the clamp at issue for Lake Company, which was the clamp's retailer. Prior to trial, plaintiff's claims against all defendants except Custom were either dismissed or settled, and the case proceeded to trial only against Custom.

Plaintiff's claims against Custom included failure to give adequate warnings; breach of implied warranty of merchantability; and negligence in the design of the clamp. Dr. Anand David Kasbekar testified for plaintiff as an expert witness in the field of mechanical engineering and material science and in the field of failure analysis of metallic components. He testified that, due to its construction, the clamp deformed with use, as a result of which the clamp could appear to be securely closed but then "flop open." Dr. Kasbekar opined that the deformation of the clamp occurred as a result of being closed around a part that was slightly too big or around parts that were not properly aligned. Additional testimony of relevance here was that of David Stout, the president of Custom, who testified to the nature of Custom's business. We discuss the testimony in further detail below.

At the close of all the evidence, Custom moved for directed verdict, and the trial court granted Custom's motion on the issues of failure to give adequate warnings and breach of implied warranty of merchantability. The trial court did not give the specific instruction that plaintiff requested on the duty of a manufacturer with respect to

design. The jury returned a verdict finding that plaintiff was not injured by the negligence of Custom. Plaintiff moved for a new trial. The trial court entered judgment in favor of Custom and denied plaintiff's motion for a new trial. Plaintiff now appeals.

In his first two assignments of error, plaintiff contends that the trial court erred by granting directed verdicts for Custom on plaintiff's claims for failure to provide adequate warnings and breach of implied warranty of merchantability. "On appeal from a directed verdict, this Court must determine whether there is substantial evidence of each essential element of a plaintiff's claim." *Horack v. Southern Real Estate Co. of Charlotte, Inc.*, 150 N.C. App. 305, 314, 563 S.E.2d 47, 53 (2002). "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). On a motion for a directed verdict at the close of all evidence, "the trial court must determine whether the evidence, when considered in the light most favorable to the nonmovant, is sufficient to take the case to the jury." *Southern Bell Tel. & Tel. Co. v. West*, 100 N.C. App. 668, 670, 397 S.E.2d 765, 766 (1990), *aff'd*, 328 N.C. 566, 402 S.E.2d 409 (1991). "The court should deny a motion for directed verdict when there is more than a scintilla to support plaintiffs' prima facie case. 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 submit the case to the jury." *Edwards v. West*, 128 N.C. App. 570, 573, 495 S.E.2d 920, 923 (citation omitted), *cert. denied*, 348 N.C. 282, 501 S.E.2d 918 (1998).

[1] The General Assembly has created special proof requirements in a cause of action for the failure to give an adequate warning in a product liability case:

> (a) No manufacturer or seller of a product shall be held liable in any product liability action for a claim based upon inadequate warning or instruction unless the claimant proves that the manufacturer or seller acted unreasonably in failing to provide such warning or instruction, that the failure to provide adequate warning or instruction was a proximate cause of the harm for which damages are sought, and also proves one of the following:
>
> (1) At the time the product left the control of the manufacturer or seller, the product, without an adequate warning or instruction, created an unreasonably dangerous condition that the manufacturer or seller knew, or in the exercise of ordinary

care should have known, posed a substantial risk of harm to a reasonably foreseeable claimant.

(2) After the product left the control of the manufacturer or seller, the manufacturer or seller became aware of or in the exercise of ordinary care should have known that the product posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances.

N.C. Gen. Stat. § 99B-5(a) (2001). Plaintiff argues that the testimony of Dr. Kasbekar regarding warnings was sufficient to address these requirements and send the claim to the jury. Dr. Kasbekar testified as follows regarding warnings:

A. There should be some warning on this clamp, some warning to indicate to the user the severity of the hazard should it fail, and also a warning to tell the user when the clamp is worn and should be discarded, if that's the manufacturer's position that these will wear out and should be discarded at some point.

Obviously there's not enough room on this clamp to have a lot of specific instructions, at least not big enough that someone could read them. So the practice I would suggest would be to warn of the severity of the hazard, which, in my opinion, would be severe or fatal injury, at least with a high pressure irrigation system, and to instruct the user to either contact the manufacturer or refer him to a booklet provided by the manufacturer to let him know how the clamp should be applied, how to inspect the clamp properly if that needs to be done to prevent this type of situation.

I think the other witness had testified that if he knew that the clamp was doing this (illustrating) that he wouldn't have used it. But if these are sitting in an open position on your truck and you go to grab one and you place it around an object and either do the—

. . . .

—either due to misalignment of the hasp or misalignment of the fittings or a fitting that's a couple tenths of an inch bigger than it should be, you go to close it and it closes in a secure manner, then you have no idea that that clamp is actually loose. If you are

> instructed that before you apply this clamp you should always join it together and line up the hasp and turn it upside down to make sure that it's functioning properly, that would probably eliminate that.

Additionally, Dr. Kasbekar testified that

> if it is the manufacturer's intent for this clamp only to be used with components supplied by the manufacturer or certain brands of components, then I think that should be stated somewhere on the clamp because what I learned, talking with other experts in the area and doing some research on my own, is that there are six inch irrigation fittings and there's actually six inch fittings that are slightly smaller and some that are slightly bigger.
>
> And, in fact, one of the clamps that we were provided with turns out to have a quarter inch smaller diameter than the subject clamp although it's still called a six inch clamp. And when you've got things that may vary by a quarter of an inch but it takes less than a quarter of an inch to totally deform the clamp so it's no longer useable, you've got a potential problem.

Assuming without deciding that there was sufficient evidence to create a jury question on whether Custom acted unreasonably in failing to provide these warnings, plaintiff proffered no evidence that Custom's failure to provide the warnings was the proximate cause of plaintiff's injuries. Therefore, we conclude that plaintiff failed to provide "substantial evidence of each essential element of [his] claim." *Horack*, 150 N.C. App. at 314, 563 S.E.2d at 53. Accordingly, the trial court did not err by directing a verdict for Custom on this claim.

[2] Plaintiff also argues that the trial court erred by directing a verdict for Custom on the issue of whether Custom breached the implied warranty of merchantability. The Uniform Commercial Code, as adopted in North Carolina, provides:

> (1) Unless excluded or modified (G.S. 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. . . .
>
> (2) Goods to be merchantable must be at least such as
>
> (a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

N.C. Gen. Stat. § 25-2-314 (2001). This Court has stated that

> an action for breach of implied warranty of merchantability under G.S. § 25-2-314 (and all other analogous state enactions of U.C.C. 2-314) entitles a plaintiff to recover without any proof of negligence on a defendant's part where it is shown that (1) a merchant sold goods, (2) the goods were not "merchantable" at the time of sale, (3) the plaintiff (or his property) was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller.

Reid v. Eckerds Drugs, Inc., 40 N.C. App. 476, 480, 253 S.E.2d 344, 347, *disc. review denied*, 297 N.C. 612, 257 S.E.2d 219 (1979).

The North Carolina Supreme Court has recently clarified how a plaintiff may present a *prima facie* case for the jury on breach of an implied warranty of merchantability, when the evidence is circumstantial. *Dewitt v. Eveready Battery Co., Inc.*, 355 N.C. 672, 565 S.E.2d 140 (2002). The Court noted the following:

> In some cases, the plaintiff may be able to prove that the product suffered from a specific defect by producing expert testimony to explain to the jury precisely how the product was defective and how the defect must have arisen from the manufacturer or seller. In cases of a manufacturing defect, such expert testimony is certainly desirable from the plaintiff's perspective, but it is not essential. The plaintiff, even without expert testimony articulating the specific defect, may be able to convince a

> jury that the product was defective when it left the seller's hands by producing circumstantial evidence. Such circumstantial evidence includes (1) the malfunction of the product; (2) expert testimony as to a variety of *possible* causes; (3) the timing of the malfunction in relation to when the plaintiff first obtained the product; (4) similar accidents involving the same product; (5) elimination of other possible causes of the accident; and (6) proof tending to establish that the accident does not occur absent a manufacturing defect.

Id. at 687-88, 565 S.E.2d at 149-50 (emphasis by the Court) (citation omitted).

Plaintiff argues that the clamp was "being used for its intended purposes in a normal way," when it failed, and therefore it must not have been "fit for the ordinary purposes for which such goods are used." N.C.G.S. § 25-2-314(2). Although we do not believe that the plaintiff must produce evidence of every factor mentioned in *Dewitt*, we believe that we may refer to these factors if they help us to determine whether the plaintiff's circumstantial evidence as a whole satisfies the requirements of the statute. Applying the factors in *Dewitt* here, we conclude otherwise.

Joseph Stevens Evans, plaintiff's father, testified that the clamp involved here had been in use in the farm's irrigation system for two or three years. Plaintiff presented no evidence that this clamp was manufactured any differently from the other clamps Custom manufactured. David Stout, Custom's president, testified that since 1972, Custom has made approximately 300,000 clamps per year similar to the one at issue here. Prior to plaintiff's accident, Stout had never received any complaints from his customers about defects in the clamps. Dr. Ronald Sneed, plaintiff's expert witness in the field of agricultural engineering, acknowledged on cross-examination that the clamp did not violate any industry custom or standard that he knew about, and that it would pass in the irrigation industry as a merchantable clamp.

However, plaintiff's evidence did not eliminate other possible causes of the accident, and provided no basis for an inference that such an accident would not occur absent a manufacturing defect. Reviewing the plaintiff's evidence as a whole, and by reference to the *Dewitt* factors, we conclude that even if the evidence tended to establish the first two factors, it did not support an inference of any of the last four, or of any other fact tending to show a defect existed when

the clamp left the manufacturer. Thus, we conclude that plaintiff failed to produce "substantial evidence of each essential element of [his] claim," in that his evidence does not tend to establish a defect at the time of sale. *Horack*, 150 N.C. App. at 314, 563 S.E.2d at 53. Accordingly, the trial court did not err by directing a verdict for Custom on this claim.

[3] In his third and final assignment of error, plaintiff contends that the trial court erred by refusing to give his requested instruction on Custom's duty regarding the design of the clamp. Our legislature has provided that:

> No manufacturer of a product shall be held liable in any product liability action for the inadequate design or formulation of the product *unless the claimant proves that* at the time of its manufacture *the manufacturer acted unreasonably in designing* or formulating the product, that this conduct was a proximate cause of the harm for which damages are sought, and also proves one of the following:
>
> (1) At the time the product left the control of the manufacturer, the manufacturer unreasonably failed to adopt a safer, practical, feasible, and otherwise reasonable alternative design or formulation that could then have been reasonably adopted and that would have prevented or substantially reduced the risk of harm without substantially impairing the usefulness, practicality, or desirability of the product.
>
> (2) At the time the product left the control of the manufacturer, the design or formulation of the product was so unreasonable that a reasonable person, aware of the relevant facts, would not use or consume a product of this design.

N.C. Gen. Stat. § 99B-6(a) (2001) (emphasis added).

Plaintiff requested the following instruction:

> A manufacturer of a product, such as a ring lock clamp, is under a duty to those who use its product to use reasonable care in the manufacture and inspection of the product so as to not subject a person to injury from a latent defect. A manufacturer is also under a duty to those who use its product to exercise that degree of care in its:

> (1) design of the product;
>
> (2) manufacture of the product;
>
> (3) selection of materials;
>
> (4) assembly process; and
>
> (5) inspection of the product
>
> that a reasonable and prudent person would use under the same or similar circumstances to protect others from injury.
>
> A manufacturer's failure to use reasonable care is negligence.

The court gave the following instruction:

> Now, members of the jury, a manufacturer of a product such as a ring lock clamp, is under a duty to those who use its product to use reasonable care in the manufacture and inspection of the product so as not to subject a person to injury from a latent defect. A manufacturer is also under a duty to those who use its product to exercise that degree of care in its manufacture of the product, selection of materials, assembly process, and inspection of the product, that a reasonable and prudent person would use under the same or similar circumstances to protect others from injury. A manufacturer's failure to use reasonable care is negligence.
>
> A manufacturer is also under a duty to make reasonable efforts to correct design defects about which it knows or should have known.

Thus, the trial court omitted plaintiff's requested instruction that a manufacturer is under a duty to exercise reasonable care in the design of a product, instructing instead that a manufacturer is under a duty to make reasonable efforts to correct design defects about which it knows or should have known. Our Supreme Court has explained:

> When charging the jury in a civil case it is the duty of the trial court to explain the law and to apply it to the evidence on the substantial issues of the action. If a party contends that certain acts or omissions constitute a claim for relief or a defense against another, the trial court must submit the issue with appropriate instructions if there is evidence which, when viewed in the light most favorable to the proponent, will sup-

> port a reasonable inference of each essential element of the claim or defense asserted.

Cockrell v. Cromartie Transport Co., 295 N.C. 444, 449, 245 S.E.2d 497, 500 (1978) (citations omitted). Plaintiff argues that the court's version of the instruction was inadequate because the jury may have understood this instruction to impose on Custom only a duty to correct a design defect after it is discovered, rather than a duty to design the clamp correctly in the first instance. Plaintiff's assertion, however, is not supported by law, as N.C.G.S. § 99B-6(a) does not impose a duty of design on the manufacturer. Rather, *if* the manufacturer designs the product, then it has a duty to use reasonable care in the design. Plaintiff did not proffer evidence to show that Custom was in fact the designer of the clamp, as well as the manufacturer, of the clamp. In fact, the evidence adduced at trial tends to show that Custom did not design the clamp.

Plaintiff argues that Dr. Kasbekar's testimony constituted evidence in support of the instruction he requested regarding the design of the clamp. In particular, Dr. Kasbekar testified that the clamp was "underdesigned." He testified that "if the clamp had been properly designed and constructed such that you didn't end up with this condition (illustrating), then, more likely than not the clamp would have held the two pieces together and this accident wouldn't have happened." Dr. Kasbekar explained that, due to the materials used in the parts of the clamp, the latch plate could become deformed, which caused, in part, the clamp to become loose. Additionally, other parts of the clamp were subject to wear and deformation. Finally, the clamp became loose because the spring stretched and elongated. Dr. Kasbekar testified that, in his opinion, this happened because the spring was not strong enough. Once the clamp is deformed, Dr. Kasbekar explained, "after it's clamped it will simply flop open." Dr. Kasbekar testified to his opinion that the spring and latch plate were not "strong enough to prevent permanent deformation or stretching of the two materials, either the spring indenting the latch plate or the spring itself stretching. A different type of material would probably prevent that, or a larger diameter spring may also prevent that." Dr. Kasbekar testified further that, in his opinion, the clamp should have contained a secondary locking device so that, if the spring mechanism failed, the clamp could not open; plaintiff's uncle attached such a device to the clamps after the accident.

This evidence may show that the clamp's designer acted unreasonably in the design. It does not show, however, that Custom was the

clamp's designer. Dr. Kasbekar testified that the selection of material was part of the design of the clamp. David Stout, Custom's president, testified as follows:

> Q. Tell the jury what your contract was with Lake Company for making these clamps.
>
> A. Our contract was to make clamps that looked like the clamp that they showed us, subject to the alterations that they requested.
>
> Q. All right. Who decided what kind of metal to make the clamps out of?
>
> A. Lake Company did.
>
> Q. Who decided what kind of metal to make the latch plate and the bale spring out of?
>
> A. Lake Company.
>
> Q. Did they come in and give you specifications for it, or a sample, or what?
>
> A. They gave us a sample of the ring lock and said we want you to do this the same way.
>
> Q. So, on what basis did you decide what materials to buy to make the clamp out of?
>
> A. We got the same materials that were incorporated in the other clamp.

Stout testified further that his company was approached by other irrigation equipment manufacturers. These other manufacturers "[said] basically the same thing the Lake Company did. 'We want a ring lock like the Western ring lock, only we need a little bit different configuration or diameter of the band itself . . . .' They all wanted the same locking mechanism." Stout testified that all the manufacturers wanted the clamp to be manufactured from the same materials as used in the Lake Company clamp. He emphasized that "We don't do design." Additionally, Stout testified as follows:

> Q. How many of [the manufacturers] asked you to put a secondary locking device like the one that Steve Evans designed?
>
> A. None.

> Q. What would you have done if they had asked you to put on a secondary locking device like the one that Steve Evans' [sic] designed?
>
> A. If they'd specked it out, I would have quoted it.
>
> Q. And what would have been the result to you?
>
> A. It would be like getting another job; we would be paid for that.

Stout's testimony indicates that Custom did not design the clamp and that Custom did not select the material from which the clamp was made. Custom merely followed the specifications given to it by Lake Company. There was no evidence presented to contradict this testimony, nor any evidence to suggest that Custom was the designer of the clamp. In fact, plaintiff's counsel asked Stout on cross examination if he knew who had designed the clamp, and Stout identified "an engineer who worked for Western Irrigation in the late '60s" as the one who "came up with the original design."

We conclude that there is no evidence to show that Custom designed the clamp. Accordingly, the law and evidence do not support the instruction that plaintiff requested, and it was not error for the trial court to refuse to give the instruction.

In summary, the superior court did not err by granting a directed verdict for Custom on the issues of failure to warn and breach of implied warranty of merchantability, or by failing to give plaintiff's requested design instruction. Accordingly, we affirm the judgment and the order denying plaintiff's motion for a new trial.

Affirmed.

Judge BIGGS concurs.

Judge GREENE concurs in the result with a separate opinion.

GREENE, Judge, concurring in the result.

I agree with the majority that the trial court properly granted Custom's motion for a directed verdict as to plaintiff's claims for failure to provide adequate warnings and breach of the implied warranty of merchantability but reach this conclusion using a different analysis.

Failure to Warn

Pursuant to N.C. Gen. Stat. § 99B-5(a), a defendant in a product liability action will not be held liable for inadequate warning or instruction unless the claimant shows: (1) "the manufacturer or seller acted unreasonably in failing to provide such warning or instruction," (2) "the failure to provide adequate warning or instruction was a proximate cause of the harm for which damages are sought," and (3) either section 99B-5(a)(1) or 99B-5(a)(2) has been satisfied. N.C.G.S. § 99B-5(a) (2001). Section 99B-5(a)(1) applies where the manufacturer or seller becomes aware of the need to warn or instruct while the product is still in its control and provides:

> At the time the product left the control of the manufacturer or seller, the product, without an adequate warning or instruction, created an unreasonably dangerous condition that the manufacturer or seller knew, or in the exercise of ordinary care should have known, posed a substantial risk of harm to a reasonably foreseeable claimant.

N.C.G.S. § 99B-5(a)(1) (2001). Section 99B-5(a)(2) deals with the scenario in which the manufacturer or seller only becomes aware of the need to warn or instruct after the product has left its control. *See* N.C.G.S. § 99B-5(a)(2) (2001). Under this section, the claimant must further prove that:

> [a]fter the product left the control of the manufacturer or seller, the manufacturer or seller became aware of or in the exercise of ordinary care should have known that the product posed a substantial risk of harm to a reasonably foreseeable user or consumer and failed to take reasonable steps to give adequate warning or instruction or to take other reasonable action under the circumstances.

Id.

In this case, plaintiff presented no evidence that the clamp, when it left Custom's control, created an unreasonably dangerous condition that Custom "knew, or in the exercise of ordinary care should have known, posed a substantial risk of harm" to plaintiff. *See* N.C.G.S. § 99B-5(a)(1). Furthermore, Custom's president testified that since it started producing clamps, Custom had not received any complaints from customers about its clamps prior to plaintiff's accident. Thus, there is no evidence under section 99B-5(a)(2) that after the clamp in question left Custom's control, Custom "became aware

of or in the exercise of ordinary care should have known that the product posed a substantial risk of harm" to plaintiff. As plaintiff failed to provide substantial evidence of the elements listed in either section 99B-5(a)(1) or (2), the trial court properly granted Custom's motion for a directed verdict on plaintiff's failure to warn claim. *Cobb v. Reitter* 105 N.C. App. 218, 220, 412 S.E.2d 110, 111 (1992) (standard of review on appeal from a directed verdict).

Implied Warranty of Merchantability

I disagree with the majority's implication that a plaintiff seeking to show a breach of the implied warranty of merchantability must offer evidence as to each factor listed in *Dewitt v. Eveready Battery Co., Inc.* to survive a motion for a directed verdict. In order to establish a breach of the implied warranty of merchantability, a plaintiff must prove that: (1) the product bought and sold was subject to an implied warranty of merchantability; (2) the product did not comply with the warranty because it was defective at the time of sale; (3) the plaintiff's injury was due to the defective nature of the product; and (4) plaintiff suffered damages as a result. *Dewitt v. Eveready Battery Co., Inc.*, 355 N.C. 672, 683, 565 S.E.2d 140, 147 (2002). According to our Supreme Court, adequate circumstantial evidence of a defect at the time of sale

> *may* include such factors as: (1) the malfunction of the product; (2) expert testimony as to a possible cause or causes; (3) how soon the malfunction occurred after the plaintiff first obtained the product and other relevant history of the product . . . ; (4) similar incidents, " 'when[] accompanied by proof of substantially similar circumstances and reasonable proximity in time' "; (5) elimination of other possible causes of the accident; and (6) proof tending to establish that such an accident would not occur absent a manufacturing defect.

Id. at —, 565 S.E.2d at 151 (citations omitted) (emphasis added). Our Supreme Court further held that "[t]he plaintiff does not have to satisfy all these factors to create a circumstantial case . . . , and if the trial court determines that the case may be submitted to the jury, ' "[i]n most cases, the weighing of these factors should be left to the finder of fact." ' " *Id.* (citation omitted). Accordingly, the fact plaintiff did not present evidence in this case relating to the last four factors outlined in *Dewitt v. Eveready* is not in and of itself determinative.

I nevertheless agree with the majority's decision to affirm the trial court's grant of a directed verdict as to plaintiff's implied warranty of merchantability claim because plaintiff failed to prove the existence of this warranty. The implied warranty of merchantability applies only to merchants. *See* N.C.G.S. § 25-2-314 (2001). Pursuant to N.C. Gen. Stat. § 25-2-104(1), a merchant is defined as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction." N.C.G.S. § 25-2-104(1) (2001).

According, to the testimony of Custom's president, "Custom . . . is a metal stamping job shop [with which] [m]anufacturers of equipment contract . . . to run parts on [Custom's] presses, parts they wish to outsource." It is the customer who provides Custom with the specifications for the requested products, which range from "parts that go into winch assemblies[,] . . . parts that go into hub assemblies for four-wheel drive vehicles[,] . . . components of exercise equipment [and] overhead door assemblies" to "cooling tubes for nuclear fuel rods." This evidence gives no indication that Custom "deal[t] in" clamps or otherwise "h[eld] [itself] out as having knowledge or skill peculiar to" the manufacture of clamps. Thus, Custom is not a merchant in respect to the manufacture of clamps, and no implied warranty of merchantability exists in this case. As such, the trial court properly granted Custom's motion for a directed verdict.

STATE OF NORTH CAROLINA v. JON ERIC PIMENTAL

No. COA01-1086

(Filed 17 September 2002)

1. Appeal and Error— appealability—defendant who entered guilty plea—writ of certiorari

The State's motion to dismiss a defendant's appeal as to the first eight issues raised in defendant's brief in a first-degree burglary and second-degree murder case is granted, and the dismissal is without prejudice to defendant's right to seek an evidentiary hearing at the trial court to determine whether defendant's guilty plea was entered reserving the right to appeal the denial of his motions to suppress, because: (1)

N.C.G.S. § 15A-1444(e) provides that a defendant who has entered a plea of guilty is not entitled to appellate review as of right unless defendant is appealing sentencing issues or the denial of a motion to suppress or defendant has made an unsuccessful motion to withdraw the guilty plea; and (2) the Court of Appeals does not have authority to grant a writ of certiorari since defendant has not failed to take timely action, defendant is not attempting to appeal from an interlocutory order, and defendant is not seeking review of an order of the trial court denying a motion for appropriate relief.

2. Sentencing— aggravating factor—murder committed with premeditation and deliberation

The trial court did not err by imposing an aggravated sentence for second-degree murder based on the nonstatutory aggravating factor that the murder was committed with premeditation and deliberation even though the case is remanded for correction of a clerical error containing the term malice on the sentencing form, because: (1) there was no actual acquittal of defendant on the charge of first-degree murder and no binding jury determination as to whether the murder was committed with premeditation and deliberation when defendant was indicted and tried for first-degree murder but subsequently pled guilty to second-degree murder; (2) a sentencing judge is not precluded from finding premeditation and deliberation as an aggravating factor even though the State has accepted a defendant's plea of guilty to second-degree murder; and (3) the trial court's reference to the murder being committed with malice was a lapsus linguae which did not prejudice defendant since the State has not argued that the murder was committed with malice and defense counsel in his response did not use the term malice.

Appeal by defendant from judgments entered 7 November 2000 by Judge J. Richard Parker in Dare County Superior Court. Heard in the Court of Appeals 6 June 2002.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General H. Alan Pell, for the State.

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

CAMPBELL, Judge.

Jon Eric Pimental ("defendant") purports to appeal from judgments entered 7 November 2000 consistent with his Alford plea of guilty to second degree murder and first degree burglary. In the alternative, defendant petitions this Court for writ of certiorari.

Defendant was indicted for first degree murder and first degree burglary. Defendant was tried capitally. Following the presentation of evidence by the State and defendant, the jury was instructed that it could find defendant guilty of first degree murder, guilty of second degree murder or not guilty on the murder charge, and guilty or not guilty of first degree burglary. On the murder charge, the jury was instructed that it could find defendant guilty of first degree murder on the basis of premeditation and deliberation or the felony murder rule—with the underlying felony being burglary.

Following deliberation, the jury returned verdict forms finding defendant guilty of first degree burglary and second degree murder. Upon review of the jury's verdict forms, the trial court sent the jury back to the jury room and informed counsel of its concern that the jury had returned an inconsistent verdict. The trial court then asked counsel to present argument concerning the trial court's responsibility to accept an inconsistent verdict. Following a weekend recess and further argument from both sides, the trial court denied defendant's motion that the trial court accept the jury's verdict and denied defendant's oral motion for a mistrial. The trial court then informed the jury that it had returned an inconsistent verdict and instructed the jury to resume deliberation. The trial court also informed the jury that it would accept the jury's verdict if, upon further deliberation, the jury once again returned a verdict of guilty of second degree murder and first degree burglary. While the jury was still in deliberation, defendant entered an Alford plea of guilty to second degree murder and first degree burglary. The trial court accepted defendant's plea, entered judgment consistent therewith, and sentenced him to consecutive prison terms in the aggravated range of 129 to 164 months for first degree burglary and 276 to 341 months for second degree murder. In sentencing defendant in the aggravated range for second degree murder, the trial court found as a non-statutory aggravating factor that the offense was committed with malice, premeditation and deliberation. Defendant gave timely notice of appeal.

In his brief to this Court, defendant contends that the trial court erred in (1) denying defendant's motions for a continuance, (2) deny-

ing defendant's motion to dismiss the short-form murder indictment and limit the prosecution to second degree murder, (3) denying defendant's motion to suppress statements made by him to law enforcement on 24 January 2000, (4) denying defendant's motion to suppress evidence obtained without a search warrant, (5) allowing the State to introduce into evidence prejudicial photographs of defendant, (6) denying defendant's motion to dismiss the charges on the ground of insufficient evidence of specific intent, (7) allowing defense counsel to argue to the jury that defendant was at most guilty of second degree murder, (8) denying defendant's motion to accept the jury's verdict and motion for a mistrial, and (9) finding as a non-statutory aggravating factor that the murder was committed with malice, premeditation and deliberation.

The State filed a motion to dismiss defendant's appeal as to Argument Nos. 1-8 set out above, contending that defendant's right to appeal is precluded by operation of N.C. Gen. Stat. § 15A-1444 and defendant's guilty plea.[1] In response, defendant asserts that he was in fact found guilty by the jury, and that the trial court's refusal to accept the jury's verdict should not interfere with his right to appeal. In the alternative, defendant requests that this Court grant a writ of certiorari to review the merits of his appeal.

[1] We first address whether this Court has the authority to review the trial court's judgments entered consistent with defendant's guilty plea.

In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute. *See* N.C. Gen. Stat. § 15A-1444 (2001); *State v. McBride*, 120 N.C. App. 623, 624, 463 S.E.2d 403, 404 (1995), *aff'd*, 344 N.C. 623, 476 S.E.2d 106 (1996); *State v. Shoff*, 118 N.C. App. 724, 725, 456 S.E.2d 875, 876 (1995), *aff'd*, 342 N.C. 638, 466 S.E.2d 277 (1996). Furthermore, there is no federal constitutional right obligating courts to hear appeals in criminal proceedings. *Abney v. United States*, 431 U.S. 651, 656, 52 L. Ed. 2d 651, 657 (1977). N.C. Gen. Stat. § 15A-1444 provides, in pertinent part:

> (a1) A defendant who has been found guilty, or *entered a plea of guilty* or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the

1. The State concedes that defendant is entitled to appeal as a matter of right as to Argument No. 9, which relates to sentencing issues.

minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

(a2) A defendant who has *entered a plea of guilty* or no contest to a felony or misdemeanor in superior court is entitled to appeal as a matter of right the issue of whether the sentence imposed:

(1) Results from an incorrect finding of the defendant's prior record level under G.S. 15A-1340.14 or the defendant's prior conviction level under G.S. 15A-1340.21;

(2) Contains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level; or

(3) Contains a term of imprisonment that is for a duration not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level.

. . .

(e) Except as provided in subsections (a1) and (a2) of this section and G.S. 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant *is not entitled to appellate review as a matter of right when he has entered a plea of guilty* or no contest to a criminal charge in the superior court, but he may petition the appellate division for a writ of certiorari . . . .

N.C.G.S. § 15A-1444 (emphasis added). Pursuant to N.C. Gen. Stat. § 15A-979(b) (2001), "[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."

Accordingly, under N.C.G.S. § 15A-1444(e), a defendant who has entered a plea of guilty is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea. *See* N.C.G.S. § 15A-1444(e); *State v. Dickson*, 151 N.C. App. 136,

— S.E.2d — (COA01-890, filed 18 June 2002). Applying N.C.G.S. § 15A-1444(e) to the instant case, we conclude that defendant is not entitled to appellate review as a matter of right as to Argument Nos. 1, 2, 5, 6, 7 and 8, because those arguments do not involve sentencing issues or the denial of a motion to suppress, and defendant has not made a motion to withdraw his guilty plea.[2]

However, in Argument Nos. 3 and 4, defendant contends that the trial court erred in denying his motions to suppress. Accordingly, we examine the record on appeal to determine whether defendant complied with the established case and statutory law, which mandates that notice of intent to appeal the denial of a motion to suppress be *specifically* given to the trial court and prosecution prior to the entry of a guilty plea.

While N.C.G.S. § 15A-979(b) allows appellate review of the denial of a motion to suppress upon appeal from a judgment entered on a guilty plea, "[t]his statutory right to appeal is conditional, not absolute." *McBride*, 120 N.C. App. at 625, 463 S.E.2d at 404; *accord State v. Brown*, 142 N.C. App. 491, 492, 543 S.E.2d 192, 193 (2001). Pursuant to this statute, "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." *McBride*, 120 N.C. App. at 625, 463 S.E.2d at 404 (citing *State v. Reynolds*, 298 N.C. 380, 396-97, 259 S.E.2d 843, 853 (1979). This Court has held that such "notice must be *specifically* given." *Id.* (emphasis in original).

The propriety of a rule nearly identical to ours was addressed by the United States Supreme Court in *Lefkowitz v. Newsome*, 420 U.S. 283, 43 L. Ed. 2d 196 (1975). There the United States Supreme Court noted:

> Once the defendant chooses to bypass the orderly procedure for litigating his constitutional claims in order to take the benefits, if any, of a plea of guilty, the State acquires a legitimate expectation of finality in the conviction thereby obtained.

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2. In so concluding, we disagree with defendant's contention that the jury had in fact found him guilty. The record shows that the trial court did not accept the jury's verdict and thus the verdict never became final and complete. *See e.g.*, *State v. Abraham*, 338 N.C. 315, 359, 451 S.E.2d 131, 155 (1994); *State v. Hampton*, 294 N.C. 242, 247-48, 239 S.E.2d 835, 839 (1978). Due to the perceived inconsistency in the verdict, we find that the trial court's failure to accept it was within the trial court's limited legal discretion to do so. *See Abraham*, 338 N.C. at 359-60, 451 S.E.2d at 155.

Lefkowitz, 420 U.S. at 289, 43 L. Ed. 2d at 202. Similarly, in *State v. Reynolds*, 298 N.C. 380, 259 S.E.2d 843 (1979), our Supreme Court supported the reasoning behind this limitation on the statutory right to appeal as follows:

> The plea bargaining table does not encircle a high stakes poker game. It is the nearest thing to arm's length bargaining the criminal justice system confronts. As such, it is entirely inappropriate for either side to keep secret any attempt to appeal the conviction.

Id. at 397, 259 S.E.2d at 853.

As stated by this Court in *McBride*:

> Once a defendant strikes the most advantageous bargain possible with the prosecution, that bargain is incontestable by the state once judgment is final. If the defendant may first strike the plea bargain, "lock in" the State upon final judgment, and then appeal a previously denied suppression motion, it gets a second bite at the apple, a bite usually meant to be foreclosed by the plea bargain itself.

McBride, 120 N.C. App. at 626, 463 S.E.2d at 405.

In the instant case, the Transcript of Plea states the following terms and conditions:

> Defendant pleads guilty to first degree burglary and second degree murder. Defendant preserves his right to appeal any and all issues which are so appealable pursuant to North Carolina statutory law and North Carolina case law and pursuant to this plea agreement.

In addition, the transcript shows that the trial court asked defendant if these were the terms and conditions of his guilty plea and defendant answered in the affirmative. The State maintains in its motion to dismiss that the language in the Transcript of Plea and the exchange between the trial court and defendant does not constitute specific notification that defendant intended to appeal the denial of his motions to suppress. Defendant counters by arguing that the language in the Transcript of Plea is sufficient notification.

Upon review of the trial transcript, we note that defendant failed to object when the trial court denied on the record those motions to suppress which defendant now asks this Court to review on appeal.

Further, as the State points out, the record on appeal contains no written rulings or findings of fact related to the trial court's denial of these motions to suppress, nor were the trial court's findings of fact and conclusions of law made part of the trial transcript. It appears from the transcript and record on appeal that the trial court denied defendant's motions to suppress, without objection by defendant, and then failed to enter on the record the findings of fact and conclusions of law in support of its denials. In light of this record, we doubt that the State and the trial court were made aware prior to entry of defendant's guilty plea that defendant intended to appeal the denial of those suppression motions now raised on appeal. Defendant failed to object when the trial court denied his motions to suppress on the record and the motions to suppress seem to have been forgotten as the trial proceeded. Accordingly, we conclude that the language in the Transcript of Plea that defendant "preserved his right to appeal any and all issues which are so appealable" was not sufficiently specific notice of defendant's intent to appeal the denial of his motions to suppress. If defendant wished to preserve his right to appeal the denial of those motions to suppress, defense counsel need only have insisted that the Transcript of Plea state that defendant was "reserving his right to appeal the Court's denial of his motions to suppress pursuant to N.C.G.S. § 15A-979(b)." Having failed to do so, we hold that defendant has waived appellate review as a matter of right as to Argument Nos. 3 and 4 and we dismiss defendant's appeal as to the denial of defendant's motions to suppress.[3]

Having concluded that defendant has no right to appeal as to the issues raised in Argument Nos. 1-8, we turn to defendant's request that this Court grant a writ of certiorari to address the merits of defendant's arguments.

While N.C.G.S. § 15A-1444(e) allows a defendant to petition for writ of certiorari after entering a guilty plea, 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

3. This dismissal is without prejudice to defendant's right to seek an evidentiary hearing in superior court to determine whether or not the guilty plea was in fact entered reserving defendant's right to appeal the denial of the motions to suppress. If it is determined that defendant pled guilty while properly reserving his right to appeal, review may then be sought by petition for writ of certiorari filed with this Court. At that time, defendant will have lost his right to prosecute an appeal by failure to take timely action, and a petition for writ of certiorari will be his only avenue of appeal.

> 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) (2002). In *State v. Dickson*, 151 N.C. App. 136, — S.E.2d — (COA01-890, filed 18 June 2002), this Court recently reiterated that

> 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."

Id. at 138, — S.E.2d at — (quoting *Neasham v. Day*, 34 N.C. App. 53, 55-56, 237 S.E.2d 287, 289 (1977)). In the instant case, defendant has not failed to take timely action, is not attempting to appeal from an interlocutory order, and is not seeking review of an order of the trial court denying a motion for appropriate relief. 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, the State's motion to dismiss defendant's appeal is allowed and defendant's appeal is dismissed as to Argument Nos. 1-8 raised in defendant's brief.

[2] Finally, we address the one issue raised by defendant which he is entitled to appeal as a matter of right under N.C.G.S. § 15A-1444(e). Defendant contends that the trial court erred in finding as a non-statutory aggravating factor that the murder was committed with malice, premeditation and deliberation.

First, defendant argues that the trial court erred in finding this aggravating factor because the jury had convicted defendant of murder in the second degree after a trial on the charge of murder in the first degree, thereby demonstrating to the trial judge that premeditation and deliberation was not supported by the evidence. In support of his argument, defendant relies on the Supreme Court's decision in *State v. Marley*, 321 N.C. 415, 364 S.E.2d 133 (1988).

In *Marley*, the defendant was tried before a jury on a charge of murder in the first degree and convicted of murder in the second degree. On appeal, the defendant contended that the sentencing judge was precluded by considerations of due process from finding as an

aggravating factor that defendant acted with premeditation and deliberation. The Supreme Court agreed, reasoning as follows:

> To allow the trial court to use at sentencing an essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself.
>
> We conclude that due process and fundamental fairness precluded the trial court from aggravating defendant's second degree murder sentence with the single element—premeditation and deliberation—which, in this case, distinguished first degree murder after the jury had acquitted defendant of first degree murder.

Marley, 321 N.C. at 425, 364 S.E.2d at 139.

We disagree with defendant's contention that *Marley* controls the resolution of the issue in the instant case. In the instant case, defendant was indicted and tried for murder in the first degree and subsequently pled guilty to murder in the second degree. As earlier noted, the trial court, acting within its limited legal discretion, did not accept the jury's verdict of guilty of murder in the second degree. A verdict is not complete until it is accepted by the court. *Abraham*, 338 N.C. at 359, 451 S.E.2d at 139; *State v. Rhinehart*, 267 N.C. 470, 481, 148 S.E.2d 651, 659 (1966). Thus, unlike in *Marley*, here there was no actual acquittal of defendant on the charge of murder in the first degree and no binding jury determination as to whether the murder was committed with premeditation and deliberation.

We find that the instant case is controlled by the Supreme Court's decisions in *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983) and *State v. Brewer*, 321 N.C. 284, 362 S.E.2d 261 (1987). In *Melton*, the defendant was indicted for murder in the first degree, but the State agreed not to try the defendant for murder in the first degree in exchange for the defendant's plea of guilty to murder in the second degree. At sentencing, the judge found that the killing was done with premeditation and deliberation. On appeal, the defendant argued "that fundamental fairness requires that facts underlying charges which have been dismissed pursuant to a plea bargain cannot be used during sentencing for the admitted charge." *Melton*, 307 N.C. at 376, 298 S.E.2d at 678. Noting that "[t]he mere fact that a guilty plea has been accepted pursuant to a plea bargain does not preclude the sen-

tencing court from reviewing all of the circumstances surrounding the admitted offense in determining the presence of aggravating or mitigating factors," the Supreme Court held that "[a]s long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing." *Id.* at 377-78, 298 S.E.2d at 678-79 (citations omitted). The Court further held that, although the State agreed not to prosecute the defendant for murder in the first degree, the fact that he premeditated and deliberated the killing was transactionally related to the second degree murder conviction and was therefore properly considered by the judge during sentencing. *Id.*

In *Brewer*, the defendant was charged with murder in the first degree and entered a plea of guilty to murder in the second degree. Upon being sentenced to life imprisonment, the defendant appealed assigning error to the trial judge's finding of premeditation and deliberation as a non-statutory aggravating factor. The Supreme Court again held that the fact that the defendant premeditated and deliberated the killing was transactionally related to the offense of murder in the second degree and was therefore properly considered by the sentencing judge. *Brewer*, 321 N.C. at 286, 362 S.E.2d at 262. Both *Brewer* and *Melton* hold that a determination by the preponderance of the evidence that a defendant premeditated and deliberated a killing is reasonably related to the purposes of sentencing. *Brewer*, 321 N.C. at 286, 362 S.E.2d at 262; *Melton*, 307 N.C. at 378, 298 S.E.2d at 679. Therefore, a sentencing judge is not precluded from finding premeditation and deliberation as an aggravating factor even though the State has accepted a defendant's plea of guilty to second degree murder.

In both *Melton* and *Brewer*, the Court noted that a plea of guilty to second degree murder is fundamentally different from a conviction of second degree murder when the defendant has been tried on a charge of first degree murder. *Brewer*, 321 N.C. at 286 n. 1, 362 S.E.2d at 262; *Melton*, 307 N.C. at 375-76 n. 2, 298 S.E.2d at 677.

The facts in the instant case are similar to those in *Melton* and *Brewer*. Defendant was tried for first degree murder based on premeditation and deliberation and the State accepted a plea of guilty to second degree murder. Defendant was never convicted of second degree murder. As the Supreme Court held in *Melton* and *Brewer*, we hold that acceptance of defendant's guilty plea to second degree mur-

der did not prevent the sentencing judge from finding the non-statutory aggravating factor that the murder was committed with premeditation and deliberation and using that factor as the basis for imposing a sentence greater than the presumptive term.

Defendant also argues that the trial court erred in finding as an aggravating factor that the murder was committed with *malice*, premeditation and deliberation, because *malice* is an element of second degree murder and the sentencing judge may not find as an aggravating factor an essential element of the offense for which defendant is being sentenced.

At the sentencing hearing, the State requested that the trial court find as a non-statutory aggravating factor that the murder was committed with premeditation and deliberation. Defense counsel responded by arguing that the overwhelming evidence showed that the murder was not premeditated and deliberated. The trial court then found on the record that the murder was committed with *malice*, premeditation and deliberation. The State had not argued that the murder was committed with *malice* and defense counsel in his response did not use the term *malice*. Accordingly, we conclude that the trial court's reference to the murder being committed with *malice* was a *lapsus linguae*, simply an inadvertent mistake, which did not prejudice defendant. We further conclude that the trial court's inclusion of the term *malice* next to box 20 on the Felony Judgment Findings of Aggravating and Mitigating Circumstances form was simply a clerical error. Therefore, we affirm the sentence imposed by the trial court and remand for correction of the clerical error contained on the sentencing form.

In summary, we grant the State's motion to dismiss defendant's appeal as to the first eight issues raised in defendant's brief. This dismissal is without prejudice to defendant's right to seek an evidentiary hearing in superior court to determine whether his guilty plea was entered reserving the right to appeal the denial of his motions to suppress. We affirm the aggravated sentence for second degree murder imposed by the trial court and remand for correction of the clerical error contained on the sentencing form.

Dismissed in part, affirmed in part, and remanded for correction of clerical error.

Judges WYNN and MARTIN concur.

HARVEY FERTILIZER AND GAS CO., PLAINTIFF v. PITT COUNTY AND THE PITT COUNTY BOARD OF COMMISSIONERS, DEFENDANTS v. ROGER McINTYRE, JUDITH HUNT, JOSEPH KELLY, BARBARA KELLY, WAYNE CLIFT, HAZEL CLIFT, JAMES A. MANNING, CLEMON A. THOMAS, BRENDA THOMAS, GEORGE M. WORSLEY, PATRICIA A. WORSLEY, FLOYD SNEED, EMMA SNEED, FRANCES WHITFIELD, A. J. THOMAS, ANNIE THOMAS, MARY HINES AND MARY BUNNS, INTERVENOR-DEFENDANTS

No. COA01-1330

(Filed 17 September 2002)

1. Parties— intervention—standard of review

The de novo standard for review of N.C.G.S. § 1A-1, Rule 24(a)(2) decisions on intervention as a matter of right is expressly adopted. Although our appellate courts have not specifically stated the standard of review, they have weighed the facts of each case in light of whether the intervening party has shown a direct and immediate interest; whether denial of intervention would result in a practical impairment of the protection of that interest; and whether representation of that interest is not adequate.

2. Parties— intervention—inadequate protection of interest—burden of showing

An order allowing intervention in a zoning case under N.C.G.S. § 1A-1, Rule 24(a)(2) was reversed because the intervenors did not show that their interests would not be adequately represented. Contrary to the intervenors' contention, the party seeking intervention must show inadequate representation of its interest.

Appeal by intervenor-defendants from order entered 3 August 2001 by Judge William C. Griffin, Jr. in Superior Court, Pitt County. Heard in the Court of Appeals 14 August 2002.

Ward and Smith, P.A., by Lance P. Martin and A. Charles Ellis, for plaintiff-appellee.

Charles L. McLawhorn, Jr.; and Land Loss Prevention Project, by Marcus Jimison and Katherine Carpenter, for intervenor-defendants.

McGEE, Judge.

Harvey Fertilizer and Gas Co. (plaintiff) filed a complaint on 16 May 2001 seeking a declaratory judgment that plaintiff had a vested right to complete its cotton gin project and a permanent injunction enjoining Pitt County and the Pitt County Board of Commissioners (Board of Commissioners) from enforcing a zoning ordinance and moratorium affecting the completion of the project. Plaintiff also requested a temporary restraining order and preliminary injunction. The trial court granted plaintiff's request for a temporary restraining order on 17 May 2001. Intervenor-defendants filed a motion to intervene in this action on 23 May 2001. The trial court held a hearing on both plaintiff's motion for preliminary injunction and intervenor-defendants' motion to intervene. In an order filed 29 May 2001 the trial court granted plaintiff's motion for preliminary injunction. Two days later the trial court granted intervenor-defendants' motion to intervene.

A hearing was held on 20 July 2001 on plaintiff's motion for summary judgment and an order was entered on 3 August 2001 granting plaintiff's summary judgment motion. The order declared that plaintiff had a vested right to complete its cotton gin project in Pitt County, and therefore Pitt County, its agents, and affiliated governmental units were permanently enjoined from enforcing the amended moratorium and zoning ordinance in a way that would prevent the completion or operation of the cotton gin project. Intervenor-defendants appeal from that order. In a cross-assignment of error, plaintiff appeals from the order granting the intervenor-defendants' motion to intervene.

Plaintiff, an Eastern North Carolina agribusiness corporation, began searching in January 2001 for a location to build a cotton gin in Pitt County. Plaintiff looked at a site off of Manning Road (Manning site), west of Bethel, North Carolina. The Board of Commissioners enacted a zoning ordinance on 22 January 2001 that would in effect make a cotton gin a non-conforming use at the Manning site upon the effective date of the ordinance, 1 July 2001. The Board of Commissioners enacted a moratorium on 5 February 2001 which prohibited the establishment of certain conditional and special uses from that date until 1 July 2001, the effective date of the January 22 zoning ordinance. However, this moratorium did not specifically list cotton gins as a prohibited use.

Despite enactment of the zoning ordinance, plaintiff entered into a contract on 10 February 2001 for the purchase of the Manning site

from Frances Carson (Carson) for the amount of $250,167.24, with a closing and payment date in April 2001. Plaintiff alleges in its complaint that two days later, the North Carolina Agricultural Finance Authority entered into an "inducement agreement" with plaintiff for the issuance of $4,500,000.00 in agriculture revenue bonds to finance the cotton gin project.

The first in a series of assurances by Pitt County officials that the cotton gin project would not be hindered by the January 22 zoning ordinance or the February 5 moratorium occurred on 15 February 2001, when a planning technician with the Pitt County Planning Office advised Carson's surveyor that the February 5 moratorium and the January 22 zoning ordinance would not affect the cotton gin project if plaintiff obtained the necessary building permits by 1 July 2001. Carson shared this information with plaintiff. Plaintiff entered into a contract for construction of a cotton gin with Consolidated Gin Co. on 16 February 2001. The contract price was $2,220,000.00 and plaintiff made a $550,000.00 down payment on the gin. Plaintiff entered into a contract with Crustbuster/Speed King on 22 February 2001 for the construction of a module feeder for the cotton gin project. The contract price was $163,350.00 and plaintiff made a down payment of $40,837.50 on 1 March 2001. Plaintiff alleges in its complaint that the estimated delivery dates for both the cotton gin and the module feeder were in June 2001.

The second instance of assurances by Pitt County officials occurred on 5 March 2001, when plaintiff's president spoke with the Pitt County Director of Planning. The Director of Planning assured plaintiff that the February 5 moratorium and the January 22 zoning ordinance would have no effect on the cotton gin project as long as plaintiff obtained a building permit for the site by 1 July 2001. In response to a request from the Director of Planning, plaintiff sent a letter to the Pitt County Planning Office that same day giving general information about the cotton gin project and a preliminary site plan. Plaintiff purchased three tractors for use at the gin for a price of $51,516.21 on 9 March 2001. Later that month, plaintiff agreed to pay approximately $180,000.00 for the conversion of three other tractors for use at the cotton gin. Plaintiff also made its first application for permits that month, when on 12 March 2001 it completed septic permit applications and paid the $300.00 application fee. Plaintiff received preliminary approval of its septic permit application on 21 March 2001 pending submission of a final site map.

The third instance of assurances by Pitt County officials occurred in late March when plaintiff attended a meeting of the Board of Commissioners to make a presentation on the cotton gin project. At that meeting, the county attorney gave further assurances that plaintiff could proceed with the cotton gin project as long as it obtained the necessary permits by 1 July 2001. Plaintiff alleges that the chairman of the Board of Commissioners made similar statements at this meeting. Opposition to the cotton gin project was voiced at this meeting.

Plaintiff applied for air quality permits from the North Carolina Department of Environment and Natural Resources (DENR) on 4 April 2001 and paid the $50.00 application fee. However, before DENR could issue a permit, a compliance letter was required from the Pitt County Planning Office stating that the cotton gin project was consistent with local regulations. Plaintiff requested on 6 April 2001 that the Pitt County Planning Office send a compliance letter to DENR. Even though plaintiff requested this letter on 6 April 2001, the letter was not sent until 26 April 2001, almost three weeks after the request. A few days after contacting the Pitt County Planning Office, plaintiff delivered its site plan to the North Carolina Environmental Health Division (EHD) for final approval of septic permits.

The Board of Commissioners held a public hearing on 16 April 2001 on whether to specifically add cotton gins to the February 5 moratorium. At this meeting there was also a unanimous vote to notify Governor Mike Easley and the North Carolina Agricultural Finance Authority that the Pitt County Board of Commissioners opposed the construction and development of a cotton gin at the Manning site. These two letters were sent 17 April 2001 and a similar letter was sent to plaintiff on 19 April 2001.

Plaintiff completed its sedimentation and erosion control plan application and submitted it on 22 April 2001 to the Pitt County Planning Office, along with the $9,728.00 application fee. A few days later on 26 April 2001, the Pitt County Planning Office sent the compliance letter required by DENR. DENR issued the required air quality permits.

After a public hearing on 7 May 2001, the Board of Commissioners amended the February 5 moratorium to include cotton gins. On the same day, septic permits for an office building and a cotton gin were issued to plaintiff. Two days after the moratorium was amended, plaintiff filed for a building permit for the cotton gin project. The Pitt

County Planning Office refused to accept the application because of the recently amended moratorium.

Plaintiff filed this action. The trial court granted a temporary restraining order to plaintiff on 17 May 2001. Plaintiff's sedimentation and erosion control plan was approved on 23 May 2001 and plaintiff again applied for a building permit for the cotton gin project. On the same day, intervenor-defendants moved to intervene in the present action. Plaintiff's building permit was issued on 25 May 2001. After obtaining all the above referenced permits, plaintiff completed construction of the cotton gin project and began operation in early October 2001.

[1] Plaintiff argues in its cross-assignment of error that intervenor-defendants were improperly allowed to intervene in the present action. Defendant Pitt County has not appealed the trial court's order. Therefore, if this Court determines that the intervenor-defendants were improperly allowed to intervene, we do not reach intervenor-defendants' assignments of error. Accordingly we first consider plaintiff's cross-assignment of error.

The trial court granted intervenor-defendants' motion to intervene on 31 May 2001. The trial court, in allowing the intervention as a matter of right, noted in its order that the intervenor-defendants "are so situated that the disposition of this action may as a practical matter impair or impede their ability to protect their property interests, as well as their health, safety and welfare."

N.C. Gen. Stat. § 1A-1, Rule 24(a) provides that a third party may intervene as a matter of right:

(1) When a statute confers an unconditional right to intervene; or

(2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

N.C.G.S. § 1A-1, Rule 24(a) (2001). To satisfy the requirements of Rule 24(a)(2), our Supreme Court has recently stated that an intervening party "must show that (1) it has a direct and immediate interest relating to the property or transaction, (2) denying intervention would result in a practical impairment of the protection of that interest, and

(3) there is inadequate representation of that interest by existing parties." *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 459, 515 S.E.2d 675, 683 (1999) (citing *Alford v. Davis*, 131 N.C. App. 214, 217-19, 505 S.E.2d 917, 920 (1998); *Ellis v. Ellis*, 38 N.C. App. 81, 83, 247 S.E.2d 274, 276 (1978)).

Before reviewing the trial court's order granting intervenor-defendants' motion to intervene, we must address the standard of review to be applied. Intervenor-defendants argue in their reply brief to this Court that the standard of review to be applied to interventions as a matter of right has not been specifically addressed by this Court. While not announcing a standard explicitly, the decisions of our appellate courts appear to have employed a *de novo* standard implicitly when reviewing decisions of a trial court concerning interventions as a matter of right. *See Virmani*, 350 N.C. at 459, 515 S.E.2d at 682-83; *Councill v. Town of Boone Bd. of Adjust.*, 146 N.C. App. 103, 107-08, 551 S.E.2d 907, 910 (2001); *Proctor v. City of Raleigh Bd. of Adjust.*, 133 N.C. App. 181, 184, 514 S.E.2d 745, 747 (1999); *see also Hill v. Hill*, 121 N.C. App. 510, 511-12, 466 S.E.2d 322, 323-24 (1996) ("Intervention of right is an absolute right and denial of that right is reversible error, regardless of the trial court's findings.") (citing *Strickland v. Hughes*, 273 N.C. 481, 485, 160 S.E.2d 313, 316 (1968) (decision under precursor to N.C.R. Civ. P. 24(a)(2), N.C. Gen. Stat. § 1-73)). In all of these cases, our appellate courts, although not specifically stating the standard of review, weighed the facts of each case in light of the three factors cited above, reaching a conclusion as to whether the facts were sufficient to satisfy the requirements of N.C.G.S. § 1A-1, Rule 24(a)(2).

In contrast, our appellate courts have noted several times that the appropriate standard for reviewing a trial court's decision concerning permissive intervention under N.C.G.S. § 1A-1, Rule 24(b) is whether the trial court abused its discretion. *See Virmani*, 350 N.C. at 460, 515 S.E.2d at 683; *Alford v. Davis*, 131 N.C. App. 214, 219, 505 S.E.2d 917, 921 (1998); *State ex rel. Long v. Interstate Casualty Ins. Co.*, 106 N.C. App. 470, 474, 417 S.E.2d 296, 299 (1992). The Supreme Court's decision in *Virmani* highlights the different treatment our appellate courts have accorded the two types of intervention. *Vermani*, 350 N.C. at 458-62, 515 S.E.2d at 682-84. In *Virmani*, the Supreme Court first reviewed the trial court's intervention as a matter of right decision, looking at the facts and applying the law to the facts as if conducting a *de novo* review. *Id.* at 458-59, 515 S.E.2d at 682-83. The Supreme Court next reviewed the trial court's decision under

N.C.G.S. § 1A-1, Rule 24(b). *Id.* at 460-62, 515 S.E.2d at 683-84. The Supreme Court noted that an abuse of discretion standard was the correct standard to employ, and accordingly engaged in a deferential review of the trial court's permissive intervention rulings. *Id.* Despite these prior appellate decisions, intervenor-defendants argue that we should adopt the view that intervention as a matter of right determinations should be subject to an abuse of discretion standard of review as well.

As this specific issue has not been decided by our State's appellate courts, we consider decisions from other jurisdictions. In that Rule 24 of the North Carolina Rules of Civil Procedure is virtually identical to Rule 24 of the Federal Rules of Civil Procedure, we appropriately look to federal court decisions for guidance. *See Turner v. Duke University*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989) (stating that since the North Carolina Rules of Civil Procedure are practically identical to the federal rules, federal courts' interpretations of the federal rules "are thus pertinent for guidance and enlightenment in developing the philosophy of the North Carolina rules") (citation omitted); *Ellis v. Ellis*, 38 N.C. App. 81, 84-85, 247 S.E.2d 274, 277 (1978) (taking a similar approach in determining the appropriate standard for review of N.C.G.S. § 1A-1, Rule 24(b) motions). However, it should be noted that we are not bound by the interpretation of any particular federal court as to the interpretation of our own rules of procedure, even though our rules are similar to the federal rules. *State ex rel. Martin v. Preston*, 325 N.C. 438, 449-50, 385 S.E.2d 473, 479 (1989) (citations omitted).

The opinions of the federal circuit courts are divided on whether the appropriate standard for reviewing decisions of the trial court on Rule 24(a)(2) motions is an abuse of discretion review or a *de novo* review. The Fifth, Sixth, Eighth, Ninth, and Tenth Circuits, as well as the Colorado, New Mexico, and Utah courts engage in *de novo* review of trial court decisions under Rule 24(a).[1] *See Alameda Water & Sanitation Dist. v. Browner*, 9 F.3d 88, 89-90 (10th Cir. 1993); *Sierra Club v. Robertson*, 960 F.2d 83, 85 (8th Cir. 1992); *United States v. Texas Eastern Transmission Corp.*, 923 F.2d 410, 413 (5th Cir. 1991) (citation omitted); *Scotts Valley Band of Pomo Indians v. United States*, 921 F.2d 924, 926 (9th Cir. 1990) (citations omitted); *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989); *Feigin v. Alexa Group, Ltd.*,

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1. The decisions from these state courts, though no more binding on this Court than federal court decisions in this case, can be used to further enlighten us as to the rationales cited by other courts in this area of the law.

19 P.3d 23, 27-28 (Colo. 2001); *In re Marriage of Gonzalez*, 1 P.3d 1074, 1077 (Utah 2000); *Chino Mines Co. v. Del Curto*, 842 P.2d 738, 740 (N.M. Ct. App. 1992) (stating that "where the facts underlying the application are not in dispute, we review the propriety of the court's ruling as an issue of law") (citations omitted). In contrast, the First, Second, Third, and Fourth Circuits review Rule 24(a)(2) decisions by a trial court under an abuse of discretion standard. *In re Sierra Club*, 945 F.2d 776, 779-80 (4th Cir. 1991); *International Paper Co. v. Town of Jay, Maine*, 887 F.2d 338, 343-44 (1st Cir. 1989); *Harris v. Pernsley*, 820 F.2d 592, 597 (3d Cir. 1987) (citations omitted); *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 990-91 (2d Cir. 1984).

The reasons courts have stated they favor a *de novo* standard, as opposed to an abuse of discretion standard, are that "review of the district court's decision involves application of a rule of law to the established facts, and because the issue primarily involves consideration of legal concepts in the mix of fact and law." *United States v. Stringfellow*, 783 F.2d 821, 825-26 (9th Cir. 1986) (citation omitted), *vacated and remanded on other grounds sub nom.*, 480 U.S. 370, 94 L. Ed. 2d 389 (1987).

The reason courts have stated for employing an abuse of discretion standard of review in intervention of right cases is that "although Rule 24(a)(2) seems to provide for three simple and distinct requirements, application of the Rule involves the pragmatic balancing of a range of factors that arise in varying factual situations." *International Paper Co.*, 887 F.2d at 343-44 (citation omitted). The First Circuit quoted from Judge Friendly's opinion in *United States v. Hooker Chemicals & Plastics Corp.* as support for the abuse of discretion standard:

> The various components of the Rule are not bright lines, but ranges—not all 'interests' are of equal rank, not all impairments are of the same degree, representation by existing parties may be more or less adequate. . . . Application of the Rule requires that its components be read not discretely, but together. . . . Finally, although the Rule does not say so in terms, common sense demands that consideration also be given to matters that shape a particular action or particular type of action.

International Paper Co., 887 F.2d at 344 (quoting *United States v. Hooker Chemicals & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984)). The First Circuit noted that it believed that the abuse of discretion

standard is the better approach, "in light of the great variety of factual circumstances in which intervention motions must be decided, the necessity of having the 'feel of the case' in deciding these motions, and other considerations essential under a flexible reading of Rule 24(a)(2)." *Id.* (internal quotes omitted) (quoting *Hooker Chemicals & Plastics Corp.*, 749 F.2d at 991).

However, several of the federal courts that have adopted the abuse of discretion standard have noted that the particular abuse of discretion standard applied to review of Rule 24(a) motions is "more stringent" than that applied to review of Rule 24(b) motions. *International Paper Co.*, 887 F.2d at 344 (citing *Harris v. Pernsley*, 820 F.2d 592, 597 (3d Cir. 1987)). The rationale for this subtle distinction is that, since Rule 24(a)(2) provides that if a party meets its requirements, the party "*shall* be permitted to intervene," a trial court's discretion in deciding whether to allow intervention of right is limited to determinations concerning the factors in Rule 24(a)(2). *Id.* (quoting *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382, 94 L. Ed. 2d 389, 402 (1987) (Brennan, J., concurring in part and concurring in the judgment)). Thus, in federal circuits that apply an abuse of discretion standard, most look to determine if the trial court "applied an improper legal standard or reached a decision that [they] are confident is incorrect." *Brody by and through Sugzdinis v. Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992) (citations and internal quotes omitted). Except for the Fourth Circuit, all of the circuits adopting the abuse of discretion standard have adopted this standard "inhabit[ing] an area somewhere between de novo review and abuse of discretion." *In re Marriage of Gonzalez*, 1 P.3d at 1077 n.2 (citations omitted).

Despite this alternative view in several courts, we believe the *de novo* standard to be the better approach. In that our appellate courts have not heretofore adopted a specific standard of review for N.C.G.S. § 1A-1, Rule 24(a)(2) decisions, we expressly adopt the *de novo* standard. Furthermore, this explicit adoption of the *de novo* standard comports with the past decisions of our State's appellate courts in reviewing N.C.G.S. § 1A-1, Rule 24(a)(2) decisions. *See Virmani*, 350 N.C. at 459, 515 S.E.2d at 682-83; *Councill*, 146 N.C. App. at 107-08, 551 S.E.2d at 910; *Proctor*, 133 N.C. App. at 184, 514 S.E.2d at 747.

[2] Plaintiff argues that intervenor-defendants failed to demonstrate that their interests were not adequately represented. Plaintiff argues that because intervenor-defendants never set forth a claim as to why

representation by Pitt County and the Pitt County Board of Commissioners was inadequate, intervenor-defendants failed to satisfy the third element required under *Virmani*, thus not meeting their burden to be permitted to intervene as a matter of right. Intervenor-defendants counter that the party opposing a third party's attempt to intervene has the burden of showing that the third party's interests are adequately represented.

Our Supreme Court in *Virmani* stated that "[t]he prospective intervenor seeking intervention as a matter of right under Rule 24(a)(2) must show that . . . there is inadequate representation of that interest by existing parties." *Virmani*, 350 N.C. at 459, 515 S.E.2d at 683 (citing *Alford v. Davis*, 131 N.C. App. 214, 217-19, 505 S.E.2d 917, 920 (1998); *Ellis v. Ellis*, 38 N.C. App. 81, 83, 247 S.E.2d 274, 276 (1978)). This Court's decisions, both before and after *Virmani*, have been consistent with this requirement. *See United Services Automobile Assn. v. Simpson*, 126 N.C. App. 393, 399, 485 S.E.2d 337, 341 (1997) (stating that intervenors "have demonstrated that the present litigants fail to adequately represent their interests"); *Hill*, 121 N.C. App. at 512, 466 S.E.2d at 324 ("To intervene of right [proposed intervenor] must also establish its interests are not adequately represented by existing parties.") (citation omitted); *see also Councill*, 146 N.C. App. at 108, 551 S.E.2d at 910 (finding intervenors not adequately represented where "appellants alleged that the Board intended to settle the dispute with [plaintiff] without appellants' input, and that the Board intended to issue a permit to [plaintiff].").

In their reply brief, intervenor-defendants argue that "[i]t is helpful to see how courts both here and in other jurisdictions have decided the issue," but cite no appellate court decision from our State to counter plaintiff's assertion. Intervenor-defendants cite only to two federal court opinions and to the *Wright and Miller Treatise*. As indicated above, the North Carolina courts can look to federal court decisions on the rules of procedure to inform their decisions. *Turner*, 325 N.C. at 164, 381 S.E.2d at 713. However, our Supreme Court has already addressed this issue in *Virmani*, *see* 350 N.C. at 459, 515 S.E.2d at 683, thus use of opinions from other jurisdictions would be erroneous. *See Hutelmyer v. Cox*, 133 N.C. App. 364, 376, 514 S.E.2d 554, 562 (1999) (noting that "it is not our prerogative to overrule or ignore clearly written decisions of our Supreme Court") (citation omitted).

Therefore, we hold that intervenor-defendants failed to meet their burden of showing that their interests were not adequately repre-

sented. Intervenor-defendants never asserted in their motion that their interests were inadequately represented. In fact, intervenor-defendants' main argument on this point is that they do not have to make such a showing; they erroneously contend it is the plaintiff's burden to show that representation is adequate. The record is devoid of anything that would support a claim that intervenor-defendants met their burden before the trial court of showing that their interests were not adequately represented.

Since defendant-intervenors did not satisfy the element of N.C.G.S. § 1A-1, Rule 24(a)(2) requiring them to show their interests would not be adequately represented, we need not address the other two requirements of the Rule.

We reverse the trial court's order allowing intervenor-defendants to intervene in this action as a matter of right and we dismiss intervenor-defendants' appeal.

Appeal dismissed.

Judges McCULLOUGH and BRYANT concur.

STATE OF NORTH CAROLINA v. GEORGE LEE BRANHAM, JR., DEFENDANT

No. COA01-980

(Filed 17 September 2002)

1. Juveniles— custody—right to have parent present during questioning

The trial court erred in a possession of marijuana with intent to sell or deliver, possession of LSD with intent to sell and deliver, and trafficking in LSD case by admitting defendant juvenile's out-of-court statements to officers that were obtained in violation of defendant's right to have a parent present under N.C.G.S. § 7B-2101(d), because: (1) even if it is assumed that defendant's mother did not want to be present during defendant's interrogation, she did not have the ability to, in effect, waive defendant's right to have her present during interrogation; and (2) there is no evidence that it was defendant who initiated further communications with the officers after the officers told defendant his mother would not see him.

2. Drugs— possession of marijuana with intent to sell or deliver—possession of LSD with intent to sell and deliver—trafficking in LSD—motion to dismiss—entrapment

The trial court did not err by failing to dismiss the charges of possession of marijuana with intent to sell or deliver, possession of LSD with intent to sell and deliver, and trafficking in LSD even though defendant pled the affirmative defense of entrapment, because although defendant's testimony that an informant pushed defendant to obtain drugs for him, that defendant attempted to get the informant to make the purchase himself, and that defendant had never before been involved in any drug sales of this quantity may have been sufficient to raise the issues of inducement and lack of predisposition to commit the offenses, it fell short of compelling a conclusion of entrapment as a matter of law.

Appeal by defendant from judgments entered 2 March 2001 by Judge Richard D. Boner in Davidson County Superior Court. Heard in the Court of Appeals 21 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Gaines M. Weaver, for the State.

Nixon & Associates, by Georgia S. Nixon and Bobby E. McCroskey, for the defendant-appellant.

HUDSON, Judge.

Defendant appeals his convictions for possession of marijuana with intent to sell or deliver, possession of LSD with intent to sell or deliver, and trafficking in LSD (1000 or more dosage units). The following is a summary of facts pertinent to defendant's appeal.

At the time of his arrest, defendant was sixteen years old and lived with his widowed mother. Although the testimony differed as to who initiated the transactions, the evidence established that police informant Jason Hunt discussed purchasing a large quantity (1000 dosage units) of LSD from defendant, and they arranged the purchase. On 2 February 2000, Hunt came to defendant's house to purchase the LSD. Defendant gave him two tabs to sample, and Hunt promised to return for the remaining LSD. Shortly thereafter, Detectives Woodall, Rankin, Westmoreland, and Cates from the Davidson County Sheriff's department arrived at defendant's

home. The detectives told his mother that defendant had sold drugs to an undercover police officer, and that they wanted to search her home. The officers proceeded to search the house, where they found a large quantity of LSD, as well as small quantities of LSD and marijuana elsewhere in the house. Officers transported defendant in handcuffs to the police station where they interrogated him. After being advised of his juvenile rights, defendant indicated and had the officers write on the form that he wanted his mother present. Although she was in the building at the time of the interrogation, the officers did not bring her to defendant, but told him he could continue with his statement anyway. Defendant wrote a statement on the form provided by the officers. The officers were not satisfied with the statement defendant wrote, so they destroyed it and instructed him to write another one. Once the officers were satisfied that the statement was consistent with what they believed, they had defendant sign it. Defendant was then charged, indicted, and later tried. We will discuss the evidence in additional detail as necessary to address the issues.

The jury convicted defendant of possession of marijuana with intent to sell or deliver, possession of LSD with intent to sell or deliver, and trafficking in LSD (1000 or more dosage units). The defense of entrapment was submitted to, and rejected by, the jury. The trial court sentenced him to a prison term of 6 months minimum and 8 months maximum for the consolidated possession convictions, and 175 months minimum and 219 months maximum for the trafficking conviction. Defendant appealed his convictions and noted seven assignments of error. In his brief, defendant brings forward six of these. *See* N.C. R. App. Proc. 28(a) (2001) (assignments of error not discussed in appellant's brief are deemed abandoned). We need only address assignments of error 1 and 4, as they are dispositive.

In addition to the arguments in his brief, defendant has filed a Motion for Appropriate Relief ("MAR") in this Court. In his MAR, defendant alleges that after his convictions in March 2001, a federal grand jury indicted Detectives Woodall, Rankin, and Westmoreland and others for conspiracy to distribute in excess of 5 kilograms of cocaine hydrochloride, in excess of 100 kilograms of marijuana, and unspecified quantities of anabolic steroids and "3, 4 methylenedioxymethamphetimine." Alleging that this new evidence affects the credibility of the three investigating officers in his case, defendant seeks a new trial. In its written response to the motion, the State concedes that the defendant's allegations were factual, but maintains that

any criminal conduct by the officers was "irrelevant" to the outcome of this case. Subsequently, the defendant forwarded additional documents supporting his MAR, incorporating a superseding indictment of the officers, an affidavit from the FBI investigator, and further allegations, including the following:

> 4. That after the filing of Defendant-Appellant's Motion for Appropriate Relief, Woodall pleaded guilty on March 7, 2002 to conspiracy to distribute narcotics, interference with interstate commerce by threat or violence, and committing a violent drug crime involving a machine gun; Westmoreland pleaded guilty on March 7, 2002 to conspiracy to distribute narcotics and interference with interstate commerce by threat or violence; and Rankin pleaded guilty on March 7, 2002 to conspiracy to distribute narcotics and depriving an arrestee of his civil rights.
>
> 5. That Woodall, Westmoreland and Rankin are currently awaiting sentencing for the above convictions.
>
> 6. That Woodall, Westmoreland and Rankin have admitted that they had been engaged in illegal drug activity and federal civil rights violations, including the fabrication of search warrants and evidence, either during the time they investigated and apprehended Defendant-Appellant, or during Defendant-Appellant's trial, or both.

At oral argument, the State did not dispute these assertions.

[1] In his first argument, defendant contends that the trial court erred in admitting his out-of-court statement to the officers, because they obtained the statement in violation of his right to have a parent present pursuant to N.C. Gen. Stat. § 7B-2101(d) (2001). The provisions of N.C.G.S. § 7B-2101 are as follows:

> (a) Any juvenile in custody must be advised prior to questioning:
>
> (1) That the juvenile has a right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and

(4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

. . . .

(c) If the juvenile indicates in any manner and at any stage of questioning pursuant to this section that the juvenile does not wish to be questioned further, the officer shall cease questioning.

(d) Before admitting into evidence any statement resulting from custodial interrogation, the court shall find that the juvenile knowingly, willingly, and understandingly waived the juvenile's rights.

A juvenile is defined as a "person who has not reached the person's eighteenth birthday and is not married, emancipated, or a member of the armed forces of the United States." N.C. Gen. Stat. § 7B-101(14) (2001). That defendant was a juvenile is not in dispute.

In *State v. Smith*, 317 N.C. 100, 106, 343 S.E.2d 518, 521 (1986), *aff'd*, 321 N.C. 290, 362 S.E.2d 159 (1987), the Court noted that "[t]he statute makes no provision regarding a resumption of interrogation once the officer has ceased questioning the juvenile pursuant to the juvenile's exercise of his right to remain silent or to consult with an attorney or to have a parent present during questioning." The Court applied the rule requiring all interrogation to cease when an adult defendant requests an attorney, to a juvenile who requests an attorney, parent, guardian, or custodian. *See id.* Once a juvenile defendant has requested the presence of a parent, or any one of the parties listed in the statute, defendant may not be interrogated further "until [counsel, parent, guardian, or custodian] has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Michigan v. Jackson*, 475 U.S. 625, 626, 89 L. Ed. 2d 631, 636 (1986) (internal citations and quotations omitted); *see also State v. Hunt*, 64 N.C. App. 81, 86, 306 S.E.2d 846, 850 (holding that juvenile defendant's Miranda rights were violated when the police continued to interrogate him after he requested his parents), *disc. rev. denied*, 309 N.C. 824, 310 S.E.2d 354 (1983).

To determine whether the interrogation has violated defendant's rights, we review the findings and conclusions of the trial court. First, the court found, and the evidence supports, that defendant was hand-

cuffed at his home, and remained handcuffed while he was transported to the police station. Once the officers walked defendant into the interrogation room, they shackled him to the chair with shackles that were also bolted to the wall. Clearly, he was in custody at the time he made his statement. *See State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 580-81 (1982) (describing the test for determining whether someone is in police custody as whether a "reasonable person in the suspect's position would believe himself to be in custody or that his freedom of action was deprived in some significant way").

Among the courts findings and conclusions are the following:

> 5. That based on controlled substances found in the residence on 2/2/00 defendant was placed in custody at his residence and transported by detectives to the Davidson County Sheriff's Department for questioning.
>
> 6. That defendant's mother was present at the residence when the residence was searched and when defendant was placed in custody. She voluntarily went to the Sheriff's Department in a vehicle separate from defendant.
>
> 7. That defendant was taken into the Sheriff's Department in handcuffs. His mother was waiting outside when he was taken into the building and observed defendant go into the building. Defendant knew she was present when he went into the building.
>
> . . . .
>
> 9. That defendant's mother was placed in a room next door to the interview room where defendant was located and was with officer [sic] Woodall of the Davidson County Sheriff's Department.
>
> 10. That defendant was read his Miranda rights by Officer Rankin at approximately 10:15 P.M. The rights form was signed by defendant and Officer Rankin. The form did include advising the defendant of his right to have a parent, guardian, or custodian present during questioning as defendant was under age 18 at the time of questioning. This form was introduced into evidence as State's Exhibit A.
>
> 11. That defendant asked that his mother be present while he was questioned.

12. That Officer Rankin called Officer Woodall on a cellular phone to tell him that defendant wanted his mother to be present.

13. That Officer Woodall informed defendant's mother of this request. She told officers she did not wish to be with her son while he gave a statement because she believed he would be "snitching" on someone else. Officer Woodall wrote out a statement documenting Ms. Branham's decision, which was introduced into evidence as State's Exhibit C.

14. That Officer Woodall informed Officer Rankin that defendant's mother refused to be present during defendant's questioning and Officer Rankin[] informed defendant of this. Officer Rankin then told defendant "he could still continue if he chose to".

15. That defendant then agreed to give a written statement in the absence of his mother.

. . . .

17. That defendant initially wrote one statement, which was later destroyed because of inaccuracies in the names defendant gave as his suppliers. Defendant then wrote a second statement, which was introduced into evidence as State's Exhibit B.

. . . .

CONCLUSIONS OF LAW

. . . .

1. The State has shown by a preponderance of the evidence that the defendant knowingly, willingly and understandingly gave a statement to the Davidson County Sheriff's Department on February 2, 2000 and that the statement meets the requirements of [N.C.G.S. §] 7B-2101.

2. WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, the written statement of the defendant given to the Davidson County Sheriff's Department on February 2, 2000 is admissible in evidence at the trial of this matter. The Court notes the objection of the defendant to this order and her allegation of the right to appeal.

The court made no specific conclusion of law regarding the significance of defendant's invoking his right to have a parent present.

Here, defendant was 16 years old at the time of his arrest. Officer Rankin informed defendant of his rights and presented him with the "Davidson County Sheriff's Department Statement of Rights: (For Juveniles up to Age 18)." In addition to the usual rights, the form includes: "[y]ou have a right to have a parent, guardian, or custodian present during questioning." Defendant signed the form next to "I understand these rights." An additional clause "(For Juveniles Age 14 to 18)" beneath his signature, states,

> I have read the above statement of my rights and have also had my rights explained to me by a police officer. Knowing these rights, I do not want a lawyer, parent, guardian or custodian present at this time. I waive each of these rights knowingly and willingly to answer questions and/or make a statement.

At defendant's insistence, Officer Rankin wrote beside defendant's signature, "[d]oes want a parent (mother)."

Defendant testified that he requested his mother's presence during his statement and instructed the officers to write down that he asked for his mother. The officers neither produced her nor ceased the questioning. Instead, they told defendant that he could continue with writing his statement. Both defendant and Officer Rankin testified that after defendant wrote out his first statement, Officer Rankin threw it away because it did not name the supplier that the officers believed was involved. Defendant and Officer Rankin testified that defendant then wrote out a second statement, and, in accordance with Officer Rankin's instructions, he changed the names of the others involved. Defendant said that the officers told him "if any information [in my statement] didn't comply with theirs, I would sit there all night," so he "wrote what they wanted to hear because I wanted to get out of there. I was scared."

The trial court made findings, based on the testimony of Officers Woodall and Rankin, that defendant's mother refused to see him. These and the other findings do not support the conclusion that the defendant's waiver and statement complied with N.C.G.S. § 7B-2101. Even if we assume that defendant's mother did not want to be present during defendant's interrogation, she did not have the ability to, in effect, waive his right to have her present during interrogation. *See In re Ewing*, 83 N.C. App. 535, 537, 350 S.E.2d 887, 888 (1986). In *Ewing*,

a decision under the prior juvenile code, this Court specifically held that "a parent, guardian, or custodian may not waive *any* right on behalf of the juvenile." *Id.* (emphasis by the Court). The current juvenile code, N.C.G.S. § 7B-2101, contains the same language. Defendant testified that after the officers told him she would not see him, he wrote a statement because he was told to and did not think that he had a choice in the matter. There is no evidence that it was defendant who initiated further communication with the officers.

Because defendant invoked his right to have a parent present during interrogation, all interrogation should have ceased. Since it did not, the trial court erred by denying defendant's motion to suppress his statement, which was elicited in violation of N.C.G.S. § 7B-2101. Defendant is entitled to a new trial, and on retrial the statement must be suppressed.

[2] In his third argument, defendant contends that the trial court erred by failing to dismiss the charges based on the affirmative defense of entrapment. Defendant argues that but for the repeated contacts and solicitation made by police agent Jason Hunt, he would not have possessed so great a quantity of LSD for the purpose of sale. We disagree.

"To establish the defense of entrapment, it must be shown that (1) law enforcement officers or their agents engaged in acts of persuasion, trickery or fraud to induce the defendant to commit a crime, and (2) the criminal design originated in the minds of those officials, rather than with the defendant." *State v. Worthington*, 84 N.C. App. 150, 157, 352 S.E.2d 695, 700 (1987) (citing *State v. Walker*, 295 N.C. 510, 246 S.E.2d 748 (1978)). "The defense is not available to a defendant who was predisposed to commit the crime charged absent the inducement of law enforcement officials." *State v. Davis*, 126 N.C. App. 415, 418, 485 S.E.2d 329, 331 (1997). Defendant bears the burden of proving the affirmative defense of entrapment. *See State v. Braun*, 31 N.C. App. 101, 103, 228 S.E.2d 466, 467, *disc. rev. denied*, 291 N.C. 449, 230 S.E.2d 766 (1976).

"Ordinarily, the issue of whether a defendant has been entrapped is a question of fact which must be resolved by the jury. It is only when the undisputed evidence discloses that an accused was induced to engage in criminal conduct that he was not predisposed to commit that we can hold as a matter of law that he was entrapped." *State v. Hageman*, 307 N.C. 1, 30, 296 S.E.2d 433, 450 (1982) (internal citations omitted). Entrapment is a complete defense to the crime

charged. If defendant's evidence creates an issue of fact as to entrapment, then the jury must be instructed on the defense of entrapment. Defendant has the burden of establishing its elements "to the satisfaction of the jury." *State v. Goldman*, 97 N.C. App. 589, 593, 389 S.E.2d 281, 283 (1990). If the jury so finds, the trial court is bound to dismiss his charges. When the evidence of entrapment is undisputed, the trial court may find that defendant was entrapped as a matter of law.

Defendant contends that the evidence at trial proved entrapment as a matter of law. The trial court denied defendant's motion to dismiss based on the affirmative defense of entrapment, but did instruct the jury on the defense of entrapment. In reviewing the trial court's denial of the motion to dismiss, we must first determine whether the evidence was undisputed that agents of the State persuaded defendant to engage in trafficking LSD or whether defendant was predisposed to commit the offense. "Predisposition may be shown by a defendant's ready compliance, acquiescence in, or willingness to cooperate in the criminal plan where the police merely afford the defendant an opportunity to commit the crime." *Hageman*, 307 N.C. at 31, 296 S.E.2d at 450. Second, we must determine whether the evidence supported the inference that the crime originated with the police and their agents, and not the defendant.

After careful analysis, we conclude that there was evidence that Jason Hunt and the officers initiated the offense, but also evidence from which the jury could have inferred that defendant was predisposed to sell LSD. Defendant testified that two days before he was arrested, Jason Hunt, the older brother of a girl defendant knew, came over to his house and asked if defendant "could get him a kilo of Cocaine." Defendant testified that he was shocked by the request because, "I never dealt with Cocaine or messed with it at all. I told him I had no idea where I could get it or anywhere that anybody ever dealt with it." Then, Hunt asked defendant if he could obtain "ten sheets of LSD" for him. Defendant testified that he had "never dealt with anything . . . bigger than ten hits. And he just, he kept pushing and pushing and kept asking me and kept asking me and I told him I didn't know where I could get it from. I didn't know where I could get that amount." Defendant testified that on that occasion and the next day Hunt asked him repeatedly to get ten sheets of LSD. Defendant stated, "I had no intention of getting it. I told him that I didn't want to have anything to do with it." Hunt persisted until defendant agreed to locate the quantity of LSD Hunt requested. Defendant offered to ride

with Hunt to the seller, so Hunt could purchase the LSD himself, but when Hunt offered defendant an additional one-hundred dollars, defendant finally agreed to make the purchase himself and bring it to defendant's home. Defendant made the purchase, contacted Hunt and told him to come pick it up, but Hunt only picked up two hits of LSD. Minutes later, the police arrived and arrested defendant.

The State presented testimony from Officer Woodall to the effect that during these events Jason Hunt was working for him as a paid informant. Woodall did not know what Hunt and defendant said to each other, but did not dispute that the drug deal at issue here originated with a telephone call from Hunt. Woodall testified that he had paid Hunt to act as an informant in drug cases for a few years. He had worked with Hunt, both before and after Hunt spent some time in prison. Woodall did not dispute that Hunt called him to initiate the deal involving defendant, or that the officers were to provide the money.

However, Hunt claimed that in a telephone call witnessed by Officer Medlin, defendant offered to sell Hunt as much LSD as he wanted. Hunt admitted that he called Officer Woodall and told him that LSD was getting into his sister's hands, and that he (Hunt) "would like to put a stop to it."

> Q. So you were upset that your sister, your baby sister, as you put it, had some LSD; is that correct?
>
> A. Yes, ma'am.
>
> Q. You decided you were going to set up whoever it was that you perceived put it that way; isn't that correct?
>
> A. Yes, ma'am.

Woodall then asked Medlin to go with Hunt to make the undercover buy. Medlin and Hunt gave widely divergent stories of what occurred next, and Medlin did not corroborate Hunt's testimony about the telephone call to defendant. Hunt's younger sister, Summer, testified that she had nothing to do with her older brother because he lied regularly and had stolen her belongings in the past. She specifically denied ever purchasing drugs from defendant or his friend, and stated that her brother lied during his testimony.

Defendant's testimony that Hunt repeatedly pushed defendant to obtain drugs for him, that he attempted to get Hunt to make the purchase himself, and that he had never before been involved in any drug

sales of this quantity may have "been sufficient to raise the issues of inducement, and lack of predisposition to commit the offenses, but fell short of compelling a conclusion of entrapment as a matter of law." *Davis*, 126 N.C. App. at 418, 485 S.E.2d at 331. Thus, the issue of entrapment was properly submitted to the jury. The trial court did not err in denying defendant's motion for dismissal of the charges based on entrapment as a matter of law.

Because we find that the officers violated N.C.G.S. § 7B-2101, we remand for a new trial. And finally, we dismiss as moot defendant's Motion for Appropriate Relief, without prejudice to his right to refile in the trial court should he deem it necessary.

New trial.

Judges GREENE and BIGGS concur.

IN THE MATTER OF DANA JAMES HODGE

No. COA01-1265

(Filed 17 September 2002)

1. Juveniles— improper service—general appearance—jurisdiction

The trial court had jurisdiction over respondent juvenile with respect to a simple assault petition even though neither respondent nor a parent was served with the summons and notice of hearing issued on 8 February 2001 and the State did not make any further attempts to serve respondent or his parents with the assault petition, because: (1) respondent and his parents were present in the courtroom during the hearing and did not object to the defect in service; and (2) respondent waived any defect in service since his denial of the allegations in the petition and his participation in the hearing on the petition without objection constitute a general appearance.

2. Appeal and Error— appealability—failure to renew motion to dismiss at close of all evidence

Respondent juvenile may not challenge on appeal the sufficiency of the evidence to support a charge of assault because

respondent presented evidence following the close of the State's case but failed to renew his motion to dismiss following the close of all evidence.

3. Assault— de minimus act—unrecognized defense

The trial court did not err by adjudicating respondent delinquent based on his commission of the offense of simple assault even though respondent juvenile contends any act which he allegedly committed was de minimus and did not rise to the level of criminal activity for a simple assault charge but was only normal boyhood behavior between two brothers, because North Carolina does not recognize such a defense.

4. Confessions and Incriminating Statements— juvenile's statements to detective during home visit—not in custody

The trial court did not err in a simple assault case by allowing a detective to testify to statements respondent juvenile made to the detective during a home visit where respondent was neither advised of his constitutional rights nor knowingly and willingly waived those rights, because: (1) N.C.G.S. § 7B-2101 provides that a juvenile must be in custody before it becomes necessary to inform him of his rights, and respondent was not in custody when he made the statements since no proceeding had been initiated against respondent and the purpose of the detective's visit was solely to investigate the allegation; and (2) there was no requirement that defendant be informed of or waive such rights prior to the interview.

5. Assault— simple assault—failure to allege specific date

The trial court did not err by adjudicating respondent delinquent based on his commission of the offense of simple assault even though respondent juvenile contends the petition was fatally defective based on the fact that it did not allege a specific date for the offense but stated it occurred between 1 April 2000 and 15 July 2000, because: (1) time is not essential to the allegation of assault; (2) respondent has failed to affirmatively establish that he was either misled as a result of the time period listed in the indictment or that he was prejudiced in the presentation of his defense; (3) the listed time period was not so vast and unspecific that it could subject respondent to double jeopardy; and (4) North Carolina courts have routinely upheld the use of time periods in indictments which extend beyond that of the two and one-half months listed in this indictment.

Appeal by respondent from order entered 21 February 2001 by Judge Robert B. Rader in Wake County District Court. Heard in the Court of Appeals 15 August 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Lisa Granberry Corbett, for the State.

Miller & Shedor, PLLC, by Marty E. Miller, for respondent-appellant.

MARTIN, Judge.

Dana James Hodge ("respondent") appeals from an order adjudicating him delinquent based upon his commission of the offense of simple assault. The record establishes that during the spring and early summer of 2000, respondent was on probation for a previous charge of possession of stolen property. As a result, respondent was required to meet with a court counselor, Barbara Pherribo. Pherribo met with respondent and his parents on 16 May 2000. During the meeting, respondent's parents informed Pherribo that respondent's younger brother Daniel had accusedl respondent of putting his penis in Daniel's moutn. On 13 July 2000, Detective Rose Beane of the Wake County Sheriff's Office met with respondent, his mother, and Daniel in their home. Daniel told Detective Beane he had accused respondent of putting his penis in his mouth because he was upset with respondent. Daniel also told Detective Beane that respondent "beat[s] [him] up," "punches [him]," and "drags him on the floor." Respondent admitted to having taken his penis out of his pants, but denied putting it near Daniel's face. Respondent admitted to Detective Beane that he sometimes "beat[s] his brothers up."

On 20 October 2000, a juvenile petition was issued alleging that between 1 January 2000 and 1 July 2000, respondent "unlawfully [and] willfully did take immoral, improper, and indecent liberties with Daniel . . . for the purpose of arousing and gratifying sexual desire." The petition was properly served on respondent and his mother, along with a summons and notice of hearing. On 6 February 2001, another juvenile petition was issued alleging respondent committed simple assault on Daniel by hitting and kicking him between 1 April 2000 and 15 July 2000. A summons and notice of hearing addressed to respondent's mother was issued on 8 February 2001, but was returned unserved on 14 February 2001.

Both petitions came to hearing on 21 February 2001. Respondent, his parents, and Daniel were present for the hearing. At the close of

the State's evidence, the trial court granted respondent's motion to dismiss the charge of indecent liberties, but denied the motion as to the assault charge. Respondent presented evidence that he and Daniel "just play like regular brothers" and that their behavior towards one another is "normal brother behavior." The trial court entered an order on 21 February 2001 adjudicating respondent delinquent based upon his commission of simple assault.

Respondent appeals, bringing forward five assignments of error. Respondent has failed to enumerate the corresponding assignment of error immediately beneath each argument in his appellate brief, as required by N.C.R. App. P. 28(b)(6). Although this failure subjects his appeal to dismissal, as respondent's five arguments correspond with five of his six assignments of error of record, we exercise our discretion to review the merits of his appeal under N.C.R. App. P. 2. *See State v. Gaither*, 148 N.C. App. 534, 559 S.E.2d 212 (2002).

[1] Respondent first argues the trial court did not have personal jurisdiction over him with respect to the simple assault petition. Respondent correctly notes that according to G.S. § 7B-1806, the summons and petition must be "personally served upon the parent, the guardian, or custodian and the juvenile not less than five days prior to the date of the scheduled hearing." N.C. Gen. Stat. § 7B-1806 (2002). Respondent emphasizes it is undisputed that neither he nor a parent was served with the summons and notice of hearing issued on 8 February 2001, and that the State did not make any further attempts to serve respondent or his parents with the assault petition.

However, respondent and his parents were present in the courtroom during the hearing and did not object to the defect in service. At the beginning of the proceedings, the district attorney clearly stated respondent was in court "on two delinquency petitions," and proceeded to describe both charges, including that one of the petitions alleged respondent was guilty of simple assault for kicking and hitting Daniel. After describing both petitions, respondent, through counsel, denied the allegations contained in the "two petitions," and proceeded to put on evidence during the hearing.

Delinquency proceedings under the Juvenile Code are civil in nature, and accordingly, "proceedings in juvenile matters are to be governed by the Rules of Civil Procedure." *Matter of Bullabough*, 89 N.C. App. 171, 179, 365 S.E.2d 642, 646 (1988). In civil cases, it is well-established that a court may not exercise jurisdiction over a person

without valid service of process. *Ryals v. Hall-Lane Moving and Storage Co., Inc.*, 122 N.C. App. 242, 247, 468 S.E.2d 600, 604, *disc. review denied*, 343 N.C. 514, 472 S.E.2d 19 (1996). "However, a person may submit himself to the jurisdiction of the court, if he makes a general appearance, even if the court has not already obtained jurisdiction over defendant by serving him with process." *Id.*

> An appearance constitutes a general appearance if the defendant invokes the judgment of the court on any matter other than the question of personal jurisdiction. The appearance must be for a purpose in the cause, not a collateral purpose. The court will examine whether the defendant asked for or received some relief in the cause, participated in some step taken therein, or somehow became an actor in the cause. Our courts have applied a very liberal interpretation to the question of a general appearance and almost anything other than a challenge to personal jurisdiction or a request for an extension of time will be considered a general appearance.

Bullard v. Bader, 117 N.C. App. 299, 301, 450 S.E.2d 757, 759 (1994) (citations omitted) (holding defendant's action in submitting information relevant to merits of case prior to asserting lack of jurisdiction constituted general appearance).

Here, respondent's and his parents' presence in the courtroom during the hearing on the simple assault petition, respondent's denial of the allegations contained in that petition, and his participation in the hearing on that petition without objection constitute a general appearance for purposes of waiving any defect in service. Accordingly, the trial court properly exercised personal jurisdiction over respondent.

[2] Respondent next argues the trial court erred in failing to dismiss the simple assault charge. He maintains the State failed to prove the elements of simple assault by failing to show respondent acted with malice, intent to harm, or that Daniel was in reasonable fear of physical harm. While respondent moved to dismiss the simple assault petition after the close of the State's evidence, he failed to renew that motion following the close of all evidence. N.C.R. App. P. 10(b)(3) provides in pertinent part that a defendant who moves to dismiss a charge based on insufficiency of the evidence after the close of the State's evidence waives the benefit of that objection if, after the motion is denied, the defendant presents his own evidence, and such waiver precludes him from urging the denial of the motion as a

ground for appeal. The defendant may preserve that argument for appeal only by renewing the motion at the close of all of the evidence. "However, if a defendant fails to move to dismiss the action . . . at the close of all the evidence, he may not challenge on appeal the sufficiency of the evidence to prove the crime charged." N.C.R. App. P. 10(b)(3).

Respondent here presented evidence following the close of the State's case, but failed to renew his motion to dismiss following the close of all evidence, and he therefore cannot assert the denial of his motion as grounds for relief on appeal. *See Matter of Davis*, 126 N.C. App. 64, 66, 483 S.E.2d 440, 442 (1997) (appellate court will not entertain juvenile's argument that State failed to prove charge where juvenile failed to renew motion to dismiss at close of all evidence). We therefore do not address this argument.

[3] Third, respondent argues any act which he allegedly committed was *de minimus* and did not rise to the level of criminal activity, but was "only normal boyhood behavior between two brothers." In support of this contention, respondent only cites provisions of the Model Penal Code, which he concedes has not been adopted in North Carolina and is therefore not binding on this Court. Nevertheless, respondent urges us to hold that even if his acts constituted assault under the law, such acts were on such a "small[] scale" that the trial court's order should be vacated. However, North Carolina does not recognize such a defense, and we decline to apply it here. This argument is overruled.

[4] Respondent next contends the trial court erred in allowing Detective Beane to testify to statements respondent made to her during her home visit where respondent was neither advised of his constitutional rights nor knowingly and willingly waived those rights. Respondent cites G.S. § 7B-2102, governing juvenile interrogations, which provides:

> (a) Any juvenile in custody must be advised prior to questioning:
>
> (1) That the juvenile has a right to remain silent;
>
> (2) That any statement the juvenile does make can be and may be used against the juvenile;
>
> (3) That the juvenile has a right to have a parent, guardian, or custodian present during questioning; and

(4) That the juvenile has a right to consult with an attorney and that one will be appointed for the juvenile if the juvenile is not represented and wants representation.

N.C. Gen. Stat. § 7B-2101 (2002). It is clear from the wording of the statute that a juvenile must be in "custody" before it becomes necessary to inform him of his rights. This "custody" requirement is consistent with the common law "*Miranda*" requirements applied in criminal cases. *See Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966).

Our Supreme Court recently summarized the law with respect to informing defendants of their juvenile rights and constitutional rights under *Miranda*. *See State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997). The Court observed that the requirement of being informed of such rights only applies where a defendant is subject to "custodial interrogation." *Id.* at 661, 483 S.E.2d at 404. "Custodial interrogation ' "mean[s] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." ' " *Id.* at 661-62, 483 S.E.2d at 405 (citations omitted). One inquiry in determining whether a person is in custody is "whether a reasonable person in the suspect's position would feel free to leave." *Id.* at 662, 483 S.E.2d at 405. However, the definitive inquiry for the appellate court, based on all of the circumstances surrounding the interrogation, is "whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *Id.* (citing *Stansbury v. California*, 511 U.S. 318, 128 L. Ed. 2d 293 (1994) (*per curiam*)). Although any interview of a suspect will necessarily possess coercive aspects, *Miranda* warnings are not required simply because the questioned person is suspected by the police of wrongdoing. *Id.*

The trial court's finding that respondent was not in custody when he made the statements to which Detective Beane testified is supported by the evidence. The evidence establishes that Detective Beane spoke to respondent, his mother, and Daniel in the living room of their home as a result of an allegation made by Daniel. No proceedings had been initiated against respondent, and the purpose of Detective Beane's visit was solely to investigate the allegation. Detective Beane testified that she prefaced her interview with respondent by saying, "[y]ou don't have to talk to me," "I am not going to arrest you," "I am not going to take you with me," and that she "joke[d]" with respondent about how he would not be able to go with

her and that he needed to stay at home with his parents. Detective Beane testified she did not inform respondent of his rights because respondent was not in custody.

Based on this evidence, and all circumstances surrounding respondent's interview, we conclude respondent was not subject to a restraint on his freedom of movement of the degree associated with a formal arrest. Thus, respondent was not in custody for purposes of being informed of his juvenile or *Miranda* rights, and the trial court correctly determined that there was no requirement that defendant be informed of, or waive, such rights prior to the interview.

[5] In his final argument, respondent maintains the simple assault petition was fatally defective because it did not allege a specific date for the offense. Rather, the petition alleged the assault occurred between 1 April 2000 and 15 July 2000. Respondent argues this was insufficient to inform him of the conduct to which the petition was addressed. We disagree.

To be valid, an indictment must allege either a designated date *or* a period of time during which the crime occurred. *State v. Stewart*, 353 N.C. 516, 546 S.E.2d 568 (2001). Our Supreme Court has held that the time period listed in an indictment is generally not considered an essential element of the crime charged, and thus, a judgment should only be vacated for an error if time was of the essence of the offense and the error or omission misled the defendant to his prejudice. *State v. Osborne*, 149 N.C. App. 235, 245-46, 562 S.E.2d 528, 536 (2002). The Supreme Court has further determined that time is of the essence only where it " ' "deprives a defendant of an opportunity to adequately present his defense." ' " *Id.* at 246, 562 S.E.2d at 536 (citations omitted). In order for any error or omission in the time period to constitute error on appeal, a defendant must affirmatively establish that he was mislead as a result, or that he was hampered in the presentation of his defense. *Id.*

Here, time is not essential to the allegation of assault, and respondent has failed to affirmatively establish that he was either mislead as a result of the time period listed in the indictment, or that he was prejudiced in the presentation of his defense; nor do we discern any such prejudice from review of the transcript. Moreover, we are unpersuaded by respondent's argument that the listed time period was so vast and unspecific that it could subject him to double jeopardy. Our courts have routinely upheld the use of time periods in indictments which extend beyond that of the two and one-half

months listed in the indictment here. *See State v. Blackmon*, 130 N.C. App. 692, 697, 507 S.E.2d 42, 45-46 (rejecting double jeopardy argument based on indictment alleging that between 1 January and 12 September 1994 defendant engaged in sexual acts and indecent liberties with minor victim; given that victim testified some of alleged acts occurred when it was warm outside and some when it was cold outside, indictment was sufficiently specific), *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998); *State v. McKinney*, 110 N.C. App. 365, 371, 430 S.E.2d 300, 303-04 (upholding indictment which listed two-year time frame for occurrence of sexual offense), *disc. review and cert. denied*, 334 N.C. 437, 433 S.E.2d 182 (1993).

The order of the trial court adjudicating respondent delinquent based on his commission of the offense of simple assault is affirmed.

Affirmed.

Judges TYSON and THOMAS concur.

BETTY DONOHO, PLAINTIFF, AND THE BUNCOMBE COUNTY BOARD OF EDUCATION, INTERVENOR PLAINTIFF v. THE CITY OF ASHEVILLE, COUNTY OF BUNCOMBE AND WESTERN NORTH CAROLINA REGIONAL AIR POLLUTION CONTROL AGENCY, DEFENDANTS

No. COA01-1293

(Filed 17 September 2002)

Penalties, Fines and Forfeitures— local air quality ordinances—fines payable to county school fund

Civil fines and penalties assessed by a regional air pollution control agency for violations of local air quality ordinances and regulations are payable to the county school fund pursuant to N.C. Const. art. IX, § 7 because the local ordinances are enacted under authority delegated by the State and the Environmental Management Commission in order to enforce State-mandated air quality standards and constitute "penal laws" within the meaning of N.C. Const. art. IX, § 7.

Appeal by plaintiff from judgment and order entered 25 June 2001 by Judge J. Marlene Hyatt in Buncombe County Superior Court. Heard in the Court of Appeals 12 June 2002.

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

Roberts & Stevens, P.A., by Cynthia S. Grady, for intervenor plaintiff appellant.

Siemens Law Office, P.A., by A. James Siemens, for Western North Carolina Regional Air Pollution Control Agency; Robert W. Oast, Jr., for the City of Asheville; and Stanford K. Clontz, for County of Buncombe, defendant appellees.

McCULLOUGH, Judge.

Plaintiff Betty Donoho is a taxpayer and resident of Asheville, North Carolina. On 30 June 2000, she instituted this lawsuit and sought both a declaratory judgment and injunctive relief. Plaintiff requested that the trial court (1) enjoin the City of Asheville and Buncombe County from forming a charitable clean air trust fund; and (2) divert funds intended for the charitable clean air trust fund to attorney fees and various school boards.

The facts leading to plaintiff's lawsuit are as follows: the Western North Carolina Regional Air Pollution Control Agency (the Agency) was created in 1970 as a local air pollution control agency pursuant to N.C. Gen. Stat. § 143-215.112(c)(1) (2001). The Agency was formed by a joint agreement between the local governments of Haywood County, Buncombe County, and the City of Asheville after those entities determined that "it is in the best interest of the citizens of their respective localities that a Regional Air Pollution Control Program be established to administer and enforce an effective Air Pollution Control Program throughout Buncombe and Haywood Counties and the City of Asheville[.]" The Agency existed in the same form until 1995, when it was reaffirmed pursuant to Article 20, Chapter 160A of the North Carolina General Statutes, which allows units of local government to jointly exercise their powers.

On 30 June 2000, Haywood County officially withdrew from the Agency. The remaining members continued to operate the Agency until 13 July 2000, when the North Carolina Environmental Management Commission (the Commission) ratified a new agreement between Buncombe County and the City of Asheville to form the present local agency, the Western North Carolina Regional Air Quality Agency.

When the original Agency was terminated on 13 July 2000, it had an approximate fund balance of $800,000.00. About half that amount represented the proceeds of Title V permit fees, while the other half represented a combination of funds, including proceeds of civil penalties assessed for violations of local ordinances which adopted state and federal air quality standards. While the Agency existed, Buncombe County held and administered the Agency's funds. On 31 January 1997, the Buncombe County Board of Education (the Board) wrote a letter demanding payment of all the fines collected by the Agency to the school board. On 7 March 1997, Buncombe County refused the Board's request.

The Agency intends to remit these remaining funds to a clean air trust fund, the purpose of which will be to leverage grants and other revenues to improve air quality in the City of Asheville and Buncombe County. Plaintiff's 30 June 2000 lawsuit requested the following types of relief:

1. That the Court enter an injunction restraining the City and the County from paying over said monies to the said Charitable Trust until the Court can determine what amount thereof represents fines and penalties subject to the constitutional requirement alleged and whether or not the payments are otherwise legal.

2. That the Court enter a Declaratory Judgment as to the liability of the City, the County and the Western North Carolina Air Pollution Control Agency to pay over fines and penalties to the appropriate School Fund.

3. That the Court enter an Order of Mandamus to the County and the City to pay over the funds declared by the Court to be subject to the constitutional requirement.

4. That the Courts declare whether or not any payment of these funds to the Trust is legal and, if so, to what extent.

5. That the Court award the Plaintiff [her] attorney's fees in accordance with law.

6. That the Court determine the amount of excess fees pursuant to G.S. § 143-215.3(a)(1d) which should be remitted to the agency administering the program for the next fiscal year and order that said sums be paid to said agency.

7. That the costs of this action be taxed to the City of Asheville and the County of Buncombe.

On 10 October 2000, the Board was permitted to intervene.

On 25 June 2001, the trial court considered several motions by the parties, including the City of Asheville's motions to dismiss, Buncombe County's motion for partial summary judgment, the Agency's motions to dismiss and motions for partial summary judgment, and plaintiff Donoho's motion for partial summary judgment (which was joined in by the Board). At this point, plaintiff and the Board conceded that the Title V permit fees were not at issue in this case and the trial court issued an order dismissing the Title V claim on 15 May 2001. On 25 June 2001, the trial court granted the Agency's motion for summary judgment and concluded the civil penalties assessed by the Agency were not assessed by a state agency and were not assessed pursuant to a penal law of the state. Plaintiff Donoho and the Board appealed.

On appeal, plaintiff and the Board argue the trial court erred in concluding that the fines levied for the violations of the local ordinances and regulations were not subject to Article IX, Section 7 of the North Carolina State Constitution. They further argue that such assessments were, in reality, for violations of the penal laws of the State. After careful consideration of the record and the arguments of the parties, we agree with plaintiff Donoho and the Board and reverse and remand the case to the trial court for proceedings consistent with this opinion.

In North Carolina, air pollution control is governed by Chapter 21B of the North Carolina General Statutes. In that Chapter, the state granted the Department of Environment and Natural Resources the power to administer the air quality program for the state. *See* N.C. Gen. Stat. § 143-215.106 (2001). The statutory scheme for regulating air pollution is a statewide framework achieved through the exercise of the State's police power; the fines and penalties collected are also part of the State regulatory scheme. N.C. Gen. Stat. § 143-215.114A(h) (2001) specifies that "[t]he clear proceeds of penalties provided for in this section shall be remitted to the Civil Penalty and Forfeiture Fund in accordance with G.S. 115C-457.2." N.C. Gen. Stat. § 115C-457.2 states:

> The clear proceeds of all civil penalties and civil forfeitures that are collected by a State agency and are payable to the County

> School Fund pursuant to Article IX, Section 7 of the Constitution shall be remitted to the Office of State Budget and Management by the officer having custody of the funds within 10 days after the close of the calendar month in which the revenues were received or collected. Notwithstanding any other law, all funds which are civil penalties or civil forfeitures within the meaning of Article IX, Section 7 of the Constitution shall be deposited in the Civil Penalty and Forfeiture Fund. The clear proceeds of such funds include the full amount of all such penalties and forfeitures collected under authority conferred by the State, diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected.

Funds so deposited are then allocated to local school administrative units pursuant to N.C. Gen. Stat. § 115C-457.3 (2001).

Under N.C. Gen. Stat. § 143-215.111(3) (2001), the North Carolina Environmental Management Commission has the power "[t]o encourage local units of government to handle air pollution problems within their respective jurisdictions and on a cooperative basis, and to provide such local units technical and consultative assistance to the maximum extent possible." The local governments are, in turn, allowed to establish local air pollution control programs pursuant to the terms and conditions of N.C. Gen. Stat. § 143-215.112 (2001). N.C. Gen. Stat. § 143-215.112(b) provides the sole method by which local governments may establish and administer an air pollution control program:

> (b) No municipality, county, local board or commission or group of municipalities and counties may establish and administer an air pollution control program unless such program meets the requirements of this section and is so certified by the Commission.

Moreover, under N.C. Gen. Stat. § 143-215.112(c)(4), certified local air pollution control programs are authorized to adopt ordinances, resolutions, rules, or regulations necessary to establish and maintain an air pollution control program and will not be approved by the Commission unless they do so.

"Each governing body, or its authorized agent, shall have the power to assess civil penalties under G.S. 143-215.114A." N.C. Gen. Stat. § 143-215.112(d)(1)(1a) (2001). Violations of the ordinances,

resolutions, rules or regulations of the local programs can carry criminal penalties ranging from misdemeanors to felonies. *See* N.C. Gen. Stat. § 143-215.112(d)(1) and N.C. Gen. Stat. § 143-215.114B (2001). Buncombe County's response to plaintiff's request for admissions acknowledged that all penalties in this case were assessed pursuant to N.C. Gen. Stat. § 143-215.112(c)(1)(a) and N.C. Gen. Stat. § 143-215.114A.

Defendants argue the fines were levied for violations of local regulations, standards and permits of the Agency, which were peculiar to its operation as a local air pollution control program. Plaintiffs, on the other hand, argue that the fines and penalties were collected under authority conferred by the state and were required to be paid to school boards under N.C. Gen. Stat. § 115C-437 and Article IX, Section 7 of the North Carolina Constitution. Article IX, Section 7 states:

> **County School Fund.**
>
> All moneys, stocks, bonds, and other property belonging to a county school fund, and the clear proceeds of all penalties and forfeitures and of all fines collected in the several counties for any breach of the penal laws of the State, shall belong to and remain in the several counties, and shall be faithfully appropriated and used exclusively for maintaining free public schools.

Additionally, N.C. Gen. Stat. § 115C-437 (2001), which interprets N.C. Const. Art. IX, Section 7, states that:

> The clear proceeds of all penalties and forfeitures and of all fines collected for any breach of the penal laws of the State, as referred to in Article IX, Sec. 7 of the Constitution, shall include the full amount of all penalties, forfeitures or fines collected *under authority conferred by the State*, diminished only by the actual costs of collection, not to exceed ten percent (10%) of the amount collected.

N.C. Gen. Stat. § 115C-437 (emphasis added).

The phrase "all fines collected for any breach of the penal laws of the State" is included in the definition of "clear proceeds" in § 115C-437. The only remaining questions are whether the statute encompasses other civil penalties and whether the penalties in the case *sub judice* were collected under authority conferred by

the state. Appellants believe both questions should be answered in the affirmative, because the only authority to levy the fines comes from state law. On this point, our Supreme Court stated:

> The crux of the distinction lies in the *nature* of the *offense* committed, and not in the *method* employed by the municipality to collect fines for commission of the offense. A "fine" is "a sum of money exacted of a person guilty of a misdemeanor, or a crime." *State v. Addington*, 143 N.C. 683, 686, 57 S.E. 398, 399 (1907); *State v. Rumfelt*, [241 N.C. 375, 85 S.E.2d 398 (1955).] The constitution mandates that "all fines collected in the several counties for any *breach of the penal laws* of the State" be appropriated to the school fund. The inquiry addressed by [*Board of Education v. Henderson*, 126 N.C. 689, 36 S.E. 158 (1900)], then, was whether the monies in dispute were collected for violations of the criminal laws of the State or for violations of city ordinances.

Cauble v. City of Asheville, 301 N.C. 340, 344, 217 S.E.2d 258, 260-61 (1980), *aff'd*, 314 N.C. 598, 336 S.E.2d 59 (1985) (emphasis in original). The Board correctly points out that several statutes refer to the State's ultimate responsibility in the area of air pollution and air quality. *See* N.C. Gen. Stat. § 143-211 (2001) (stating that "[i]t is hereby declared to be the public policy of this State to provide for the conservation of its water and air resources[]" and affirming "the State's ultimate responsibility for the preservation and development of these resources[]"); § 143-215.106 (referring to "the air quality program of the State[]"); § 143-215.105 (2001) (air pollution control); and § 143-215.112 (State Commission's role in reviewing and certifying all local air pollution control programs).

These statutes all reinforce the concept that the actions of the local Agency are actually those of the State Commission and that, in essence, the State allows local agencies to act in lieu of the Commission if standards at least as strong as the State standards are adopted and such are enforced by local ordinances. *See generally* 24 Strong's N.C. Index 4th *Principal and Agent §§* 1-3, 8-10 (1993); and 3 Am. Jur. 2d *Agency §§* 1-8 (2002) (principles of agency law). In sum, the only power conferred upon the Agency to levy fines is that power conferred by State law; when the penalties were levied, they were levied only for a violation of the ordinance enacted pursuant to that authority.

While *Cauble* dealt with overtime parking fines levied pursuant to N.C. Gen. Stat. § 14-4, N.C. Const. Art. IX, Section 7 also encompasses

penalties or forfeitures. A "penal law" is any state law, the violation of which results in a fine, penalty or forfeiture. *See* N.C. Const. Art. IX, Section 7. We hold that a local ordinance, which is enacted pursuant to authority delegated by the state and the Commission and passed to enforce state-mandated air quality standards, is such a law. *See Craven County Bd. of Education v. Boyles*, 343 N.C. 87, 468 S.E.2d 50 (1996) (monies paid to Department of Environment, Health and Natural Resources pursuant to a settlement agreement for violations of environmental laws held to constitute a penalty, fine, or forfeiture under Article IX, Section 7 of the North Carolina Constitution). Absent the statutory scheme described above, the Agency had no legal right to exist, much less assess penalties for violations of air quality standards. The local program acts, in effect, as an agent for the state and its failure to properly enforce the adopted air quality standards will result in the Commission supplanting the local agency. *See* N.C. Gen. Stat. § 143-215.112.

While the penalties were not payable to the State Treasurer (i.e., "accrue to the State"), this fact is not determinative of the case's outcome. Several cases have held that the phrase "accrue to the State" should be taken in the context in which it was developed—as opposed to being payable to a private party. *See Katzenstein v. R.R. Co.*, 84 N.C. 688 (1881); *Hodge v. R.R.*, 108 N.C. 24, 12 S.E. 1041 (1891); *Mussallam v. Mussallam*, 321 N.C. 504, 364 S.E.2d 364, *reh'g denied*, 322 N.C. 116, 367 S.E.2d 915 (1988); *State ex rel. Thornburg v. House and Lot*, 334 N.C. 290, 432 S.E.2d 684 (1993); and *Craven County*, 343 N.C. 87, 468 S.E.2d 50.

In *Mussallam*, our Supreme Court stated:

> We interpret the provisions of section 7 relating to the clear proceeds from penalties, forfeitures and fines as identifying two distinct funds for the public schools. These are (1) the clear proceeds of all penalties and forfeitures in all cases, regardless of their nature, so long as they accrue to the state; and (2) the clear proceeds of all fines collected for any breach of the criminal laws. . . . The term "penal laws," as used in the context of article IX, section 7, means laws that impose a monetary payment for their violation. The payment is punitive rather than remedial in nature and is intended to penalize the wrongdoer rather than compensate a particular party. *See* D. Lawrence, *Fines, Penalties, and Forfeitures: An Historical and Comparative Analysis*, 65 N.C.L. Rev. 49, 82 (1986). Thus, in the first category, the monetary

> payments are penal in nature and accrue to the state regardless of whether the legislation labels the payment a penalty, forfeiture or fine or whether the proceeding is civil or criminal.

Mussallam, 321 N.C. at 508-09, 364 S.E.2d at 366-67. In the present case, both Buncombe County and the Agency admitted the penalties they assessed were punitive in nature and were intended to punish violators of the Agency's ordinances, resolutions, rules and regulations. In that regard, the present case is similar to *Craven County*, where payments in settlement of a civil penalty were subject to the constitutional mandate of Article IX, Section 7 and thus payable to the school board. We believe this interpretation of the phrase "accrue to the State" comports with the plain language of N.C. Const. Art. IX, Section 7 and N.C. Gen. Stat. § 115C-437.

It would be anomalous for violations of state-mandated air quality standards to result in civil penalties allocated to local school boards in all counties where the Commission enforces the state air pollution laws but a similar violation in the counties with local programs approved by the Commission experienced a different result. If such were the case, every county and local governmental unit could circumvent the state constitution by setting up a local air quality enforcement unit pursuant to state-delegated authority, and thereby develop a new revenue stream, while depriving the schools of funds directed to them by Article IX, Section 7 of the North Carolina Constitution.

After careful examination of the record and the arguments of the parties, we conclude the trial court erred in granting partial summary judgment in favor of defendants. The trial court's judgment and order are reversed and the case is remanded to the trial court for entry of summary judgment in favor of plaintiff Donoho and the Buncombe County Board of Education.

Reversed and remanded.

Judges TIMMONS-GOODSON and BRYANT concur.

IN THE MATTER OF: APPEAL OF THE LANE COMPANY-HICKORY CHAIR DIVISION FROM THE DECISION OF THE CATAWBA COUNTY BOARD OF EQUALIZATION AND REVIEW CONCERNING REAL PROPERTY TAXATION FOR TAX YEAR 1999

No. COA01-1343

(Filed 17 September 2002)

1. Appeal and Error— assignments of error—too broad and vague

A motion to dismiss an appeal for violation of the appellate rules was denied despite broad, vague, and unspecific assignments of error.

2. Taxation— review of Property Tax Commission—whole record test

The standard of review of a decision of the Property Tax Commission is the whole record test, under which the reviewing court determines whether the decision of the Commission is supported by substantial evidence.

3. Taxation— ad valorem—property valuation—sales comparison approach adopted over income approach

The Property Tax Commission did not err in finding that the county employed an arbitrary method of valuing a furniture manufacturing facility where the Commission made clear findings that it gave greater weight to expert testimony supporting the sales comparison approach rather than to testimony supporting the income approach used by the county. The Commission found that the county's assessment did not reflect the true value of the property and, while the county's use of a table of values shows an objective process in the county's valuation, it does not prove that the valuation and assessment was not arbitrary.

4. Taxation— ad valorem—property valuation—presumption of correctness—rebutted

A taxpayer sufficiently rebutted the presumption of the correctness of the county's property tax assessment where there was testimony that the county's use of the income approach did not represent the true value and the county's original assessment substantially exceeded both the county's subsequent modified assessment and an appraisal from the taxpayer's expert.

5. Taxation— ad valorem—property valuation—arbitrary

Although a county contended in a property tax assessment case that the taxpayer's argument was an attack on the county's schedule of values rather than on the appraisal, the Property Tax Commission's holding that the county employed an arbitrary appraisal method was based on the finding that the county's income method did not produce a true value. The lack of sufficient data merely bolsters the argument for arbitrariness and was not an attack on the schedule of values.

6. Taxation— ad valorem—property—valuation—post-octennial sales

The Property Tax Commission did not err by valuing property lower than had the county where the county's presumption of correctness was lost when the taxpayer offered substantial rebutting evidence. The post-octennial sales comparisons used in the taxpayer's appraisal were of comparable properties rather than the subject property.

Appeal by Catawba County from the Final Decision of the North Carolina Property Tax Commission. Heard in the Court of Appeals 22 August 2002.

Jerry E. Hess for Catawba County/Appellant.

Bell, Davis & Pitt, P.A., by John A. Cocklereece, Jr., Stephen M. Russell and Kevin G. Williams, for Taxpayer/Appellee.

TYSON, Judge.

Catawba County appeals the Final Decision of the North Carolina Property Tax Commission ("Commission"), entered 11 June 2001 which valued the subject property at $2,020,000.00. We affirm the decision of the Commission.

I. Facts

A. Description of Property

The Lane Company ("Taxpayer") owns a multistory manufacturing facility of approximately 573,980 feet located on 10.54 acres in Catawba County.

The original facility was built in the 1920's. Multiple additions were made in the 1950's and 1960's, with one addition built as recently

as 1980. The facility's use is devoted to the manufacturing of residential furniture products, one of the businesses of the taxpayer. The overall age of the building is estimated to be fifty years with a remaining life of fifteen to twenty years.

Testimony before the Commission tended to show that the overall condition of the building is physically poor due to cracked floors and walls and sags in the ceilings. The Commission found that the improvements are functionally obsolete due to ceiling heights and varying levels of the floors, and that certain areas of the building are not used for these reasons.

Catawba County assessed the property at a total value of $3,820,000; $3,360,900 for the improvements and $459,100 for the land for the year 1999. Taxpayer appealed the county's assessment of the property to the county board of equalization and review, and the board affirmed the county's value. At the hearing before the Commission, the county adjusted the total assessment to $3,459,500.

B. Valuation Procedures

Catawba County employs three appraisal methods including cost, income capitalization, and sales comparison to value property for assessment of ad valorem taxes. The county utilized the income approach to value the subject property with an initial assessment of $3,820,000. The income approach is used to measure the present worth of the future benefits of a property by the capitalization of a net income stream over the remaining economic life of the property. According to Billy E. Little ("Little"), a real estate appraiser employed by Catawba County and the county's expert at the hearing, the income capitalization approach is used to value 90-95% of all commercial property in Catawba County. The income method was applied to information supplied by the owners of manufacturing facilities who responded to a questionnaire. Six of the responders owned facilities containing more than 100,000 square feet of manufacturing space. Mr. Little testified that the county used 20 different property record cards while employing the income approach to consider the varying age and condition of this property.

James Marlow, MAI SGA ("Marlow"), qualified as an expert witness, and testified that use of the income capitalization method was improper to assess the value of the subject property. Marlow explained that the income method did not reflect the motivations of buyers and sellers of this type of property. Marlow further explained

that the cost method was improper because of the substantial accrued depreciation, physical deterioration, and functional obsolescence associated with the building. Marlow testified that the sales comparison approach was the best method for valuing the subject property, as it is direct evidence of the marketplace and the subject property's position in the market. Marlow stated that the sales comparison approach was particularly appropriate here due to the facility being used by the owner.

The sales comparison approach compares the subject property with market data based upon an appropriate unit of comparison. Marlow's investigation of the subject property's value produced few local sales of properties. Marlow testified that the market for manufacturing facility property is regional in scope. Marlow cited eight representative sales, used these comparables with adjustments to determine the market value for the subject property, and opined the fair market value at $3.50 per square foot of building area. The Commission relied on Marlow's testimony to hold that Catawba County employed an arbitrary method of appraisal in reaching the assessed value. A divided Commission (3-2) valued the property at $2,020,000. Catawba County appeals.

II. Issues

Catawba County contends the Commission erred by (1) finding that the county employed an arbitrary method of valuation of the subject property and in deciding that the finding was supported by competent, material and substantial evidence, (2) failing to afford a presumption of correctness to the county's valuation of the subject property using the comparable sales method of assessment, (3) allowing Taxpayer to challenge the county's Schedule of Values during its appeal of the assessment of the subject property, and (4) finding that the true value of the subject property as of 1 January 1999, was two million twenty thousand dollars ($2,020,000).

III. Motion to Dismiss

[1] Taxpayer moved to dismiss the county's appeal based on alleged violations of Rules 10 and 28 of the North Carolina Rules of Appellate Procedure. Rule 10 sets forth the requirements for assigning error on appeal and Rule 28 outlines the function and content of the appellate briefs. "[T]he appellant must except and assign error separately to each finding or conclusion that he or she contends is not supported by the evidence, then state which assignments support which ques-

tions in the brief." *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 684, 340 S.E.2d 755, 750-760 (1986).

Catawba County's assignments of error on appeal as found in the record are broad, vague, and unspecific. They allege the final decision of the Commission to be "[u]nsupported by competent, material and substantial evidence in view of the entire record . . . and [a]ffected by other errors of law, to wit: failure to follow the mandate of clearly applicable and controlling decisions of the North Carolina Supreme Court and Court of Appeals."

These assignments of error do not comply with the North Carolina Rules of Appellate Procedure: "[e]ach assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C. R. App. P. 10(c)(1). "A single assignment generally challenging the sufficiency of the evidence to support numerous findings of fact, as here, is broadside and ineffective." *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266 (1985).

Here, the assignments of error contend four separate and distinct errors in two general assignments of error (one as to the facts and the other as to the conclusions of law) in violation of the rule.

The Rules of Appellate Procedure are designed to expedite appellate review. Catawba County's failure to observe the requirements of the Rules subjects their appeal to dismissal. *See Bowen v. N.C. Dep't. of Health and Human Servs.*, 135 N.C. App. 122, 519 S.E.2d 60 (1999); N.C. R. App. P. 25(b), 34(b)(1). Nevertheless, we will consider the arguments pursuant to N.C. R. App. P. 2. Taxpayer's motion to dismiss is denied.

IV. Standard of Review

[2] Our standard of review of a decision of the Commission is the "whole record" test. *See* N.C.G.S. § 105-345 (d), N.C.G.S. § 7A-29 (2001). The reviewing court is not allowed to substitute its own judgment in place of the Commission's judgment even where there are two reasonably conflicting views. *Rainbow Springs Partnership v. County of Macon*, 79 N.C. App. 335, 341, 339 S.E.2d 681, 684 (1986). A reviewing court must determine whether the decision of the Commission is supported by substantial evidence when using the whole record test. *Id.* at 341, 339 S.E.2d at 685.

" 'Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 341, 339 S.E.2d at 685 (quoting *Thompson v. Board of Education*, 292 N.C. 406, 414, 233 S.E.2d 538, 544 (1977) (citations omitted)). "[T]he credibility of the witnesses and resolution of conflicting testimony is a matter for the administrative agency to determine." *In re Appeal of General Tire*, 102 N.C. App. 38, 40, 401 S.E.2d 391, 393 (1991) (citing *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300-01 (1980)). If the Commission's decision is supported by substantial evidence, this Court must affirm the Commission's decision. *Rainbow Springs*, 79 N.C. App. at 343, 339 S.E.2d at 686.

V. Sufficiency of Evidence

[3] Catawba County contends that the Commission erred in finding that the county employed an arbitrary method of valuation as unsupported by competent, material and substantial evidence in the entire record. The county asserts there is a lack of substantial evidence because there are no findings of fact supporting the decision of arbitrariness in the final decision. Secondly, the county relies on its schedule of values to show the assessment is not arbitrary. We disagree.

The Commission made clear findings of fact that it gave greater weight to the testimony of Marlow than to Little. The Commission found that the county's assessment did not reflect the "true value" of the property. "True value" is defined as "market value":

> [T]hat is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C.G.S. § 105-283 (2001).

Since "[a]n illegal appraisal method is one which will not result in 'true value' as that term is used in [N.C. Gen. Stat. § 105-283]", it follows that such method is also arbitrary. *In re Southern Railway*, 313 N.C. 177, 181, 328 S.E.2d 235, 239 (1985). The Commission made sufficient findings of fact to show that the method employed by the county was arbitrary.

Secondly, the county argues that the schedule of values, as first proposed to the County Commissioners and the public in 1998, shows the Tax Assessor spent years preparing for its 1999 octennial reevaluation. County relies on *In re Allred*, 351 N.C. 1, 519 S.E.2d 52 (1999) in arguing that the use of a schedule of values indicates an objective and consistent evaluation.

In *Allred*, the Supreme Court held that the taxpayer did not present any evidence of "misapplication of the schedules, standards and rules used in the county's most recent general reappraisal or horizontal adjustment . . . ." *Id.* at 11-12, 519 S.E.2d at 58. The Court stated, "[t]he use of schedules and values and rules of application not only makes the valuation of a substantial number of parcels of property feasible, but also ensures objective and consistent countywide property valuations and corollary equity in property tax liability." *Id.* at 10, 519 S.E.2d at 57.

Although the schedule of values shows an objective process in the county's valuation procedures as a whole, it does not prove that the valuation and assessment of the subject property was itself not arbitrary. The schedule of values standing alone does not support reversing the Commission's ruling that the valuation method employed by the county was arbitrary. This assignment of error is overruled.

VI. Presumption of Correctness

[4] Catawba County cites *In Re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E.2d 752 (1975) to support the presumption of correctness of the assessments. In *Amp*, our Supreme Court held that ad valorem tax assessments are presumed to be correct. *Id.* at 562, 215 S.E.2d at 761. To rebut the presumption, the taxpayer must present "competent, material and substantial evidence that tends to show that: (1) [e]ither the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation AND (3) the assessment *substantially* exceeded the true value in money of the property." *Id.* at 563, 215 S.E.2d at 762.

Marlow testified that he considered, but excluded, the income approach in his analysis because it would not reflect the motivations of buyers and sellers in the marketplace, and that the county's assessment did not represent the "true value." This evidence supports the Commission's finding that the county's use of the income approach to value was an arbitrary method. This evidence is also sufficient to rebut the first prong of presumption of correctness.

The other prong of the *Amp* presumption is whether the assessment substantially exceeded the true value in money of the property. *Id.* at 563, 215 S.E.2d at 762. The taxpayer must show that the valuation was unreasonably high. *Electric Membership Corp. v. Alexander*, 282 N.C. 402, 410, 192 S.E.2d 811, 816-17 (1972).

Here, the county's original assessment was $3,820,000. Catawba County admitted this exceeded the fair market value by conceding before the Commission that the value of the property did not exceed $3,459,500, a difference of $360,500. Marlow's appraisal valued the property at $2,020,000. The difference in value between the original assessment is $1,800,000. The difference between the modified assessment by the county and that of Taxpayer is $1,439,500. Either difference is a substantial difference. Taxpayer satisfied its burden to prove to the Commission that the county's assessment substantially exceeded the true value of the property.

We hold that the Commission's findings of fact are based on substantial evidence, and that its findings of fact support its conclusions of law. Taxpayer successfully rebutted the presumption of correctness of the county's assessed value.

VII. Effect of Challenge to Schedule of Values

[5] Catawba County contends that Taxpayer's arguments are attacks on the schedule of values and not on the appraisal of the property being evaluated. Taxpayer argued before the Commission that insufficient data was available to the county for the purpose of creating a schedule of values for use in an income capitalization assessment.

There is no indication in the Commission's order that it relied in any way on the insufficiency of the data to determine the income method was arbitrary. The order indicates the Commission's finding that the value reached under the income method was not the "true value". This is the basis the Commissioners used to find the income method arbitrary. The lack of sufficient data merely bolsters the argument for arbitrariness and is not an attack on the schedule of values.

The Commission determines the weight and sufficiency of the evidence and the credibility of the witnesses. The Commission draws inferences to appraise the conflicting evidence. *In re Southern Railway*, 59 N.C. App. 119, 123 296 S.E.2d 463, 467, *rev'd on other grounds*, 313 N.C. 177, 328 S.E.2d 235 (1985). Since the Commission's

decision was not solely based on the insufficiency of data and is based on substantial evidence in the record, we overrule this assignment of error.

VIII. True Value

[6] Catawba County assigns error to the Commission's valuation of the property. The Commission assigned the value of $2,020,000 as appraised by Taxpayer's expert witness. The county argues that the county's tax appraiser was not afforded the substantial rights a presumption of correctness creates. See *In re Appeal of Camel City Laundry Co.*, 115 N.C. App. 469, 475, 444 S.E.2d 689, 692 (1994).

This argument fails because the substantial rights afforded by the presumption of correctness are lost when the taxpayer offers substantial rebutting evidence. The burden of producing evidence to show the tax assessment is correct now rests on the county. *See In re Southern Railway*, 313 N.C. 177, 182, 328 S.E.2d 235, 239 (1985).

The county further contends that the use of Taxpayer's appraisal report was inappropriate because two of the eight comparative sales used were not made until after the effective date of the county's octennial reevaluation. County relies on the *Allred* case in support of its position. *In re Allred*, 351 N.C. 1, 519 S.E.2d 52 (1999).

The Supreme Court held in *Allred* that post-octennial sales data of the property under review was an impermissible basis for valuation adjustment as it "impinge[d] upon the statutory requirement that any adjustment to a general valuation be made 'in accordance with the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment.' " *Id.* at 13, 519 S.E.2d at 59 (quoting N.C.G.S. § 105-287(c) (2001)). We agree that a post-octennial sale of the property in question cannot be used for a valuation adjustment.

Here, the post-octennial sales comparisons used by Taxpayer's expert were not sales of the subject property, but of comparable properties, adjusted by Marlow to compensate for the changing values over time. Also, the post-octennial sale comparisons were properly admitted. The difference in time goes to the weight of the evidence and not its admissibility. We find this case distinguishable from *Allred*. We hold that the Commission may use post-octennial sales comparables of other properties to base its valuation of the subject property.

IX. Summary

The whole record test only allows us to determine whether the decision of the Commission was based on substantial evidence. The weight and credibility of the evidence remains for the Commission.

Taxpayer's expert testimony provided substantial evidence for the Commission to find that the county employed an arbitrary method of valuation. The tax assessment was significantly greater than the valuation offered by Taxpayer's expert witness and accepted by the Commission. The presumption of correctness was rebutted; once rebutted, the county did not offer additional evidence to meet its burden to show its valuation was the "true value". The Commission's decision is supported by substantial evidence in the record and is affirmed.

Affirmed.

Judges MARTIN and THOMAS concur.

AKILI JHAFFI BOOKER MARSHALL, JACQUELINE MARIE TAYLOR AND RAYMOND M. MARSHALL, PLAINTIFFS v. BENNIE LEE WILLIAMS, JR., AND BENNIE LEE WILLIAMS, SR., DEFENDANTS

No. COA01-1349

(Filed 17 September 2002)

1. Negligence— sudden emergency—sufficiency of evidence—instruction

The trial court did not err in an automobile accident case by instructing the jury on sudden emergency where there was substantial evidence that defendant-Williams, Jr. was driving his vehicle within the speed limit when an eleven-year-old child swerved his bicycle into defendant's lane of traffic; defendant attempted to avoid the accident by slamming on his brakes and pulling his car to the right away from the child; and defendant was unable to avoid the child. Moreover, any error in giving the instruction is harmless because the court instructed the jury that it must find that the sudden or unexpected danger arose through no negligence on the part of defendant.

2. Trials— bifurcation sua sponte—no due process violation

The plaintiffs in an automobile accident case were not denied due process by the trial court's sua sponte bifurcation of the trial where plaintiffs were given the opportunity to be heard on the issue and did not request additional notice or time before arguing, plaintiffs were not denied the opportunity to present evidence at trial, defendants stipulated that the injury was the direct result of the accident, and, if the jury had found negligence, plaintiffs would have been given the opportunity to present evidence on damages.

3. Evidence— lay opinion—speed of vehicle

The trial court did not abuse its discretion in an automobile accident case by not allowing two lay opinions about the speed of defendant's vehicle where the witnesses were eleven and thirteen years old at the time of the accident (but over eighteen at the time of trial), neither witness watched the vehicle continuously, and both witnesses were allowed to testify that defendant was going fast.

4. Evidence— speed and timing of accident—testimony not allowed

The trial court did not abuse its discretion in an automobile accident case by not allowing testimony as to the speed and timing of defendant's vehicle where the witness was a land surveyor whom plaintiffs attempted to treat as an accident reconstruction expert without qualifying him as an expert in any subject. He was allowed to testify as to the distance from the crest of a hill to the location of impact.

Appeal by plaintiffs from judgments entered 19 April 2001 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 22 August 2002.

Kennedy, Kennedy, Kennedy and Kennedy, L.L.P., by Harold L. Kennedy, III and Harvey L. Kennedy, for plaintiff-appellants.

Burton & Sue, L.L.P., by Walter K. Burton and James D. Secor, III, for defendants-appellees Bennie Lee Williams, Jr. and Bennie Lee Williams, Sr. and Davis & Hamrick, by Kent L. Hamrick, for unnamed defendant State Farm Mutual Automobile Insurance Company.

TYSON, Judge.

Plaintiffs appeal from an order granting a directed verdict at the end of plaintiffs' evidence in favor of defendant Bennie Lee Williams, Sr. (Williams, Sr.), and from a judgment in favor of defendant Bennie Lee Williams, Jr. (Williams, Jr.) entered after the jury found that plaintiff Akili Marshall was not injured by the negligence of defendant. We affirm the trial court's order and judgment.

I. Facts

On 21 May 1994, Akili Jhaffi Booker Marshall (Akili) was thirteen years old and riding his bicycle south on Patterson Avenue in Winston-Salem. Defendant Williams, Jr., was driving north on Patterson Avenue with his one-year-old son in a vehicle owned by Williams, Sr. The vehicle driven by Williams, Jr. struck Akili which caused serious injuries to Akili.

Matthew El-Amin (Matthew), eleven years old at the time, was sitting on the front porch of a friend's house and saw Akili ride his bicycle down the sidewalk, stop, look both ways, and proceed across Patterson Avenue while looking straight ahead. Matthew testified that, while Akili was crossing the street, a truck came over the hill heading north on Patterson "going pretty fast." He further testified that "Akili was looking straight and the truck saw Akili and tried to go to the right but still hit Akili, and Akili went flying in the air and came down on his head."

Ernest Leonard House was sitting on his front porch on the same day. He testified that the truck came over the hill going 45 to 50 miles per hour. He further testified that he never saw the truck slow down before hitting Akili nor did he hear a horn from the truck.

Leon Samuel Taylor (Leon), who was thirteen at the time, also witnessed the accident. He testified that "a truck appeared out of nowhere as [Akili] got ready to cross the street. It was just like out of the blue, as it crested the hill, it was like it was coming at a—a fast speed." The trial court ruled that neither Leon nor Matthew could testify as to their opinion of the actual rate of speed of the vehicle.

Williams, Jr. testified that, on 21 May 1994, he was driving his son home from the babysitter's house about a block and a half south of the scene of the accident. He testified that he saw a boy on a bicycle appear between some cars and proceed south in the southbound lane of Patterson Avenue. Williams, Jr. testified that he was driving his

vehicle at "[p]robably around 20 miles an hour." Akili was in the middle of the street coming towards Williams, Jr. After traveling about five car lengths in the southbound lane, the boy made a 90-degree turn to cross the northbound lane about four feet in front of Williams Jr.'s vehicle. Williams Jr. testified "I [knew] I had to take some evasive action. I snatched the wheel and hit the brakes at the same time and pulled as hard as I could to the right of the road." Although the truck did move to the right, Williams, Jr. testified that he was unable to avoid hitting the boy. Testimony showed that the handlebars and front of the bicycle collided with the fender of the vehicle near the driver's side headlight.

Akili brought suit against Williams, Jr. alleging negligence in operating the vehicle and imputing Williams, Jr.'s negligence to Williams, Sr. In a bifurcated trial on the issue of negligence, the trial court granted a directed verdict in favor of Williams, Sr. at the end of plaintiff's evidence. The jury found no negligence on the part of Williams, Jr. Plaintiffs appeal.

II. Issues

Plaintiffs assign error to the trial court's (1) instructing the jury regarding the sudden emergency doctrine (2) bifurcation of the trial *sua sponte* (3) refusal to allow plaintiffs' lay witnesses to testify to defendant's speed and (4) excluding the testimony of plaintiffs' witness regarding distance and speed.

III. Jury Instructions

[1] Plaintiffs contend that the trial court erred in instructing the jury on the doctrine of sudden emergency. Plaintiffs assert that the negligence of Williams, Jr. created any sudden emergency which might have existed. We disagree.

The doctrine of sudden emergency creates "a less stringent standard of care for one who, through no fault of his own, is suddenly and unexpectedly confronted with imminent danger to himself or others." *Long v. Harris*, 137 N.C. App. 461, 467, 528 S.E.2d 633, 637 (2000) (*quoting Holbrook v. Henley*, 118 N.C. App. 151, 153, 454 S.E.2d 676, 677-78 (1995)). The two elements of the doctrine are (1) "an emergency situation must exist requiring immediate action to avoid injury" and (2) "the emergency must not have been created by the negligence of the party seeking the protection of the doctrine." *Id.* (*quoting Conner v. Continental Industrial Chemicals*, 123 N.C. App. 70, 73, 472 S.E.2d 176, 179 (1996)). Substantial evidence of each element of

the doctrine must be presented for a jury instruction to be properly given on sudden emergency. *Id.* The evidence is taken in a light most favorable to the party requesting the benefit of the instruction. *Id.*

Taken in a light most favorable to defendants, there is substantial evidence that Williams, Jr. was driving his vehicle within the speed limit when Akili, an eleven-year-old, swerved into his lane of traffic. Williams, Jr. attempted to avoid the accident by slamming on his brakes, such that skid marks resulted, and pulling his car to the right away from Akili. He was unable to avoid Akili. Defendants presented sufficient evidence to support an instruction on the sudden emergency doctrine.

Presuming the trial court erred in giving an instruction on sudden emergency, such error is harmless if the trial court properly instructed that the jury must find the sudden or unexpected danger arose through no negligence on the part of the defendant. *Moreau v. Hill*, 111 N.C. App. 679, 682-83, 433 S.E.2d 10, 13 (1993). Here, the trial court did so instruct the jury. The trial court instructed the jury that they must find that the emergency arose through no negligence on the part of Williams, Jr. for the sudden emergency doctrine to apply. We overrule this assignment of error.

IV. Bifurcated Trial

[2] Defendants contend the trial court erred in "ruling to bifurcate the trial regarding the issues of liability and damages in that said ruling was made unilaterally by the trial court and violated plaintiffs' right to due process of law."

The trial court is granted the authority to bifurcate a trial "in furtherance of convenience or to avoid prejudice." N.C. Gen. Stat. § 1A-1, Rule 42(b) (2001). "The discretion reposed in the trial judge by the rule is extremely broad." *In re Will of Hester*, 320 N.C. 738, 742, 360 S.E.2d 801, 804 (1987). Although bifurcated trials are frequently used in complicated tort proceedings, our Courts have not restricted the use to those cases. *Id.* at 743, 360 S.E.2d at 804.

At a pretrial hearing the trial court stated:

> The Court, in its discretion, after thorough review of these matters and careful thought and consideration of these issues, for the purpose of judicial economy, for the ease of understandability and presentation to the jury, and again after lengthy consideration of the best presentation of this matter will, in its

> discretion, as it is allowed to do by law, bifurcate this trial, proceeding first with the issues of negligence, contributory negligence, and related negligence issues and reserve the issues of damages to be heard immediately following any verdict favorable to the plaintiff.

Plaintiffs objected to the *sua sponte* actions of the trial court and were allowed to argue their position for not bifurcating the trial. Plaintiffs' pre-trial argument contended their need to present a whole picture to the jury. To prove negligence, plaintiffs would be required to prove that any damages were a proximate cause of the negligence of Williams, Jr. Defendants stated: "We will certainly stipulate that he was injured as a direct result of the accident."

On appeal, plaintiffs contend that, because the decision to bifurcate was made *sua sponte*, they were denied due process based on the lack of notice and opportunity to be heard on the issue. The trial court allowed both parties to argue before it ruled on the merits of bifurcating the trial. Plaintiffs never requested additional time to prepare for arguments. Instead, they immediately argued against bifurcation.

We find that plaintiffs were not denied due process by the *sua sponte* bifurcation of the trial. Plaintiffs were given the opportunity to be heard on the issue and did not request additional notice or time before arguing. Plaintiffs were not denied the opportunity to present all evidence at trial. Defendants stipulated that the injury was a direct result of the accident. If the jury had found negligence on the part of Williams, Jr., plaintiffs would have been given the opportunity to present evidence on the extent of their damages. This assignment of error is overruled.

V. Witnesses Testimony

[3] Defendants contend the trial court erred in refusing to allow two eyewitnesses, who were minors at the time of the accident but adults at the time of the trial, to testify as to the speed of Williams Jr.'s truck immediately preceding the accident. We disagree.

For a lay witness to testify as to his opinion of the speed of a vehicle, the trial court must determine, based on the facts and circumstances, that the witness had "a reasonable opportunity to observe the vehicle and judge its speed." *McNeil v. Hicks*, 119 N.C. App. 579, 581, 459 S.E.2d 47, 48 (1995) (citations omitted). The trial court must also consider the "intelligence and experience" of the wit-

ness in determining whether there was a reasonable opportunity to judge the speed of the vehicle. *State v. Grice*, 131 N.C. App. 48, 57, 505 S.E.2d 166, 171 (1998).

At the time of the accident here, Matthew was eleven years old and Leon was thirteen years old. Both testified during *voir dire* that, while they had not driven a vehicle at the time of the accident, both had experience as passengers in vehicles and looking at speedometers. At the time of trial, both witnesses were over the age of eighteen and had been driving vehicles for over two years. Each witness also testified that he had to look away from the vehicle in order to see Akili and that, when he did, he was not watching the vehicle continuously. Leon testified that it was only approximately five seconds from when he first saw the vehicle until the accident occurred. Matthew testified that all events occurred in "a matter of seconds." Although they were not allowed to testify as to their opinion of the actual speed of the vehicle, Matthew did testify before the jury that the vehicle was going "pretty fast" and "never slowed down." Leon testified before the jury that the vehicle was going at "a fast speed."

The trial court found that "it is not convinced that [Matthew] was possessed at age eleven on May 21st, 1994 with the ability to accurately estimate and present a lay opinion as to the speed of a moving automobile on that particular occasion." It also found that "plaintiff is unable to meet the foundational requirements to allow [Leon] to present a lay opinion." In both instances, the trial court also ruled that if the foundation was properly laid to allow lay opinion, "the probative value would be outweighed by the prejudicial impact pursuant to Rule 403."

We hold the trial court did not abuse its discretion in refusing to allow Leon and Matthew to present lay opinions as to the speed of the vehicle. This assignment of error is overruled.

VI. Expert Witness Testimony

[4] Plaintiffs contend that "the trial court abused its discretion in not allowing [Clinton] Osborne to testify about distances and speed as it relates to this collision." We disagree.

Mr. Osborne testified that he was a professional land surveyor and had worked in his profession for a number of years both in the Army and in private practice. He was allowed to testify before the jury as to the distances from the crest of the hill to location of the impact. Plaintiffs never qualified Mr. Osborne as an expert in any

subject but attempted to treat him as an expert in accident reconstruction. After *voir dire* testimony of distance, speed, and time, the trial court found as follows in part:

> [T]here's no foundation laid as to the accuracy of his speed devices, timing devices on that occasion, no foundation regarding the conditions either at the date of the event on this date that may have changed both physical and meteorological, no foundation except hearsay as to his calculations regarding the location of the defendant, the height of the defendant's vehicle except to note that he indicated that his vehicle that he used to make the calculation looks a lot like the one that he saw pictured. And, further, that his opinion was based on the assumption that the speed of the vehicle would be constant during that period of time. All these variables, the Court did not allow him to make these or give these opinions in front of the jury. And the Court further found that such testimony would be prejudicial under 403 and for those reasons did not allow it[.]

The admissibility of expert testimony is within the sound discretion of the trial court and will not be overruled absent an abuse of discretion. *Griffith v. McCall*, 114 N.C. App. 190, 194, 441 S.E.2d 570, 573 (1994) (*citing State v. Davis*, 106 N.C. App. 596, 601, 418 S.E.2d 263, 267 (1992)). Our Court has held that "with respect to the speed of a vehicle, the opinion of a lay or expert witness will not be admitted where he did not observe the accident, but bases his opinion on the physical evidence at the scene." *Hicks v. Reavis*, 78 N.C. App. 315, 323, 337 S.E.2d 121, 126 (1985), *cert. denied*, 316 N.C. 553, 344 S.E.2d 7 (1986).

We hold that the trial court did not abuse its discretion in not allowing Mr. Osborne to testify as to the speed and timing of defendant's vehicle based on the lack of foundation and the assumptions used in his opinion testimony. This assignment of error is overruled.

VII. Conclusion

Plaintiffs have abandoned any appeal of the directed verdict as to Williams, Sr. by failing to argue error on appeal. We hold the trial court did not err in submitting an instruction to the jury on sudden emergency. We find no abuse of discretion in bifurcating the trial, in the trial court ruling to not allow plaintiffs' lay witnesses to testify as to the rate of speed of Williams Jr.'s vehicle, nor in not allowing Mr. Osborne to testify as to the rate of speed of Williams Jr.'s vehicle.

No error.

Judges MARTIN and THOMAS concur.

STATE OF NORTH CAROLINA v. GREGORY ALLEN GANT

No. COA01-1361

(Filed 17 September 2002)

1. Forgery— uttering—motion to dismiss—sufficiency of evidence

The trial court did not err by failing to dismiss four counts of forgery and uttering charges against defendant, because: (1) there was substantial direct evidence with respect to Counts I and II against defendant regarding a $35.00 check since a store clerk testified that defendant said his mother had given him the check, she saw defendant fill out the check, and the store clerk cashed the check for defendant whereas defendant's mother testified that she had not given defendant permission to sign the check; and (2) there was substantial circumstantial evidence with respect to Counts VII and VIII against defendant regarding a $75.00 check since a store clerk testified that despite not seeing defendant fill out the check the store clerk only cashed the check after defendant told him that his mother had authorized the store to do so, and the mother denied giving such authorization.

2. Criminal Law— expression of opinion by trial court—re-instruction according to pattern jury instruction

The trial court did not commit plain error in a forgery and uttering case by allegedly expressing an opinion to the jury when it re-instructed on credibility after the jury asked whether any consideration could be given to defendant's testimony that his sister wrote and cashed one of the checks, because the trial court gave no opinion regarding the jury's question but merely re-instructed the jury on credibility using a pattern jury instruction without providing extraneous comments and without objection from either party.

3. Sentencing— prayer for judgment—superceding habitual felony indictment to change date

The trial court did not abuse its discretion in a forgery and uttering case by entering a prayer for judgment to allow the State time to obtain a superceding habitual felony indictment for purposes of changing the date of the occurrence of defendant's first felony offense from 16 April 2000 to 16 April 1990, because: (1) N.C.G.S. § 15A-1334(a) provides that either defendant or the State may obtain a continuance of the sentencing hearing upon a showing that the judge determines to be good faith; and (2) the defect was only technical in nature and in no way deprived defendant of sufficient notice that he was being prosecuted as an habitual felon at the time of his plea to the underlying substantive felony charges.

4. Constitutional Law— effective assistance of counsel—attempt to fire court-appointed attorney

The trial court did not err in a forgery and uttering case by ordering defendant to proceed with trial immediately either with his court-appointed attorney, who defendant wanted to discharge, or pro se because: (1) one of the letters defendant offered as an exhibit signified that he attempted to fire his appointed counsel on 14 March 2001 and defendant offered no evidence on the date of his motion on 30 April 2001 that he had made any arrangements to obtain private counsel after writing the letter; and (2) the court's interest in the speedy disposition of defendant's criminal charges was paramount since defendant failed to timely act on his right to obtain private counsel.

5. Sentencing— habitual felon—motion to dismiss—sufficiency of evidence—true copy of prior convictions

The trial court did not err in a forgery and uttering case by refusing to dismiss the habitual felon charge even though defendant contends the admissibility of his prior convictions was in violation of N.C.G.S. § 14-7.4 based on the fact that the State introduced those convictions as true copies instead of as certified copies, because no recognizable distinction between the two types of copies would require exclusion of a true copy from admissibility.

Appeal by defendant from judgment entered 2 May 2001 by Judge Benjamin G. Alford in Lenoir County Superior Court. Heard in the Court of Appeals 20 August 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Jay L. Osborne and Special Deputy Attorney General Judith R. Bullock, for the State.

William D. Spence for defendant-appellant.

HUNTER, Judge.

Gregory Allen Gant ("defendant") appeals his convictions and sentencing for forgery, uttering, and being an habitual felon. We find no error.

On 28 August 2000, defendant was indicted by a Lenoir County Grand Jury for nine counts of forgery and nine counts of uttering (00CRS007551). Thereafter, an indictment dated 6 November 2000 was filed naming defendant as an habitual felon due to his convictions for three prior felonies (00CRS009559). On 30 January 2001, defendant was tried on two of the forgery counts and two of the uttering counts before a jury in Lenoir County Superior Court. The following evidence was introduced at trial.

The State's evidence tended to show that in April of 2000, defendant's mother, Rosena Gant ("Mother Gant"), received telephone calls from two merchants, Mr. Bingo (a bingo parlor) and Wal-mart, regarding checks written from her bank account. After learning that a few of her checks were missing, Mother Gant reported the incident to Investigator Lolita Chapman ("Investigator Chapman") of the Kinston Police Department. Mother Gant told Investigator Chapman that defendant may have written the checks without her permission. Upon seeing the checks at trial, Mother Gant testified that although they had come from her bank account and had her name on the signature line, she had not signed the checks herself nor given anyone else permission to do so.

The State also offered evidence from the employees believed to have received the checks from defendant. Tonya Johnson ("Johnson"), an employee of Mr. Bingo, testified that she personally knew defendant and saw him fill out and sign two of the checks in question. Johnson had placed her initials in the top left corner of those checks and cashed them for defendant. Also, Victor Wooten ("Wooten"), an employee of Wal-Mart, testified that he had cashed one of Mother Gant's checks for defendant in April of 2000 because (1) he knew Mother Gant from her previous employment at Wal-Mart, and (2) defendant stated that his mother had spoken with the store

manager and authorized the transaction. Although Wooten testified that he did not see defendant fill out the check or remember the amount of the check, he had only cashed one check for defendant during the month of April.

Defendant testified on his own behalf. During his testimony, defendant denied writing or cashing the checks to Wal-mart or Mr. Bingo. He further testified that he was with his sister when she cashed the checks at Mr. Bingo.

At the conclusion of defendant's trial, but prior to the jury's verdict, the court noted that the State's habitual felon indictment contained an incorrect date for one of defendant's previous felonies. Thus, after the jury found defendant guilty as charged, the State moved for a prayer for judgment so that the habitual felon indictment could be corrected. The motion was allowed, and a superseding indictment was filed on 12 February 2001. Thereafter, on 1 May 2001, the jury also found defendant guilty of being an habitual felon. Defendant was sentenced to a minimum term of 108 months and a maximum term of 139 months. The remaining fourteen counts against defendant were dismissed by the State on 7 May 2001. Defendant appeals.

Defendant brings forth six assignments of error, the first of which he abandons in his brief to this Court. With respect to defendant's remaining assigned errors, we conclude that the trial court committed no error.

I.

[1] By defendant's second assignment of error, he argues the trial court erred in failing to dismiss the forgery and uttering charges against him due to insufficiency of the evidence. We disagree.

When determining whether to dismiss a criminal action, the trial court is to consider the evidence in the light most favorable to the State, which entitles the State "to every reasonable intendment and every reasonable inference to be drawn from the evidence[.]" *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). The evidence considered must be "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." *Id.* at 65-66, 296 S.E.2d at 651. 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). Also, "the rule for determining the

sufficiency of evidence is the same whether the evidence is completely circumstantial, completely direct, or both." *State v. Wright*, 302 N.C. 122, 126, 273 S.E.2d 699, 703 (1981) (citations omitted).

In the present case, defendant was on trial for two counts of forgery and two counts of uttering. The essential elements of forgery are: "(1) [t]here must be a false making or alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud." *State v. Phillips*, 256 N.C. 445, 447, 124 S.E.2d 146, 148 (1962). The essential elements of uttering a forged check are: "(1) the offer of a forged check to another, (2) with knowledge that the check is false, and (3) with the intent to defraud or injure another." *State v. Hill*, 31 N.C. App. 248, 249, 229 S.E.2d 810, 810 (1976).

Counts I and II against defendant referred to a $35.00 check that was written to Mr. Bingo. During the trial, Johnson testified that (1) defendant said Mother Gant had given him the check; (2) she saw defendant fill out the check for $35.00; and (3) she cashed the check for defendant. Yet, defendant's mother had previously testified that she had not given defendant permission to sign the check issued to Mr. Bingo. Thus, when viewing this evidence in the light most favorable to the State, there was substantial *direct* evidence establishing defendant's guilt on these two counts.

Additionally, counts VII and VIII against defendant referred to a $75.00 check that was written to Wal-Mart. Wooten testified at trial that despite not seeing defendant fill out the check or remembering the amount of the check, he had only cashed one check for defendant in April of 2000, which was the same month the $75.00 check was written and cashed. Wooten further testified that he only cashed the check because defendant told him that Mother Gant had authorized the store to do so. However, as stated earlier, Mother Gant denied giving such authorization. Therefore, when viewing this evidence in the light most favorable to the State, there is substantial *circumstantial* evidence establishing defendant's guilt with respect to counts VII and VIII.

Accordingly, the trial court did not err in failing to dismiss these four counts against defendant due to insufficiency of the evidence.

II.

[2] By his third assignment of error, defendant argues the trial court committed error when it allegedly expressed an opinion to the

jury. In particular, defendant contends that the court erred in re-instructing on "credibility" when asked by the jury whether any consideration could be given to defendant's testimony that his sister wrote and cashed the Mr. Bingo check. However, since defendant did not object when the trial judge stated he intended to re-instruct the jury on credibility using a pattern jury instruction, this Court must review defendant's assigned error using the "plain error" rule. *State v. Black*, 308 N.C. 736, 740, 303 S.E.2d 804, 806 (1983).

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 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[.]" ' "

Id. (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)). In the case *sub judice*, the court gave no opinion regarding the jury's question. The trial judge simply re-instructed the jury on credibility per a pattern jury instruction, without providing any extraneous comments, and without objection from either party. Therefore, the court did not commit error, much less "plain error."

III.

[3] By defendant's fourth assignment of error, he argues the court erred in entering a prayer for judgment to allow the State time to obtain a superceding indictment. We disagree.

Section 15A-1334(a) of our statutes provide that "[e]ither the defendant or the State may, upon a showing which the judge determines to be good cause, obtain a continuance of the sentencing hearing." N.C. Gen. Stat. § 15A-1334(a) (2001). The trial court's judgment on this matter "will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962). *See also State v. Oakes*, 113 N.C. App. 332, 337, 438 S.E.2d 477, 480 (1994).

Here, the State was allowed to obtain a superceding indictment for purposes of changing the date of the occurrence of defendant's first felony offense from "April 16, 2000" to "April 16, 1990." Defendant contends that the court's conduct was prejudicial to him because had the court not pointed out the incorrect date in the indictment, the State would have had to continue with the habitual felon proceeding and suffer the consequences of having a defective indictment. However, this defect was only technical in nature. *See id.* Moreover, the defect's presence in the original habitual felon indictment in no way deprived defendant of sufficient notice that he was being prosecuted as an habitual felon at the time of his plea to the underlying substantive felony charges. *Id. See also State v. Allen*, 292 N.C. 431, 233 S.E.2d 585 (1977). Thus, the trial court's entry of a prayer for judgment was not an abuse of discretion or an act that was prejudicial or unfair to defendant.

IV.

[4] Next, defendant assigns error to the court's ordering him to proceed with trial immediately with either his court-appointed counsel (whom defendant wanted the court to discharge) or *pro se.* The facts relevant to this assignment of error involve defendant making motions on 30 April 2001, the morning of the sentencing hearing, to (1) remove his appointed counsel and (2) for a continuance to retain private counsel. In support of his motions, defendant offered two exhibits that were letters he had written to his appointed counsel stating that the counsel was fired. The court ruled that defendant could either proceed with his appointed counsel or represent himself, but that his case would not be continued. Defendant contends that this ruling denied him the constitutional right to assistance of competent counsel. We are not persuaded by defendant's argument.

A defendant's "right to be defended by chosen counsel is not absolute." *State v. Foster*, 105 N.C. App. 581, 584, 414 S.E.2d 91, 92 (1992). A judge's denial of a defendant's motion for a continuance to retain private counsel does not violate that defendant's constitutional right to the assistance of counsel if that right is "balanced with the need for speedy disposition of the criminal charges and the orderly administration of the judicial process." *Id.* In the present case, one of the letters defendant offered as an exhibit signified that he attempted to fire his appointed counsel on 14 March 2001. However, on the date of defendant's motions (30 April 2001), defendant offered no evidence

that he had made any arrangements whatsoever to obtain private counsel after writing the letter. Since defendant failed to timely act on his right to obtain private counsel, the trial court did not err in denying defendant a continuance due to the court's interest in the speedy disposition of his criminal charges. *See State v. Chavis*, 141 N.C. App. 553, 540 S.E.2d 404 (2000).

V.

[5] By defendant's final assignment of error, he argues the trial court erred in refusing to dismiss the habitual felon charge against him due to insufficiency of the evidence. We disagree.

In essence, the Habitual Felons Act ("the Act") provides that prior convictions of a defendant are admissible and "*may* be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction." N.C. Gen. Stat. § 14-7.4 (2001) (emphasis added). Defendant contends that the admissibility of his prior convictions was in violation of the Act because the State introduced those convictions as "true copies" instead of as "certified copies." Nevertheless, this Court has held that since the Act uses the word "may," other methods of proving prior convictions are not excluded, i.e., true copies. *See State v. Wall*, 141 N.C. App. 529, 533, 539 S.E.2d 692, 695 (2000), *cert. denied*, — N.C. —, 566 S.E.2d 480 (2002). Furthermore, the absence of a definition for "certified copy" in the Act requires this Court to consider the term's ordinary meaning. *See Transportation Service v. County of Robeson*, 283 N.C. 494, 196 S.E.2d 770 (1973). A "certified copy" is ordinarily defined as "[a] copy of a document or record, signed and certified as a *true copy* by the officer to whose custody the original is intrusted." Black's Law Dictionary 228 (6th ed. 1990) (emphasis added). This definition provides no recognizable distinction between the two types of copies that would require exclusion of a "true copy" from admissibility under the Act. Thus, we overrule this assignment of error.

For the aforementioned reasons, we conclude that defendant's convictions and sentencing for forgery, uttering, and being an habitual felon are free from error.

No error.

Judges GREENE and TIMMONS-GOODSON concur.

LOUISE C. HEMPHILL-NOLAN, PETITIONER-APPELLANT v. TOWN OF WEDDINGTON, A NORTH CAROLINA MUNICIPALITY AND ITS TOWN COUNCIL, RESPONDENT-APPELLEE

No. COA01-1326

(Filed 17 September 2002)

Cities and Towns— subdivision ordinance—judicial review of application for variance

The trial court erred by dismissing under N.C.G.S. § 160A-388(e) petitioner's petition for certiorari to review a decision of a town council denying petitioner's application for a variance from the town's subdivision ordinance based on an alleged failure to comply with the thirty-day time limit for filing, and the case is remanded for a determination of whether petitioner's filing of this case was done within a reasonable time because N.C.G.S. § 160A-388(e) does not apply to petitioner's appeal since the appeal is based on the denial of a variance from a subdivision ordinance as opposed to a zoning ordinance.

Appeal by petitioner from order entered 17 August 2001 by Judge W. Robert Bell in Union County Superior Court. Heard in the Court of Appeals 15 August 2002.

The Brough Law Firm, by Robert E. Hornik, Jr., for petitioner-appellant.

Parker, Poe, Adams & Bernstein, L.L.P., by Anthony Fox, for respondent-appellee.

MARTIN, Judge.

Louise C. Hemphill-Nolan ("petitioner") appeals an order dismissing her Petition for Certiorari to review a decision of the Town of Weddington through its Town Council (collectively "respondent") denying her application for a variance from the Town of Weddington Subdivision Ordinance ("the ordinance"). For the reasons discussed herein, we reverse the dismissal of the petition and remand to the trial court for further proceedings.

Petitioner is the owner of approximately twenty-nine acres of land in the Town of Weddington. On 7 April 2000, petitioner submitted plans to respondent's Zoning Administrator for a proposed "Weddington Lake Subdivision." On the same day, the Zoning Administrator determined that petitioner's proposal met the require-

ments of the ordinance "with the exception of a variance needed for Lakeside Court due to the length of the cul-de-sac." The ordinance provides that "[p]ermanent dead end streets should not exceed six hundred (600) feet in length unless necessitated by topography or property accessibility." According to petitioner's proposal, Lakeside Court, a street in the proposed subdivision, would be 785 feet in length.

On 9 August 2001, petitioner submitted an application for a variance from the 600-foot cul-de-sac restriction contained in the ordinance. Respondent's Planning Board considered petitioner's application on 28 August 2000, and recommended four-to-one that it be denied. On 11 September 2000, respondent Town Council conducted a public hearing to consider the matter, following which it denied petitioner's application for a variance. Respondent's decision to deny the application was contained in the minutes of respondent's meeting. Following the meeting, petitioner did not request a copy of the decision. The decision was filed with the Town Clerk on 9 October 2000, and the minutes of respondent's meeting were recorded in full with the Town Clerk on 11 October 2000. By letter dated 12 October 2000, petitioner's attorney requested a copy of the minutes, which contained respondent's decision to deny petitioner's application. Petitioner alleged she received a copy of the minutes and decision on 16 October 2000.

On 13 November 2000, petitioner filed a Verified Petition for Review in the Nature of Certiorari in Union County Superior Court, seeking review of respondent's decision to deny her application for a variance. Following a hearing on 13 August 2001, the trial court dismissed the petition for petitioner's failure to comply with the thirty-day time limit for filing, as established by G.S. § 160A-388(e) (2001). Petitioner appeals the dismissal.

Petitioner argues the trial court erred in dismissing her petition under G.S. § 160A-388(e) because that statute does not apply to her appeal, which is based on the denial of a variance from a *subdivision* ordinance, as opposed to a *zoning* ordinance. We agree. G.S. § 160A-388(e) provides, in pertinent part:

> (e) The concurring vote of four-fifths of the members of the board shall be necessary to reverse any order, requirement, decision, or determination of any administrative official charged with *the enforcement of an ordinance adopted pursuant to this Part,*

> or to decide in favor of the applicant *any matter* upon which it is required to pass under *any ordinance, or to grant a variance from the provisions of the ordinance. Every decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari.* Any petition for review by the superior court shall be filed with the clerk of superior court within 30 days after the decision of the board is filed in such office as the ordinance specifies, or after a written copy thereof is delivered to every aggrieved party who has filed a written request for such copy with the secretary or chairman of the board at the time of its hearing of the case, whichever is later. The decision of the board may be delivered to the aggrieved party either by personal service or by registered mail or certified mail return receipt requested.

N.C. Gen. Stat. § 160A-388(e) (2001) (emphasis added).

Petitioner argues the italicized phrase "the enforcement of an ordinance adopted pursuant to this Part" clearly means that G.S. § 160A-388(e) only applies to appeals based upon ordinances adopted under Part III of Article 19 of Chapter 160A, entitled "Zoning," of which G.S. § 160A-388 is a part. The Weddington Subdivision Ordinance from which petitioner sought a variance was not adopted pursuant to Part III; rather, it was adopted pursuant to Part II of Article 19, entitled "Subdivision Regulation." Thus, petitioner maintains the plain language of G.S. § 160A-388(e) prohibits its application to this case.

Respondent argues the italicized phrases "any ordinance" and "any matter" make clear that G.S. § 160A-388(e) is not limited to matters involving ordinances adopted pursuant to Part III, and that the language "or to grant a variance from the provisions of the ordinance" establishes G.S. § 160A-388(e) as the applicable statute for an appeal from the denial of a variance application. Respondent also contends the phrase "[e]very decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari" lends support to the position that the statute is not limited to ordinances adopted under Part III.

However, isolated terms such as "any ordinance," "any matter" and "[e]very decision" must be read within the context of the entire statute. *See, e.g., Ball v. Randolph County Bd. of Adjustment*, 129 N.C. App. 300, 303, 498 S.E.2d 833, 835, *disc. review improv. allowed*, 349 N.C. 348, 507 S.E.2d 272 (1998) (words in ordinance or statute

"must be construed in context and given only the meaning that the other modifying provisions of the ordinance will permit."). Thus, they must be construed as being modified by the preceding condition that the section applies to matters involving the enforcement of ordinances "adopted pursuant to this Part." They must also be construed within the context of G.S. § 160A-388 as a whole. Subsection (b) of the statute, which describes some of the duties and procedures of the board, begins with the following qualifier: "The board of adjustment shall hear and decide appeals from and review any order, requirement, decision, or determination made by an administrative official charged with the enforcement of any ordinance adopted pursuant to this Part." N.C. Gen. Stat. § 160A-388(b) (2001). Therefore, it is reasonable to interpret the terms "any ordinance" and "[e]very decision," when construed within the context of the statute, as referring to any ordinance adopted under Part III of Article 19, and to all decisions of the Board, which, according to subsection (b), are limited to matters regarding ordinances adopted under Part III.

Moreover, respondent failed to cite any authority wherein G.S. § 160A-388(e) has been applied to the appeal of a board decision based upon a subdivision ordinance. Indeed, cases citing G.S. § 160A-388 almost invariably involve decisions based on zoning and development ordinances and regulations. Although this Court has recognized that the legal principles involved in review of zoning applications are similar and relevant to review of the denial of subdivision applications, we have also stated that "zoning statutes do not limit how a subdivision applicant may seek judicial review." *Batch v. Town of Chapel Hill*, 92 N.C. App. 601, 610, 376 S.E.2d 22, 28 (1989), *reversed on other grounds*, 326 N.C. 1, 387 S.E.2d 655, *cert. denied*, 496 U.S. 931, 110 L. Ed. 2d 651 (1990).

In *Batch*, a case involving an appeal of the denial of a subdivision application, we noted that "[p]roper procedure in this case can be distinguished from zoning case denials because the statutory scheme governing zoning ordinances provides that when a municipality denies a special use or conditional use permit, 'every such decision of the city council shall be subject to review by the superior court by proceedings in the nature of certiorari.' " *Id.* at 606, 376 S.E.2d at 26 (quoting N.C. Gen. Stat. §§ 160A-381; 160A-388). We further recognized that there exists "no similar statutory mandate for review of town decisions on subdivision applications," and thus, "it would be incorrect to limit review of subdivision application denials based on the procedure authorized for zoning application denials." *Id.*

Similarly, our Supreme Court has observed that Chapter 160A is "deliberately divided" into separate parts, including two parts which "provide separately for the regulation of subdivisions and for zoning." *Town of Nags Head v. Tillett*, 314 N.C. 627, 630, 336 S.E.2d 394, 397 (1985). The Court noted that the provisions of section 160A-375 contained in Part II of Article 19 are intended to deter the violation of subdivision ordinances, whereas section 160A-389 permits broader proceedings to prevent or correct violation of zoning ordinances. *Id.* The Court held that it is error "to cite the broad enforcement provisions of N.C.G.S. 160A-389, a *zoning* statute, as the statutory basis for denying a building permit to one whose lot violates the *subdivision* requirements of [the local ordinance]." *Id.* at 631, 336 S.E.2d at 397.

Although we concede that no clear authority, statutory or otherwise, exists as to whether the legislature intended the thirty-day time limitation contained in G.S. § 160A-388(e) to apply in cases such as this, our review of the statute and limited case law emphasizing the existence of distinct statutory schemes for regulation of subdivision and zoning leads us to conclude that the trial court erred in applying G.S. § 160A-388(e) in this case. In the absence of such clear legislative intent, we decline to read such a requirement into the statutory scheme of Article 19 and hold that G.S. § 160A-388(e) does not apply to judicial review of decisions of boards of adjustment based on ordinances adopted pursuant to Part II of Article 19 of Chapter 160A.

Although respondent argues petitioner may not bring her appeal because Part II of Article 19 does not provide for appeal procedures regarding variances, the superior court has discretion to grant a writ of certiorari "in proper cases." *See* N.C.R. Prac. 19; *State v. Hamrick*, 110 N.C. App. 60, 65, 428 S.E.2d 830, 832-33 (likening superior court's authority to grant writ of certiorari in proper cases to Court of Appeals' power to grant writ of certiorari pursuant to N.C. Gen. Stat. § 7A-32(c)), *appeal dismissed and disc. review denied*, 334 N.C. 436, 433 S.E.2d 181 (1993). In this case, had the trial court not applied G.S. § 160A-388(e) to dismiss the petition, petitioner would have been required to file her petition within a "reasonable time" following respondent's decision. *See White Oak Properties, Inc. v. Town of Carrboro*, 313 N.C. 306, 311, 327 S.E.2d 882, 886 (1985) (where statute fails to designate time period within which to seek review of a board decision, trial court must use discretion to determine whether petition for writ of certiorari was filed within reasonable time of board decision). Accordingly, we remand this matter to the trial court for a

determination of whether petitioner's filing of this case was done within a reasonable time, and if so, for consideration of the merits of the petition.

The order dismissing the petition is hereby reversed, and this matter is remanded to the trial court for further proceedings in accordance with this opinion.

Reversed and remanded.

Judges TYSON and THOMAS concur.

RICH, RICH & NANCE, A NC GENERAL PARTNERSHIP, PLAINTIFF v. CAROLINA CONSTRUCTION CORPORATION, DEFENDANT

No. COA00-96-2

(Filed 17 September 2002)

1. Corporations— addendum to land sale contract— signatures

An addendum to a contract for the sale of land was enforceable even though the person who was vice-president, secretary, treasurer, and a fifty percent shareholder of defendant corporation did not sign the addendum. Defendant did not dispute the finding that it had executed the addendum, defendant admitted in its answer that it was a party to the addendum, defendant's president, who was also a fifty percent shareholder, signed the addendum, defendant did not argue that the president lacked authority to enter the contract on behalf of defendant, and defendant offered no authority for its assertion that another signature was necessary.

2. Deeds— covenant against encumbrances—availability fee not listed indeed—subsequent purchaser

Plaintiff did not waive its right to a deferred availability fee for the sale of land where the fee was not identified as an exception to title in the general warranty deed. Defendant was a subsequent purchaser; a claim for breach of the covenant against encumbrances may be brought only by the immediate covenantee. Furthermore, plaintiff's reliance upon defendant to perform

as agreed by the parties in no way constitutes an intentional relinquishment of its rights to availability fees.

3. Contracts— changes—modification rather than new agreement

There was substantial evidence to support the trial court's finding that changes to a land sales contract represented a modification and not a new contract where the acreage conveyed and the responsibilities for drainage changed, but not the purchase price or the deferred fee.

4. Vendor and Purchaser— deferred sales fee—sale of entire tract

The trial court did not err in an action for breach of a real estate sales contract by ordering that the balance would come due if defendant sold the entire tract without selling each of the remaining lots. From the plain language of an addendum to the contract, the parties contemplated that defendant might sell the improved tract as a whole and did not intend this possibility to negate plaintiff's interest in deferred availability fees.

Appeal by defendant from judgment entered 31 August 1999 by Judge Cy A. Grant in Pasqoutank County Superior Court. Originally heard in the Court of Appeals 15 February 2001. An opinion reversing and remanding the judgment of the trial court was filed by this Court on 19 June 2001. Pursuant to N.C. Gen. Stat. § 7A-30(2), plaintiff appealed to the Supreme Court. Heard in the Supreme Court 15 October 2001. An opinion reversing the Court of Appeals and remanding for consideration of issues not previously addressed by this Court was filed by the Supreme Court on 1 February 2002.

Trimpi, Nash & Harman, L.L.P., by John G. Trimpi, for plaintiff appellee.

The Twiford Law Firm, L.L.P., by Branch W. Vincent, III, for defendant appellant.

TIMMONS-GOODSON, Judge.

Carolina Construction Corporation ("defendant") appeals from a judgment by the trial court awarding monetary damages to Rich, Rich & Nance ("plaintiff") for breach of a real estate sales contract. For the reasons set forth herein, we affirm the judgment of the trial court.

The pertinent facts of this appeal are as follows: Plaintiff, a North Carolina general partnership, owned an 11.89-acre parcel of land known as "Walking Horse Subdivision" in Elizabeth City, North Carolina. On 29 August 1994, plaintiff entered into a contract with LFM Properties ("LFM") to sell this parcel. Based on discussions by the parties regarding the eventual use of the property, plaintiff anticipated that at some date in the future, LFM would convey its interest in the property to defendant, which would ultimately subdivide and develop the property into thirty-seven single-family residential lots. Accordingly, on 29 August 1994, plaintiff, LFM, and defendant executed the following addendum to the contract:

> At the close of each of the 37 (thirty seven) lots of Walking Horse subdivision, LFM Properties and or Carolina Construction Corporation, whomever is owner, agrees to pay to Rich, Rich and Nance the sum of $600.00 (Six Hundred Dollars) per lot as an availability fee. These fees shall survive any and all listing agreements and shall remain as a lien against the lots until they are paid. The sale or transfer of these lots from LFM Properties to Carolina Construction Corporation is exempt from the fee until such time as Carolina Construction Corporation sells the property improved or unimproved.

A further addendum provided that:

> Upon the subject property being developed by LFM Properties, or its successor in interest, a Declaration of Restrictive Covenants shall be recorded with the subdivision plat. The Declaration shall refer to the above-mentioned fee agreement and provide record notice thereof.

Lucien O. Morrisette ("Morrisette"), a principal stockholder of LFM and defendant, signed the addendum on behalf of LFM and defendant. Plaintiff thus anticipated a total payment of $97,200.00: $75,000.00 at the closing and, based on the addendum agreement, $22,200.00 to be paid over time as the lots in the subdivision were sold.

The parties subsequently modified the sales contract in terms of the acreage conveyed and responsibilities in connection with the drainage. The $75,000.00 purchase price and the $600.00 per lot availability fee remained unchanged, however. Plaintiff and LFM closed the sale of the property on 28 April 1995 and thereafter recorded the deed.

On 30 May 1997, LFM conveyed the property to defendant as contemplated by the parties. Defendant thereafter subdivided the property into thirty-eight lots and renamed the development "Carolina Village." On 22 April 1998, defendant sold the first lot in Carolina Village, but failed to pay plaintiff the $600.00 availability fee, as required by the addendum. When plaintiff thereafter demanded the fee payment, defendant refused, indicating that it was not bound, and therefore, would not honor the agreement contained in the addendum.

Plaintiff filed an action against defendant for breach of contract and sought $600.00 in damages. The complaint further alleged anticipatory repudiation of the contract and sought the balance due of $22,200.00. The matter came before the trial court on 2 August 1999. At the time of trial, only twelve lots had been platted, and defendant had sold nine lots in the subdivision without paying any of the availability fees. Approximately 6.9 acres remained undivided.

After considering all of the evidence, the trial court entered judgment for plaintiff in the amount of $5,400.00, the fees due for the nine lots sold. The court further ordered defendant to "pay the balance of $16,800.00 when and as each of the 28 additional lots in Carolina Village are sold by paying to plaintiff the sum of $600.00 upon the closing of each lot sale[.]" Additionally, the judgment provided that "[i]n the event defendant sells the entire tract without selling each of the 28 remaining lots, then the entire balance then due would become immediately payable." Defendant moved pursuant to Rules 59 and 60 of the Rules of Civil Procedure for reconsideration and for relief from the court's decision, which motions the court denied.

On appeal by defendant, a divided panel of this Court held that the rule against perpetuities prevented enforcement of the addendum and accordingly reversed the trial court. Plaintiff appealed to the Supreme Court, which held that the rule against perpetuities did not apply and thus would not bar enforcement of the contractual rights in the addendum. The Supreme Court therefore reversed the opinion of the Court of Appeals and remanded the case for further consideration of issues previously raised by the parties but unaddressed by this Court.

Defendant presents five issues on appeal, arguing that the availability fee contained in the addendum is unenforceable in that (1) one of the principals of the defendant corporation did not sign the adden-

dum; (2) plaintiff waived its right to the availability fee; (3) plaintiff breached the covenant against encumbrances; and (4) a second contract superseded the parties' original agreement. Defendant further argues that the trial court erred when it (5) ordered that, if defendant sold the entire property without selling the twenty-eight remaining lots, the entire balance then due to plaintiff would become immediately payable. For the reasons stated herein, we affirm the judgment of the trial court.

On appeal from a judgment of the trial court, we are bound by the trial court's findings of fact where they are supported by competent evidence, even where there may be evidence to the contrary. *See Barnhardt v. City of Kannapolis*, 116 N.C. App. 215, 217, 447 S.E.2d 471, 473, *disc. review denied*, 338 N.C. 514, 452 S.E.2d 807 (1994). Where such findings are supported by competent evidence, we may reverse the judgment only for erroneous conclusions of law. *See id.*

[1] By its first assignment of error, defendant argues that it is not bound by the addendum because Robert D. Saunders ("Saunders") did not sign the contract. Saunders is vice-president, secretary and treasurer of defendant corporation and owns fifty percent of the outstanding shares of stock. Defendant asserts that Saunder's signature was necessary to the contract, and that plaintiff was aware of such necessity. Defendant therefore argues that the addendum is unenforceable. We disagree on several grounds.

First, the trial court found that "Defendant executed the Addendum[,]" a finding defendant does not dispute in its argument. Defendant is therefore bound by such a finding. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991). Moreover, defendant similarly admitted in its answer to plaintiff's complaint that it was a party to the addendum. An admission by a party in its pleading is conclusive and binding upon the parties. *See Crowder v. Jenkins*, 11 N.C. App. 57, 62, 180 S.E.2d 482, 485 (1971). Further, the addendum was signed by Morrisette, who is president and fifty-percent shareholder of the defendant corporation. Although defendant's brief cites extensive authority concerning the concept of agency, defendant does not argue that Morrisette lacked the proper authority to enter into the contract on behalf of the defendant corporation. Defendant likewise offers no authority or other basis for its assertion that Saunder's signature was necessary to the contract. We therefore overrule this assignment of error.

[2] By its next two assignments of error, defendant contends that plaintiff waived its rights in the addendum by failing to identify the availability fee contained therein as an exception to title in the general warranty deed. Defendant asserts that the availability fee represents a lien on the real property and that therefore, plaintiff's failure to identify the availability fee in the general warranty deed breached the covenant against encumbrances. We disagree.

As defendant recognizes in its brief, the covenant against encumbrances is a personal covenant and does not run with the land. *See Lockhart v. Parker*, 189 N.C. 138, 143, 126 S.E. 313, 315 (1925); *Commonwealth Land Title Ins. Co. v. Stephenson*, 101 N.C. App. 379, 381, 399 S.E.2d 380, 381 (1991). A claim for breach of the covenant against encumbrances may be brought only by the immediate covenantee, not a subsequent purchaser. *See Lockhart*, 189 N.C. at 142, 126 S.E. at 315; *Commonwealth*, 101 N.C. App. at 381, 399 S.E.2d at 381. The immediate covenantee in the instant case was LFM and not defendant. As a subsequent purchaser, defendant has no right to bring a claim for breach of the covenant against encumbrances.

Furthermore, we perceive no grounds for waiver by plaintiff of its rights in the addendum. Waiver is the " 'intentional relinquishment of a known right.' " *Clement v. Clement*, 230 N.C. 636, 639, 55 S.E.2d 459, 461 (1949) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466 (1938)). The parties agreed in the instant case that defendant "would acquire the property from LFM Properties and build residential houses[.]" Further, "defendant agreed to refer to the $600.00 per lot fee arrangement in a declaration of restrictive covenants for the subdivision which would be created and placed of record at a later time." Clearly, plaintiff expected and relied upon defendant to honor its agreement to refer to the availability fees in a future set of restrictive covenants. Plaintiff's reliance upon defendant to perform as agreed to by the parties in their contract in no way constitutes an "intentional relinquishment" of its rights in the availability fees. We overrule these assignments of error.

[3] Defendant next argues that the addendum cannot be enforced because it was superseded by a subsequent agreement between the parties.[1] Specifically, defendant contends that the original offer to

1. We note that, although defendant refers to the doctrine of merger in this assignment of error, the actual argument focuses exclusively on the formation of a second contract between the parties and provides no further elaboration on the doctrine of merger or its application to the present facts.

purchase and contract was "not the same contract underlying the conveyance of real property on April 28, 1995." Defendant asserts that this second contract contained no availability fees and superseded any rights of plaintiff contained in the original contract. Defendant's argument has no merit.

Defendant's only support for its argument that the parties formed a new contract is that "the acreage under contract was reduced by 2 acres" and that defendant was "required to spend substantial sums of money when the drainage easement was signed." Defendant provides no other evidence to contradict the trial court's finding that the parties "modified the contract in terms of the acreage being conveyed and responsibilities in connection with drainage but did not change the purchase price or the $600.00 per lot deferred fee." There was substantial evidence to support the trial court's finding that the changes to the original contract represented a modification and not a new contract. We overrule this assignment of error.

[4] By its final assignment of error, defendant contends that the trial court erred when it ordered that "[i]n the event defendant sells the entire tract without selling each of the 28 remaining lots, then the entire balance then due would become immediately payable." Defendant argues that the trial court's order is contrary to the intent of the parties as expressed in the contract and at trial. We do not agree.

Where the language of a contract is plain and unambiguous, the construction of the agreement is a matter of law for the court. *See Kent Corporation v. Winston-Salem*, 272 N.C. 395, 401, 158 S.E.2d 563, 567-68 (1968); *Ins. Co. of North America v. Aetna Life & Casualty Co.*, 88 N.C. App. 236, 240, 362 S.E.2d 836, 839 (1987), *disc. review denied*, 321 N.C. 743, 366 S.E.2d 860 (1988). The addendum to the contract in the instant case states that "[t]he sale or transfer of these lots from LFM Properties to Carolina Construction Corporation is exempt from the fee until such time as Carolina Construction Corporation sells the property improved or unimproved." From the plain language of the addendum, the parties clearly contemplated that defendant might sell the unimproved tract as a whole, without selling the individual lots. It is equally clear that the parties did not intend for this possibility to negate plaintiff's interest in the availability fees. Instead, the parties agreed that defendant would not have to pay the availability fees until it sold the property.

Moreover, it is clear from the evidence at trial that the parties intended for the availability fees to operate as a form of creative financing for the sale of the property. Plaintiff characterized the money owed from the addendum as a deferred portion of the purchase price, an accommodation to the buyer and an interest-free loan until the lots were sold. Morrisette testified at trial that when he signed the addendum on behalf of defendant, he believed that the corporation was obligated to pay the $600.00 per lot fee.

We conclude that the trial court's order is consistent with the intent of the parties, as expressed by the language of the contract and the evidence at trial. The trial court therefore did not err in its order, and we overrule defendant's final assignment of error.

The judgment of the trial court is hereby

Affirmed.

Judges MARTIN and TYSON concur.

PURCHASE NURSERY, INC., A CORPORATION, PAUL VANCE AND FAYE J. VANCE, PLAINTIFFS v. WENDELL H. EDGERTON, MARGERY A. EDGERTON, LOREN BUCHANAN, NANCY G. BUCHANAN, ROBERT S. SMITHEY, DAVIDA B. SMITHEY, BINGHAM REAL ESTATE, L.P., A LIMITED PARTNERSHIP, MICHAEL WAYNE BINGHAM, AND CINDY V. BINGHAM, DEFENDANTS

No. COA01-1364

(Filed 17 September 2002)

1. Landlord and Tenant— lease—new agreement rather than option exercise

A lease agreement was a new, separate lease rather than the belated exercise of an expired option in an old lease.

2. Landlord and Tenant— lease—essential elements

A valid lease contains the identity of landlord and tenant; a description of land to be leased; a statement of the term of the lease; and the rental or other consideration to be paid. A writing is sufficient if the contract provisions can be determined from separate but related writings.

3. Landlord and Tenant— lease—identity of parties—reference to prior lease

A lease satisfied the statute of frauds requirement of identity of landlord and tenant where it stated that it was entered into by all the parties to the former lease and plaintiff was specifically named in the new lease.

4. Landlord and Tenant— lease—description—reference to prior lease

A lease satisfied the statute of frauds where it incorporated the description from an old lease.

5. Landlord and Tenant— agricultural lease—term—definiteness

A lease for a Christmas tree farm did not fail for lack of a definite term or for lack of mutuality of contract where the term was five years plus the additional time required to grow existing trees to a marketable size. There was evidence that "marketable size" is a term of art and has a definite meaning in the Christmas tree business.

6. Landlord and Tenant— lease—consideration—reference to prior lease

A new lease satisfied the Statute of Frauds by incorporating the rental consideration from the old lease.

7. Pleadings— defense to lease—waived by not pleading

Defendants in a lease action waived the defense that the lease was not signed by their spouses where they did not affirmatively assert the defense in their original or amended answer.

8. Landlord and Tenant— lease—sufficiency of signatures for party not charged—immaterial

The question of whether the signature of the secretary of plaintiff-corporation on a lease was sufficient without the president's signature was immaterial because plaintiff was not the party against whom enforcement of the lease was sought.

Appeal by plaintiff from judgment entered 26 June 2001 by Judge Ronald K. Payne in Avery County Superior Court. Heard in the Court of Appeals 22 August 2002.

Di Santi Watson & Capua, by Frank C. Wilson, III, for plaintiff-appellant.

Vannoy & Reeves, PLLC, by David Jolly, for defendants-appellees.

TYSON, Judge.

Purchase Nursery, Inc. ("plaintiff") appeals from an order granting Wendell H. Edgerton, Loren Buchanan, and Robert S. Smithey ("defendants") summary judgment and denying plaintiff's motion for summary judgment. We reverse in part and affirm in part the trial court's order.

I. Facts

Defendants and their spouses purchased 113 acres of real property in Ashe County, North Carolina in 1984 and took title as tenants by the entireties. On 1 April 1985, defendants and their wives executed a lease for this property to Paul and Faye Vance ("Vances"), d/b/a/ Purchase Nursery, for a term of ten years with an expiration date of 31 March 1995 ("old lease"). The old lease was never recorded in Ashe County but was mistakenly recorded in Wilkes County where defendants resided.

The Vances entered into possession of the land pursuant to the lease and operated a nursery business. The old lease provided that the Vances would pay $100.00 per year fixed rental plus twenty-five percent of sales from everything grown on the property. The old lease contained a clause that prohibited transfer, assignment, or subletting the property without prior written consent by defendants. The old lease also contained a clause that allowed the Vances to extend the term of the old lease for an additional five years provided that the Vances notified defendants in writing at least six months prior to the expiration of the Lease.

The Vances did not exercise the option to extend the lease prior to 31 March 1995. In the summer of 1995, the Vances incorporated their business under the name Purchase Nursery, Inc. (plaintiff). The Vances purported to have "orally assigned" the old lease to plaintiff. In January of 1996, defendants accepted $100.00 in fixed yearly rent and $8,211.00 in percentage rental from plaintiff. In the spring of 1996, the Vances transferred ownership in plaintiff to Ronnie and Debra Yates.

On 15 August 1996, plaintiff and defendants executed a document entitled "Exercise of Lease Option on New River Property" ("new lease"). The new lease was signed by all three defendants and by Debra Yates as secretary of plaintiff and on behalf of plaintiff. Defendants' spouses, who had an entireties interest in the property, did not sign.

The new lease was not recorded. Provisions in the new lease incorporated terms of the old lease. After the execution of the new lease, plaintiff continued to care for and harvest the trees that it had planted on the property during the old lease, but did not plant any additional trees on the land as agreed to in the new lease. Defendants accepted fixed annual and percentage rents from plaintiff until the farm was sold.

On or about 4 January 1999, defendants and their spouses transferred the land to Bingham Real Estate, L.P. ("Bingham") without any reference to the encumbrance of the new lease. When defendants received the 1999 rent payment from plaintiff, they returned it to plaintiff with assurances that Bingham would honor the lease. Plaintiff then sent Bingham a corporate check for the 1999 rent which was accepted.

On 7 February 2000, plaintiff sent Bingham a percentage rental check for the trees harvested in 1999 and one for the 2000 fixed annual rent. On 28 March 2000, Bingham accepted the 1999 percentage rent check but returned the 2000 fixed annual rental check stating that the lease would be terminated effective 31 March 2000. On 5 July 2000, plaintiff's employees working on the property were told to leave and were not allowed to continue harvesting the remaining trees.

On 20 October 2000, plaintiff filed a complaint against defendants for breach of contract, fraudulent concealment, and unfair and deceptive trade practices. Bingham was initially joined but subsequently dismissed from the complaint. Defendants filed a motion for summary judgment claiming that no valid lease existed because the wives of the defendants did not sign the lease, the secretary of plaintiff corporation signed the lease without affixing a corporate seal, and that plaintiff's failure to record the lease constituted contributory negligence. Plaintiff also filed a motion for summary judgment on the issue of liability claiming that defendants breached the new lease. Plaintiff presented depositions which claimed that defendants signed as agents of their wives and with their wives' authority. A hearing was

held on 14 May 2001 and continued to 11 June 2001. The trial court granted summary judgment in favor of defendants and denied summary judgment in favor of plaintiff. Plaintiff appeals.

II. Issues

Plaintiff assigns as error the trial court's (1) granting defendants' motion for summary judgment, and (2) denying plaintiff's motion for summary judgment.

III. Summary Judgment

[1] Plaintiff contends that it "submitted sufficient evidence to create a triable issue of fact as to whether or not there was a valid contract . . . and whether that contract was breached by [defendants]." We agree.

Summary judgment should only be granted where the evidence, taken in a light most favorable to the non-moving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Langley v. Moore*, 64 N.C. App. 520, 522, 307 S.E.2d 817, 819 (1983). To show a breach of contract, plaintiff must show the existence of a valid contract and a breach of the terms of that contract. *Poor v. Hill*, 138 N.C. App. 19, 26, 530 S.E.2d 838, 843 (2000).

Defendants claim that no valid contract exists between the parties because the old lease "died on the vine" when the option in the old lease was not extended within the time required and that the new lease alone is not sufficient as a valid lease. In *Sherwin-Williams Co. v. ASBN, Inc.*, 145 N.C. App. 176, 550 S.E.2d 527 (2001), *disc. rev. denied*, 355 N.C. 215, 560 S.E.2d 137 (2002), this Court addressed the question of "whether a retroactive lease 'extension' executed after the expiration of a lease term constitutes a continuation of the original lease or a new lease." 145 N.C. App. at 178, 550 S.E.2d at 529. This Court held that the extension was a new lease and not a retroactive extension or exercise of an option. *Id.* at 179, 550 S.E.2d at 530. We agree with the reasoning of *Sherwin-Williams*. We hold that the "Exercise of Lease Option on New River Property" is a separate new lease and not a belated exercise of an expired option to extend contained in the old lease.

A. Validity of the New Lease

[2] For a lease with a term of three years or more to be valid, the essential terms of the contract must be in writing and signed by the

party being charged. N.C. Gen. Stat. § 22-2 (2001). Our Supreme Court has long held that the party being charged is "the one against whom relief is sought; and if the contract is sufficient to bind him, he can be proceeded against though the other could not be held, because as to him the statute is not sufficiently complied with." *Lewis v. Murray*, 177 N.C. 17, 19, 97 S.E. 750, 751 (1919). A valid lease contains four essential elements: (1) identity of landlord and tenant, (2) description of land to be leased, (3) a statement of the term of the lease, and (4) rental or other consideration to be paid. *Fuller v. Southland Corp.*, 57 N.C. App. 1, 8, 290 S.E.2d 754, 759, *disc. rev. denied*, 306 N.C. 556, 294 S.E.2d 223 (1982). A writing, incomplete in itself, is sufficient under the statute "if the contract provisions can be determined from separate but related writings." *Greenberg v. Bailey*, 14 N.C. App. 34, 37, 187 S.E.2d 505, 507 (1972) (citations omitted). "The writings need not be physically connected if they contain internal reference to other writings." *Fuller*, 57 N.C. App. at 7, 290 S.E.2d at 758. While a lease must be recorded to be valid against a lien creditor or a third-party purchaser for value, recordation is not an element of a valid lease agreement between the original parties to the agreement. N.C. Gen. Stat. § 47-18.

1. Identity of Landlord and Tenant

[3] The new lease stated, "This agreement is entered into by all former parties so listed in the original lease to be effective immediately." Plaintiff was specifically named in the new lease. The new lease satisfies the Statute of Frauds requirement of the identity of the landlord and tenant.

2. Description of the Land

[4] The new lease incorporated the old lease by stating "The contents and provisions of the existing lease have not changed otherwise." The old lease provided a definite description of the property leased. As the essential terms of the lease do not have to be contained in one writing to be valid, the new lease sufficiently incorporated the description contained in the old lease to satisfy the Statute of Frauds as to the description of the property leased. *Fuller*, 57 N.C. App. at 4, 290 S.E.2d at 758.

3. Term of the Lease

[5] The new lease provides for a five year term "plus any additional time required to grow the existing trees on the property to marketable size. This is in the event that after the 5 years, there is still a

number of trees under marketable size, as determined by the seller, PURCHASE NURSERY, INC." Defendants contend that this creates an indefinite time period for the contract and creates a contract which lacks mutuality. We disagree.

The new lease creates a five year lease which can only be extended if the trees are not of "marketable size". Plaintiff agreed not to plant new trees on the property and only harvest the trees in existence at the execution of the new lease. According to the affidavit of the president of plaintiff, "marketable size" is a term of art in the Christmas tree business and has a definite meaning. We hold that in the context of the agricultural lease, the new lease does not fail for lack of definiteness in duration of the term nor for lack of mutuality of contract. There is sufficient evidence to create a question of fact whether there was a definite term.

4. Rents and Other Consideration

[6] The new lease incorporated provisions of the old lease by stating "The contents and provisions of the existing lease have not changed otherwise." The old lease provided with specificity for the amount of annual rents and percentage rents to be paid by plaintiff. The rental reserved did not change. The new lease allowed for plaintiff to harvest trees already in existence, but did not allow plaintiff to plant new trees. The new lease satisfied the Statute of Frauds by incorporating the rental consideration from the old lease.

5. Signatures

a. Wives of Defendants

[7] The new lease was signed by defendants Edgerton, Buchanan, and Smithey but not by their wives. Defendants assert that the new lease is unenforceable and void because they are not signed by their respective spouses. In their brief, defendants rely on N.C. Gen. Stat. § 39-13.6(a), which states "Neither spouse may bargain, sell, lease, mortgage, transfer, convey or in any manner encumber any property so held [in tenancy by the entirety] without the written joinder of the other spouse."

The North Carolina Rules of Civil Procedure require that a party shall affirmatively set forth any matter constituting an avoidance or affirmative defense. N.C.G.S. § 1A-1, Rule 8(c). "Failure to raise an affirmative defense in the pleadings generally results in a waiver thereof." *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717

(1998) (citations omitted). Neither defendants' original nor amended answer included an affirmative defense based upon N.C. Gen. Stat. § 39-13.6. Defendants waived this defense by failing to affirmatively assert this defense.

b. Corporation

[8] Plaintiff signed the new lease as "Purchase Nursery, Inc. Sec/ Debra V. Yates." Defendants do not contend on appeal that this signature is insufficient to bind the corporation to the contract. They only claim, without citing authority, that "The signature of the president of Purchase Nursery, Inc., does not appear on the extension." As plaintiff is not the party against whom enforcement of the lease is sought, the nature or existence of plaintiff's valid signature is immaterial. *Lewis*, 177 N.C. at 19, 97 S.E. at 751.

IV. Conclusion

Plaintiff presented sufficient evidence to establish a genuine issue of material fact as to defendants' breach of a valid lease. We reverse the trial court's grant of summary judgment in favor of defendants. We affirm the trial court's denial of plaintiff's motion for summary judgment. We remand the case to the trial court to determine whether defendants breached a valid lease and to determine the claims of fraudulent concealment and unfair and deceptive trade practices against defendants.

Affirmed in part, reversed in part, and remanded.

Judges MARTIN and THOMAS concur.

STATE OF NORTH CAROLINA v. ANTHONY REVELS

No. COA01-1233

(Filed 17 September 2002)

1. Homicide— first-degree murder—motion to dismiss—sufficiency of evidence

The trial court did not err denying defendant's motion to dismiss the two charges of first-degree murder even though defendant alleged self-defense, because: (1) there was substantial evi-

dence supporting the necessary elements of first-degree murder; and (2) although the evidence offered by defendant provided a conflicting account of what occurred and indicated that defendant acted in self-defense, contradictions in the evidence remain for the jurors to resolve.

2. Homicide— first-degree murder—motion for mistrial—emotional outbursts by victim's family

The trial court did not abuse its discretion in a double first-degree murder case by denying defendant's motion for a mistrial even though there were several incidents of emotional outbursts by members of one of the victim's families, because: (1) the trial court excused the jurors when the emotional outburst occurred, cautioned the audience, and provided a curative instruction to the jury; and (2) defendant has failed to establish that the emotional outbursts resulted in irreparable prejudice to defendant.

Appeal by defendant from judgments entered 15 March 2000 by Judge Gregory A. Weeks in Robeson County Superior Court. Heard in the Court of Appeals 13 August 2002.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General David Roy Blackwell, for the State.

Carlton M. Mansfield for defendant-appellant.

HUNTER, Judge.

Anthony Revels ("defendant") appeals from judgments sentencing him to life imprisonment without parole for his conviction of two counts of first degree murder. Defendant assigns error to the trial court's denial of his motion to dismiss the charges of first degree murder and his motion for mistrial. For reasons stated herein, we find no error.

The State's evidence at trial tended to show that on the morning of 17 August 1998, law enforcement officers found a red Dodge Avenger with two dead individuals, identified as Patrick Sam Locklear ("Locklear") and Billy Dean Wearnes ("Wearnes"), seated inside the vehicle at the intersection of John French Road and Melinda Road in Robeson County. Officers found a nine millimeter handgun with its safety off and a bullet in its chamber, laying on the front passenger's side floorboard.

A forensic pathologist, Dr. Robert L. Thompson ("Dr. Thompson"), testified that Locklear's autopsy revealed five gunshot wounds and opined that Locklear's death was caused by gunshot wounds to the head and chest. Dr. Thompson further testified that Wearnes' autopsy revealed three gunshot wounds. According to Dr. Thompson, the cause of Wearnes' death was a bullet which entered his mouth and injured his right carotid artery.

The State's evidence also tended to show that defendant, Brian Chavis ("Chavis"), and several others cruised Pembroke, North Carolina on the night of 16 August 1998. Later that evening, defendant's group as well as Locklear and Wearnes, who were driving a red Dodge Avenger, convened at Curley Jacobs' ("Jacobs") trailer to talk and drink beer. At one point while at Jacobs' home, Wearnes began showing off a small black nine millimeter gun. Defendant then removed a gun from Jacobs' waistband and told Wearnes that the gun was a real nine millimeter. Chavis never saw defendant return the gun to Jacobs.

Chavis testified that around 3:00 a.m. on 17 August 1998, defendant stated "he was thinking about robbing [Locklear and Wearnes], they wasn't nothing but a bunch of punks, and it wouldn't take nothing but two knocks on the side of the head." Jacobs testified that he lent his nine millimeter to defendant prior to defendant's statements about robbing Locklear and Wearnes.

At approximately 3:15 a.m., defendant, Chavis, Locklear, and Wearnes left Jacobs' trailer and drove to Bennie Locklear's ("Bennie") residence. Bennie was Wearnes' employer, who according to Wearnes, owed him money. Defendant and Chavis rode in defendant's truck while Locklear and Wearnes rode in Locklear's Avenger; defendant and Locklear were the drivers. In transit, when defendant made a sharp left turn, Chavis saw Jacobs' nine millimeter gun slide across the seat of the truck. When he realized that Chavis saw the gun, defendant told Chavis that he was going to get Locklear and Wearnes.

Defendant, Chavis, Locklear, and Wearnes arrived at Bennie's trailer between 3:30 and 4:00 a.m. on 17 August 1998. Defendant got out of his truck and walked to Locklear's car and started talking to Locklear while Wearnes walked up to the trailer. When Bennie asked Wearnes who was with him, Wearnes responded that defendant and the crowd were with him. Bennie then told Wearnes to stay right there and shut the door of the trailer. Wearnes quickly walked back to

Locklear's car and said, " '[l]et's go.' " As they were leaving, Chavis heard about seven gunshots. Defendant and Chavis followed Locklear and Wearnes to an open area next to a tobacco field. The two vehicles were parked with the driver's side of defendant's truck beside the driver's side of Locklear's car.

Defendant asked Wearnes why he had mentioned his name to Bennie. Wearnes replied that Bennie asked him who was with him so he told him. Locklear stated, " '[w]ell, where do we go from here?' " and defendant responded, " '[y]ou don't go nowhere[.]' " Defendant then began shooting toward Locklear and Wearnes. According to Chavis, defendant shot twelve or thirteen times. Defendant exited his truck, walked over to Locklear's car and reached into the car through the driver's side window. When defendant returned to his truck, he had a ring and a wallet that he did not have before the shooting.

Defendant and Chavis then left the scene and traveled to Jacobs' trailer just before daylight. Defendant told Jacobs that he had to kill Locklear and Wearnes. Jacobs was in disbelief so defendant showed him the ring and wallet. Defendant, Chavis, and Jacobs then got into defendant's truck; defendant drove until reaching a dirt road where defendant stopped the truck. Defendant pulled out Locklear's food card and Blue Cross/Blue Shield card from the wallet which he showed Jacobs and Chavis. Defendant then stuck the cards back in the wallet and threw the wallet on the ditch bank. Defendant, Jacobs, and Chavis returned to Jacobs' trailer.

On 21 August 1998, Jacobs turned his handgun over to the sheriff's department. Eugene E. Bishop, a special agent with the North Carolina State Bureau of Investigation, testified that Jacobs' gun was compared with the bullet fragments recovered from the two victims' bodies and this comparison showed that Jacobs' gun had fired the bullets.

Defendant testified at trial in his own defense and provided a different account indicating that he had acted in self-defense. Defendant testified that after parking by the tobacco barn on the morning of 17 August 1998, Wearnes told him that he wanted defendant to drive his truck by Bennie's trailer so that he and Locklear could do a drive-by shooting. According to defendant, after he refused, Wearnes began firing shots at him. Defendant then returned fire using Jacobs' nine millimeter pistol. After the shooting ceased, defendant drove back to Jacobs' residence where he picked up his girlfriend and went home.

Defendant was charged with two counts of first degree murder, one count of conspiracy to commit armed robbery, and two counts of robbery with a dangerous weapon. At the close of the State's evidence, the trial court granted defendant's motions to dismiss the charge of conspiracy to commit armed robbery and one count of robbery with a dangerous weapon. A jury found defendant guilty of two counts of first degree murder and not guilty of robbery with a dangerous weapon. Defendant appeals.

I.

[1] Defendant initially contends the trial court erred in denying his motion to dismiss the charges of first degree murder at the close of all the evidence based on the insufficiency of the evidence. Defendant asserts that his motion to dismiss should have been granted because of the evidence he presented showing that he acted in self-defense. We disagree.

At the outset, when reviewing a motion to dismiss, the trial court must determine "whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). When considering a motion to dismiss, the trial court must view the evidence in the light most favorable to the State. *State v. Smith*, 121 N.C. App. 41, 44, 464 S.E.2d 471, 473 (1995). "[I]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss should be allowed." *State v. Bates*, 309 N.C. 528, 533, 308 S.E.2d 258, 262 (1983).

First degree murder is defined as "the intentional and unlawful killing of a human being with malice and with premeditation and deliberation." *State v. Flowers*, 347 N.C. 1, 29, 489 S.E.2d 391, 407 (1997). "A killing is 'premeditated' if the defendant contemplated killing for some period of time, however short, before he acted." *State v. Williams*, 334 N.C. 440, 447, 434 S.E.2d 588, 592 (1993), *judgment vacated on other grounds*, 511 U.S. 1001, 128 L. Ed. 2d 42 (1994). Deliberation means an intent to kill, carried out in a cool state of blood, in furtherance of a fixed design for revenge or to accomplish an unlawful purpose and not under the influence of a violent passion,

suddenly aroused by lawful or just cause or legal provocation. *State v. Lowery*, 309 N.C. 763, 768, 309 S.E.2d 232, 237 (1983).

In the case *sub judice*, the State's evidence tended to show that while at Jacobs' home on the night of 16 August 1998, defendant brandished to the crowd Jacobs' nine millimeter pistol. Additionally, Chavis testified that defendant stated that he was thinking of robbing the victims, Locklear and Wearnes. Defendant described the victims as "nothing but a bunch of punks," and pointed out that "it wouldn't take nothing but two knocks on the side of the head" to rob them. While following Locklear and Wearnes to Bennie's residence, Chavis saw Jacobs' nine millimeter pistol slide across the seat at which point defendant informed Chavis that he was going to get Locklear and Wearnes. While parked beside a tobacco barn on the morning of 17 August 1998, when Locklear asked " '[w]ell, where do we go from here?' " defendant responded " '[y]ou don't go nowhere,' " and defendant began shooting toward Locklear and Wearnes in the car. Chavis recalled defendant shooting twelve or thirteen times. The State's evidence tended to show that defendant exited the truck and reached into the victims' car. Defendant returned to the truck with a ring and a wallet, containing cards with Locklear's name on them, that he did not have before the shooting. Further, the State offered evidence showing that the bullets recovered from the victims' bodies had been fired by Jacobs' gun.

When the evidence is viewed in the light most favorable to the State, there is substantial evidence supporting the necessary elements of first degree murder. Therefore, the trial court was proper in denying defendant's motion to dismiss the first degree murder charges. The evidence offered by defendant provided a conflicting account of what occurred and indicated that defendant acted in self-defense. However, contradictions in the evidence remain for the jurors to resolve. *State v. Brown*, 310 N.C. 563, 313 S.E.2d 585 (1984). This assignment of error is overruled.

II.

[2] Defendant next argues the trial court erred in denying his motion for mistrial following several incidents of emotional outbursts by members of Locklear's family. N.C. Gen. Stat. § 15A-1061 provides in pertinent part: "The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case."

N.C. Gen. Stat. § 15A-1061 (2001). The decision to grant or deny a defendant's motion for mistrial rests within the sound discretion of the trial court. *State v. Blackstock*, 314 N.C. 232, 243, 333 S.E.2d 245, 252 (1985). Therefore, a trial court will not be reversed unless its "ruling is clearly erroneous so as to amount to a manifest abuse of discretion . . . ." *State v. Sorrells*, 33 N.C. App. 374, 377, 235 S.E.2d 70, 72 (1977).

The record reveals that during trial, the trial judge had to caution the audience several times regarding audible emotions. At one point, a member of Locklear's family began sobbing and immediately rose and attempted to leave the courtroom. The court then sent the jury out of the courtroom. Defendant moved for a mistrial and a hearing was conducted. After denying defendant's motion, the trial judge called the jury back in and instructed the jurors that they were not to consider the emotional outburst in reaching a verdict. We conclude the trial court did not abuse its discretion in denying defendant's motion for mistrial. The trial court excused the jurors when the emotional outburst occurred, cautioned the audience, and provided a curative instruction to the jury. Defendant has failed to establish that it was clearly erroneous for the trial court to find that the emotional outburst did not result in irreparable prejudice to defendant. Accordingly, this assignment of error has no merit.

No error.

Judges GREENE and TIMMONS-GOODSON concur.

KEVIN BELVERD AND WIFE, MERYL BELVERD, PLAINTIFFS-APPELLANTS v. ALLAN D. MILES AND WIFE, WANDA M. MILES, SYCAMORE PROPERTIES, A NORTH CAROLINA GENERAL PARTNERSHIP, SYCAMORE DEVELOPMENT, LLC, AND HUNTER & BROWN, INC., DEFENDANTS-APPELLEES

No. COA01-1108

(Filed 17 September 2002)

1. Deeds— restrictive covenants—use of lot for through-street

Subdivision restrictive covenants did not prohibit the use of a portion of a lot in the subdivision for construction of a through-street to provide access to an adjacent tract where a covenant

restricting use of the subdivision lots to residential purposes was modified by another covenant providing that lots could be used for the purpose of constructing a public street to property surrounding the subdivision with the written consent of the original grantors, and the original grantors conveyed the portion of the lot used for the through-street to the developers of the adjacent tract.

2. Contracts— breach of promise implied in development plan—voluntary dismissal of claims

The trial court did not err by granting summary judgment in favor of defendant developers on plaintiffs' claim that defendant individuals breached a promise implied from the development plan, because: (1) the claim as set forth in the complaint is expressly alleged against defendant individuals; and (2) plaintiffs have voluntarily dismissed all claims against defendant individuals.

3. Parties— necessary—motion to join

The trial court did not err by denying defendant's motion to join as necessary parties all of the lot owners and the pertinent city, because this case involves the determination of whether a certain use of the pertinent land violates the applicable restrictive covenants instead of a determination of whether changed circumstances have taken place so as to void a restrictive covenant in equity.

4. Injunction— preliminary—failure to return bond posted as security

Although plaintiffs contend the trial court erred by failing to return to plaintiffs the $5,000 bond posed by plaintiffs as security for the issuance of a preliminary injunction, this issue is premature because the record does not contain any indication that the trial court has yet considered or determined whether defendant developers have sustained any damages as a result of the injunction entered against them.

Appeal by plaintiffs from an order entered 16 April 2001 by Judge Michael E. Beale in Superior Court, Cabarrus County. Heard in the Court of Appeals 5 June 2002.

Womble Carlyle Sandridge & Rice, PLLC, by John C. Cooke and Christine Carlisle Odom, for plaintiff-appellants.

Rosenman & Colin LLP, by Richard L. Farley, for defendant-appellees.

McGEE, Judge.

This case involves the question of whether Sycamore Properties, Sycamore Development, LLC, and Hunter & Brown, Inc. (the Developers) are prohibited from using a particular strip of land, located on a lot in a subdivision, to construct a through-street as a result of certain restrictive covenants. The trial court held that the restrictive covenants do not prohibit the use of the land in question to construct a through-street. We affirm.

The following facts are undisputed. The Partridge Bluff subdivision (Partridge Bluff) is a single-family, residential subdivision in Concord, Cabarrus County, North Carolina that is divided into two sections, Section I and Section II. The original owners of Partridge Bluff, Allan D. Miles and Wanda M. Miles (the Mileses), executed and recorded "Protective Covenants and Restrictions for the Subdivision of Partridge Bluff" (the Covenants) for Section I of Partridge Bluff at Book 527, Page 93 in the Cabarrus County Registry. The Mileses conveyed Lot 30 to the predecessor-in-title of plaintiffs in 1983. Lot 30 fronts on Bridlewood Place (a public street) and is directly across from Lot 1. The Mileses also owned a large tract of land adjacent to Partridge Bluff (the Sycamore Property). The Mileses conveyed the Sycamore Property and a certain portion of Lot 1 of Partridge Bluff (together the Sycamore Tract) to defendant Sycamore Properties by deed (the Sycamore Deed) dated 26 January 1988. The Sycamore Deed identifies the portion of Lot 1 conveyed to Sycamore Properties as being sixty feet in width and 385 feet in length (the Lot 1 Strip). One of the purposes of including the Lot 1 Strip in the Sycamore Deed was "to provide access to the Sycamore Tract directly from Bridlewood Place, a public street."

Lot 30 was acquired by Carolina Family Restaurants Limited Partnership I (CFRP I) and Carolina Family Restaurants Limited Partnership II (CFRP II) in 1996. Plaintiff Kevin Belverd was and is the general partner of CFRP I and CFRP II. CFRP I and CFRP II conveyed Lot 30 to Carolina Family Restaurants Limited Partnership III (CFRP III) in 1998. CFRP III conveyed Lot 30 to plaintiffs.

Defendant Sycamore Properties employed defendant Hunter & Brown, Inc. in 1998 to provide planning and project management services for the development of the Sycamore Tract. In November 1998, Hunter & Brown, Inc. presented to the City of Concord Planning and Zoning Commission (the Commission) a preliminary plan to subdivide the Sycamore Tract into a residential section and a commercial section, and to call the subdivision "Coldwater." The Commission published a Notice of Public Hearing on 4 January 1999 for the preliminary plat review of the Coldwater Subdivision. No notice of the hearing was mailed directly to the owners of lots in Partridge Bluff, and plaintiffs did not have actual knowledge of the Commission's consideration of the plat.

At the hearing on 19 January 1999, the preliminary plat plan was unopposed, and the Commission thereafter approved the plat. In March 1999, the Developers began to construct a through-street across the Lot 1 Strip in order to connect the Coldwater Subdivision on the Sycamore Tract to Bridlewood Place in Partridge Bluff, Section I.

Plaintiffs filed a complaint against the Developers and the Mileses on 5 May 2000, setting forth various causes of action, requesting declaratory judgment, and seeking to prevent continued construction of the through-street. The Developers and the Mileses filed answers denying the allegations and asserting affirmative defenses of laches and estoppel. The trial court entered a temporary restraining order in June 2000 and subsequently entered a preliminary injunction, specifically enjoining the use of the through-street for access to the commercial portion of Coldwater. The trial court indicated that the Developers could continue to construct the through-street at their own risk. The Developers proceeded with construction of the through-street and offered the street for public dedication in December 2000. The street, originally named "Henry Place" and subsequently renamed "Ravenswood Drive," now connects the residential portion of the Sycamore Tract, renamed Sycamore Ridge, to Bridlewood Place. Ravenswood Drive is currently the only completed, paved street connecting Sycamore Ridge to the public street system.

The parties participated in a Mediated Settlement Conference and reached a Settlement Agreement in January 2001, pursuant to which plaintiffs dismissed all of their claims for damages against Sycamore Properties, Sycamore Development, LLC, and Hunter & Brown, Inc., and took a voluntary dismissal as to all claims against the Mileses.

Plaintiffs filed one motion for summary judgment as to all of their claims, and a second motion for summary judgment as to the Developers' affirmative defenses of laches and estoppel. Plaintiffs also filed a motion to join necessary parties. The Developers filed a motion for summary judgment as to all of plaintiffs' claims. Following a hearing, the trial court entered an order on 16 April 2001 that dissolved the preliminary injunction, granted the Developers' motion for summary judgment on all claims, and denied all of plaintiffs' motions, holding that the Developers' "use and intended use of the disputed portion of Lot 1 does not violate, complies with and is permitted by [the covenants]." The trial court's order did not address the $5,000.00 bond that plaintiffs had posted in support of the preliminary injunction.

[1] On appeal, plaintiffs first argue that the trial court erred in granting summary judgment in favor of the Developers on claim one (seeking injunctive relief based on an alleged violation of the covenants), and on claim nine (seeking declaratory judgment). Plaintiffs contend that the applicable covenants prohibit the Developers' use of the Lot 1 Strip as a through-street. We disagree.

The covenants contain a list of provisions, including the following:

> 1. No lot shall be used for other than residential purposes. No residential dwelling shall be erected, placed or permitted to remain on any lot other than one single family dwelling[.]
>
> . . . .
>
> 13. No lot shall be used for the purpose of constructing a public street or to provide access to and from the properties located in the subdivision of Partridge Bluff, Section One, to property surrounding Partridge Bluff, Section One, except with the written consent and permission of Allan D. Miles, and wife, Wanda M. Miles, their heirs and assigns.

Neither paragraph one nor paragraph thirteen is, on its own, ambiguous. However, in terms of whether a lot may be used for a through-street, paragraphs one and thirteen conflict with each other. Paragraph one would prohibit the use of a lot for a public through-street since such use is clearly not "residential." *See Easterwood v. Burge*, 103 N.C. App. 507, 509, 405 S.E.2d 787, 789 (1991) (holding that a covenant restricting property to "residential purposes only" prohibited construction of access road to separate parcel); *see also Franzle*

v. Waters, 18 N.C. App. 371, 376, 197 S.E.2d 15, 18 (1973). Paragraph thirteen, on the other hand, would allow such use if the Mileses gave written consent. Plaintiffs contend that paragraph thirteen was not intended to modify the general prohibition against using lots for non-residential purposes in paragraph one; rather, plaintiffs contend, paragraph thirteen was only intended to "add[] an additional layer of protection." We find this argument to be without merit.

If paragraph thirteen is not construed as modifying paragraph one, then, pursuant to paragraph one, no lot could ever be used to construct a public street because such use is not residential, and paragraph thirteen, purporting to allow such use if the Mileses give written consent, would be superfluous. We believe such an interpretation of the covenants would be contrary to the applicable rules of interpretation.

> The applicable rules of interpretation require that the meaning of the contract be gathered from a study and a consideration of all the covenants contained in the instrument and not from detached portions. It is necessary that every essential part of the contract be considered—each in its proper relation to the others—in order to determine the meaning of each part as well as of the whole, and each part must be given effect according to the natural meaning of the words used.
>
> Another fundamental rule of construction applicable here requires that each part of the contract must be given effect, if that can be done by fair and reasonable intendment, before one clause may be construed as repugnant to or irreconcilable with another clause.

Callaham v. Arenson, 239 N.C. 619, 625, 80 S.E.2d 619, 623-24 (1954) (internal citations omitted).

Pursuant to these rules, we hold that paragraph thirteen was intended to modify the general prohibition of paragraph one by providing that lots could be used for the specific non-residential purpose of constructing a public street upon obtaining consent from the Mileses in writing. Furthermore, we note that this construction comports with the well-established principle that when the meaning of covenants purporting to restrict the free use of property is in doubt, such covenants are to be construed in favor of the unrestricted use of property. *See Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 239 (1967).

[2] Because we hold that the covenants do not prohibit the Developers' use of the Lot 1 Strip as a through-street, we need not address plaintiffs' argument that the trial court erred in denying plaintiffs' motion for summary judgment as to the Developers' defenses of laches and estoppel. Plaintiffs also contend that the trial court erred in granting summary judgment in favor of the Developers on plaintiffs' claim that the Mileses breached a promise implied from the development plan. We disagree and affirm the trial court's ruling on this claim because the claim, as set forth in the complaint, is expressly alleged against the Mileses and, as noted above, plaintiffs have voluntarily dismissed all claims against the Mileses.

[3] Furthermore, we disagree with plaintiffs' argument that the trial court erred in denying plaintiffs' motion to join certain parties. Plaintiffs rely solely upon the case of *Karner v. Roy White Flowers, Inc.*, 351 N.C. 433, 527 S.E.2d 40 (2000), for the proposition that the trial court should have joined as necessary parties all of the lot owners and the City of Concord. However, plaintiffs' reliance upon *Karner* is misplaced. That case involved a "determination of whether a change of circumstances has taken place so as to void a restrictive covenant in equity[.]" *Id.* at 437, 527 S.E.2d at 43. The case before us involves no such determination, but rather involves the determination of whether a certain use of the land in question violates the applicable restrictive covenants. Having found no authority to support plaintiffs' proposition, we affirm the trial court's ruling on this issue.

We have also examined plaintiffs' arguments that the trial court erred in granting summary judgment on plaintiffs' claims of negligence and unfair and deceptive practices and find them to be without merit.

[4] Finally, plaintiffs contend the trial court erred by failing to return to plaintiffs the $5,000.00 bond posted by plaintiffs as security for the issuance of the preliminary injunction. However, the record does not contain any indication that the trial court has yet considered or determined whether the Developers have sustained any damages as a result of the injunction entered against them. *See Tedder v. Alford*, 128 N.C. App. 27, 36, 493 S.E.2d 487, 492 (1997), *disc. review denied*, 348 N.C. 290, 501 S.E.2d 917 (1998). Thus, plaintiffs' assignment of error on this issue is premature.

We affirm the order of the trial court.

Affirmed.

Judges WYNN and LEWIS concur.

LEE RAY BERGMAN REAL ESTATE RENTALS AND SOUTHERN REPAIR SERVICES, INC., PLAINTIFFS v. NORTH CAROLINA FAIR HOUSING CENTER, DEFENDANT

No. COA01-1286

(Filed 17 September 2002)

1. Administrative Law— determination of standing—exhaustion of remedies not required

The trial court had subject matter jurisdiction to grant summary judgment for plaintiffs in an action for a declaratory judgment concerning the standing of defendant to file a complaint with the Human Relations Department of the City of Durham. Although defendant contended that plaintiffs should have been required to exhaust their administrative remedies, the department is not an agency and the Administrative Procedure Act does not apply. Even if the APA did apply, plaintiffs did not have to exhaust administrative remedies because they sought to determine whether defendant had standing and were not seeking judicial review of the Department's decision.

2. Landlord and Tenant— standing—discrimination claim—discrimination not suffered by defendant

The trial court correctly determined that a defendant nonprofit organization did not have standing to file a housing discrimination claim with the Human Relations Department of the City of Durham because tenants suffered the alleged discrimination rather than defendant. The only injury claimed by defendant was financial, the result of a voluntary investigation.

Appeal by defendant from judgment entered 20 July 2000 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 13 June 2002.

Hutson, Hughes & Powell, PA, by James H. Hughes and William A. Hatch, for plaintiff-appellees.

Land Loss Prevention Project, by Stephon Bowens and Don Corbett, for defendant-appellant.

North Carolina Justice and Community Development Center, by Jack Holtzman, for North Carolina Justice and Community Development Center, El Centro Hispano, and El Pueblo, amici curiae.

Office of the Durham City Attorney, by Emanuel McGirt, Assistant City Attorney, for the City of Durham, amicus curiae.

THOMAS, Judge.

The North Carolina Fair Housing Center (NCFHC), defendant, appeals the trial court's grant of summary judgment in favor of plaintiffs in this action for declaratory judgment. The trial court based its order on NCFHC not having standing to pursue a claim against plaintiffs before the Human Relations Department of the City of Durham (Department).

For the reasons discussed herein, we affirm.

NCFHC is a non-profit organization whose stated goal is equal and fair housing opportunities for all citizens. It "became aware of a potentially discriminatory pattern" at Meadow Creek Apartments after several complaints were filed by Hispanic residents. The property is owned by Lee Ray Bergman, president of both plaintiff Lee Ray Bergman Real Estate Rentals (Bergman Rentals) and plaintiff Southern Repair Services, Inc.

NCFHC, led by its director, Stella Adams, investigated the complaints and claimed Bergman Rentals was inappropriately charging Hispanic tenants higher rent and fees than other tenants. Plaintiffs, however, maintain that any difference in rent was solely due to restitution owed by tenants for damages they caused. As a result of its investigation, NCFHC filed an administrative complaint with the Department alleging discrimination on the basis of race, color, and national origin, specific to the Meadow Creek tenants. NCFHC amended its complaint to include an assertion of specific injury to itself as an organization, alleging it "diverted resources to identify and counteract the unlawful actions." It claimed to have spent approximately $5,582.54 on the investigation, including $200 per hour for Adams's services and $100 per hour for the services of two of NCFHC's fair housing specialists.

Plaintiffs refused a request by the Department to submit a position statement and instead filed this action in Durham County

Superior Court against both NCFHC and the Department. They requested a declaratory judgment concerning the standing of NCFHC to file the complaint with the Department, as well as a temporary restraining order and preliminary injunction to halt the investigation.

The trial court granted the preliminary injunction. The parties then moved for summary judgment. The Department also moved for a Rule 12 dismissal, claiming it is not a corporation capable of being sued and that service of process was insufficient. The Department's motion was granted. Following hearing, the trial court determined that NCFHC lacked standing to have brought the claim and granted plaintiffs' summary judgment motion. NCFHC appeals.

[1] By its first assignment of error, NCFHC argues the trial court erred in granting plaintiffs' summary judgment motion because the trial court lacked subject matter jurisdiction to hear and decide the issues. NCFHC contends plaintiffs should have been required to exhaust their administrative remedies through the Department before they filed their complaint for declaratory judgment. We disagree.

The Administrative Procedure Act (APA) provides that:

> It is the policy of this State that any dispute between *an agency* and another person that involves the person's rights, duties, or privileges, including licensing or the levy of a monetary penalty, should be settled through informal procedures. In trying to reach a settlement through informal procedures, the agency may not conduct a proceeding at which sworn testimony is taken and witnesses may be cross-examined. If the agency and the other person do not agree to a resolution of the dispute through informal procedures, either the agency or the person may commence an administrative proceeding to determine the person's rights, duties, or privileges, at which time the dispute becomes a "contested case."

N.C. Gen. Stat. § 150B-22 (2001) (emphasis added). However, the general provisions of the APA state that the APA is applicable to agencies. *See* N.C. Gen. Stat. § 150B-1 (2001). "Agency" is defined as:

> an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor's Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. *A local unit of government is not an agency.*

N.C. Gen. Stat. § 150B-2(1a) (2001) (emphasis added). Here, the administrative agency at issue is the Department. Because it is not a unit of state government, but rather a local one, it does not fall under the definition of "agency" within the confines of the APA. Thus, since the APA "establishes a uniform system of administrative rule making and adjudicatory procedures for *agencies*[,]" *see* N.C. Gen. Stat. § 150B-1, and the Department is not an agency, the APA does not apply and plaintiffs were not required to exhaust administrative remedies.

Nonetheless, even if the APA did apply, our Supreme Court has held that a plaintiff does not have to exhaust administrative remedies where there is a request for a declaratory judgment and injunction against a commission. *See Charlotte-Mecklenburg Hospital Auth. v. N.C. Industrial Comm.*, 336 N.C. 200, 211, 443 S.E.2d 716, 723 (1994). In *Charlotte-Mecklenburg*, the plaintiff was not seeking the review of an award by the Industrial Commission, but seeking to determine if one of the Commission's rules was valid. Likewise, in the instant case, plaintiffs were not requesting judicial review of the Department's decisions. Instead, they were merely seeking to determine whether NCFHC had standing before the Department. We therefore reject NCFHC's argument that the trial court did not have subject matter jurisdiction.

[2] By its second and third assignments of error, NCFHC contends the trial court erred in concluding it lacks standing. We disagree.

Preliminarily, we note the issue of whether NCFHC has standing is a question of law. *Creeke Pointe Homeowner's Ass'n, Inc. v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 224-25 (2001), *disc. review denied,* 356 N.C. 161, 568 S.E.2d 191 (2002). Accordingly, we conduct our review *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). NCFHC argues it has suffered injury and that the State Fair Housing Act and the Durham Fair Housing Ordinance give it proper organizational standing.

Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy that he or she may properly seek adjudication of the matter. *Sierra Club v. Morton*, 405 U.S. 727, 31 L. Ed. 2d 636 (1972). To satisfy standing requirements, a plaintiff must show: (1) "injury in fact," or injury that is concrete and particularized, and actual or imminent; (2) causation between the challenged action of the defendant and the injury; and (3) likelihood that the injury will be redressed by a favorable decision. *Transcontinental*

Gas Pipe Line Corp. v. Calco Enter., 132 N.C. App. 237, 246, 511 S.E.2d 671, 678 (Wynn, J., concurring) (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559, 119 L. Ed. 2d 351, 354 (1992)), *disc. review denied and dismissed*, 351 N.C. 121, 540 S.E.2d 751 (1999).

Our Supreme Court has held that an organization has standing to bring suit on behalf of others only when its members are actually injured. *River Burch Associates v. City of Raleigh*, 326 N.C. 100, 130, 388 S.E.2d 538, 555 (1990). "[W]here an association seeks to recover damages on behalf of its members, the extent of injury to the individual members and the burden of supervising the distribution of any recovery mitigates against finding standing in the association." *Id.*

Here, we must determine whether NCFHC has standing under the State Fair Housing Act, *see* N.C. Gen. Stat. §§ 41A-1 through 41A-10 (2001), and the Fair Housing Ordinance of the City of Durham.

The enforcement provision of the State Fair Housing Act reads as follows:

> (a) Any person who claims to have been injured by an unlawful discriminatory housing practice or who reasonably believes that he will be irrevocably injured by an unlawful discriminatory housing practice may file a complaint with the North Carolina Human Relations Commission.

N.C. Gen. Stat. § 41A-7(a) (2001). Likewise, the Durham Fair Housing Ordinance allows any person who has been injured to file a complaint with the Durham Human Relations Commission. Durham City Code, § 8.5-27(A). Under both the Act and the Ordinance, the definition of a "person" includes an association, corporation, or any other legal or commercial entity. N.C. Gen. Stat. § 41A-3(5) (2001); Durham City Code, § 8.5-3(S).

The California Court of Appeals addressed the issue of a fair housing organization's standing in *Midpeninsula Citizens for Fair Housing v. Westwood Investors*, 221 Cal. App. 3d 1377 (1990). The fair housing organization there filed suit under California's Unruh Civil Rights Act to contest the defendant apartment complex's rental policy limiting occupancy to one person per bedroom. Under the Unruh Act, a civil action to enjoin any alleged discriminatory pattern or practice may be brought by "the Attorney General, any district attorney or city attorney, or any person aggrieved by the pattern or practice." Cal. Civ. Code § 52 subd. (c). The California Court of Appeals held that the fair housing organization, whose

only injury was a drain on resources, was not a "person aggrieved" and did not have organizational standing to challenge an apartment complex's alleged discriminatory practices. *See Midpeninsula*, 221 Cal. App. 3d 1377.

Similarly, in the instant case, the tenants are the persons who have allegedly suffered injury. NCFHC does not claim it was discriminated against by plaintiffs. In fact, the only injury claimed by NCFHC is financial, a result of the voluntary investigation. It is therefore not a "person who [can] claim[] to have been injured by an unlawful discriminatory housing practice" within the meaning of the Act or Ordinance. N.C. Gen. Stat. § 41A-7(a); Durham City Code, § 8.5-27(A).

Accordingly, we reject NCFHC's contention as to standing and affirm the judgment of the trial court.

AFFIRMED.

Chief Judge EAGLES and Judge TYSON concur.

MICHAEL S. KING, PLAINTIFF v. CAROL P. KING, DEFENDANT

No. COA01-1338

(Filed 17 September 2002)

1. **Child Support, Custody, and Visitation— support—motion to reduce—income voluntarily depressed**

   The trial court did not err in denying a motion to reduce child support by finding that defendant-realtor had voluntarily depressed her income and had not acted in good faith where her supervisor did not see defendant for one to two weeks prior to placing defendant on a leave of absence, defendant claimed that this trial was interfering with her work, the amount of time taken by the trial was not as great as defendant had indicated and should not have interfered with her income, and the trial court was left with no explanation for defendant's actions.

2. **Appeal and Error— preservation of issues—child support—presumption of changed circumstances—not properly raised**

   Issues relating to whether a defendant in an action to modify child-support was entitled to a presumption of changed circum-

stances under the Child Support Guidelines were not properly before the Court of Appeals where defendant did not request a modification of her obligations on the basis of the Guidelines presumption and did not point to any place in the record on appeal where she raised the issue to the trial court after the appropriate time period had run.

Appeal by defendant from orders filed 6 June 2000 and 17 April 2001 by Judge H. William Constangy in Mecklenburg County District Court. Heard in the Court of Appeals 13 August 2002.

James A. Warren, Jr. for plaintiff appellee.

The Tryon Legal Group, by Jerry Alan Reese, for defendant appellant.

GREENE, Judge.

Carol P. King (Defendant) appeals an order filed 6 June 2000 denying her motion to reduce child support and an order filed 17 April 2001 denying her motion for reconsideration and amendment of the 6 June 2000 order.

On 28 January 1999, Defendant filed a motion for modification of child support (the Motion). The Motion stated the trial court had entered a previous order for child support on 17 December 1996 (the 1996 order), which based the parties' child support obligations on a monthly gross income of $2,800.00 for Defendant and $3,378.00 for Defendant's former husband, Michael Stephen King (Plaintiff). A subsequent order was entered by the trial court on 30 March 1998 denying Defendant's motion to modify her monthly child support obligation of $560 per month under the 1996 order. In the Motion, Defendant requested a modification of child support based on a change of circumstances in that: (1) Plaintiff's income had substantially increased; (2) Defendant's income as a real estate agent had substantially decreased; and (3) the number of actual overnights the parties' children spent with each parent was substantially different from the percentages used in calculating the child support obligations in the 1996 order.

The evidence presented at the modification hearing revealed Defendant was employed as a real estate agent by Carolinas Prudential Realty. Joanne LaVecchia (LaVecchia), Defendant's supervisor, testified Defendant was "a good agent . . . when she work[ed]."

By July 1999, Defendant had already earned $16,000.00 and was on course to make more money than she had earned the previous year. Around September 1999, however, LaVecchia placed Defendant on a leave of absence. LaVecchia had not seen Defendant for one to two weeks and had become concerned. When LaVecchia telephoned Defendant to ask why she had not checked in with the office, Defendant failed to explain why she could not work. Defendant instead alluded to the fact that the trial in this matter was "going on and on" and stated that "as soon as [the trial] was over, she[] [would] be okay and [they would] go forward." When LaVecchia later learned the actual time frame of the trial, she was surprised because Defendant had given her the impression that Defendant "was in trial more than that."

Defendant testified she had made "good money" in real estate over the last ten years. She further stated she "probably could do a lot better in [her] real estate sales, . . . but until this child support [matter got] straightened out, it[] [was] not there."

In an order dated 6 June 2000, the trial court found in pertinent part that:

> 2. In 1999, . . . [D]efendant's 1099 from Carolinas Prudential Realty showed gross earnings of $30,594.35. In addition to that[,] [Defendant] earned rental income of $200.00 per month. By the end of June, 1999, she had earned $16,000.00 as a realtor and still earns $200.00 per month in rental income in addition to her earnings as a realtor. Thus, half[]way through 1999, she was earning income at a pace ahead of what she earned in 1998.
>
> . . . .
>
> 5. For approximately ten (10) months out of the year, [Defendant] does not have primary physical custody of the minor children, which allows her additional time to devote towards her work as a realtor. However, she goes for long periods of time when she does not contact the realty office and is not seen at the realty office.
>
> 6. [D]efendant does not avail herself of opportunities to earn income through her employment with the realty agency.
>
> 7. [D]efendant quit her employment voluntarily as a realtor at or near the end of September 1999. [D]efendant testified that she

was on a "leave of absence" from Carolinas Prudential Realty. She had a meeting with LaVecchia and stated that the reason she was no longer working was because of "court." LaVecchia stated she did not hear from or see . . . [D]efendant for a long time. LaVecchia was concerned about . . . [D]efendant's lack of production. The [trial] court did not learn that . . . [D]efendant had voluntarily stopped working until that portion of the trial which commenced on January 31, 2000. The [trial] court [cannot] find that the period of time . . . [D]efendant has been involved in the trial of this matter should or could have interfered with her income as a realtor. It is clear . . . [D]efendant has not worked at her employment as a realtor since September[] 1999. No satisfactory reason has been offered to the [trial] court as to why . . . [D]efendant did not or is not working. [D]efendant's [r]ealtors license was de-activated in December[] 1999. LaVecchia said [Defendant] was a "good agent."

8. The [trial] court finds that . . . [D]efendant has an income earning capacity as a realtor of at least $30,000.00 annually and earns a rental income of $200.00 a month in addition thereto. The [trial] court further finds that [Defendant] has earned this income for a number of years and is capable of earning that income as a real estate agent if she would work at said career at this time.

. . . .

12. From that evidence, the [trial] court [cannot] find that the number of overnights spent by the minor children with each party is significantly different, if at all different, from the shared custody order entered previously in this cause.

13. The [trial] court [cannot] find from the evidence that significant, regular contributions are made by third parties to . . . [P]laintiff or to the benefit of the minor children . . . . Since the [trial] court concludes hereinbelow that . . . [D]efendant has voluntarily suppressed her income and that there has not been a material and substantial change in circumstances regarding her ability to pay child support, the [trial] court will not address the issue of deviation from the North Carolina [C]hild [S]upport [G]uidelines.

14. The [trial] court finds that . . . [D]efendant has voluntarily suppressed her income and that she has failed to prove that there

has, in the aggregate, been a substantial change in circumstances sufficient to warrant modification of child support.

Based on these findings, the trial court denied the Motion.

On 16 June 2000, Defendant filed a motion for reconsideration and amendment of the trial court's 6 June 2000 order. The trial court entered an order on 17 April 2001 in which it amended its 6 June 2000 order to include the following language: "[D]efendant's actions which reduced her income were not taken in good faith. The earnings capacity rule should be imposed. The [trial] [c]ourt concludes that . . . [D]efendant engaged in a deliberate depression of her income." The trial court denied Defendant's motion in all other respects.

The dispositive issues are whether: (I) the evidence supports the trial court's findings that Defendant voluntarily depressed her income and that her actions were not taken in good faith; and (II) Defendant was entitled to a presumption of a substantial change of circumstances under the North Carolina Child Support Guidelines.

I

[1] A party's capacity to earn income may become the basis of a child support award if it is found that the party voluntarily depressed her income. *Mittendorff v. Mittendorff*, 133 N.C. App. 343, 344, 515 S.E.2d 464, 466 (1999); *Askew v. Askew*, 119 N.C. App. 242, 244-45, 458 S.E.2d 217, 219 (1995) (earning capacity will be used if a party "deliberately depressed [her] income or otherwise acted in deliberate disregard of the obligation to provide reasonable support for the child"). Before the earning capacity rule may be applied, there must, however, also be a showing, reflected by the trial court's findings, "that the actions which reduced a party's income were not taken in good faith." *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997); *see Cauble v. Cauble*, 133 N.C. App. 390, 395, 515 S.E.2d 708, 712 (1999) (the trial court's findings must be supported by competent evidence). "The burden of showing good faith rests with the party seeking a reduction in the child support award." *Mittendorff*, 133 N.C. App. at 344, 515 S.E.2d at 466.

In this case, there was evidence establishing Defendant essentially stopped working in September 1999. Prior to being placed on a leave of absence, LaVecchia had not seen Defendant for one to two weeks. In explaining her absence to LaVecchia, Defendant claimed the trial was interfering with her ability to work and indicated the

trial was taking up more time than it actually did, as LaVecchia later discovered. The trial court found "the period of time . . . [D]efendant ha[d] been involved in the trial of this matter should [not] or could [not] have interfered with her income as a realtor." Having rejected Defendant's testimony, *see Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994) ("[q]uestions of credibility and the weight to be accorded the evidence remain in the province of the finder of facts"), the trial court was left with no explanation for Defendant's actions, leading to the conclusion that by not reporting to her supervisor in September 1999 Defendant voluntarily engaged in conduct that led to her placement on a leave of absence. Furthermore, as Defendant did not carry her burden of showing good faith, *see Mittendorff*, 133 N.C. App. at 344, 515 S.E.2d at 466, the trial court, in the absence of any evidence regarding intent, properly found that "[D]efendant's actions which reduced her income were not taken in good faith."

II

[2] Defendant next argues in her brief to this Court that, regardless of whether the trial court considered her earning capacity or her actual income, she was entitled to a presumption of changed circumstances based on the North Carolina Child Support Guidelines. We disagree.

The North Carolina Child Support Guidelines provide that:

> [i]n any proceeding to modify an existing order which is three years old or older, a deviation of 15% or more between the amount of the existing order and the amount of child support resulting from application of the Guidelines shall be presumed to constitute a substantial change of circumstances warranting modification.

N.C. Child Support Guidelines, 2001 Ann. R. (N.C.) 33, 36 [hereinafter Guidelines]. The three-year period required before application of this rule has been interpreted to be the period between the entry of the support order that is currently in effect and the time of the hearing on the party's motion to modify child support. *See Wiggs v. Wiggs*, 128 N.C. App. 512, 515, 495 S.E.2d 401, 404 (1998).

We first note Defendant, in the Motion, did not request a modification of her child support obligations on the basis of the presumption pursuant to the Guidelines. Furthermore, Defendant, in her brief, points to no place in the record where she raised this issue to the trial court after December 1999 when the three-year period had run.

Therefore, the question of whether Defendant was entitled to a presumption under the Guidelines is not properly before this Court. *See* N.C.R. App. P. 10(b)(1) (2001).

Defendant also assigns as error the trial court's findings relating to the number of overnights the children spent with each parent and the lack of any third-party contributions to Plaintiff. The issues raised by this assignment of error, however, were only discussed in connection with Defendant's argument for applying the presumption under the Guidelines. As we have found Defendant did not raise the issue of the presumption to the trial court, we need not address this assignment of error.[1]

Affirmed.

Judges TIMMONS-GOODSON and HUNTER concur.

BRITT FENDER AND REBUILDABLE CARS, INC., PLAINTIFFS v. W. ROBINSON DEATON, JR., DEFENDANT

No. COA01-633

(Filed 17 September 2002)

1. Statutes of Limitation and Repose— legal malpractice— continuing course of conduct not applicable

The trial court did not err by holding that the statute of limitations bars a professional negligence claim against an attorney where the attorney voluntarily dismissed plaintiff's contract claim on 1 October 1990, plaintiffs discovered that the case had been dismissed in November of 1993, and plaintiffs filed this action on 9 October 1996. The last opportunity for defendant to act was on 1 October 1991, one year after the voluntary dismissal; the "continuing course of treatment" doctrine is not extended to legal malpractice.

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1. We nevertheless note that a review of the relevant evidence reveals the trial court's findings on these issues are supported by competent evidence.

2. Statutes of Limitation and Repose— legal malpractice action—not governed by limitations for fraud

The trial court did not err by granting summary judgment for defendant-attorney under the statute of limitations for professional malpractice, N.C.G.S. § 1-15(c). Plaintiff contended that the action was governed by the statute of limitations for fraud, but the allegations in the complaint set forth nothing more than an ordinary claim for legal malpractice.

3. Fraud— constructive—legal malpractice

The trial court did not err by dismissing a claim for constructive fraud against an attorney where plaintiffs failed to allege that the attorney took advantage of a position of trust to benefit himself. The allegations were claims for ordinary legal malpractice, barred by the statute of limitations.

Appeal by plaintiffs from judgment entered 27 November 2000 by Judge Beverly T. Beal in Mecklenburg County Superior Court. Heard in the Court of Appeals 13 March 2002.

John E. Hodge, Jr. for plaintiffs-appellants.

Dean & Gibson, L.L.P., by Rodney Dean & Barbara J. Dean, for defendant-appellee.

TIMMONS-GOODSON, Judge.

This appeal arises from the summary judgment for defendant of a legal malpractice action against Attorney W. Robinson Deaton, Jr. Plaintiffs, Britt Fender and Rebuildable Cars, Inc., argue on appeal that the trial court erred in granting summary judgment because: (I) the statute of limitations did not bar their claims against Mr. Deaton, and (II) genuine issues of material fact were presented by their claim of fraud against Mr. Deaton. We disagree with plaintiffs' contentions and therefore, affirm the order of the trial court.

The facts indicate that plaintiffs brought a legal malpractice action on 9 October 1996 against Mr. Deaton alleging claims for fraud, constructive fraud, and negligence based upon legal malpractice. The complaint alleged that on or about March of 1987, plaintiffs hired Mr. Deaton to bring a breach of contract action against Wayne Allen. Plaintiffs alleged that Mr. Deaton failed to prepare the case for trial and further, that on 1 October 1990, without plaintiffs' knowledge or consent, Mr. Deaton voluntarily dismissed

the action without prejudice under Rule 41 of the North Carolina Rules of Civil Procedure.

On 27 June 2000, Mr. Deaton moved to dismiss plaintiffs' cause of action under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that the action was barred by all applicable statute of limitations and repose. After considering additional materials submitted by Mr. Deaton in support of his motion, the trial court granted summary judgment in his favor. Plaintiffs appealed.

Preliminarily, we note that the trial court properly treated Mr. Deaton's motion to dismiss as one for summary judgment. On a motion to dismiss pursuant to 12(b)(6), "if matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." *Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 251, 552 S.E.2d 186, 189 (2001). Since the trial court considered additional documents in the form of interrogatories and depositions of plaintiff Britt and Mr. Deaton, the trial court properly noted that "the matters now before the Court are for summary judgment."

[1] On appeal, plaintiffs first contend that the trial court erred by holding that the statute of limitations bars plaintiffs' claim for professional negligence under N.C. Gen. Stat. § 1-15(c). Plaintiffs argue that although Mr. Deaton voluntarily dismissed their action against Wayne Allen on 1 October 1990, the "last act" for purposes of the statute of limitations occurred in November of 1993 when plaintiff Britt discovered that the case had been dismissed. Therefore, plaintiffs contend, the action was timely filed within the three-year statute of limitations under N.C. Gen. Stat. § 1-15(c), on 1 October 1996.[1] We disagree.

N.C. Gen. Stat. § 1-15 (c) which governs legal malpractice claims, establishes a four-year statute of repose and a three-year statute of limitations. *McGahren v. Saenger*, 118 N.C. App. 649, 652, 456 S.E.2d 852, 853, *appeal dismissed and disc. review denied*, 340 N.C. 568, 460 S.E.2d 319 (1995). It provides in pertinent part:

1. Plaintiffs urge this Court to extend the "continuing course of treatment" doctrine to legal malpractice claims. Under that doctrine, which our Supreme Court has applied to medical practice claims, "[the] running of the statute of limitations period is tolled during the time a physician continues to treat a patient in relation to the original act, omission, or failure which gave rise to the claim." *State Ex Rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 442, 499 S.E.2d 790, 797 (1996). However, that doctrine has never been applied by our Courts in the context of a legal malpractice action, and we decline to extend it to legal malpractice actions under the facts of this case.

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to *accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action*: Provided that whenever there is bodily injury to the person, economic or monetary loss, or a defect in or damage not readily apparent to the claimant at the time of its origin, and the injury, loss, defect, or damage is discovered or should reasonably be discovered by the claimant two or more years after the occurrence of the last act of the defendant giving rise to the cause of action, suit must be commenced within one year from the date the discovery is made: Provided nothing herein shall be construed to reduce the statute of limitation in any such case below three years. Provided further, that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action[.]

N.C. Gen. Stat. § 1-15 (c) (2001) (emphasis added). Thus, the statute creates a statute of limitations based upon the date of the " 'last act of the defendant giving rise to the cause of action.' " *Id.* at 652, 456 S.E.2d at 854 (quoting *Sharp v. Teague*, 113 N.C. App. 589, 593, 439 S.E.2d 792, 795 (1994), *disc. review denied*, 339 N.C. 730, 456 S.E.2d 771 (1995)).

In the instant case, the facts show that on 1 October 1990, Mr. Deaton voluntarily dismissed the Allen action without prejudice under Rule 41(a) which requires that any new action after a voluntary dismissal, must be re-filed within one year after the dismissal. *See* N.C. Gen. Stat. § 1A-1, Rule 41(a) (2001). Thus, the last opportunity for Mr. Deaton to act on the Allen case occurred on 1 October 1991, which is one year after the case was voluntarily dismissed and the last date by which Deaton could have filed plaintiff's case. Since five years had passed before plaintiffs brought the subject legal malpractice action against Mr. Deaton in October of 1996, the trial court properly granted summary judgment on the grounds that plaintiffs' claims arising under legal malpractice were barred by the statute of limitations under N.C. Gen. Stat. § 1-15(c).

[2] Plaintiffs further argue that the trial court erred by granting summary judgment as to his claim for fraud because the statute of limitations for fraud claims are governed by the statute of limitations under N.C. Gen. Stat. § 1-52(9). We disagree because the plaintiffs' allegations of fraud are in essence claims of legal malpractice

which are governed by the three-year statute of limitations under N.C. Gen. Stat. § 1-15(c).

The elements of fraud are " '(1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.' " *McGahren*, 118 N.C. App. at 654, 456 S.E.2d at 855 (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)).

In the instant case, plaintiffs' claim for fraud alleges that (1) Mr. Deaton failed to accept or return calls, (2) Mr. Deaton failed to discuss the cause of action with plaintiff, (3) Mr. Deaton dismissed the case on 1 October 1990, without the knowledge or consent of plaintiff, and (4) that he concealed and did not disclose the legal effect of a dismissal with prejudice. Clearly, the allegations set forth in plaintiffs' complaint are nothing more than ordinary claims of legal malpractice, which, as stated above, are barred by N.C. Gen. Stat. § 1-15(c). This assignment of error is therefore overruled.

[3] In their last assignment of error, plaintiffs contend that the trial court erred by dismissing its claim for constructive fraud. We disagree.

"In order to maintain a claim for constructive fraud, plaintiffs must show that they and defendants were in a 'relationship of trust and confidence . . .[which] led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.' " *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (citation omitted). "Constructive fraud differs from actual fraud in that 'it is based on a confidential relationship rather than a specific misrepresentation.' " *Id.* (quoting *Terry v. Terry*, 302 N.C. 77, 85, 273 S.E.2d 674, 678-79 (1981)). With this requirement, there must be an allegation that defendant sought to benefit himself. *Id.* "A claim of constructive fraud based upon a breach of fiduciary duty falls under the ten-year statute of limitations contained in N.C. Gen. Stat. § 1-56." *Nationsbank of N.C. v. Parker*, 140 N.C. App. 106, 113, 535 S.E.2d 597, 602 (2000).

In the instant case, plaintiffs' claim for constructive fraud alleges that Mr. Deaton: (1) failed to prepare or settle the case, (2) that Mr. Deaton dismissed the case without plaintiffs' knowledge; (3) that he concealed the dismissal from plaintiffs and that he made unspecified

misrepresentations to plaintiffs about the case. However, the plaintiffs failed to allege that Mr. Deaton took advantage of his position of trust for the purpose of benefitting himself. Thus, plaintiffs' claim for constructive fraud must fail. Moreover, as stated previously, these allegations are no more than claims of ordinary legal malpractice, which as we have stated, are barred by the statute of limitations. This assignment of error is overruled.

In sum, we affirm the judgment of the trial court.

Affirmed.

Judges WYNN and TYSON concur.

STATE OF NORTH CAROLINA v. CHRIS WILLIAMS

No. COA01-1400

(Filed 17 September 2002)

1. Assault— habitual misdemeanor assault—no accompanying indictment

An indictment did not sufficiently charge defendant with the felony of habitual misdemeanor assault where the indictment only charged assault on a female and there was no accompanying indictment as required by N.C.G.S. § 15A-928(b). There was no jurisdiction for the felony charge without a valid indictment and, even though defendant failed to move to dismiss, the appropriate action when the record shows a lack of jurisdiction is to vacate or arrest judgment.

2. Appeal and Error— preservation of issues—failure to object at trial—failure to argue plain error

Defendant did not preserve for appellate review an issue regarding the judge's pre-trial remarks where defendant failed to object at trial and did not raise plain error in his assignments of error or argue plain error in his brief.

Appeal by defendant from a judgment entered 17 April 2001 by Judge William C. Griffin, Jr. in Pasquotank County Superior Court. Heard in the Court of Appeals on 22 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Mary Penny Thompson, for the State/Appellee.

Paul Pooley, for Defendant/Appellant.

TYSON, Judge.

Chris Williams ("defendant") appeals from a judgment entered after a jury convicted him of assault on a female and felonious habitual misdemeanor assault. We vacate defendant's conviction of felonious habitual misdemeanor assault because a special accompanying indictment was required and not rendered. We remand for entry of judgment on defendant's conviction of assault on a female.

I. Facts

The State's evidence tended to show that on 28 July 2000, defendant appeared at the home of Jennifer Bacon at 9:00 a.m. He knocked at her door and asked for a cigarette. Ms. Bacon knew defendant as she often saw him at the local Citgo convenience store where she would speak to him and give him cigarettes or spare change. Ms. Bacon agreed to give defendant a cigarette.

While Ms. Bacon went to get a cigarette, defendant stepped into her home. According to Ms. Bacon, defendant proposed that he and Ms. Bacon engage in sexual intercourse. Ms. Bacon testified that defendant then assaulted her by wrapping his arms around her, kissing her cheek and grabbing her buttocks. Defendant testified and denied these allegations stating that he did not have the chance to do anything because Ms. Bacon shoved him out the door.

Ms. Bacon reported the incident to the police later that day, and defendant was questioned. Defendant was indicted on 16 October 2000, and a warrant for his arrest was issued the same day.

A bifurcated trial was held for the State to initially prove the crime of assault on a female and subsequently to prove the felony of habitual misdemeanor assault. While giving the jury a summary of the case before the trial for assault on a female, the judge characterized the charge as "feloniously assaulting Jennifer Bacon, a female, by kissing her on the cheek and grabbing her by the buttocks against her will, he then [a] male being over 18." At the close of evidence, the court instructed the jury on the elements of assault on a female. The jury rendered a guilty verdict.

The trial then moved to the felony of habitual misdemeanor assault phase. An assistant county clerk of court testified that defendant had been convicted of second degree trespass and resisting arrest on 13 March 1997 as well as assault on a government official on 15 October 1992. She further attested to defendant's guilty pleas of (1) disorderly conduct on 27 May 1993, (2) second degree trespass on 11 January 1994, and (3) simple assault on 18 June 1992. A probation officer's testimony connected defendant to the certified judgments already in evidence. The court instructed the jury on the felony of habitual misdemeanor assault. The jury returned a verdict of guilty on that charge. Defendant appeals.

II. Issues

Defendant assigns as error that the trial court: (1) lacked jurisdiction to sentence defendant for felonious habitual misdemeanor assault where the indictment only charged assault on a female and (2) erred under N.C.G.S. § 15A-1213 in describing the offense with which defendant was charged as "felonious assault".

III. Jurisdiction

[1] Defendant contends that the trial court lacked jurisdiction to sentence him for the felony of habitual misdemeanor assault where the indictment only charged assault on a female. Defendant argues that this discrepancy makes the indictment invalid, and that an invalid indictment robs the trial court of jurisdiction.

A valid indictment is a predicate for jurisdiction. *State v. McBane*, 276 N.C. 60, 65, 170 S.E.2d 913, 916 (1969). It is generally prejudicial error for a trial judge to permit a jury to convict on a theory not supported by the bill of indictment. *State v. Taylor*, 301 N.C. 164, 170, 270 S.E.2d 409, 413 (1980). An indictment is insufficient if it does not accurately and clearly allege all the essential elements of the charged offense. *State v. Perry*, 291 N.C. 586, 592, 231 S.E.2d 262, 266 (1977) (citations omitted).

We hold that the indictment was insufficient to charge defendant with the felony of habitual misdemeanor assault. N.C.G.S. § 15A-928(b) (2001) requires a "special accompanying indictment" for a charge which requires conviction on a lesser charge unless the prosecutor incorporates a separate count into the principal indictment. *See State v. Sullivan*, 111 N.C. App. 441, 442-44, 432 S.E.2d 376, 377-78 (1993). The absence of any indictment alleging violation of

N.C.G.S. § 14-33.2, habitual misdemeanor assault, renders the principal indictment in this case one which charged defendant with only the misdemeanor of assault on a female. Without a valid indictment, there was no jurisdiction for the felony charge.

The issue of a variance between the indictment and proof is properly raised by a motion to dismiss. *State v. Baldwin*, 117 N.C. App. 713, 717, 453 S.E.2d 193, 195, *cert. denied*, 341 N.C. 653, 462 S.E.2d 518 (1995) (citing *State v. Waddell*, 279 N.C. 442, 183 S.E.2d 644 (1971)). Defendant failed to move to dismiss. Assignments of error for appellate review must be preserved at trial. N.C.R. App. P. 10(b)(1). At bar, the felony conviction fails not because of a mistake in citation causing a variance between the proof and indictment, but rather because of the lack of a substantive element of the State's prima facie case for the felony of habitual misdemeanor assault. " 'When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.' " *State v. Petersilie*, 334 N.C. 169, 175-76, 432 S.E.2d 832, 836 (1993) (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)). The indictment sufficiently charged defendant with assault on a female but not with the felony of habitual misdemeanor assault.

IV. Prejudicial Error in the Judge's Pre-trial Remarks

[2] Defendant alleges prejudicial error for the trial judge to denominate the charge a "felonious assault" when summarizing the case in his pre-trial remarks made before the jury was impaneled. This remark was made before the trial began and before the bifurcation of the trial. After the jury was impaneled, the State referred to the charge simply as "assault." The judge properly instructed the jury on the charge of assault on a female during the first phase of the trial. The only mention of "felony" during the assault phase of the trial was when defendant testified to having been charged with a felony.

Defendant failed to preserve this assignment of error. Defendant failed to object at trial. Error may not be asserted upon appellate review unless the error has been brought to the trial court's attention by motion or objection. *State v. Choppy*, 141 N.C. App. 32, 37-38, 539 S.E.2d 44, 48 (2000), *disc. review denied*, 353 N.C. 384, 547 S.E.2d 817 (2001). Where no objection is made, defendant carries the burden of establishing the right to review. *Choppy*, 141 N.C. App. at 38, 539 S.E.2d at 48.

Defendant also failed to assign plain error. Plain error is fundamental error amounting to a denial of the accused's basic rights. *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983). Defendant must "specifically and distinctly" contend in his brief and argue in his assignments of error that an error amounted to plain error. *State v. Nobles*, 350 N.C. 483, 514-15, 515 S.E.2d 885, 904 (1999) (citing N.C.R. App. P. 10(c)(4), 28 (a),(b)(5)).

Here, defendant did not raise plain error in his assignments of error or argue plain error in his brief. The issue was not preserved or argued and is not reviewable by this Court.

We find error in the indictment charging habitual assault as invalid due to lack of a special accompanying indictment as required by N.C.G.S. § 15A-928(b). We vacate defendant's conviction of the felony of habitual misdemeanor assault, and remand for entry of judgment on defendant's conviction for assault on a female.

Judgment vacated and remanded for entry of judgment for defendant's conviction of assault on a female.

Judges MARTIN and THOMAS concur.

IN THE MATTER OF: MARCELLO WILSON, JUVENILE

No. COA01-1557

(Filed 17 September 2002)

Juveniles— delinquency—simple affray

The trial court did not err by adjudicating the juvenile a delinquent based on a petition alleging simple affray in violation of N.C.G.S. § 14-33(a) even though defendant alleged self-defense, because: (1) the juvenile does not contest that the State has presented substantial evidence of each of the elements of simple affray; and (2) the credibility of the witnesses and the weight of the evidence was for the trial court sitting as a jury.

Appeal by juvenile from order dated 21 March 2001 by Judge Karen A. Alexander in Carteret County District Court. Heard in the Court of Appeals 20 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.

James Q. Wallace, III for Juvenile Appellant.

GREENE, Judge.

Marcello Wilson (Juvenile) appeals from an order dated 21 March 2001 adjudicating him a delinquent juvenile on a petition alleging simple affray in violation of N.C. Gen. Stat. § 14-33(a).

The incident alleged in the petition occurred on 20 October 2000, at the end of a physical education class at Broad Creek Middle School. Juvenile was sitting in the school gymnasium when he was approached by a classmate who pulled him off the bleachers. An altercation between the two ensued. After the two separated, Juvenile picked up a trumpet case in an attempt to pursue his assailant but stopped at the instruction of his teacher.

On 21 March 2001, a hearing was held on the petition and at that hearing, Juvenile denied the allegations.[1] The case proceeded to hearing and at the close of the State's evidence, Juvenile moved to dismiss the petition. The motion was denied and evidence was then presented on Juvenile's behalf and arguments were made by counsel. The motion to dismiss was not renewed. At the close of all evidence, Juvenile was "found to be responsible" and adjudicated delinquent.[2]

The dispositive issue is whether there was substantial evidence of the elements of the crime, simple affray, in light of the Juvenile's claim of self-defense.[3]

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1. We are aware some attorneys representing juveniles charged with delinquent acts respond "not responsible" when asked in court how the juvenile pleads to the petition. The proper inquiry is whether the juvenile "admits" or "denies" the allegations of the petition and the proper response is that the allegations are either "admitted" or "denied." *See* N.C.G.S. § 7B-2407-2408 (2001).

2. Again, we note trial judges, after hearing the evidence in a juvenile delinquency proceeding, often find the juvenile either "responsible" or "not responsible," as occurred in this case. While the intent of the trial court in this case is not ambiguous, the correct procedure is for the trial court to find the allegations of the petition have either been "proved" or "not been proved." N.C.G.S. § 7B-2411 (2001).

3. Juvenile's first assignment of error is whether the trial court committed reversible error by denying his motion to dismiss at the close of the State's evidence. This assignment of error was waived under N.C.R. App. P. 10(b)(3) when Juvenile presented evidence and thus, we do not address this argument. *See In re Davis*, 126 N.C. App. 64, 66, 483 S.E.2d 440, 442 (1997).

Juvenile argues the trial court should have dismissed the petition on the grounds his evidence of self-defense compels a dismissal.[4] We disagree.

An affray is a "fight between two or more persons in a public place so as to cause terror to the people." *In re Drakeford*, 32 N.C. App. 113, 118, 230 S.E.2d 779, 782 (1977) (citing *State v. Huntly*, 25 N.C. 418 (1843)). A claim of self-defense may be used to defeat a charge of affray where the juvenile or defendant is without fault in provoking, engaging in, or continuing a difficulty with another. *See State v. Allred*, 129 N.C. App. 232, 235, 498 S.E.2d 204, 206 (1998); *see also State v. Harrell*, 107 N.C. 944, 946-7, 12 S.E. 439, 440 (1890).

Self-defense, when asserted in a criminal or a juvenile delinquency case, cannot serve as a basis for dismissing the case. *Cf. State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455, *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000) (the trial court must disregard defense evidence unless it supports the State's case in considering a motion to dismiss). Evidence in support of the defense is to be considered, along with the other evidence in the case, to determine whether there is substantial evidence of each of the elements of the crime or delinquent act. *See In re Heil*, 145 N.C. App. 24, 28-29, 550 S.E.2d 815, 819 (2001). If there is substantial evidence of each of the elements, the motion to dismiss is properly denied. *Id.* at 28, 550 S.E.2d at 819. If the case is being presented to a jury and there is substantial evidence of self-defense, the trial court is required to instruct the jury on self-defense. *State v. Hayes*, 130 N.C. App. 154, 178, 502 S.E.2d 853, 869-70 (1998), *aff'd in part and dismissed in part*, 350 N.C. 79, 511 S.E.2d 302 (1999). If the case does not involve a jury, as in a delinquency case, the trial court is to consider the evidence of self-defense and, if it finds the evidence persuasive, enter a finding that the allegations of the petition are "not proved." *See* N.C.G.S. § 7B-2411.

In this case, Juvenile does not contest that the State has presented substantial evidence of each of the elements of simple affray. Accordingly, the trial court did not err in failing to dismiss the petition at the close of all the evidence. Furthermore, as the credibility of the witnesses and the weight of the evidence was for the trial court

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4. Juvenile's failure to renew his motion to dismiss after he had presented evidence subjects this assignment of error to dismissal under N.C.R. App. P. 10(b)(3). *See Davis*, 126 N.C. App. at 66, 483 S.E.2d at 442. Nonetheless, we exercise our discretion under N.C.R. App. P. 2 and address the merits of this argument.

(sitting as a jury), *see In re Simmons*, 24 N.C. App. 28, 32-33, 210 S.E.2d 84, 87-88 (1974), the trial court did not err in rejecting the evidence on self-defense and adjudicating Juvenile a delinquent juvenile. *See Heil*, 145 N.C. App. at 30, 522 S.E.2d at 820.

Affirmed.

Judges TIMMONS-GOODSON and HUNTER concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

Filed 17 September 2002

ABRAMS v. FEAGANS No. 02-63	Wilson (00CVS313)	Affirmed
BARRY v. CARPENTER No. 02-132	Iredell (99CVD1408)	Affirmed
ELLIOTT v. DANIEL No. 01-1299	Granville (00CVS165)	Affirmed
GLASS v. GLASS No. 00-930	Wake (95CVD6779)	Reversed and remanded
HOWELL v. FURMAN No. 01-1212	Watauga (01CVS13)	Dismissed
IN RE ANDERSON No. 02-170	Alamance (99J50)	No error
IN RE OXENDINE No. 01-1393	Anson (98J63)	Affirmed
LEE v. BRIAN CTR. No. 01-650	Ind. Comm. (I.C. 202149)	Reversed and remanded
PITT & GREENE ELEC. MEMBERSHIP CORP. v. RASBERRY No. 01-1380	Greene (00SP16)	Affirmed
SMITH v. SHIPMAN No. 01-1367	Wayne (99CVS2684)	Dismissed
STATE v. CARTER No. 01-1230	Gaston (99CRS30651) (00CRS16898)	No error
STATE v. COSTON No. 02-116	Forsyth (00CRS13021) (00CRS28695)	No error
STATE v. DILWORTH No. 02-112	Guilford (98CRS23683) (98CRS23684) (98CRS65055) (98CRS65056) (98CRS65057) (98CRS65058) (98CRS65210) (98CRS102191) (98CRS102192) (99CRS23257)	Remanded for resentencing

STATE v. DUNLAP No. 02-220	Davidson (01CRS8315)	No error
STATE v. HUNT No. 01-945	Durham (00CRS52459)	No error
STATE v. INGLE No. 01-1417	Buncombe (99CRS2300) (99CRS2301) (99CRS2302) (99CRS2303) (99CRS2304) (99CRS2305) (99CRS2306) (99CRS2307) (99CRS2308) (98CRS65872) (98CRS65873) (98CRS65874) (98CRS65875) (98CRS65869) (98CRS65866) (98CRS65867) (98CRS65864) (98CRS65859) (98CRS65860) (98CRS65861) (98CRS65862) (98CRS65798) (98CRS65799) (98CRS65800)	No error
STATE v. JENKINS No. 01-1312	Guilford (99CRS107020)	No error
STATE v. KORNEGAY No. 02-166	Pitt (00CRS63817)	No error
STATE v. MARMOR No. 01-664	Pender (99CRS975) (99CRS976)	No error
STATE v. PERRY No. 02-218	Iredell (99CRS20978)	No error
STATE v. PHILLIPS No. 01-1606	Henderson (98CRS2238) (98CRS2239) (98CRS22084) (98CRS142) (98CRS143) (98CRS144) (98CRS146)	No error

STATE v. SMITH No. 01-1324	Forsyth (98CRS41806) (01CRS4223)	No error
STATE v. WADDELL No. 01-1088	Rockingham (00CRS9435) (00CRS11574)	No error
STATE v. WILLIAMS No. 02-228	Dare (01CRS3061) (01CRS3062)	No error

STATE OF NORTH CAROLINA v. LAWRENCE EDWARD ROGERS, JR.

No. COA01-989

(Filed 1 October 2002)

1. Rape— attempted first-degree—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of attempted first-degree rape even though the State relied on the serious injuries suffered by the victim mother's daughter to elevate the offense when the daughter was not present during the attempted rape and the indictment did not allege which element the State relied on to elevate the crime to a first-degree offense, because: (1) when the State is proceeding under the theory that the serious personal injury was inflicted on a person other than the victim of the rape or attempted rape, there is no requirement under N.C.G.S. § 14-27.2(a)(2)(b) that the other person actually be present during the rape or attempted rape; (2) viewing the evidence in the light most favorable to the State reveals that a jury could have reasonably inferred that defendant attacked the daughter for the purpose of concealing the attempted rape of the mother or aiding in his escape from apprehension and that the attempted rape of the mother and the attack on the daughter were part of one continuous transaction; (3) the evidence supports the serious personal injury element of attempted first-degree rape based on the injuries suffered by either of the two victims; and (4) N.C.G.S. § 15-144.1 does not require that an indictment for rape contain an allegation of which element the State was relying on to elevate the crime to a first-degree offense.

2. Assault— deadly weapon—singular hand—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury even though the State relied on defendant's use of his singular hand as a deadly weapon, because: (1) North Carolina courts have held that hands and fists may be considered deadly weapons given the manner in which they were used and the relative size and condition of the parties involved; (2) the State's evidence showed that the manner in which defendant used his hand to assault the victim had devastating physical

effect, and defendant is a six feet two inches tall male weighing 165 pounds while the victim is a female approximately five feet three inches tall weighing ninety-nine pounds; (3) the distinction advanced by defendant between a singular hand as opposed to both hands or fists is insignificant in light of the evidence; and (4) the evidence supported a reasonable inference that defendant intended to kill the victim while he was hitting and choking her, and the fact defendant may have changed his mind and allowed the victim to escape from his attack does not mean the State was precluded from submitting the issue of intent to kill to the jury.

3. Kidnapping— unlawful removal to facilitate commission of rape—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of kidnapping based on defendant's unlawful removal of the victim from one place to another for the purpose of facilitating the commission or attempted commission of first-degree rape, because: (1) there was substantial evidence that defendant's removal of the victim through the house was for the purpose of facilitating the attempted rape; and (2) the removal of the victim was not a separate complete act independent and apart from the acts necessary to constitute the attempted rape.

4. Rape— attempted first-degree—jury instructions—serious personal injury on victim or another

The trial court did not err in its instructions on attempted first-degree rape by instructing the jury that it could find defendant guilty if it found that he inflicted serious personal injury on the victim or any other person, because the State presented sufficient evidence to show that the attempted rape of the victim and the assault of another victim were part of a continuous transaction.

5. Criminal Law— jury instructions—voluntary intoxication

The trial court did not err in an attempted first-degree rape, felony breaking or entering, second-degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury case by denying defendant's requests for jury instructions on voluntary intoxication, because there was insufficient substantial evidence that defendant was utterly incapable of forming the requisite intent to commit the crimes at issue.

6. Sentencing— record level—prior misdemeanor convictions obtained without counsel

The trial court did not err in an attempted first-degree rape, felony breaking or entering, second-degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury case by denying defendant's motion to suppress the use of two prior misdemeanor convictions used by the State to elevate defendant's prior record level for sentencing purposes from Level IV to Level V even though defendant contends the two prior convictions were obtained in violation of his right to counsel under N.C.G.S. § 15A-980, because: (1) defendant failed to prove by the preponderance of the evidence that he was indigent at the time of the two prior convictions which he sought to suppress at trial; and (2) the only evidence of defendant's indigency was his mere assertion that he could not afford an attorney at the time of the prior convictions.

Appeal by defendant from judgments entered 30 October 2000 by Judge Narley L. Cashwell in Alamance County Superior Court. Heard in the Court of Appeals 22 May 2002.

Attorney General Roy Cooper, by Assistant Attorney General Donald W. Laton, for the State.

Daniel H. Monroe for defendant-appellant.

CAMPBELL, Judge.

Defendant was indicted on one count of first degree rape, one count of felony breaking or entering, one count of first degree kidnapping, two counts of misdemeanor assault inflicting serious injury, and one count of assault with a deadly weapon with intent to kill inflicting serious injury. The State did not proceed on the misdemeanor assault inflicting serious injury charge naming Pamela Hadley as the victim.[1] Following a jury trial, defendant was convicted of attempted first degree rape, felony breaking or entering, first degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury. The trial court arrested judgment on first degree kidnapping and sentenced defendant for second degree kidnapping. Defendant was sentenced to four consecutive terms of imprisonment. Defendant appeals.

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1. Pamela Hadley was also the alleged victim in the assault with a deadly weapon with intent to kill inflicting serious injury charge.

The State's evidence tended to show that on 19 May 2000, at approximately 11:30 a.m., defendant knocked on the front door of Bonnie Prevette's ("Prevette") residence at 1011 South Main Street in Burlington and asked Prevette if he could mow her lawn for twenty dollars. After declining defendant's offer, Prevette stepped back to close the door. Defendant grabbed the screen door and started pushing his way into the house. Prevette responded: "You're not coming in my house. Get out of my house. You cannot come in my house." Defendant reached through the screen door and hit Prevette in the face, causing her to lose her grip on the front door. Defendant continued hitting Prevette in the face, eventually knocking her to the floor. Defendant then positioned himself on top of Prevette, tore off Prevette's shorts, pulled down his own pants, removed his penis, and began "working it back and forth" with one hand while keeping the other hand on Prevette's throat. Defendant then placed his hand and penis between Prevette's legs and began pushing his penis up against her vaginal area, while keeping one hand on her throat. Prevette protested.

While defendant was assaulting Prevette, Prevette's daughter, Pamela Hadley ("Hadley"), entered the house through the back door. Hadley walked through the kitchen and into the next room where she saw her son, Nolan, asleep on the floor. Hadley opened a door which led to the living room, where she thought her mother would be watching television. When Hadley opened the door, she saw a man's legs sticking out from the hallway. She then heard Prevette state, "Just get off me. Please get off." Hadley also noticed Prevette's eyeglasses on the floor. Realizing her mother was in trouble, Hadley ran outside and called 911 from her car phone.

After calling 911, Hadley went back into the house hoping to retrieve her son. She again entered the house through the back door. As she was walking through the house, Hadley was confronted by defendant and her mother. Defendant had stopped attempting to rape Prevette when he was startled by a noise in the house, and had dragged Prevette through the house as he was looking for the source of the noise.

Upon confronting Hadley, defendant grabbed her by the shirt, hit her in the face, and knocked her to the floor. Defendant then hit Hadley multiple times in the face before he got on top of her and began choking her. As he was beating and choking Hadley with one hand, defendant was holding Prevette with the other. Prevette kicked defendant in the stomach, which caused him to stagger and release

his grip on Hadley's throat. Defendant responded by hitting both victims several more times. Hadley then rolled over and noticed her son, whereupon she started screaming loudly. Defendant then stopped attacking the women and allowed Hadley to hold her son. For approximately two to three minutes, defendant did not assault the two women. Officer Amy Isley then knocked on the front door and defendant fled from the house.

At the conclusion of the State's evidence, defendant moved to dismiss all of the charges against him on the grounds of insufficiency of the evidence. The trial court dismissed the first degree rape charge but allowed the State to proceed on attempted first degree rape. The trial court also dismissed the misdemeanor assault inflicting serious injury charge naming Bonnie Prevette as the victim.

Defendant's evidence consisted solely of the testimony of his mother, Dorothea Rogers, who testified that defendant had a history of mental illness for which he had been hospitalized on five or more occasions. At the close of all the evidence, defendant moved to dismiss the remaining charges against him. The trial court denied this motion.

Defendant asserts twelve assignments of error in the record on appeal. However, defendant fails to present argument or authority in support of several of his assignments of error. Those assignments of error are deemed abandoned pursuant to N.C. R. App. P. 28(b)(6). We only address those assignments of error properly set forth and argued in defendant's brief.

I.

Defendant first contends the trial court erred in denying his motions to dismiss the charges of attempted first degree rape, first degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury.

A motion to dismiss is properly denied if "there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). In ruling on a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State and give the State the benefit of every reasonable inference that

may be drawn from the evidence. *State v. Jaynes*, 342 N.C. 249, 274, 464 S.E.2d 448, 463 (1995). The test of the sufficiency of the evidence is the same whether the evidence is direct, circumstantial, or both. *State v. Jones*, 303 N.C. 500, 504, 279 S.E.2d 835, 838 (1981).

Attempted First Degree Rape

[1] N.C. Gen. Stat. § 14-27.2 (2001) defines first degree rape in pertinent part as follows:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> . . .
>
> (2) With another person by force and against the will of the other person, and:
>
> . . .
>
> b. Inflicts serious personal injury upon the victim *or another person*; or
>
> . . . .

The trial court in the mandate of its instructions to the jury on the charge of attempted first degree rape stated:

> So I charge you, that if you find from the evidence beyond a reasonable doubt that on or about May the 19th, 2000, the Defendant intended to have vaginal intercourse with Bonnie Prevette by force and against her will, and that the Defendant performed an act or acts which was or were calculated and designed to bring about vaginal intercourse by force and against Bonnie Prevette's will, and would have resulted in such intercourse had the Defendant not been stopped or prevented from completing his apparent course of action, and that the Defendant inflicted serious personal injury upon Bonnie Prevette *or another person*, it would be your duty to return a verdict of guilty of attempted first degree rape. (Emphasis added).

Defendant contends there was insufficient evidence the victim of the attempted rape, Bonnie Prevette, suffered serious personal injury. Defendant further contends the State could not rely on the injuries suffered by Pamela Hadley in elevating the offense to attempted *first* degree rape because Hadley was not present during the attempted rape.

When the State is proceeding under the theory that the serious personal injury was inflicted on a person other than the victim of the rape, or attempted rape, there is no requirement under N.C.G.S. § 14-27.2(a)(2)(b) that the other person actually be present during the rape, or attempted rape. *See State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985). In *Blackstock*, the Supreme Court held that the element of infliction of serious personal injury is satisfied

> when there is a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury. Such incidents include injury inflicted on the victim to overcome resistance or to obtain submission, injury inflicted upon the victim or another in an attempt to commit the crimes or in furtherance of the crimes of rape or sexual offense, or injury inflicted upon the victim *or another for the purpose of concealing the crimes or to aid in the assailant's escape.*

Id. at 242, 333 S.E.2d at 252 (emphasis added).

In the instant case, the State's evidence tended to show Hadley came into the house while defendant was attacking Prevette. Defendant apparently heard Hadley and discontinued his attempt to rape Prevette. Defendant then pulled Prevette through the house, whereupon the two of them encountered Hadley, who had reentered the house after calling the police. Defendant then attacked Hadley, hitting her in the face and choking her. Viewing the evidence in the light most favorable to the State, a jury could have reasonably inferred that defendant attacked Hadley for the purpose of concealing the attempted rape of Prevette or aiding in his escape from apprehension and that the attempted rape of Prevette and the attack on Hadley were part of one continuous transaction. Accordingly, the State could properly rely on the injuries suffered by Hadley in elevating the attempted rape to attempted *first* degree rape.

"In determining whether serious personal injury has been inflicted, the court must consider the particular facts of each case." *State v. Herring*, 322 N.C. 733, 739, 370 S.E.2d 363 (citing *State v. Roberts*, 293 N.C. 1, 235 S.E.2d 203 (1977)). The injury must be serious but it must fall short of causing death. *See Roberts*, 293 N.C. at 13, 235 S.E.2d at 211; *State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962). Our courts have consistently stated that further definition seems neither wise nor desirable. *Roberts*, 293 N.C. at 13, 235 S.E.2d at 211; *Jones*, 258 N.C. at 91, 128 S.E.2d at 3.

Here, the State's evidence tended to show that both Prevette and Hadley were hit in the face multiple times and were choked by defendant. Prevette suffered a broken nose, a concussion, bruises on the upper and lower parts of both arms, and abrasions to other parts of her body. Dr. Strickland testified that Prevette's broken nose was the type of injury that would cause "severe pain." Hadley suffered a cracked cheekbone, a broken nose and a broken jaw. The broken jaw required surgery which resulted in Hadley's jaw being wired shut for three weeks. We conclude that the evidence, taken in the light most favorable to the State, supports the serious personal injury element of attempted *first* degree rape based on the injuries suffered by either of the two victims in the instant case.

Defendant also argues the trial court should have granted his motion to dismiss attempted *first* degree rape because the indictment did not allege which element the State was relying on to elevate the crime to a *first* degree offense. However, N.C. Gen. Stat. § 15-144.1 does not require that an indictment for rape contain such an allegation. *See State v. Lowe*, 295 N.C. 596, 247 S.E.2d 878 (1978).

Assault With a Deadly Weapon With Intent to Kill Inflicting Serious Injury

[2] Defendant contends there was insufficient evidence of his use of a deadly weapon or his intent to kill Pamela Hadley to support submitting the felony assault charge to the jury. We disagree.

The indictment alleged defendant assaulted Pamela Hadley with his hand, a deadly weapon, with the intent to kill inflicting serious injury. Defendant contends that the evidence presented at trial was insufficient to classify defendant's singular hand, as opposed to his hands or fists, as a deadly weapon. Defendant further maintains that no prior case has supported the proposition that a single hand may be used as a deadly weapon.

A deadly weapon is "any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981). "It has long been the law of this state that '[w]here the alleged deadly weapon and the manner of its use are of such character as to admit of but one conclusion, the question as to whether or not it is deadly . . . *is one of law, and the Court must take responsibility of so declaring*.' " *State v. Torain*, 316 N.C. 111, 119, 340 S.E.2d 465, 470 (1986) (quoting *State v. Smith*,

187 N.C. 469, 470, 121 S.E.737, 737 (1924) (emphasis in original)). However, "where the instrument, according to the manner of its use or the part of the body at which the blow is aimed, may or may not be likely to produce [death or great bodily harm], its allegedly deadly character is one of fact to be determined by the jury." *State v. Joyner*, 295 N.C. 55, 64-65, 243 S.E.2d 367, 373 (1978); *see also State v. Grumbles*, 104 N.C. App. 766, 770-71, 411 S.E.2d 407, 410 (1991). This Court has held that hands and fists may be considered deadly weapons, given the manner in which they were used and the relative size and condition of the parties involved. *See State v. Krider*, 138 N.C. App. 37, 530 S.E.2d 569 (2000); *Grumbles*, 104 N.C. App. at 771, 411 S.E.2d at 410; *State v. Jacobs*, 61 N.C. App. 610, 611, 301 S.E.2d 429, 430 (1983).

In the instant case, the State's evidence showed that the manner in which defendant used his hand to assault the victim, Pamela Hadley, had devastating physical effect. Defendant hit the victim so hard that she suffered a cracked cheekbone, a broken nose and a broken jaw. The broken jaw required surgery. The evidence also showed that defendant choked the victim so severely that red marks were left on her neck. Further, the evidence shows that defendant is six feet two inches tall and weighs one hundred sixty-five (165) pounds, while the victim is a female approximately five feet three inches tall and weighing ninety-nine (99) pounds.

Based on this evidence, we conclude the trial court properly allowed the jury to decide whether defendant's hand was a deadly weapon. The distinction advanced by defendant on appeal between a singular "hand," as opposed to both "hands" or "fists," is insignificant in light of the evidence in the instant case. The evidence showed that defendant hit and choked Pamela Hadley with one hand while holding the other victim, Bonnie Prevette, with his other hand. Accordingly, we hold that a single hand may be considered a deadly weapon, based on the manner in which it is used and the relative size and condition of the parties involved.

Defendant also contends the evidence was insufficient to show his intent to kill Pamela Hadley. Defendant focuses on the fact that, after initially beating and choking Pamela Hadley, he stopped and allowed her to hold and comfort her baby son, after which he did not resume assaulting her. In fact, the evidence shows defendant did not assault Pamela Hadley in the final two to three minutes he was in the house prior to running from the police. Accordingly, defendant argues

the evidence was insufficient to show intent to kill, but rather showed an ample opportunity to kill on his part which was not acted upon. We disagree with defendant's contention.

"The defendant's intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. James*, 321 N.C. 676, 688, 365 S.E.2d 579, 586 (1988) (citing *State v. Thacker*, 281 N.C. 447, 189 S.E.2d 145 (1972)). There is ample evidence in the record from which a jury could reasonably infer that defendant intended to kill Pamela Hadley. Defendant hit Hadley in the face with such force that she suffered a cracked cheekbone, a broken nose, and a broken jaw. Defendant also choked Hadley to the point where she was having extreme difficulty breathing and thought that she was going to die. Although defendant is correct that the evidence shows he stopped hitting and choking Ms. Hadley for two to three minutes before he fled from the house, these additional facts make the State's evidence no less sufficient to send to the jury. In sum, the evidence supported a reasonable inference that defendant intended to kill Pamela Hadley while he was hitting and choking her. The fact defendant may have changed his mind and allowed Hadley to escape from his attack does not mean the State was precluded from getting to the jury on the issue of his intent to kill. Defendant's argument to the contrary lacks merit.

Kidnapping

[3] Defendant contends the trial court erred in denying his motion to dismiss the kidnapping charge because the evidence showed that any removal of the victim occurred after he discontinued his attempt to rape her. We disagree.

N.C. Gen. Stat. § 14-39 (2001) provides in pertinent part:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for a ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

(3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person; or

. . . .

The indictment in the instant case charged that defendant committed kidnapping by unlawfully removing the victim from one place to another for the purpose of facilitating the commission of first degree rape. Accordingly, the jury was only permitted to convict defendant of first degree kidnapping if the evidence showed that he unlawfully removed the victim from one place to another for the purpose of facilitating the commission, or the attempted commission, of first degree rape. *See State v. Tucker*, 317 N.C. 532, 346 S.E.2d 417 (1986).

The State's evidence tended to show that, after defendant forced his way into Prevette's house, he knocked her to the floor and attempted to rape her. According to Prevette, defendant apparently became startled, got up, grabbed her by the arm and pulled her from room to room in the house while his pants were still down. Defendant and Prevette then encountered Hadley, who had entered the house through the back door. Defendant began beating and choking Hadley with one hand while holding Prevette with the other. Defendant struck both victims numerous times before a police officer knocked on the front door causing defendant to flee from the house.

While we agree that one inference to be drawn from this evidence is that defendant permanently discontinued his attempt to rape Prevette, an equally reasonable inference could be drawn that defendant moved Prevette from room to room in the house while maintaining his intent to rape her. Defendant still had his pants down while dragging Prevette through the house and later assaulted both she and her daughter. The jury could have reasonably inferred that defendant intended to resume his attempted rape of Prevette but was not provided the opportunity due to Hadley's entrance into the house, the screaming of her baby son, and the police officer knocking on the door. Viewed in the light most favorable to the State, there was substantial evidence that defendant's removal of Prevette through the house was for the purpose of facilitating the attempted rape.

We likewise disagree with defendant's contention that the removal of Prevette was not a separate, complete act, independent and apart from the acts necessary to constitute the attempted rape. *See State v. Silhan*, 297 N.C. 660, 256 S.E.2d 702 (1979). It is clear that the removal in the instant case was not necessary to accomplish the

attempted rape; in fact, the attempted rape had already been accomplished at the time of the removal. Accordingly, the trial court did not err in denying defendant's motion to dismiss the kidnapping charge.

II.

[4] Defendant next contends the trial court erred in its instructions on attempted first degree rape by instructing the jury that it could find defendant guilty if it found that he inflicted serious personal injury on Bonnie Prevette or any other person. Having already held that the State presented sufficient evidence to show that the attempted rape of Prevette and the assault of Hadley were part of a continuous transaction, we conclude that the trial court's instructions on this charge were proper. *See Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985).

[5] Defendant next contends the trial court erred in denying his requests for jury instructions on voluntary intoxication. Defendant argues that the evidence of his mental condition on the day of the crimes, coupled with his history of mental health, alcohol and drug addiction problems, warranted a jury instruction on voluntary intoxication. We disagree.

To be entitled to an instruction on voluntary intoxication, a defendant must produce substantial evidence which would support a conclusion by the judge that the defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming the intent required to commit the offense. *State v. Mash*, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988); *see also State v. Lancaster*, 137 N.C. App. 37, 45, 527 S.E.2d 61, 67 (2000). "Evidence of mere intoxication, however, is not enough to meet the defendant's burden of production." *Mash*, 323 N.C. at 346, 372 S.E.2d at 536. A person may be excited, intoxicated and emotionally upset, and still have the capability to formulate the necessary intent required to commit a criminal offense. *See State v. McQueen*, 324 N.C. 118, 142, 377 S.E.2d 38, 52 (1989); *Mash*, 323 N.C. at 347, 372 S.E.2d at 537; *State v. Hamby*, 276 N.C. 674, 678, 174 S.E.2d 385, 387 (1970).

In the instant case, Officer Poston testified that defendant had a moderate odor of alcohol about his person after he was apprehended by police. Defendant was given an alco-sensor test which showed a blood alcohol content of .07, a level below the level at which one would be presumed to be driving while impaired under our motor vehicle laws. *See State v. Medley*, 295 N.C. 75, 243 S.E.2d 374 (1978)

(holding evidence that a defendant's blood alcohol content is such that driving would violate the motor vehicle laws, standing alone, does not entitle the defendant to an instruction on voluntary intoxication). Although Donna Balsinger testified defendant had "wild-looking eyes" when he ran through her business attempting to avoid the police, and defendant's mother testified about his history of drug and alcohol abuse, Officer Poston testified that, during questioning, defendant's speech was clear and understandable and not slurred, that defendant was responsive to the officer's questions, and that defendant's eyes were clear. Further, both Officer Poston and Officer Long testified that in their opinion defendant was not impaired.

Viewed in the light most favorable to defendant, there was not substantial evidence that defendant was utterly incapable of forming the requisite intent to commit the crimes at issue. Therefore, defendant was not entitled to an instruction on voluntary intoxication.

III.

[6] Defendant next contends the trial court erred in denying his motion to suppress the use of two prior misdemeanor convictions used by the State to elevate his prior record level for sentencing purposes from Level IV to Level V. Defendant argues that these prior convictions were obtained in violation of his right to counsel.

N.C. Gen. Stat. § 15A-980 governs defendant's motion to suppress prior convictions in violation of his right to counsel. The statute reads, in pertinent part:

> (a) A defendant has the right to suppress the use of a prior conviction that was obtained in violation of his right to counsel if its use by the State is to impeach the defendant or if its use will:
>
> (1) Increase the degree of crime of which the defendant would be guilty; or
>
> (2) Result in a sentence of imprisonment that otherwise would not be imposed; or
>
> (3) Result in a lengthened sentence of imprisonment.
>
> . . .
>
> (c) When a defendant has moved to suppress use of a prior conviction under the terms of subsection (a), he has the burden of proving by the preponderance of the evidence that the conviction was obtained in violation of his right to counsel. To prevail, he

> must prove that at the time of the conviction [1] he was indigent, [2] had no counsel, and [3] had not waived his right to counsel. If the defendant proves that a prior conviction was obtained in violation of his right to counsel, the judge must suppress use of the conviction at trial or in any other proceeding if its use will contravene the provisions of subsection (a).

N.C. Gen. Stat. § 15A-980 (2001). This Court has held that a defendant must prove all three facts—(1) he was indigent, (2) had no counsel, and (3) had not waived his right to counsel—by the preponderance of the evidence. *State v. Brown*, 87 N.C. App. 13, 22, 359 S.E.2d 265, 270 (1987); *Cf. State v. Haislip*, 79 N.C. App. 656, 658, 339 S.E.2d 832, 834 (1986).

It is uncontroverted that the two prior convictions defendant sought to suppress were used to elevate his prior record level to Level V, which resulted in a lengthened sentence of imprisonment. It is also uncontroverted that defendant had no counsel at the time of the two prior convictions. Thus, the only issues are whether defendant was indigent and whether defendant waived his right to counsel.

In the instant case, the trial court conducted a hearing on defendant's motion to suppress the prior convictions. At the hearing, defendant testified as follows:

> **Q** Never had a lawyer on any of those? Okay. Back on July 11th, 1997, could you afford to hire a lawyer back then?
>
> **A** No, I couldn't.
>
> . . .
>
> **Q** We're not through yet. We're still in it, but we've been trying it for six days. Now, back in 19—on October 6, 1998, could you afford to hire a lawyer back then?
>
> **A** No.

Defendant's testimony was the only evidence elicited concerning whether defendant was indigent at the time of the prior convictions.

In *Brown*, this Court was faced with a similar set of facts. There, the trial court heard evidence following the defendant's motion to suppress the use of a prior conviction. The defendant was the sole witness. Following the defendant's testimony, the trial court made the following pertinent findings of fact:

> Next. That the defendant Brown testified that he had called an attorney and was quoted a fee; that he does not remember but he was advised as to the penalty that he might receive.
>
> Next. That the defendant Brown then made his own decision that he could not afford to hire an attorney.
>
> That the defendant did not make a request of the Court at any time that he be appointed counsel on the grounds of being indigent.

Based on these findings of fact, the trial court made the following pertinent conclusion of law:

> 2. That the defendant has failed to prove by a preponderance of the evidence that he was indigent within the meaning of the General Statutes of North Carolina.

The trial court denied the defendant's motion to suppress use of the prior conviction, and this Court upheld that decision on appeal. *Brown*, 87 N.C. App. at 22-24, 359 S.E.2d at 270-71.

This Court's decision in *Brown* stands for the proposition that the mere assertion by a defendant that he could not afford an attorney at the time of a prior conviction does not prove by a preponderance of the evidence that the defendant was indigent, as required under N.C.G.S. § 15A-980. Applying this proposition to the instant case, we conclude defendant failed to prove by the preponderance of the evidence that he was indigent at the time of the two prior convictions which he sought to suppress at trial. The only evidence of defendant's indigency was his mere assertion that he could not afford an attorney at the time of the prior convictions. Having concluded defendant failed to prove by a preponderance of the evidence that he was indigent at the time of the prior convictions, we need not consider whether defendant had waived his right to counsel. Defendant's assignment of error is overruled.

We have considered defendant's remaining assignments of error and, based on the record, briefs, and applicable law, we find them lacking in merit.

Defendant received a fair trial and sentencing free from error.

No error.

Judges WYNN and HUNTER concur.

HUNTINGTON PROPERTIES, LLC, A MICHIGAN LIMITED LIABILITY CORPORATION, AND CAROLINA VILLAGE, LLC, A MICHIGAN LIMITED LIABILITY CORPORATION, PLAINTIFFS v. CURRITUCK COUNTY, ELDON L. MILLER, JR., S. PAUL O'NEAL, ERNIE BOWDEN, GENE A. GREGORY AND J. OWEN ETHERIDGE, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

No. COA01-884

(Filed 1 October 2002)

1. Zoning— mobile home park—prohibition on expansion of nonconforming use

The trial court did not err in a declaratory judgment action by granting defendant county's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) based on its interpretation of defendant county's Uniform Development Ordinance (UDO) §§ 1507(3) and 1504(9) to prevent plaintiffs from upgrading their wastewater treatment system to serve existing but unoccupied rental spaces in the pertinent mobile home park, because: (1) the UDO, both before and after its amendment, prohibited expansion of plaintiffs' nonconforming use to the additional existing spaces since there was no state permit to sell those additional spaces; and (2) at the time the mobile home park became a nonconforming use it was only permitted to rent a total of 140 spaces, and not its full capacity of 440 spaces, based on the water limits.

2. Zoning— mobile home park—nonconforming use—vested rights doctrine

The trial court did not err in a declaratory judgment action by granting defendant county's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claim regarding defendant county's authority to zone property and to regulate and prohibit the expansion of nonconforming uses based on its interpretation of defendant county's Uniform Development Ordinance (UDO) Article 15 even though plaintiffs contend it impaired plaintiffs' vested right to repopulate the entire pertinent mobile home park up to the original capacity of 440 units, because: (1) plaintiffs cannot show that they had either the county's permission or a valid permit authorizing them to expand the mobile home park to 440 units before the amendment was enacted in 1996, and plaintiffs cannot prove they made substantial expenditures in reliance on a permit or permission from the county; (2) plaintiffs never obtained a final interpretation of the UDO from the county's planning staff; (3) plaintiffs failed to follow the proper avenue for

appealing their situation; (4) plaintiffs' proposed upgrade in the mobile home park's wastewater treatment system was an increase in the extent of the nonconforming use, and defendants' attempts to prevent this expansion is in harmony with the State's policy of construing ordinances against the expansion of a nonconforming use; and (5) plaintiffs could have learned of the existence and details of the permits through means other than just legal discovery procedures.

3. Zoning— county's authority—prohibition on expansion of nonconforming use

The trial court did not err in a declaratory judgment action by granting defendant county's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claim regarding defendant county's authority to zone property and to regulate and prohibit the expansion of nonconforming uses, and by ruling the General Assembly did not grant exclusive authority in the Department of Environment and Natural Resources to regulate wastewater treatment systems, because: (1) defendant county's amendment was a proper exercise of its powers to control land use within the territorial jurisdiction of the county and controls with the county's territorial jurisdiction; and (2) there was no discord between state regulations regarding wastewater treatment systems and the county's amendment.

4. Zoning— county's authority—prohibition on expansion of nonconforming use—due process—equal protection

The trial court did not violate plaintiffs' federal and state constitutional rights to due process and equal protection in a declaratory judgment action by granting defendant county's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claim regarding defendant county's authority to zone property and to regulate and prohibit the expansion of nonconforming uses, because: (1) it is a legitimate interest as a matter of law to legislate against the expansion or continuation of nonconforming uses; (2) preventing the growth of nonconforming uses represents a conscious effort on the part of the legislative body to regulate the use of land and thus promote the health, safety, or general welfare of the community; and (3) plaintiffs have failed to successfully demonstrate that the county violated their equal protection rights when classifications are presumed valid under the lower tier rational basis test.

Appeal by plaintiffs from order entered 15 March 2001 by Judge William C. Griffin, Jr., in Currituck County Superior Court. Heard in the Court of Appeals 24 April 2002.

Smith Helms Mulliss & Moore, L.L.P., by Thomas E. Terrell, Jr., and Neale T. Johnson, for plaintiff appellants.

Poyner & Spruill, by Robin L. Tatum and Kacey C. Sewell, for defendant appellees.

McCULLOUGH, Judge.

This case arises from a declaratory judgment action, the pertinent facts of which are as follows: In July 1995, Dutch Key Corporation (Dutch Key) purchased Orchard Park, a 90-acre mobile home park in Currituck County, North Carolina. Orchard Park was constructed in 1972 and was approved to accommodate 440 mobile homes on the land, including pads, sewer, water, and electrical connections. At the time Orchard Park opened, it was a permitted use under Currituck County (County) zoning. After Orchard Park opened, but prior to its purchase by plaintiffs, the County adopted the Uniform Development Ordinance (UDO); Article 15 of the UDO governed "nonconforming situations." In 1992, the County amended the UDO to prohibit mobile home parks altogether, except as lawful nonconforming uses, which Orchard Park was. Orchard Park retained its status as a legal nonconforming use under UDO §§ 1501(1)(g) and 2501. As a result of the County's amendments to the UDO, Orchard Park has operated as a nonconforming use since at least November 1992.

Orchard Park operated near capacity in the 1970s and 1980s. During that time, Orchard Park's owners provided sewer services to its residents using a private wastewater treatment system. The system was approved by the State of North Carolina; when such approvals were later assigned to the Division of Environmental Management (DEM), DEM also approved the system. During the 1980s, environmental regulations concerning private wastewater treatment systems became more demanding. By 1987, Orchard Park's wastewater treatment system could only service about 140 mobile home residents, due to a 29,000 gallon daily limit on the amount of treated water that could be sprayed onto the system's spray fields.

The 1992 UDO restricted owners from enlarging or increasing the nonconforming use by altering structures or placing new structures on open land if such activity resulted in

> (a) an increase in the total amount of space devoted to a nonconforming use; or
>
> (b) greater nonconformity with respect to dimensional restrictions such as setback requirements, height limitations or density requirements or other requirements such as parking requirements.

UDO § 1504(1). UDO § 1504(4) stated that

> [t]he volume, intensity, or frequency of use of property where a nonconforming situation exists may be increased and the equipment or processes used at a location where a nonconforming situation exists may be changed if these or similar changes amount only to changes in the degree of activity rather than changes in kind and no violation of other paragraphs of this section occur.

UDO § 1505(1) encouraged owners to repair and maintain structures located on property where nonconforming situations existed. "[R]enovation, restoration or reconstruction" of structures was permissible to refurbish or replace what previously existed so long as Article 15 of the UDO was not violated. UDO § 1505(1). Additionally,

> [f]or purposes of determining whether a right to continue a nonconforming situation is lost pursuant to this section, all of the buildings, activities, and operations maintained on a lot are generally to be considered as a whole. For example, the failure to rent one (1) apartment in a nonconforming apartment building for 270 days shall not result in a loss of the right to rent that apartment or space thereafter so long as the apartment building as a whole is continuously maintained. But if a nonconforming use is maintained in conjunction with a conforming use, discontinuance of a nonconforming use for the required period shall terminate the right to maintain it thereafter.

UDO § 1507(3).

In December 1995, Dutch Key hired an engineer to design, upgrade, and apply for permits for a wastewater treatment system that would comply with DEM regulations to serve all 440 rental spaces at Orchard Park. When the County learned of Dutch Key's actions, its Board of Commissioners amended UDO § 1504(9) by adding a new paragraph, which stated:

> Improvements to water and sewage treatment systems in order to accommodate more mobile homes in a mobile home park shall be

> considered an enlargement of a nonconforming situation and shall not be permitted. However, improvements to a water and sewage treatment system serving a mobile home park for the purpose of improving public health that will not result in an increase in the number of mobile homes within the park shall be permitted. (Amended 8/19/96)

UDO § 1504(9) (hereinafter the Amendment). The Amendment was finalized on 19 October 1996.

On 17 October 1996, Dutch Key filed a complaint challenging the validity of the Amendment and sought a judgment declaring the Amendment void, as well as a permanent injunction to enjoin the County from enforcing the Amendment against it. Dutch Key believed it could continue operating Orchard Park at its original capacity of 440 mobile homes because "the use of plaintiff's property as a mobile home park has not been discontinued for a consecutive period of 270 days at any point in time since Orchard Park first opened."

The County filed its answer on 2 August 2000. The delay in answering was caused by questions regarding whether Dutch Key's original counsel could represent it in this action. On 29 January 2001, the parties consented to substitution of counsel. On 20 February 2001, Dutch Key moved to substitute real parties in interest because "[t]he affected property has been sold by . . . Dutch Key Corporation, and its successors in interest and current owners are Carolina Village, L.L.C., a Michigan limited liability corporation, and Huntington Properties, L.L.C., a Michigan limited liability corporation." On 13 March 2001, the trial court allowed the motion. The case was heard at the 5 March 2001 Civil Session of Currituck County Superior Court on defendants' N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2001) motion to dismiss. On 15 March 2001, the trial court entered an order granting the County's motion to dismiss the action. Plaintiffs appealed.

On appeal, plaintiffs argue the trial court erred in granting the County's motion to dismiss because (I) UDO §§ 1507(3) and 1504(9) do not prohibit them from upgrading the wastewater treatment system to serve existing but unoccupied spaces at Orchard Park; (II) UDO Article 15 was improperly construed to impair plaintiffs' vested rights; (III) the General Assembly granted exclusive authority to the Department of Environment and Natural Resources to regulate wastewater treatment systems; and (IV) plaintiffs' constitutional rights to due process and equal protection under the state and federal

constitutions were violated. For the reasons set forth herein, we disagree with plaintiffs' arguments and affirm the action of the trial court.

"A motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) tests the legal sufficiency of the complaint, which will be dismissed if it is completely without merit." *Town of Beech Mountain v. County of Watauga*, 91 N.C. App. 87, 89, 370 S.E.2d 453, 454-55 (1988), *aff'd*, 324 N.C. 409, 378 S.E.2d 780, *cert. denied*, 493 U.S. 954, 107 L. Ed. 2d 351 (1989) (citations omitted). The main inquiry 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[.]" *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987).

When evaluating zoning ordinances, the following rules apply: "It is well established that a duly adopted zoning ordinance is presumed to be valid and the burden is on the complaining party to show it to be invalid." *Williams v. Town of Spencer*, 129 N.C. App. 828, 830-31, 500 S.E.2d 473, 475 (1998). This is a heavy burden. *Id.* Prohibition of the expansion of a nonconforming use is lawful and consistent with good zoning practices. A county has legitimate power to regulate the extent to which nonconforming uses can be extended, expanded and enlarged. *See* N.C. Gen. Stat. § 153A-340 (2001); and *Williams*, 129 N.C. App. 828, 500 S.E.2d 473. This Court has consistently held that nonconforming uses are common; however, "[a]ny expansion of a nonconforming use is . . . subject to regulation." *Pamlico Marine Co., Inc. v. N.C. Dept. of Natural Resources*, 80 N.C. App. 201, 203-04, 341 S.E.2d 108, 111 (1986). "Zoning ordinances are construed against indefinite continuation of a nonconforming use. Ordinances in general are construed to give effect to all of their parts if possible." *Forsyth Co. v. Shelton*, 74 N.C. App. 674, 676, 329 S.E.2d 730, 733, *appeal dismissed, disc. review denied*, 314 N.C. 328, 333 S.E.2d 484 (1985) (citations omitted). Moreover,

> [n]on-conforming uses are not favored by the law. Most zoning schemes foresee elimination of non-conforming uses either by amortization, or attrition or other means. In accordance with this policy, zoning ordinances are strictly construed against indefinite continuation of non-conforming uses.

CG&T Corp. v. Bd. of Adjustment of Wilmington, 105 N.C. App. 32, 39, 411 S.E.2d 655, 659-60 (1992) (quoting *Appalachian Poster*

Advertising Co. v. Board of Adjustment, 52 N.C. App. 266, 274, 278 S.E.2d 321, 326 (1981) (citations omitted)). With these principles in mind, we turn to the arguments presented by the parties.

Right to Lease Existing but Unoccupied Rental Spaces

[1] By their first assignment of error, plaintiffs contend the trial court erred in interpreting UDO §§ 1507(3) and 1504(9) to prevent them from upgrading their wastewater treatment system to serve existing but unoccupied rental spaces at Orchard Park. Plaintiffs argue the trial court's interpretation of UDO Article 15 was erroneous as a matter of law because it failed to read and harmonize the statute as a whole, failed to apply the directly applicable statutory provision and applied an incorrect provision instead, and failed to give the benefit of the doubt to plaintiffs. We do not agree.

"Statutes dealing with the same subject matter must be construed *in pari materia* and harmonized, if possible, to give effect to each." *Bd. of Adjmt. of the Town of Swansboro v. Town of Swansboro*, 334 N.C. 421, 427, 432 S.E.2d 310, 313, *reh'g denied*, 335 N.C. 182, 436 S.E.2d 369 (1993). " '[T]he various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency, so as to render the statute a consistent and harmonious whole.' " *Walker v. Bakeries Co.*, 234 N.C. 440, 442, 67 S.E.2d 459, 461 (1951) (quoting 50 Am. Jur. *Statutes* § 363). Portions of the same statute dealing with the same subject matter are " 'to be considered and interpreted as a whole, and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment . . . .' " *In re Hickerson*, 235 N.C. 716, 721, 71 S.E.2d 129, 132 (1952).

Article 15 of the County's UDO prevented landowners engaged in a nonconforming use from enlarging or extending the nonconforming use (UDO § 1504), wholly replacing the structure or facility that constituted the nonconforming use (UDO § 1505(1)(c)), changing the use of property to a different nonconforming use (UDO § 1506), and restarting a nonconforming use after it has been discontinued for 270 consecutive days (UDO § 1507). Nonetheless, plaintiffs maintain Article 15, § 1502 of the UDO expressly allows legal, nonconforming uses to continue and be replenished to their original use or occupancy:

1. Unless otherwise specifically provided in these regulations and subject to the restrictions and set forth in Article 15, non-

conforming situations that were otherwise lawful on the effective date of this Ordinance may be continued.

2. Nonconforming projects may be completed only in accordance with the provisions of Article 15.

To reach this result, plaintiffs argue Orchard Park should be examined as a whole—a mobile home park with 440 rentable spaces. Furthermore, because some spaces were continuously rented, the park's operations never fully ceased for any period of time, much less the 270 consecutive days mentioned in UDO § 1507(1). Plaintiffs refer to UDO § 1507's apartment example to argue that full occupancy is not the test to determine when a use has been discontinued. Lastly, plaintiffs note that when "the zoning and subdivision regulations are in derogation of private property, such provisions should be liberally construed in favor of the owner." *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 111, 388 S.E.2d 538, 543 (1990). Plaintiffs believe there is ambiguity in the wording and placement of UDO § 1504(9), such that the trial court erred in resolving the ambiguity against them.

We agree with the County that the UDO, both before and after passage of the Amendment, prohibited expansion of plaintiffs' nonconforming use. As of both 1992 (when the mobile home park became a nonconforming use) and 1995 (when Dutch Key purchased Orchard Park at a foreclosure sale), neither Dutch Key nor plaintiffs could have rented the additional existing spaces (beyond the 140 mobile homes that could be serviced under the 29,000 gallon per day water limits) because neither Dutch Key nor plaintiffs had a state permit to sell those additional spaces. *See* UDO § 1502(1). At the time Orchard Park became a nonconforming use, it was only permitted to rent a total of 140 spaces—not 440—because of the water limits. Therefore, any number of spaces greater than 140 was never a part of the nonconforming situation and was incapable of falling under UDO § 1507's provision for "Abandonment and Discontinuation of Nonconforming Situations." Accordingly, plaintiffs' first assignment of error is overruled.

Vested Rights

[2] By their second assignment of error, plaintiffs contend the trial court erroneously interpreted UDO Article 15 in a way that impaired plaintiffs' vested rights. We disagree.

"The 'vested rights' doctrine has evolved as a constitutional limitation on the state's exercise of its police power to restrict an individual's use of private property by the enactment of zoning ordinances." *Godfrey v. Zoning Bd. of Adjustment*, 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986); *Town of Hillsborough v. Smith*, 276 N.C. 48, 55, 170 S.E.2d 904, 909 (1969). "[A] determination of the 'vested rights' issue requires resolution of questions of fact, including reasonableness of reliance, existence of good or bad faith, and substantiality of expenditures." *Godfrey*, 317 N.C. at 63, 344 S.E.2d at 279.

Plaintiffs argue that, because their case was dismissed before discovery could begin, they were unable to ascertain the nature of the permits (site plan approval, building permits, electrical permits, Health Department permits, and so forth) they needed to obtain. They assert the only available method for establishing the strength of their claim is discovery. If the case were allowed to proceed, plaintiffs believe the permits would show that Orchard Park (at its full capacity of 440 spaces) was approved and permitted by the County, and that they built Orchard Park in good faith reliance on those permits. Thus, plaintiffs maintain they have a vested right to repopulate the entire mobile home park, up to the original capacity of 440 units.

Defendants argue plaintiffs' vested rights claim fails because plaintiffs cannot show they had either the County's permission or a valid permit authorizing them to expand Orchard Park to 440 units before the Amendment was enacted in 1996. Defendants also maintain plaintiffs cannot prove they made substantial expenditures in reliance on a permit or permission from the County. After reviewing the history of this case, we agree with defendants that plaintiffs cannot carry their burden.

Plaintiffs could have established vested rights in Orchard Park by (1) obtaining zoning and building permits from the State which would have allowed them the right to expand Orchard Park, or (2) obtaining a final interpretation of the UDO from the County's Planning Staff stating that they were allowed to operate Orchard Park at a capacity over 140 units. Upon examination of the record, however, it is clear that plaintiffs neither applied for nor obtained state permits to operate Orchard Park at a capacity over 140 units at the time the Amendment was passed in 1996. Consequently, plaintiffs failed to show their "obligations and/or expenditures were made in reasonable reliance on and after the issuance of a valid building permit, if such permit is required[.]" *Browning-Ferris Industries v. Guilford County Bd. of Adj.*, 126 N.C. App. 168, 171, 484 S.E.2d 411, 414 (1997).

The record also indicates that plaintiffs never obtained a final interpretation of the UDO from the County's Planning Staff. In fact, it would have been impossible for plaintiffs to have obtained permission to expand Orchard Park because a 440-unit mobile home park was not otherwise lawful at the time Orchard Park became nonconforming in 1992, much less when the Amendment was passed in 1996.

We also note that plaintiffs failed to follow the proper avenue for appealing their situation. Article 21 of Currituck County's UDO gives the County Planning Staff jurisdiction to make initial interpretations of its provisions. *See* UDO § 1913. Appeal is then to the Board of Adjustment and then to the superior court under a writ of certiorari. *See* UDO Article 21. Direct civil action, as plaintiffs have used here, has not been allowed to proceed or successfully challenge a nonconforming use. *See Fantasy World, Inc. v. Greensboro Bd. of Adjustment*, 128 N.C. App. 703, 496 S.E.2d 825, *appeal dismissed, disc. review denied*, 348 N.C. 496, 510 S.E.2d 382 (1998) (demonstrating the proper method for challenging nonconforming use issues).

Moreover, we agree with defendants that plaintiffs' proposed upgrade in Orchard Park's wastewater treatment system was an increase in the *extent* of the nonconforming use. Defendants' attempts to prevent this expansion is in harmony with the State's policy of construing ordinances against the expansion of a nonconforming use. *See In re O'Neal*, 243 N.C. 714, 92 S.E.2d 189 (1956); *In re Appeal of Hasting*, 252 N.C. 327, 113 S.E.2d 433 (1960); and *Kirkpatrick v. Village Council*, 138 N.C. App. 79, 530 S.E.2d 338 (2000).

We believe plaintiffs' arguments are without merit for a number of other reasons. First, plaintiffs' brief asserts that "[o]nly during discovery can Huntington establish the strength of its claim." Plaintiffs evidently argue that whenever a Rule 12(b)(6) motion is pending, the case should not be dismissed so long as the plaintiff may gather information to support its position. However, fishing expeditions of this sort are not contemplated by Rule 12(b)(6), which allows dismissals based upon the pleadings. Second, plaintiffs stated that the contents of the permits were "not known." It follows, then, that plaintiffs could never have relied upon them in good faith. Lastly, we note that permits (such as those sought by plaintiffs) are issued by the State and are easily obtainable public records. We do not believe plaintiffs could only learn of the existence and details of such permits through

legal discovery procedures. We therefore conclude that the trial court properly dismissed plaintiffs' vested rights claim, and this assignment of error is overruled.

Preemption

[3] By their third assignment of error, plaintiffs contend the trial court erred in granting defendants' motion to dismiss and in ruling the General Assembly did not grant exclusive authority in the Department of Environment and Natural Resources (DENR) to regulate wastewater treatment systems. Plaintiffs believe the power to regulate wastewater treatment systems lies exclusively with the DENR, so that the County was not within its rights by trying to prevent plaintiffs from updating their system. In support of their contention, plaintiffs point to the detail and volume of the North Carolina Administrative Code's references on the subject of wastewater treatment systems.

After reviewing the County's Amendment, we believe it is most accurately described as a zoning ordinance that clarifies what constitutes the impermissible expansion of a nonconforming use. It is not, as plaintiffs argue, an attempt by the County to control wastewater treatment systems. Our conclusion is bolstered by the fact that the Amendment is found in the section of the UDO detailing enlargements of nonconforming uses. By its own terms, the Amendment states "[i]mprovements to water and sewage treatment systems *in order to accommodate more mobile homes in a mobile home park* . . . shall not be permitted." *See* UDO § 1504(9) (emphasis added). The Amendment limits improvements to wastewater treatment systems when those improvements are designed to increase capacity and allow the expansion of a nonconforming use. This is explained in the second sentence of UDO § 1504(9), which states: "However, improvements to a water and sewage treatment system serving a mobile home park for the purpose of improving public health that will not result in an increase in the number of mobile homes within the park shall be permitted."

N.C. Gen. Stat. § 153A-4 (2001) states:

> It is the policy of the General Assembly that the counties of this State should have adequate authority to exercise the powers, rights, duties, functions, privileges, and immunities conferred upon them by law. To this end, the provisions of this Chapter and of local acts shall be broadly construed and grants of power shall

be construed to include any powers that are reasonably expedient to the exercise of that power.

Keeping in mind that counties are authorized to zone property and to regulate and prohibit the expansion of nonconforming uses, *see* N.C. Gen. Stat. § 153A-340, and *Williams*, 129 N.C. App. 828, 500 S.E.2d 473, we believe the County's Amendment was (1) a proper exercise of its powers to control land use within the territorial jurisdiction of the County, and (2) controls within Currituck County's territorial jurisdiction. We therefore perceive no discord between state regulations regarding wastewater treatment systems and the County's Amendment. Accordingly, plaintiffs' third assignment of error is overruled.

Constitutional Considerations

[4] In their final assignment of error, plaintiffs contend the trial court's dismissal of their case violated their federal and state constitutional rights to due process and equal protection. More specifically, plaintiffs argue that if they prevail on the vested rights issue, they have necessarily established a violation of their constitutional rights because " '[a] lawfully established nonconforming use is a vested right and is entitled to constitutional protection.' " *Godfrey*, 317 N.C. at 62, 344 S.E.2d at 279 (quoting 4 E. Yokley, Zoning Law and Practice § 22-3 (4th ed. 1979)). Plaintiffs also charge the County with knowledge of Dutch Key's (and later their) intent to restore Orchard Park to a 440-unit operational mobile home park by upgrading the wastewater treatment system. Plaintiffs believe the County's 1996 Amendment to the UDO was enacted simply to frustrate those plans, and for no other legitimate policy reasons. Plaintiffs contend such behavior violated Dutch Key's substantive and procedural due process rights and singled Dutch Key out for unequal treatment (in turn affecting them, as they were Dutch Keys' successors in interest).

"Substantive due process is a guaranty against arbitrary legislation, demanding that the law shall not be unreasonable, arbitrary or capricious, and that the law be substantially related to the valid object sought to be obtained." *State v. Joyner*, 286 N.C. 366, 371, 211 S.E.2d 320, 323, *appeal dismissed*, 422 U.S. 1002, 45 L. Ed. 2d 666 (1975). However, "[u]nless legislation involves a suspect classification or impinges upon fundamental personal rights, it is presumed constitutional and need only be rationally related to a legitimate state interest." *Treants Enterprises, Inc. v. Onslow County*, 83 N.C. App. 345, 351, 350 S.E.2d 365, 369 (1986), *aff'd*, 320 N.C. 776, 360 S.E.2d 783

(1987). If no suspect classification or fundamental personal right is involved, the mere rationality standard applies and the law in question will be upheld if it has "any conceivable rational basis." *Id.* Our state constitution's standard for due process analysis has been described as follows: "[T]he law must have a rational, real and substantial relation to a valid governmental objective (i.e., the protection of the public health, morals, order, safety, or general welfare)." *Id.* at 352, 350 S.E.2d at 369-70.

Our Courts have held that it is a legitimate interest, as a matter of law, to legislate against the expansion or continuation of nonconforming uses. *See Williams*, 129 N.C. App. at 831, 500 S.E.2d at 475. *See also Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 358 S.E.2d 372 (1987); and *Joyner*, 286 N.C. 366, 211 S.E.2d 320. In *Joyner*, the Supreme Court held that

> [i]n examining the reasonableness of an ordinance, due process dictates that the court look at the entire ordinance and not only at the provision as it applies to a particular inhabitant of the municipality. The fact that one citizen is adversely affected by a zoning ordinance does not invalidate the ordinance.

Id. at 371, 211 S.E.2d at 323 (citations omitted). Preventing the growth of nonconforming uses "represents a conscious effort on the part of the legislative body . . . to regulate the use of land . . . and thus promote the health, safety, or general welfare of the community." *Id.* at 372, 211 S.E.2d at 324. Based on the foregoing, we believe plaintiffs have failed to demonstrate a violation of their due process rights.

Plaintiffs have likewise failed to show their equal protection rights were violated. We first note that our state standard is the same as the federal standard. *See State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 336 N.C. 657, 680-81, 446 S.E.2d 332, 346 (1994).

> When a governmental classification does not burden the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, the lower tier of equal protection analysis requiring that the classification be made upon a rational basis must be applied. The "rational basis" standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government. Additionally, in instances in which it is appropriate to apply the rational basis standard, the governmental act is entitled to a presumption of validity.

White v. Pate, 308 N.C. 759, 766-67, 304 S.E.2d 199, 204 (1983) (citations omitted). Classifications are presumed valid; "under the lower tier, rational basis test, the party challenging the legislation has a tremendous burden in showing that the questioned legislation is unconstitutional." *In re Appeals of Timber Companies*, 98 N.C. App. 412, 420, 391 S.E.2d 503, 507-08 (1990). Moreover, "[t]he deference afforded to the government under the rational basis test is so deferential that even if the government's actual purpose in creating classifications is not rational, a court can uphold the regulation if the court can *envision* some rational basis for the classification." *Guerra v. Scruggs*, 942 F.2d 270, 279 (4th Cir. 1991) (emphasis in original). After careful review of plaintiffs' contentions, we believe they have failed to successfully demonstrate that the County violated their equal protection rights. Accordingly, plaintiffs' final assignment of error is overruled.

After thoughtful consideration of both the underlying proceedings and the arguments presented by the parties, we conclude the trial court properly dismissed plaintiffs' complaint. The trial court's order granting defendants' motion to dismiss plaintiffs' complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) is hereby

Affirmed.

Judges WYNN and BIGGS concur.

STATE OF NORTH CAROLINA v. SHAWN DELL KEMP

STATE OF NORTH CAROLINA v. EDWARD EARL McDOWELL

No. COA01-1345

(Filed 1 October 2002)

1. Conspiracy— armed robbery—evidence sufficient

There was sufficient evidence to deny defendant's motion to dismiss a charge of conspiracy to commit armed robbery where defendant was present when "everyone agreed" to the conspiracy, rode with the others to and from the victim's house, and received a portion of the money and the drugs taken during the robbery.

2. Criminal Law— armed robbery prosecution—shooting victim allowed in courtroom—injuries apparent—no cross-examination

The trial court did not err by not excluding a shooting victim from the courtroom during a robbery prosecution where defendant contended that the jury could simply look at the victim to determine the extent of his injuries without defendant being able to cross-examine the victim. The presence of the victim in the courtroom did not constitute the presentation of evidence or its functional equivalent, the victim's presence is not reflected in testimony or in the record, there is no indication that the State attempted to use the victim's presence for evidentiary purposes, there is no indication that the jury based its decision on its observation of the victim, there was testimony that the victim could not speak but could communicate non-verbally, and defendant could have called the victim as a witness.

3. Criminal Law— victim's rights—presence in courtroom—exercise of rights by guardian

The trial court did not incorrectly interpret the Crime Victim's Rights Act, N.C.G.S. § 15A-830, in refusing to exclude a shooting victim from the courtroom. The Act was designed to safeguard the rights of victims as they confront the accused through the legal process and the guardianship provision should be viewed as supplemental to the victim's rights rather than as being in competition with the victim's rights.

4. Conspiracy— armed robbery—inducement of others—sentence enhanced

The trial court did not abuse its discretion by imposing an aggravated sentence for conspiracy to commit armed robbery based on inducement where defendant initiated the idea of robbing the victim, defendant's inducement of others to join in the offense preceded the formation of the actual conspiracy, and inducement of others is not an element of the conspiracy.

5. Firearms and Other Weapons— possession by felon—inducement of others—sentence enhanced

The trial court did not abuse its discretion by imposing an aggravated sentence for possession of a firearm by a felon based on inducement where defendant initiated the idea of a robbery, convinced others to participate, and obtained a firearm

from one of the conspirators, who also provided a gun to another conspirator.

6. Sentencing— armed robbery—mitigating factor—support system in community—evidence insufficient

The trial court did not abuse its discretion when sentencing defendant McDowell for conspiracy to commit armed robbery, armed robbery, and possession of a firearm by a felon by not finding the mitigating factor that defendant has a strong support system in the community. A large family in the community and the support of that family is not sufficient by itself to demonstrate the separate mitigating factor of a community support system, and one witness' conclusory testimony as to the existence of a support structure is not sufficient to clearly establish the factor.

Appeal by defendants from judgments entered 3 April 2001 by Judge Gregory A. Weeks in Superior Court, Bladen County. Heard in the Court of Appeals 14 August 2002.

Attorney General Roy Cooper, by Brian L. Blankenship, Assistant Attorney General, for the State.

Attorney General Roy Cooper, by John J. Aldridge, III, Special Deputy Attorney General, for the State.

Paul Pooley for defendant Shawn Dell Kemp.

Appellate Defender Staples Hughes, by Constance E. Widenhouse, Assistant Appellate Defender, for defendant Edward Earl McDowell.

McGEE, Judge.

Shawn Dell Kemp (Kemp) was indicted on 19 January 2000 for conspiracy to commit armed robbery with a dangerous weapon. Edward Earl McDowell, Jr. (McDowell) was indicted 6 December 1999 for conspiracy to commit robbery with a dangerous weapon, robbery with a dangerous weapon, and possession of a firearm by a convicted felon. The evidence presented by the State at trial tended to show the following.

Sammie Ripley (Ripley) testified that defendants Kemp and McDowell, along with Timothy Rhodes (Rhodes), Antoine Barr (Barr), and Ripley were on the porch of Kemp's mother's house on the

morning of 3 August 1999. The topic of robbery was raised in the conversation and McDowell suggested they rob Felix Gillespie (Gillespie), whom McDowell had purchased drugs from the previous day. Kemp did not verbally respond to McDowell's statement, but Ripley testified that "everyone agreed to it."

Kemp, McDowell, Ripley, and Rhodes got into McDowell's car and drove to Gillespie's house. After finding that Gillespie was not at home, the four men drank beer while waiting at a friend's house across the road. The group returned to McDowell's car and circled the block. Rhodes said Kemp and Ripley would enter Gillespie's house and rob him, but Kemp stated that Gillespie knew him. McDowell then agreed to enter the house instead of Kemp. Kemp and Rhodes remained in the vehicle while Ripley and McDowell forced their way into the trailer where Gillespie was staying.

Ripley pointed a gun at Gillespie and ordered him to lie on the floor. McDowell placed a gun to the head of Brandon Williams (Williams), Gillespie's son. Ripley took Gillespie's wallet and then walked him into the back room in search of crack cocaine. Gillespie gave Ripley a bag containing the drugs. Gillespie heard a gunshot from another room in the trailer. A struggle ensued between Ripley and Gillespie during which Gillespie was shot in the shoulder. Ripley ran back through the trailer and exited with Gillespie in pursuit. They saw Williams lying face down on the floor with a puddle of blood in his back. Gillespie fired several shots at Ripley as they ran out of the trailer.

McDowell and Ripley flagged down the car being driven by Rhodes with Kemp as a passenger. The group returned to Kemp's mother's house and divided the money and drugs. Kemp received a portion of the drugs and a twenty dollar bill taken from Gillespie's wallet. McDowell received a portion of the money and the drugs.

Williams' mother testified that prior to her son being shot, he was an honor student, played football, and planned to attend college. He is now permanently unable to walk, uses a feeding tube, and requires twenty-four hour nursing care. She testified he can no longer speak but communicates by smiling, blinking, or raising his legs.

Kemp moved to dismiss the charges against him at the close of the State's evidence, which was denied by the trial court. Defendants did not present evidence. Kemp renewed his motion to dismiss the

charges, which was again denied by the trial court. The jury found Kemp guilty of conspiracy to commit armed robbery and the trial court sentenced him to a minimum of twenty months and a maximum of thirty-three months in prison. McDowell moved to dismiss the charges against him at the close of all the evidence, which was denied by the trial court. The jury found McDowell guilty of conspiracy to commit robbery with a firearm, robbery with a firearm, and possession of a firearm by a convicted felon. The trial court sentenced McDowell to a minimum of forty-six months and a maximum of sixty-five months in prison for conspiracy to commit robbery with a firearm, a minimum of 117 months and a maximum of 150 months in prison for robbery with a firearm, and a minimum of twenty months and a maximum of twenty-four months in prison for possession of a firearm by a convicted felon. Both defendants appeal and we separately address their arguments.

I. Shawn Dell Kemp

[1] Kemp argues that the trial court erred in denying his motions to dismiss the charges at the close of the State's evidence and at the close of all the evidence. Kemp contends that evidence of his participation in the conspiracy to commit armed robbery was legally insufficient to support the charge.

Upon review of a denial of a motion to dismiss, we must determine "whether there is substantial evidence: 1) of each essential element of the offense charged . . . and 2) of defendant's being the perpetrator of the offense. If each of these requirements are satisfied, the motion is properly denied." *State v. Richardson*, 308 N.C. 470, 474, 302 S.E.2d 799, 802 (1983); *see also State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990); *State v. Duncan*, 136 N.C. App. 515, 520, 524 S.E.2d 808, 811 (2000). Substantial evidence is defined as "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). All evidence is to be viewed in a light most favorable to the State and the State must have the benefit of all reasonable inferences from the evidence. *See State v. Baker*, 338 N.C. 526, 558, 451 S.E.2d 574, 593 (1994).

"A criminal conspiracy is an agreement between two or more people to do an unlawful act or to do a lawful act in an unlawful manner. In order to prove conspiracy, the State need not prove an express agreement; evidence tending to show a mutual, implied understand-

ing will suffice." *State v. Morgan*, 329 N.C. 654, 658, 406 S.E.2d 833, 835 (1991) (citations omitted); *see also State v. Martinez*, 149 N.C. App. 553, 561 S.E.2d 528 (2002). This evidence may be circumstantial or inferred from the defendant's behavior. *See State v. Choppy*, 141 N.C. App. 32, 39, 539 S.E.2d 44, 49 (2000), *disc. review denied*, 353 N.C. 384, 547 S.E.2d 817 (2001). The crime of conspiracy does not require an overt act for its completion; the agreement itself is the crime. *State v. Bindyke*, 288 N.C. 608, 616, 220 S.E.2d 521, 526 (1975). "Ordinarily the existence of a conspiracy is a jury question." *State v. Gary*, 78 N.C. App. 29, 35, 337 S.E.2d 70, 74 (1985), *disc. review denied*, 316 N.C. 197, 341 S.E.2d 586 (1986).

In the case before us, Kemp concedes that the State presented sufficient evidence to withstand a motion to dismiss regarding the existence of a conspiracy. However, Kemp argues that the evidence was insufficient to demonstrate that he was a member of that conspiracy.

The evidence presented at trial showed that Kemp was present when the idea to rob Gillespie was presented to the group by McDowell on the porch of Kemp's mother's house. Ripley further testified that "everybody agreed to it." After the agreement was reached, Kemp got into the vehicle with the others and rode to Gillespie's house.

Trial testimony further showed that Rhodes instructed Kemp and Ripley to enter the house and rob Gillespie. Rather than denying a role in the conspiracy, Kemp stated that Gillespie knew him and therefore he could not enter the trailer. Kemp remained in the vehicle with Rhodes and waited for McDowell and Ripley, picking them up after the robbery. Kemp also received twenty dollars taken from Gillespie's wallet, along with a portion of the drugs, after the robbery was completed.

The evidence presented at trial was sufficient to allow a reasonable mind to support a conclusion that Kemp was a perpetrator of the conspiracy. The evidence demonstrated that Kemp was present when "everyone agreed" to the conspiracy, rode with the other parties to and from Gillespie's house, and received a portion of the money and drugs taken during the robbery. Accordingly, we find evidence in the record to satisfy the substantial evidence standard for denying defendant's motion to dismiss the charge of conspiracy to commit armed robbery. We find no error by the trial court and affirm the trial court's denial of Kemp's motions to dismiss.

II. Edward Earl McDowell

[2] McDowell first assigns error to the trial court's failure to exclude victim Williams from the courtroom, contending that Williams was incompetent to understand or participate in the proceedings and his presence unfairly prejudiced the jury against McDowell. McDowell first argues that Williams' presence in the courtroom was "functionally equivalent to the presentation of evidence which defendant was without means to confront or cross-examine." McDowell states that the jury could simply look at Williams to determine the extent of his injuries, but that McDowell was prevented from cross-examining Williams about the injuries he sustained because Williams did not testify.

We agree with the trial court that Williams' presence in the courtroom did not constitute the presentation of evidence or its functional equivalent. Williams' courtroom presence for evidentiary purposes is not reflected in the trial testimony or the record, nor is there any indication that the State attempted to utilize his presence for evidentiary purposes. Furthermore, there is no indication that the jury based any part of its decision upon its observance of Williams' physical condition. The jury found McDowell not guilty of the charges of attempted murder and felonious assault of Williams. These verdicts in McDowell's favor tend to demonstrate the absence of prejudice caused by Williams' courtroom presence during trial.

McDowell argues that he was denied the opportunity to confront and cross-examine Williams because Williams was not called to testify and was incapable of communicating. However, McDowell could have called Williams as a witness and could have questioned him about his injuries. While the testimony indicated that Williams could not verbally communicate, it did tend to show that Williams could communicate through non-verbal means, such as blinking his eyes and lifting his legs. Thus, McDowell was not prevented from examining Williams as a result of his injuries and had sufficient opportunity to confront Williams as a witness if he wished.

McDowell further argues that, to the extent Williams' presence was evidence, it should have been excluded because the evidence was not presented in accordance with the North Carolina Rules of Evidence. Additionally, McDowell argues that the prejudicial effect of the evidence substantially outweighs any probative value and should have been excluded from evidence. McDowell cites *State v. Stokes*, 528 S.E.2d 430 (S.C. Ct. App. 2000), in support of this argument. In

Stokes, the South Carolina court ruled that it was error to admit a child into evidence to demonstrate the injuries sustained by the child during an assault. The court reasoned that submitting the injured child into evidence would "evoke great sympathy for the victim" and would likely produce a prejudiced response from the jury. *Id.* at 433.

Stokes is clearly distinguishable from the case before us. In *Stokes*, the injured child was actually physically presented and admitted into evidence as an exhibit. In the case before us, Williams was neither admitted into evidence as an exhibit nor tendered as a witness. He simply observed the trial from the seats in the courtroom that were open to the general public. There was no improper or overly prejudicial evidentiary admission because Williams' presence was never admitted or utilized as evidence during the trial.

[3] McDowell also argues that the trial court incorrectly interpreted the Crime Victims' Rights Act in refusing to exclude Williams from the courtroom. *See* N.C. Gen. Stat. § 15A-830 (2001). McDowell maintains that the Act's provision permitting a legal guardian to be present in the courtroom in lieu of a physically or mentally incompetent or minor victim, prohibits the actual victim from being in the courtroom as well. This aspect of the Crime Victims' Rights Act has not been previously addressed by our appellate courts and we disagree with McDowell's narrow interpretation of the statute.

N.C. Gen. Stat. § 15A-841 (2001) provides that

> [w]hen a victim is mentally or physically incompetent or when the victim is a minor, the victim's rights under this Article . . . may be exercised by the victim's next of kin or legal guardian.

In interpreting statutory language, we must give effect to the intent of the General Assembly. *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). We must primarily rely on the language of the statute itself and refrain from judicial construction in the absence of ambiguity in the express terms of the statute. *Id.* at 354, 542 S.E.2d at 671-72.

The Crime Victims' Rights Act was designed to safeguard the rights of victims as they confront the accused through the legal process. The statute does not state that the exercise of rights of a minor or an incompetent by his or her legal guardian exclude the actual victim from the benefits and rights granted by the statute. Such

a restrictive reading would effectively bar all minors from observing or participating in proceedings relating to events in which they were victims. This is contrary to the spirit of the Crime Victims' Rights Act and was not reflected by the language used by the General Assembly. The statute should not be construed to place the victim's rights in competition with the guardian's ability to exercise those rights in the event the victim is rendered incapable of exercising them. Instead, the guardianship provision should be viewed as supplemental to the victim's rights in order to ensure that the victim's enjoyment of his or her rights under the Act is not hindered by any incompetency.

In the present case, Williams, the victim, was a minor and physically incompetent to exercise some of his rights under the Crime Victims' Rights Act, thereby permitting his mother to properly exercise those rights on his behalf. However, there is no evidence that Williams was incapable of observing the trial due to his physical incompetency or any mental incapacity and he exercised this right by attending the trial proceedings. His mother's attendance alongside him is inconsequential to the issue raised by McDowell. The fact that she may have exercised some of Williams' rights during the process did not preclude Williams from attending the trial under the terms of the Crime Victims' Rights Act. Williams' presence at trial was proper, whether the right was asserted primarily on his own or by his mother.

The language and purpose of the Act requires us to give a more expansive reading to the statute than proposed by McDowell. He has failed to demonstrate error in the trial court's decision or any prejudice resulting from Williams' presence in the courtroom. The trial court did not err in refusing to exclude victim Brandon Williams from the courtroom.

[4] McDowell next argues the trial court erred in sentencing him in the aggravated range for conspiracy based on a finding that McDowell induced others to participate in the crime. McDowell argues that finding that he induced others to participate in the offense as an aggravating factor is erroneous as a matter of law because it is based on the same evidence used to support his conspiracy conviction.

Under the Structured Sentencing Act, the trial court must consider evidence of aggravating and mitigating factors and may then impose a sentence in its discretion. N.C. Gen. Stat. § 15A-1340.16(a) (2001). The State bears the burden of proving aggravating factors by a preponderance of the evidence. *Id.* A trial court's weighing of miti-

gating and aggravating factors will not be disturbed on appeal absent a showing that there was an abuse of discretion. *See State v. Wampler*, 145 N.C. App. 127, 549 S.E.2d 563 (2001); *see also State v. Daniels*, 319 N.C. 452, 355 S.E.2d 136 (1987). "Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation, and the same item of evidence shall not be used to prove more than one factor in aggravation." N.C.G.S. § 15A-1340.16(d); *see State v. Holt*, 144 N.C. App. 112, 547 S.E.2d 148 (2001). In *State v. SanMiguel*, 74 N.C. App. 276, 328 S.E.2d 326 (1985), our Court upheld the aggravated sentence of a defendant who pled guilty to conspiracy and was found by the trial court during sentencing to have induced others to participate in the conspiracy. Our Court reasoned that a conspiracy is an agreement to do a criminal act, while "inducement to enter an agreement necessarily precedes the agreement itself." *Id.* at 281, 328 S.E.2d at 330. The inducement of others is not an element of conspiracy and may be found independently of the conspiracy.

In the present case, testimony was presented that McDowell initiated the idea of robbing Gillespie. There is no evidence of a contemplated robbery or of targeting Gillespie outside of McDowell's suggestion. McDowell's inducement of others to join in the offense preceded the formation of the actual conspiracy and is not an element thereof. The evidence presented at trial is sufficient to prove the aggravating factor by a preponderance of the evidence. The trial court did not abuse its discretion by finding an aggravated factor of inducement and imposing an aggravated sentence for the charge of conspiracy.

[5] McDowell next argues that the trial court erred in finding as an aggravating factor that he induced others to participate in the offense of possession of a firearm by a felon because (1) the evidence in support of this factor was the same evidence used to support the conspiracy conviction and (2) this aggravating factor was inapplicable to the facts in this case. An aggravating factor should be found by the trial court only if the defendant behaved in a manner that increases his culpability for the offense. *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985). The aggravating factor must be proven by a preponderance of the evidence and the sentence imposed is within the discretion of the trial court. N.C.G.S. § 15A-1340.16(a).

In the case before us, the trial court found an aggravating factor based on inducement of others to participate in the offense of possession of a firearm by a felon. Prior to the formation of the conspir-

acy, there is no evidence that McDowell possessed a firearm on his own accord. McDowell obtained a firearm from Rhodes, one of the co-conspirators, who also provided a gun to Ripley. As previously discussed, McDowell initiated the idea of robbing Gillespie and convinced the others to participate in the conspiracy, including Rhodes. The evidence is sufficient to prove the aggravating factor by a preponderance of the evidence. The trial court did not abuse its discretion by finding an aggravated factor of inducement and imposing an aggravated sentence for the charge of possession of a firearm by a felon.

[6] Lastly, McDowell argues the trial court erred in not finding a statutory mitigating factor which was supported by reliable and uncontroverted evidence. A trial court must consider evidence of mitigating factors and may depart from the presumptive range of sentencing in its discretion. N.C.G.S. § 15A-1340.16(a). The defendant bears the burden of proving mitigating circumstances by a preponderance of the evidence. *Id.*; *State v. Noffsinger*, 137 N.C. App. 418, 429, 528 S.E.2d 605, 612 (2000). "A sentencing judge must find a statutory mitigating sentence factor if it is supported by a preponderance of the evidence." *State v. Crisp*, 126 N.C. 30, 41, 483 S.E.2d 462, 469, *disc. review denied and appeal dismissed*, 346 N.C. 284, 487 S.E.2d 559 (1997). A mitigating factor is proven when the evidence is substantial, " 'uncontradicted[,] and there is no reason to doubt its credibility.' " *State v. Truesdale*, 123 N.C. App. 639, 643, 473 S.E.2d 670, 672 (1996) (quoting *State v. Hood*, 332 N.C. 611, 623, 422 S.E.2d 679, 685 (1992)); *see also State v. Maness*, 321 N.C. 454, 364 S.E.2d 349 (1988). The trial court has wide latitude in determining the existence of mitigating factors. *State v. Heatwole*, 333 N.C. 156, 423 S.E.2d 735 (1992).

McDowell argues that the trial court erred in not finding the mitigating factor of McDowell having a "support system in the community." *See* N.C.G.S. § 15A-1340.16(e)(18). Trial testimony offered by McDowell tended to show that he took care of his family, supported his minor child, and had a good reputation in the community. Thus, the trial court correctly found the mitigating factors of family support and positive employment history. While McDowell's sister-in-law testified that there was a large support structure available to McDowell in the community, the evidence did not demonstrate that he was engaged in this support structure or intended to utilize it. Furthermore, no evidence was presented indicating what this support structure consisted of. Testimony demonstrating the existence of a

large family in the community and support of that family alone is insufficient to demonstrate the separate mitigating factor of a community support system. One witness' conclusory testimony as to the existence of a support structure is unsubstantial and insufficient to clearly establish the factor and does not compel a finding of the mitigating factor. *See Maness*, 321 N.C. at 463, 364 S.E.2d at 353-54. The trial court did not err in refusing to find the mitigating factor.

No error in the trial of Shawn Dell Kemp.

No error in the trial of Edward Earl McDowell.

Judges McCULLOUGH and BRYANT concur.

STATE OF NORTH CAROLINA v. JEFFREY B. FRIERSON

No. COA01-1250

(Filed 1 October 2002)

Evidence— hearsay—business records exception—company deposit slips—validation reports—bank account statements

The trial court did not err in an embezzlement case by admitting certain records into evidence including company deposit slips, validation reports, and bank account statements under the N.C.G.S. § 8C-1, Rule 803(6) business records exception to the hearsay rule even though defendant contends the State failed to lay a proper foundation, because: (1) the alleged counterfeit deposit slips were offered for the non-hearsay purpose of showing that they existed so that the jury could consider them as circumstantial evidence in determining whether defendant embezzled from his employer and concealed it by falsifying deposit records; (2) in regard to the valid deposit slips, evidence was presented that the slips were filled out at the end of each work shift, the slips were kept in the ordinary course of business, and the records were dated so that it was unnecessary for a witness to testify from personal knowledge that they were made at or near the time of the transaction in question; (3) in regard to the validation reports, evidence was presented that the reports were made and kept in the ordinary course of business, were authenti-

cated by a witness who was familiar with them and the system in which they were made, and the records were created at or near the time of the transactions involved; and (4) in regard to the bank account statements, evidence was presented by a witness familiar with the record keeping system at the bank that the statements were kept in the ordinary course of business and that the statements being offered into evidence were made on the pertinent dates.

Appeal by defendant from judgment entered 28 March 2001 by Judge L. Todd Burke in Guilford County Superior Court. Heard in the Court of Appeals 13 August 2002.

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

Causey Law Offices, by *Ames C. Chamberlin for defendant-appellant.*

HUNTER, Judge.

Jeffrey B. Frierson ("defendant") appeals from a judgment sentencing him to a suspended term of five to six months in prison upon his conviction of embezzlement. Defendant claims the trial court erred in admitting certain records into evidence under the business records exception to the hearsay rule because the State failed to lay a proper foundation. For reasons stated herein, we find no error.

Defendant was charged with embezzling money belonging to J.T. Enterprises, Inc., a management company that runs several McDonald's restaurants, including the one at issue in this case located at the intersection of South Elm-Eugene Street and Lee Street in Greensboro, North Carolina. Evidence at trial tended to show that defendant was promoted to manager of this McDonald's in January 1999. As manager, defendant's responsibilities included overseeing the day-to-day operations of the restaurant. Johnny Tart ("Mr. Tart") is the owner of this McDonald's and President of J.T. Enterprises, Inc.

At trial, Mr. Tart explained the procedure for handling and depositing cash receipts for the restaurant where defendant was employed. According to Mr. Tart, each shift manager takes the cash receipts from the registers for that shift's sales, counts the money and fills out a deposit slip for the checking account. The deposit slip and

the money are then put into a bag, sealed, placed in a safe and locked up. After placing the money and deposit slip in the safe, the shift manager logs into the restaurant's computer system using an identifying code and enters the deposit amount. Thereafter, the money and deposit slips are taken from the safe to the bank for deposit. According to Mr. Tart, at the particular McDonald's where defendant was employed, defendant was the only manager who had a car to drive to the bank, so he was given permission to take all of the deposits from the safe to the bank. Mr. Tart further testified that the only other person who could have taken deposits to the bank from that McDonald's was Mike Teeple, an operations manager in charge of four McDonald's restaurants and employed by J.T. Enterprises, Inc.

Once the bank deposit is made and a receipt of the deposit from the bank is received, the deposit is "validated" in the restaurant's computer. According to Mr. Tart, defendant was the only manager at the McDonald's restaurant where he was employed who was able to validate deposits. This validating procedure is merely a way of confirming that the cash has gone from the safe to the bank and that the total amount on the deposit slip from the bank matches the amount that was supposed to have been deposited.

After a deposit slip is validated, a cash sheet for that day is printed showing the amount of total sales, receipts and deposits. The deposit slips are then stapled to the cash sheet and validation sheet. The cash sheet, validation sheet, and deposit slips are then sent to the J.T. Enterprises, Inc. office where the deposits are entered into the checkbook so that a running balance can be kept for check writing purposes.

The State offered evidence in the form of validation reports, alleged counterfeit deposit slips, and First Union Bank CAP account statements to show that defendant validated deposits that the State alleged were never deposited into J.T. Enterprises, Inc.'s account at First Union Bank. Mr. Tart discovered that certain deposits that were supposed to have been made, according to the alleged counterfeit deposit receipts and validation sheets, were never made, when a check bounced on the J.T. Enterprises, Inc. account and when he reviewed bank statements which failed to show some deposits for which he had alleged counterfeit deposit receipts. Mr. Tart testified that when he reviewed the bank statements, he noticed that he was missing deposits for \$958.45, \$645.87, \$2,128.65, \$1,288.24, \$933.17, and \$936.02. These cash amounts were supposed

to have been deposited on 30 August 1999, 19 September 1999, 25 September 1999, 8 October 1999, 12 October 1999, and 16 October 1999, respectively.

Angie Barnett ("Ms. Barnett"), a commercial teller at First Union Bank where the McDonald's deposits were made, recognized defendant at trial since he was in the bank on a daily basis to make deposits for McDonald's. She testified that on 18 October 1999, defendant entered the bank, broke into her line, looked fidgety and nervous, handed her a folded deposit slip and asked her to drop it in the drop box, where the deposit receipts were kept for deposits made after the bank had closed. Later that day, Ms. Barnett inspected the folded deposit slip dated 16 October 1999 for $936.02 and noticed that this deposit slip did not look like other deposit slips used by First Union—the boldness of the print of the stamp was different and it was torn instead of perforated.

The defense presented evidence that other employees besides defendant would travel to the bank and make deposits for the restaurant. Defendant testified that occasionally Mike Teeple, the operations manager, would make deposits, call defendant at the restaurant, and tell him to validate the deposit when defendant had not seen the receipt from the bank.

Defendant was charged in a true bill of indictment with embezzlement. On 28 March 2001, a jury found him guilty as charged. Defendant appeals from the judgment entered upon the verdict.

Defendant contends the trial court erred in admitting into evidence the McDonald's franchise's deposit slips (both allegedly counterfeit and valid), validation reports, and First Union CAP account statements under the business records exception to the hearsay rule because the State failed to lay a proper foundation for the records' admission. For the following reasons, we conclude that these exhibits were either offered for a non-hearsay purpose or were properly admitted under the business records exception to the hearsay rule after the State laid a proper foundation for their admission.

At the outset, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2001). "If a statement is offered for any other purpose, it is not hearsay and is admissible." *State v. Dickens*, 346 N.C. 26, 46, 484 S.E.2d 553, 564 (1997). Hearsay is inadmissible unless it

falls within a recognized exception to the hearsay rule. *State v. Parker*, 140 N.C. App. 169, 539 S.E.2d 656 (2000), *appeal dismissed and disc. review denied*, 353 N.C. 394, 547 S.E.2d 37, *cert. denied*, 532 U.S. 1032, 149 L. Ed. 2d 777 (2001).

Business records are admissible as an exception to the hearsay rule if "made in the regular course of business, at or near the time of the transaction involved, and . . . authenticated by a witness who is familiar with them and the system under which they were made . . . ." *State v. Galloway*, 304 N.C. 485, 492, 284 S.E.2d 509, 514 (1981). It is unnecessary for the witness who authenticates the records to be the person who made them. *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985). Our Supreme Court has stated that "if the records themselves show that they were made at or near the time of the transaction in question, the authenticating witness need not testify from personal knowledge that they were made at that time." *Id.* at 533, 330 S.E.2d at 462.

In the case *sub judice*, we initially note that the alleged counterfeit deposit slips were offered to show that they existed so that the jury could consider them as circumstantial evidence in determining whether defendant embezzled from his employer and concealed it by falsifying deposit records. A statement is not hearsay where it is only offered to show that the statement was made, and not to prove the truth of the statement. *State v. Mitchell*, 135 N.C. App. 617, 620, 522 S.E.2d 94, 95-96 (1999). Therefore, the alleged counterfeit deposit slips do not constitute hearsay. Because we conclude the alleged counterfeit deposit slips were offered for a non-hearsay purpose, we need not address whether the State laid an adequate foundation for their admission under the business records exception to the hearsay rule.

The valid deposit slips were offered into evidence for the purpose of comparing them with the alleged counterfeit deposit slips in order to show that the latter were in fact fake. Since the valid deposit slips were offered for their truth, they are hearsay evidence. Mr. Tart, owner of the McDonald's in question and familiar with the records and the franchise's system of filling out deposit slips, testified that the deposit slips were filled out at the end of each work shift and usually took place three times a day. Mr. Tart further testified that the deposit slips were made and kept in the ordinary course of business. These records were dated and therefore it was unnecessary for a witness to testify from personal knowledge that they were made at or near the time of the transaction in question. *See Wilson*, 313 N.C. 516, 330

S.E.2d 450. We conclude the State laid an adequate foundation for the deposit slips and the trial court did not err in admitting them.

We now turn to the admission of the validation reports. The validation reports constitute hearsay since one of the purposes for which they were offered was to identify the "preparer" (person who prepared the deposit), "depositor" (person who carried the deposit to the bank), and "validator" (person who confirmed that the cash was actually deposited into the bank). Therefore, the validation reports were being offered to prove the truth of the matters asserted.

It is undisputed that the validation reports would fall under the business records exception to the hearsay rule. N.C. Gen. Stat. § 8C-1, Rule 803(6) (2001). However, defendant argues the State failed to lay a proper foundation for these records. We disagree.

In the instant case, Mr. Tart testified that the validation reports were made in the ordinary course of business and described in detail the system in which the validation reports are prepared, including the people who are allowed to prepare such reports. Defendant asserts that since Mr. Tart did not testify as to when the records were made, the validation reports were improperly admitted. However, the records in question have dates listed showing that the records were created at or near the time of the transactions in question and therefore were self-authenticating as to the time at which they were made. *See Wilson*, 313 N.C. 516, 330 S.E.2d 450. There was evidence that the validation reports were made and kept in the ordinary course of business, were authenticated by a witness who was familiar with them and the system in which they were made, and the records were created at or near the time of the transactions involved. Therefore, the State laid a proper foundation for these records and the trial court accordingly, did not err in admitting them.

Defendant finally assigns error to the trial court's admission into evidence the McDonald's First Union Bank CAP account statements because defendant claims the State failed to lay a proper foundation for their admission. The bank statements were offered into evidence for the purpose of showing the absence of some of the purported deposits and to show the true status of the company's deposits. Thus, these bank statements were offered for the truth of the matters asserted and therefore, constitute hearsay. The State used Ms. Louise Joyce ("Ms. Joyce"), an operations consultant with thirty-two years of experience with First Union Bank, to lay a foundation. Ms. Joyce testified that as an operations consultant, she was familiar with how the

record-keeping system at First Union works and that the First Union CAP account statements were made and kept in the ordinary course of business. She further testified that the statements being offered into evidence were made or printed 31 August 1999, 30 September 1999, and 31 October 1999. Thus, we conclude that a proper foundation was laid and these bank statements were properly admitted.

Because defendant offers no argument in support of his remaining assignments of error, they are deemed abandoned. N.C.R. App. P. 28(a), 28(b)(6).

No error.

Judges GREENE and TIMMONS-GOODSON concur.

FIRST UNION NATIONAL BANK OF DELAWARE, PLAINTIFF v. BANKERS WHOLESALE MORTGAGE, LLC, AND BWM MORTGAGE, LLC, DEFENDANTS

No. COA01-1543

(Filed 1 October 2002)

Jurisdiction— personal—long-arm statute—minimum contacts

The trial court did not err in a breach of contract and negligent misrepresentation case, arising out of the purchase of loans secured by mortgages or deeds of trust, by denying defendant limited liability companies' motion to dismiss based on lack of personal jurisdiction because: (1) North Carolina's long-arm statute permits the exercise of in personam jurisdiction when all payments made to defendant were mailed or wired from plaintiff's Charlotte, North Carolina offices during the four years that defendant did business with plaintiff, defendant registered with the North Carolina Commission of Banks in North Carolina to allow it to both broker and fund mortgage loans within the state of North Carolina, and defendant posted a $25,000 surety bond as a prerequisite for obtaining registration as a mortgage banker which remains in full force and effect in North Carolina; and (2) the exercise of in personam jurisdiction over defendants comports with due process when defendants purposefully availed themselves of the right to conduct business activities in North Carolina and had sufficient minimum contacts. N.C.G.S. §1-75.4

Appeal by defendants from judgment entered 19 September 2001 by Judge Richard D. Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 September 2002.

James, McElroy & Diehl, P.A., by Edward T. Hinson, Jr. and Richard S. Wright, for plaintiff-appellee.

Shumaker, Loop & Kendrick, LLP, by William H. Sturges, for defendants-appellants.

TYSON, Judge.

Bankers Wholesale Mortgage, L.L.C. and BWM Mortgage, L.L.C. ("defendant" or "BWM") appeal from the trial court's denial of their motion to dismiss for lack of personal jurisdiction. We affirm the order of the trial court.

I. Facts

Defendants are limited liability companies organized under the laws of the state of Wisconsin. Plaintiff is a corporation organized under the laws of the state of Delaware with a principal place of business in Charlotte, North Carolina. In January of 1996, BWM and plaintiff entered into a written "Continuous Buy-Sell Agreement" ("agreement") which stated plaintiff could purchase loans secured by mortgages or deeds of trust from BWM. Pursuant to this agreement, plaintiff purchased approximately forty-five loans from BWM over a four-year period. All payments made from plaintiff originated in and were mailed or wired from its Charlotte, North Carolina offices.

On 30 May 2000, BWM applied for registration with the North Carolina Commissioner of Banks to do business as a mortgage banker in the state of North Carolina pursuant to N.C. Gen. Stat. § 53-233 (2001). BWM posted a $25,000 surety bond as a prerequisite to obtaining registration pursuant to 4 NCAC 3I .0301(b)(1) (June 2002). The application was approved by the Commissioner on 16 June 2000. BWM's status allowed it to both broker and fund mortgage loans within the State of North Carolina. BWM never brokered or funded mortgage loans in North Carolina and allowed their registration to expire in January of 2001; however, the surety bond defendant posted remains in full force and effect.

In August of 2000, plaintiff discovered alleged misrepresentations in the files of three loans purchased from BWM. Defendant refused to repurchase these loans despite plaintiff's demand. Plaintiff sued

defendants in Mecklenburg County Superior Court for breach of contract and negligent misrepresentation. Defendants moved to dismiss based on lack of personal jurisdiction. The trial court found in part:

> 5. Over the course of four years, from execution of the Agreement in 1996 to 2000, BWM sold FUNB-DE approximately forty-five separate loans.
>
> 6. FUNB-DE is based in Charlotte, and all payments to BWM for loans pursuant to the Agreement were mailed or wired from FUNB-DE's Charlotte, North Carolina offices.
>
> 7. BWM applied for registration with the North Carolina Commissioner of Banks on May 30, 2000 to do business as a mortgage banker in this state. The Commissioner approved the application on June 16, 2000. BWM's registered status allowed it to both broker and fund mortgage loans within the state of North Carolina. However, BWM never brokered or funded mortgage loans within the State of North Carolina.
>
> 8. As a prerequisite to obtaining registration as a mortgage banker, BWM was required to post a $25,000.00 surety bond. Although BWM's registration expired as of January 31, 2001 and has not been renewed, the bond nevertheless remains in full force and effect.

The trial court concluded in part:

> 2. The payments transferred by FUNB-DE to BWM from its corporate offices for each loan purchased under the Agreement satisfies the requirements of the Long-Arm Statute.
>
> 3. BWM conducted substantial activity in North Carolina and therefore established the requisite minimum contacts with the forum state by receiving said payments from this state, by becoming registered as a mortgage banker in North Carolina, and by posting a bond in favor of the North Carolina Commissioner of Banks which remains in full force and effect.
>
> 4. By obtaining registration as a mortgage banker under North Carolina law, BWM also purposefully availed itself of the right to conduct business in North Carolina.
>
> 5. This Court's exercise of *in personam* jurisdiction over BWM does not offend traditional notions of fair play and substantial

justice and comports with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Defendants appeal.

II. Issue

Defendants' sole assignment of error is the trial court's denial of defendants' motion to dismiss for lack of personal jurisdiction.

III. In Personam Jurisdiction

"[A]n appeal lies immediately from refusal by the trial court to dismiss a cause for want of jurisdiction over the person where the motion is made pursuant to G.S. 1A-1, Rule 12(b)(2)." *Chamberlain v. Chamberlain*, 70 N.C. App. 474, 475, 319 S.E.2d 670, 671, *disc. rev. denied*, 312 N.C. 621, 323 S.E.2d 921 (1984). The determination of whether a trial court can properly exercise in personam jurisdiction over a non-resident defendant requires a two-part inquiry. First, the court must determine whether North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4 (2001), permits the exercise of in personam jurisdiction. *Cooper v. Shealy*, 140 N.C. App. 729, 732, 537 S.E.2d 854, 856 (2000) (*citing ETR Corporation v. Wilson Welding Service*, 96 N.C. App. 666, 386 S.E.2d. 766 (1990)). Second, the court must consider whether exercising in personam jurisdiction over the defendant comports with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Id. See also*, *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 614-15, 532 S.E.2d 215, 217, disc. rev. denied, 353 N.C. 261, 546 S.E.2d 90 (2000).

A. North Carolina's Long-Arm Statute

Defendants contend that North Carolina's long-arm statute does not permit the exercise of *in personam* jurisdiction over them. We disagree. Our Courts have held that our long-arm statue "should receive liberal construction, favoring the finding of jurisdiction." *Starco, Inc. v. AMG Bonding and Ins. Services, Inc.*, 124 N.C. App. 332, 338, 477 S.E.2d 211, 216 (1996) (*citing Marion v. Long*, 72 N.C. App. 585, 325 S.E.2d 300, *disc. review denied*, 313 N.C. 604, 330 S.E.2d 612 (1985)).

The long-arm statute provides for *in personam* jurisdiction over a party, who, when service of process is made upon it, has "engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." N.C. Gen. Stat. § 1-75.4(1)(d). North Carolina's long-arm statute also provides for *in*

personam jurisdiction in any action which "[r]elates to goods, documents of title, or other things of value shipped from this State by the plaintiff to the defendant on his order or direction." N.C. Gen. Stat. § 1-75.4(5)(d). It is well established that money is a "thing of value" contemplated under the long-arm statute. *See Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 630, 394 S.E.2d 651, 654-55 (1990) (*citing Pope v. Pope*, 38 N.C. App. 328, 248 S.E.2d 260 (1978)). Contacts found to constitute "substantial activity" under the long-arm statute include telephone conversations between out-of-state defendants and North Carolina plaintiffs and one or more payments to out-of-state payees with checks mailed from an in-state company's local checking account. *See Hiwassee Stables, Inc. v. Cunningham*, 135 N.C. App. 24, 519 S.E.2d 317 (1999) (single check written from in-state account); *ETR Corporation v. Wilson Welding Service*, 96 N.C. App. 666, 667, 386 S.E.2d 766, 768 (1990) (payment of single invoice); *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 630-31, 394 S.E.2d 651, 655 (1990) (payments from in-state checking account).

Here, the trial court found all payments made to defendant were mailed or wired from plaintiff's Charlotte, North Carolina offices during the four years that defendant did business with the plaintiff. The trial court further found that defendant registered with the North Carolina Commissioner of Banks in North Carolina, allowing it to both broker and fund mortgage loans within the state of North Carolina. As a prerequisite for obtaining this registration as a mortgage banker, defendant posted a $25,000 surety bond which remains in full force and effect in North Carolina. Based on the findings of fact in the record, we affirm the trial court's ruling that the exercise of *in personam* jurisdiction over BWM met the requirements of North Carolina's long-arm statute.

B. Due Process

When *in personam* jurisdiction is alleged to exist under the North Carolina long-arm statute, the question of authority raises the question of "whether the defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process." *Replacements, Ltd. v. Midwesterling*, 133 N.C. App. 139, 143, 515 S.E.2d 46, 49 (1999). Due Process requires defendant to have sufficient minimum contacts with the forum state before being hailed into court. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L.Ed.2d, 490, 501 (1980). Minimum contacts must be such that the exercise of personal jurisdiction does not offend 'traditional notions

of fair play and substantial justice.' *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945) (*quoting Milliken v. Meyer*, 311 U.S. 457, 463, 85 L.Ed. 278, 283 (1940)).

The test for sufficient "minimum contacts" is not mechanical, but instead requires individual consideration of the facts in each case. *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 114, 516 S.E.2d 647, 650 (1999). In determining whether sufficient minimum contacts exist, the Court should consider (1) the quantity of contacts between defendants and North Carolina; (2) the nature and quality of such contacts; (3) the source and connection of plaintiff's cause of action to any such contacts; (4) the interest of North Carolina in having this case tried here; and (5) convenience to the parties. *Fran's Pecans, Inc. v. Greene*, 134 N.C. App. 110, 114, 516 S.E.2d 647, 650 (1999) (*citing Marion v. Long*, 72 N.C. App. 585, 587, 325 S.E.2d 300, 302, *disc. rev. denied*, 313 N.C. 604, 330 S.E.2d 612 (1985). In addition to the "minimum contacts" inquiry, the Court should take into account (1) whether defendants purposefully availed themselves of the privilege of conducting activities in North Carolina, *International Shoe Co. v. Washington*, 326 U.S. 310, 319, 90 L.Ed. 95, 104 (1945), (2) whether defendants could reasonably anticipate being brought into court in North Carolina, *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980), and (3) the existence of any choice-of-law provision contained in the parties' agreement. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481-82, 85 L. Ed. 2d 528, 547 (1985) (concluding that courts should consider contractual choice-of-law provisions in determining whether a defendant has purposefully availed itself of the protection of the laws of the forum state).

Here, the trial court found that defendants purposefully availed themselves of the right to conduct business activities in North Carolina and had sufficient minimum contacts to establish *in personam* jurisdiction. Defendant purposefully registered in North Carolina as a mortgage banker under North Carolina laws and posted a $25,000 surety bond to obtain registration in North Carolina which remains in full force and effect today. Defendant sold plaintiff approximately forty-five loans during a four year period and received and accepted all payments from plaintiff's North Carolina offices. The contract between the parties contained a choice-of-law provision which stated the agreement "shall be construed according to the laws of North Carolina." We conclude BWM engaged in sufficient "minimum contacts" with North Carolina to satisfy Due Process and pur-

posefully availed itself of the right to conduct business in North Carolina. The trial court correctly found that the exercise of *in personam* jurisdiction over defendants comports with Due Process.

IV. Conclusion

We affirm the trial court's order denying defendants' motion to dismiss due to lack of personal jurisdiction and remand this action to the trial court for further proceedings.

Affirmed and remanded.

Judges McCULLOUGH and BRYANT concur.

JERRY L. HOLDEN, PLAINTIFF v. BARTLEY A. BOONE, DEFENDANT v. JOHN WILLIAMS PLUMBING, INC., AND BUILDERS MUTUAL INSURANCE COMPANY, INC., UNNAMED DEFENDANTS

No. COA01-1347

(Filed 1 October 2002)

Workers' Compensation— liens—modification—authority

The parties must apply to the Industrial Commission under N.C.G.S. § 97-17 to adjust a lien amount agreed to in a workers' compensation claim settlement approved by the Industrial Commission. In granting the superior court the discretion to determine subrogation amounts under N.C.G.S. § 97-10.2(j) to facilitate settlement of third party claims, the Legislature did not intend to undermine the authority of the Industrial Commission to do the same for workers' compensation claims.

Appeal by unnamed defendants from order entered 20 July 2001 by Judge William C. Gore in Brunswick County Superior Court. Heard in the Court of Appeals 22 August 2002.

The Del Re' Law Firm, by Benedict J. Del Re', Jr., for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by A. Graham Shirley and John H. Ruocchio, for unnamed defendant-appellants.

MARTIN, Judge.

The unnamed defendants, plaintiff's former employer and its workers' compensation insurance carrier, appeal from a superior court order decreasing their compensation lien against plaintiff's third-party recovery pursuant to G.S. § 97-10.2(j). Defendant Boone is not a party to this appeal.

On 6 March 1998, plaintiff was driving a van in the course of his employment with unnamed defendant-employer John Williams Plumbing, Inc. ("Williams Plumbing"), when he was rear-ended by defendant Boone. While there was $400.00 or less in damage to the van plaintiff was driving, plaintiff received personal injuries that required emergency room treatment and further medical care. Unnamed defendant-carrier Builders Mutual Insurance Company ("Builders Mutual") was the carrier on the risk at the time of the accident and accepted plaintiff's claim as a compensable injury by accident and began paying compensation pursuant to an I.C. Form 63.

After an initial diagnosis of neck strain by the emergency room physician, plaintiff received chiropractic treatment for neck pain but eventually had to undergo surgery for a cervical disc protrusion. As part of plaintiff's claim, Builders Mutual paid $12,266.46 in compensation for temporary total disability and $29,076.46 in medical bills. Based on a rating of 10 percent permanent partial disability of the cervical spine, plaintiff and Williams Plumbing and Builders Mutual entered into an Agreement of Final Settlement and Release ("the Agreement") on 13 May 1999. Under the terms of the Agreement, plaintiff received a lump sum payment of $15,000 and payment of all related medical bills up to the time of the Agreement. Under G.S. § 97-10.2, the temporary and permanent disability compensation and medical expenses paid by Builders Mutual would have provided Builders Mutual with a subrogation lien of $56,342.92. Recognizing the possibility of a third-party recovery against defendant Boone, the parties included the following provision in the Agreement:

> As a part of this settlement the Employer and Insurer agree to reduce their lien pursuant to G.S. 97-10.2 to a net of $24,151.00. The parties agree that, in the event of a third-party recovery, the Employer and Insurer will receive a total of $24,151.00, not subject to a reduction for counsel fees, costs or expenses and *not subject to reduction under G.S. 97-10.2(j)* (emphasis added).

The Agreement, which was executed after plaintiff had filed suit once against defendant Boone and taken a voluntary dismissal without prejudice, was approved by the Industrial Commission on 25 May 1999.

Plaintiff filed a second lawsuit against defendant Boone on 25 July 2000. As a result of mediation, plaintiff and Boone's insurance carrier, State Farm, reached a settlement in the amount of $30,000. Builders Mutual was present at the negotiations and refused requests to reduce its lien amount further. Due to this refusal, plaintiff moved the trial court to decrease Builders Mutual's lien pursuant to G.S. § 97-10.2(j). Plaintiff requested that the lien be reduced to $10,000 so that plaintiff, plaintiff's counsel, and Builders Mutual would each receive one-third of the recovery amount.

After a hearing on the motion, the trial court found that since the Agreement had been executed, plaintiff had been diagnosed with a "more substantial disability." It also found that "a favorable recovery to the plaintiff if the matter had gone to trial was speculative based upon representations from counsels for Plaintiff and Defendant based upon possible contributory negligence on the part of the Chiropractor . . . ." Thus, the trial court reasoned that Builders Mutual stood to lose any chance of redeeming its lien if the jury verdict was for defendant Boone. The trial court entered an order decreasing Builders Mutual's lien in accordance with plaintiff's request.

Following the entry of the order decreasing the lien, plaintiff took a voluntary dismissal with prejudice of the civil claim against defendant Boone. Williams Plumbing and Builders Mutual submitted timely notice of appeal from the order.

Williams Plumbing and Builders Mutual challenge the trial judge's order decreasing their compensation lien on two grounds. First, they assert that the trial court had no jurisdiction to modify the terms of the Agreement, which had been approved by the Industrial Commission. Next, they argue that even if the trial court had the necessary jurisdiction to decrease the lien, its decision to do so was an abuse of discretion. We agree with appellants' first argument, and thus do not reach their second.

The primary question presented by this appeal is whether G.S. § 97-10.2(j) authorizes a superior court judge to override the terms of a settlement agreement approved by the Industrial Commission with

respect to an agreed-upon lien amount for the employer and carrier. The statute does not specifically address the rights of an employer or its carrier to enforce an agreement with the injured employee with respect to a lien upon proceeds of a recovery agreement with a third party. The statute provides:

> (j) Notwithstanding any other subsection in this section, . . . in the event that a settlement has been agreed upon by the employee and the third party, either party may apply to the resident superior court judge of the county. . . to determine the subrogation amount. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, and the amount of cost of the third-party litigation to be shared between the employee and employer. The judge shall consider the anticipated amount of prospective compensation the employer or . . . carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien.

Furthermore, there is no case precedent precisely on point in North Carolina. The general language of G.S. § 97-10.2(j) has been held to be clear and unambiguous, granting a trial judge authority to use its discretion in adjusting a compensation lien amount, even if the result is a double recovery for the plaintiff. *See Allen v. Rupard*, 100 N.C. App. 490, 397 S.E.2d 330 (1990). However, under the facts of this case, this subsection would appear to be in tension with the Industrial Commission's exclusive jurisdiction over settlements of workers' compensation claims. *See* N.C. Gen. Stat. § 97-10.1, 97-17 (2002).

Under G.S. § 97-17, parties to a workers' compensation claim may submit a settlement agreement to the Industrial Commission for approval. If approved by the Commission, the agreement is considered binding on the parties involved, and can only be set aside by the Industrial Commission upon a showing of "fraud, misrepresentation, undue influence, or mutual mistake." *Id.*; *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 221 S.E.2d 355 (1976). In particular, the statute provides that unless a party can make such a showing:

> [n]o party to any agreement for compensation approved by the Commission shall deny the truth of the matters contained in the settlement agreement . . . .

N.C. Gen. Stat. § 97-17(a) (2002). Therefore, where a settlement agreement speaks specifically to the matter of the employer and carrier's lien, and the plaintiff-employee has agreed to the lien provision, G.S. § 97-17 indicates that the employee is bound by the agreement and only the Industrial Commission has jurisdiction to set it aside.

In *Turner v. CECO Corp.*, 98 N.C. App. 366, 390 S.E.2d 685 (1990), the plaintiff-employee sustained injuries while working for the defendant-employer for which a third-party tortfeasor was also potentially liable. The plaintiff and third party entered into a settlement agreement that was reviewed and approved by the trial court. The defendant-employer and carrier consented to this settlement and represented to the trial court that they had agreed to waive any lien they would have on the proceeds of the third-party settlement in exchange for the plaintiff's promise not to pursue two disputed compensation claims against the employer. However, at the same time the defendants submitted their agreement with the plaintiff to the Industrial Commission for approval, they also petitioned for a lien on the monthly payments plaintiff would receive under the third-party settlement. The Commission approved the settlement, but denied the defendants' petition for a lien. This denial was upheld on appeal, with this Court emphasizing that:

> [a]n agreement, approved by the Commission and otherwise valid, between the parties to a workers' compensation claim *as to the distribution between them of proceeds recovered from a third party action* is binding.

Id. at 370, 390 S.E.2d at 688 (emphasis added).

Although the *Turner* case differs from the case at hand in that the lien-related request was put to the Commission rather than the trial judge, it does indicate that provisions of a settlement agreement approved by the Commission that limit or waive a lien are to be considered binding on the parties. *See id.* Moreover, if an employer and carrier will not be allowed to escape a waiver of their lien, it stands to reason that employees should be held to their agreement to a certain lien amount, especially where the parties specifically agreed it was "not subject to reduction under G.S. 97-10.2(j)."

In his brief, plaintiff points out that one of the factors a judge should consider under G.S. § 97-10.2(j) is the "likelihood of the plaintiff prevailing at trial" and that the judge in this case found that a favorable recovery for plaintiff was "speculative" given the possible intervening liability of plaintiff's chiropractor. Under these circumstances, plaintiff characterizes Builders Mutual's refusal to reduce their lien as "forcing" plaintiff to go to trial.

Although G.S. § 97-10.2(j) may have been intended in part to avoid just such a situation, in a case where the employee, employer, and carrier have agreed in advance as to the disposition of any lien, a carrier's insistence on the agreed-upon lien amount may be viewed as an insistence on receiving the benefit of the bargain previously struck with the employee. These bargains have been committed to the discretion of the Industrial Commission. N.C. Gen. Stat. § 97-10.1, 97-17. Were we to hold otherwise, the Commission's authority to approve settlement agreements in which rights to a lien are an essential element of the bargain would be undermined. Parties would no longer be able to have confidence that agreements as to compensation liens were binding and would thus lose this useful bargaining element. Lastly, parties such as the defendants in this case, stripped of their rights by a trial court, would have no recourse other than further litigation either to set aside the agreement and receive reimbursement of the settlement consideration from plaintiff, or for breach of contract against plaintiff. We do not imagine that in granting the superior court the discretion to determine subrogation amounts under G.S. § 97-10.2(j) to facilitate settlement of third party claims, the Legislature intended to undermine the authority of the Industrial Commission to do the same for workers' compensation claims.

We hold that in order to adjust a lien amount agreed to in a workers' compensation claim settlement approved by the Commission, the parties must apply to the Industrial Commission under G.S. § 97-17. Plaintiff may not use G.S. § 97-10.2(j) to make an end-run around the duly executed and Commission-approved Agreement. The superior court had no jurisdiction to adjust a lien amount agreed upon in such an agreement. The order appealed is vacated.

Vacated.

Judges TYSON and THOMAS concur.

STATE OF NORTH CAROLINA v. BOBBY OSMOLD CURRY

No. COA01-1242

(Filed 1 October 2002)

1. Confessions and Incriminating Statements— plea negotiations—no authority—no offer made

The trial court did not err in a prosecution for indecent liberties with a student, statutory rape and statutory sexual offenses by denying defendant's motion to suppress statements to law enforcement officers where defendant contended that the statements were made in the course of plea negotiations and were thus inadmissible under N.C.G.S. § 8C-1, Rule 410, but the assistant district attorney made clear that she had no authority to negotiate a plea and no offer was laid on the table.

2. Evidence— prior sexual offenses—common plan or scheme

The trial court did not err in a prosecution for indecent liberties with a student, statutory rape, and statutory sexual offenses by allowing witnesses to testify about prior sexual activities with defendant where the ages of the victims, the manner in which defendant pursued them and gained their trust, and the sexual conduct were all sufficiently similar to be probative of defendant's common plan or scheme. N.C.G.S. § 8C-1, Rule 404(b).

Appeal by defendant from judgments dated 15 June 2001 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 13 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.

J. Clark Fischer for defendant appellant.

GREENE, Judge.

Bobby Osmold Curry (Defendant) appeals judgments dated 15 June 2001 entered consistent with a jury verdict finding him guilty of statutory rape, four counts of statutory sexual offense, and five counts of taking indecent liberties with a student.

On 19 May 2000, a warrant for Defendant's arrest was issued on charges of indecent liberties with a student and indecent liberties with a child, C.C., a fourteen-year-old who attended the school where

Defendant coached. Between 14 August and 6 November 2000, Defendant was indicted for statutory rape, statutory sexual offenses, and indecent liberties with a student. On 19 January 2001, Defendant filed a motion to suppress statements made by him during the "course of plea discussions with the District Attorney from the Prosecuting Authority," which he claimed were protected by N.C. Gen. Stat. § 8C-1, Rule 410.

At the pre-trial motion hearing, Defendant's attorney, David Freedman (Freedman)[1], testified he had spoken to an assistant district attorney sometime after the issuance of initial arrest warrant. At this time, the assistant district attorney told him "there may be possibilities of [Defendant] pleading to a string of indecent libert[y] [charges] although that was not an offer." The assistant district attorney emphasized she was "not in a position to make an offer because [the district attorney] had taken an interest in the case and anything . . . would have to go through him." She further stated that "in order to consider [an] offer, [Defendant] would have to be completely cooperative in the investigation." Subsequently, Freedman advised his client that "if he [were] fully cooperative, . . . hopefully [they] could work out a plea to something less than a charge of statutory rape." Defendant's attorney stressed that they did not have a firm offer and therefore "not a guarantee." Thereafter, Defendant agreed to a police interview. During the interview, held 16 June 2000, Defendant admitted to having fondled and digitally penetrated C.C. four to six times but denied having had vaginal intercourse with her. Defendant repeated this statement when he took part in a polygraph test on 5 July 2000.

The two law enforcement officers who interviewed Defendant on 16 June 2000 testified at the motion hearing that Defendant signed a "Miranda Rights Waiver" before they spoke to him. They also explained that they did not have any authority from the district attorney to negotiate a plea and did not convey to Defendant the impression they possessed such authority. Furthermore, neither Defendant nor Freedman attempted to negotiate with the law enforcement officers for a plea in any way.

At the conclusion of the motion hearing, the trial court denied Defendant's motion to suppress his statements to the law enforcement officers because (1) Defendant's motion to suppress was un-

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1. Freedman represented Defendant during the period testified to but not thereafter.

timely and (2) Rule 410 had not been violated. The trial court also denied Defendant's motion to have certain witness testimony excluded pursuant to N.C. Gen. Stat. § 8C-1, Rules 404(b) and 403. In support of this ruling, the trial court found that the testimony Defendant sought to have excluded was

> strikingly similar, in that the ages of the proffered witnesses . . . , the sexual activity engaged in by the witnesses and . . . Defendant[,] the nature of the relationship between the witnesses and . . . Defendant[,] . . . Defendant's position of leadership, trust or care with the witness[es][,] even the locale of some of the sexual activities was remarkably similar to those on trial . . . .

The trial court further noted that "due to the nature of the matters, they [were] not so remote in time as to make them inadmissible" and found the evidence proper to "prove intent . . . and common plan or scheme."

At trial, C.C. testified she attended Forsyth Country Day School (Forsyth) when she met Defendant. Defendant, who was the track coach at Forsyth, had asked C.C. in August 1999 to join the track team and help manage the football team. These activities brought C.C. into contact with Defendant "on a fairly regular basis." In time, Defendant began to drive C.C. home after practice on a daily basis and often waited at her home until C.C.'s mother arrived. On these occasions, Defendant frequently brought his seven-year-old son along, whom C.C. would babysit from time to time. Sometime around February 2000, Defendant began an intimate relationship with C.C., which included vaginal intercourse, oral sex, and digital penetration.

Over Defendant's objection, the State introduced into evidence Defendant's incriminating statements made to law enforcement on 16 June and 5 July 2000. The State also presented testimony, again over Defendant's objection, of five other females with whom Defendant had had sexual contact of the type allegedly engaged in with C.C. dating as far back as 1990. The females were between thirteen and fourteen years old at the time of the alleged acts, and Defendant was usually in some position of authority over them. Four of the five females were involved in athletics with Defendant. Similar to C.C.'s experience, Defendant began his relationship with two of them when both were high school students and recruited by Defendant to join the track team he coached. Defendant offered all five females

transportation to and from school and asked three of them to babysit his son.

The issues are whether the trial court erred: (I) in denying Defendant's motion to suppress his statements to law enforcement on 16 June and 5 July 2000 and (II) in allowing the State to offer 404(b) witnesses to testify about their sexual activities with Defendant.

I

[1] Assuming without deciding that Defendant's motion to suppress his statements to law enforcement was timely, we will analyze the substantive ground for the trial court's denial of Defendant's motion. The admissibility of statements made during plea negotiations is governed by N.C. Gen. Stat. § 8C-1, Rule 410. This rule is identical to Fed. R. Evid. 410. Thus, the case law that evolved under the federal rule is highly illustrative for our purposes.

According to Rule 410, "[a]ny statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn" is inadmissible at trial. N.C.G.S. § 8C-1, Rule 410(4) (2001). Hence, "[p]lea negotiations, in order to be inadmissible, must be made in negotiations with a government attorney or with that attorney's express authority." *United States v. Porter*, 821 F.2d 968, 977 (4th Cir. 1987); *United States v. Grant*, 622 F.2d 308, 313 (8th Cir. 1980) (statements made to law enforcement officials who had received express authority from the prosecuting attorney to make an offer to a defendant are statements made "in the course of plea discussions"). "In addition, conversations with government agents do not constitute plea discussions unless the defendant exhibits a subjective belief that he is negotiating a plea, and that belief is reasonable under the circumstances." *Sitton*, 968 F.2d at 957; *United States v. Robertson*, 582 F.2d 1356, 1367 (5th Cir. 1978). In ascertaining a defendant's subjective belief, "[t]he trial court must focus searchingly on the record to determine whether the accused reasonably had such a subjective intent, examining all of the objective circumstances." *Robertson*, 582 F.2d at 1367.

In this case, Freedman was told by an assistant district attorney "there may be possibilities of [Defendant] pleading to a string of indecent libert[y] [charges] although that was not an offer." The assistant district attorney made it clear that she had no authority to negotiate a plea bargain but indicated that the State might consider an offer if

Defendant cooperated in the investigation. Based on this conversation, Freedman told Defendant to cooperate in the hope that they "could work out a plea to something less than a charge of statutory rape."

In light of the assistant district attorney's representation that she lacked the authority to enter plea discussions, there is no evidence to substantiate a reasonable, subjective belief on the part of Defendant that he was "negotiating a plea" by cooperating with law enforcement. "Negotiation is [the] process of submission and consideration of offers until [an] acceptable offer is made and accepted," *Black's Law Dictionary* 1036 (6th ed. 1990), but necessarily requires the parties engaged in any type of negotiation to be authorized to do so. Moreover, "[p]lea bargaining implies an offer to plead guilty upon condition." *Porter,* 821 F.2d at 976-77. Neither the assistant district attorney, provided she had or purported to have the authority, made an offer to Defendant nor did Freedman or Defendant express an intent to plead guilty to certain charges. As no offer had been laid on the table, Defendant's statement to law enforcement could not have been made "in the course of plea discussions with an attorney for the prosecuting authority." Accordingly, the trial court did not err in denying Defendant's motion to suppress.

II

[2] Rule 404(b) is designed to prevent the admission into evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show that he acted in conformity therewith. [Such evidence] may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b) (2001); *see State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (describing Rule 404(b) as a rule of inclusion). " 'When evidence of the defendant's prior sex offenses is offered for the proper purpose of showing plan, scheme, system, or design . . . the "ultimate test" for admissibility has two parts: First, whether the incidents are sufficiently similar; and second, whether the incidents are too remote in time.' " *State v. Harris*, 140 N.C. App. 208, 212, 535 S.E.2d 614, 617 (citation omitted), *appeal dismissed and disc. review denied*, 353 N.C. 271, 546 S.E.2d 122 (2000). If, however, " 'similar acts have been performed continuously over a period of years, the passage of time serves to prove, rather than disprove, the existence of a plan.' " *State v. Frazier*, 344 N.C. 611, 616, 476 S.E.2d 297, 300 (1996) (defendant's prior acts of sexual abuse, which occurred continuously over a period

of approximately twenty-six years and in a strikingly similar pattern, were properly admitted into evidence to show a common plan or scheme) (citation omitted). Moreover, in instances where such evidence is offered to prove a defendant's intent to commit the similar sexual offense charged, our Supreme Court has stated a rule of liberal admission. *See State v. White*, 331 N.C. 604, 612, 419 S.E.2d 557, 561-62 (1992) (citing *State v. Boyd*, 321 N.C. 574, 578, 364 S.E.2d 118, 120 (1988) (evidence the defendant was found in bed naked with a young female relative on a prior occasion was admissible to demonstrate the defendant's intent or scheme to take sexual advantage of young female relatives left in his custody)).

The admissibility of evidence under Rule 404(b) is further "subject to the weighing of probative value versus unfair prejudice mandated by [N.C. Gen. Stat. § 8C-1,] Rule 403." *State v. Agee*, 326 N.C. 542, 549, 391 S.E.2d 171, 175 (1990). Because evidence that is probative of the State's case is necessarily prejudicial to the defendant, the question remains one of degree. *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56. "Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *Id.*

In this case, the ages of the victims, the manner in which Defendant pursued them and gained their trust through a combination of sports, babysitting, and rides to and from school and the sexual conduct in which Defendant had engaged with the victims are all sufficiently similar to be probative of Defendant's intent and common plan or scheme. These acts, which were continuously performed over the course of ten years cannot be said to be too remote in time to be inadmissible. *See Frazier*, 344 N.C. at 616, 476 S.E.2d at 300. Furthermore, in light of the strong similarities between the alleged acts, the probative value of admitting the evidence far exceeds any unfair prejudice to Defendant. *See* N.C.G.S. § 8C-1, Rule 403 (2001). As such, the trial court properly ruled on the admissibility of the witnesses' testimony.

No error.

Judges TIMMONS-GOODSON and HUNTER concur.

[153 N.C. App. 266 (2002)]

GINGER DAYLE HUNT, EMPLOYEE, PLAINTIFF v. TENDER LOVING CARE HOME CARE AGENCY, INC., EMPLOYER, PHARMACISTS MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA01-1571

(Filed 1 October 2002)

1. Workers' Compensation— going and coming rule—traveling salesman exception—not applicable

The traveling salesman exception to the going and coming rule did not apply in a workers' compensation case where plaintiff-nursing aide had worked for the entirety of her employment at one home and was not required to attend multiple patients with no fixed work location.

2. Workers' Compensation— going and coming rule—contractual duty exception—not applicable

The contractual duty exception to the going and coming rule did not apply in a workers' compensation case where plaintiff was employed as a nursing aide, her employer provided reimbursement for employees who traveled over 30 miles a day, and plaintiff did not travel that distance on the day of the accident. The Commission's conclusion that this employer's reimbursement policy was arbitrary did not bring the mileage policy within the exception.

3. Workers' Compensation— nurse's aide—automobile accident

The Industrial Commission erred in a workers' compensation case by concluding that plaintiff nursing aide's job duties as an in-home health care provider included traveling to and from the homes of patients where it was undisputed that plaintiff worked with one patient. Plaintiff had a fixed job location and her automobile accident does not fall under the traveling salesman exception to the going and coming rule.

Appeal by defendants from Opinion and Award of the North Carolina Industrial Commission entered 13 August 2001. Heard in the Court of Appeals 11 September 2002.

Musselwhite, Musselwhite, Musselwhite & Branch, by James W. Musselwhite, for plaintiff-appellee.

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

TYSON, Judge.

Defendants, Tender Loving Care Home Care Agency, Inc. ("employer") and Pharmacists Mutual Insurance Company ("carrier"), appeal from the opinion and award of the North Carolina Industrial Commission ("Commission"). The Commission reversed the decision of the Deputy Commissioner and awarded benefits to Ginger Hunt ("plaintiff") on the basis that the injury arose out of or in the course of employment. We reverse the opinion and award of the Commission.

I. Facts

Plaintiff was employed by employer as a certified nursing aide (CNA). Plaintiff's job included caring for Ms. Locklear, her sole patient, in Ms. Locklear's home and running errands for her. The plaintiff drove her personal vehicle to and from Ms. Locklear's residence and used it to run Ms. Locklear's errands. Plaintiff's work schedule was set from 7:30 a.m. through 3:30 p.m. on weekdays, and from 1:00 p.m. to 8:00 p.m. on Saturdays. Plaintiff had been employed in this position since March 1997. Ms. Locklear had been plaintiff's only patient during the entire period of her employment.

On Wednesday, 1 September 1999, plaintiff was injured in an accident while driving her personal vehicle to her home from Ms. Locklear's house. The distance between the two houses is approximately 13 miles.

At the time of the accident, employer reimbursed its CNAs for certain mileage expenses. Under employer's policy, CNAs who drove more than 30 miles on a weekday, either because they lived more than 15 miles from their patients or they were required to run patient errands, were reimbursed for excess mileage. All CNAs were reimbursed for their commuting and patient errand mileage on the weekends, regardless of the miles traveled. According to the employer, the policy concerning weekday travel was based on the fact that a CNA's average commute was approximately 15 miles one way.

Plaintiff's injury caused her to be out of work from 2 September 1999 through 28 February 2000. Plaintiff returned to work part-time

for the defendant on 29 February 2000, and returned to work full-time on 4 April 2000. Plaintiff suffers a 10% permanent partial impairment of her left leg.

After employer filed a Form 61, Denial of Claim, plaintiff filed a Form 33 Request for Hearing. The hearing was scheduled for 21 September 2000. Both parties agreed that no actual testimony or presence at the hearing was necessary and submitted stipulations and exhibits. The Deputy Commissioner issued an opinion denying plaintiff workers' compensation benefits because the accident arose while plaintiff was coming to and from work. The Full Commission reversed the Deputy Commissioner's decision on 13 August 2001 on the grounds (1) that these facts fell within the "traveling salesmen's exception" to the coming and going rule, and (2) that employer's reimbursement for mileage on some days and not others was arbitrary.

II. Issue

Defendants argue that the Commission erred as a matter of law in concluding that the plaintiff sustained an injury by accident arising out of and in the course of her employment.

III. Standard of Review

Our review of a decision of the Commission is limited to two issues: "(1) whether any competent evidence in the record supports the Commission's findings of fact, and (2) whether such findings of fact support the Commission's conclusion of law." *Creel v. Town of Dover*, 126 N.C. App. 547, 552, 486 S.E.2d 478, 480 (1997) (citing *Moore v. Davis Auto Service*, 118 N.C. App. 624, 627, 456 S.E.2d 847, 850 (1995)). The Commission's conclusions of law are reviewable. *Grant v. Burlington Industries, Inc.*, 77 N.C. App. 241, 247, 335 S.E.2d 327, 332 (1985) (citation omitted). "Whether an injury arises out of and in the course of a claimant's employment is a mixed question of fact and law, and our review is thus limited to whether the findings and conclusions are supported by the evidence." *Creel* at 552, 486 S.E.2d at 481 (citing *Hoyle v. Isenhour Brick and Tile Co.*, 306 N.C. 248, 251, 293 S.E.2d 196, 198 (1982)).

IV. "Arising Out of and in the Course of Employment"

Defendants contend that plaintiff's injury was not an accident that arose out of and in the course of plaintiff's employment with employer. Defendants argue that plaintiff worked a fixed work schedule and was commuting home from a fixed place of work. Defendants

assert that plaintiff's injury occurred within the "going and coming" rule, and that plaintiff is not entitled to reimbursement and workers' compensation benefits for this particular trip.

An employee is entitled to workers' compensation benefits for injuries sustained in an accident arising out of and in the course of employment. *See Ross v. Young Supply Co.*, 71 N.C. App. 532, 536, 322 S.E.2d 648, 652 (1984). "Arising out of" refers to the cause of the accident; the employee must be about the business of the employer. *Id.* (citing *Taylor v. Wake Forest*, 228 N.C. 346, 350, 45 S.E.2d 387, 390 (1947)). "In the course of" points "to the time, place, and circumstances under which an accident occurred." *Id.* at 536-37, 322 S.E.2d at 652. The accident must happen during the time and at the place of employment. *Id.* at 537, 322 S.E.2d at 652 (citation omitted).

The "going and coming" rule states that an accident occurring while an employee travels to and from work generally does not arise out of or in the course of employment. *Royster v. Culp, Inc.*, 343 N.C. 279, 281, 470 S.E.2d 30, 31 (1996). An employee is not engaged in the business of the employer while driving his or her personal vehicle to the place of work or while leaving the place of employment to go home. *Ellis v. American Service Co., Inc.*, 240 N.C. 453, 456, 82 S.E.2d 419, 421 (1954) (citations omitted). Accidents falling within this rule are not compensable. *Royster* at 281, 470 S.E.2d at 31.

A. "Traveling Salesman" Exception

[1] The "going and coming rule" is subject to some exceptions. The Commission found the "traveling salesman" exception to apply here. If travel is contemplated as part of the employment, an injury from an accident during travel is compensable. *Yates v. Hajoca Corp.*, 1 N.C. App. 553, 556, 162 S.E.2d 119, 120 (1968); *Ross v. Young Supply Co.*, 71 N.C. App. 532, 537, 322 S.E.2d 648, 652 (1984). Recognizing that traveling to and from work is inherent in nearly all jobs, Professor Larson notes that "for employees having fixed hours and place of work, [an accident occurring while] going to and from work is covered only *on the employer's premises.*" 1 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, § 13.01 (2001). Whether the travel is "part of the service" performed is also significant. *Id.* at § 14.01 (2001).

Plaintiff cites *Creel v. Town of Dover* for the proposition that an employee is within the course of employment when making a journey to perform a service on behalf of the employer. *Creel*, 126 N.C. App.

547, 486 S.E.2d 478 (1997). In *Creel*, the employer argued that because the plaintiff-employee, the town's mayor, did not have a job with fixed hours or fixed location, he could not take advantage of the "special errand" exception to the "coming and going" rule. *Id.* at 556, 486 S.E.2d at 483. This Court held the claim compensable under the "traveling salesman" exception because "employees with *no definite time and place of employment*, . . ., are within the course of their employment when making a journey to perform a service on behalf of their employer." *Id.* at 556-57, 486 S.E.2d at 483. The applicability of the "traveling salesman" rule to the facts at bar depends upon the determination of whether plaintiff had fixed job hours and a fixed job location.

Here, plaintiff had worked for employer over two years. During the entirety of plaintiff's employment with employer, she had worked solely with Ms. Locklear, at Ms. Locklear's home from 7:30 a.m. through 3:30 p.m. on weekdays, and from 1:00 p.m. to 8:00 p.m on Saturdays. Her employment did not require attending to several patients, at differing locations with no fixed work location. Plaintiff had fixed hours and a fixed work location. The plaintiff's job description does not fall into the "traveling salesman" exception.

B. The Contractual Duty Exception

[2] The Commission found plaintiff's claim compensable by also referencing the "contractual duty" exception as being applicable. The "contractual duty" exception provides that where an employer provides transportation or allowances to cover the cost of transportation, injuries occurring while going to or returning from work are compensable. *Puett v. Bahnson Co.*, 231 N.C. 711, 712, 58 S.E.2d 633, 634 (1950). For a claim to fall within this exception, the transportation must be provided as a matter of right as a result of the employment contract. *Whittington v. Schnierson & Sons*, 255 N.C. 724, 725, 122 S.E.2d 724, 725 (1961) (citations omitted). If the transportation is provided permissively, gratuitously, or as an accommodation, the employee is not within the course of employment while in transit. *Robertson v. Construction Co.*, 44 N.C. App. 335, 337, 261 S.E.2d 16, 18 (1979). Where the cost of transporting employees to and from work is made an incident to the contract of employment, compensation benefits have been allowed. *Puett v. Bahnson Co.*, 231 N.C. 711, 713, 58 S.E.2d 633, 634 (1950).

The Commission's order contains no findings of fact that defendant provided transportation or its expenses as incident to its employ-

ment contracts. Employer maintained a policy to reimburse and assist its employees who traveled over 30 miles a day during a weekday or at all during the weekend with the costs of commuting. The parties stipulated that plaintiff was not compensated for her travel because she did not travel over 30 miles on 1 September 1999. The present situation does not fall within the "contractual duty" exception to the "going and coming" rule. The Commission's conclusion of law that the partial mileage reimbursement policy of the employer was found to be "arbitrary" does not bring that mileage policy into the "contractual duty" exception.

V. The Commission's Misapplication of Fact to Law

[3] The Commission erred in its application of the findings of fact to its conclusions of law. The Commission found as fact that the "[p]laintiff's job duties included caring for the patient in the patient's home and running any errands for the patient. . . ." In its conclusions of law, the Commission states that "[d]ue to plaintiff's employment as an in-home health care provider, she was required to travel in her own vehicle back and forth to the *homes* of the patients and in providing services to the *patients*." (emphasis supplied). This conclusion of law indicates that plaintiff was responsible for caring for more than one patient. It is undisputed that plaintiff worked with only one patient. This fact is critically important because it provides a fixed job location. Because plaintiff has a fixed job location, the accident does not fall under the "traveling salesman" exception.

The Commission cites the Arkansas Supreme Court case of *Olsten Kimberly Quality Care v. Pettey*, 944 S.W.2d 524 (Ark. 1997), for the proposition that accidents occurring during the travel of a home care nurse from her home to that of her first patient are compensable. *Olsten*, 944 S.W.2d at 527. In *Olsten*, plaintiff-employee was a nurse that traveled daily to the homes of her *patients*. *Id.* at 525. Plaintiff's job description submitted her to the hazards of day-to-day travel in her own vehicle as she traveled between the *homes* of her *patients*. *Id.* at 527. As those facts are not present here, the *Olsten* case is distinguished.

VI. Summary

Plaintiff did not service more than one patient a day. Plaintiff had fixed hours and a fixed place of work. Her accident is not compensable under the "traveling salesman" exception. Employer was not under a contractual duty to provide plaintiff with transportation or

unqualified reimbursement. Plaintiff was injured while traveling to and from work and is precluded from receiving compensation benefits. We reverse the award of benefits by the Full Commission, and remand for entry of an order holding for defendant.

Reversed and Remanded.

Judges McCULLOUGH and BRYANT concur.

FRANCIS J. HALE, III, EMPLOYEE, PLAINTIFF v. NOVO NORDISK PHARMACEUTICAL INDUSTRIES, INC., EMPLOYER, ZURICH INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA01-1341

(Filed 1 October 2002)

1. Workers' Compensation— carpal tunnel syndrome—findings of fact—hobbies

There was competent evidence to support the Industrial Commission's finding in a workers' compensation carpal tunnel case that plaintiff's hobbies, activities, and part-time employment involved a significant use of his hands where there was evidence that plaintiff played his saxophone twenty minutes a day, handled baggage and cleaned airplanes as a part-time employee, and drove a motorcycle. Furthermore, for plaintiff to testify that these activities bothered his hands, he must have been using his hands.

2. Workers' Compensation— carpal tunnel syndrome—findings—causation

There was competent evidence to support the Industrial Commission's finding in a workers' compensation case that plaintiff's carpal tunnel syndrome was caused by something other than his work with defendant where the Commission found that other possible causes included his part-time employment, his work after he was terminated by defendant, his hobbies, a motorcycle accident, a car accident, and his preexisting cervical disc condition.

3. Workers' Compensation— carpal tunnel syndrome—findings—plaintiff's disc condition

There was competent evidence to support the Industrial Commission's finding in a workers' compensation carpal tunnel case that plaintiff's neurologist was not aware of plaintiff's cervical disc condition where the issue before the Commission was whether plaintiff's doctor knew that his disc condition caused numbness in plaintiff's upper right extremity and there was evidence that the doctor wrote a letter relating plaintiff's pain to an automobile accident rather than to his disc condition.

4. Workers' Compensation— carpal tunnel syndrome—findings—ability to work

There was competent evidence to support the Industrial Commission's finding in a workers' compensation carpal tunnel case that there was insufficient evidence that plaintiff's carpal tunnel syndrome precluded plaintiff from performing his work duties where the record is replete with evidence that plaintiff continued working and engaging in activities requiring significant use of his hands.

5. Workers' Compensation— carpal tunnel syndrome—findings—favorable to plaintiff—favorable conclusions not mandated

The Industrial Commission did not err by not making conclusions favorable to plaintiff after making certain findings favorable to plaintiff. The Commission has the duty to weigh the evidence and the authority to conclude that plaintiff's evidence was outweighed by defendant's evidence.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission entered 28 August 2001. Heard in the Court of Appeals 21 August 2002.

Scudder & Hedrick, by John A. Hedrick, for the plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, L.L.P., by Bruce Hamilton and Tracey L. Jones, for the defendants-appellees.

WYNN, Judge.

Plaintiff-employee Francis J. Hale appeals from the Industrial Commission's opinion and award concluding that his carpal tunnel

syndrome was not a compensable occupational disease under the North Carolina Workers' Compensation Act. He presents two issues: (1) Were the Industrial Commission's findings of fact supported by any competent evidence?; and (2) Were the Commission's conclusions of law supported by the Commission's findings of fact? We answer both questions, yes; accordingly, we affirm the Commission's opinion and award.

While employed by defendant Novo Nordisk Pharmaceutical Industries, Inc. for two years, through 20 November 1995, Mr. Hale used a hand-held calculator to verify calibration reports. Mr. Hale is right hand dominant, and entered the calculations with his middle and index fingers. According to Mr. Hale, the calculator was unusually stiff and lacked flexibility: "Depression of the keys required some pressure and some force."

Mr. Hale began experiencing stiffness, soreness, and swelling in his right hand; however, while employed by Novo Nordisk, he did not report this discomfort to his supervisor at any time. On 20 November 1995, Mr. Hale was terminated by Novo Nordisk for cause, and for reasons unrelated to the use of his right hand. After his termination, Mr. Hale worked for Environmental Specialties from January through May 1996. Mr. Hale experienced pain in his right hand when using a crimping tool and when handwriting.

On 8 May 1996, Mr. Hale sought medical treatment from Dr. Bertics, a neurologist. Mr. Hale told Dr. Bertics that his hand difficulties began in November 1995 after an automobile accident, and that his former job with Novo Nordisk required "a lot of keyboarding" that made his hand feel particularly sore and "funny." Dr. Bertics diagnosed Mr. Hale with carpal tunnel syndrome in his right hand. After receiving "a course of conservative treatment," Dr. Bertics did not recommend surgery.[1]

On 28 June 1996, Mr. Hale filed form 18 notifying the Commission and Novo Nordisk of his workers' compensation claim. On 12 September 2000, after a full hearing before a Deputy Commissioner, Mr. Hale's claim was denied. Following the full Commission's rejection of Mr. Hale's appeal from that denial, he appealed to this Court.

1. However, in February 1997 Mr. Hale was involved in another automobile accident which aggravated a preexisting C7 radiculopathy in his cervical spine. In May 1998 surgery was performed on Mr. Hale's spine and right hand.

[1] On appeal, Mr. Hale contends that the Commission's findings of fact are not supported by any competent evidence. In particular, he contests the following findings of fact by the Commission:

> 2. Prior to contracting the alleged occupational disease, plaintiff's hobbies included riding a motorcycle, playing the saxophone, and using and selling firearms. . . . All of these activities involved a significant use of plaintiff's hands and arms
>
> 14. Dr. Bertics opined that plaintiff's job as a validation technician with defendant-employer caused plaintiff's carpal tunnel syndrome and placed him at an increased risk of developing carpal tunnel syndrome. However, a consideration of the totality of the circumstances of this case leads to a different conclusion. . . . [P]laintiff's other activities and hobbies as well as his part-time job all involved the use of his hands and arms . . . . [T]he jobs held by plaintiff after leaving defendant-employer also involved many of the same tasks required by his job with defendant-employer, and it was during his [subsequent] employment that he first sought medical treatment for carpal tunnel problems. There is a lack of temporal relationship between the alleged onset of plaintiff's carpal tunnel syndrome and when he first sought medical treatment. . . . [Moreover], plaintiff had a diagnosed herniated cervical disc which was previously noted to have caused numbness in his upper right extremity. It does not appear that Dr. Bertics was aware of this condition.
>
> 15. Likewise, there is insufficient evidence to find by the greater weight of the evidence that the plaintiff's carpal tunnel condition, as presented in 1996 to Dr. Bertics and prior to [plaintiff's] 1997 automobile accident, precluded plaintiff from performing his work duties for the defendant-employer, or other similar work.

"Under our Workers' Compensation Act, 'the Commission is the fact finding body.' " *Adams v. AVX Corp.*, 349 N.C. 676, 680, 509 S.E.2d 411, 413 (1998) (quoting *Brewer v. Powers Trucking Co.*, 256 N.C. 175, 182, 123 S.E.2d 608, 613 (1962)). " 'The Commission is the sole judge of the credibility of the witnesses and the weight to be given their testimony.' " *Adams*, 349 N.C. at 680, 509 S.E.2d at 413 (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965)). The Commission's findings of fact " 'are conclusive on appeal if supported by any competent evidence.' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (quoting *Gallimore v. Marilyn's*

Shoes, 292 N.C. 399, 402, 233 S.E.2d 529, 531 (1977)). Thus, this Court is precluded from weighing the evidence on appeal; rather, we can do no more than " 'determine whether the record contains any evidence tending to support the [challenged] finding.' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted).

Mr. Hale first challenges finding of fact two, that Mr. Hale's hobbies, activities, and part-time employment "involved a significant use of [Mr. Hale's] hands." He contends that the Commission had no evidence presented concerning the use of his hands during these activities, and therefore, the Commission could not possibly conclude that this use, if any, was "significant." This argument is without merit.

As noted in Mr. Hale's and Novo Nordisk's briefs, the Commission's findings of fact " 'are conclusive on appeal if supported by any competent evidence.' " *Adams*, 349 N.C. at 681, 509 S.E.2d at 414 (citation omitted). Here, the record contained evidence that Mr. Hale: (1) played his saxophone twenty minutes a day; (2) handled baggage and cleaned airplanes at the airport as a part-time employee; and (3) drove a motorcycle. Mr. Hale testified that these activities "bothered" his hands. Accordingly, Mr. Hale must have used his hands if these activities "bothered" his hands. Following *Adams*, we conclude that finding of fact two is supported by competent evidence. Therefore, finding of fact two is binding on appeal.

[2] Mr. Hale next challenges two separate aspects of the Commission's finding of fact fourteen. He contends that "the Commission's 'findings' that [Mr. Hale's] carpal tunnel syndrome was caused by something other than his work with [Novo Nordisk] are not supported by any competent evidence and must be set aside." However, the Commission found, and the record reveals, that other possible causes of Mr. Hale's carpal tunnel syndrome included his part-time employment, his subsequent work after being terminated by Novo Nordisk, his hobbies, his motorcycle accident in 1995, his car accident in 1997, and Mr. Hale's preexisting cervical condition. Thus, the record shows competent evidence that Mr. Hale's carpal tunnel syndrome was caused by something other than his work with Novo Nordisk. Therefore, this aspect of finding of fact fourteen is binding on appeal.

[3] Mr. Hale also challenges the aspect of the Commission's finding of fact fourteen holding that it did not "appear that Dr. Bertics was aware of [Mr. Hale's cervical disc] condition." He contends that this finding of fact unreasonably discredited the testimony of Dr. Bertics.

He argues that, as of 23 July 1997, there is clear evidence in the record that Dr. Bertics knew of his disc condition. However, the issue before the Commission was not whether Dr. Bertics knew of the condition, but rather, whether Dr. Bertics knew that the condition "caused numbness in [Mr. Hale's] upper right extremity." The record reflects that Dr. Bertics wrote a letter on 18 November 1997 relating Mr. Hale's arm and neck pain to the 26 February 1997 automobile accident, rather than to Mr. Hale's cervical disc condition. Thus, there was competent evidence that Dr. Bertics was unaware that Mr. Hale's disc condition caused numbness in Mr. Hale's extremities. Therefore, this aspect of finding of fact fourteen is binding on appeal.

[4] Mr. Hale also challenges the Commission's finding of fact fifteen that "there is insufficient evidence . . . that the plaintiff's carpal tunnel condition . . . precluded plaintiff from performing his work duties for the defendant-employer, or other similar work." However, the record is replete with evidence that Mr. Hale continued working and engaging in activities requiring significant use of his hands. Mr. Hale worked for two and a half years after his termination by Novo Nordisk. Mr. Hale's subsequent employment included computer work and technical writing. Thus, the record shows competent evidence to find fact fifteen; accordingly, finding of fact fifteen is binding on appeal.

Having determined that the Commission's findings of fact are supported by competent evidence, we turn to the Commission's conclusions of law, which we review *de novo*. *Snead v. Carolina Pre-cast Concrete, Inc.*, 129 N.C. App. 331, 335, 499 S.E.2d 470, 472 (1998).

[5] In his appeal, Mr. Hale selects particular sentences from the Commission's findings of fact 14 and 16, and argues that these findings support a conclusion of law in his favor. For instance, Mr. Hale notes that the Commission found that "Dr. Bertics opined that plaintiff's job as a validation technician with defendant-employer caused plaintiff's carpal tunnel syndrome and placed him at an increased risk of developing carpal tunnel syndrome." Mr. Hale relies on this statement to support the proposition that "the Commission's findings of fact lead to a conclusion of law opposite from the conclusion reached by the Commission." This reliance is misplaced. In the very next sentence, the Commission states: "However, a consideration of the totality of the circumstances of this case leads to a different conclusion."

Even assuming that the Commission did find some facts favoring Mr. Hale, this would not mandate a conclusion in favor of Mr. Hale.

Rather, Mr. Hale bears the burden of proving his case by the "greater weight of the evidence." *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 654, 508 S.E.2d 831, 835 (1998). Thus, even if the Commission recited facts tending to support Mr. Hale, the Commission has the duty to weigh the evidence and the authority to conclude that Mr. Hale's evidence was outweighed by Defendants' evidence. *Hawley v. Wayne Dale Const.*, 146 N.C. App. 423, 428, 552 S.E.2d 269, 272 (2001) (holding that the "Commission may weigh the evidence and believe all, none or some of the evidence") (citations omitted).

In sum, because "there is some competent evidence in the record to support" the Commission's findings of fact, "we hold that the Commission's findings of fact [are] conclusive on appeal." *Adams*, 349 N.C. at 682, 509 S.E.2d at 414. We also conclude that these findings of fact support the Commission's conclusions of law.

Affirmed.

Judges CAMPBELL and HUNTER concur.

IN THE MATTER OF: MEB

No. COA01-1323

(Filed 1 October 2002)

Juveniles— special condition of probation—wear juvenile criminal sign in public

The trial court erred in a felony breaking and entering and felony possession of burglary tools case by requiring as a special condition of probation that a juvenile offender publicly wear a 12" x 12" sign with the words "I am a juvenile criminal," because: (1) N.C.G.S. § 7B-3001(b) merely provides a mechanism for individuals to obtain juvenile records upon a showing of need, and this special condition of probation transforms the privilege into a punishment against the juvenile; (2) the juvenile is not subject to the condition of intensive supervision under N.C.G.S. § 7B-2510(b)(5) since she has no prior record; and (3) the State's attempt to place the juvenile under a de facto house arrest by stating she can choose to stay home, rather than be required to wear the sign, is without statutory authority.

Appeal by juvenile from orders entered 19 February 2001 by Judge James M. Honeycutt in District Court, Iredell County. Heard in the Court of Appeals 21 August 2002.

William M. Willis, IV, for respondent-appellant.

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

WYNN, Judge.

This appeal presents an issue of first impression: Did the trial court err by requiring as a special condition of probation that a juvenile offender publicly wear a 12" x 12" sign with the words "I AM A JUVENILE CRIMINAL"? We answer, yes, and therefore, reverse the order of the district court.

On 1 October 2000, Appellant, a 14-year old female juvenile, and three other juveniles broke into a middle school and caused approximately $60,000 of damage to school property. As a result of the offense, Appellant was expelled from the ninth grade for the remainder of the school year.

On 18 January 2001, Appellant, who had no prior history of delinquency, admitted allegations supporting the offenses of Felony Breaking and Entering and Felony Possession of Burglary Tools. On 19 February 2001, the district court entered its Disposition Order, Supplemental Order, and Conditions of Probation. As conditions of Appellant's twelve-month probation, the court ordered her (1) to pay $250 in restitution; (2) to complete 50 hours of community service; (3) to follow the curfew established by the Court Counselor; (4) not to associate with codefendants; (5) not to go on the property of the damaged school; (6) not to use firearms, controlled substances, or alcohol; and (7) to submit to random drug testing.

As a special condition of probation, the court ordered Appellant "to wear a sign around her neck, 12" x 12" with the words—I AM A JUVENILE CRIMINAL—written in large letters." Moreover, the court provided that: "The Juvenile is to wear this sign whenever out in public, whenever she is away from her own residence." The court further ordered Appellant to wear the sign "until the school year term would have ended if the juvenile would have been attending school." This condition of probation is the sole issue on appeal.

N.C. Gen. Stat. § 7B-2510 states the law governing the imposition and conditions of juvenile probation in North Carolina. The section provides that "[t]he court may impose conditions of probation that are related to the needs of the juvenile and that are reasonably necessary to ensure that the juvenile will lead a law-abiding life . . . ." N.C. Gen. Stat. § 7B-2510(a) (2001). Although the section lists thirteen specific conditions of probation that may be applied, the trial court can require "the juvenile [to] satisfy any other conditions determined appropriate by the court." N.C. Gen. Stat. § 7B-2510(a)(14). "In deciding the conditions of probation, the trial judge is free to fashion alternatives which are in harmony with the individual child's needs." *In re McDonald*, 133 N.C. App. 433, 434, 515 S.E.2d 719, 721 (1999) (upholding a special condition of probation restricting a juvenile's access to television for a one year period).

Appellant contends the discretion of the trial court to fashion alternative conditions of probation is limited by specific statutory language protecting the confidentiality of juvenile offenders. To illustrate this first contention, Appellant points to two sections in the Juvenile Code. First, Appellant points to N.C. Gen. Stat § 7B-3100 which provides that: "Disclosure of information concerning any juvenile under investigation or alleged to be within the jurisdiction of the court that would reveal the identity of that juvenile is prohibited . . . ." Second, Appellant points to N.C. Gen. Stat. § 7B-2102(d) which provides that fingerprints and photographs taken pursuant to the Juvenile Code are not public records, and are not subject to public examination or inspection. Furthermore, Appellant notes that the Juvenile Code and the Criminal Law prohibit state agencies and law enforcement from releasing the names of juveniles who are registered sex offenders. *See* N.C. Gen. Stat. § 14-208.29 (2001) (providing that: "Under no circumstances shall the registration of a juvenile adjudicated delinquent be included in the county or statewide registries, or be made available to the public via internet"). Accordingly, Appellant argues that "if it is unlawful to disseminate a photograph of a juvenile to the public, logically it is not proper to require a juvenile to conduct her public business in open while wearing a sign that brands her as a 'juvenile criminal.' "

As a second contention, Appellant argues that the special condition of probation violates the "focus of the juvenile justice system" which "is not on punishing the juvenile offender but on achieving an *individualized* disposition that meets the juvenile's needs and promotes [her] best interests." *In re Groves*, 93 N.C. App. 34, 36, 376

S.E.2d 481, 482-83 (1989) (emphasis in original). In support of this contention, Appellant points to a North Carolina Supreme Court decision noting that the "[d]isposition of a juvenile . . . involves a philosophy far different from adult sentencing." *In re Vinson*, 298 N.C. 640, 666, 260 S.E.2d 591, 607 (1979) (holding that "a delinquent child is not a 'criminal.' The inference is that a juvenile's disposition is not intended to be a punishment but rather an attempt" at rehabilitation.); *see also*, *In re Burrus*, 275 N.C. 517, 529-30, 169 S.E.2d 879, 886-87 (1969). Thus, Appellant contends that requiring a juvenile to wear a sign stating "I AM A JUVENILE CRIMINAL" undermines the policy that a juvenile is not a criminal and unnecessarily subjects the juvenile to pubic humiliation and embarrassment.

In response to Appellant's first argument, the State concedes that many statutes restrict the dissemination of information about juvenile cases. The State contends, however, that various statutes permit disclosure of juvenile records "by order of the court." *See* N.C. Gen. Stat. § 7B-3001(b). The State argues that this statutory power, in conjunction with the court's authority under N.C. Gen. Stat. § 7B-2506(16) to "require the juvenile to comply with any other reasonable conditions . . . that are designed to facilitate supervision," provides a legal basis for the trial court's special condition of probation. Specifically, the State argues that because the juvenile was expelled from school, and because the juvenile's family dynamics did not ensure sufficient supervision, the trial court's order was reasonable in order to facilitate community supervision over the juvenile by alerting community members that the juvenile was in need of supervision.

In response to Appellant's second argument, the State contends that the sign does not undermine the policy of treating juveniles as delinquent because the sign is not a criminal punishment. Although the sign identifies the juvenile as a "criminal," the State contends that the sign is intended to emphasize the accountability and responsibility of the juvenile, and not the juvenile's criminal acts. Furthermore, the State argues that the sign does not cause unnecessary embarrassment, because the juvenile is not *required* to wear the sign: The juvenile is free to remain at home at all times.

We find the State's arguments unpersuasive. The State's first contention, that N.C. Gen. Stat. § 7B-3001(b) gives the trial court the discretion to open juvenile records to public display, is based on a misinterpretation of the relevant statute. Section 7B-3001(b) provides that "all law enforcement records and files concerning a juve-

nile . . . *shall* be withheld from public inspection." (emphasis added). Section 7B-3001(b) provides five exceptions to this general principle; namely, the juvenile, the juvenile's parents, the prosecutor, the juvenile court counselor, and law enforcement officers may examine juvenile records without a court order. "Otherwise, the records and files may be examined or copied only by order of the court." *Id.*

Indeed, the State's reliance on this section to support the proposition that a court can order a juvenile to publicly disclose her status as a juvenile delinquent is misplaced. At most, this section provides a mechanism for individuals to obtain juvenile records upon a showing of need. This section does not grant the court authority to place juvenile records in a public display case on the courthouse steps. This is precisely the situation we face today. The court's order, requiring the juvenile to wear a sign stating "I AM A JUVENILE CRIMINAL," opens the juvenile's records to public display rather than permitting individual inspection of juvenile records authorized "by order of the court" under Section 7B-3001(b). The special condition of probation in the present case, transforms the privilege of an individual to obtain access to juvenile records, upon a showing of need, into a punishment against the juvenile. This is impermissible.

The State's second contention, that the sign is a reasonable means of facilitating community supervision, violates the Juvenile Code. Under N.C. Gen. Stat. § 7B-2510(b)(5), the court may authorize the court counselor to order the juvenile to comply with conditions of "intense supervision." The court, however, "shall not" give the chief counselor the authority to order "intense supervision" unless the juvenile is subject to a class 2 disposition. *See* N.C. Gen. Stat. § 7B-2510(b)(5). Here, the Appellant has no prior record and, therefore, the Appellant is a class 1 disposition under N.C. Gen. Stat. §§ 7B-2507, 2508. Accordingly, Appellant is not subject to the condition of "intensive supervision," and the State's justification for the sign is without merit.

Finally, the State argues that Appellant is not *required* to wear the sign, because Appellant can choose to stay home. While this argument would solve the State's problems associated with "intensive supervision" and confidentiality in the State's first two arguments, it too is unpersuasive. Essentially, the State is arguing that Appellant has a choice between public ridicule and *de facto* house arrest. As noted previously, the first choice violates the Juvenile Code and public policy. The alternative choice, house arrest, is a remedy only available against class 2 juvenile dispositions. *See* N.C. Gen. Stat.

§§ 7B-2506(18), 2508(d). Here, Appellant is a class 1 disposition. Accordingly, the State's attempt to place the juvenile under a *de facto* house arrest is without statutory authority.

In sum, we reverse the trial court's special condition of probation requiring the Appellant to wear a sign reading "I AM A JUVENILE CRIMINAL." We, therefore, remand this matter to the district court for modification of the Conditions of Probation.

Reversed and Remanded.

Judges HUDSON and CAMPBELL concur.

WILSON COUNTY ON BEHALF OF LYN W. EGBERT, PLAINTIFF v. JAMES D. EGBERT, DEFENDANT

No. COA01-1334

(Filed 1 October 2002)

Child Support, Custody, and Visitation— modification—Full Faith and Credit for Child Support Orders Act

The trial court did not err by holding that a Florida court's purported modification of a North Carolina child support order did not operate as a modification of the North Carolina order, because: (1) North Carolina had exclusive jurisdiction over the parties by virtue of the first child support order in 1989 and by virtue of the residence and domicile of the custodian and children; (2) neither the record nor defendant's brief allege or indicate that written notice of consent was filed in North Carolina before or after the Florida modification in 1992 as required by U.S.C. § 1738B(e)(2)(b); (3) even if Florida had jurisdiction to enter an order, the Full Faith and Credit for Child Support Orders Act (FFCCSOA) requires the Court of Appeals to give the North Carolina child support order priority since the home state of the children is North Carolina; and (4) FFCCSOA can be applied retroactively since it imposes no new obligations and merely reinforces an existing obligation of child support.

Appeal by defendant from order entered 25 July 2001 by Judge William G. Stewart in District Court, Wilson County. Heard in the Court of Appeals 21 August 2002.

Beaman and King, P.A., by Charlene Boykin King, for plaintiff-appellee Wilson County o/b/o Lyn W. Egbert.

W. Michael Spivey, for the defendant-appellant James David Egbert.

WYNN, Judge.

James David Egbert appeals from an order upholding his obligation to pay child support to Lyn W. Egbert under a North Carolina court order notwithstanding contrary Florida court orders. On appeal, he presents one fundamental issue: Did 1992 and 1997 Florida child support orders modify and discharge his obligations under a 1989 North Carolina child support order? We answer, no, and summarize our holding today as follows: Interstate child support orders are governed by the Full Faith and Credit for Child Support Orders Act ("FFCCSOA"). 28 U.S.C. § 1738B. The FFCCSOA, enacted to reconcile multiple and inconsistent child support orders entered by different state courts under the Uniform Reciprocal Enforcement of Support Act ("URESA"), provides that:

> If 2 or more courts have issued child support orders for the same obligor and child, and more than 1 of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home State of the child must be recognized . . . .

Id. at § 1738B(3). Here, one child support order was entered by North Carolina in 1989, and two child support orders were entered by Florida in 1992 and 1997 respectively. However, North Carolina is the home state of the children who are the subjects of the child support order. Mr. Egbert made every child support payment to Ms. Egbert in North Carolina, where Ms. Egbert maintained continuous custody of the children. In accordance with the Supremacy Clause of the United States Constitution, FFCCSOA mandates this Court to recognize the North Carolina order as the controlling law in this case. Therefore, we affirm the judgment of the District Court.

The underlying facts to this matter show that on 27 December 1989, an order was entered in District Court, Wilson County, North Carolina requiring Mr. Egbert to pay $520.00 per month in child support. Subsequently, Mr. Egbert moved to the State of Florida. On 1 April 1991, the North Carolina order was registered in Hernando County, Florida pursuant to URESA. On 23 November 1992, the

Circuit Court in Hernando County, Florida entered an order reducing the child support from $520 to $284.20 per month.

Over the next five years, the Florida order had the effect of reducing Mr. Egbert's child support obligation by $14,901.43. The order also recited that in 1992, Mr. Egbert owed child support arrears in the amount of $14,055.39. Mr. Egbert was ordered to pay his arrearage at the rate of $56.84 per month. On 26 August 1997, the Circuit Court, Hernando County, entered an order dismissing the registered child support and arrears action under URESA, because Mr. Egbert had completed his financial obligations under the Florida order of 23 November 1992.

On 23 April 2001, the North Carolina District Court entered a judgment against Mr. Egbert, finding Mr. Egbert had accumulated a $14,901.43 arrearage by virtue of Mr. Egbert's failure to pay $520 per month to Ms. Egbert, pursuant to the 1989 North Carolina child support order. On 8 June 2001, Mr. Egbert filed a Rule 60(b) Motion requesting the District Court to vacate and set aside the judgment. At the hearing, Mr. Egbert stipulated that the amount of arrearage owed to Ms. Egbert was not in dispute. Although Mr. Egbert agreed that he validly owed $14,901.43 in arrearage pursuant to the North Carolina child support order, Mr. Egbert argued that this amount should be dismissed, in its entirety, because the URESA action was dismissed in Florida on 26 August 1997.

On 19 July 2001, the District Court in Wilson County, North Carolina denied Mr. Egbert's Rule 60(b) Motion. The District Court held that the Florida court's modification of the 1989 North Carolina order was ineffective, and therefore, Mr. Egbert owed $520 per month from January 1, 1990 forward. Mr. Egbert contends that the District Court erred by holding that the Florida court's modification of a North Carolina child support order did not operate as a modification of the North Carolina order.

Interstate child support orders are governed by FFCCSOA. 28 U.S.C. § 1738B. Congress passed FFCCSOA because multiple and inconsistent child support orders, under statutory schemes like URESA, were contributing to: (1) excessive relitigation over existing orders; (2) a disregard of state child support orders "resulting in massive arrearages nationwide"; and (3) an epidemic of non-custodial parents failing to pay regularly scheduled child support for "extensive periods of time, resulting in substantial hardship for the children" and

their custodians. FFCCSOA, Pub. L. No. 103-383(2)(a), 108 Stat. 4063 (codified as amended at 28 U.S.C. § 1738B (1994)). In response to these concerns, Congress passed FFCCSOA for the purpose of establishing "national standards" to facilitate the payment of child support, discourage interstate conflict over inconsistent orders, and to avoid jurisdictional competition. *Id.*, Pub. L. No. 103-383(2)(b), 108 Stat. 4063 (codified as amended at 28 U.S.C. § 1738B (1994)).

The FFCCSOA is a federal law, and therefore, preempts any contrary or inconsistent state law under the Supremacy Clause of the United States Constitution.[1] U.S. Const. art. VI, cl. 2; *see Kelly v. Otte*, 123 N.C. App. 585, 589, 474 S.E.2d 131, 134 (1996), *disc. review denied*, 345 N.C. 180, 479 S.E.2d 204 (1996). Moreover, in *Twaddell v. Anderson*, this Court held that FFCCSOA applies retroactively because: (1) the statute is primarily procedural in nature; (2) retroactive application does not result in manifest injustice; and (3) a failure to apply the statute retroactively would frustrate the essential purpose of the Act. *Twaddell v. Anderson*, 136 N.C. App. 56, 66, 523 S.E.2d 710, 717 (1999). Accordingly, we will apply FFCCSOA retroactively to the facts of this case.

Under FFCCSOA, once a state enters a child support order, that state retains "continuing, exclusive jurisdiction over the order if the State is the child's state or the residence of any individual contestant unless the court of another State, acting in accordance with subsections (e) and (f), has made a modification of the order." 28 U.S.C. § 1738B(d).

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1. Mr. Egbert argues that URESA, rather than FFCCSOA, should apply. If URESA is applied, Mr. Egbert contends, the North Carolina order was properly modified by the Florida Circuit Court. To support this proposition, Mr. Egbert points to URESA's "anti-nullification clause" which provides that:

> A support order made by a [North Carolina court]. . . is not nullified by a support order made by a . . . court of any other state . . . unless otherwise specifically modified by the court.

N.C. Gen. Stat. § 52A-21 (repealed 1996). Mr. Egbert argues that Florida specifically modified the North Carolina order by altering Mr. Egbert's child support obligation, and by the Florida court's conclusion that: "All other issues addressed in the parties' Judgment entered in . . . North Carolina . . . not modified herein shall remain in full force and effect." Although Mr. Egbert may be correct in his application and interpretation of URESA, URESA is not the controlling law. Congress enacted FFCCSOA precisely to address conflicting and inconsistent support orders. Before the enactment of FFCCSOA, URESA, and similar statutes, provided little guidance to courts regarding the resolution of inconsistent child support orders. FFCCSOA is a procedural and remedial statute, which provides courts with specific instructions regarding the priority to give multiple and successive child support orders.

Under subsection (e), a State can modify an existing support order from another state if "each individual contestant has filed written consent with the State of continuing, exclusive jurisdiction for a court of another State to modify the order and assume continuing exclusive jurisdiction over the order." 28 U.S.C. § 1738B(e)(2)(b); *see also Hinton v. Hinton*, 128 N.C. App. 637, 639, 496 S.E.2d 409, 411 (1998).

Here, Mr. Egbert argues that Ms. Egbert consented to the Florida modification, and therefore, either FFCCSOA should not apply or Ms. Egbert should be estopped from asserting that the North Carolina order was not properly modified. We disagree.

Section 1738B(e)(2)(b) requires the parties to file written notice of the consent to change jurisdiction with the state currently having exclusive jurisdiction. In this case, North Carolina had exclusive jurisdiction over the parties by virtue of the first child support order in 1989, and by virtue of the residence and domicile of the custodian and children. Neither the record nor Mr. Egbert's brief allege or indicate that written notice of consent was filed in North Carolina before or after the Florida modification in 1992. Thus, the record shows that the Florida court's modification was not done in accordance with subsection (e).

Moreover, even assuming that Florida had jurisdiction to modify the North Carolina order, under subsection (f), if one or more child support orders have been entered by different state courts, and each court has exclusive jurisdiction, FFCCSOA mandates a reviewing court to apply the following rule in determining which order has priority:

> If 2 or more courts have issued child support orders for the same obligor and child, and more than 1 of the courts would have continuing, exclusive jurisdiction under this section, an order issued by a court in the current home State of the child must be recognized . . . .

28 U.S.C. § 1738B(f)(3).

Here, the home state of the children is North Carolina. Therefore, even if Florida had jurisdiction to enter an order, FFCCSOA requires this Court to give the North Carolina child support order priority.

Next, Mr. Egbert contends that even if FFCCSOA is applicable, FFCCSOA should not be retroactively applied because its application

would result in manifest injustice to Mr. Egbert. In support of this proposition, Mr. Egbert relies on this Court's reasoning in *Twaddell* providing that "legislation that is interpretive, procedural, or remedial must be applied retroactively, while substantive amendments are given only prospective application." *Twaddell*, 136 N.C. App. at 65, 523 S.E.2d at 717. Mr. Egbert is correct in noting that a statute may not be applied retroactively that abridges substantive rights. *Garner v. Garner*, 300 N.C. 715, 718, 268 S.E.2d 468, 471 (1980). However, as this Court held in *Twaddell*,

> the [FFCCSOA] imposes no new obligation, because the obligation of support arises at the birth of the minor child. The statute merely reinforces an existing obligation of child support. It deals with remedial matters of great Congressional concern, i.e., the inability to enforce interstate child support orders, resulting in arrearages. Finally, the obligor is not deprived of a right that has matured or become unconditional, because the preexisting obligation remains the same.

Twaddell, 136 N.C. App. at 65, 523 S.E.2d at 717.

In fact, Mr. Egbert conceded this proposition in his Rule 60(b) Motion hearing on 19 July 2001. In that hearing, the District Court noted, in paragraph 6, that Mr. Egbert stipulated that there was "no dispute that the order entered by Judge Evans set forth the correct amount [of arrearage] considering the terms of the original North Carolina order . . . ."[2] Accordingly, application of FFCCSOA does not impose any new obligations upon Mr. Egbert or result in manifest injustice, rather application of FFCCSOA "merely reinforces an existing obligation of child support." *Twaddell*, 136 N.C. App. at 65, 523 S.E.2d at 717.

Affirmed.

Judges HUDSON and CAMPBELL concur.

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2. Mr. Egbert asks this Court to reconsider our finding in *Twaddell* that FFCCSOA applies retroactively. However, the North Carolina Supreme Court has consistently held that: "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Therefore, this Court does not have the authority to overrule *Twaddell*.

NATIONAL TRAVEL SERVICES, INC. AND PLAZA RESORTS, INC. D/B/A RAMADA PLAZA RESORTS ORLANDO/FT. LAUDERDALE VACATIONS, PLAINTIFFS v. STATE OF NORTH CAROLINA EX REL. ROY A. COOPER, III, ATTORNEY GENERAL, DEFENDANT

No. COA01-1096

(Filed 1 October 2002)

Declaratory Judgments— letter threatening legal action—no actual controversy

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' complaint seeking a declaratory judgment to determine whether their advertising package complied with the parameters set by a consent judgment, because: (1) there is no actual controversy to invoke the jurisdiction of the trial court, and courts do not issue anticipatory judgments resolving controversies that have not arisen; and (2) North Carolina courts have historically required more than anticipation of future action based on a letter threatening legal action.

Appeal by plaintiffs from order entered 1 June 2001 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 15 May 2002.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Robin K. Vinson; Greenspoon Marder Hirschfeld Rafkin Ross & Berger by Gerald Greenspoon, Esq., Richard W. Epstein, Esq., and Robby H. Birnbaum, Esq., for plaintiff appellants.

Attorney General Roy Cooper, by Assistant Attorney General Harriet F. Worley, for defendant appellee.

McCULLOUGH, Judge.

Plaintiffs National Travel Services, Inc. and Plaza Resorts, Inc., d/b/a Ramada Plaza Resorts Orlando/Ft. Lauderdale Vacations, appeal from an order by Judge Cashwell dismissing their complaint for Declaratory Judgment on 30 May 2001.

Plaintiff National Travel is a Nevada corporation that promotes and sells vacation packages throughout the country. Plaintiff Plaza Resorts is a Florida corporation that also promotes and sells vacation packages throughout the country.

The State of North Carolina has had dealings and litigation with plaintiffs prior to this suit. North Carolina, along with fifteen other states and the District of Columbia, filed actions for unfair and deceptive business practices against plaintiffs. All parties settled and consent judgments were filed in the respective states. The North Carolina consent judgment, filed in Wake County Superior Court on 8 February 2000, enjoined plaintiffs from engaging in certain vacation marketing and sales practices used to lure consumers to Florida so they could be solicited to purchase time share properties there. The consent judgment set forth parameters and guidelines for future solicitations and advertisements by plaintiffs. In addition, plaintiffs had to reimburse some previous customers and pay further damages and penalties.

As for the present controversy, plaintiffs developed and prepared a new advertisement package which they believed complied with the parameters set by the consent judgment. Rather than proceed with distribution of the package to the public, plaintiffs submitted it to the North Carolina Attorney General's Office. This was done "to ensure that the Attorney General would not inadvertently bring an enforcement action without thoroughly considering the mailing."

According to the Attorney General's Office, it consulted other states while reviewing the package. On 3 November 2000, it sent a detailed letter to plaintiffs outlining ways in which the proposed solicitations did not comply with the consent judgment. The letter, in pertinent part, read:

> If Ramada Plaza insists on attempting to use solicitations of this type in North Carolina, this office will take whatever action necessary to enjoin their use and seek to have the Court exercise its contempt powers for violations of the Consent Judgment.

Plaintiffs filed a complaint for declaratory judgment on 1 February 2001. Essentially, plaintiffs' complaint asked the trial court to determine whether or not the advertisement package complied with the parameters set by the consent judgment. On 13 March 2001, the State made its motion to dismiss the complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted on the grounds that this matter is not one that can be determined in a declaratory judgment under the provisions of N.C. Gen. Stat. § 1-253, *et seq.* On 30 May 2001, the trial court entered an order allowing the State's motion and dismissing the complaint. Plaintiffs appeal.

Plaintiffs' only assignment of error is that the trial court erred by dismissing the complaint pursuant to Rule 12(b)(6) in that the record shows that the complaint states a valid claim for relief under Rule 8 of North Carolina Rules of Civil Procedure and that the trial court had jurisdiction over the subject matter of the case.

We hold that there is no actual controversy to invoke the jurisdiction of the trial court, and therefore we need not address the merits of this appeal.

As mentioned above, plaintiff brought this action under North Carolina's Uniform Declaratory Judgment Act, N.C. Gen. Stat. §§ 1-253 through 1-267 (2001). N.C. Gen. Stat. § 1-253 provides that our courts "shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed." N.C. Gen. Stat. § 1-253 (2001). N.C. Gen. Stat. § 1-254 states:

> Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

N.C. Gen. Stat. § 1-253 (2001).

In actions involving a request for a declaratory judgment, our Supreme Court "has required that an actual controversy exist both at the time of the filing of the pleading and at the time of hearing." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 585, 347 S.E.2d 25, 30 (1986).

Our Supreme Court has stated that:

> We have described an actual controversy as a "jurisdictional prerequisite" for a proceeding under the Declaratory Judgment Act, the purpose of which is to "preserve inviolate the ancient and sound juridic concept that the inherent function of judicial tribunals is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status or other legal relations." *Adams v. North Carolina Dept. of Natural and Economic Resources*, 295 N.C. [683] at 703, 249 S.E.2d [402] at

> 414 (quoting *Lide v. Mears*, 231 N.C. [111] at 118, 56 S.E.2d [404] at 409 [(1949)]). In *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 22 S.E.2d 450 (1942) this Court acknowledged that, although the actual controversy rule may be difficult to apply in some cases and the definition of a "controversy" must depend on the facts of each case, "[a] mere difference of opinion between the parties" does not constitute a controversy within the meaning of the Declaratory Judgment Act. *Id.* at 205, 22 S.E.2d at 453.
>
> Although it is not necessary that one party have an actual right of action against another to satisfy the jurisdictional requirement of an actual controversy, it is necessary that litigation appear unavoidable. *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 206 S.E.2d 178 [1974]. Mere apprehension or the mere threat of an action or a suit is not enough. *Newman Machine Co. v. Newman*, 2 N.C. App. 491, 163 S.E.2d 279 (1968), *rev'd on other grounds*, 275 N.C. 189, 166 S.E.2d 63 (1969). Thus the Declaratory Judgment Act does not "require the court to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise." *Town of Tryon v. Power Co.*, 222 N.C. at 204, 22 S.E.2d at 453 (1942).

Gaston Bd. of Realtors, Inc. v. Harrison, 311 N.C. 230, 234, 316 S.E.2d 59, 61-62 (1984).

Plaintiffs, in their briefs and at oral argument, stress the letter from the Attorney General's Office and argue that it shows litigation is unavoidable, and thus an actual controversy exists. This argument fails. Our courts have historically required more than anticipation of future action. *See Wendell v. Long*, 107 N.C. App. 80, 418 S.E.2d 825 (1992); *Town of Pine Knoll Shores v. Carolina Water Service, Inc.*, 128 N.C. App. 321, 494 S.E.2d 618 (1998). In an analogous case, a party sent a letter to the opposing side stating that he would " 'take such actions as are necessary to protect myself . . . from harm by the actions of individuals involved in this matter.' " *Gaston Bd. of Realtors*, 311 N.C. at 235, 316 S.E.2d at 62. The Supreme Court held that "litigation between the parties does not appear unavoidable and that the controversy between them is not therefore actual, genuine and existing." *Id.* The *Gaston* Court further noted that

> [i]t is true that the defendant in seeking a rehearing before the Board stated in a letter that he would take whatever actions necessary to protect himself. That statement does not in and of

> itself point to unavoidable litigation and the existence of an actual controversy. Although the defendant did not specify what action he intended to take to protect his interests, he never mentioned filing a lawsuit. *Even if the defendant had directly threatened to sue the Board, a mere threat to sue is not enough to establish an actual controversy.*

Id. at 235-36, 316 S.E.2d at 62 (emphasis added).

Plaintiffs' complaint is rife with words such as "could," "may," and "would" in reference to the advertisement package it has yet to send out and the legal action which the Attorney General's Office has threatened but not yet brought to bear. Our case law mandates the affirmance of the trial court's order of dismissal.

In addition, we note that granting jurisdiction and allowing a declaratory judgment to be rendered in this case would arguably not settle anything between the parties. We cite with approval the Texas case of *California Products, Inc. v. Puretex Lemon Juice, Inc.*, 160 Tex. 586, 334 S.W.2d 780 (1960). In that case, the plaintiff sought a declaratory judgment as to whether or not a bottle in which it planned to market lemon and lime juice would violate the terms of a permanent injunction which defendant had obtained in an earlier suit in which plaintiff had been enjoined from marketing juice in a bottle resembling that used by the defendant. The Texas court held that the adjudication sought was but an advisory opinion and therefore not a proper subject for declaratory judgment action, and noted that:

> A declaratory judgment rendered herein would not settle the controversy between the parties. The permanent injunction . . . is still outstanding. A violation of that judgment is subject to be punished for contempt in a proper proceeding. It cannot be determined whether or not a proposed bottle will be violative of the injunction . . . until [plaintiff] seeks to market its product in a bottle in the same market with [defendant]. Only in this way can it be determined whether the [plaintiff's] bottle is of the size and appearance that it misleads and deceives the buying public into believing that it is securing [defendant's] products rather than [plaintiff's] products.
>
> We agree with the Court of Civil Appeals that this proceeding is one in which an advisory opinion is sought. Should we decide that the bottle proposed to be used by [plaintiff] did violate the injunction, we would settle nothing. [Plaintiff] could continue

> indefinitely to propose bottles of different sizes, shapes and colors on which it could seek an equally indefinite number of advisory opinions as to whether such bottles violate the injunction. Such procedure would accomplish nothing. [Plaintiff] should propose a bottle which it thinks does not violate the injunction, use it and litigate the material issue on a contempt hearing.

Id. at 591, 334 S.W.2d at 781.

"The courts of this state do not issue anticipatory judgments resolving controversies that have not arisen." *Bland v. City of Wilmington*, 10 N.C. App. 163, 164, 178 S.E.2d 25, 26 (1970), *rev'd on other grounds*, 278 N.C. 657, 180 S.E.2d 813 (1971). While plaintiffs are seemingly legitimately seeking to comply with the consent judgment they are bound by, "[t]he Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice." *Lide v. Mears*, 231 N.C. at 117, 56 S.E.2d at 409.

Affirmed.

Judges WALKER and BRYANT concur.

STATE OF NORTH CAROLINA v. IVORY JOE TISDALE

No. COA01-1339

(Filed 1 October 2002)

Drugs— constructive possession—rented car

The trial court did not err by denying defendant's motion to dismiss a cocaine possession charge where defendant was driving a rental car registered in another person's name; the car had been used by at least two individuals on a regular basis; an admitted cocaine addict testified that he had recently dropped cocaine in the car while washing it; defendant had accelerated from 0 to 60 m.p.h. in a 35 m.p.h. zone with an officer directly behind him; after the stop, the officer noticed cocaine in plain view in the driver's side door handle, well within defendant's reach; defendant was sweating profusely and was nervous; the officer thought that defendant was under the influence of something; and more cocaine was found under the driver's seat, also well within

defendant's reach. The evidence supports a reasonable inference that defendant was aware of the presence of cocaine in the vehicle and had the power and intent to control its disposition. Defendant was free to argue that the cocaine did not belong to him.

Appeal by defendant from judgment entered 18 January 2001 by Judge James C. Spencer, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 15 August 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Elizabeth Leonard McKay, for the State.

Donald E. Gillespie, Jr. for defendant-appellant.

THOMAS, Judge.

Defendant, Ivory Joe Tisdale, was convicted of possession of cocaine and being an habitual felon. He was sentenced to a term of 132 to 168 months imprisonment and now appeals.

Defendant argues the trial court erred in denying his motion to dismiss the possession of cocaine charge for insufficiency of the evidence. For the reasons discussed herein, we find no error.

The State's evidence tended to show that on or about 11 March 2000, Officer M.P. O'Hal of the Greensboro Police Department stopped his patrol car at a stop light just behind a white Mitsubishi Eclipse operated by defendant. When the light turned green, defendant quickly accelerated through the intersection. O'Hal paced the vehicle and determined it was traveling 60 miles per hour in a 35 mile per hour speed zone. He pulled defendant over for speeding. Defendant was alone and the vehicle he was driving was a rental car registered to Harold Leak.

Defendant was asked by O'Hal to produce a driver's license and vehicle registration, to which defendant responded, "No, I do not have one." While O'Hal and defendant were discussing the license and registration, O'Hal looked inside the vehicle and noticed in plain view a small baggie containing two "off-white rocklike substance[s]." The baggie was located in the cutout near the handle on the driver's side door.

O'Hal then asked defendant to get out of the vehicle and placed him under arrest for not having a driver's license. O'Hal testified

that defendant was "sweating profusely," which the officer attributed to nervousness engendered by the stop. After placing defendant in the patrol car, Officer O'Hal searched defendant's vehicle. He found another small baggie under the driver's seat which contained "the same type of off-white rocklike substance." Field tests on the substances in the two baggies produced a positive reaction for cocaine. Later analysis by the State Bureau of Investigation confirmed that the baggies contained a total of .39 grams of cocaine.

O'Hal testified that he observed defendant for the better part of two hours. Based on his observations, O'Hal stated defendant "was impaired under some substance." However, on cross examination, O'Hal stated he did not believe defendant was "appreciably impaired [or] unfit to drive." Accordingly, he did not charge defendant with driving while impaired. O'Hal further testified that he smelled a mild odor of alcohol on defendant.

Defendant presented the testimony of Harold Leak, who stated that he leased the vehicle in February 2000 to use on the weekends, and for April King, a female friend, to use during the week. Prior to defendant gaining possession of the car, Leak had taken it to the carwash, where he allowed Jeff Cosby, an admitted homeless crack cocaine addict, to wash it. Leak did not notice any cocaine in the driver's side door when he left the carwash, but he testified that Cosby told him a couple of days later that Cosby had dropped some "dope" in the car. After getting the car washed, Leak returned it to April King, who subsequently loaned it to defendant.

Cosby testified that he washed the car for Leak in March 2000, and in the course of vacuuming the inside of the car, he dropped some cocaine and "put some on the door handle."

In his assignment of error, defendant argues the trial court erred in denying his motion to dismiss at the close of all the evidence. He contends the State presented insufficient evidence of actual or constructive possession. 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). If substantial evidence exists, whether direct, circumstantial, or both, supporting a finding that the offense charged was committed by the defendant, the case must be left for the jury. *State v. Davis*, 325 N.C. 693, 696-97, 386 S.E.2d 187, 189 (1989). If the trial court determines that a *reasonable* inference of the defendant's guilt *may* be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence. *State v. Grigsby*, 351 N.C. 454, 456-57, 526 S.E.2d 460, 462 (2000).

"A defendant has possession of a controlled substance when he has both the power and intent to control its disposition or use." *State v. Hunter*, 107 N.C. App. 402, 408, 420 S.E.2d 700, 705 (1992), *overruled on other grounds*, *State v. Pipkins*, 337 N.C. 431, 446 S.E.2d 360 (1994). With regard to the possession of controlled substances, the Supreme Court recently set forth the applicable law as follows:

> "[I]n a prosecution for possession of contraband materials, the prosecution is not required to prove actual physical possession of the materials." *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986). Proof of nonexclusive, constructive possession is sufficient. *Id.* Constructive possession exists when the defendant, "while not having actual possession, . . . has the intent and capability to maintain control and dominion over" the narcotics. *State v. Beaver*, 317 N.C. 643, 648, 346 S.E.2d 476, 480 (1986). "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." *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). "However, unless the person has exclusive possession of the place where the narcotics are found, the State must show other incriminating circumstances before constructive possession may be inferred." *Davis*, 325 N.C. at 697, 386 S.E.2d at 190; *see also Brown*, 310 N.C. at 569, 313 S.E.2d at 588-89.

State v. Matias, 354 N.C. 549, 552, 556 S.E.2d 269, 270-71 (2001).

"An inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the

vehicle where the controlled substance was found." *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984). In fact, this Court has consistently held that "[t]he driver of a borrowed car, like the owner of the car, has the power to control the contents of the car." *State v. Glaze*, 24 N.C. App. 60, 64, 210 S.E.2d 124, 127 (1974); *see also Dow*, 70 N.C. App. at 85, 883 S.E.2d at 886; *State v. Wolfe*, 26 N.C. App. 464, 467, 216 S.E.2d 470, 473 (1975). Thus, where contraband material is found in a vehicle under the control of an accused, even though the accused is the borrower of the vehicle, "this fact is sufficient to give rise to an inference of knowledge and possession which *may* be sufficient to carry the case to the jury." *Glaze*, 24 N.C. App. at 64, 310 S.E.2d at 127 (emphasis added). This inference is rebuttable and if the accused offers evidence rebutting the inference, the State must show other incriminating circumstances before constructive possession may be inferred. *See Matias*, 354 N.C. at 552, 556 S.E.2d at 270-71.

Here, although the evidence shows defendant had control of the vehicle when stopped by O'Hal, defendant's control was not exclusive. The vehicle was a rental car registered in another person's name. The car had recently been used by at least two individuals on a regular basis and an admitted crack cocaine addict testified he had recently dropped cocaine in the car while washing it. Therefore, the critical issue is whether the evidence discloses other incriminating circumstances sufficient for the jury to find defendant had constructive possession of the cocaine. When the evidence is examined in the light most favorable to the State, we find such additional incriminating circumstances do exist and conclude the trial court properly denied defendant's motion to dismiss.

Just before defendant was pulled over, he had accelerated from 0 to 60 miles per hour in a 35 mile per hour speed zone with a police officer directly behind him. The officer noticed the cocaine in *plain view* in the car door handle on the driver's side of the vehicle, well within reach of defendant. While talking with the officer, defendant was "sweating profusely" and was nervous. In the officer's opinion, defendant "was under the influence of something[,]" although the officer did not consider defendant to be so impaired that he could not drive. A subsequent search of the vehicle uncovered more cocaine located under the driver's seat. This second baggie of cocaine was also well within defendant's reach. Although Cosby, an admitted cocaine addict, testified he placed or dropped cocaine in the car while cleaning it, Leak testified he did not notice any cocaine in the vehicle following the cleaning. Taken in the light most favorable to

the State, this evidence supports a reasonable inference that defendant was aware of the presence of cocaine in the vehicle and had the power and intent to control its disposition.

Defendant was free to argue to the jury that Cosby had placed the cocaine in the vehicle and that the cocaine did not belong to defendant. However, that argument does not make the State's evidence of other incriminating circumstances any less sufficient to survive a motion to dismiss. Accordingly, we hold that the trial court did not commit error.

No error.

Judges MARTIN and TYSON concur.

IN THE MATTER OF: MARGARET KAY MAY, DOB: 06-19-89

No. COA01-1544

(Filed 1 October 2002)

1. Appeal and Error— Anders brief—service on juvenile

In an appeal decided on other grounds, it was noted that service of Anders documents on a juvenile was insufficient where the documents were not served on the juvenile's parents, guardian, or custodian.

2. Assault— simple affray—private property

The trial court should have dismissed a charge of simple affray against a juvenile which arose from a fight in the front yard of a house used as a group home for as many as eight children. Every indication in the record was that the home was private property and not a place which the public had the right to use.

Judge HUNTER dissenting.

Appeal by juvenile from order filed 28 August 2001 by Judge Ernest J. Harviel in Alamance County District Court. Heard in the Court of Appeals 20 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Bart Njoku-Obi, for the State.

Benjamin M. Turnage for the Juvenile Appellant.

GREENE, Judge.

Margaret Kay May (Juvenile) appeals from an order dated 28 August 2001 adjudicating her as a delinquent juvenile on a petition alleging simple affray in violation of N.C. Gen. Stat. § 14-33(a).

On 1 August 2001, Juvenile, an 11-year-old child and a resident of the Alamance Multiple Purpose Group Home (the Home), was involved in an altercation with another resident of the Home. The Home is located in a house in a residential community and has space for eight children. What began as an argument escalated into pushing and shoving and finally into grabbing each other, pulling hair, and scratching. The incident took place while the assailants and several others were walking in an open area in the front yard of the Home. A staff counselor at the Home intervened but was unable to stop the fight. A second counselor managed to separate the two children, but the fight quickly resumed. Ultimately, police were called, and the fight ended.

At the hearing on 23 August 2001, the State presented testimony from the two counselors. At the close of the State's evidence, Juvenile moved to dismiss the charge and that motion was denied. No evidence was presented on Juvenile's behalf. Subsequently, the trial court found the allegations in the petition to be "proven . . . beyond a reasonable doubt" and adjudicated Juvenile as a delinquent juvenile.

Juvenile's attorney, unable to identify any issue with sufficient merit to support a meaningful argument for relief on appeal, filed an *Anders* brief asking this Court to conduct its own review of the record for possible prejudicial error. Attached to the *Anders* brief is a copy of a letter the attorney, according to his brief, states he mailed to Juvenile informing her of her right to "submit to the Court any written arguments [she] believe[d] to have merit." The letter also indicates the attorney furnished Juvenile copies of the *Anders* brief, the transcript of the trial proceedings, and the record on appeal. There is nothing in the letter indicating the brief and other documents were served on the parents of the Juvenile or some other person having custody of the Juvenile.

The issues are whether: (I) *Anders* reviews are appropriate in juvenile delinquent proceedings; if so, (II) adequate notice of the *Anders* filing was given to the necessary parties; and (III) the fight occurred in a public place.

I

In 1967, the United States Supreme Court held that an attorney for an indigent criminal defendant, who after a conscientious examination of the record believes an appeal of his client's conviction would be "wholly frivolous," may so advise the appellate court in a brief to that court "referring to anything in the record that might arguably support the appeal." *Anders v. California*, 386 U.S. 738, 744, 18 L. Ed. 2d 493, 498 (1967); *see State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). The appellate court, after a full examination of the proceedings, is to then decide whether the appeal is wholly frivolous or has some merit. *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498; *Kinch*, 314 N.C. at 102, 331 S.E.2d at 667. The *Anders* brief, as it has come to be known, is grounded in the due process and equal protection clauses of the United States Constitution and assures an indigent defendant the "same rights and opportunities on appeal . . . as are enjoyed by those persons who are in a similar situation but are able to afford the retention of private counsel." *Anders*, 386 U.S. at 744-45, 18 L. Ed. 2d at 498-99.

Although a juvenile delinquency proceeding is not for all purposes treated as a criminal proceedings, the United States Supreme Court has held a juvenile alleged to be delinquent is entitled to "the essentials of due process." *Kent v. United States*, 383 U.S. 541, 562, 16 L. Ed. 2d 84, 97-98 (1966). Essentials of due process have been determined to include the right to appointed counsel, the right against self incrimination, and the right to timely notice of the allegations. *In re Gault*, 387 U.S. 1, 18 L. Ed. 2d 527 (1967). The essentials of due process also include the right and opportunity of an indigent juvenile to have her case presented on appeal. *Gilliam v. State*, 808 S.W.2d 738, 740 (Ark. 1991); *see also State v. Berlat*, 707 P.2d 303, 307 (Ariz. 1985) (due process and right to counsel extend to a juvenile's first appeal as of right). Thus, an attorney for an indigent juvenile adjudicated to be delinquent may file an *Anders* brief in the appellate courts of this state.

In this case, the attorney for the Juvenile has filed an *Anders* brief requesting this Court to "conduct a full examination of the record on appeal for possible prejudicial error." Additionally, the brief notes the

failure of the trial court to dismiss the petition on the grounds the affray did not occur in a public place might arguably support the appeal.

II

[1] The *Anders* court held that a copy of the "counsel's brief should be furnished the indigent and time allowed [her] to raise any points that [she] chooses." *Anders*, 386 U.S. at 744, 18 L. Ed. 2d at 498. Furthermore, this Court has held, in applying *Anders*, the defendant is entitled to all documents "necessary" for her to conduct her own review of the case. *State v. Mayfield*, 115 N.C. App. 725, 726, 446 S.E.2d 150, 152 (1994) (citing *State v. Bennett*, 102 N.C. App. 797, 800, 404 S.E.2d 4, 5 (1991)). The documents deemed "necessary" for the review include the transcript, the record on appeal, the appellate brief filed by the defendant's attorney, and the appellate brief filed by the State in response. *See Bennett*, 102 N.C. App. at 800, 404 S.E.2d at 5. The attorney also must provide the defendant with a letter informing her of her right to file a brief or other writing in the appellate court, and that letter must be filed in the appellate court. *See Kinch*, 314 N.C. at 101, 331 S.E.2d at 666.

A delinquent juvenile includes any person "less than 16 years of age but at least 6 years of age." N.C.G.S. § 7B-1501(7) (2001). It is thus unlikely the juvenile will appreciate the merits of the appeal filed by her attorney. Accordingly, in a juvenile delinquency appeal where the attorney for the juvenile has filed an *Anders* brief, the attorney must provide the "necessary" documents and letter to the juvenile and her parents, guardian, or custodian.[1] *Cf.* N.C.G.S. § 7B-1807 (2001).

In this case, the attorney served a copy of the necessary documents on Juvenile, along with the required letter.[2] There is no indication in the record service of the "necessary" documents and letter have been made upon Juvenile's parents, guardian, or custodian. This lack of service would ordinarily require us to enter an order directing the required service and delay review of this appeal until that service is completed and those persons have had an opportunity to file briefs in this Court. *See Bennett*, 102 N.C. App. at 801, 404 S.E.2d at 5.

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1. Neither the Department of Social Services nor the State are to be considered a custodian of the juvenile for the purposes of service of the *Anders* documents.

2. In this case, Juvenile's attorney did not file this letter in our Court. He did attach a copy of that letter to his brief, and we accept that in this case as sufficient compliance with *Anders*. The better practice, however, is to file the letter in this Court, along with a certificate of service. *See* N.C.R. App. P. 26(d).

Because, however, the record reveals the trial court erred in failing to dismiss the petition filed against Juvenile based on the insufficiency of the State's evidence, the order of the trial court adjudicating Juvenile a delinquent juvenile must be reversed.

III

[2] A simple affray has been defined "as a fight between two or more persons in a public place so as to cause terror to the people." *In re Drakeford*, 32 N.C. App. 113, 118, 230 S.E.2d 779, 782 (1977) (citing *State v. Huntley*, 25 N.C. 418 (1843)). A public place is defined to be

> A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public.

Blacks Law Dictionary 1231 (6th ed. 1990).

In this case, the fight occurred in the front yard of a house that was being used as a home for as many as eight children located in a neighborhood. Every indication in the record is that the Home was private property and not a place which the public had a right to resort or use. Accordingly, the trial court should have allowed the motion to dismiss.

Reversed.

Judge TIMMONS-GOODSON concurs.

Judge HUNTER dissents.

HUNTER, Judge, dissenting.

I respectfully dissent from the majority opinion's conclusion that the trial court should have allowed the motion to dismiss against Juvenile. Specifically, I take issue with the majority's conclusion that the physical altercation between Juvenile and another resident of the Home did not occur in a public place.

As stated in the majority opinion, a simple affray has clearly been defined "as a fight between two or more persons in a public place so

as to cause terror to the people." *In re Drakeford*, 32 N.C. App. 113, 118, 230 S.E.2d 779, 782 (1977). However, since our courts have never clearly defined a "public place" in relation to this misdemeanor, the majority defines the term using Black's Law Dictionary. Even though I agree that this definition is generally applicable to simple affrays, our case law indicates that the number of persons viewing the alleged affray must be considered as well.

In *State v. Fritz*, 133 N.C. 725, 45 S.E. 957 (1903), a defendant appealed an order finding him guilty of simple affray for engaging in a fight with another man at a corner tree midway between their homes and in the presence of seven other people. The defendant argued, in part, that he was erroneously convicted of simple affray because the fight did not occur in a public place. Our Supreme Court affirmed the guilty verdict and held that the fighting of two persons in the presence of others made the location a public place. *Id.* at 728, 45 S.E. at 958.

Although *Fritz* does not specifically define a "public place," it does indicate that the presence of several people can qualify a location that is normally private property as a public place for simple affray purposes. Here, the evidence showed that a physical altercation between Juvenile and another juvenile occurred on the grounds of the Home. The altercation took place in the presence of two counselors and several residents of the Home. Thus, it is my conclusion that the grounds of the Home are a "public place" in light of the facts in this case and the holding in *Fritz*. To find otherwise would lend itself to a very strict interpretation of what constitutes a "public place," thereby preventing the police from ever being able to arrest and charge a person with simple affray if that individual enters into a fight with another person on private property regardless of how many people are present and placed in terror.

Accordingly, the trial court did not err in denying Juvenile's motion to dismiss.

HOWARD EUGENE CAMPBELL, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, DIVISION OF MEDICAL ASSISTANCE, DEFENDANT

No. COA01-1048

(Filed 1 October 2002)

Public Assistance— Medicaid recovery—personal injury settlement with eighteen-year-old

The trial court properly concluded that plaintiff was a beneficiary of Medicaid assistance under N.C.G.S. § 108A-57, and did not err by requiring plaintiff to reimburse defendant out of the proceeds of a personal injury settlement, where plaintiff was enrolled in the Medicaid program as a minor, was involved in an automobile accident when he was seventeen, and settled a personal injury claim one month after his eighteenth birthday. Although plaintiff argued that any Medicaid benefits were for the parent's benefit, there is no authority for the contention that a beneficiary under N.C.G.S. § 108A-57, or a recipient in the meaning of N.C.G.S. § 108A-59, must be one who receives a direct cash payment or relief from debt, or who has the legal right to bring suit for medical benefits.

Appeal by plaintiff from order entered 23 March 2001 by Judge W. Douglas Albright in Moore County Superior Court. Heard in the Court of Appeals 10 June 2002.

Webb & Graves, PLLC, by Jerry D. Rhoades, Jr., for plaintiff-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Claud R. Whitener, III, for the State.

BIGGS, Judge.

Plaintiff appeals from an order requiring him to pay defendant, North Carolina Department of Human Resources, Division of Medical Assistance (hereinafter referred to as DMA), $3,788.00 in reimbursement for medical assistance benefits. We affirm.

On 23 October 1999, plaintiff was injured in an automobile accident. At the time of the accident, plaintiff was seventeen years old, and lived with his mother and sole guardian, Lenora McCleod. At some point prior to the accident, plaintiff was enrolled in the Medicaid program; consequently, defendant paid medical care

providers $3,788.00 for services rendered to plaintiff as a result of the injuries plaintiff received in the accident. On 10 July 2000, a month after plaintiff's eighteenth birthday, he settled a personal injury claim arising out of the accident for $25,000. The settlement money was paid directly to plaintiff. Thereafter, defendant sought reimbursement of the $3,788.00 paid to plaintiff's medical care providers.

Plaintiff filed a declaratory judgment action on 12 October 2000, seeking a judgment that plaintiff was not indebted to defendant, and that defendant had no right of subrogation against him. In addition, plaintiff filed a motion for summary judgment on 21 November 2000, which was heard on 26 February 2001. The trial court entered an order on 23 March 2001, concluding "as a matter of law . . . that the Plaintiff is a 'beneficiary' under N.C.G.S. 108A-57" and ordering that plaintiff pay defendant the sum of $3,788.00 "under the terms of the lien set out in N.C.G.S. 108A-57." Plaintiff appeals from this order.

Plaintiff argues that the trial court erred by requiring him to repay defendant for the cost of medical assistance. He contends that he is not "a 'beneficiary' under N.C.G.S. § 108-57 or a 'recipient' under N.C.G.S. § 108A-59[,]" and, thus, that he is under no obligation to reimburse defendant. We disagree.

In general, "North Carolina law entitles the state to full reimbursement for any Medicaid payments made on a plaintiff's behalf in the event the plaintiff recovers an award for damages." *Cates v. Wilson*, 321 N.C. 1, 6, 361 S.E.2d 734, 738 (1987). The pertinent statutory provisions governing defendant's right to seek reimbursement from those receiving medicaid benefits include N.C.G.S. § 108A-57, which provides in relevant part that "to the extent of payments under this Part, the State, or the county providing medical assistance benefits, shall be subrogated to all rights of recovery, contractual or otherwise, of the beneficiary of this assistance[.]" Further, N.C.G.S. § 108A-59 provides that "by accepting medical assistance, the recipient shall be deemed to have made an assignment to the State of the right to third party benefits, contractual or otherwise, to which he may be entitled." *See N. C. Dept. of Human Resources v. Weaver*, 121 N.C. App. 517, 519, 466 S.E.2d 717, 719, *disc. review denied*, 342 N.C. 896, 467 S.E.2d 905 (1996) ("a person [who] accepts medical assistance through [DMA] . . . assigns to the State the right to any third party benefits the person may subsequently recover"). Thus, we agree with plaintiff that "whether or not Plaintiff is obligated . . . to refund the money paid by [defendant] hinges upon whether he is the 'beneficiary' or the 'recipient' as defined by law."

Plaintiff argues that (1) the assistance provided by the state was "financial in nature"; (2) plaintiff was a minor who obtained "[n]o money and no relief from debt"; and (3) as a minor he "had no legal standing to bring a claim for medical expenses[.]" On this basis, plaintiff contends that "any Medicaid payments received [were] for the parent's benefit, not that of [plaintiff.]" However, plaintiff cites no authority, and we find none, to support his contention that a beneficiary in the meaning of N.C.G.S. § 108A-57, or a recipient in the meaning of N.C.G.S. § 108A-59, must be one who receives a direct cash payment or relief from debt, or who has the legal right to bring suit for medical benefits.

Under N.C.G.S. § 108A-24(5), a recipient of medicaid is defined as "a person to whom, or on whose behalf, assistance is granted under this Article." We conclude that when defendant paid for plaintiff's medical treatment, plaintiff became "a person . . . on whose behalf" assistance was rendered. Beneficiary is not defined in N.C.G.S. Chapter 108A. However, "[w]hen language used in the statute is clear and unambiguous, this Court must . . . accord words undefined in the statute their plain and definite meaning." *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995), *reh'g denied*, 342 N.C. 666, 467 S.E.2d 722 (1996) (citation omitted). A beneficiary is "a person who receives benefits[;]" while the definition of benefit includes "payment made under insurance, social security, welfare, etc." Oxford Encyclopedic English Dictionary 132 (Judy Pearsall and Bill Trumble, eds., 1995). We conclude that the "plain and definite meaning" of the term 'beneficiary' includes plaintiff.

It is true, as plaintiff argues, that a minor "even after reaching majority, may not recover medical expenses incurred during minority." *Vaughan v. Moore*, 89 N.C. App. 566, 568, 366 S.E.2d 518, 520 (1988). Accordingly, the settlement money which plaintiff received was not recompense for medical expenses. However, N.C.G.S. § 108A-57(a) does not restrict defendant's right of subrogation to a beneficiary's right of recovery only for medical expenses. N.C.G.S. § 108A-57(a) (2001) (State "subrogated to *all rights* of recovery, contractual or otherwise, of the beneficiary of this assistance"); *N. C. Dept. of Human Resources v. Weaver*, 121 N.C. App. 517, 519, 466 S.E.2d 717, 719 (1996) (State subrogated to *all* rights of recovery of beneficiary of medical assistance, "to the extent of [Medicaid] payments under [Medical Assistance Program]") (emphasis added).

Moreover, this Court previously has held that defendant is entitled to recover the costs of medical treatment provided for a

minor, even when the funds received by the minor are not reimbursement for medical expenses. In *Payne v. N. C. Dept. of Human Resources*, 126 N.C. App. 672, 677, 486 S.E.2d 469, 471, *disc. review denied*, 347 N.C. 269, 493 S.E.2d 656 (1997), the plaintiff, a minor living with his mother, was severely injured in a swimming pool accident. DMA paid over $138,000 in medical benefits for plaintiff. Plaintiff later settled a personal injury claim for $1,000,000. He distributed $45,000 to his mother for medical expenses, and placed the remainder in an irrevocable disability trust for plaintiff's benefit. Plaintiff then argued that DMA was barred by a federal statute, 42 U.S.C.A. § 1396p(a)(1), from enforcing its Medicaid lien, because the statute, which governs the creation of a disability trust, provides that no lien "may be imposed against the property of any individual . . . on account of medical assistance paid . . . on his behalf[.]" Plaintiff argued that DMA's subrogation rights extended only to the amount allocated to his mother for medical expenses. This Court disagreed, and held that "by accepting Medicaid benefits, [minor plaintiff] assigned his right to third-party benefits to DMA, and . . . DMA's lien vested at that time." In the instant case, as in *Payne*, defendant's lien vested when plaintiff accepted medicaid benefits.

We hold that the trial court properly concluded that plaintiff was a beneficiary of Medicaid assistance under N.C.G.S. § 108A-57. Thus, the trial court did not err by requiring plaintiff to reimburse defendant out of the proceeds of his settlement. In addition, defendant's motion to dismiss is denied. Accordingly, the trial court's order is

Affirmed.

Chief Judge EAGLES and Judge WALKER concur.

J. NELSON DOLLAR, PLAINTIFF v. TOWN OF CARY, A MUNICIPAL CORPORATION, AND ROCKETT, BURKHEAD & WINSLOW, INC., DEFENDANTS

No. COA01-1412

(Filed 1 October 2002)

Cities and Towns— advertisements promoting policy during election—implicitly promoting candidates

The trial court properly granted a preliminary injunction enjoining advertisements by a town during municipal elections which promoted the town's smart growth policies where the advertisements were more than informational in nature and implicitly promoted candidates sympathetic to the policy.

Appeal by Defendant Town of Cary from order filed 6 September 2001 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 20 August 2002.

Stam, Fordham & Danchi, P.A., by Paul Stam, Jr., for plaintiff appellee.

Tharrington Smith, L.L.P., by Michael Crowell and Deborah R. Stagner, for defendant-appellant Town of Cary.

The Law Office of John T. Benjamin, Jr., by John T. Benjamin, Jr., for defendant-appellee Rockett, Burkhead & Winslow, Inc.

GREENE, Judge.

The Town of Cary (the Town) appeals from an order filed 6 September 2001 granting a preliminary injunction in favor of J. Nelson Dollar (Plaintiff).

On 28 August 2001, Plaintiff filed suit against the Town seeking injunctive and declaratory relief. The complaint alleged: (1) the Town had no authority to conduct its Growth Management Education and Outreach campaign (Campaign), and (2) the Town was engaging in an impermissible attempt to influence the outcome of the 2001 Town Council (the Council) election through a media advertising campaign.

In response to the complaint and after a hearing on the matter, the trial court found in pertinent part:

3. On or about March 8, 2001 and June 28, 2001 [the Council] appropriated public funds for a [Campaign] . . . , using the sum of

$200[,]000 for[,] among other things[,] "direct mail, media buys, and contracted services" . . . "to better inform citizens about growth management issues."

4. The [Campaign] promotes the merits of what it refers to as "smart growth" or "managed growth" in a coordinated print, radio and television campaign which includes paid media to run from September 6, 2001 through November 19, 2001.[1]

There is undisputed evidence in the record that growth management in the Town was an important issue in the 2001 municipal elections[2] and, although no incumbents were running to retain seats, several candidates for the Council had aligned themselves with the Town's "slow growth" or "managed growth" policies. Plaintiff was a candidate for an "at large" seat on the Council who did not agree with the growth management policies of the Town. The trial court then found as a fact that:

6. . . . [I]t is more likely than not that a Wake County jury would find that a primary purpose of this [Campaign] is to influence [the Town's] voters in favor of "slow growth" or "managed growth" candidates in the upcoming election.

The trial court concluded:

8. The Town . . . lacks enabling authority to spend money for the advertising campaign . . . (including the materials to be disseminated in the newspaper, radio, and television advertisements) which has as a primary purpose to influence [the Town's] voters during a municipal election campaign.

9. The Plaintiff is likely to prevail on the merits. A preliminary injunction is necessary to protect Plaintiff's rights during the course of litigation.

10. Plaintiff's motion for a preliminary injunction should be allowed because of the timing of the advertising campaign and the utilization of tax revenue.

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1. The Town does not assign error to these findings of fact and they are thus deemed to be supported by evidence in the record. *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982).

2. The Council elections were to be conducted on 9 October 2001 and 6 November 2001.

The preliminary injunction only enjoined the newspaper, radio, and television advertisements and was set to expire at the conclusion of the elections.

The dispositive issue is whether the Town's promotion of its growth management policies through newspaper, radio, and television advertising was permissible during the 2001 municipal elections for the Council in which growth management was a campaign issue.[3]

Local government advertising on particular issues is allowed where the advertising is of an informational nature. *See Dennis v. Raleigh*, 253 N.C. 400, 405, 116 S.E.2d 923, 927 (1960) (city is permitted to advertise its advantages); *see also Bardolph v. Arnold*, 112 N.C. App. 190, 435 S.E.2d 109 (1993) (no cause of action against county commissioners in their personal capacity arising from an expenditure for advertising for informational purposes about a referendum on a school merger and school board redistricting). Where the advertising, however, is designed to promote a viewpoint on an issue in order to influence an election, it is impermissible. *See* David M. Lawrence, *Financing Capital Projects in North Carolina*, at 87 (2d ed. 1994); *see also Burt v. Blumenauer*, 699 P.2d 168 (Ore. 1985) (county officials may be held personally liable for expenditures used to promote the defeat of a measure on a ballot); *Stanson v. Mott*, 551 P.2d 1 (Cal. 1976) (promotional advertising by a state parks and recreation department during a bond campaign is impermissible); *Citizens to Protect Public Funds v. Bd. of Educ.*, 98 A.2d 673 (N.J. 1953) (board of education was not permitted to fund advertising promoting voting for school bonds).

The determination of whether advertising is informational or promotional is a factual question, and factors such as the style, tenor, and timing of the publication should be considered. *Stanson*, 551 P.2d at 12. It is not necessary for the advertisement to urge voters to vote "yes" or "no" or "for" or "against" a particular issue or candidate in order for the advertising to be promotional. *Id.*

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3. The complaint raises the separate and more fundamental issue of whether the Town has the authority to conduct a Growth Management Education and Outreach Project. The trial court did not reach that issue, and we will not address it in this appeal. Although this appeal is interlocutory and subject to dismissal, we elect to review it as a petition for writ of certiorari and address the merits. *See* N.C.R. App. P. 21.

In this case, the undisputed evidence shows the Council authorized the spending of $200,000 on multimedia advertisements in support of its "smart growth" and "managed growth" policies. The advertisements were to run between 6 September and 19 November 2001, a period of time coinciding with the Council elections where the smart/managed growth concept was a contested issue between candidates. We agree with the trial court that this evidence reveals "it is more likely than not that a . . . jury would find that a primary purpose of this [Campaign] is to influence [the Town's] voters in favor of 'slow growth' or 'managed growth' candidates in the [2001 Council] election" and failure to issue an injunction would cause irreparable harm to Plaintiff. *See Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (standard for issuing preliminary injunction). The advertisements, in the context of the Council elections, appear to be more than informational in nature and instead implicitly promote the candidacy of those Council candidates in sympathy with the Council's position on the Town's growth.[4] It is not material that the advertisements did not directly support one candidate over another; they promoted only one point of view on an important campaign issue. *See Citizens to Protect Public Funds*, 98 A.2d at 677.

Accordingly, the trial court properly granted the preliminary injunction.

Affirmed.

Judges TIMMONS-GOODSON and McCULLOUGH concur.

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4. Just as the trial court's findings of fact and other rulings in a preliminary injunction hearing are not binding at trial, this Court's decision and findings of fact are not binding at a trial on the merits. *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 578, 561 S.E.2d 276, 282 (2002).

STATE OF NORTH CAROLINA v. LINWOOD ARRTAGUS EVANS

No. COA01-891

(Filed 1 October 2002)

Constitutional Law; Probation and Parole— right to assistance of counsel—probation revocation hearing

The trial court erred in a probation revocation hearing by allowing defendant to proceed pro se without conducting an inquiry as required by N.C.G.S. § 15A-1242, because: (1) the execution of a written waiver of the right to assistance of counsel does not abrogate the trial court's responsibility to ensure the requirements of N.C.G.S. § 15A-1242 are fulfilled; (2) although the trial court ascertained that defendant did not have counsel, did not desire counsel, and that defendant understood that he could have had counsel appointed, there is no indication in the record that the trial court made an inquiry as to whether defendant understood and appreciated the consequences of his decision; and (3) the trial court failed to ascertain whether defendant comprehended the nature of the charges and proceedings and the range of permissible punishments that he faced.

Appeal by defendant from judgment entered 12 February 2001 by Judge Quentin T. Sumner in Pitt County Superior Court. Heard in the Court of Appeals 15 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for the State.

Angela H. Brown for defendant-appellant.

WALKER, Judge.

On 21 August 1998, defendant pled guilty to six breaking and entering charges. He was subsequently sentenced to six consecutive eight to ten-month terms of imprisonment. These sentences were suspended and defendant was placed on supervised, intensive probation for a total of 60 months. Defendant's probation was modified and he was ordered, among other things, to pay restitution in the amount of $10,842.00 and not violate any State laws which penalty exceeds 45 days in jail.

On 5 September 2000, the trial court ordered that all of defendant's past due and future supervision fees be remitted. On 18 January

2001, defendant's probation officer filed a violation report alleging that defendant had violated the terms of his probation. Specifically, the report alleged that defendant was in arrearage on the restitution requirement and that he also violated his probation by committing the offense of driving while license revoked.

At defendant's probation revocation hearing on 12 February 2001, defendant executed a written waiver of his right to counsel and proceeded *pro se*. At the beginning of the hearing, the trial court inquired as follows:

THE COURT: Mr. Evans, do you have a lawyer, sir?

MR. EVANS: No, sir.

THE COURT: Do you understand that you have the right to have a lawyer represent you, sir?

MR. EVANS: Yes, sir.

THE COURT: Do you want a lawyer, Mr. Evans?

MR. EVANS: No, sir.

THE COURT: I will be happy to appoint you one.

MR. EVANS: No, sir.

THE COURT: You do not want one at all.

MR. EVANS: No, sir.

THE COURT: All right. Sign a waiver please to that, please sir.

Thereafter, the trial court proceeded with the probation revocation hearing and subsequently found defendant to be in willful violation of his probation without lawful excuse, revoked his probation and activated his suspended sentences.

Defendant contends that the trial court erred in allowing him to proceed *pro se* without conducting an inquiry as required by N.C. Gen. Stat. § 15A-1242, which 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 (2001).

A defendant has a right to assistance of counsel during probation revocation hearings. N.C. Gen. Stat. § 15A-1345(e) (2001). Inherent to that right to assistance of counsel is the right to refuse the assistance of counsel and proceed *pro se*. *State v. Gerald*, 304 N.C. 511, 516, 284 S.E.2d 312, 316 (1981); *State v. Brooks*, 138 N.C. App. 185, 193, 530 S.E.2d 849, 854 (2000). However, the right to assistance of counsel may only be waived where the defendant's election to proceed *pro se* is "clearly and unequivocally" expressed and the trial court makes a thorough inquiry as to whether the defendant's waiver was knowing, intelligent and voluntary. *State v. Carter*, 338 N.C. 569, 581, 451 S.E.2d 157, 163 (1994), *cert. denied*, 531 U.S. 843, 121 S. Ct. 109, 148 L. Ed. 2d 67, *and rehearing denied*, 531 U.S. 1002, 121 S. Ct. 506, 148 L. Ed. 2d 475 (2000). This mandated inquiry is satisfied only where the trial court fulfills the requirements of N.C. Gen. Stat. § 15A-1242.

The provisions of N.C. Gen. Stat. § 15A-1242 are mandatory where the defendant requests to proceed *pro se*. *State v. Lyons*, 77 N.C. App. 565, 568, 335 S.E.2d 532, 534 (1985). The execution of a written waiver is no substitute for compliance by the trial court with the statute. *State v. Wells*, 78 N.C. App. 769, 773, 338 S.E.2d 573, 575 (1986). A written waiver is "something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not . . . an alternative to it." *State v. Hyatt*, 132 N.C. App. 697, 703, 513 S.E.2d 90, 94 (1999).

The State correctly points out that, where the defendant has executed a written waiver of counsel which is certified by the trial court, a presumption arises that the waiver by the defendant was knowing, intelligent and voluntary. *State v. Warren*, 82 N.C. App. 84, 89, 345 S.E.2d 437, 441 (1986). Nevertheless, where the record indicates otherwise, that presumption is rebutted. *Hyatt*, 132 N.C. App. at 703, 513 S.E.2d at 94; *State v. Love*, 131 N.C. App. 350, 507 S.E.2d 577 (1998), *affirmed*, 350 N.C. 586, 516 S.E.2d 382 (1999); *Warren*, 82 N.C.

App. at 89, 345 S.E.2d at 441. The execution of a written waiver of the right to assistance of counsel does not abrogate the trial court's responsibility to ensure the requirements of N.C. Gen. Stat. § 15A-1242 are fulfilled.

In the present case, the record reveals the trial court ascertained that defendant did not have counsel, did not desire counsel and that defendant understood that he could have had counsel appointed. However, this inquiry satisfied only the first of the three inquires required by N.C. Gen. Stat. § 15A-1242. There is no indication in the record that the trial court, at any time, made an inquiry as to whether defendant understood and appreciated the consequences of his decision. Further, the trial court failed to ascertain whether defendant comprehended the nature of the charges and proceedings and the range of permissible punishments that he faced. In omitting the second and third inquiries required by N.C. Gen. Stat. § 15A-1242, the trial court failed to determine whether defendant's waiver of his right to counsel was knowing, intelligent and voluntary.

The trial court's judgments revoking defendant's probation are reversed. On remand, the trial court shall first determine if defendant is entitled to the assistance of counsel in accordance with this opinion. Because defendant is entitled to a new hearing, we need not reach defendant's second assignment of error, that the trial court failed to make adequate findings to support its decision to revoke defendant's probation.

Reversed and remanded.

Chief Judge EAGLES and Judge BIGGS concur.

STATE OF NORTH CAROLINA v. VICTOR CARSON HUNT

No. COA01-1502

(Filed 1 October 2002)

1. Assault— deadly weapons—hands and feet—sufficiency of evidence

The jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury was properly allowed to determine whether defendant's hands and feet constituted deadly

weapons, given the severity of the victim's injuries, the size differential, and the fact that the victim was pregnant at the time of the assault.

2. Assault— intent to kill—sufficiency of evidence

There was sufficient evidence in an assault prosecution that defendant intended to kill the victim where defendant severely beat the victim, refused to allow her to seek help, cut the telephone lines, and told the victim that she wasn't calling for help, wasn't going to the doctor, and could lie there and die. This evidence, combined with the evidence of the attack, the resulting injuries, and defendant's actions throughout, was enough to support an inference that defendant intended to kill.

Appeal by defendant from judgment entered 15 May 2001 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 30 September 2002.

Attorney General Roy Cooper, by William M. Polk, Director, Victims and Citizens Services, for the State.

Carlton M. Mansfield for defendant-appellant.

THOMAS, Judge.

Defendant, Victor Carson Hunt, appeals a conviction of assault with a deadly weapon with intent to kill inflicting serious injury. For reasons discussed herein, we find no error.

The pertinent facts are as follows: Defendant and his girlfriend, Kelli Bullard, lived together in Pembroke, North Carolina. On 1 September 1999, sometime around midnight, defendant returned home. Intoxicated and hungry, he demanded that Bullard "cook me a damn steak." Bullard refused. Defendant hit her right eye, knocking Bullard into the refrigerator. Her head slammed into the handle of the freezer section and she was knocked unconscious. When Bullard regained consciousness, defendant had her by the hair and was dragging her down the hall. Defendant hit and kicked Bullard and stepped on her neck. He then took Bullard to the bedroom, tore off her clothes, and had sex with her. After the attack, defendant cut the phone lines and refused to let Bullard seek help.

At trial, defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury and sentenced to a term of seventy-three to ninety-seven months imprisonment. He appeals.

Defendant's sole assignment of error is his contention that there was insufficient evidence to support the conviction.

To survive a motion to dismiss, the State must present substantial evidence of each essential element of the charged offense. *State v. Cross*, 345 N.C. 713, 716-17, 483 S.E.2d 432, 434 (1997). " 'Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion.' " *Id.* at 717, 483 S.E.2d at 434 (quoting *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992)). The essential elements of an assault with a deadly weapon with intent to kill inflicting serious injury are: "(1) an assault, (2) with a deadly weapon, (3) with intent to kill, (4) inflicting serious injury, (5) not resulting in death." *State v. Wampler*, 145 N.C. App. 127, 132, 549 S.E.2d 563, 567 (2001) (citing N.C. Gen. Stat. § 14-32(a)).

[1] Defendant first argues that his hands and feet should not have been considered deadly weapons when taking into account the relative size and condition of the parties. *See State v. Grumbles*, 104 N.C. App. 766, 771, 411 S.E.2d 407, 410 (1991). Defendant notes that he weighs 230 pounds while Bullard's normal weight is 190 pounds. He also claims he was highly intoxicated while Bullard was sober.

This Court has stated that "hands [and feet] may be considered deadly weapons, given the manner in which they were used and the relative size and condition of the parties involved." *Grumbles*, 104 N.C. App. at 771, 411 S.E.2d at 410 (citing *State v. Jacobs*, 61 N.C. App. 610, 301 S.E.2d 429 (1983)). In the instant case, the State presented evidence that defendant beat Bullard with his hands and feet so severely that she had to be flown from Southeastern Hospital in Lumberton to Duke University Medical Center in Durham because Southeastern did not have the facilities to treat her substantial injuries. Bullard was admitted to the intensive care unit at Duke and placed on a ventilator. Her injuries included fractures of the left orbit, or eye socket, and the left maxillary. Bullard also had swelling and contusions about her face, neck and upper chest. Additionally, the evidence reflected that defendant outweighed her by forty pounds and Bullard was nineteen weeks pregnant at the time of the assault.

Whether defendant used his hands and feet in a manner "likely to produce fatal results due to [their] use" is a question of fact to be determined by the jury. *State v. Lotharp*, 148 N.C. App. 435, 443, 559 S.E.2d 807, 812 (2002) (citing *State v. Joyner*, 295 N.C. 55, 64-65, 243

S.E.2d 367, 373 (1978)). Given the severity of Bullard's injuries, the size differential, and the fact she was pregnant at the time of the assault, the trial court was correct in denying the defendant's motion to dismiss. The jury was properly allowed to determine the question of whether defendant's hands and feet constituted deadly weapons under the circumstances here.

[2] Second, defendant contends the State failed to prove that he had the specific intent to kill. Defendant says the clearest evidence of lack of intent to kill is that he did not kill her. Additionally, he claims the fact he stopped beating Bullard after taking her to the bedroom is further proof he was not trying to kill her. Furthermore, while there may have been evidence that he did not care whether Bullard died, defendant contends this is not evidence of an intent to kill and there is no credible evidence beyond speculation that he had the intent to kill Bullard.

This Court has stated:

> "Proof of an assault with a deadly weapon inflicting serious injury not resulting in death does not, as a matter of law, establish a presumption of intent to kill. Such intent must be found by the jury as a fact from the evidence." However, "[a]n intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances."

Wampler, 145 N.C. App. at 130, 549 S.E.2d at 566 (citations omitted). Here, defendant severely beat Bullard and refused to allow her to seek help. Defendant cut the phone lines in their home and told Bullard she "weren't calling nobody for help and won't [be] going to no doctor," and "You can lay there and die first." This evidence, when considered with the evidence of the attack, the resulting injuries and defendant's actions throughout, is sufficient to support an inference that defendant intended to kill her. Accordingly, we find no error.

NO ERROR.

Judges WALKER and BIGGS concur.

DENISE VANHOY, PLAINTIFF v. DUNCAN CONTRACTORS, INC., DEFENDANT

AND

DUNCAN CONTRACTORS, INC., PLAINTIFF v. DENISE VANHOY, DEFENDANT

No. COA01-1464

(Filed 1 October 2002)

Arbitration and Mediation— attorney fees—no authority to modify award

The trial court properly vacated a modified arbitrator's award of attorney fees and reinstated the original award because the arbitrator was without authority under N.C.G.S. § 1-567.10 to modify the original award to include attorney fees. This modification did not constitute a clarification of the original award and the failure to include attorney fees in the original award did not constitute a mistake subject to correction.

Appeal by Plaintiff from order entered 19 September 2001 by Judge Clarence E. Horton, Jr., Superior Court, Cabarrus County. Heard in the Court of Appeals 10 September 2002.

Richard H. Robertson, for plaintiff-appellant, C. Denise Vanhoy.

Jones, Hewson & Woolard, by Lawrence J. Goldman and Griffin & Brunson, L.L.P., by Scott I. Perle, for defendant-appellee, Duncan Contractors, Inc.

WYNN, Judge.

Under the Uniform Arbitration Act, there is no authority for an arbitrator or court to award attorney's fees after an original award is made. N.C. Gen. Stat. § 1-567.10; § 1-567.13(a); § 1-567.14; *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 423 S.E.2d 747 (1992). In this case, the arbitrator issued an award on 6 April 2001 providing that each party would be responsible for its own attorney fees; thereafter on 17 May 2001, the arbitrator issued a modified award granting Plaintiff $30,000 in attorney's fees. Because the Uniform Arbitration Act does not grant an arbitrator the authority to modify an existing award to provide for attorney's fees, we uphold Superior Court Judge Clarence Horton's order vacating the modified award.

The facts pertinent to the resolution of this appeal are that on 6 April 2001, an arbitrator issued an award in favor of plaintiff but concluded that "each party is responsible for their own attorney's fees."

However, the construction contract underlying the arbitrated dispute provided that the prevailing party in an arbitration proceeding would be entitled to attorney's fees.

> 15. Arbitration of Disputes. . . . The party against whom the award is rendered shall pay the cost and expense of the arbitration, including without limitation any filing fees paid by the other party and the other party's attorney's fees and costs as set forth below.
>
> . . .
>
> 18. Attorney's Fees. Should either party employ an attorney to institute suit or demand arbitration to enforce any of the provisions hereof, to protect its interest in any matter arising under this agreement, . . . the prevailing party shall be entitled to recover reasonable attorney's fees, cost, charges, and expenses expended or incurred therein.

Thus, following the issuance of the original award, plaintiff requested the arbitrator modify the award to correct "clerical, typographical, technical or computational errors." In response, on 17 May 2001, the arbitrator issued a modified award granting plaintiff $30,000 in attorney's fees. From the trial court's order vacating the arbitrator's modified award and confirming the original award, plaintiff appeals.

On appeal, plaintiff contends that because "arbitrators have the same powers as the court to modify or correct an award which is inconsistent with the parties' contract", the trial court erred by holding that the arbitrator did not have the authority to modify the original award to grant attorney's fees as provided for under the parties' contract. We disagree.

N.C. Gen. Stat. § 1-567.10 (2001) permits an arbitrator upon the application of a party to modify or correct an arbitration award for the purpose of clarifying the arbitration award, or upon the grounds stated in subdivisions (1) and (3) of subsection (a) of G.S. 1-567.14:

> (1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;
>
> (3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

In this case, the modification of the original award to add a grant of attorney's fees did not constitute a clarification of the original award.

Moreover, the arbitrator's failure to include attorney's fees in the original award did not constitute a mistake subject to modification under either subdivisions (1) or (3) of G.S. 1-567.14(a). Indeed, the arbitrator's decision not to include attorney's fees in the original award in this case[1] is best summed as follows:

> If an arbitrator makes a mistake, either as to law or fact, it is a misfortune of the party, and there is no help for it. There is no right of appeal and the Court has no power to revise the decisions of "judges who are of the parties' own choosing." An award is intended to settle the matter in controversy, and thus save the expense of litigation. If a mistake be a sufficient ground for setting aside an award, it opens a door for coming into court in almost every case; for in nine cases out of ten some mistake either of law or fact, may be suggested by the dissatisfied party. Thus *** arbitration, instead of ending would tend to increase litigation.

Carolina Virginia Fashion Exhibitors, Inc. v. Gunter, 41 N.C. App. 407, 415, 255 S.E.2d 414, 420 (1979) (quoting *Poe & Sons, Inc. v. University*, 248 N.C. 617, 625, 104 S.E.2d 189, 195 (1958)).

We conclude that the arbitrator's failure to include attorney's fees in the original arbitration award did not constitute a ground for modification or vacatur under the Uniform Arbitration Act. Accordingly, Judge Horton properly vacated the modified award and confirmed the original award on the grounds that the arbitrator was without authority, under N.C. Gen. Stat. § 1-567.10, to modify his original award to include attorney's fees.

Affirmed.

Judges GREENE and BIGGS concur.

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1. Defendant argues that *Nucor Corp. v. General Bearing Corp.*, 333 N.C. 148, 423 S.E.2d 747 (1992) "indicates the arbitrator could not have awarded attorney fees even if they were included in the original award." However, N.C. Gen. Stat. § 1-567.11 provides "*unless otherwise provided in the agreement to arbitrate*, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award." (emphasis added). Therefore, unless the parties "specifically agree to and provide for such fees in the arbitration agreement, attorney fees may not be awarded in an arbitration award." *Nucor Corp. v. General Bearing Corp.*, 333 N.C. App. 148, 153, 423 S.E.2d 747, 750 (1992). Thus, by implication, where parties specifically agree to the provision of attorneys fees in an arbitration agreement, an arbitrator may award such fees in an arbitration award.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 1 OCTOBER 2002

Case	County	Disposition
COMPREHENSIVE BUS. SERVS., INC. v HAGEMAN No. 01-1290	Guilford (00CVS76)	Dismissed
EVANS v. RUTHERFORD HOSP., INC. No. 01-1433	Rutherford (99CVS804)	Affirmed
IN RE GRAHAM No. 02-3	Mecklenburg (00J1217)	Affirmed
IN RE HALL No. 01-1112	Alexander (97J8)	Dismissed in part and affirmed in part
IN RE LAWSON No. 01-1603	Alamance (00J205)	Reversed and remanded
POPE v. FARRINGTON No. 01-1075	Wilkes (99CVS1024)	No error
STAMM v. SALOMON No. 01-1080	Iredell (00CVS176)	Affirmed
STAMM v. SALOMON No. 01-1078	Iredell (00CVS176)	Affirmed
STATE v. ALLEN No. 02-12	Mitchell (01CRS1129) (01CRS1130) (01CRS1131) (01CRS1132) (01CRS1133) (01CRS1134) (01CRS1135) (01CRS1136) (01CRS1137) (01CRS1138) (01CRS1139) (01CRS1140) (01CRS1141) (01CRS1142) (01CRS1143)	No error
STATE v. ANDERSON No. 01-1153	Forsyth (00CRS7474) (00CRS7475) (00CRS7476) (00CRS7477) (00CRS7478) (00CRS7483)	No error

	(00CRS7558) (00CRS35153) (00CRS35154) (00CRS35155) (00CRS35157) (00CRS40231) (00CRS40233) (00CRS40234) (00CRS40235)	
STATE v. COLT No. 01-912	Carteret (99CRS10086) (99CRS10087) (99CRS10088) (99CRS10089) (99CRS10090) (99CRS10091) (00CRS2301) (00CRS2302)	No error in part; vacated in part, and remanded for new sentencing
STATE v. CROSS No. 01-1556	Wilson (00CRS54755)	Affirmed
STATE v. DURAND No. 01-1472	Scotland (98CRS872) (98CRS873) (98CRS874) (98CRS1132) (98CRS1133)	Dismissed
STATE v. GOMEZ No. 01-1527	Guilford (00CRS99072) (00CRS99073)	No error
STATE v. HARVEY No. 02-72	Guilford (01CRS77735)	No error
STATE v. HICKS No. 01-1438	Forsyth (01CRS13)	No error
STATE v. LOVE No. 01-1515	Mecklenburg (00CRS114716) (00CRS114717) (00CRS114718) (00CRS114719)	No error
STATE v. MALLOY No. 01-1456	Cumberland (99CRS60865)	No error
STATE v. MASSEY No. 01-1383	Mecklenburg (00CRS3756) (00CRS3757) (00CRS3758) (01CRS106848)	No error

STATE v. O'REILLY No. 01-831	Wayne (98CRS19551)	Affirmed
STATE v. PASOUR No. 01-1432	Cleveland (98CRS9636) (98CRS9637)	No error
STATE v. PECHE No. 01-1535	Lincoln (00CRS692) (00CRS693)	No error
STATE v. PERRY No. 01-1541	Chatham (98CRS1683) (98CRS1872)	Affirmed
STATE v. PERSON No. 01-1477	Pitt (00CRS53833) (00CRS53834)	No error
STATE v. RANGEL No. 01-1454	Durham (00CRS52046) (00CRS52049)	No error
STATE v. ROBINSON No. 01-1382	Iredell (99CRS11470) (99CRS11471) (99CRS11472)	No error
STATE v. SMITH No. 01-1486	Mecklenburg (99CRS33455) (99CRS33456)	No error
STATE v. STEPPS No. 01-680	Martin (96CRS3697) (96CRS3698) (96CRS3700) (96CRS3701)	Dismissed
STATE v. WEBB No. 01-1508	Buncombe (00CRS57583) (00CRS57584)	No error
STATE v. WRIGHT No. 01-1554	Mecklenburg (00CRS27236) (00CRS143443)	No error

STATE OF NORTH CAROLINA v. ALBERT THOMAS, JR.

No. COA01-1436

(Filed 15 October 2002)

1. Assault— on officer with firearm—jury instruction—no plain error

The trial court did not commit plain error in an assault on a law enforcement officer with a firearm case by instructing that defendant should be found guilty if defendant committed the lesser included offense of assault on an officer even though the indictment only charged defendant with assault on a law enforcement officer with a firearm, because: (1) the jury instructions were clear that not only was the charge of assault on a law enforcement officer with a firearm being submitted for consideration, but also the lesser charge of assault on a law enforcement officer; (2) the trial court was clear on instructing the jury as to the elements required for a guilty verdict as to each of the two charges; and (3) in light of the trial court's repeated emphasis that the jury could only find defendant guilty of assault on a law enforcement officer with a firearm if it found the required five elements, there is no reasonable cause to believe the jury was misled by the trial court's isolated statement following the instruction on the lesser included offense.

2. Burglary and Unlawful Breaking or Entering— felonious breaking or entering—intent to commit larceny—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charge of felonious breaking or entering even though defendant contends there was insufficient evidence of his intent to commit a larceny, because an intent to commit larceny at the time of the breaking or entering may be inferred from defendant's conduct and other circumstances shown by the evidence.

3. Assault— on officer with firearm—sufficiency of indictment

The trial court did not err by failing to vacate defendant's conviction for assault on a law enforcement officer with a firearm even though defendant contends the indictment failed to allege that defendant knew or had reasonable grounds to know that the person he assaulted was a law enforcement officer,

because: (1) the indictment properly charged the offense in the language of N.C.G.S. § 14-34.5(a); and (2) although the indictment does not specifically aver that defendant knew the person was a law enforcement officer, the indictment does allege defendant willfully committed an assault on a law enforcement officer which indicates defendant knew that the person he was assaulting was a law enforcement officer.

4. Assault— on officer with firearm—sufficiency of evidence

The trial court did not err by failing to vacate defendant's conviction for assault on a law enforcement officer with a firearm even though defendant contends there was insufficient evidence that he knew or had reasonable grounds to know that the person he assaulted was a law enforcement officer, because: (1) the officer arrived on the scene in a marked patrol car and was dressed in uniform, and the area was illuminated by a streetlight even though it was nighttime; (2) defendant told the person that if he let defendant go that defendant would stop, implying that defendant knew the person had the authority to keep or detain defendant; and (3) even when approached by two more officers who came to the first officer's aid, defendant continued to struggle and resist apprehension.

5. Assault— on officer with firearm—failure to submit lesser included offenses—no plain error

The trial court did not commit plain error in an assault on a law enforcement officer with a firearm case by failing to submit the possible verdicts of assault with a deadly weapon and assault by pointing a gun, because: (1) the trial court is not obligated to give a lesser included instruction if there is no evidence giving rise to a reasonable inference to dispute the State's contention; and (2) there was no evidence that defendant did not know the person he assaulted was an officer, and the State presented sufficient evidence to meet the knowledge requirement of the offense.

6. Assault— on officer with firearm—failure to instruct on self-defense

The trial court did not err in an assault on a law enforcement officer with a firearm case by failing to give an instruction on self-defense as requested by defendant, because: (1) there was no evidence that defendant had a reasonable belief that he was required to use force against the officer in order to avoid death or great bodily harm; (2) the evidence establishes that defendant was the

aggressor in the struggle with the officer; and (3) there was no evidence that the officer was making an unlawful arrest or that he was using excessive force.

7. Criminal Law— trial court's expression of opinion—asking purpose of defense counsel's questions

A defendant is not entitled to a new trial in an assault on a law enforcement officer with a firearm and felonious breaking or entering case even though defendant contends the trial court expressed an improper opinion by asking defense counsel several times about the purpose of his questions on cross-examination, because: (1) defendant failed to establish that the trial court's questions of counsel were anything other than a proper exercise of the trial court's discretion in directing the scope of cross-examination; and (2) the trial court's occasional inquiries into the relevance of particular questions on cross-examination did not amount to improper statements from which the jury would rationally infer the trial court believed defendant to be guilty.

8. Sentencing— aggravating factors—hired to commit offense—administrative error

A defendant is not entitled to a new sentencing hearing in an assault on a law enforcement officer with a firearm and felonious breaking or entering case even though the trial court allegedly found the erroneous aggravating factor that defendant was hired to commit the offense, because: (1) the record reveals that the marking of the factor was an administrative error and the trial court in fact found the aggravating factor that defendant committed the offense for the purpose of avoiding or preventing lawful arrest; and (2) a defendant is not entitled to a new sentencing hearing where there exists a discrepancy between the transcript and the judgment sheet as to a finding in aggravation where the trial court clearly stated its findings in open court and where the mark on the judgment sheet is clearly a clerical error.

9. Sentencing— statutory mitigating factors—supports family—positive employment history or gainfully employed

The trial court did not err in an assault on a law enforcement officer with a firearm and felonious breaking or entering case by failing to find the statutory mitigating factors that defendant supports his family and defendant has a positive employment history or is gainfully employed, because: (1) evidence of defendant's

employment and support does not rise to the level of being uncontradicted and manifestly credible; and (2) defendant failed to show the trial court abused its discretion by rejecting these factors.

Appeal by defendant from judgments entered 9 March 2001 by Judge Dwight L. Cranford in Halifax County Superior Court. Heard in the Court of Appeals 9 September 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Barbara A. Shaw, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

MARTIN, Judge.

Albert Thomas, Jr., ("defendant") appeals from judgments entered upon his convictions by a jury of assault on a law enforcement officer with a firearm, felonious breaking or entering, and being an habitual felon. We conclude there was no prejudicial error in defendant's trial.

The State's evidence tended to establish the following facts. On 17 August 2000, Thomas Dufford was in New York, away from his home in Roanoke Rapids, North Carolina. Dufford's neighbor, Harvey Meadows, was in charge of watching over the Dufford house. Meadows, who lived behind Dufford, testified that he checked on the Dufford house every day that Dufford was away by inspecting the doors and windows and collecting the mail. Meadows testified that on 17 August 2000, he was awakened sometime between 11:30 p.m. and midnight to the sounds of "beating or slamming" that sounded like "somebody trying to beat [his] door in." Meadows looked out his bedroom window, about twenty yards from the back of Dufford's house, and saw a man "beating" and "hitting" Dufford's back door with a heavy object that appeared to be a piece of firewood. Meadows directed his wife to call 911 and inform the dispatcher that a man was trying to break into Dufford's house.

Meadows continued to observe the man beating on Dufford's back door. Within a few moments, the man stopped beating and came out of the carport, where he stood for a few seconds. The man then walked around to the front of the Dufford house, and Meadows heard the sound of shattering glass. Meadows then observed a policeman in uniform walking across Dufford's front yard toward the

house, and within a few seconds, heard a gunshot. Meadows then heard cries for help.

Officer Scott Hall of the Roanoke Rapids Police Department testified he was on patrol around midnight on 17 August 2000 when he received a radio call to go to the address of the Dufford house to investigate. Officer Hall, who was in uniform and driving a marked patrol car, arrived at the Dufford house less than one minute after receiving the call. Officer Hall testified that immediately after getting out of his patrol car, he heard a "thump noise" coming from the front of the house. Officer Hall approached the bushes and trees near the front of the house with an illuminated flashlight. He saw, in the light of the flashlight, a pair of legs in dark pants under some bushes a few feet from the front door. Officer Hall drew his weapon and instructed the person not to move. As Officer Hall approached the bushes, he saw defendant, dressed in all dark clothing, laying face down under the bushes.

Defendant began to lift himself up from the ground, and Officer Hall, who was approximately two feet from defendant, again instructed him not to move. Defendant then made a "very quick . . . lunge" at Officer Hall and grabbed the barrel of his weapon. Officer Hall pushed defendant to the ground, falling with him, and the two struggled for the weapon. Officer Hall attempted to obtain his pepper spray during the fight, but defendant knocked it out of his hands. Officer Hall attempted to turn the gun towards defendant, who was still gripping its barrel, and he fired, but defendant moved the barrel and the shot missed. Defendant then forced the barrel of the gun into Officer Hall's chest. Officer Hall testified that although his hand was on the gun, he had little control over it, and he believed defendant was about to kill him. Officer Hall began to scream for help. Defendant stated, "[i]f you let me go, I'll stop."

Officer Hall then observed headlights and two officers with flashlights approaching. Officer Hall told the officers defendant had control of his gun. Defendant fought the two other officers, and continued to resist being subdued, but was eventually handcuffed. The gun was recovered from underneath where defendant had been laying on the ground. The officers recovered a rock approximately four inches in diameter from defendant's pants pocket and a three-foot long black nylon bag which was tucked under defendant's shirt and pants. Officer Hall estimated he fought with defendant for control of his gun for about three minutes.

Meadows testified that after the situation was under control, he observed that the glass on Dufford's back door had been shattered and the glass in the front door had also been knocked out. Meadows testified that he had checked on Dufford's house around noon that day and observed that the glass on both doors was intact.

Officer Jamal Bryant of the Roanoke Rapids Police Department testified defendant made a statement while in custody to the effect that he did not intend to hurt Officer Hall, but that he could have had he so desired. Defendant stated he attempted to gain control of the gun because he realized Officer Hall would shoot him otherwise. Defendant also confessed that he had broken Dufford's windows with a rock. Defendant did not present any evidence.

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[1] Defendant brings forward eleven assignments of error contained in nine arguments. First, he maintains he is entitled to a new trial as to his conviction for assault on a law enforcement officer with a firearm because the trial court committed plain error in instructing the jury on that charge. Specifically, defendant argues the jury's verdict was rendered fatally ambiguous by the trial court's instruction to the jury that "it would be your duty to return a verdict of guilty as charged" if it were to find defendant had committed the submitted lesser included offense of assault on an officer, whereas the indictment only charged defendant with assault on a law enforcement officer with a firearm. Defendant did not object to the instruction at trial.

Defendant relies on *State v. Jeffries*, 3 N.C. App. 218, 164 S.E.2d 398 (1968), in which this Court held the defendant was entitled to a new trial based on the court's inadvertent error in instructing the jury that it could return a verdict of guilty as charged if it found the defendant guilty of assault with a deadly weapon, where the defendant had not been charged with that crime. *Id.* at 221, 164 S.E.2d at 399. As in *Jeffries*, the trial court in the present case inadvertently erred when it instructed the jury that if it found defendant had committed the acts required for conviction of assault on a law enforcement officer, it would find the defendant "guilty as charged."

Our inquiry does not end here, however. The instructional error in *Jeffries* was not analyzed under a plain error standard. Because defendant did not object or otherwise call the instructional error to the attention of the trial court, we must review the instruction under a plain error standard, which requires that defendant carry the heavy

burden of establishing that the error in the instruction was " ' "so fundamental as to amount to a miscarriage of justice or which probably resulted in the jury reaching a different verdict than it otherwise would have reached." ' " *State v. Gainey*, 355 N.C. 73, 106, 558 S.E.2d 463, 484 (2002) (citations omitted). "It is indeed the rare case when a criminal conviction will be reversed on the basis of an improper instruction where the defendant made no objection." *Id.* at 106-07, 558 S.E.2d at 484.

In analyzing whether defendant has met this burden, we must view the instructions in their entirety, not in " ' "detached fragments." ' " *State v. Anderson*, 350 N.C. 152, 179, 513 S.E.2d 296, 312 (citations omitted), *cert. denied*, 528 U.S. 973, 145 L. Ed. 2d 326 (1999). "The charge must be viewed in context; isolated portions will not be held prejudicial when the instruction as a whole is correct." *State v. Jarrett*, 137 N.C. App. 256, 265, 527 S.E.2d 693, 699, *disc. review denied*, 352 N.C. 152, 544 S.E.2d 233 (2000). " '[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' " *State v. Hanton*, 140 N.C. App. 679, 683, 540 S.E.2d 376, 379 (2000) (citation omitted) (rejecting defendant's argument that he was entitled to new trial based on instruction to jury " 'if you are not satisfied as to one or more of these things [the elements of second degree murder]' " because it lowered burden of proof from " 'beyond a reasonable doubt' " to " 'the satisfaction of the jury' " where phrase "beyond a reasonable doubt" was used at three other pivotal points in instruction on second-degree murder).

In this case, the jury instructions were clear that not only was the charge of assault on a law enforcement officer with a firearm being submitted for consideration, but also the lesser charge of assault on a law enforcement officer. The trial court was clear in instructing the jury as to the elements required for a guilty verdict as to each of the two charges. During the charge conference, defense counsel requested an instruction on the lesser included offense of assault on an officer, and the trial court agreed to instruct on both offenses. The trial court thereafter first instructed the jury, with respect to the assault on Officer Hall, that in order to find defendant guilty of assault on a law enforcement officer with a firearm, the jury would be required to find five elements beyond a reasonable doubt. The trial court listed the elements, and then summarized them a second time. The trial court then began its instruction on the lesser included offense by stating, "[i]f you do not find the Defendant guilty

of assault with a firearm on a law enforcement officer, you must determine whether he is guilty of an assault on an officer." The trial court charged the jury that it would be required to find four elements beyond a reasonable doubt in order to find defendant guilty of assault on a law enforcement officer, and it then explained the elements and summarized them a second time.

On at least two occasions, the trial court clearly stated that in order for the jury to find defendant guilty of assault on a law enforcement officer with a firearm, the jury would be required to find the five elements of that charge. The trial court also instructed that if the jury did not find those five elements, it would be required to return a verdict of not guilty as to that charge. The trial court made clear that the jury was only to consider the elements of assault on an officer if it did not find the five elements of assault on a law enforcement officer with a firearm. In addition, the verdict sheet submitted to the jury clearly delineated that it could either find defendant guilty of assault on a law enforcement officer with a firearm, guilty of assault on an officer, or not guilty.

In light of the trial court's repeated emphasis that the jury could only find defendant guilty of assault on a law enforcement officer with a firearm if it found the required five elements, there is no reasonable cause to believe the jury was misled by the trial court's isolated statement following the instruction on the lesser included offense. *See State v. Graham*, 145 N.C. App. 483, 486, 549 S.E.2d 908, 910-11 (2001) (trial court's erroneous preliminary instruction on burden of proof did not amount to plain error where trial court instructed jury properly on burden of proof with respect to each charge; thus, there existed no "reasonable cause to believe the jury in this case was misled regarding the State's burden of proof."). Viewing the statement in the context of the instructions as a whole, we do not agree with defendant that this is one of those exceptional and rare cases where the error was so fundamental as to amount to a miscarriage of justice or which probably resulted in a different verdict than would have resulted otherwise. This assignment of error is overruled.

[2] In his second argument, defendant maintains his conviction for felonious breaking or entering must be vacated because there was no evidence of his intent to commit a larceny. At the close of all evidence, the trial court dismissed the charge of second-degree burglary, deciding instead to submit the lesser included offense of felonious breaking or entering. Defendant moved to dismiss

the charge for insufficiency of the evidence, and the trial court denied the motion.

" '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. Jones*, 151 N.C. App. 317, 328, 566 S.E.2d 112, 119 (2002) (citation omitted). The State may rely on circumstantial evidence to prove the State's *prima facie* case, as "[t]he law makes no distinction between the weight to be given to either direct or circumstantial evidence." *State v. Salters*, 137 N.C. App. 553, 557, 528 S.E.2d 386, 390, *disc. review denied*, 352 N.C. 361, 544 S.E.2d 556 (2000). Moreover, in reviewing the denial of a motion to dismiss for insufficiency of the evidence, the trial court is required to view the evidence in the light most favorable to the State, giving it the benefit of every reasonable inference to be drawn therefrom. *State v. Santiago*, 148 N.C. App. 62, 557 S.E.2d 601 (2001), *disc. review denied*, 355 N.C. 291, 561 S.E.2d 499 (2002). An intent to commit larceny at the time of the breaking or entering may be inferred from the defendant's conduct and other circumstances shown by the evidence. *State v. Costigan*, 51 N.C. App. 442, 276 S.E.2d 467 (1981).

In the present case, the evidence established that around midnight on an evening when Thomas Dufford was away from his home, Meadows was awakened by the sounds of beating and slamming. He looked out the window and observed a man at the back door of the Dufford house repeatedly hitting the door with a heavy object. The man eventually walked to the front of the house, and Meadows thereafter heard the sound of shattering glass. Officer Hall arrived on the scene within one minute of receiving the call to investigate. Officer Hall discovered defendant dressed in dark clothing and laying face down under the bushes a few feet from Dufford's front door. The window closest to the door knob and latch on the front door was broken out, a window in the back door was broken out, the hinges were broken off a screen door, and the front door jam was broken. Meadows testified that the Dufford house was not in this condition when he inspected it around noon that day. Defendant confessed to having broken the windows, but offered no evidence as to why he did so. Defendant resisted arrest after struggling for control of Officer Hall's weapon. Defendant had a large rock in his pocket, and a three-foot nylon bag rolled up under his clothing. We hold this evidence, taken in the light most favorable to the State, constitutes substantial evidence of each essential element of the offense of felonious breaking or entering. This argument is overruled.

[3] Next, defendant maintains his assault conviction must be vacated because the indictment failed to allege that he knew or had reasonable grounds to know that Officer Hall was a law enforcement officer. We disagree. The assault indictment alleged that defendant "unlawfully, willfully, and feloniously did assault T.S. HALL, a law enforcement officer . . . with a firearm . . . by GRABBING THE OFFICERS [sic] WEAPON AND TURNING IT TOWARD THE OFFICER. At the time of this offense, the officer was performing a duty of his office."

Defendant is correct in noting that to prove this offense, the State must prove that the defendant knew the victim was a law enforcement officer. *See State v. Haynesworth*, 146 N.C. App. 523, 553 S.E.2d 103 (2001). As we have recently stated, an indictment must charge the essential elements of the alleged offense. *State v. Floyd*, 148 N.C. App. 290, 295, 558 S.E.2d 237, 241 (2002). We further observed in *Floyd* that "[i]f the charge is a statutory offense, the indictment is sufficient 'when it charges the offense in the language of the statute.' " *Id.* (citation omitted); *see also State v. Youngs*, 141 N.C. App. 220, 230, 540 S.E.2d 794, 800-01 (2000) (" 'an indictment couched in the language of the statute is sufficient to charge the statutory offense' " (citation omitted)), *appeal dismissed and disc. review denied*, 353 N.C. 397, 547 S.E.2d 430 (2001). The applicable statute here, G.S. § 14-34.5(a), provides: "Any person who commits an assault with a firearm upon a law enforcement officer, probation officer, or parole officer while the officer is in the performance of his or her duties is guilty of a Class E felony." N.C. Gen. Stat. § 14-34.5(a) (2002). The indictment in this case charges the offense in the language of G.S. § 14-34.5(a).

In any event, "[i]t is also generally true tha[t] an indictment need only allege the ultimate facts constituting the elements of the criminal offense." *Youngs*, 141 N.C. App. at 230, 540 S.E.2d at 800-01. The elements need only be alleged to the extent that the indictment (1) identifies the offense; (2) protects against double jeopardy; (3) enables the defendant to prepare for trial; and (4) supports a judgment on conviction. *State v. Baynard*, 79 N.C. App. 559, 562, 339 S.E.2d 810, 812 (1986). The indictments in *Baynard* charged the defendant with obtaining and attempting to obtain a controlled substance by fraud and forgery. *Id.* at 561, 339 S.E.2d at 812. The defendant argued that the indictments were insufficient in that neither alleged that the defendant presented a forged prescription with knowledge that it was forged. This Court held that although knowl-

edge is an essential element of the offenses, the failure of the indictments to specifically aver knowledge was not fatal where they alleged the defendant had committed the offenses "intentionally," which term "implies that the defendant knew the prescriptions were forged when she attempted to have them filled." *Id.* at 562, 339 S.E.2d at 812. We concluded the indictments were sufficient to meet the four-part test.

In this case, as in *Baynard*, although the indictment does not specifically aver that defendant knew Officer Hall was a law enforcement officer, the indictment does allege defendant "willfully" committed an assault on a law enforcement officer, which, as with the term "intentionally," indicates defendant knew that the person he was assaulting was a law enforcement officer. *See, e.g., State v. Smith*, 146 N.C. App. 1, 10, 551 S.E.2d 889, 894 (2001) (defining "willful" as "an act being done ' "purposely and designedly in violation of [the] law" ' " (citations omitted)), *reversed on other grounds*, 355 N.C. 268, 559 S.E.2d 786 (2002); *Muse v. Charter Hosp. of Winston-Salem, Inc.*, 117 N.C. App. 468, 483, 452 S.E.2d 589, 599 (" 'An act is done wilfully when it is done purposely and deliberately in violation of law, or when it is done knowingly and of set purpose' " (citation omitted)), *affirmed*, 342 N.C. 403, 464 S.E.2d 44 (1995), *reh'g denied*, 342 N.C. 666, 467 S.E.2d 718 (1996); *Starr v. Clapp*, 40 N.C. App. 142, 148, 252 S.E.2d 220, 224 (defining "willful" injury as one requiring "actual knowledge, or that which the law deems to be the equivalent of actual knowledge, of the peril to be apprehended, coupled with a design, purpose, and intent to do wrong and inflict injury"), *affirmed*, 298 N.C. 275, 258 S.E.2d 348 (1979).

We hold that the indictment in this case, which was properly couched in the language of G.S. § 14-34.5(a), was sufficient to identify the offense of assault on a law enforcement officer with a firearm; to protect defendant from double jeopardy; to enable defendant to prepare for trial and present a defense; and to support the judgment in this case. Accordingly, we overrule this assignment of error.

[4] In his fourth argument, defendant asserts his assault conviction must be vacated for lack of sufficient evidence that he knew or had reasonable grounds to know at the time of the assault that Officer Hall was a law enforcement officer. Again, we disagree.

The evidence established that Officer Hall, dressed in uniform, arrived on the scene in a marked patrol car. Although it was nighttime, a nearby streetlight was illuminated, and there was a "bright

light" coming from inside Dufford's house. The area was illuminated enough that Meadows could tell from looking out his window from several feet away that the person walking across Dufford's front lawn was a uniformed police officer. This evidence creates a reasonable inference that defendant, who struggled body to body with Officer Hall for approximately three minutes, was aware that Officer Hall was in uniform and a police officer. During the struggle, Officer Hall grabbed his pepper spray, a tool commonly carried by law enforcement, but defendant knocked it out of his hands. Defendant also told Officer Hall, "[i]f you let me go, I'll stop," thereby implying defendant knew Officer Hall had the authority to keep or detain him. Moreover, even when approached by two more officers who came to Officer Hall's aid, defendant continued to struggle and resist apprehension. There was no evidence tending to show that he did not know nor had reason to know Officer Hall was a law enforcement officer. Viewing the evidence in the light most favorable to the State, giving it the benefit of all reasonable inferences, we hold the State presented sufficient evidence of the knowledge element of the charge, and the trial court did not err in submitting the charge to the jury.

[5] Defendant next argues he is entitled to a new trial because the trial court erroneously failed to submit the possible verdicts of assault with a deadly weapon and assault by pointing a gun. Defendant argues that both are lesser included offenses of assault on a law enforcement officer with a firearm, separated only by the knowledge requirement of the greater offense, and that both were supported by the evidence. Defendant failed to request either of these instructions during the charge conference, nor did he object to the court's instructions on assault; thus, we review for plain error.

While it is generally true that a trial court must instruct on a lesser included offense where supported by the evidence, "[t]he trial court is not, however, obligated to give a lesser included instruction if there is 'no evidence giving rise to a reasonable inference to dispute the State's contention.' " *State v. Hamilton*, 132 N.C. App. 316, 321, 512 S.E.2d 80, 84 (1999) (citation omitted) (trial court not required to submit misdemeanor breaking or entering, a lesser included offense of larceny, which requires a felonious purpose, where the defendant did not testify or present any evidence that he broke or entered for any non-felonious purpose). "The mere possibility that a jury might reject part of the prosecution's evidence does not require submission of a lesser included offense." *Id.*

Here, as in *Hamilton*, there was no evidence that defendant did not know Officer Hall was a police officer, nor was there any evidence tending to show that he did not know, nor should have known, that Officer Hall was a law enforcement officer. As we have previously held, the State presented sufficient evidence to meet the knowledge requirement of the offense. As stated in *Hamilton*, the mere possibility that the jury would reject the State's evidence on this element does not require that the trial court instruct on every possible lesser included offense. *See also State v. Stevenson*, 327 N.C. 259, 263, 393 S.E.2d 527, 529 (1990) ("mere fact that the jury could selectively believe part of the State's evidence and disbelieve part of it did not entitle the defendant to an instruction on a lesser included offense."). The trial court's failure to instruct on these lesser included offenses was not error so fundamental as to amount to a miscarriage of justice.

[6] By his sixth argument, defendant maintains he is entitled to a new trial on the assault charge because the trial court failed to give an instruction on self-defense, as requested by defendant. A trial court is only required to give such an instruction where the evidence supports each element of self-defense. *State v. Nicholson*, 355 N.C. 1, 30, 558 S.E.2d 109, 130 (2002). "If, however, no such evidence is presented, a defendant is not entitled to an instruction on self-defense." *Id.*

In order to be entitled to an instruction on self-defense, the evidence must establish the following: (1) the defendant believed it necessary to kill or use force against the victim in order to save himself from death or great bodily harm; (2) the defendant's belief was reasonable "in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness;" (3) the defendant was not the aggressor in bringing on the affray, i.e., "he did not aggressively and willingly enter into the fight without legal excuse or provocation;" and (4) the defendant did not use excessive force other than what was necessary or reasonably appeared necessary to protect himself from death or great bodily harm. *State v. Wood*, 149 N.C. App. 413, 418-19, 561 S.E.2d 304, 308, *disc. review denied*, 356 N.C. 175, 569 S.E.2d 280 (2002).

In this case, there was no evidence that defendant had a reasonable belief that he was required to use force against Officer Hall in order to avoid death or great bodily harm, given that the evidence supports a reasonable inference that defendant knew Officer Hall was a law enforcement officer. Moreover, defendant is not entitled to

a self-defense instruction because the evidence clearly establishes that defendant was the aggressor in the struggle with Officer Hall. The evidence shows that when Officer Hall discovered defendant under the bushes, he instructed him not to move. Defendant nevertheless began to lift himself up from the ground, and Officer Hall, who was approximately two feet from defendant, again instructed him not to move. Defendant then lunged at Officer Hall, grabbing the barrel of the weapon. Defendant aggressively and willingly entered into the fight with Officer Hall without legal excuse or provocation. *See* N.C. Gen. Stat. § 15A-401(f)(1) (2002) ("A person is not justified in using a deadly weapon or deadly force to resist an arrest by a law-enforcement officer using reasonable force, when the person knows or has reason to know that the officer is a law-enforcement officer and that the officer is effecting or attempting to effect an arrest."); N.C. Gen. Stat. § 14-223 (2002) (making it unlawful for any person to resist, delay or obstruct a public officer in the discharging or attempting to discharge a duty of his office).

Defendant also argues he should have been entitled to a self-defense instruction because Officer Hall was making an unlawful arrest and was doing so using excessive force. The evidence simply does not support these arguments. Officer Hall was in the process of simply investigating a potential break-in when the affray occurred, and to the extent he was attempting to effectuate defendant's arrest, there is no evidence that such an arrest was unlawful. Moreover, there is no evidence that Officer Hall used any force, let alone excessive force, prior to defendant's initiating the struggle for the weapon. Although Officer Hall's weapon was drawn when he approached defendant, at no time did Officer Hall threaten defendant or become physical with defendant until defendant grabbed the weapon. Nor was it unreasonable for Officer Hall to have his weapon drawn, given that he was investigating a potential break-in and observed a dark figure hiding in the bushes. The trial court did not err in refusing to instruct the jury on self-defense.

[7] Defendant next contends he is entitled to a new trial because the trial court improperly expressed an opinion as to defendant's guilt by discrediting his cause. During cross-examination of Officer Hall regarding the manner in which he entered Dufford's front yard, the trial court stated to defense counsel, "I don't want to restrict cross examination, but what is the point of this, if you could help me with that maybe . . . ." The trial court then stated, "go ahead with your question but let's get to the point if you can." Subsequently, during

cross-examination of Officer Hall regarding the investigation into the matter, the following occurred:

> THE COURT: What is the point of that? I don't want to restrict you, but what's the point of that?
>
> MR. WALKER: I guess, your Honor, the point is . . .
>
> THE COURT: Go ahead, what's your point?
>
> MR. WALKER: The point is I want to know whether anything came of any sort of investigation of the firing of the weapon.
>
> THE COURT: For what purpose?
>
> MR. WALKER: Whether it was appropriate under the circumstances for the weapon to have been fired.
>
> THE COURT: Well then whether it was examined or not wouldn't have anything to do with that, would it?

Defendant also points to two other instances in which the trial court asked defense counsel the purpose of his questions on cross-examination, one with respect to Officer Bryant's work history, and another regarding the police department's investigation policy.

A trial judge may not express any opinion in the presence of the jury on any question to be decided by the jury, such as the defendant's guilt. *State v. Poland*, 148 N.C. App. 588, 594, 560 S.E.2d 186, 190 (2002) (citing N.C. Gen. Stat. § 15A-1222 (1999)). "However, 'not every expression of opinion by the trial court constitutes prejudicial error . . . . In a criminal case, reversible error results where the jury may rationally infer from the trial judge's action an expression of opinion as to the defendant's guilt or the credibility of a witness.' " *Id.* (citation omitted). Further, "[t]he scope of cross-examination is governed by the sound discretion of the trial court." *State v. Fleming*, 350 N.C. 109, 139, 512 S.E.2d 720, 740, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999).

Here, defendant has failed to sufficiently establish that the trial court's questions of counsel were anything other than a proper exercise of the court's discretion in directing the scope of cross-examination. We do not believe the trial court's occasional inquiries into the relevance of particular questions on cross-examination amounted to improper statements from which the jury would rationally infer the trial court believed defendant to be guilty. *See State v. Snowden*, 51 N.C. App. 511, 514, 277 S.E.2d 105, 107 (trial court did

not impermissibly express opinion where question "was a proper focusing of one of defendants' questions on cross-examination"), *disc. review denied*, 303 N.C. 318, 281 S.E.2d 657 (1981). We reject this argument.

[8] In his eighth argument, defendant maintains he is entitled to a new sentencing hearing because the trial court erred in finding, as an aggravating factor, that defendant was hired to commit the offense. It is clear to us from the record, however, that the marking of that factor on the AOC Form CR-303 (Felony Judgment Findings of Factors In Aggravation And Mitigation of Punishment) was an administrative error. The record shows clearly that the trial court, in fact, found the aggravating factor that defendant committed the offense for the purpose of avoiding or preventing lawful arrest. A review of the trial transcript shows that the trial court announced in open court that as to the assault charge, "the Court finds . . . aggravating factor No. 3, that the offense was committed for the purpose of avoiding or preventing a lawful arrest." However, that aggravating factor was listed on the AOC form sheet as factor No. 2a.; the factor listed as No. 3a. reads "The defendant was hired to commit the offense."

Our Supreme Court has recently held that a defendant is not entitled to new sentencing hearing where there exists a discrepancy between the transcript and the judgment sheet as to a finding in aggravation where the trial court clearly stated its findings in open court and where the mark on the judgment sheet is clearly a clerical error. *See State v. Gell*, 351 N.C. 192, 218, 524 S.E.2d 332, 349 (holding erroneous mark on judgment sheet an "obvious clerical error because it [wa]s inconsistent with the trial court's actual findings" as set forth in the transcript), *cert. denied*, 531 U.S. 867, 148 L. Ed. 2d 110 (2000). Likewise, in this case, it is clear from the record as a whole that the trial court found that defendant committed the offense for the purpose of evading arrest, not that he was hired to commit the offense, and that the court simply referred to the wrong number on the AOC form, resulting in a clerical error when the form was completed. Defendant has not suffered prejudice as a result of this clerical error. This argument is overruled.

[9] Finally, defendant argues the trial court erred in failing to find the statutory mitigating factors that defendant supports his family, and that defendant has a positive employment history or is gainfully employed. The trial court must consider a defendant's evidence of a statutory mitigating factor, but has "discretion and latitude in determining whether a mitigating circumstance exists." *State v. Hughes*,

136 N.C. App. 92, 100, 524 S.E.2d 63, 68 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000). In order to show an abuse of such discretion by failing to find a mitigating factor, a defendant must show that the factor is established by substantial evidence, which is uncontradicted and manifestly credible so that no other reasonable inferences can be drawn. *Id.* The evidence of defendant's employment and support in this case does not rise to that level and defendant, therefore, has not shown any abuse of the trial court's discretion in rejecting these factors in mitigation.

For the foregoing reasons, we hold defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge EAGLES and Judge HUNTER concur.

RPR & ASSOCIATES, INC., A SOUTH CAROLINA CORPORATION, PLAINTIFF v. THE UNIVERSITY OF NORTH CAROLINA-CHAPEL HILL AND THE NORTH CAROLINA DEPARTMENT OF ADMINISTRATION, DEFENDANTS

No. COA01-1146

(Filed 15 October 2002)

1. Appeal and Error—jurisdiction after appeal—continuing trial court proceedings

The trial court did not err by continuing to exercise jurisdiction after notice of appeal in a construction contract case where defendant asserted sovereign immunity. Although the trial court has no jurisdiction over a case after perfection of an appeal, the trial court has the authority to determine whether or not its order affects a substantial right or is otherwise immediately appealable.

2. Interest— construction claims—breach of contract rather than unpaid balance

The trial court erred by awarding prejudgment and postjudgment interest on a construction contract with a state university where plaintiff's recovery was based on damages incurred from defendant's breaches of contract and warranty rather than from

an unpaid balance due under the contract and N.C.G.S. § 143-134.1 was inapplicable.

3. Construction Claims—damages for rock excavation—sufficiency of evidence

There was sufficient evidence to support the trial court's award of damages for direct costs for additional rock excavation on a construction claim where a civil engineer testified extensively regarding plaintiff's damages and the trial court's findings accurately and properly reflected that testimony.

4. Construction Claims—delays—evidence

The trial court did not err in its award of damages for delay by defendant under a construction contract where defendant contended that the trial court had neglected to deduct from the total the time extensions granted for a series of change orders as well as time awarded by the State Office of Construction. The expert testimony before the court included the time extensions, and defendant had refused to pay any portion of the State Office of Construction award.

5. Construction Claims—masonry damages—evidence of cause rather than extent

The trial court did not err in a construction contract action by concluding that plaintiff had presented insufficient evidence of specific damages for additional costs for masonry work where the denial of the claim was based on plaintiff's failure to present sufficient evidence as to how much of the additional expense was caused by defendant's conduct rather than the extent of such damages.

6. Construction Claims—excessive punchlist—findings on evidence

The trial court erred in a construction claim in its findings about damages from an excessive punchlist where the court awarded damages for costs incurred for additional labor by subcontractors but made no findings based on plaintiff's direct costs, about which plaintiff submitted substantial evidence.

7. Construction Claims—offset—settlement with architect

The trial court did not err in a construction claim by allowing an offset against a judgment for monies plaintiff had received in a settlement with the architect of the project.

Appeal by plaintiff and defendant University of North Carolina at Chapel Hill from judgment entered 1 May 2000 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 11 June 2002.

Brian E. Upchurch for plaintiff appellant-appellee.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Ziko, for defendant appellant-appellee.

TIMMONS-GOODSON, Judge.

RPR & Associates, Inc. ("plaintiff") and the University of North Carolina at Chapel Hill ("defendant") appeal from judgment in favor of plaintiff for breach of contract by defendant. For the reasons set forth herein, we affirm in part and reverse in part the judgment of the trial court.

The procedural and factual history of this appeal is a lengthy one: On 15 January 1998, plaintiff filed a complaint in Wake County Superior Court against defendant, the State of North Carolina ("the State"), and the North Carolina Department of Administration ("the DOA"). The complaint alleged that plaintiff, a South Carolina corporation, entered into a contract with the State, by and through defendant and the DOA, for the purpose of constructing the George Watts Hill Alumni Center ("Alumni Center"), located on the campus of the University of North Carolina at Chapel Hill. The complaint set forth claims for breaches of contract and of warranty.

All three defendants thereafter filed motions to dismiss plaintiff's complaint pursuant to Rules 12(b)(1), (2), (4), (5) and (6) of the North Carolina Rules of Civil Procedure. After a hearing on the motions, the trial court entered an order granting the State's motion to dismiss pursuant to Rule 12(b)(5) for insufficient service of process. The trial court denied, however, the motions to dismiss filed by defendant and the DOA, which denials defendant and the DOA appealed to this Court on 12 August 1998.

Despite the appeal filed by defendant and the DOA, plaintiff continued to pursue its claims in the superior court. Defendant and the DOA resisted such proceedings, contending that their notice of appeal removed jurisdiction from the trial court pending resolution of the appeal. Plaintiff rejoined that, as the orders from which defendant and the DOA appealed were interlocutory and nonappeal-

able, the notice of appeal did not deprive the trial court of jurisdiction or otherwise stay proceedings at the trial level.

On 8 September 1998, the trial court denied defendant's motion to stay proceedings pending resolution of the appeal. Defendant thereafter filed a petition for writs of certiorari and supersedeas with the Court of Appeals, and moved for a temporary stay of the trial court proceedings. Although this Court initially granted defendant's motion for a temporary stay, it dissolved the stay on 23 September 1998. The Court also denied defendant's petition for writ of supersedeas and dismissed the petition for writ of certiorari. On 30 September 1998, this Court denied a second motion filed by defendant for a temporary stay.

Defendant then filed petitions for writ of supersedeas and writ of certiorari with the Supreme Court, which petitions were denied. By order dated 12 October 1998, the Supreme Court also denied defendant's motion for temporary stay of the judgment of the Court of Appeals. On 15 October 1998, the Court of Appeals denied defendant's petition for writ of prohibition.

Defendant moved the trial court once more for a stay of proceedings, which motion was heard on 3 May 1999. Upon reviewing the repeated denials of defendant's motions by the appellate courts, as well as the 8 September 1998 order by the trial court denying a stay of proceedings, the trial court once again denied defendant's motion to stay proceedings. On 2 June 1999, the Court of Appeals denied further petitions by defendant for writ of supersedeas and prohibition.

On 6 October 1999, this Court heard the appeal by defendant and the DOA from the trial court's denial of their motions to dismiss plaintiff's complaint. *See RPR & Assocs. v. State*, 139 N.C. App. 525, 534 S.E.2d 247 (2000), *affirmed per curiam*, 353 N.C. 362, 543 S.E.2d 480 (2001) (hereinafter "*RPR I*"). The first issue addressed by the *RPR I* Court was the interlocutory nature of the appeal. The Court concluded that, because the motion to dismiss was based in part on the doctrine of sovereign immunity, the denial of such motion affected a substantial right, thus rendering the decision of the trial court immediately appealable. *See id.* at 527, 534 S.E.2d at 250. Having determined that the appeal was properly before the Court, the Court proceeded to address the substantive issues of the case. Concluding that plaintiff had complied with all applicable statutory procedures, the Court held that defendant had waived its claim to

sovereign immunity from suit by entering into the contract with plaintiff. The Court thus held that the trial court properly denied defendant's motion to dismiss. The Court filed its opinion on 15 August 2000.

On 22 November 1999 and 21 February 2000, after defendant's appeal had been heard in this Court, but before a decision had been filed, the merits of plaintiff's case came before the trial court. The parties presented evidence for more than two weeks, upon the conclusion of which the trial court entered a judgment one hundred and twenty pages in length. In its judgment, filed 1 May 2000, the trial court concluded that defendant had breached its contract with plaintiff, causing substantial monetary injury. The trial court assessed such damages against defendant as $851,058.38, with interest accrued in the amount of $748,931.37. It is from this judgment that defendant and plaintiff now appeal.

Defendant presents three issues on appeal, arguing that the trial court erred by (1) continuing to assert jurisdiction over the case after defendant filed its notice of appeal; (2) assessing interest in the judgment against defendant; and (3) awarding excessive monetary damages. Plaintiff also argues three issues on appeal, contending that the trial court erred in (1) failing to award damages on its "masonry" claim; (2) failing to award damages based on plaintiff's "excessive punchlist" claim; and (3) failing to make findings regarding an offset against the judgment granted to defendant. We first examine defendant's assignments of error.

I. Defendant's Appeal

Defendant argues that the trial court erred by (1) exercising jurisdiction over the case; (2) awarding interest; and (3) awarding damages in amounts unsupported by the evidence. We address these issues in turn.

A. Functus Officio

[1] By its first assignment of error, defendant argues that the trial court had no jurisdiction over the case after defendant perfected its appeal, and that therefore, the trial court erred in entering judgment against defendant.

As a general rule, once a party gives notice of appeal, such appeal divests the trial court of its jurisdiction, and the trial judge becomes *functus officio. See Bowen v. Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d

748, 749 (1977); *Sink v. Easter*, 288 N.C. 183, 197, 217 S.E.2d 532, 541 (1975). *Functus officio*, which translates from Latin as "having performed his of her office," is defined as being "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." *Black's Law Dictionary* 682 (7th ed. 1999). Thus, when a court is *functus officio*, it has completed its duties pending the decision of the appellate court. The principle of *functus officio* stems from the general rule that two courts cannot ordinarily have jurisdiction of the same case at the same time. *See Wiggins v. Bunch*, 280 N.C. 106, 110, 184 S.E.2d 879, 881 (1971).

It follows from the principle of *functus officio* that if a party appeals an immediately appealable interlocutory order, the trial court has no authority, pending the appeal, to proceed with the trial of the matter. *See Patrick v. Hurdle*, 7 N.C. App. 44, 45-46, 171 S.E.2d 58, 59 (1969). Where a party appeals from a *non*appealable interlocutory order, however, such appeal does not deprive the trial court of jurisdiction, and thus the court may properly proceed with the case. *See Veazey v. Durham*, 231 N.C. 357, 364, 57 S.E.2d 377, 382-83 (1950); *T & T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 603, 481 S.E.2d 347, 349, *disc. review denied*, 346 N.C. 185, 486 S.E.2d 219 (1997). "[A] litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a nonappealable interlocutory order of the trial court." *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 144 N.C. App. 589, 591, 551 S.E.2d 873, 875 (2001).

An interlocutory order is immediately appealable if such order affects a substantial right of the parties involved. *See* N.C. Gen. Stat. §§ 1-277(a), 7A-27(d) (2001). A right is substantial when it will clearly be lost or irremediably and adversely affected if the order is not reviewed before final judgment. *See Cagle v. Teachy*, 111 N.C. App. 244, 246, 431 S.E.2d 801, 802 (1993).

> Admittedly the 'substantial right' test for appealability of interlocutory orders 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); *see also Cagle*, 111 N.C. App. at 246, 431 S.E.2d at 802 (noting that there are "[n]o hard and fast rules . . . for determining which

appeals affect a substantial right"). The trial court has the authority, however, to determine whether or not its order affects a substantial right of the parties or is otherwise immediately appealable. *See Utilities Comm. v. Edmisten, Attorney General*, 291 N.C. 361, 365, 230 S.E.2d 671, 674 (1976); *Veazey*, 231 N.C. at 364, 57 S.E.2d at 382-83; *T & T Development Co.*, 125 N.C. App. at 603, 481 S.E.2d at 349; *Benfield v. Benfield*, 89 N.C. App. 415, 420, 366 S.E.2d 500, 503 (1988). Pursuant to Appellate Rule 8, a party may apply to the appellate courts for a stay when the trial court chooses to proceed with the matter. *See* N.C.R. App. P. 8 (2002).

In the instant case, defendant appealed from the trial court's order denying defendant's motion to dismiss. Defendant argues that this order was immediately appealable because it affected a substantial right. The substantial right at issue was based on the doctrine of sovereign immunity which, defendant asserted, barred plaintiff's suit. Defendant contends that, as the order was immediately appealable, the trial court had no jurisdiction over the case once defendant perfected its appeal.

Although this Court eventually held that defendant's appeal affected a substantial right, and was thus immediately appealable, such a holding was not a foregone conclusion. The Court noted in its opinion that the "Supreme Court has never specifically addressed the issue." *RPR & Assocs.*, 139 N.C. App. at 527, 534 S.E.2d at 250. There is moreover substantial authority for the proposition that, once the State enters into a contract, it waives its rights to sovereign immunity. *See, e.g.*, N.C. Gen. Stat. § 143-135.3 (2001); *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976); *Stahl-Rider v. State*, 48 N.C. App. 380, 384, 269 S.E.2d 217, 219 (1980). As noted *supra*, the trial court had the authority to determine whether or not its order was immediately appealable. *See Veazey*, 231 N.C. at 364, 57 S.E.2d at 382-83; *T & T Development Co.*, 125 N.C. App. at 603, 481 S.E.2d at 349. Given the fact that plaintiff's claim against defendant was based upon a contract, the trial court's decision that defendant had waived all claims to sovereign immunity, and that therefore the appeal did not affect defendant's substantial rights, was a reasonable one. The reasonableness of the trial court's decision to proceed with trial is underscored by the fact that both this Court and the Supreme Court repeatedly rejected defendant's attempts to stay the lower court proceedings or otherwise remove jurisdiction from the trial court. Defendant does not contend that the proceeding before the trial court was otherwise flawed or resulted in prejudice to defendant.

Because the trial court had the authority to determine whether its order affected defendant's substantial rights or was otherwise immediately appealable, the trial court did not err in continuing to exercise jurisdiction over this case after defendant filed its notice of appeal. The trial court's determination that the order was nonappealable was reasonable in light of established precedent and the repeated denials by the appellate courts of this State to stay proceedings. Although this Court ultimately held that defendant's appeal affected a substantial right, it also held that defendant was not immune to suit. Defendant states no grounds, nor has it produced any evidence to demonstrate how it was prejudiced by the trial court's exercise of jurisdiction over this case. We therefore overrule defendant's first assignment of error.

B. Prejudgment and Postjudgment Interest

[2] By its second assignment of error, defendant contends that the trial court erred when it included prejudgment and postjudgment interest in the award entered for plaintiff. Citing the well-established rule that interest is not recoverable against the State absent express authorization by a statute or contract, *see, e.g.*, *Faulkenbury v. Teachers' and State Employees' Ret. Sys.*, 132 N.C. App. 137, 149, 510 S.E.2d 675, 683, *disc. review denied*, 350 N.C. 379, 536 S.E.2d 620, *cert. denied*, 352 N.C. 102, 540 S.E.2d 358 (1999), defendant argues that the award of interest was improper and must be reversed. On this point, we agree with defendant.

In its award to plaintiff, the trial court ordered that

> (2) G.S. 143-134.1, which is incorporated in Article 17 of the general conditions of this contract governs the issue of interest. Interest accrues at the rate of one percent (1%) beginning on the 46th day after substantial completion as to all monies due and unpaid a contractor. RPR completed its work on November 16, 1992 and is entitled to interest on sums awarded by this court to run from January 1, 1993 until paid. Therefore, RPR is entitled to prejudgment interest at the contract and the statutory rate (1% per month) from January 1, 1993 which has accrued in the amount of $748,931.37 as of May 1, 2000.
>
> (3) Interest on the principal sum from and after the date of this judgment at the contract and statutory rate of 1% per month.

As noted in the trial court's order, the parties agreed in their contract that "payments to subcontractors shall be made in accordance with

the provisions of G.S. 143-134.1 entitled *Interest on final payments due to prime contractors: payments to subcontractors.*" Section 143-134.1 of the North Carolina General Statutes provides in pertinent part that:

> On all public construction contracts which are let by a board or governing body of the State government or any political subdivision thereof . . . the **balance due** prime contractors shall be paid in full within 45 days after respective prime contracts of the project have been accepted by the owner, certified by the architect, engineer or designer to be completed in accordance with terms of the plans and specifications, or occupied by the owner and used for the purpose for which the project was constructed, whichever occurs first. Provided, however, that whenever the architect or consulting engineer in charge of the project determines that delay in completion of the project in accordance with terms of the plans and specifications is the fault of the contractor, the project may be occupied and used for the purposes for which it was constructed without payment of any interest on **amounts withheld past the 45 day limit**. . . . Should **final payment** to any prime contractor beyond the date such contracts have been certified to be completed by the designer or architect, accepted by the owner, or occupied by the owner and used for the purposes for which the project was constructed, be delayed by more than 45 days, said prime contractor shall be paid interest, beginning on the 46th day, at the rate of one percent (1%) per month or fraction thereof unless a lower rate is agreed upon on such **unpaid balance** as may be due.

N.C. Gen. Stat. § 143-134.1(a) (2001) (emphasis added). Under the plain terms of section 143-134.1, a prime contractor may recover interest of one percent on any unpaid balance due under a public construction contract beginning on the forty-sixth day after such balance was due.

In the instant case, plaintiff filed suit against defendant for breach of contract and for breach of warranty. Plaintiff did not allege, however, nor did the trial court find, that defendant failed to pay plaintiff the amount due under the contract for completion of the construction project. Instead, plaintiff asserted that defendant's conduct rendered performance of the contract more difficult, resulting in unforeseen extra-contractual expense and damages to plaintiff. The trial court agreed, finding and concluding that defendant's breach of contract injured plaintiff in the amount of $851,058.38 in damages.

The trial court then ordered that plaintiff was "entitled to interest on sums awarded by this court." Such a conclusion was in error.

The case of *Davidson and Jones, Inc. v. N.C. Dept. of Administration*, 69 N.C. App. 563, 317 S.E.2d 718 (1984), *reversed in part on other grounds*, 315 N.C. 144, 337 S.E.2d 463 (1985), is strikingly similar to the facts of the instant case and instructive on the issue of interest awarded against the State on damages for a breach of contract action. In *Davidson*, the plaintiff-contractor entered into a contract with the defendants, the University of North Carolina at Chapel Hill ("UNC-CH") and the North Carolina Department of Administration, "for the construction by plaintiff of new stacks for books for the Wilson Library on the [UNC-CH] campus." *Id.* at 564, 317 S.E.2d at 719. During the course of construction, the plaintiff incurred unforeseen expenses for rock excavation and removal. After the plaintiff's request for additional compensation was rejected by the defendants, the plaintiff "filed claims for equitable adjustment, requesting '$262,551.00 for the extra costs, duration expenses, inefficiency and interest costs' allegedly incurred because of the overrun in rock excavation." *Id.* at 567, 317 S.E.2d at 721. The trial court agreed with the plaintiff, concluding that it "was 'entitled to recover from the State as an equitable adjustment under the Contract.' " *Id.* at 569, 317 S.E.2d at 722. The trial court also ruled that the plaintiff was entitled to interest on such recovery.

On appeal, this Court held that, although the trial court correctly awarded damages to the plaintiff for expenses it incurred as a result of the rock excavation, the plaintiff was not entitled to interest on such damages. *See id.* at 574-75, 317 S.E.2d at 725. In so holding, the Court specifically rejected section 143-134.1 as a basis for awarding interest. *See id.* at 575, 317 S.E.2d at 725. Noting that it was unaware of "any statute authorizing the recovery of any interest against the State on breach of contract on the facts of this case[,]" the Court reversed the award of interest by the trial court.

As did the *Davidson* Court, we conclude that "on the face of its textual language[,]" section 143-134.1 is inapplicable to the facts of the instant case. *Id.* at 575, 317 S.E.2d at 725. Plaintiff's recovery was based on damages it incurred as a result of defendant's breaches of contract and of warranty, and not for any "unpaid balance" due under the contract. As noted *supra*, "the State is not required to pay interest on its obligations unless it is required to do so by contract or by statute." *Faulkenbury*, 132 N.C. App. at 149, 510 S.E.2d at 683. Because defendant was not obligated under the contract or section

143-134.1 to pay interest on damages suffered by plaintiff as a result of defendant's breach of contract, the trial court erred in awarding prejudgment and postjudgment interest. We therefore reverse the trial court's award of interest against defendant and turn to defendant's third assignment of error.

C. Sufficiency of Evidence

[3] By its final assignment of error, defendant argues that the trial court erred in awarding excessive damages to plaintiff. Defendant contends that there was insufficient evidence to support the award by the trial court. We disagree.

Upon review of judgment by the trial court, we must determine whether there was competent evidence before the court to support its findings of fact, and whether those findings of fact, in turn, support its conclusions of law. *See Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580-81, 350 S.E.2d 83, 86 (1986). "On appeal, the findings of fact made below are binding on the Court of Appeals if supported by the evidence, even when there may be evidence to the contrary." *Barnhardt v. City of Kannapolis*, 116 N.C. App. 215, 217, 447 S.E.2d 471, 473, *disc. review denied*, 338 N.C. 514, 452 S.E.2d 807 (1994).

Defendant first contends that there was insufficient evidence to support the trial court's award of direct costs of $86,214.12 for damages plaintiff incurred under its rock excavation claim. Defendant asserts that plaintiff submitted a damage claim for rock excavation totaling only $82,961.62. Our review of the transcript in this case reveals that defendant's argument is without merit.

James E. Anderson ("Anderson"), a civil engineer, testified extensively regarding plaintiff's damages on the rock excavation claim. Anderson testified that plaintiff suffered damages amounting to $2,214.03 for "additional open rock excavation[,]" $1,038.47 for "additional utility trench rock excavation[,]" and $82,961.62 for "additional footings trench rock excavation[,]" the total of which is $86,214.12. Thus, the figure of $82,961.62 represented only a portion of plaintiff's claim, rather than the entire figure as defendant asserted. The trial court's findings accurately and properly reflect Anderson's testimony. Because there was substantial evidence to support the trial court's findings, we conclude that the trial court properly found that plaintiff's damages for rock excavation totaled $86,214.12.

[4] Defendant next argues that the finding by the trial court that plaintiff suffered damages totaling $138,800.00 due to a delay on the

project of 347 days is unsupported by the evidence. Defendant asserts that the trial court neglected to deduct from its total of 347 days a time extension of forty-eight days granted to plaintiff by a series of change orders, as well as a time period of eighty days previously awarded to plaintiff by the State Office of Construction. We disagree.

Plaintiff presented extensive evidence at trial on the cause and effect of construction delay. Mr. William W. Gurry ("Gurry"), an expert in the analysis of construction delay and critical path methodology of construction scheduling, testified in detail concerning the construction delays caused by defendant. Gurry testified that, according to his calculations, the project "was 391 days late beyond contract completion[,]" a figure which "include[d] a 44 day time extension." Thus, contrary to defendant's assertions, the evidence before the trial court, and the trial court's findings concerning the delay, took into account the time extensions granted to plaintiff. Moreover, the trial court explicitly recognized that the State Office of Construction had previously awarded plaintiff damages, but found that defendant "refused to pay any portion of that award of the State Office of Construction." The trial court therefore included these time extensions in its award. We conclude that the trial court's award to plaintiff of damages suffered due to delay of the project is supported by the evidence and does not constitute a double recovery for plaintiff. We therefore overrule defendant's final assignment of error. We now examine the issues presented by plaintiff on appeal.

II. Plaintiff's Appeal

Plaintiff assigns as error three issues on appeal, arguing that the trial court erred in failing to award plaintiff damages on its (1) "masonry" claim and (2) its "excessive punchlist" claim. Plaintiff also asserts that the trial court erred by (3) making no findings regarding its conclusion that an offset against the judgment was proper for sums paid to plaintiff in settlement of a lawsuit against the project architect.

In addressing plaintiff's claims, we note again the proper standard of review for this Court. Findings of fact made by the trial court are binding if supported by competent evidence, *see Barnhardt*, 116 N.C. App. at 217, 447 S.E.2d at 473, while we review *de novo* the trial court's conclusions of law. *See Lemmerman*, 318 N.C. at 581, 350 S.E.2d at 86.

A. Masonry Claim

[5] Plaintiff asserts that the trial court erred in concluding that plaintiff had presented insufficient evidence of the specific damages it incurred in connection with the masonry phase of construction. In its judgment, the trial court found that

> RPR's budget for the masonry work, including materials and subcontract labor to install the masonry and appurtenances, was $669,064.00, which is found to be reasonable. RPR's actual cost for this work was $1,280,268.00. RPR's budget amount is found to be reasonable. RPR has been unable to prove to the court by the greater weight of the evidence how much of this additional masonry expense which was actually incurred by RPR was due to the conduct of UNC. Some, but not all of these additional costs, likely arose out of estimating errors. Although it is clear on this masonry claim that RPR suffered damages through owner caused inefficiencies, the amount of such actual damages has not been proven with the degree of specificity required by law. Therefore, the court rules that the Plaintiff cannot receive any monetary recovery for this claim.

Plaintiff argues that the trial court's failure to award damages on its masonry claim arises from the trial court's misapprehension of the law concerning speculative damages. Plaintiff correctly notes that, " 'where the plaintiff can prove the fact of damage, but not the extent of it, the reasonable certainty rule as it is now applied in most courts does not require proof of damages with mathematical precision.' " *Bolton Corp. v. T.A. Loving Co.*, 94 N.C. App. 392, 405, 380 S.E.2d 796, 805 (1989) (quoting Dobbs, *Remedies* § 3.3 (1973)), *disc. review denied*, 325 N.C. 545, 385 S.E.2d 496 (1989). Plaintiff contends that it produced sufficient evidence to support an award for damages on the masonry claim, and that the trial court erred in failing to make such an award. We disagree.

Contrary to plaintiff's assertions, it is clear that the trial court's denial of its masonry claim was based on plaintiff's failure to present sufficient evidence as to the *cause* of the damages rather than the *extent* of such damages. As recited above, the trial court found that

> RPR has been unable to prove to the court by the greater weight of the evidence how much of this additional masonry expense which was actually incurred by RPR was due to the conduct of UNC. Some, but not all of these additional costs, likely arose out of estimating errors.

It is well established that, for breach of an executory contract, the plaintiff has the burden of presenting sufficient evidence of damages "as can be ascertained and measured with reasonable certainty." *Biemann & Rowell Co. v. Donohoe Cos.*, 147 N.C. App. 239, 245, 556 S.E.2d 1, 5 (2001). "Moreover, where both parties contribute to the delay, neither can recover damages, unless there is proof of clear apportionment of the delay and expense attributable to each party." *Id.* In the instant case, the trial court found that plaintiff had failed to sustain its burden on the issue of apportionment of damages on the masonry claim and declined to award any monetary damages for such. The trial court's findings were based on competent evidence, and we conclude that the trial court did not err in failing to award damages for plaintiff's masonry claim. *See Biemann*, 147 N.C. App. at 246, 556 S.E.2d at 6 (holding that the trial court did not err in failing to award the plaintiff damages for its construction claim where the plaintiff "failed to properly establish responsibility for its additional costs"). We therefore overrule this assignment of error.

B. Excessive Punchlist Claim

[6] Plaintiff further assigns error to the trial court's failure to award plaintiff damages for the direct expenses it incurred on its "excessive punchlist" claim. After reviewing the evidence connected with this claim, the trial court found that "[a]s a direct and proximate result of the unreasonable means and methods employed by UNC in performing pre-final and final inspections and of the imposition of excessively high standards on RPR's finished work, RPR incurred . . . additional costs[.]" Although the trial court awarded plaintiff damages for costs it incurred in connection with additional labor by subcontractors, the trial court made no findings and no award based on plaintiff's direct costs, for which plaintiff submitted substantial evidence. Plaintiff argues that the trial court's failure to make findings regarding the direct costs constitutes error. We agree.

"In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon . . . ." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2001). Our Supreme Court has noted that

> 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 v. Quick, 305 N.C. 446, 452, 290 S.E.2d 653, 658 (1982) (alteration in original). Such specific findings are necessary for appropriate appellate review. *See Mann Contr'rs, Inc. v. Flair With Goldsmith Consultants-II, Inc.*, 135 N.C. App. 772, 775, 522 S.E.2d 118, 121 (1999) (holding that the trial court's award of damages was not supported by the findings).

In the instant case, plaintiff submitted substantial evidence of the direct costs it incurred as a result of defendant's unreasonable behavior in its inspection of plaintiff's work. Specifically, plaintiff produced evidence of costs totaling $38,221.00 in "clean up expense[;]" $273,334.00 in "additional payroll" expense; and $264.00 in "travel expenses." Further, Anderson testified at trial that plaintiff incurred $311,000.00 in "direct costs" as a result of defendant's behavior in connection with this claim. Although the trial court found that, "[a]s a result of the unreasonable and excessive punchlist process, RPR was required to expend an extraordinary sum of money for punchlist work above and beyond that reasonably anticipated and included in RPR's bid" and awarded costs related to subcontractor expenses, the trial court made no findings in connection with the direct costs expended by plaintiff. As a result, we are unable to determine whether or not the trial court properly considered the evidence of plaintiff's direct costs. We therefore remand the case for additional findings of fact regarding this evidence. We now examine plaintiff's final assignment of error.

C. Offset

[7] By its final assignment of error, plaintiff argues that the trial court erred in allowing an offset against monies plaintiff received from a settlement of claims against the architect on the project. In its judgment, the trial court ordered that

> UNC shall receive a credit to be applied to this judgment for monies received by Plaintiff resulting from the settlement of similar claims made by RPR in a separate lawsuit against the Architect, O'Brien/Atkins Associates, P.A. in the amount of $200,000.00, plus interest at one percent per month (1%) running from the date of such settlement payment to RPR.

Plaintiff contends that the trial court erred in ordering the credit without making findings of fact and conclusions of law regarding the necessity of this offset. We disagree.

In a breach of contract action, a defendant is entitled to produce evidence of payment of compensation by a third party to a plaintiff for damages resulting from a similar claim regarding the same subject matter. *See Markham v. Nationwide Mut. Fire Ins. Co.*, 125 N.C. App. 443, 455, 481 S.E.2d 349, 357, *disc. review denied*, 346 N.C. 281, 487 S.E.2d 551 (1997).

> Simply put, although plaintiff is entitled to full recovery for its damages, plaintiff is nevertheless not entitled to "double recovery" for the same loss or injury. As stated by our Supreme Court, "any amount paid by anybody . . . for and on account of any injury or damage should be held for a credit on the total recovery . . . ."

Id. (quoting *Holland v. Utilities Co.*, 208 N.C. 289, 292, 180 S.E. 592, 593-94 (1935)) (citations omitted).

In the case at bar, plaintiff asserted that it incurred expenses as a result of delay of the project caused by "the State of North Carolina through its agent architect." Plaintiff conceded that it had sued the architect over such delay and had settled its case for the amount of $200,000.00. Thus, in bringing the present breach of contract action, plaintiff sought compensation for injuries for which it had already in part received some monies. In its judgment, the trial court found that plaintiff was entitled to expenses it incurred as a result of the project delay. It is clear that defendant was entitled to a reduction of damages for monies plaintiff received for identical injuries resulting from an identical delay. *See Ryals v. Hall-Lane Moving and Storage Co.*, 122 N.C. App. 134, 141-42, 468 S.E.2d 69, 74-75 (1996). Because the facts regarding the settlement were not in dispute, and because defendant was entitled to the credit as a matter of law, the trial court was not required to make findings regarding the offset. We therefore overrule plaintiff's final assignment of error.

In conclusion, we hold that the trial court did not err by continuing to exercise jurisdiction over this case after defendant perfected its appeal. We further hold that the trial court erred when it awarded prejudgment and postjudgment interest against defendant, and by neglecting to make findings of fact concerning the evidence of direct costs plaintiff incurred in connection with its "excessive punchlist" claim. We otherwise affirm the judgment of the trial court.

The judgment of the trial court is hereby

Affirmed in part, reversed in part, and remanded.

Judges GREENE and HUNTER concur.

STATE OF NORTH CAROLINA v. HAROLD WESLEY JONES, Defendant

No. COA01-1422

(Filed 15 October 2002)

1. **Confessions and Incriminating Statements— custodial interrogation—age—mental capacity**

The trial court did not err by denying defendant sixteen-year-old's motion to suppress statements he made to law enforcement officers in an interview room at a police station detailing his involvement in the victim's death even though defendant contends his statements were the result of a custodial interrogation and were therefore inadmissible given his age and subnormal mental capacity, because: (1) defendant was not in custody when he understood that he was free to leave at any time, he made no incriminating statements at his first interview, and he demonstrated a marked level of familiarity with the criminal justice system; and (2) a reasonable person in defendant's position would not have believed himself to be in custody.

2. **Confessions and Incriminating Statements— voluntary and intelligent waiver—age—mental capacity**

The trial court did not err by denying defendant sixteen-year-old's motion to suppress statements he made to law enforcement officers in an interview room at a police station detailing his involvement in the victim's death even though defendant contends he was incapable of voluntarily and intelligently waiving his rights based on his age and subnormal mental capacity, because: (1) the circumstances were not sufficient to render defendant's will overborne and his capacity for self-determination critically impaired; (2) the trial court was confronted with conflicting evidence concerning defendant's true mental capacity; and (3) there is no evidence indicating that defendant was in any way mistreated or coerced by the police.

Appeal by defendant from judgment entered 5 October 2000 by Judge E. Lynn Johnson in Cumberland County Superior Court. Heard in the Court of Appeals 9 September 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Robert J. Blum, for the State.

David J. P. Barber for defendant-appellant.

EAGLES, Chief Judge.

Defendant Harold Wesley Jones was indicted and tried on charges of first-degree murder, first-degree kidnapping, first-degree forcible rape, first-degree statutory rape, first-degree statutory sexual offense and two counts of first-degree forcible sexual offense for his role in the kidnapping, rape and murder of ten-year-old T.L. Defendant was convicted on all counts except first-degree statutory rape, for which the jury returned a verdict of not guilty.

The evidence tended to establish the following. At the time of the offense defendant was sixteen years old and had been living with his twenty-three-year-old sister Al-Nesia Jones and his thirteen-year-old nephew J. J. Defendant moved in with his sister following the death of his mother in 1997, leaving his father, who continued living in New Jersey. Until 29 September 1998, defendant lived in a rental house located at 614 Lakeside Avenue in Burlington, approximately one block away from the victim's home. However, on 16 October 1998, defendant was living on Morningside Drive in Burlington. Defendant's seventeen-year-old girlfriend, D. B., frequently visited defendant and occasionally lived with him and the other members of his family. Consequently, the defendant, D. B., and J. J. all knew the ten-year-old, female victim, T. L.

After school on 16 October 1998, defendant, D. B. and J. J. went to Elmira Park near Lakeside Avenue in Burlington. Defendant and D. B. watched from the Elmira Recreation Center while J. J. played football with some of his friends. At some point in the afternoon, the victim walked by the park and recreation center on her way home from a local convenience store. Defendant and D. B. followed the victim away from the park on foot, in the direction of Lakeside Avenue. J. J. left the park a short time later, also in the direction of Lakeside Avenue. J. J. caught up with the victim sometime thereafter and accompanied her to the house located at 614 Lakeside Avenue, which had been vacant and under repair since defendant and his family moved out.

Once the defendant, the victim, J. J. and D. B. were all inside the house, J. J. began strangling the victim with a piece of coaxial television cable that he found in the house. D. B. directed defendant and J. J. to pull down the victim's pants. After J. J. did so, J. J. pushed the victim to the ground. D. B. then held the victim down while J. J. engaged in vaginal intercourse and defendant engaged in anal intercourse with the victim. Once this was over, D. B. and J. J. attempted to clean up the victim. When their efforts proved to be unsuccessful, defendant watched as J. J. and D. B. beat the victim about the head with a wooden bed rail that was found in the house. However, the victim did not die, so J. J. again wrapped the coaxial wire around the victim's neck and strangled her. Defendant then held the door while J. J. and D. B. dragged the victim's body out of the house by the coaxial cable wrapped around her neck. The victim was covered with a large piece of cloth and left between the fence and an oil drum in the back yard. She later died as a result of blunt force trauma to the head. In the days following discovery of the victim's body, the defendant, as well as J. J. and D. B. were all identified by police as suspects in the victim's death.

On 17 October 1998, two non-uniformed investigators with the Burlington Police Department went to defendant's home to see if he would agree to be interviewed. Al-Nesia Jones, D. B. and J. J. were also there. All three suspects were asked, in Al-Nesia's presence, if they would come to the police department to talk about T. L.'s death. Each was told they were not under arrest, did not have to go to the police department and were under no obligation to give any statements. Each agreed to talk with the officers and thereafter were driven by police to the Burlington Police Department. Defendant was directed into an interview room where he was interviewed separately from D. B. and J. J. by the two investigators who had driven them to the station. Before the interview began, the defendant was again told that he was not under arrest, was free to leave at any time and was under no obligation to speak. Defendant said he understood and agreed to talk to the officers. During the interview, defendant told police that he had not been back to 614 Lakeside Avenue since he moved approximately three weeks earlier. Defendant initially denied knowing the victim, however, he later admitted that he had met her once while living on Morningside Avenue. Defendant denied any involvement in the victim's death. The interview lasted approximately thirty to thirty-five minutes and defendant was taken home by police at the conclusion of the interview.

On 21 October 1998, police again sought to interview the defendant concerning T. L.'s death. This time, two different non-uniformed investigators went to defendant's school to see if he would come to the police department for another interview. Before going to the school, the investigators contacted the school resource officer assigned to defendant's school. This officer went to defendant's class and escorted defendant to the principal's office where he met with the investigators.

The investigators introduced themselves to defendant as members of the Burlington Police Department investigating the death of T. L. They told defendant that they wanted to interview him again and asked if he would be willing to come to the police department. The investigators told defendant that he was not under arrest and did not have to speak or go with them if he did not want to. Defendant was further told that if he came to the police department, he could leave at any time and the officers would see that he was driven home. Defendant said he understood and agreed to speak with the officers. Defendant rode in the front passenger seat of the investigators' car. Defendant was neither searched before he got in the car nor restrained once inside. The conversation on the way consisted mainly of general discussion about school and how long defendant had lived in Burlington. Defendant was not questioned about T. L.'s death on the way to the police department.

After arriving at the Burlington Police Department, the investigators escorted defendant to Lieutenant Jackie Sheffield's office. The office was of average size, carpeted, wall-papered and had four windows to the outside. The office was furnished comfortably with pictures and plants, as well as three extra office chairs arranged around a living-room type end table. Defendant went in and sat in one of the three chairs. The investigators followed, closing the door behind them and sitting in the remaining two chairs near the end table.

Once the investigators sat down, they produced a written *Miranda* waiver form and went over it with defendant, each line being read aloud by one of the investigators. Defendant also followed along on the page as the words were read to him. Reading the form verbatim, the investigators reintroduced themselves to defendant, told him the purpose for the interview, and gave defendant each of his *Miranda* warnings. In addition, defendant was also told that he had the right to have a parent or guardian present with him during questioning and that if he chose to answer questions without a guardian, he had the right to stop anytime he decided he wanted one present.

Following the reading of each individual right, the investigators paused and asked defendant if he understood or had any questions. Defendant indicated each time that he understood, both verbally and by initialing or writing "yes" on the page next to the clause that had just been read to him. The investigators then read the waiver portion of the document aloud to defendant and again asked defendant if he understood and wanted to answer their questions. Defendant said he did and so indicated by signing the waiver. Defendant was then asked if he needed anything to drink or a break to use the bathroom. After indicating that he did not, defendant was told that he could stop the interview anytime he needed to take a break. Defendant said he understood and the interview began.

Defendant's initial interview lasted approximately two hours. During most of this period, defendant denied any involvement in T. L.'s death. At the end of this period, however, defendant admitted that he was at 614 Lakeside Avenue the day T. L. was killed. Following this admission, the investigators took a break and again asked defendant if he needed to go to the bathroom or wanted anything to drink. Defendant declined. The investigators then left defendant alone in the office while they stepped out into the hallway. While the first two investigators were out of the room, a third plain-clothes investigator went into the office alone and asked defendant if he knew what happened to T. L. This time defendant said he did and gave an oral statement detailing his involvement in the victim's death. The first two investigators then came back into the office and memorialized defendant's statement in writing. Defendant made corrections on the written statement which he initialed and signed each page of the statement.

Defendant moved to suppress his statements, contending they were made involuntarily because he lacked the mental capacity to knowingly and understandingly waive his Constitutional rights. An evidentiary hearing was conducted on defendant's motion from 18 September 2000 to 21 September 2000. Defendant's evidence included testimony from Dr. John Warren, an expert in the field of clinical psychology with specialization in forensic and medical psychology. Dr. Warren testified that defendant suffered from fetal alcohol syndrome and was mentally retarded, with full scale I.Q. scores that ranged somewhere between 56 and 65. According to Dr. Warren, I.Q. scores between 100 and 90 were average; scores between 90 and 80 were low average; scores between 80 and 70 were borderline; and below 70 was the mentally retarded range.

Dr. George Baroff, an expert in clinical psychology with specialization in mental retardation, also testified for defendant. Dr. Baroff testified on cross-examination that the scores reflected in Dr. Warren's report did not coincide with the scores that appeared on the test administered to defendant. Dr. Baroff further testified that the results on the test indicated that defendant's full scale I.Q. score was 69, with scores of 72 on both the verbal and performance sub-tests. This placed defendant only one point below the threshold for mild mental retardation.

To further rebut defendant's assertion that he could not competently understand and waive his rights, the State presented the testimony of Art Dunn, a special education teacher at Western Youth Institute. Dunn testified that defendant performed satisfactorily on the reading comprehension assignments given to him while he was at Western Youth Institute. The State also presented testimony concerning two instances where defendant was previously questioned by police in matters unrelated to T. L.'s death. Finally, Deputies Hester Rastle and Jeffrey Svedek testified that while transporting prisoners including the defendant, they overheard defendant assure three other prisoners that jail officials "can't prove anything," during a conversation concerning charges pending against defendant and the other prisoners.

The trial court entered an order concluding there was no custodial interrogation and that the statements made by defendant on 21 October 1998 were given freely, voluntarily and knowingly. The trial court denied defendant's motion to suppress. At trial defendant was convicted of first-degree murder, first-degree kidnapping, first-degree forcible rape, first-degree statutory sexual offense and two counts of first-degree forcible sexual offense. Defendant appeals.

[1] Defendant argues that the trial court erred in denying his motion to suppress the statements he made to police. Specifically, defendant contends that his confession was the product of custodial interrogation and therefore inadmissible because given his age and mental capacity, he was incapable of voluntarily and intelligently waiving his Constitutional rights. After a careful review of the record and trial transcript, we disagree.

We begin by noting that "the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Buchanan*, 353

N.C. 332, 336, 543 S.E.2d 823, 826 (2001). "However, the determination of whether a defendant was in custody, based on those findings of fact, is a question of law that is fully reviewable by this Court." *State v. Patterson*, 146 N.C. App. 113, 120, 552 S.E.2d 246, 253 (2001), *disc. review denied*, 354 N.C. 578, 559 S.E.2d 548 (2001). "[T]he trial court's conclusions . . . must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001).

Here, the trial court concluded that defendant was not in custody on 21 October 1998, based on the criteria set forth in *State v. Daughtry*, 340 N.C. 488, 459 S.E.2d 747 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996), and *State v. Sanders*, 122 N.C. App. 691, 471 S.E.2d 641 (1996). Since these decisions reiterate the appropriate test for determining whether a person is "in custody," we conclude that the trial court applied the correct legal standard.

"[C]ustodial interrogation . . . mean[s] questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966). *See also*, *State v. Buchanan*, 353 N.C. 332, 337, 543 S.E.2d 823, 826 (2001). "[I]n determining whether a suspect is in custody, an appellate court must examine all the circumstances surrounding the interrogation; but the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *Buchanan*, 353 N.C. at 338, 543 S.E.2d at 827. This involves " 'an objective test as to whether a reasonable person in the position of the defendant would believe himself to be in custody or that he had been deprived of his freedom of action in some significant way.' " *State v. Sanders*, 122 N.C. App. 691, 693, 471 S.E.2d 641, 642 (1996) (quoting *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992)).

In *Sanders*, the defendant agreed to accompany detectives to the police station for an interview. The interview lasted approximately two hours and was conducted in an interview room by two detectives who were joined for a brief time by a third officer. Upon request, defendant was allowed to go to the bathroom and take a break and was never threatened or promised that he would not be prosecuted or obtain a lesser sentence by cooperating with police. *Sanders*, 122 N.C. App. at 694, 471 S.E.2d at 643. This Court held "that a reasonable

person in defendant's position would not have believed himself to be "in custody" for *Miranda* purposes." *Id.* (emphasis supplied).

Here, defendant attempts to distinguish *Sanders* on grounds that a sixteen-year-old, mentally retarded boy would have believed himself to be in custody the moment he was removed from his class and brought to the principal's office by a school officer.

> The test for determining whether the interrogation was custodial is 'whether a reasonable person in the suspect's position would believe that he had been taken into custody or otherwise deprived of his freedom of action in any significant way,' or whether the suspect felt free to leave. This is an objective test, based upon a reasonable person standard, and is 'to be applied on a case-by-case basis considering all the facts and circumstances.'

State v. Hall, 131 N.C. App. 427, 432, 508 S.E.2d 8, 12 (1998), *aff'd*, 350 N.C. 303, 513 S.E.2d 561 (1999) (citation omitted). *See also State v. Medlin*, 333 N.C. 280, 291, 426 S.E.2d 402, 407 (1993). The subjective belief of the defendant as to his freedom to leave is not in and of itself determinative. *Hall*, 131 N.C. App. at 432, 508 S.E.2d at 12. Instead, "we must examine the record as a whole and, applying the reasonable person standard set out above, determine as a matter of law whether [the] defendant was in custody." *Id.* Therefore, "the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Stansbury v. California*, 511 U.S. 318, 324, 128 L. Ed. 2d 293, 299 (1994).

Here, the trial court made detailed findings of fact with regard to the interview which took place on 21 October 1998. The trial court found that two plain-clothes Burlington police officers went to defendant's school and asked defendant if he would accompany them to the police department for an interview. Prior to this, the officers contacted another officer assigned to defendant's school and had defendant brought to the principal's office to meet them. The officers told defendant he was not under arrest and did not have to speak with them. Defendant was further told that if he did go with the officers, he could leave at any time and the officers would take him home if he needed them to. Defendant voluntarily accompanied the officers to the police department, where he was interviewed in a comfortably furnished office by two, unarmed, plain-clothes officers. Defendant was offered the use of the bathroom as well as given the opportunity for a break whenever he desired, both of which he declined. Defendant was fully advised of his rights, which he acknowledged

and waived in writing. Defendant was not shackled or handcuffed; no threats or promises were made; and no pressure was exerted upon defendant during the course of the interview. Defendant had three prior police contacts in 1998, one of which involved a similar interview by police on 17 October 1998.

Evidence elicited during the suppression hearing is also relevant to this inquiry. First, the interview of 17 October 1998 took place in an interview room, not an office. Defendant understood then that he was free to leave at any time and made no incriminating statements. Following the interview, defendant was allowed to leave the police station, just as he had been promised. Next, defendant demonstrated a marked level of familiarity with the criminal justice system, particularly principles of proof. Finally, defendant was left unattended in Lt. Sheffield's office while the interviewing officers took a break.

On the record before us, the trial court's findings are sufficient to support the conclusion that a reasonable person in defendant's position would not have believed himself to be in custody. Furthermore, these findings are amply supported by the evidentiary record. Accordingly, we conclude that defendant was not in custody when he gave the statements in question.

[2] Defendant next argues that he was incapable of effectively waiving his constitutional rights due to his age and sub-normal mental capacity. As a result, defendant contends his confession was inadmissible because it was not given voluntarily. Because we find that defendant was not in custody at the time he confessed, it is unnecessary for us to determine whether defendant properly waived his constitutional rights under *Miranda.* Even assuming *arguendo* that defendant was in custody, we conclude he effectively waived his rights.

In reaching this conclusion, we are guided by the decisions of our own Supreme Court:

> We have consistently held that a defendant's subnormal mental capacity is a factor to be considered when determining whether a knowing and intelligent waiver of rights has been made. Such lack of intelligence does not, however, standing alone, render an in-custody statement incompetent if it is in all other respects voluntarily and understandingly made.
>
> Although age is also to be considered by the trial judge in ruling upon the admissibility of a defendant's confession, the fact

> that the defendant is youthful will not preclude the admission of his inculpatory statement absent mistreatment or coercion by the police officers.

State v. Fincher, 309 N.C. 1, 8, 305 S.E.2d 685, 690 (1983) (citation omitted). *Accord, State v. Jenkins*, 300 N.C. 578, 268 S.E.2d 458 (1980) (mildly retarded defendant with I.Q. of 60 capable of waiving rights under *Miranda*); *State v. Thompson*, 287 N.C. 303, 214 S.E.2d 742 (1975), *death sentence vacated*, 428 U.S. 908, 49 L. Ed. 2d 1213 (1976) (nineteen-year-old defendant with an I.Q. of 55 capable of waiving rights).

The test for voluntariness in North Carolina requires our review of the totality of the circumstances to determine if the confession is " 'the product of an essentially free and unconstrained choice by its maker.' " *State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 36 L. Ed. 2d 854, 862 (1973)).

> Factors to be considered in this inquiry are whether defendant was in custody, whether he was deceived, whether his Miranda rights were honored, whether he was held incommunicado, the length of the interrogation, whether there were physical threats or shows of violence, whether promises were made to obtain the confession, the familiarity of the declarant with the criminal justice system, and the mental condition of the declarant.

Id. See also Schneckloth, 412 U.S. at 226, 36 L. Ed. 2d at 862.

Applying these principles to the facts here, we conclude that the defendant's confession was voluntarily given. Defendant argues that the nature of the interrogation and the psychiatric testimony concerning his mental capabilities compel us to conclude that his confession was not voluntarily given. We disagree.

Here, the initial interview lasted approximately two hours. After a short break in the interview, the first two investigators left the room and a third investigator resumed the interview alone. We agree with the trial court that *State v. Sanders*, 122 N.C. App. 691, 471 S.E.2d 641 (1996), is instructive and weighs against a finding that the circumstances here were sufficient to render defendant's "will . . . overborne and his capacity for self-determination critically impaired." *Schneckloth*, 412 U.S. at 225-26, 36 L. Ed. 2d at 862.

Furthermore, the trial court was confronted with conflicting evidence concerning defendant's true mental capacity. One of defendant's own experts testified on cross-examination that defendant's actual full scale I.Q. score placed him only one point below the threshold for mental retardation. Moreover, defendant's verbal and performance test scores placed him two points above that threshold. "When the *voir dire* evidence is conflicting . . . the trial judge must weigh the credibility of the witnesses, resolve the crucial conflicts and make appropriate findings of fact. When supported by competent evidence, his findings are conclusive on appeal." *State v. Jenkins*, 300 N.C. 578, 584, 268 S.E.2d 458, 463 (1980). On this record, there is ample evidence to support the trial judge's findings of fact and conclusions of law that defendant knowingly and intelligently waived his rights.

Likewise, we find no evidence in the record before us that indicates defendant was in any way mistreated or coerced by the police. *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983), is instructive. In *Fincher*, the defendant argued that his consent to the search of his apartment was ineffective because it was not voluntarily and intelligently given. Our Supreme Court explained that the legal principles involved in determining the voluntariness of an inculpatory statement made by a mentally deficient defendant "are equally apposite to situations where the voluntariness of a consent to search is at issue." *Id.* 309 N.C. at 8, 305 S.E.2d at 690.

In *Fincher*, a seventeen-year-old defendant was arrested and handcuffed, read his *Miranda* warnings, and immediately taken from his apartment to a patrol car. The arresting officer presented defendant with a written consent to search form for his apartment and defendant agreed to sign the form in the presence of at least ten city police officers. During *voir dire*, defendant introduced psychiatric testimony that he was mentally retarded, suffered from a schizophreniform disorder and had an I.Q. of 50 although his verbal I.Q. was estimated to be 65. The *Fincher* Court concluded that defendant was capable of "giving a valid consent to search as a matter of law," *id.* 309 N.C. at 8, 305 S.E.2d at 690-91, and held that these facts supported the conclusion that defendant "voluntarily, willingly and understandingly consented to the search . . . ." *Id.* 309 N.C. at 9, 305 S.E.2d at 691.

In light of *Fincher*, nothing on the record before us indicates that defendant waived his rights as a result of mistreatment or coercion at the hands of the police. Accordingly, we hold that defendant was

capable of effectively waiving his constitutional rights and did so. Therefore, the trial court properly denied defendant's motion to suppress and the judgment of the trial court is affirmed.

Affirmed.

Judges MARTIN and HUNTER concur.

STATE OF NORTH CAROLINA v. ANTONIO McKINNEY

No. COA02-8

(Filed 15 October 2002)

1. Confessions and Other Incriminating Statements—confession of sixteen-year-old—coercive factors

The totality and degree of coercive factors surrounding the confession of a sixteen-year-old murder and burglary defendant were not sufficient to render the confession involuntary and inadmissible considering defendant's youth and unfamiliarity with the justice system, the officer's deceptive statements, the length of the interrogation, and defendant's access to food, drink, and restroom facilities.

2. Confessions and Other Incriminating Statements—custodial—no findings as to custody

The trial court did not err in a burglary and murder prosecution when considering whether a confession was coerced by not making findings resolving a discrepancy about whether defendant was in custody when he confessed. All of the evidence showed that defendant was given Miranda warnings before the interrogation took place and defendant offered no evidence other than his own affidavit to show when he was brought into custody.

Appeal by defendant from judgment entered 18 January 2001 by Judge Jerry Braswell in Wayne County Superior Court. Heard in the Court of Appeals 18 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Thomas J. Pitman, for the State.

Mary March Exum, for Defendant.

TYSON, Judge.

Antonio McKinney ("defendant") appeals from a judgment entered on a jury verdict of guilty on two counts of first degree murder, one count of first degree burglary, and one count of attempted armed robbery with a dangerous weapon. We find no error.

I. Facts

On the early morning of 30 July 1999, Peggy Lofton and her infant daughter, Kelly, were shot to death in their bedroom. Peggy's older daughter, Princess, age 13, resided in the home with her mother and sister. Princess heard an intruder enter the home. Princess told Captain Jerry Best of the Wayne County Sheriff's Department that she recognized the voice of the intruder to be that of the defendant.

Around 3:45 a.m. the same morning, Princess knocked at the door of a neighbor, Deveda Yelverton. Princess asked Ms. Yelverton to call 911 because there was a man in her house with a gun. She also told Yelverton that defendant was in her home. Yelverton made an emergency call. When the sheriff deputies arrived at the Lofton home, the bodies of Peggy Lofton and Kelly Lofton were found with fatal gunshot wounds to their heads.

Spent .22 rifle cartridges were found inside the victims' home. According to Ronald Mars, SBI firearms expert, the victims were shot with a broken .22 caliber rifle that was later found in a field near the victims' home.

Captain Jerry Best testified that Princess told him that she heard someone come into the house, and that she recognized defendant's voice. Best gave this information to Sergeant David Disch and informed him that Princess had identified the defendant as the intruder. A bicycle was found at the crime scene together with tire tracks and footprints. The tracks implicated the defendant.

Based on this information, Disch went to defendant's home and found defendant seated in the back of a police car. Disch obtained consent to search the house from defendant's aunt, the owner, and obtained consent to search defendant's bedroom from defendant.

Deputy Greene took defendant to Captain Best at the Sheriff's office. Best and Greene believed defendant had been arrested and charged with multiple homicides although defendant had not yet been charged. Best and Detective Salo took defendant into an interview room and presented him with a Juvenile Rights Form and

explained his *Miranda* warnings. Disch had informed Best that defendant was ready to talk. Defendant answered each of the questions on the form, initialed the answers and signed the form waiving his rights.

Defendant was crying when he arrived at the Sheriff's Department, but appeared coherent prior to being informed of his *Miranda* rights. He denied any involvement in the murders, even after having been told that Princess Lofton had implicated him. Best told defendant that he did not believe his story. Defendant was made aware that he could take a break if needed. Best did not recall actually offering defendant food, drink, or use of the restroom. Best told the defendant that it was important to show remorse for the crimes if defendant had committed them.

After Best interviewed defendant from 8:15 a.m. to about 10:00 a.m., Disch arrived and began his interrogation. Disch wrote a statement for defendant in which defendant denied any knowledge of or complicity in the murders. Disch handed the statement to defendant who read it partly aloud. In the statement, defendant asked for a polygraph examination. The polygraph test had been suggested by Disch. Disch talked with defendant until approximately 11:45 a.m. Defendant's mother gave permission for her son to be polygraphed.

Later that afternoon, Disch and Sergeant Edwards took defendant to the SBI office in Greenville to undergo the polygraph test. Disch testified that he asked defendant before leaving if he needed to go to the restroom. Disch stopped at a gas station on the way to Greenville and asked defendant if he cared for anything to eat or drink. Defendant declined.

Upon arriving in Greenville around 3:30 p.m., Special Agent Kelly Moser spoke with the detectives about the case. Defendant waived his *Miranda* rights in a polygraph waiver. Moser administered the polygraph test to defendant after 4:30 p.m. while Disch and Edwards were not present. Defendant scored poorly on the polygraph, and Moser shared the results with him. Defendant initially denied committing the crimes, and Moser told defendant that there was good evidence against him. Defendant confessed committing the crimes to Moser. Defendant became visibly upset while confessing. After defendant verbally confessed, Moser asked Criminal Specialist Bruce Kennedy to take the defendant's statement.

Before repeating the confession at about 8:00 p.m., defendant was offered food, drink, and the opportunity to go to the restroom, and defendant declined. Defendant was again reminded of his *Miranda* rights. Defendant drew three sketches of the crime scene and signed them. Kennedy read the confession to the defendant who verified its accuracy. Defendant was returned to Wayne County and placed under arrest at 11:50 p.m.

Defendant moved to suppress his statements and confession. The trial court denied defendant's motion to suppress, after finding that defendant presented no evidence to substantiate his allegations. It found that (1) the State had offered defendant repeated opportunities to have food, drink, and use the restroom, (2) defendant made no incriminating statements prior to being given his *Miranda* warnings after being taken into custody, (3) defendant had the opportunity to talk with his mother before making any incriminating statements, and (4) defendant was given written *Miranda* warnings twice and verbally advised as well.

II. Issues

The defendant assigns error and argues that (1) the uncontradicted evidence shows his confession was made under circumstances that rendered it to be a coerced and involuntary confession, (2) the trial court failed to resolve material disputed facts going to the admissibility of the confession, and (3) the admissibility of the confession constituted reversible error. We only consider defendant's first assignment of error as it is the only one specifically argued in his brief. N.C.R. App. P. 28(b)(5).

III. Standard of Review

Our review of a motion to suppress is limited to whether the trial court's findings of fact are supported by competent evidence. If competent evidence exists, the findings of fact are binding on appeal. Our review is focused upon whether those findings of fact support the trial court's conclusions of law. *State v. Cabe*, 136 N.C. App. 510, 512, 524 S.E.2d 828, 830, *appeal dismissed*, 351 N.C. 475, 543 S.E.2d 496 (2000).

IV. Circumstances Surrounding Confession

[1] Defendant contends that the circumstances surrounding his confession evidence a "coercive environment" that renders his statements involuntary. Defendant was 16 years old at the time of the con-

fession. Defendant argues that he was not able to eat, drink, or use a restroom for a 12-hour period. Defendant was interviewed by four different "gun-wearing officers" (Best, Disch, Moser, and Kennedy) in small rooms. At times, the officers told defendant that they did not believe him and that there was strong evidence of his guilt. Defendant argues that the evidence, including a bicycle found at the scene and Princess Lofton's statement that she heard defendant's voice at the time of the intrusion, was not nearly as incriminating as the officers indicated to the defendant. What was incriminating were defendant's own words.

A confession is admissible if "it was given voluntarily and understandingly." *State v. Chapman*, 343 N.C. 495, 500, 471 S.E.2d 354, 356 (1996). The totality of the circumstances must be viewed, and "one of which may be whether the means employed were calculated to procure an untrue confession." *State v. Jackson*, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983), *cert. denied*, 490 U.S. 1110, 104 L. Ed. 2d 1027 (1989). North Carolina follows the federal test to determine voluntariness. *Id.* at 581, 304 S.E.2d at 152. The confession should be the "product of an essentially free and unconstrained choice by its maker." *Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 36 L. Ed. 2d 854, 862 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602, 6 L. Ed. 2d 1037, 1057-58 (1961)). If "[one's] will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process." *Id.* at 225-26, 36 L. Ed. 2d at 862.

Some factors considered to determine whether a confession is voluntary are: (1) the youth of the accused, (2) the accused's lack of education, (3) the length of detention, (4) the nature of the questioning, and (5) the use of physical punishment, such as deprivation of food or sleep. *Schneckloth*, 412 U.S. at 226, 36 L. Ed. 2d at 862.

Our Supreme Court has added the following: (1) whether defendant was in custody, (2) whether his *Miranda* rights were honored, (3) whether he was deceived, (4) whether he was held incommunicado, (5) the length of interrogation, (6) whether there were physical threats or shows of violence, (7) the declarant's familiarity with the criminal justice system, (8) the mental condition of the declarant, and (9) whether promises were made to obtain the confession. *Jackson*, 308 N.C. at 582, 304 S.E.2d at 152-53. In analyzing the factors our Supreme Court stated that "[w]here the requirements of *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 (1966), have been met and 'the defendant has not asserted the right to have counsel present during

questioning, no single circumstance may be viewed in isolation as rendering a confession the product of improperly induced hope or fear and, therefore, involuntary.' " *State v. Richardson*, 316 N.C. 594, 601, 342 S.E.2d 823, 829 (1986) (quoting *State v. Corley*, 310 N.C. 40, 48, 311 S.E.2d 540, 545 (1984)).

The defendant was given his *Miranda* warnings prior to the first interrogation by Captain Best. Defendant presented no evidence that questioning was initiated prior to defendant being placed in custody and *Mirandized.* The factors can only be viewed in reference to each other, and one cannot be relied on in isolation to the others.

Here, the factors that raise an issue that defendant's confession is suspicious include (1) the defendant's young age, (2) the deceiving statements of the officers, (3) unfamiliarity with the justice system, (4) length of interrogation, and (5) the deprivation of food, drink and use of restroom.

A. Defendant's Youth & Unfamiliarity with the Justice System

" '[A] minor has the capacity to make a voluntary confession, even of capital offenses, without the presence or consent of counsel or other responsible adult, and the admissibility of such a confession depends not on his age alone but on a combination of that factor with such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement.' " *In re Mellott*, 27 N.C. App. 81, 82, 217 S.E.2d 745, 747 (1975) (quoting *State v. Dawson*, 278 N.C. 351, 180 S.E.2d 140 (1971)).

The twelve-year-old defendant in *Mellott* contended his confession was involuntary due to his young age. *Id.* This Court upheld the entry of his confession despite his youthful age because there was no evidence that he did not understand the effect of his statement. *Id.* Similarly, the fact of defendant's youth, coupled with his inexperience in the justice system, does not show a lack of understanding. Defendant acknowledged to all of the interrogating officers that he knew and understood his rights.

B. Officers' Deceiving Statements

The interviewing officers told defendant that they did not believe him and that he should tell the truth. They also informed him that he would benefit if he showed some remorse for the crimes if he committed them. The officers exaggerated the evidence against

defendant and actually lied to the defendant about the implicating statement Princess Lofton had made against him.

Custodial admonitions to a suspect to tell the truth do not render his confession inadmissible. *State v. Jackson*, 308 N.C. at 579, 304 S.E.2d at 151. "Any inducement of hope must promise relief from the criminal charge to which the confession relates." *Id.* The officers urged defendant to tell the truth but only if he had committed the crime. There is no evidence that the officers promised leniency or other relief from the criminal charge in exchange for defendant's confession. The admonitions of the officers do not bolster circumstances indicating coercion.

As for the false statement concerning the evidence in the case, the State contends that the misstatement of Princess Lofton's statement against the defendant was not a significant misrepresentation. Regardless of its materiality,

> [d]eceptive methods or false statements by police officers are not commendable practices, [and] standing alone they do not render a confession of guilt inadmissible. . . . False statements by officers concerning evidence, as contrasted with threats or promises, have been tolerated in confession cases generally, because such statements do not affect the reliability of the confession.

Jackson, 308 N.C. at 574, 304 S.E.2d at 148. In *Jackson*, the police officers not only made false statements, but showed the defendant false evidence to induce the confession. The confession was admitted. *Id.* at 574-75, 304 S.E.2d at 148. Such actions were far more threatening than the statements made at bar which merely exaggerated Princess Lofton's testimony.

C. Length of Interrogation and Deprivation of Necessities

Defendant argues that during 12 hours of interrogation, he was deprived of food, drink and restroom privileges. Defendant likens his case to *Haley v. Ohio*, 332 U.S. 596, 92 L. Ed. 224 (1948) where a 15-year-old boy suspected of complicity with a murder was arrested at midnight and interrogated without counsel or parent present until 5:00 a.m. in relays of two or more officers. The U.S. Supreme Court determined that the confession was "wrung from a child by means which the law should not sanction." *Haley*, 332 U.S. at 601, 92 L. Ed. at 229.

There are important factual distinctions between *Haley* and the instant case. First, the accused in *Haley* was fifteen years of age while the defendant here was sixteen years old at the time of the confession. The difference appears minuscule as only one year separates the defendants, but North Carolina law affords more privileges and responsibilities to its citizens at the age of sixteen. *See* N.C.G.S. § 20-7 (issuance and renewal of drivers licenses). This Court has upheld the admissibility of a confession of an accused who was younger than sixteen. *See In re Mellott*, 27 N.C. App. 81, 82, 217 S.E.2d 745, 746-47 (1975).

The most startling difference between the cases regards the deprivation of necessities experienced in *Haley* and by the defendant at bar. The defendant in *Haley* was interrogated continuously for five hours during the middle of the night resulting in significant sleep deprivation. *Haley*, 332 U.S. at 598, 92 L. Ed. at 227. Defendant here did not drink, eat or go to the restroom during the entire time of questioning. Defendant presented no evidence that the absence of food, drink, or use of the restroom occurred because officers deprived him of these things. All testimony reveals that the officers asked defendant if he needed or wanted food, drink, or a restroom. For whatever reason, defendant *deprived himself* of those necessities. The officers cannot be held responsible for the defendant's personal choices after being provided numerous opportunities.

As for the length of the questioning, there is no indication that the defendant in *Haley* received any break from non-stop questioning by six different officers. *Haley*, 332 U.S. at 598, 92 L. Ed. at 227-28. Defendant McKinney received breaks during questioning, and was questioned by four officers. Although the questioning spanned the course of the day, it was broken into increments of less than three to four hours each.

Aggravating factors in the *Haley* case included the disputed testimony that the accused was physically beaten and the undisputed evidence showed that the defendant was kept incommunicado for over three days. *Id.* at 597-98, 92 L. Ed. at 227-28. These factors are clearly not present here where defendant was allowed to see his mother during the day of questioning.

D. Summary

The standard for voluntariness is a "totality of the circumstances" standard. The totality and degree of coercive factors in this case are

not sufficient to render the defendant's confession involuntary and inadmissible. The trial court found sufficient facts based upon competent evidence to hold that defendant's confession was not coerced.

V. Resolution of Disputed Facts

[2] Defendant contends that the trial court erred in failing to address inconsistencies in the record, specifically to determine the point in time when defendant was actually arrested and taken into custody. Defendant points to Disch's statement that before taking defendant to Greenville, he was not in custody, was free to leave and had not been formally charged. Disch testified that he actually arrested defendant at 11:50 p.m. after the confession was elicited. Captain Best testified that defendant was arrested for the murders before he was brought in for the first interview at 8:15 a.m.

The inconsistencies were not resolved as the trial court simply found the defendant had been "apprehended." Defendant argues that a determination of when he was in police custody is material in considering the admissibility of his confession.

We disagree. All evidence shows that defendant was given his *Miranda* warnings before a custodial interrogation ever took place. The sole situation where custody was questionable and important was brought to light in defendant's affidavit. Defendant states that while he was inside the police car before being brought in, someone made a threatening comment to induce a confession. The trial court reviewed this material and believed Officers Disch and Greene. Both were present at the time and testified that they neither heard nor said a threatening comment.

The trial court did not have to resolve all of the material conflicts presented at the *voir dire* hearing because the defendant offered no evidence other than his own affidavit in support of the motion to suppress. *State v. Smith*, 328 N.C. 99, 118-19, 400 S.E.2d 712, 723 (1991). Because defendant offered no other evidence to show when he was brought into custody, the conflict is between the officers. The trial court may take the State's evidence as uncontradicted and forego a finding of facts regarding the conflict. *Id.*

VI. Reversible Error

Defendant argues that because the confession was the evidence linking defendant to the crimes, its admission is reversible error. If the confession had been coerced and inadmissible, it could constitute

reversible error. As we find the confession admissible, we need not reach this conclusion.

We find no error in the judgment entered on the jury's verdict convicting defendant of the crimes charged.

No error.

Judges McCULLOUGH and BRYANT concur.

SHARON LYNN LOVELACE, ADMINISTRATRIX OF THE ESTATE OF SHAYLA MEAGEN MOORE, AND SHARON LYNN LOVELACE, INDIVIDUALLY, PLAINTIFF-APPELLEE v. CITY OF SHELBY AND THOMAS LOWELL LEE, DEFENDANTS-APPELLANTS

No. COA01-1381

(Filed 15 October 2002)

1. Appeal and Error— appealability—denial of motion for summary judgment—interlocutory order

Defendant individual's appeal in a wrongful death and negligent infliction of emotional distress case from the denial of his motion for summary judgment is dismissed as an appeal from an interlocutory order because: (1) a substantial right is not affected; and (2) the claim against defendant individual does not involve doctrines of importance for public bodies and does not have compelling exigencies that require invocation of discretionary review in this case.

2. Appeal and Error— preservation of issues—failure to raise issue at trial

The Court of Appeals declined to consider plaintiff's motion to dismiss defendant city's appeal of the trial court's denial of defendant's N.C.G.S. § 1A-1, Rule 12(c) motion in a wrongful death and negligent infliction of emotional distress case based on plaintiff's failure to preserve this issue because: (1) N.C. R. App. P. Rule 10(b)(1) requires a party to timely present a question to the trial court in order to preserve it; and (2) this is the first time plaintiff has raised this issue.

3. Cities and Towns— public duty doctrine—911 operator

The trial court did not err in a wrongful death and negligent infliction of emotional distress case by denying defendant city's N.C.G.S. § 1A-1, Rule 12(c) motion to dismiss even though defendant contends the public duty doctrine prevents plaintiff from seeking recovery for the death of her minor child based on a 911 operator's alleged delay in calling the fire department to plaintiff's burning house, because: (1) the fact that the 911 operator was an actual police officer does not allow application of the public duty doctrine; and (2) the public duty doctrine is meant to provide protection to local law enforcement officials and the municipalities for which they work in a narrow set of circumstances that are not applicable to this case.

Appeal by defendants from order dated 22 May 2001 by Judge J. Gentry Caudill in Superior Court, Cleveland County. Heard in the Court of Appeals 21 August 2002.

Deaton & Biggers, P.L.L.C., by W. Robinson Deaton, Jr. and Brian D. Gulden; and Flowers, Martin & Moore, P.A., by Fred A. Flowers, for plaintiff-appellee.

Stott, Hollowell, Palmer & Windham, LLP, by Martha Raymond Thompson and Heather Graham Conner, for defendant-appellant City of Shelby.

Horn, Pack & Brown, P.A., by Becky J. Brown, for defendant-appellant Thomas Lowell Lee.

McGEE, Judge.

Sharon Lynn Lovelace (plaintiff) filed a complaint on 5 November 1997, both as the representative of the estate of her deceased minor child, Shayla Meagen Moore (decedent), and individually, seeking damages from the City of Shelby and Thomas Lowell Lee (collectively defendants) for the wrongful death of decedent and for negligent infliction of emotional distress. Defendant Lee (Lee) filed an answer and motion to dismiss on 15 January 1998 pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). The next day, 16 January 1998, defendant City of Shelby (City of Shelby) also filed a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6). Plaintiff filed a motion to amend her complaint, which was granted on 11 March 1998. The trial court denied the City of Shelby's Rule 12(b)(6) motion to dismiss on 12 March 1998. The City of Shelby appealed the trial court's denial to our

Court on 8 April 1998. In an opinion filed on 1 June 1999, our Court reversed the trial court's denial of the City of Shelby's Rule 12(b)(6) motion to dismiss and remanded the case to the trial court for the entry of an order allowing the motion to dismiss. Judge Wynn dissented from the majority concerning the proper application of the public duty doctrine. Plaintiff appealed this Court's decision to the N.C. Supreme Court based on the dissent in the case. Our Supreme Court reversed the decision of this Court on 7 April 2000, holding that the City of Shelby's Rule 12(b)(6) motion should have been denied since the public duty doctrine did not apply in this case. The City of Shelby filed a petition for rehearing on 1 June 2000, which was denied by our Supreme Court on 15 June 2000.

The City of Shelby filed an answer in which it admitted that the 911 operator in question was employed as a police officer by the City of Shelby. Plaintiff's complaint alleged that the 911 operator was an employee of the City of Shelby Police Department, and for the purposes of a Rule 12(b)(6) motion, this allegation was taken as true by each of the courts reviewing the matter. *Block v. County of Person*, 141 N.C. App. 273, 275, 540 S.E.2d 415, 417 (2000) (citing *Lovelace v. City of Shelby*, 351 N.C. 458, 526 S.E.2d 652 (2000) (*Lovelace I*)).

Lee filed a motion for summary judgment on 4 April 2000. The City of Shelby filed a motion to amend its answer and a motion for judgment on the pleadings pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c) on 5 April 2000. An order was entered 16 April 2001 allowing the City of Shelby to amend its answer. The only amendment the City of Shelby made to its answer was to add that its Police Department was administering the 911 system for the City of Shelby as part of its general duty to protect the public. An order was entered 22 May 2001 denying both the City of Shelby's Rule 12(c) motion to dismiss and Lee's motion for summary judgment. Defendants appeal from the trial court's order.

In an appeal from the denial of a motion to dismiss based on N.C.G.S. § 1A-1, Rule 12(c), except for conclusions of law, legally impossible facts, and matters not admissible at trial, we must take all of the non-moving party's allegations as true. *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted). Further, in deciding Lee's appeal from the denial of his motion for summary judgment, "the evidence must be viewed in the light most favorable to the non-movant." *Dalton Moran Shook Inc. v. Pitt Development Co.*, 113 N.C. App. 707, 714, 440 S.E.2d 585, 590 (1994)

(citation omitted). Plaintiff alleges in her complaint that on or about 29 June 1996, plaintiff and her minor children, including decedent, resided at 706 Calvary Street, Shelby, North Carolina, in a house owned by Lee. Plaintiff also alleges Lee failed to install or maintain a fire detection system in plaintiff's home as required by his contract with the U.S. Department of Housing and Urban Development. The house was located approximately 1.1 miles from the closest City of Shelby fire station. A fire began inside plaintiff's home. Plaintiff exited the home with two of her three children; however, decedent did not follow them out. At least two people called the 911 emergency number to report the fire. A police department employee serving as the operator answered these calls, indicating that an emergency response would be forthcoming. While waiting for the fire department to arrive, decedent could be heard inside the house calling for her mother. Several attempts were made by bystanders and volunteer workers to enter the house, but the intensity of the flames prevented anyone from being successful. The police arrived at the scene before the fire department, but without equipment to fight the fire, they could not enter the house to attempt to rescue decedent. The fire department arrived at the scene at least ten minutes after the 911 calls were made. At some point after the 911 calls were made, and before the fire department arrived, decedent died. Plaintiff alleges she continues to have nightmares, flashbacks, and other post-traumatic symptoms as a result of hearing the cries of decedent in the burning house.

I.

[1] Lee argues the trial court erred in denying his motion for summary judgment. However, the denial of a motion for summary judgment is an interlocutory order from which appeal generally cannot immediately be taken. *Schmidt v. Breeden*, 134 N.C. App. 248, 251, 517 S.E.2d 171, 174 (1999) (citing *Hill v. Smith*, 38 N.C. App. 625, 626, 248 S.E.2d 455, 456 (1978)). In order to immediately appeal the denial of a motion for summary judgment, the appealing party must show that the denial of the motion deprives the party of a "substantial right" which might be "lost, prejudiced, or less than adequately protected" absent review before a final judgment. *Murphy v. Coastal Physicians Grp., Inc.*, 139 N.C. App. 290, 294, 533 S.E.2d 817, 820 (2000) (citation omitted); *Dolton Moran Shook Inc.*, 113 N.C. App. at 710, 440 S.E.2d at 588 (citation omitted). Lee argues that the order at issue affects a substantial right but all he states in support of this contention is that:

> [t]his case is one of significant public importance as evidenced by the procedural history. Defendant Lee is an elderly man and a party entitled to the expeditious administration of justice. In allowing this interlocutory appeal, the court would be exercising its proper discretion in placing him on the same footing as defendant City of Shelby[.]

Lee seems to be arguing that because he is elderly, he should therefore be entitled to an immediate appeal of the court's denial of his motion for summary judgment. While acknowledging that the rigors of trial could be greater on an elderly person than on someone of less advanced age, we have clearly stated that avoidance of a trial is not a substantial right that would allow immediate appeal from an interlocutory order. *Yang v. Three Springs, Inc.*, 142 N.C. App. 328, 330, 542 S.E.2d 666, 667 (2000) (citations omitted). Further, Lee seems to be arguing that we should allow his appeal since the City of Shelby is also appealing. However, this contention lacks merit. While Lee's case involves the same basic factual situation, the facts and issues of law that would determine his liability are completely disparate from the issues affecting the claims against the City of Shelby. *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 344, 511 S.E.2d 309, 312 (1999) ("Avoiding separate trials of different issues does not qualify as a substantial right . . . ."). Further, the substantial right of "avoidance of separate trials" is normally applied when the *same* party is trying to avoid two separate trials. *See id.* at 344-45, 511 S.E.2d at 312. In this case, Lee is arguing that he should be on the same footing with the City of Shelby, a completely different party. Assuming, *arguendo*, that this Court allows the City of Shelby to appeal the denial of its Rule 12(c) motion, Lee will not be prejudiced in any substantial right if he is not allowed to immediately appeal the denial of his summary judgment motion. We thus determine that Lee has no substantial right that would be "lost, prejudiced, or less than adequately protected" absent review before a final judgment. *Murphy*, 139 N.C. App. at 294, 533 S.E.2d at 820 (citation omitted).

Lee also urges this Court to allow his appeal under our discretionary review powers. While this Court has the power to allow such a discretionary review, "[s]uch discretion is not intended to displace the normal procedures of appeal, but inheres to appellate courts under our supervisory power to be used only in those rare cases in which normal rules fail to administer to the exigencies of the situation." *Stanback v. Stanback*, 287 N.C. 448, 453-54, 215 S.E.2d 30, 34

(1975) (citation omitted). Lee cites *Flaherty v. Hunt*, 82 N.C. App. 112, 345 S.E.2d 426, *disc. review denied*, 318 N.C. 505, 349 S.E.2d 859 (1986), in support of his request. *Flaherty* involved the appeal by a defendant from the denial of a Rule 12(b)(6) motion. *Id.* In *Flaherty*, this Court noted that no direct appeal was generally allowed from such an interlocutory order, and that the defendant was not deprived of a substantial right that could not be protected by a timely appeal from a decision on the merits. *Id.* at 113, 345 S.E.2d at 427. However, this Court stated that "where a decision of the principal question presented would expedite the administration of justice, or where the case involves a legal issue of public importance, appellate courts may exercise their discretion to determine such an appeal on its merits." *Id.* at 113-14, 345 S.E.2d at 427 (citations omitted). This Court determined that since *Flaherty* involved the alleged misuse of state property by a governor while in office, it was an appropriate case for the exercise of such discretion. *Id.* at 114, 325 S.E.2d at 427-28. In *Flaherty*, this Court did not specify whether it was relying on the "expedition of justice" or an "issue of legal importance" to exercise such discretion. However, this doctrine has also been applied to other situations appearing to involve the "public good," such as in *Bardolph v. Arnold*, 112 N.C. App. 190, 435 S.E.2d 109, *disc. review denied*, 335 N.C. 552, 439 S.E.2d 141 (1993) (concerning the liability of county officials for expenditures of county money), and *Block*, 141 N.C. App. 273, 540 S.E.2d 415 (concerning the liability of a city in a dispute involving a septic system).

Lee argues that this case is of "significant public importance" given the procedural history of the case. However, his reference is to the earlier appeal involving the City of Shelby and our appellate courts' interpretation of the public duty doctrine. *See Lovelace I*, 351 N.C. 458, 526 S.E.2d 652 (2000). The claim against Lee was not involved in the earlier appeals, does not involve doctrines of similar import for public bodies, and does not have compelling exigencies that require invocation of discretionary review in this case. *See Stanback*, 287 N.C. at 453-54, 215 S.E.2d at 34. Lee's appeal is dismissed.

II.

[2] Plaintiff filed a motion to dismiss the City of Shelby's appeal of the trial court's denial of its Rule 12(c) motion. In order to succeed on a Rule 12(c) motion, the City of Shelby "must show that no material issue of fact exists and that [it] is clearly entitled to judgment" as a matter of law. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499 (citation

omitted). After reviewing the pleadings, the City of Shelby's Rule 12(c) motion was denied by the trial court. Plaintiff argues that the City of Shelby's motion to dismiss is really a second Rule 12(b)(6) motion captioned as a Rule 12(c) motion. The record does not reflect a ruling on that specific issue at the trial court. Further, there is no contention that plaintiff even sought dismissal of the City of Shelby's Rule 12(c) motion before the trial court on the basis she now asserts, or on any other basis.

Rule 10(b)(1) of the Rules of Appellate Procedure provides in pertinent part that "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(b)(1) (2002). As this is the first time plaintiff has raised this issue, she has failed to preserve this issue for review. *Creasman v. Creasman*, 152 N.C. App. 119, 123, 566 S.E.2d 725, 728 (2002) (citing *Town of Chapel Hill v. Burchette*, 100 N.C. App. 157, 159-60, 394 S.E.2d 698, 700 (1990); N.C.R. App. P. 10(b)(1)). We decline to consider plaintiff's motion to dismiss the City of Shelby's appeal, and address the merits of the appeal.

III.

[3] The City of Shelby argues the trial court erred in denying its Rule 12(c) motion to dismiss. As noted above, in order to succeed on a motion pursuant to Rule 12(c), the movant bears the burden of proving, after viewing the facts and permissible inferences in a light most favorable to the non-movant, that there are no material issues of fact and the non-movant is entitled to judgment as a matter of law. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499. The City of Shelby contends that the public duty doctrine prevents plaintiff from seeking recovery from the city in this case, and it is therefore entitled to judgment as a matter of law. We disagree.

Since the public duty doctrine was announced by our Supreme Court in *Braswell v. Braswell*, 330 N.C. 363, 410 S.E.2d 897 (1991), it has been applied to a variety of situations beyond the one addressed in *Braswell*. *See Moses v. Young*, 149 N.C. App. 613, 616-17, 561 S.E.2d 332, 334-35, *disc. review denied*, 356 N.C. 165, 568 S.E.2d 199 (2002) (cataloguing the applications). However, our Supreme Court, in *Lovelace I*, 351 N.C. at 461, 526 S.E.2d at 654, an earlier appeal in this very case, confined the public duty doctrine for local government to

its original application in *Braswell*. In our Supreme Court's most recent opinion on the public duty doctrine, *Wood v. Guilford Cty.*, the Court reaffirmed this limitation. 355 N.C. 161, 167, 558 S.E.2d 490, 495 (2002) ("Thus, the public duty doctrine, as it applies to local government, is limited to the facts of *Braswell*.") (citation omitted). In *Braswell*, the public duty doctrine was applied to protect the city from suit for failure to provide protection to a specific individual from the criminal acts of another. 330 N.C. at 370-71, 410 S.E.2d at 901-02.

Several opinions of our Court have recognized this limitation on the public duty doctrine, explaining how the decision in *Lovelace I* overruled many past applications of the public duty doctrine. *See, e.g.*, *Willis v. Town of Beaufort*, 143 N.C. App. 106, 109, 544 S.E.2d 600, 603, *disc. review denied*, 354 N.C. 371, 555 S.E.2d 280 (2001) (noting that *Lovelace I* had overruled the previous application of the public duty doctrine to fire protection services); *Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 761-62, 529 S.E.2d 693, 695 (2000) (recognizing that the N.C. Supreme Court has recently restricted the application of the public duty doctrine as applied to local government). As our Supreme Court stated in *Lovelace I*, "we have never expanded the public duty doctrine to any local government agencies other than law enforcement departments when they are exercising their general duty to protect the public." 351 N.C. at 461, 526 S.E.2d at 654.

As noted above, in *Lovelace I*, the N.C. Supreme Court has already addressed the applicability of the public duty doctrine to the situation in this case. *Id.* The Court in *Lovelace I* held that the public duty doctrine should not be extended to protect the City of Shelby from the alleged negligence of its 911 operator for allegedly delaying in dispatching fire department services. *Id.* at 461, 526 S.E.2d at 654; *see also Willis*, 143 N.C. App. at 109, 544 S.E.2d at 603. Defendant again has essentially the same claim before our Court. The only difference is that, due to an amendment in the City of Shelby's answer, it is now alleged that the 911 operator was not only an employee of the Shelby Police Department, but was in fact a police officer. The fact that the 911 operator was an employee, and thus an agent of the Shelby Police Department, was part of the record in the *Lovelace I* case. *Block*, 141 N.C. App. at 275, 540 S.E.2d at 417 (noting that the allegations of the non-moving party in a motion to dismiss a case are taken as true) (citation omitted). There is contention between the parties as to whether the Supreme Court, in addressing this case on a

Rule 12(b)(6) motion, knew that the 911 operator was a police officer, and not simply an employee of the Shelby Police Department. However, even assuming the Supreme Court did not know that the 911 operator was an actual police officer, this difference does not allow application of the public duty doctrine as delineated in *Braswell*. 330 N.C. at 370-71, 410 S.E.2d at 901-02. As our Supreme Court stated in *Lovelace I*:

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals. This rule recognizes the limited resources of law enforcement and refuses to judicially impose an overwhelming burden of liability for failure to prevent every criminal act.

351 N.C. at 460-61, 526 S.E.2d at 654 (quoting *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901). Plaintiff's cause of action against the City of Shelby does not allege a failure of the city to furnish police protection to plaintiff or her children. In fact, plaintiff alleges in her complaint that the police department did arrive and join in a rescue attempt, but the fire department did not arrive until more than ten minutes had passed.

Our Supreme Court has not seen the public duty doctrine as blanket protection for local municipalities carrying out all of the activities traditionally undertaken by them. The narrow scope of the public duty doctrine does not increase the burden on local law enforcement and city officials in that their duties are no greater than they have always been. The public duty doctrine is simply meant to provide protection to local law enforcement officials and the municipalities for which they work in a narrow set of circumstances. The trial court's decision denying the City of Shelby's Rule 12(c) motion is affirmed.

In review, we dismiss Lee's appeal as interlocutory. We affirm the order of the trial court denying the City of Shelby's Rule 12(c) motion.

Dismissed in part; affirmed in part.

Judges McCULLOUGH and BRYANT concur.

ELECTRONIC WORLD, INC., PLAINTIFF v. RICKEY J. BAREFOOT, KATHERINE BAREFOOT, MIKE CHANDLER AND TOMMY CHANDLER, DEFENDANTS

No. COA01-1197

(Filed 15 October 2002)

1. Landlord and Tenant— lease—description—latently ambiguous

The trial court erred by concluding that a lease was void for an insufficient description of the land conveyed where the description referred to a highway and store, from which the property could possibly be identified with certainty. The lease was latently rather than patently ambiguous and the court should have considered extrinsic evidence before ruling on the validity of the lease.

2. Statute of Frauds— lease—possibly invalid—other claims not barred

Claims for trespass, civil conspiracy, unfair and deceptive trade practices, and monies owed were not necessarily barred because they arose in connection with a lease that could be declared void under the Statute of Frauds. The Statute of Frauds bars only enforcement of the invalid contract; it does not bar other claims even though those claims arose in connection with an invalid lease.

3. Trespass— summary judgment—disputed lease

The trial court erred by granting summary judgment for defendant on a civil trespass claim where there was a genuine issue of material fact regarding the extent of the property rented by plaintiff. Moreover, plaintiff forecast sufficient evidence to overcome defendant's motion for summary judgment in that plaintiff was in possession, the entry by defendant was unauthorized, and plaintiff was injured.

4. Conspiracy— civil—lease dispute

The trial court erred by granting summary judgment for defendants on a civil conspiracy claim arising from a disputed lease where the evidence, viewed in the light most favorable to plaintiff, establishes that defendants attempted to coerce plaintiff to sell a convenience store located on the leased property through hostile and threatening behavior; defendant Chandler began parking used vehicles on plaintiff's leased property and

allowed its customers to use the property as a parking lot, which forced plaintiff to discontinue its sale of gasoline; and defendant Barefoot, the property owner, was verbally abusive and refused to take any action when plaintiff's president requested assistance. These actions, taken in total, create more than a suspicion or conjecture regarding a civil conspiracy between Barefoot and Chandler.

5. Unfair Trade Practices— disputed lease—summary judgment

The trial court erred by granting summary judgment for defendant on an unfair practices claim arising from a disputed lease.

6. Real Property— removal of underground gasoline tanks—claim for monies owed—summary judgment

The trial court erred by granting summary judgment for defendants on a claim for monies owed arising from a disputed lease where issues of material fact arose from the removal of gasoline tanks.

7. Appeal and Error— preservation of issues—failure to ask for ruling

An assignment of error was waived where plaintiff asked for leave to amend its complaint after a summary judgment ruling, the trial court did not rule on that request, and plaintiff did not ask for a ruling.

Appeal by plaintiff from judgment entered 29 June 2001, *nunc pro tunc* 4 June 2001, by Judge James F. Ammons, Jr., in Columbus County Superior Court. Heard in the Court of Appeals 11 June 2002.

Marshall, Williams & Gorham, L.L.P., by John L. Coble, for plaintiff appellant.

Ramos and Lewis, L.L.P., by Michael R. Ramos, for defendant appellees.

TIMMONS-GOODSON, Judge.

Electronic World, Inc. (hereinafter "plaintiff") appeals from summary judgment granted by the trial court in favor of Rickey Barefoot, Katherine Barefoot, Mike Chandler, and Tommy Chandler (hereinafter collectively, "defendants"). For the reasons stated herein, we reverse the judgment and remand this case to the trial court.

An examination of the pleadings, exhibits, and depositions filed in response to defendants' summary judgment motion, considered in the light most favorable to plaintiff, tends to show the following: In 1986, plaintiff entered into a lease with Frances Barefoot for the possession of certain real property located at 924 Jefferson Street, also known as U.S. Highway 74/76, in Whiteville, North Carolina. The terms of the lease ("1986 lease") included possession of a store named "Shorty's Convenient Mart" (hereinafter "Shorty's") located on the property. The property also included two underground gasoline storage tanks ("original gasoline tanks"). After acquiring possession of the property, plaintiff installed two additional underground gasoline tanks ("additional gasoline tanks"), attached gasoline pumps on the gasoline aisles, and acquired the necessary permits for the sale of gasoline at Shorty's. Plaintiff tendered rental payments to Frances Barefoot for the full term of the 1986 lease.

On or before 16 December 1996, Frances Barefoot transferred title of the property to her son, Rickey Barefoot ("Barefoot") and his wife, Katherine Barefoot (hereinafter collectively, "the Barefoots"), and on 16 December 1996, plaintiff and the Barefoots executed a lease ("1996 lease") of the property. Under the terms of the 1996 lease, plaintiff and the Barefoots agreed that the lease would begin 20 October 1996 and expire 19 October 2007. Plaintiff agreed to pay $425.00 per month for rental of the premises, with a gradual increase over the years of the lease.[1] The lease agreement contained the following description of the premises: "all that certain parcel of land together with improvements presently known as Shortie's [sic] Convenient Mart, located on U.S. 74/76 in Whiteville, Columbus County, North Carolina." During the lease negotiations, Rickey Barefoot and plaintiff discussed the fact that both the original and additional gasoline tanks required removal and/or replacement pursuant to state and federal law. Barefoot acknowledged that the tanks needed replacement and agreed to repave the parking lot once the replacement was completed.

Plaintiff thereafter continued to sell gasoline at Shorty's and tender rental payments to the Barefoots. In December of 1997, the Environmental Protection Agency ("EPA") informed plaintiff that it must remove or replace the original gasoline tanks. Raymond Banks Watts ("Watts"), the president of plaintiff corporation, informed

1. Specifically, the lease required plaintiff to pay $425.00/month for the first three years, $475.00/month for the next two years, $550.00/month for next three years, and $625.00/month for the next two years.

Frances Barefoot that he would assist in removing the original gasoline tanks, but that she would have to hire someone for the removal if his equipment was inadequate. According to Watts, Rickey Barefoot informed both Watts and the environmental testing company hired for the job that he would "take care of" the costs for removing the tanks. Consequently, workers began excavating the original gasoline tanks on the property. After the initial excavation, however, Barefoot refused to contribute any further payments, forcing plaintiff to complete the removal at a cost of $5,455.12.

Later that year, Barefoot leased to Mike and Tommy Chandler (hereinafter collectively, "Chandler"), certain real property located at 926 Jefferson Street. Chandler then began operating a business known as "Bogue Motor Sales" on the property, which is adjacent to the property leased by plaintiff. After signing the Barefoot-Chandler lease, Barefoot asked Watts if he was interested in selling Shorty's to Chandler. Watts informed Barefoot that he would discuss the sale of Shorty's with Chandler. Subsequently, Mike Chandler approached Watts and offered to purchase Shorty's from plaintiff, but sales discussions quickly collapsed and Mike Chandler in turn informed Watts that "we really don't want the business, we just want the property."

After this incident, Watts witnessed Barefoot visiting the neighboring Chandler business on several occasions. On one such occasion, Barefoot invited Watts to the Chandler office in order to "resolve this." Watts refused, and shortly thereafter, Chandler began parking used vehicles on the property under which the additional gasoline tanks were located. Although Watts repeatedly asked Chandler to remove the vehicles from the property, Chandler refused to do so.

Because the vehicles obstructed plaintiff's access to the gasoline tanks, plaintiff allegedly was unable to replace them, as required by state and federal law. Plaintiff was thereby forced to discontinue its sale of gasoline at Shorty's. Chandler's customers then began using plaintiff's property as a parking lot—"even to the point of leaving [their] cars parked at [plaintiff's] gas pumps" while they visited and test-drove vehicles from Chandler's business. When Watts asked Barefoot to intervene and prevent Chandler from parking vehicles on the property, Barefoot became "hostile," cursed Watts, refused to acknowledge that plaintiff was entitled to possession of the gasoline tanks, and made no attempts to prevent Chandler from parking vehicles on plaintiff's property. Watts contacted law enforcement officers on several occasions regarding Chandler's increasingly hostile

behavior towards plaintiff. For example, on one occasion, Tommy Chandler threatened to "slap [Watts'] head off."

After the dispute between plaintiff and Chandler arose, Barefoot surveyed the property. Barefoot then informed Watts that the land encompassing the gasoline tanks was part of the rental property covered in the Barefoot-Chandler lease. In 1999, after receiving a letter from the EPA, Chandler removed the cars from the land where the gasoline tanks were located. Barefoot did not, however, remove or replace the additional gasoline tanks as required by state and federal law. Subsequently, plaintiff hired a consultant to remove the additional gasoline tanks at a cost of $8,447.00.

On 16 February 2000, plaintiff filed a complaint against defendants alleging breach of lease, trespass, civil conspiracy, and unfair and deceptive trade practices. Plaintiff also sought recovery for monies allegedly due from Barefoot for removal of the original and additional gasoline tanks. On 18 May 2000, defendants filed their answer, in which they asserted four affirmative defenses, including, *inter alia*, that plaintiff's lease failed "to adequately describe the leased premises as required by the statute of frauds." Moreover, Chandler asserted a counterclaim against plaintiff for trespass.

On 8 February 2001, defendants filed a motion for summary judgment, which was heard by the trial court on 4 June 2001. Upon review of the pleadings, exhibits, depositions, and arguments of counsel, the trial court found that "the lease referred to in plaintiff's complaint and attached thereto and giving rise to plaintiff's claim is void in that the description contained in said lease is inadequate to support the actions of the plaintiff." The trial court therefore concluded that defendants were entitled to judgment as a matter of law and consequently granted defendants' motion for summary judgment. Plaintiff appeals.

The dispositive issues before this Court are whether the trial court erred in (1) concluding that the lease referenced in the complaint was void and (2) granting summary judgment in favor of defendants based on its conclusion that a lease rendered void by the statute of frauds bars any claims that arise in connection with the lease.

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). The party moving for summary judgment has the burden of showing that either an essential element of the plaintiff's claim does not exist, or that plaintiff cannot produce evidence to support an essential element of the claim. *Evans v. Appert*, 91 N.C. App. 362, 365, 372 S.E.2d 94, 96, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 584 (1988). In determining the propriety of summary judgment, all evidence is viewed in the light most favorable to the non-movant. *See Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

[1] Plaintiff contends that the trial court erred in concluding that the lease referenced in plaintiff's complaint was void because the description of the land conveyed was insufficient as a matter of law. We agree with plaintiff.

To be enforceable, a lease must meet the requirements of the statute of frauds. *See* N.C. Gen. Stat. § 22-2 (2001). Section 22-2 of the North Carolina General Statutes states that, "all . . . leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith." *Id.* "The writing must contain a description of the land to be conveyed, certain in itself, or capable or being rendered certain by reference to an external source referred to therein." *House v. Stokes*, 66 N.C. App. 636, 638, 311 S.E.2d 671, 673, *cert. denied*, 311 N.C. 755, 321 S.E.2d 133 (1984). "If the description set forth in the writing is uncertain in itself to locate the property, and refers to nothing extrinsic by which such uncertainty may be resolved, such ambiguity is said to be 'patently' ambiguous[,]" and the contract is held to be void. *Brooks v. Hackney*, 329 N.C. 166, 171, 404 S.E.2d 854, 858 (1991). The determination of whether a description is patently ambiguous is a question of law for the court. *See Kidd v. Early*, 289 N.C. 343, 353, 222 S.E.2d 392, 400 (1976). A description of property is merely latently ambiguous, however, "if it is insufficient, by itself, to identify the land, but refers to something external by which identification might be made." *House*, 66 N.C. App. at 638, 311 S.E.2d at 674. Where the ambiguity is latent, extrinsic evidence may be offered to identify the property. *See Lane v. Coe*, 262 N.C. 8, 13, 136 S.E.2d 269, 273 (1964).

The property description at issue in the present case is as follows: "all that certain parcel of land together with improvement

presently known as Shortie's Convenient Mart, located on U.S. 74/76 in Whiteville, Columbus County, North Carolina." We do not conclude that such a description creates "a state of absolute uncertainty" as to its precise location. *Lane*, 262 N.C. at 13, 136 S.E.2d at 273. The location of the highway, as well as the name of the store, provide sufficient indicators by which the property could "possibly be identified with certainty." *Id.* As such, the property description contained in the lease was latently rather than patently ambiguous, and the trial court should have considered extrinsic evidence in order to determine the identity of the property before ruling on the validity of the lease. *See id.*; *Yaggy v. B.V.D. Co.*, 7 N.C. App. 590, 599-600, 173 S.E.2d 496, 502 (1970). The trial court therefore erred in concluding that the lease was void.

[2] Moreover, plaintiff's other claims for trespass, civil conspiracy, unfair and deceptive trade practices, and monies owed were not necessarily barred because they arose in connection with a lease that may be declared void. "It has long been the rule in this State that the Statute of Frauds bars only enforcement of the invalid contract; it does not bar other claims which a party might have even though those claims arise in connection with the [invalid] lease." *Kent v. Humphries*, 303 N.C. 675, 679, 281 S.E.2d 43, 46 (1981). We now examine plaintiff's other claims to determine whether summary judgment was properly entered as to each claim.

Trespass

[3] A trespass is a wrongful invasion of the possession of another. *See Matthews v. Forrest*, 235 N.C. 281, 283, 69 S.E.2d 553, 555 (1952). "The elements of a trespass claim are that plaintiff was in possession of the land at the time of the alleged trespass; that defendant made an unauthorized, and therefore unlawful, entry on the land; and that plaintiff was damaged by the alleged invasion of his rights of possession." *Jordan v. Foust Oil Company*, 116 N.C. App. 155, 166, 447 S.E.2d 491, 498 (1994), *disc. review denied*, 339 N.C. 613, 454 S.E.2d 252 (1995).

In the present case, plaintiff held a sufficient property interest in the rental property to maintain a claim for trespass. *See Maintenance Equipment Co. v. Godley Builders*, 107 N.C. App. 343, 351, 420 S.E.2d 199, 203 (1992) (holding that a tenant who paid rent for the right to occupy and use certain property owned by a railroad company had sufficient possessory interest to maintain a trespass suit against the adjoining property owner), *disc. review denied*, 333 N.C. 345, 426

S.E.2d 707 (1993). The evidence viewed in the light most favorable to plaintiff tends to show that plaintiff tendered rental payments to the Barefoots and was in lawful possession of the land. According to Watts' deposition, Barefoot and plaintiff agreed that the property where the additional gasoline tanks were located was part of plaintiff's rental property. As such, genuine issues of material fact exist regarding the extent of the property rented by plaintiff. Further, plaintiff was in actual possession of the rental property at the time Chandler committed the alleged trespass. Finally, Chandler's entry onto plaintiff's rental property was unauthorized and caused injury to plaintiff. We hold that plaintiff forecast sufficient evidence to overcome defendants' motion for summary judgment regarding plaintiff's trespass claim.

Civil Conspiracy

[4] "A civil conspiracy claim consists of: (1) an agreement between two or more persons; (2) to do an unlawful act or to do a lawful act in an unlawful way; (3) which agreement resulted in injury to the plaintiff." *Boyd v. Drum*, 129 N.C. App. 586, 592, 501 S.E.2d 91, 96 (1998), *affirmed per curiam*, 350 N.C. 90, 511 S.E.2d 304 (1999). While an action for civil conspiracy "may be established by circumstantial evidence, sufficient evidence of the agreement must exist 'to create more than a suspicion or conjecture in order to justify submission of the issue to a jury.' " *Id.* (quoting *Dickens v. Puryear*, 302 N.C. 437, 456, 276 S.E.2d 325, 337 (1981)).

In the present case, the evidence viewed in the light most favorable to plaintiff establishes that defendants attempted to coerce Watts into selling Shorty's through hostile and threatening behavior. After signing their lease with one another, both Barefoot and Chandler pressured Watts to sell Shorty's. When plaintiff refused to sell the business, Barefoot and Chandler acted in an openly hostile manner towards Watts. Thereafter, Chandler began parking used vehicles on plaintiff's property and refused to remove the vehicles, despite plaintiff's protests. Chandler also allowed its customers to use plaintiff's property as a parking lot. These actions forced plaintiff to discontinue its sale of gasoline at Shorty's. When Watts requested Barefoot's assistance in the matter, Barefoot verbally abused him and refused to take any action to prevent Chandler from parking its vehicles on plaintiff's property. Further, Tommy Chandler threatened Watts with physical violence on at least one occasion. These actions, taken in total, create more than a suspicion or conjecture regarding whether a civil conspiracy existed between Barefoot and Chandler.

Therefore, the trial court erred in granting summary judgment to defendants on plaintiff's civil conspiracy claim.

Unfair and Deceptive Trade Practices

[5] Plaintiff's claim for unfair and deceptive trade practices is governed by section 75-1.1 of the North Carolina General Statutes, which states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2001). This Court has held that the renting of commercial property satisfies the statutory requirement of "commerce" under this section. *See Kent v. Humphries*, 50 N.C. App. 580, 589, 275 S.E.2d 176, 183, *affirmed as modified*, 303 N.C. 675, 281 S.E.2d 43 (1981). The same facts that exist to support plaintiff's civil conspiracy claim against defendants likewise support plaintiff's claim for unfair and deceptive trade practices. The trial court therefore erred in granting summary judgment to defendants on plaintiff's unfair and deceptive trade practices claim.

Monies Owed

[6] In 1997, state and federal law required the removal of the original gasoline tanks. Plaintiff contends that the original gasoline tanks belonged to Barefoot, and that Barefoot agreed to bear the cost of removal. Despite Barefoot's assertions that he would finance the tank removal, plaintiff was forced to reimburse the workers for the excavation, whereby plaintiff incurred costs of $5,455.12. Plaintiff incurred further costs of $8,447.00 when it was forced to remove the additional gasoline tanks. We conclude that plaintiff presented genuine issues of material fact precluding defendants' motion for summary judgment regarding plaintiff's claim for monies owed. The trial court therefore erred in granting summary judgment to defendants on this claim.

Estoppel

[7] In addition, plaintiff also assigns as error the trial court's denial of plaintiff's right to assert that defendants were equitably estopped from contesting the validity of the lease. "In order to preserve a question for appellate review . . . . it is . . . necessary for the complaining party to obtain a ruling upon the party's request, objection or motion." N.C.R. App. P., Rule 10(b)(1) (2002). In the present case, at the close of the summary judgment hearing, plaintiff asked the trial court for leave to amend its complaint to assert estoppel to defend-

ants' statute of frauds defense. The trial court did not rule on plaintiff's request, however, and plaintiff did not ask for a ruling. Therefore, pursuant to Rule 10(b)(1), this assignment of error is waived. We note, however, that plaintiff may properly renew its request for amendment of its complaint upon remand to the trial court.

In conclusion, we reverse the trial court's entry of summary judgment in favor of defendants and remand this case to the trial court. The judgment of the trial court is therefore

Reversed and remanded.

Judges GREENE and HUNTER concur.

STATE OF NORTH CAROLINA, Plaintiff v. MICHAEL ROBERT HYMAN, Defendant

No. COA01-1397

(Filed 15 October 2002)

1. Evidence— urine test—chain of custody

The trial court did not err in a delivery of cocaine to a minor child thirteen years or younger, second-degree kidnapping, and assault on a child under the age of twelve years case by allowing into evidence the results of the test of the minor child's urine, because: (1) concerns about the chain of custody of the material or the procedures used to test it go to the weight that should be accorded the test results, and the defense had ample opportunity to present these concerns to the jury; and (2) although defendant contends a witness nurse allegedly offered an improper expert opinion about the test results, the witness rendered no expert opinion and the test results had already been received into evidence.

2. Evidence— drug paraphernalia—illustrative purposes

The trial court did not err in a delivery of cocaine to a minor child thirteen years or younger, second-degree kidnapping, and assault on a child under the age of twelve years case by allowing an investigator to illustrate his testimony concerning crack

cocaine usage by using cocaine, marijuana, and sundry items of drug paraphernalia that were neither found in defendant's residence nor otherwise connected to the events alleged to have occurred on 19 June 2000, because: (1) the items were admitted for illustrative purposes only and no attempt was made to link defendant with the items; and (2) the trial court repeatedly gave limiting instructions emphasizing to the jury that the exhibits were not seized from defendant, were not linked to him, and were to be considered only for the purpose of illustrating and explaining the investigator's testimony.

3. Jury— motion to replace juror—spoke to officer about trial outside courtroom

The trial court did not abuse its discretion in a delivery of cocaine to a minor child thirteen years or younger, second-degree kidnapping, and assault on a child under the age of twelve years case by denying defendant's motion to remove and replace a juror after the juror reported that a law enforcement officer had spoken to her about the trial outside the courtroom, because: (1) the trial court conducted an inquiry of the juror which established that the person who had made the comment to her had no connection to the case or the trial; and (2) the juror stated unequivocally that nothing about the incident would affect her consideration in any way, that she would exclude the incident from her consideration, and that she would decide the case based solely on the evidence presented in the courtroom and law as explained by the court.

Appeal by defendant from judgments entered 8 May 2001 by Judge W. Osmond Smith, III, in Alamance County Superior Court. Heard in the Court of Appeals 22 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Edwin L. Gavin, II, for the State.

Mary March Exum for defendant-appellant.

MARTIN, Judge.

Defendant appeals from judgments entered upon his convictions of delivery of cocaine to a minor child 13 years old or younger, second degree kidnapping, and assault on a child under the age of 12 years.

The State's evidence tended to show that C.J., an eight-year-old girl, and her family were neighbors with defendant in a mobile home park. Prior to the alleged incident, there had been friendly interactions between C.J.'s family members and defendant, including C.J., her sisters, and/or her mother going to defendant's home to watch television or use the telephone. On 19 June 2000, her sister's birthday, C.J. was playing outside and saw defendant, who asked her to come to his trailer because he had a birthday present for her sister. Once inside the trailer, C.J. testified that defendant turned the television up loud, took her into the bedroom, and put a weight bench and weights against the door. He then reached under the bed and pulled out what C.J. described as a plastic tube that had "black stuff at the bottom and it was bubbling." He held a lighter to the far end of the tube and inhaled from the other end, then held the tube to C.J.'s mouth and had her inhale twice before he inhaled from it again. C.J. testified that her stomach hurt and her throat burned after the inhalations.

Meanwhile, C.J.'s mother had become concerned about her daughter's whereabouts and learned from a neighbor that C.J. had gone with defendant to his residence. She went to defendant's door, knocked very loudly, and called their names. C.J. stated that when her mother was at the door, the defendant held his hand over her mouth, asking her to be quiet. C.J. testified that after her mother left, defendant put her in the bedroom closet and held the door closed. One of C.J.'s sisters then came to the door of the trailer and knocked. Defendant let C.J. out of the closet and the bedroom, gave her a hug, asked her "not to tell anyone," and gave her fifty cents.

C.J. went to a neighbor's residence where her mother was, began to cry, and told her mother what had happened. The police and EMS were called and C.J. was later taken to the hospital for testing for drug exposure. Results of a test of her urine revealed that C.J. had cocaine metabolites in her system.

A search of defendant's residence by law enforcement officers on the following day, 20 June 2000, turned up rolling paper, a spoon and a plastic bag corner that both tested positive for cocaine residue, two pointed metal rods, a metal wire sponge, and other plastic bags or bag corners. The officers found neither a plastic tube such as that described by C.J., nor crack cocaine.

Robert Wilborn, a narcotics investigator for the Alamance County Sheriff's Department, was permitted to testify as an expert witness "in the field of identification of cocaine related paraphernalia and

illegal cocaine use and practices." Over defendant's objection, and after giving a limiting instruction to the jury, the trial court allowed Mr. Wilborn to use two plastic bag corners, each containing a piece of crack cocaine, a plastic bag of marijuana, and two glass tubes containing screens, which he identified as homemade pipes used to smoke crack cocaine, to illustrate his testimony concerning crack cocaine use. None of the items had been found in defendant's residence nor did the State contend the items were connected to defendant in any way. The witness explained how crack cocaine is made by cooking powder cocaine and baking powder together, and how it is packaged for sale by being pushed into the corner of a plastic bag that is then tied off and cut above the knot. He also explained how crack pipes are made and used. Mr. Wilborn testified that the plastic bags and bag corners found in defendant's home were similar to those used to package crack cocaine. He also testified that crack cocaine can be broken into small pieces, rolled with marijuana in rolling paper, and smoked, and that this substance was called "Bufi" on the street. With respect to the two metal rods and metal sponge taken from defendant's trailer, the officer testified that the sponge appeared to have a bit cut off of it. He also described the metal rods as being about 4 inches in length. He testified that "push rods" are used in the construction of a crack pipe to push a screen into a tube to hold the crack cocaine at one end. Finally, he testified that C.J.'s testimony about the alleged incident was consistent with the use of crack cocaine.

Defendant offered the testimony of his landlady, who stated that the previous tenants to whom she had rented the mobile home had not cleaned after they had vacated it and that she had not had time to clean it thoroughly before defendant moved in. She also testified that she had never smelled the odor of marijuana or cocaine in the mobile home after defendant moved in and had never known him to be involved with drugs. There was evidence that C.J. did not have any "funny odor" on her breath when she went to the neighbor's house and told her mother about the alleged incident.

Defendant also offered the testimony of an expert witness in the field of toxicology who testified that proper procedures which should be used in forensic testing required that a confirmatory test should have been conducted after the screening test revealed a positive result for the presence of cocaine metabolites in C.J.'s urine. There was also evidence that some substances, such as analgesics, can cause false positives.

Defendant brings forward three assignments of error in which he alleges the trial court erred by (1) admitting into evidence the results of an analysis of C.J.'s urine, (2) admitting into evidence, for illustrative purposes, items that were wholly unconnected to the defendant, and (3) denying his motion to remove and replace a juror to whom a deputy sheriff had made a comment about the case. His remaining assignments of error have been abandoned. N.C.R. App. P. 28(b)(6). We have carefully considered his arguments and find no prejudicial error in his trial.

I.

[1] Defendant first asserts that it was error for the trial court to allow into evidence the results of the test of C.J.'s urine because (a) there was no evidence confirming that the urine tested was C.J.'s, (b) the results are not "inherently reliable" due to the lack of a formal chain of custody, and (c) the test was done for medical purposes and thus lacked the confirmatory procedures normally required for forensic evidence. Defendant moved *in limine* for the exclusion of the results and objected to their admission at trial. After a *voir dire* hearing on the issue, the motion was denied. Defendant's objections at trial were overruled.

Defendant challenges the State's use of the urine test results as "hearsay" because no witness saw C.J. give the urine sample. Thus, defendant asserts that even before any flaws in the chain of custody occurred, there was no valid sample that could be connected with the victim. Defendant also attacks various differences between the procedure used by the hospital in this case and the procedures it would normally use for forensic testing, including the handling of the sample and how it was tested.

In general, a trial judge has the discretion to decide whether enough evidence has been introduced to show that the item offered is the same as the one involved in the case. *See State v. Sloan*, 316 N.C. 714, 343 S.E.2d 527 (1986). Although a defendant may point to gaps or flaws in the chain of custody or procedure, a showing that the evidence was tampered with or altered is generally required for a reversal of the trial court's decision to admit the evidence. *See id.* Rather, concerns about the chain of custody of the material or the procedures used to test it go to the weight that should be accorded to the test results. *See id.*; *State v. Miller*, 80 N.C. App. 425, 342 S.E.2d 553 (1986). The defense had ample opportunity to present those concerns to the jury in this case and did so at length.

Defendant also argues the trial court erred in permitting the nurse who attended C.J. during her visit to the emergency room to testify from the medical records that C.J.'s urine tested "positive" for cocaine. Asserting that the nurse should not have been allowed to testify as to the test results, defendant cites cases in which new trials were granted because medical experts improperly testified as to results of tests, thus presenting the results as substantive evidence rather than as a basis for expert opinion. *See, e.g., State v. Wade*, 296 N.C. 454, 251 S.E.2d 407 (1979); *State v. Edwards*, 63 N.C. App. 737, 306 S.E.2d 160, *disc. review denied*, 309 N.C. 633, 308 S.E.2d 717 (1983). Those cases, however, are inapposite here; the witness rendered no expert opinion and the test results had already been received into evidence. Moreover, defendant's expert, who testified primarily about forensic and medical testing procedures, gave testimony, without objection, as to the positive results of the test and the attending doctor's diagnosis of "cocaine abuse." An objection to the admission of evidence is waived where the same or similar evidence is subsequently admitted without objection. *State v. Jolly*, 332 N.C. 351, 420 S.E.2d 661 (1992). Defendant's assignments of error relating to the admission of the results of the test of C.J.'s urine are overruled.

II.

[2] Defendant next asserts that it was prejudicial error for the Court to allow Investigator Wilborn to illustrate his testimony concerning crack cocaine usage by using cocaine, marijuana, and sundry items of drug paraphernalia that were neither found in defendant's residence nor otherwise connected to the events alleged to have occurred on 19 June 2000. Defendant asserts the evidence was irrelevant and unfairly prejudicial.

The relevance of evidence is judged in terms of its tendency to make the existence of any fact at issue more or less probable. N.C. Gen. Stat. § 8C-1, Rule 401 (2002). Even where evidence is determined to be relevant, the trial court must balance its probative value against the likelihood of unfair prejudice due to confusion or the inflammatory nature of the evidence. N.C. Gen. Stat. § 8C-1, Rule 403 (2002). While clearly reviewable on appeal, a trial court's ruling on relevance is generally given much deference. *See State v. Godley*, 140 N.C. App. 15, 25, 535 S.E.2d 566, 574 (2000); *disc. review denied*, 353 N.C. 387, 547 S.E.2d 25, *cert. denied*, 532 U.S. 964, 149 L. Ed. 2d 384 (2001). A trial judge's decision under Rule 403 regarding the relative balance of probative weight and potential for prejudice will only be

overturned for an abuse of discretion. *See State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). Even where evidence is erroneously admitted because it is irrelevant or prejudicial, the defendant has the burden of showing that the error was not harmless, that "there [was] a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial . . . ." N.C. Gen. Stat. § 15A-1443(a) (2002).

Defendant cites *State v. Moctezuma*, 141 N.C. App. 90, 539 S.E.2d 52 (2000), in support of his argument that the admission of evidence which is not connected to a defendant is both irrelevant and prejudicial. In *Moctezuma*, the defendant was convicted of trafficking in cocaine after police interrupted an alleged drug transaction in a parking lot and found a quantity of cocaine in a van driven by defendant. Defendant claimed not to have had knowledge the cocaine was in the van. The State was permitted to introduce evidence of a large quantity of drugs and drug paraphernalia found in a residence which defendant shared with several other men. Defendant, however, was not charged with possession of the drugs and paraphernalia found at the residence and there was no evidence to connect those substances with defendant. The trial court instructed the jury it could consider the evidence of the drugs and paraphernalia found at the residence on the issue of defendant's knowledge of the cocaine found in the van he was driving at the time of his arrest. *Id.* at 95, 539 S.E.2d at 56. This Court held that, despite the trial court's limiting instruction, the evidence was improperly admitted because it was not connected to the defendant and could have led the jury to conclude that defendant was a "high level drug trafficker." *Id.*

In *Moctezuma*, the improperly admitted evidence was offered for substantive purposes, to show the defendant's awareness of the drugs in the van. Here, the items about which defendant complains were admitted only for illustrative purposes; no attempt was made to link the defendant with the items. "It is an established principle of the law of evidence that a model of a place or a person or an object may be employed to illustrate the testimony of a witness so as to make it more intelligible to the . . . jury." *State v. See*, 301 N.C. 388, 391, 271 S.E.2d 282, 284 (1980).

C.J. testified that defendant used a tube with "black stuff" at the bottom and that he held a lighter under it, the "black stuff" was bubbling, and that defendant held the tube to her mouth and told her to

inhale. That drug paraphernalia was found in defendant's residence was unquestionably relevant to support her testimony, but would have little meaning to the jury without some explanation of the manner in which such paraphernalia could be used, since crack cocaine use is not within the life experience of most jurors. While no tubes were found in defendant's residence, plastic bag corners, metal rods, and metal sponge material were found. In his testimony, Investigator Wilborn explained what a "crack pipe" is, how it is made, and how it is used. To illustrate his explanation, he used the glass tubes to which defendant objects. We believe the use of the tubes for illustrative purposes to show the jury the manner in which crack cocaine can be used was helpful to an understanding of the significance of C.J.'s description of the events as well as to explain the relevance of the metal sponge material and metal rods found in defendant's residence. Likewise, Investigator Wilborn explained how crack cocaine is packaged in plastic bag corners by using pieces of crack cocaine, though none had been found in defendant's residence, to illustrate his testimony. This testimony was admissible to explain the relevance of the bag corners found in defendant's residence. Finally, to explain the relevance of the rolling papers found in defendant's residence, Investigator Wilborn was appropriately permitted to use the marijuana to illustrate his testimony that marijuana and crack cocaine can be mixed and smoked in rolling paper. We find no prejudicial error in the trial court's ruling permitting Investigator Wilborn to use the exhibits to illustrate his testimony, especially in view of the careful and repeated limiting instructions given by the trial court, in which the court emphasized to the jury that the exhibits were not seized from the defendant, were not linked to him, and were to be considered only for the purpose of illustrating and explaining Investigator Wilborn's testimony. *See State v. Moore*, 335 N.C. 567, 440 S.E.2d 797 (1994); *State v. See, supra; State v. McLeod*, 17 N.C. App. 577, 194 S.E.2d 861 (1973).

III.

[3] Defendant lastly assigns error to the trial court's denial of his motion to remove and replace a juror after the juror reported that a law enforcement officer had spoken to her about the trial outside the courtroom. The record shows that after the evidence was completed on a Friday, the jury was excused for the weekend. Upon the return of the jury on the following Monday, and prior to receiving the jury instructions, Juror Hall sent the following written communication to the court:

> For Your Information:
>
> On Friday afternoon another unknown Sheriff approached me and asked "shouldn't you have left that badge in the courthouse." I replied, "no, the judge instructed us to wear them to and from court." He seemed to doubt me still, and I told him it was a long case. He then asked, "is that the case where they gave the 9 yr old dope," I did not know what to do or say. Knowing I'm not supposed to talk about the case, however, he was a Sheriff. I just shook my head even though he did not know the specifics.
>
> Just wanted to let you know, made me very uncomfortable.

Defendant contends the trial court abused its discretion in not replacing the juror upon learning of the improper contact. We disagree.

Where it is brought to the trial court's attention that there has been outside contact with a juror, it is the duty of the trial court to inquire and to determine the nature of the contact and whether it resulted in substantial and irreparable prejudice to the defendant. *State v. Garner*, 340 N.C. 573, 459 S.E.2d 718 (1995), *cert. denied*, 516 U.S. 1129, 133 L. Ed. 2d 872 (1996). The scope of the inquiry is within the discretion of the trial court. *Id.*

In the present case, upon receipt of the note, the trial court, with agreement of counsel for the State and defendant, conducted an inquiry of the juror which established that the person who had made the comment to her had no connection to the case or the trial. In addition, the juror stated unequivocally that nothing about the incident would affect her consideration in any way, that she would exclude the incident from her consideration, and that she would decide the case based solely on the evidence presented in the courtroom and law as explained by the court. The trial court found and concluded, from the inquiry, that the juror was "able to decide the case solely on the evidence presented and exclude any contact—any effects of the contact by mentioning her communication to the Court and as she said to the court in the courtroom." The trial court was in a position to observe the juror and to measure her responses, which satisfied the court that the comment of the deputy had not tainted the juror. We discern no abuse of discretion in the trial court's decision. *See State v. Barnes*, 345 N.C. 184, 481 S.E.2d 44 (1997). This assignment of error is overruled.

No error.

Judges TYSON and THOMAS concur.

DAVID PARKS, PLAINTIFF v. CHRISTOPHER GREEN, DEFENDANT

No. COA01-1448

(Filed 15 October 2002)

1. Arbitration and Mediation— party's absence—authority of those attending—required at hearing

The trial court did not err by granting plaintiff's motion to enforce an arbitration award based in part on defendant's failure to participate in good faith where defendant did not attend the arbitration hearing and did not provide documentary evidence that an insurance representative had the necessary authority to make binding decisions. The evidence must be known and provided at the arbitration.

2. Arbitration and Mediation— attendance at hearing—someone with authority—notice

The trial court did not err by concluding that defendant's failure to attend arbitration was contrary to the rules and intent of arbitration. While the Rules for Court-Ordered Arbitration do not require a party to give prior notice that he will not attend, they do require the attendance of the party or someone with authority to act on the party's behalf. Defendant here failed to appear and there was no documentation or evidence presented at the hearing to show that the insurance representative or defendant's attorney was authorized to make binding decisions on his behalf.

3. Arbitration and Mediation— failure to attend—sanctions

The trial court did not abuse its discretion by striking defendant's request for a trial de novo and enforcing an arbitration award where defendant had not appeared for the hearing and there was no evidence at the time of the hearing that the two people who appeared on his behalf had the necessary authority to make decisions. The trial court had the authority to strike the request for trial de novo as a sanction.

4. Civil Procedure— motion for reconsideration—failure to attend arbitration—new evidence

The trial court did not err by denying's defendant's motion for reconsideration of an order that an arbitration award be enforced and striking defendant's request for a trial de novo where the order was based on defendant's failure to appear at the hearing or to have evidence at the hearing that those present on his behalf had the necessary authority to act, and defendant's motion to reconsider was based on his affidavit that the insurance representative in fact had the necessary authority. Defendant's affidavit was not given until after the hearing and is not newly discovered evidence. Moreover, defendant did not explain why he was unable to obtain his own affidavit prior to the arbitration hearing, and did not show extraordinary circumstances, that justice demands relief, or a meritorious defense.

Appeal by defendant from orders entered 4 September 2001 and 21 September 2001 by Judge Fritz Mercer in Mecklenburg County District Court. Heard in the Court of Appeals 9 September 2002.

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

Dean & Gibson, L.L.P., by Thomas G. Nance, for defendant-appellant.

EAGLES, Chief Judge.

Christopher Green, ("defendant"), appeals from an order enforcing an arbitration award in favor of David Parks, ("plaintiff"), and an order denying defendant's motion for reconsideration. After careful consideration, we affirm.

On 1 January 1996, plaintiff and defendant, each operating their own motor vehicle, were involved in an automobile collision in Mecklenburg County. Plaintiff commenced this negligence action on 9 September 1998 seeking $8,000.00 for his personal injuries and damages as a result of the automobile collision. After notice of non-binding arbitration pursuant to G.S. § 7A-37.1 and the Rules for Court-Ordered Arbitration dated 5 February 2001, both plaintiff and defendant made pre-arbitration filings.

At the arbitration hearing on 13 March 2001, plaintiff, his attorney, defendant's attorney and a claims representative from defend-

ant's insurance carrier were present. Defendant did not attend in person. The arbitrator awarded plaintiff $3,000.00 and defendant requested a trial *de novo*. On 29 March 2001, plaintiff moved to enforce the arbitration award. On 4 April 2001, defendant filed an affidavit by Emilia Carlisle ("Carlisle"), the claims representative of defendant's insurer, Allstate Insurance Company ("Allstate"), who attended the 13 March arbitration hearing. This affidavit purported to show that Carlisle "had full authority to make binding decisions on behalf of the Defendant in all matters in controversy before the arbitrator." On 9 May 2001, defendant filed a copy of defendant's automobile liability policy provided by Allstate.

A hearing on plaintiff's motion to enforce the arbitration award was held on 4 June 2001 in Mecklenburg County District Court before Judge Fritz Mercer. The trial court ordered that the arbitration award be enforced and struck defendant's request for a trial *de novo*.

Defendant moved for reconsideration on 17 July 2001 and defendant's motion included his own affidavit. Defendant stated in his affidavit that Allstate "has and at all relevant times has had the authority to make binding decisions on my behalf with regard to the settlement or other disposition of the claims pending in this lawsuit." Defendant further stated that Carlisle "had authority to make binding decisions on my behalf with regard to all matters in controversy in this case and before the Arbitrator." After a hearing on 4 September 2001, Judge Mercer, by order dated 21 September 2001, denied defendant's motion for reconsideration. Defendant appeals from both orders.

[1] Defendant contends on appeal that the trial court erred in granting plaintiff's motion to enforce the arbitration award and in denying defendant's motion for reconsideration. After careful consideration, we affirm.

Defendant first contends that the trial court erred in granting plaintiff's motion to enforce the arbitration award and striking defendant's request for a trial *de novo*. We disagree.

Rule 3(p) of the North Carolina Rules for Court-Ordered Arbitration (N.C. Arb. R. 3(p)) states:

> *Parties Must Be Present at Hearings; Representation.* All parties shall be present at hearings in person or through representatives authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator. All parties may be represented by counsel. Only individuals may appear pro se.

In *Mohamad v. Simmons*, 139 N.C. App. 610, 612, 534 S.E.2d 616, 618 (2000), the defendant did not appear at a mandatory non-binding arbitration hearing but "counsel purporting to represent defendants and an adjuster employed by their liability insurance carrier were present." The trial court determined that defendants' failure to appear at the arbitration hearing was in violation of Rule 3(p) of the Rules for Court-Ordered Arbitration. *Id.* On appeal, the defendants argued that Rule 3(p) "allows appearance by counsel or a liability insurance carrier representative in lieu of the actual parties." *Id.* In affirming the trial court, this Court noted that "no evidence in the record reflects that counsel purporting to appear on defendants' behalf or the representative of defendants' liability insurance carrier were authorized 'to make binding decisions . . . in all matters' on behalf of defendants." *Id.* at 614, 534 S.E.2d at 619. This Court stated that

> no documents in the record, such as defendants' contract with counsel, an affidavit setting forth the nature of the representational relationship and the authority of counsel, or defendants' policy of insurance, indicate the attorney purporting to represent defendants or the representative of their liability insurance carrier who were present at the hearing possessed *in this case* authority "to make binding decisions on [defendants'] behalf *in all matters* in controversy before the arbitrator."

Id. at 613, 534 S.E.2d at 619 (quoting N.C. Arb. R. 3(p)) (emphasis in original).

Here defendant argues that he complied with the Rules for Court-Ordered Arbitration since his attorney and a claims representative from his insurer were present. Defendant contends that the insurance representative had authority to make binding decisions in all matters in controversy on defendant's behalf. Defendant argues that the Rules for Court-Ordered Arbitration do not require that he give notice that he did not plan to attend or that he provide documentary evidence to the arbitrator showing that his representative had the necessary authority. Defendant contends that he provided an affidavit from a representative of his insurance company that stated she had the requisite authority, a copy of his insurance policy and in addition, an affidavit from defendant stating that the insurance representative had the necessary authority. Defendant argues that this evidence complied with the requirements set forth in *Mohamad* to show that the insurance representative had the necessary authority to represent him at the hearing.

However, the trial court made the following findings of fact:

> 14. There was no documentation or evidence presented, at the time of the arbitration, to show that either the Defense attorney or the Allstate adjuster were authorized to make binding decisions on behalf of the Defendant in all matters in controversy before the arbitrator.
>
> 15. The Defendant's attorney, prior to the hearing on the above-captioned motion but after the arbitration, filed a copy of Defendant's Insurance Policy and an affidavit from the Allstate Insurance Company adjuster purporting to show authority on Defendant's behalf.
>
> 16. There was no documentation or evidence presented, from the named Defendant, to show that either the Defense attorney or the Allstate adjuster were authorized to make binding decisions on behalf of the Defendant in all matters in controversy before the arbitrator.

The trial court then made the following conclusions of law:

> 1. Defendant did not act in good faith by failing to appear at the arbitration and failing to notify Plaintiff that they did not intend to appear at the arbitration.
>
> ....
>
> 3. The failure of the Defendant to comply with the mandatory attendance requirement subverts and completely eviscerates the Rules of Arbitration.
>
> 4. Defendant failed or refused to participate in the arbitration proceeding in good faith or in a meaningful matter [sic].

Defendant's reliance on merely including certain documents in the record is misplaced. Without discussing the sufficiency of the documents to provide authority to act on defendant's behalf, we note that the affidavit from the representative of defendant's insurance carrier was filed on 4 April 2001 and a copy of defendant's automobile insurance policy was filed on 9 May 2001. Both of these documents were filed *after the arbitration* which took place on 13 March 2001. Further, defendant's personal affidavit was not filed until 17 July 2001 with defendant's amended motion for reconsideration. This document was filed approximately *four months after* the arbitration hearing and approximately *six weeks after* the trial court's hearing on

plaintiff's motion to enforce the arbitration award. The notice of the arbitration hearing, dated 5 February 2001, approximately five weeks prior to the arbitration hearing, stated that "[a]ll parties must be present at the hearing or represented by someone authorized to make binding decisions on their behalf in all matters in controversy before the arbitrator."

"The purpose of these rules is to create an efficient, economical alternative to traditional litigation for prompt resolution of disputes involving money damage claims up to $15,000." N.C. Arb. R. 1, official comment.

> We believe both the express and implied bases for the Rules would be subverted, if not completely eviscerated, if parties were allowed to disregard the mandatory attendance requirement without unequivocal evidence in the record that representatives attending on behalf of absent parties were indeed "authorized to make binding decisions on [the absent parties'] behalf in all matters in controversy before the arbitrator." To conclude otherwise would simply countenance the failure to participate in mandatory arbitration "in a good faith and meaningful manner."

Mohamad, 139 N.C. App. at 614, 534 S.E.2d at 619 (citations omitted).

It is not enough for the record to contain this evidence at the time this Court reviews the matter on appeal. The evidence showing that defendant's representative had the authority "to make binding decisions on [his] behalf in all matters in controversy before the arbitrator" must be known and provided at the arbitration. This provides the opportunity for the parties and representatives present at the hearing to participate in good faith and a meaningful manner.

[2] Defendant further argues that the trial court erred in concluding that defendant violated the Rules for Court-Ordered Arbitration based on the finding that defendant "failed to notify Plaintiff that he did not intend to appear at the arbitration." We agree with defendant that this would not be a proper basis for concluding that defendant's actions were "contrary to the rules and intent of District Court arbitration." While there is no evidence that defendant notified plaintiff that he would not be attending, the Rules for Court-Ordered Arbitration do not require a party to give prior notice that the party will not attend. The Rules do require that the party attend or that someone with authority to act on their behalf attend. *See* N.C. Arb. R. 3(p). "However, there is no indication in the order that the trial

court's conclusion was dependent upon this finding." *Bledsole v. Johnson*, 150 N.C. App. 619, 626, 564 S.E.2d 902, 907 (2002).

The defendant failed to appear at the arbitration hearing. There was no documentation or evidence presented at the arbitration hearing to show that the Allstate insurance representative or defendant's attorney were authorized to make binding decisions on behalf of the defendant in all matters in controversy before the arbitrator. Further, at the time of the arbitration hearing and the hearing before the trial court, there was no evidence from defendant showing that his attorney or the insurance representative had the requisite authority to act on his behalf. Defendant failed to comply with Rule 3(p) by "be[ing] present at the hearing in person or through representatives authorized to make binding decisions on [his] behalf in all matters in controversy before the arbitrator." N.C. Arb. R. 3(p). Accordingly, we affirm the trial court's conclusions that "[d]efendant's failure to attend the arbitration . . . is contrary to the rules and intent of District Court arbitration" and that "[t]he failure of the Defendant to comply with the mandatory attendance requirement subverts and completely eviscerates the Rules of Arbitration."

[3] Rule 3(l) of the Rules for Court-Ordered Arbitration provides that "[a]ny party failing or refusing to participate in an arbitration proceeding in a good faith and meaningful manner shall be subject to sanctions" set forth in North Carolina Rules of Civil Procedure Rule 37(b)(2)(c). Pursuant to Rule 37(b)(2)(c), the trial court is allowed to enter "[a]n order striking out pleadings or parts thereof, . . . or dismissing the action or proceeding or any part thereof." G.S. § 1A-1, Rule 37(b)(2)(c). Defendant concedes in his brief and we hold that the trial court has the authority to strike his request for a trial *de novo* as a sanction pursuant to the Rules for Court-Ordered Arbitration. When a defendant violates Rule 3(p), "under [appropriate] circumstances, a trial court's award of sanctions against the defendant in the form of striking the defendant's demand for trial *de novo* and enforcing the arbitration award in favor of the plaintiff is not an abuse of discretion." *Bledsole*, 150 N.C. App. at 622-23, 564 S.E.2d at 905. "Sanctions imposed under Rule 37(b)(2)(c) will not be upset on appeal in the absence of an abuse of discretion." *Mohamad*, 139 N.C. App. at 615, 534 S.E.2d at 620. After careful review of the circumstances here, we conclude that the trial court did not abuse its discretion in striking defendant's request for a trial *de novo* and enforcing the arbitration award.

[4] Defendant next contends that the trial court erred in denying defendant's motion for reconsideration. Defendant argues that the basis for his motion was his affidavit stating that the Allstate insurance representative had "express authority to make binding decisions on behalf of the named defendant." Defendant contends that the trial court accepted his affidavit and it stands uncontested. We are not persuaded.

"[A] motion for 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). Defendant does not state in his motion the specific bases for reconsideration under Rule 60 but appears to argue Rule 60(b)(2) and (6).

Rule 60(b)(2) of the North Carolina Rules of Civil Procedure "provides in pertinent part that a trial judge may relieve a party from a judgment when there is 'newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).' " *Cole v. Cole*, 90 N.C. App. 724, 727, 370 S.E.2d 272, 273 (quoting G.S. § 1A-1, Rule 60(b)(2)), *disc. review denied*, 323 N.C. 475, 373 S.E.2d 862 (1988). "[T]o constitute 'newly discovered evidence' within the meaning of Rule 60(b)(2), the evidence must be such that it could not have been obtained in time for the original proceeding through the exercise of due diligence." *Waldrop v. Young*, 104 N.C. App. 294, 297, 408 S.E.2d 883, 884 (1991). The "newly discovered evidence" must have been in existence at the time of the trial. *Grupen v. Furniture Industries*, 28 N.C. App. 119, 121, 220 S.E.2d 201, 202 (1975), *disc. review denied*, 289 N.C. 297, 222 S.E.2d 696 (1976). "This limitation on newly discovered evidence has been justified on the firm policy ground that, if the situation were otherwise, litigation would never come to an end." *Cole*, 90 N.C. App. at 728, 370 S.E.2d at 274.

Here, defendant asserted in his motion that the trial court found as fact that there was no evidence in the record from defendant to show that either his attorney or the Allstate insurance representative had the requisite authority. The basis for defendant's motion to reconsider was defendant's own affidavit which purported to show that the Allstate insurance representative present at the arbitration hearing had the necessary authority to act on his behalf. Defendant alleges in his motion that through due diligence, he was not able to obtain this affidavit before entry of the trial court's order. Defendant moved for reconsideration with his affidavit on 17 July 2001.

Defendant's personal affidavit is not newly discovered evidence. Defendant did not make his affidavit until after the arbitration and the hearing. Even if the affidavit could be considered newly discovered evidence, defendant did not exercise due diligence. Defendant does not explain why he was unable to obtain his own affidavit prior to the arbitration hearing on 13 March 2001 and the hearing before the trial court on 4 June 2001. We can discern no abuse of discretion by the trial court in denying defendant's motion for reconsideration.

Our conclusion under Rule 60(b)(6) is the same. Rule 60(b)(6) states that relief is available for "[a]ny other reason justifying relief from the operation of the judgment." G.S. § 1A-1, Rule 60(b)(6). To set aside a judgment or order under Rule 60(b)(6), the movant must show that extraordinary circumstances exist and that justice demands the relief. *Jenkins v. Middleton*, 114 N.C. App. 799, 800-01, 443 S.E.2d 110, 112 (1994). In addition, the movant must also show that he has a meritorious defense. *State v. Reid*, 35 N.C. App. 235, 237, 241 S.E.2d 110, 111 (1978). Here, defendant has not shown extraordinary circumstances, that justice demands relief or a meritorious defense. After careful consideration, we discern no abuse of discretion.

Accordingly, the decision of the trial court is affirmed.

Affirmed.

Judges MARTIN and HUNTER concur.

CECIL C. HOLCOMB, PLAINTIFF v. COLONIAL ASSOCIATES, L.L.C., AND JOHN OLSON, DEFENDANTS

No. COA01-1067

(Filed 15 October 2002)

Animals— dog attack—liability of rental property owner

The trial court erred by denying defendant-Colonial's motion for a directed verdict where Colonial owned land and rental buildings rented to defendant Olson, who owned two dogs; the dogs attacked plaintiff; and Colonial was not the owner or keeper of the dogs. The evidence showed at most that Colonial allowed Olson to have dogs on the property and was aware of prior inci-

dents of the dogs, but alleging that Colonial was an owner or keeper of the dogs was an essential part of plaintiff's prima facie case.

Judge WALKER dissenting.

Appeal by defendant from judgment entered 4 October 2000 and order entered 12 February 2001 by Judge James C. Spencer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 15 August 2002.

Waller & Stroud, LLP, by W. Randall Stroud, for plaintiff-appellee.

Bailey & Dixon, L.L.P., by Gary S. Parsons and Warren T. Savage, for defendant-appellant Colonial Associates, L.L.C.

EAGLES, Chief Judge.

Colonial Associates, L.L.C. ("Colonial), defendant, appeals from judgment entered on a jury verdict finding Colonial negligent for personal injury to Cecil Holcomb ("Holcomb"), plaintiff, caused by a tenant's two Rottweiler dogs. Colonial also appeals from an order denying its motion for judgment notwithstanding the verdict and a new trial. After careful consideration of the briefs and record, we reverse and remand.

Colonial owned 13 acres of land on Nelson Road in Wake County. The two houses were approximately 100 yards apart. Colonial hired Management Associates to manage these two houses which were used as rental property. John Olson ("Olson") leased one of the homes and John Feild ("Feild") leased the other home on the property.

At trial, the evidence tended to show the following. In 1994, a Rottweiler dog owned by Olson lunged, with its teeth showing, at Feild while Feild was in his own driveway. The dog struck a machete held by Feild and then turned and ran. After the incident, Feild told Olson and a representative of Management Associates about the encounter. Also, sometime between February 1994 and April 1996, one of Olson's dogs bit an employee of Feild's partner while the employee was loading scaffolding at Feild's house.

In April 1996, Parker Lincoln Developers hired Holcomb to provide an estimate for removal of the two houses located on Colonial's

property at Nelson Road. On 18 April 1996, Holcomb went to the property. Holcomb did not contact Colonial, Management Associates, or Olson before going on the property. Holcomb initially went to the first house on the property. Holcomb pulled into the driveway and knocked on the front door. After no one answered, Holcomb looked around the house to see if it had any storage buildings, patios, decks, or concrete driveways. After making notes, Holcomb got back into his truck and proceeded to Olson's house. Holcomb went to the front door, rang the doorbell and knocked. He observed a note that stated "[b]eware, mean dog or large dog inside." No one answered the door so Holcomb began to walk around outside the house. As Holcomb was walking down the side of the house, he observed a storage building with a small chain link fence enclosure in the back yard. There was one Rottweiler dog behind the fence. Holcomb continued to the back corner of the house where he saw a deck. Under the deck, Holcomb saw two other Rottweiler dogs. The two dogs got up and came towards Holcomb. While making his way back to the front of the house, Holcomb continued to knock the two dogs back with his clipboard as they lunged at him. After approximately twenty minutes, Holcomb reached the front of the house. As Holcomb took a step backwards onto the driveway, one dog lunged, hit Holcomb, and knocked him down. Holcomb broke his arm and injured his back when he fell. He remained still on the ground for approximately five minutes while the two dogs stood over him. When the dogs started to walk away, Holcomb moved slowly towards his truck. The dogs then came back towards Holcomb. As he opened the door to his truck, Holcomb had to "beat" the dogs to keep them out. Holcomb shut the truck door, rested, and proceeded to the hospital.

Holcomb commenced this action on 26 May 1998 asserting a strict liability claim against Olson and negligence claims against Olson and Colonial. The matter was tried at the 18 September 2000 Civil Session of Wake County Superior Court before Judge James C. Spencer, Jr. The jury returned a verdict finding that: (1) Holcomb was a lawful visitor at the time and place of his injury; (2) Holcomb was injured by the negligence of Olson; (3) Holcomb was injured by the negligence of Management Associates; and (4) Management Associates was the agent for Colonial at the time of Holcomb's injury. The jury awarded Holcomb $330,000.00 for his personal injuries. The trial court ordered that Olson and Colonial were jointly and severally liable. On 12 February 2001, the trial court denied Colonial's motion for judgment notwithstanding the verdict and a new trial. Colonial appeals.

On appeal, Colonial contends that the trial court: (1) erred in denying Colonial's motions for directed verdict, judgment notwithstanding the verdict, and a new trial; (2) erred in instructing the jury regarding Colonial's duty and Management Associates' status as an independent contractor; and (3) abused its discretion by allowing Holcomb's testimony regarding lost income and earnings based on documents and information not provided to Colonial until the week before the trial. After careful consideration, we reverse.

Colonial first contends that the trial court erred in denying Colonial's motions for directed verdict, judgment notwithstanding the verdict, and a new trial. Colonial argues that in order for a party to be liable for injuries caused by domestic animal, the animal must be dangerous or vicious and the party must be the owner or keeper of the animal and knew or should have known about the animal's dangerous propensities. *See Swain v. Tillett*, 269 N.C. 46, 51, 152 S.E.2d 297, 301 (1967). Colonial contends that it is not liable because Colonial was neither the owner nor keeper of the dogs that caused Holcomb's injuries. After careful review, we agree.

"A motion for a directed verdict tests the legal sufficiency of the evidence to take the case to the jury." *Gregory v. Kilbride*, 150 N.C. App. 601, 609, 565 S.E.2d 685, 691 (2002). "[A] defendant is not entitled to a directed verdict unless the court, after viewing the evidence in a light most favorable to the plaintiff, determines the plaintiff has failed to establish a *prima facie* case or right to relief." *B & F Slosman v. Sonopress, Inc.*, 148 N.C. App. 81, 84, 557 S.E.2d 176, 179 (2001), *disc. review denied*, 355 N.C. 283, 560 S.E.2d 795 (2002). "The trial court should deny a motion for directed verdict when it finds any evidence more than a scintilla to support plaintiff's prima facie case." *Swinson v. Lejeune Motor Co.*, 147 N.C. App. 610, 611, 557 S.E.2d 112, 114 (2001).

"A motion for judgment notwithstanding the verdict represents a renewal, after a verdict is issued, of a motion for directed verdict, and the standards of review for both motions are the same." *Crist v. Crist*, 145 N.C. App. 418, 422, 550 S.E.2d 260, 264 (2001). "The test for determining whether a motion for directed verdict is supported by the evidence is identical to that applied when ruling on a motion for judgment notwithstanding the verdict." *Martishius v. Carolco Studios, Inc.*, 355 N.C. 465, 473, 562 S.E.2d 887, 892 (2002). "Judgment notwithstanding the verdict is properly granted if all the evidence supporting plaintiffs' claim, taken as true and considered in the light most favorable to plaintiffs, was not sufficient as a matter of

law to support a verdict for the plaintiffs." *Cap Care Grp., Inc. v. McDonald*, 149 N.C. App. 817, 821-22, 561 S.E.2d 578, 581 (2002). "[I]f the motion for directed verdict could have been properly granted, then the subsequent motion for judgment notwithstanding the verdict should be granted." *Raintree Homeowners Assn. v. Bleimann*, 342 N.C. 159, 164, 463 S.E.2d 72, 75 (1995).

"To recover for injuries inflicted by a domestic animal, a claimant must show (1) that the animal was in fact vicious, and (2) that the owner or keeper knew or should have known of its vicious propensities." *Patterson v. Reid*, 10 N.C. App. 22, 28-29, 178 S.E.2d 1, 5 (1970); *see also Swain*, 269 N.C. at 51, 152 S.E.2d at 301. " 'The gravamen of the cause of action in this event is not negligence, but rather the wrongful keeping of the animal with knowledge of its viciousness; and thus both viciousness and scienter are indispensible elements to be averred and proved.' " *Swain*, 269 N.C. at 51, 152 S.E.2d at 301 (quoting *Barber v. Hochstrasser*, 136 N.J.L. 76, 79, 54 A.2d 458, 460 (1947)). "The owner of an animal is the person to whom it belongs. The keeper is one who, either with or without the owner's permission, undertakes to manage, control, or care for the animal as owners in general are accustomed to do." *Swain*, 269 N.C. at 51, 152 S.E.2d at 302.

In *Joslyn v. Blanchard*, 149 N.C. App. 625, 561 S.E.2d 534 (2002), this Court recently decided a similar case. There, the plaintiff, a minor child, was bitten by a dog belonging to tenants on the defendant's property. *Id.* at 626, 561 S.E.2d at 535. "The complaint alleged negligence on defendants' part in that they 'were aware of the violent nature of [the tenant's] dog . . .' but nevertheless allowed the [tenants] to keep the dog on the property." *Id.* The trial court granted summary judgment for the defendant property owner. *Id.* at 626-27, 561 S.E.2d at 535. This Court affirmed summary judgment for the defendant property owner. *Id.* at 630, 561 S.E.2d at 537.

Josyln reaffirmed the general rule that:

> In order to recover at common law for injuries inflicted by a domestic animal, a plaintiff must show both "(1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal's vicious propensity, character, and habits."

Id. at 628-29, 561 S.E.2d at 536 (quoting *Sellers v. Morris*, 233 N.C. 560, 561, 64 S.E.2d 662, 663 (1951)). The "[p]laintiff's complaint and

supporting affidavits contain[ed] no allegations whatsoever to support any connection between defendants and the dog, beyond the fact that they permitted the [tenants] to keep the dog on the property." *Id.* at 630, 561 S.E.2d at 537. This Court went on to state that the "plaintiff has failed to prove that defendants were the 'keepers' of the animal here involved, as defined by our Supreme Court in *Swain.*" *Id.*

Here, the evidence is undisputed that: Colonial owned the land and the rental dwellings on the property; that Olson rented one of the dwellings; and that Olson owned the two dogs. Plaintiff presented no evidence to support the inference that Colonial was either an owner or keeper of the two dogs. At most, plaintiff's evidence showed that Colonial allowed Olson to have a dog at the property and that Management Associates was aware of prior incidents with Olson's dogs. However, plaintiff has failed to establish an essential element of his prima facie case, i.e., that Colonial was an *owner* or *keeper* of the two dogs. Accordingly, the trial court erred in denying Colonial's motion for directed verdict at the close of plaintiff's evidence and in denying Colonial's motion for judgment notwithstanding the verdict after the trial.

Because we have reversed for failure to direct a verdict or judgment notwithstanding the verdict for the defendant, we need not address Colonial's remaining assignments of error. Accordingly, the decision of the trial court is reversed and the matter is remanded to the trial court for entry of an order consistent with this opinion.

Reversed and remanded.

Judge BIGGS concurs.

Judge WALKER dissents.

WALKER, Judge, dissenting.

I respectfully dissent from the majority opinion which reverses for failure to direct a verdict or judgment notwithstanding the verdict for the defendant on the grounds that plaintiff presented insufficient evidence to establish his *prima facie* case of negligence for personal injury against Colonial Associates, L.L.C. (Colonial).

This Court recently reaffirmed the general rule that:

> In order to recover at common law for injuries inflicted by a domestic animal, a plaintiff must show both "(1) that the animal

> was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal's vicious propensity, character, and habits."

Joslyn v. Blanchard, 149 N.C. App. 625, 628-29, 561 S.E.2d 534, 536 (2002) (*quoting Sellers v. Morris*, 233 N.C. 560, 561, 64 S.E.2d 662, 663 (1951)).

Inherent in this common law rule is the requirement that the plaintiff present evidence to support the inference that the landlord is either an owner or a keeper of the animal that caused the injury. Our Supreme Court has defined "keeper" as "one who, either with or without the owner's permission, undertakes to manage, *control*, or care for the animal as owners in general are accustomed to do." *Swain v. Tillet*, 269 N.C. 46, 51, 152 S.E.2d 297, 302 (1967) (emphasis added). Although the Court did not define "control," a common definition of "control" is "[t]o exercise authoritative or dominating influence over; direct." *The American Heritage College Dictionary* 303 (3d ed. 1997).

By virtue of the landlord-tenant relationship, a landlord has control over the premises and the tenant's conduct on the premises. Lease provisions define the extent of the landlord's control by either permitting or prohibiting certain conduct by the tenant.

In this case, the lease, executed on behalf of Colonial by its agent, Management Associates (Management), contained the following provision:

> The tenant may keep as a pet the following: one Rottweiler dog. . . . The tenant shall remove any pet previously permitted under this paragraph within forty-eight hours of written notification from the landlord that the pet, in the landlord's sole judgment, creates a nuisance or disturbance or is, in the landlord's opinion, undesirable.

This provision evidences Colonial's ultimate authority over the tenant's dogs on the premises, thereby demonstrating Colonial's ability to control.

The majority relies in part on *Joslyn, supra*, where this Court affirmed summary judgment for defendants because the plaintiff failed to present any evidence that defendants were keepers. *Joslyn*, 149 N.C. App. at 630, 561 S.E.2d at 537. In *Joslyn*, the plaintiff's

complaint and affidavits made "no allegations whatsoever to support any connection between defendants and the dog, beyond the fact that they permitted the [tenants] to keep the dog on the property." *Id.*

In contrast, here, the plaintiff's complaint alleged that Colonial "failed to address a dangerous condition and require their tenant, Defendant Olson, to adequately restrain and control his vicious animals." Further testimony revealed that Colonial instructed Management to order the tenant to remove the dogs after this incident and, thus, maintained ultimate responsibility for the conduct on the premises. Unlike *Joslyn*, these facts demonstrate a connection between Colonial and the dogs and, when viewed in the light most favorable to the plaintiff, tend to support an inference that Colonial is a keeper by virtue of its control evident in the lease.

In addition to demonstrating the landlord's keeper status, an injured plaintiff must establish the landlord's knowledge of the animal's vicious propensities to recover under the common law rule. In an agency relationship, a principle is chargeable with and bound by the knowledge held by his agent with respect to matters within the scope of the agency, even if the agent does not inform the principle of such knowledge. *Norburn v. Mackie*, 262 N.C. 16, 24, 136 S.E.2d 279, 285 (1964); *Reinninger v. Prestige Fabricators, Inc.*, 136 N.C. App. 255, 261-62, 523 S.E.2d 720, 725 (1999). Here, plaintiff argued and the jury found that Management was Colonial's agent. Further, as the majority points out, the evidence showed a Rottweiler dog, owned by defendant Olson, exhibited vicious propensities toward Mr. Feild, a neighbor, in 1994. Management learned of this previous incident prior to the attack on the plaintiff. Management's knowledge of the previous incident is imputed to Colonial under the principles of agency. *Swain*, 269 N.C. at 53-54, 152 S.E.2d at 303. Thus, plaintiff presented sufficient evidence on the issue of Colonial's knowledge of the dog's vicious propensities to overcome a motion for directed verdict.

However, I believe the able trial judge erred in submitting issue three as to the negligence of Management. Because plaintiff presented sufficient evidence on the *prima facie* elements of his case against Colonial, I would award plaintiff a new trial in which the jury should be instructed on whether Colonial was a keeper by virtue of its control of the premises through the lease and whether Colonial was negligent by reason of being charged with knowledge of the vicious propensities of defendant Olson's Rottweiler as imputed by

its agency relationship with Management. I would affirm that portion of the judgment in which the jury found plaintiff to be a lawful visitor at the time and place of the injury.

REDLEE/SCS, INC., PLAINTIFF v. CARL J. PIEPER, BEN SIMON, AND ALLIED INTERNATIONAL BUILDING SERVICES, INC., DEFENDANTS

No. COA01-1399

(Filed 15 October 2002)

Employer and Employee; Injunction— covenant not to compete—preliminary injunction

The trial court did not err in an action to enforce a covenant not to compete governed by Texas law by granting a preliminary injunction in favor of plaintiff company, because: (1) defendant former employee was an employee under a satisfaction contract that supports the restrictive covenant; (2) the restrictions as to time, scope, and geographic location set forth in the covenants were reasonable; (3) plaintiff met its burden of showing a likelihood of success on the merits; (4) plaintiff was likely to sustain irreparable loss unless the injunction was issued; and (5) contrary to defendant's assertion, equitable considerations did not mandate a lenient interpretation.

Appeal by defendants from order entered 13 September 2001 by Judge Richard Boner in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 August 2002.

Womble Carlyle Sandridge & Rice, by Mark P. Henriques, attorney for plaintiff-appellee.

R. Frost Branon, Jr. for defendants-appellants.

THOMAS, Judge.

Plaintiff, Redlee/SCS, Inc., filed an action against defendants seeking to enforce a covenant not to compete. The trial court granted a preliminary injunction in favor of plaintiff, and defendants appeal. For the reasons herein, we affirm.

Redlee is in the business of securing contracts with owners or managers of large office buildings to perform janitorial services. It

then manages and supervises cleaning subcontractors. Redlee does business throughout the United States, including North Carolina.

On or about 8 September 1997, defendant Carl Pieper began employment with Redlee in its Charlotte office as an area manager. In consideration of his employment and training, Pieper executed an employment agreement at the initiation of his work with Redlee expressly effective for a six-month term. The agreement contained a covenant not to compete with Redlee for a period of two years after termination of his employment. In March of 1998, Pieper executed a second employment agreement that continued his employment with Redlee as an area manager. Additionally, the agreement obligates Pieper to maintain the confidentiality of, and not disclose or use, confidential information obtained while employed by Redlee "concerning [it's] business clients, methods, operations, financing or services."

Around December 1999 or January 2000, defendant Ben Simon became employed as a district manager with Redlee in its Charlotte office. On or about July 2000, Simon entered into an employment agreement forbidding him to compete with Redlee for two years after the termination of his employment or to disclose any confidential information obtained during his employment.

In January 2000, Pieper resigned from Redlee and began work with defendant Allied International Building Services, Inc. Allied is one of Redlee's direct competitors. In December 2000, Simon resigned from Redlee and also began working for Allied. After learning that Pieper and Simon contacted some of Redlee's customers on behalf of Allied to solicit business, Redlee instituted an action against them as well as Allied.

At the outset, we note the two-year duration of the covenant not to compete. "[W]here time is of the essence, the appellate process is not the procedural mechanism best suited for resolving the dispute. The parties would be better advised to seek a final determination on the merits at the earliest possible time." *A.E.P. Industries v. McClure*, 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983). Pieper's covenant not to compete expired in January of 2002. The preliminary injunction is no longer in effect. Therefore, the issues on appeal regarding Pieper are moot. Simon's noncompete agreement, however, expires in December 2002. We proceed only on the assignments of error as to Simon.

By their first and second assignments of error, defendants Simon and Allied contend the trial court improperly granted the

preliminary injunction. They argue that: (1) the agreements are not valid; and (2) the trial court erred in concluding Redlee can show "a likelihood of success on the merits" of its case. *See A.E.P.*, 308 N.C. at 401, 302 S.E.2d at 759-60 (requiring such a showing for the issuance of a preliminary injunction).

A preliminary injunction is interlocutory in nature and therefore not immediately appealable unless it deprives the appellant of a substantial right that he would lose absent immediate review. *Wade S. Dunbar Ins. Agency, Inc. v. Barber*, 147 N.C. App. 463, 466, 556 S.E.2d 331, 334 (2001). Our courts have recognized the inability to practice one's livelihood as a substantial right. *Id.* at 464, 556 S.E.2d at 334; *Triangle Leasing Co. v. McMahon*, 96 N.C. App. 140, 146, 385 S.E.2d 360, 363 (1989), *rev'd on other grounds*, 327 N.C. 224, 393 S.E.2d 854 (1990); *Robins & Weill v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984); *Industries, Inc. v. Blair*, 10 N.C. App. 323, 331, 178 S.E.2d 781, 786 (1971). As a result of the preliminary injunction, Simon has been prevented from managing janitorial services in Mecklenburg County. The granting of Redlee's motion for a preliminary injunction therefore deprived him of a substantial right.

"[O]n appeal from an order of superior court granting or denying a preliminary injunction, an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P.*, 308 N.C. at 402, 302 S.E.2d 760. Thus, our review is essentially *de novo*. *Dunbar*, 147 N.C. App. at 467, 556 S.E.2d at 334.

In *A.E.P. Industries*, our Supreme Court stated:

> [A] preliminary injunction is an extraordinary measure taken by a court to preserve the status quo of the parties during litigation. It will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

308 N.C. 393, 401, 302 S.E.2d 754, 759-60 (quoting *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)).

There is no dispute between the parties that the agreement states it will be "governed by and construed in accordance with the laws of the State of Texas." This provision is effective. *See id.* at 402, 302 S.E.2d at 760 (enforcing a choice of law provision requiring the Court to apply New Jersey law to restrictive covenants); *see also Blair*, 10

N.C. App. at 331, 178 S.E.2d 786 (applying Georgia law to restrictive covenants). Since the agreement is, in fact, governed by Texas law, we must next determine whether there is a likelihood that Redlee will prevail on the merits in light of Texas law.

The validity and enforceability of restrictive covenants is governed by the Covenants Not to Compete Act. Tex. Bus. & Com. Code Ann. §§ 15.50-15.52 (Vernon's Supp. 2001). Under the Act, a covenant is enforceable if:

> (1) it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made, and (2) the limitations of time, geographical area and scope of activity are reasonable and do not impose a greater restraint than is necessary to protect the good will or other business interest of the promisee.

Evans World Travel, Inc. v. Adams, 978 S.W.2d 225, 228 (Tex. App. 1998); Tex. Bus. & Com. Code Ann. § 15.50 (Vernon's Supp. 2001).

In Texas, an agreement to employ for specified terms is an "otherwise enforceable agreement" for the purposes of a covenant not to compete. *Evans*, 978 S.W.2d at 230. Simon's agreement provides for a definite twelve-month term of employment. Therefore, the noncompete covenants in it are "part of an otherwise enforceable agreement." *Id.* at 228.

Moreover, "satisfaction contracts" are recognized:

> In Texas, a contract by which one agrees to employ another as long as the services are satisfactory, or which is otherwise expressed to be conditional on the satisfactory character of the services rendered, gives the employer the right to terminate the contract and to discharge the employee whenever the employer, acting in good faith, is actually and honestly dissatisfied with the work.

Zep Mfg. Co. v. Harthcock, 824 S.W.2d 654, 659 (Tex. App. 1992). Therefore, while an employment-at-will contract allows severance of the employment relationship at any time without cause, "when an employment agreement is a satisfaction contract, there must be a bona fide dissatisfaction or cause for discharge." *Id.* at 659. As a result, a satisfaction contract is an enforceable ancillary agreement that will support a restrictive covenant; an employment-at-will contract will not. *Id.*

Here, the agreement states that the employee may be terminated for "failure to meet and perform duties of employment to mini-

mum performance standards and expectations of the employer." It further provides: "Employer shall not have the right to terminate this agreement without cause." These limitations on Redlee's right to terminate Simon, as long as he satisfactorily performs his duties, changes the normal at-will relationship. Accordingly, Simon was an employee under a satisfaction contract that supports the restrictive covenant.

We next determine whether the restrictions as to time, scope, and geographic location set forth in the covenants are reasonable under Tex. Bus. & Com. Code Ann. § 15.51. Section 15.51 provides:

> If the covenant is found to be ancillary to or part of an otherwise enforceable agreement but contains limitations as to time, geographical area, or scope of activity to be restrained that are not reasonable and impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee, the *court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable* and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed, except that the court may not award the promisee damages for a breach of the covenant before its reformation and the relief granted to the promisee shall be limited to injunctive relief.

Tex. Bus. & Com. Code Ann. § 15.51(c) (Vernon's Supp. 2001) (emphasis added).

Our determination is governed by: (1) whether the restriction is greater than necessary to protect the business and goodwill of Redlee; (2) whether Redlee's need for protection outweighs the economic hardship which the covenant imposes on Simon; and (3) whether the restriction adversely affects the interests of the public. *Stone v. Griffin Communications and Security Systems, Inc.*, 53 S.W.3d 687 (Tex. App. 2001). "The restrictive covenant must bear some relation to the activities of the employee and must not restrain his activities into a territory into which his former work has not taken him or given him the opportunity to enjoy undue advantages in later competition with his former employer." *Id.*

Here, the covenant not to compete restricts Simon for a period of two years from: (1) directly competing with Redlee; and (2) soliciting

or servicing any customer of Redlee's existing at the time of termination who had been solicited or serviced by Redlee within one year prior to the time of termination, or whose contract expired within one year prior to termination.

The agreement prohibits Simon from working with direct competitors in the business of securing contracts with owners or managers of large office buildings to perform janitorial services and then soliciting or servicing current or recent clients of Redlee at the time of his termination.

We conclude that the restraint created is not greater than necessary to protect Redlee's legitimate interests in its confidential information, particularly its customer and pricing information. Moreover, the necessity of the restraint created was not outweighed by the hardship to the promisors or injury to the public. Thus, the covenant not to compete was reasonable as to the scope of activity restrained. We also find the two-year time period reasonable. *See Stone*, 53 S.W.3d at 696. ("[T]wo to five years has repeatedly been held a reasonable time restriction in a non-competition agreement.").

The geographical restriction, as reformed by the trial court, is also reasonable. "Texas courts have generally held that a geographical limitation imposed on the employee which consists of the territory within which the employee worked during his employment is a reasonable geographical restriction." *Evans*, 978 S.W.2d at 232. The agreement here restricted the geographical area to several counties. The trial court, however, reformed the covenant's territorial limitation to just Mecklenburg County. That was the only county in which Simon had worked during his employment with Redlee. Accordingly, we hold the agreement to be valid under Texas law.

We now turn to the issue of whether Redlee has met its burden of showing a likelihood of success on the merits. The agreement was voluntarily signed by Simon. As set forth above, the time and territory provisions are reasonable and not unduly oppressive. Simon's at-will employment changed to termination only for cause when he signed the agreement, thus constituting valuable consideration.

Under the agreement, Simon agreed to not solicit current or recent clients of Redlee, or "use . . . or possess any of [Redlee's] confidential and proprietary information." Redlee introduced evidence that Simon solicited Redlee's customers on behalf of Allied. Simon actually admits calling a Redlee client, answering questions about

Allied, and then delivering an Allied brochure to the client's office. Redlee has met its burden of showing a likelihood of success on the merits.

The next issue is whether Redlee is "likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *A.E.P.*, 308 N.C. at 401, 302 S.E.2d at 759-60. This determination is discretionary and requires the trial court to weigh the equities. We therefore apply North Carolina law. *See id.* at 405, 302 S.E.2d at 762 (applying North Carolina law to this determination despite New Jersey choice of law provision).

In *QSP, Inc. v. A. Wayne Hair*, 152 N.C. App. 174, 566 S.E.2d 851 (2002), this Court stated:

> "[I]ntimate knowledge of the business operations or personal association with customers provides an opportunity to [a] . . . former employee . . . to injure the business of the covenantee." *Kuykendall*, 322 N.C. [643,] 649, 370 S.E.2d [375,] 380. In *A.E.P. Industries*, our Supreme Court emphasized that this potential harm warrants injunctive relief:
>
> > "It is clear that if the nature of the employment is such as will bring the employee in personal contact with patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and the names and requirements of the patrons or customers, enabling him by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons and customers of his former employer, and thereby gain an unfair advantage, equity will interpose in behalf of the employer and restrain the breach . . . ."
>
> *A.E.P. Industries*, 308 N.C. at 408, 302 S.E.2d at 763 (citation omitted).

QSP, 152 N.C. App. at 178-79, 566 S.E.2d at 854. Here, Redlee's evidence pertaining to Simon's solicitation of its customers is sufficient to show that Redlee is likely to sustain irreparable loss unless an injunction is issued.

Accordingly, based on the foregoing, Simon and Allied's first two assignments of error are without merit.

By their third assignment of error, Simon and Allied argue that if the covenant provisions are valid, equitable considerations mandate a lenient interpretation of them. We carefully examined the validity of the covenants under Texas law and, as a result, concluded the covenants to be valid and fully enforceable. Under North Carolina law, we determined that, absent the preliminary injunction, Redlee is likely to sustain irreparable loss. As defendants cite no additional law contrary to our decision that the covenants here are valid and serve a legitimate business interest of Redlee, we reject their assertion that they are entitled to a "lenient interpretation." This assignment of error is without merit.

Accordingly, we affirm the decision of the trial court.

AFFIRMED.

Judges MARTIN and TYSON concur.

IN THE MATTER OF SPENCER STRATTON, DOB: 4/14/84; ISAIAH STRATTON, DOB: 10/01/85; SOLOMON STRATTON, DOB: 3/20/89; TANNA STRATTON, DOB: 8/24/90; RACHEL STRATTON, DOB: 4/19/92; SIMON STRATTON, DOB: 3/01/94; MICHELLE STRATTON, DOB: 8/24/95; MARIA STRATTON, DOB: 9/06/96; STEPHANIE STRATTON, DOB: 10/28/97; AND LEAH STRATTON, DOB: 7/02/99 MINOR CHILDREN

No. COA01-1528

(Filed 15 October 2002)

Parent and Child— neglect—immunization—religious objections—best interest of children

The trial court did not err by issuing an order requiring the immunization of respondent parents' ten children while in custody of the Department of Social Services (DSS) even though respondents contend their parental rights have not been extinguished and they have religious objections to the immunizations, because: (1) neglect was found and the trial court determined that immunization was in the best interest of the children; (2) respondents acted in a manner inconsistent with their constitutionally protected parental relationship by failing to provide basic necessities for their children; and (3) respondents no longer have authority to object to the immunization pursuant to

N.C.G.S. § 130A-157 where the children have been adjudicated dependent and neglected by their parents and their legal custody now resides with DSS.

Appeal by respondent-parents from order entered 3 July 2001 by Judge Elizabeth M. Currence in Mecklenburg County District Court. Heard in the Court of Appeals 9 September 2002.

Leslie C. Rawls for appellant-mother.

Rick D. Lail for appellant-father.

Womble Carlyle Sandridge & Rice, P.L.L.C., by Garth A. Gersten and Karen Ousley, guardians ad litem.

Mecklenburg County Department of Social Services, by Associate County Attorney Tyrone C. Wade, for petitioner-appellee.

EAGLES, Chief Judge.

Jack and Cathy Stratton ("appellants") appeal from the trial court's order requiring that their children be immunized. Appellants assign error to the trial court's order that the children be vaccinated in contravention of their parents' bona fide religious beliefs. Appellants allege that the order violated their constitutional rights and exceeded the court's authority. After careful review, we disagree and affirm.

The evidence tends to show the following. On 18 December 2000, the Mecklenburg County Department of Social Services ("DSS") received a report that the ten Stratton children were living in a home where there was inadequate heat and food. Several workers from DSS attempted to visit the home the next day and were intercepted by the father-appellant, Mr. Stratton. Although it was sleeting and raining outside, the father would not allow the DSS workers inside his home. Eventually, the workers called the police.

Father-appellant allowed the children and mother-appellant to leave the family home and walk to the paternal grandmother's house next door. The DSS workers observed ten children in the family, and determined that all ten of the children were in apparent need of some service. The workers noted that only one of the ten children had a coat, none of them had a sweater, and several of them were wearing spring or summer clothing that was wrinkled or dirty.

Appellants would not allow the workers to interview the children separately, which interfered with the workers' ability to perform their investigation.

After the DSS workers spoke with the family, father-appellant allowed the workers to enter the family home. The home was in severe disrepair. The family had been living in squalid conditions. Ceilings in both the kitchen and lone bathroom had holes in them. In the kitchen, a large tub caught water dripping from the ceiling. The tub of water had debris floating in it. The plumbing facilities were in disrepair. No beds or mattresses were found throughout the home. Only two working kerosene heaters were seen in the home, despite the cold outside temperature as evidenced by the sleet and freezing rain earlier that day. The DSS workers found almost no food in the home. Although the father-appellant told the workers that mother-appellant had been home schooling the children, the workers found no records or educational materials to support that claim. Appellants stated that none of the children had ever attended public school.

The following day, 20 December 2000, the workers returned to the family home to find that the Strattons had vacated the premises. DSS eventually found the Strattons in Gaston County, where Mr. Stratton had moved his family in order to avoid Mecklenburg County DSS personnel.

On 30 January 2001, DSS took custody of the children. The children were adjudicated neglected and dependent on 12 March 2001. Once the children were placed in foster care, DSS learned that none of the children had been immunized. The children were prepared for immunization as part of the overall provision of health care services by DSS. Appellants informed DSS that they objected to the children being vaccinated without parental consent. In a letter dated 19 February 2001, appellants set forth their medical and religious objections to the immunizations.

The trial court heard appellants' objections on 25 April 2001. At the hearing, father-appellant testified as follows:

> I have many religious objections. I'm a Christian, I believe the Bible. Many Scriptures that I believe you should not vaccinate children. [sic] In the beginning—the Bible says "In the beginning, God created the heavens and earth. God created mankind and God said it was good." That includes the immune system. Also Psalm 91, it says "He who abides under the shadow of the most

> high," it says, "10,000 may fall at his right hand, but . . . pestilence will not go near him." Now I believe that. I have faith in God. Also Jesus Christ said that . . . the well do not need a physician but the sick. And I believe it's wrong to take perfectly healthy children and subject them to possible brain damage, possible side effects.

The trial court found that appellants could cite to scriptural passages as a basis for their religious objections, but could not point to any particular provision of their religion that prohibits immunization. The trial court also made the following findings of fact regarding appellants' religious objections:

> 13. A previous order of this Court has taken the decision making authority for these children away from the parents due to their poor judgment and inability to care for the children in a safe and responsible way, thereby, putting the children at risk.
>
> 14. The Court has given the authority to make such decisions to the Department of Social Services.
>
> 15. NCGS 130A-152 mandates that "every parent, guardian, person in loco parents and person or agency, whether governmental or private, with legal custody of the child shall have the responsibility to ensure that the child has received the required immunization at the age required." Although § 130A-157 allows for religious exemption, YFS, the agency with legal custody of the children and mandated by statute to have the children immunized, has not requested the exemption.

In its order of 3 July 2001, the trial court concluded that it was in the "best interest of the children that they receive the required immunizations." It then ordered the children to be immunized before 30 July 2001. Parents appeal. We granted appellants' motion for a temporary stay on the execution of the immunization order pending the hearing of this appeal.

Appellants argue that the trial court erred by ordering their children's immunization. Appellants claim that, notwithstanding the trial court order awarding custody of the children to DSS, appellants still have standing to make medical decisions for their children. They base their argument on the fact that DSS has not terminated their parental rights pursuant to G.S. § 7B-1100 *et seq.* Appellants contend that immunization of their children while in the temporary custody of DSS would be a violation of the parents' constitutionally protected religious beliefs. After careful consideration, we disagree.

North Carolina has a strong public policy encouraging immunization of all children. This policy is demonstrated in our statutes:

> Every child present in this State shall be immunized against diphtheria, tetanus, whooping cough, poliomyelitis, red measles (rubeola) and rubella . . . . Every parent, guardian, person in loco parentis and person or agency, whether governmental or private, with legal custody of a child shall have the responsibility to ensure that the child has received the required immunization at the age required . . . .

G.S. § 130A-152 (2001). Before a child can attend school, whether public or private, he or she must present a certificate of immunization. G.S. § 130A-155 (2001). There are two statutory exceptions to the requirement of immunization before a child can attend school in North Carolina: G.S. §§ 130A-156 and 130A-157. G.S. § 130A-156 deals with medical exemptions. The religious exemption, which is at issue here, reads as follows:

> If the bona fide religious beliefs of . . . the parent, guardian, or person in loco parentis of a child are contrary to the immunization requirements contained in this Part, the . . . child shall be exempt from the requirements. Upon submission of a written statement of the bona fide religious beliefs and opposition to the immunization requirements, the person may attend the college, university, school or facility without presenting a certificate of immunization.

G.S. § 130A-157 (2001). Since its amendment and enactment in 1967, G.S. § 130A-157 has not been judicially applied or interpreted. Appellants here contend that they should be allowed to avail themselves of the exemption provided by G. S. § 130A-157 because their parental rights have not been extinguished and immunization violates their religious tenets. We disagree.

In *Prince v. Massachusetts*, 321 U.S. 158, 88 L. Ed. 645 (1944), the United States Supreme Court mandated compliance with child immunization requirements despite religious protests. In the *Prince* case, the Supreme Court stated its firm support of immunizations: "The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health and death." *Prince*, 321 U.S. at 166-67, 88 L. Ed. at 653. The Court noted its holding by stating that "neither rights of religion nor rights of parenthood are beyond limitation." *Prince*, 321 U.S. at 166, 88 L. Ed. at 652.

Our courts do not have a history of routinely ordering the performance of medical procedures on children without parental consent. However, when parents refuse to provide necessary medical care, their inaction can extinguish custody and support a finding of neglect. *See In re Huber*, 57 N.C. App. 453, 291 S.E.2d 916, *appeal dismissed and disc. rev. denied*, 306 N.C. 557, 294 S.E.2d 223 (1982). In *Huber*, the child had severe speech and hearing defects which were treatable by therapy and other medical care. The trial court ordered treatment despite the mother's protest, since the child had been adjudicated neglected. The *Huber* case allowed a judge to override a parent's objection to medical treatment when the reason for the adjudication of neglect was the lack of medical treatment itself. Here, the DSS workers found that the Stratton children were all in need of some kind of service, but the parental custody was not interrupted specifically because of a child's urgent medical need.

Appellants argue that because there is no medical emergency or other strong need for immunization, their objections to immunization should take precedence over the trial court's order. We agree that the parental rights of care, custody, and control over a child are held in high regard and will not be interfered with lightly. "It is cardinal with us that the custody, care and nurture of the child reside first in the parents." *Prince*, 321 U.S. at 166, 88 L. Ed. at 652.

However, when the parents' actions towards their child are contrary to the child's best interest or against the public interest, the state may interfere with the usual parental prerogatives as to their children:

> [T]he natural and legal right of parents to the custody, companionship, control and bringing up of their children is not absolute. It may be interfered with or denied for substantial and sufficient reason, and it is subject to judicial control when the interest and welfare of the children require it.

In re McMillan, 30 N.C. App. 235, 238, 226 S.E.2d 693, 695 (1976). "When a parent neglects the welfare and interest of his child, he waives his usual right of custody." *In re Hughes*, 254 N.C. 434, 437, 119 S.E.2d 189, 191 (1961). The Supreme Court of North Carolina has held that "absent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally-protected paramount right of parents to custody, care, and control of their children must prevail." *Petersen v. Rogers*, 337 N.C. 397, 403-04, 445 S.E.2d 901, 905 (1994). Once it has been determined that a parent is

unfit or has neglected his child, the parent loses his decision-making ability as of right.

The constitutionally protected status of parents is diminished by the parents' neglect of the children and must sometimes give way to consideration of the best interests of the children. As our Supreme Court stated:

> A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child. Therefore, the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child. . . . Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy. Other types of conduct, which must be viewed on a case-by-case basis, can also rise to this level so as to be inconsistent with the protected status of natural parents.

Price v. Howard, 346 N.C. 68, 79, 484 S.E.2d 528, 534-35 (1997) (citations omitted). Once unfitness, neglect or other action inconsistent with the parent's constitutionally protected interest has been found, a court should revert to a basic determination of what action is in the best interests of the child. *Id.* Here, the trial court found that immunization was in the best interest of the Stratton children.

The religious exemption outlined in G.S. § 130A-157 is a parental right to be exercised by a parent with a bona fide religious belief contrary to the immunization requirement. Appellants have presented evidence of a religious objection to immunization, and we do not consider the bona fide nature of that objection. However, when the principles of *Petersen* and *Price* are applied to the case at bar, it is clear that appellants no longer have authority to object to the immunization of the children. Here, the children have been adjudicated dependent and neglected by their parents, appellants, and their legal custody now resides with DSS. The children have been removed from their home and placed in foster care because their parents failed to provide adequate shelter, clothing, food, medical care and formal education. By their failure to provide basic necessities for their children, appellants have acted in a manner inconsistent with their constitutionally protected parental relationship. Here, the trial court

correctly focused on the best interest of the children. The placement of the children in the temporary custody of DSS upon the adjudication of neglect was in the best interest of the children, and foreclosed appellants' ability to assert the rights under G.S. § 130A-157. Because appellants have surrendered the companionship, custody, care and control of their children by neglecting their welfare, DSS is now the only party that may legitimately make health decisions for the Stratton children.

For the foregoing reasons, we conclude that the trial court correctly issued an order to immunize the children and affirm that order. Accordingly, we affirm and dissolve the temporary stay preventing execution of the immunization order.

Affirmed.

Judges MARTIN and TIMMONS-GOODSON concur.

GORDON E. PINCZKOWSKI, Plaintiff v. NORFOLK SOUTHERN RAILWAY COMPANY, successor in interest to SOUTHERN RAILWAY COMPANY, a Virginia Corporation, Defendant

No. COA01-1445

(Filed 15 October 2002)

Employer and Employee; Statutes of Limitations and Repose— Federal Employers' Liability Act—occupational pneumoconiosis

The trial court did not err by granting summary judgment in favor of defendant company based on the expiration of the pertinent three-year statute of limitations in an action under the Federal Employers' Liability Act (FELA) of 45 U.S.C. § 51 alleging plaintiff employee contracted occupational pneumoconiosis as a result of defendant's alleged negligence and statutory violations, because: (1) plaintiff had sufficient information to know that he may have suffered a workplace injury and plaintiff had a duty to investigate whether he had suffered such an injury; (2) during the several years between 1993 and 1999 that plaintiff suffered from stomach and breathing problems which he believed were caused by asbestos exposure at the workplace, plaintiff sought medical

treatment only once, plaintiff did not believe he had been properly treated for his stomach problems, and yet plaintiff failed to seek further assistance until approximately five years later upon the advice of an attorney; (3) plaintiff never sought any medical treatment for his breathing ailments that began around 1994 prior to 1999, and plaintiff failed to investigate whether his breathing ailments were related to asbestos exposure; (4) plaintiff is not allowed to create issues of fact by a last-minute filing of an affidavit which is contradictory to his deposition testimony as a whole; and (5) plaintiff testified that when he began experiencing shortness of breath, he attributed the symptom to asbestos exposure at the workplace.

Appeal by plaintiff from order entered 10 September 2001 by Judge Dennis J. Winner in Buncombe County Superior Court. Heard in the Court of Appeals 9 September 2002.

Bondurant & Appleton, P.C., by Randall E. Appleton; Long, Parker, Warren & Jones, P.A., by William A. Parker, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Reid L. Phillips and Clinton R. Pinyan, for defendant-appellee.

MARTIN, Judge.

Gordon E. Pinczkowski ("plaintiff") appeals the trial court's order granting summary judgment in favor of Norfolk Southern Railway Company ("defendant"). For reasons discussed herein, we affirm.

Plaintiff was employed by defendant from 1973 until 1994. Plaintiff testified he was exposed to asbestos dust throughout his employment with defendant, and that beginning in the 1980's, he began to be concerned that the exposure was posing a hazard to his health. Plaintiff testified he began experiencing stomach problems sometime in 1993 or 1994. He further testified he began experiencing breathing difficulties sometime prior to 1994. Plaintiff believed at the time he began experiencing both stomach and breathing problems that they were the result of asbestos exposure at work.

In 1994, plaintiff sought treatment from a Dr. Grier for his stomach problems. The evidence does not show that Dr. Grier made any diagnosis, but at Dr. Grier's direction, plaintiff underwent a proce-

dure to stretch his esophagus. Plaintiff testified the procedure relieved some of his symptoms for about one month, but after that, he continued to experience the same stomach problems. Plaintiff testified he did not think Dr. Grier "had the solution" and plaintiff continued to worry that he was being injuriously exposed to asbestos.

In 1999, a former co-worker recommended an attorney to plaintiff for the purpose of seeking compensation from defendant. Plaintiff did seek that counsel, and the attorney recommended that plaintiff be evaluated by Dr. Stephen Proctor. Dr. Proctor examined plaintiff in late 1999 and diagnosed him with asbestosis. Plaintiff's 1999 visit to Dr. Proctor was the first time he had sought treatment for his breathing difficulties and the first time he had sought treatment for his stomach ailments since being unsuccessfully treated by Dr. Grier in 1994.

On 8 March 2000, plaintiff filed a complaint under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51, *et seq.*, alleging he contracted occupational pneumoconiosis, including asbestosis and silicosis, as a result of defendant's negligence and statutory violations. Defendant moved for summary judgment on grounds that FELA's three-year statute of limitations on plaintiff's claims had already run. The trial court granted the motion and dismissed the complaint on 10 September 2001. Plaintiff appeals.

Plaintiff argues on appeal that the trial court erred in granting defendant's motion for summary judgment based on FELA's three-year statute of limitations because genuine issues of fact existed as to whether and when plaintiff knew or reasonably should have known that he had suffered an occupational injury, and whether he acted with reasonable diligence in investigating the source of his injuries. " '[T]he standard of review on appeal from summary judgment is whether there is any genuine issue of material fact and whether the moving party is entitled to a judgment as a matter of law.' " *Willis v. Town of Beaufort*, 143 N.C. App. 106, 108, 544 S.E.2d 600, 603 (citation omitted), *disc. review denied*, 354 N.C. 371, 555 S.E.2d 280 (2001).

In granting defendant's motion in open court, the trial court observed that plaintiff's case was not sufficiently distinguishable from this Court's decision in *Vincent v. CSX Transp., Inc.*, 145 N.C. App. 700, 552 S.E.2d 643, *disc. review denied*, 354 N.C. 371, 557 S.E.2d 537 (2001), and therefore, the complaint should be dismissed.

The plaintiff in *Vincent* worked for the defendant railroad from 1970 until 1986, during which time he was exposed to various levels of dust. *Id.* at 701, 552 S.E.2d at 644. The plaintiff was hospitalized in 1984 for breathing difficulties, and was advised by his doctors that cigarette smoking was contributing to his ailments. *Id.* However, the plaintiff did not ask his doctors the cause of his breathing difficulties because he already believed that the dust at his workplace was the cause. *Id.* The plaintiff contacted an attorney in 1998, who advised him that he should undergo a pulmonary evaluation. *Id.* at 701, 552 S.E.2d at 645. The evaluation revealed that the plaintiff had asbestosis attributable to exposure to asbestos dust in the workplace. *Id.* The plaintiff filed a complaint under FELA in January 1999, and the defendant moved for summary judgment. *Id.* The trial court granted the motion, finding that FELA's three-year statute of limitations had already expired. *Id.*

This Court reviewed federal law interpreting FELA and its statute of limitation, noting that an action under FELA accrues for purposes of the commencement of the three-year limitation when the plaintiff becomes or should become aware of his injury. *Id.* at 703, 552 S.E.2d at 646. The Court also observed that federal law holds that a plaintiff has an "affirmative duty to investigate his injury with reasonable diligence." *Id.* at 704, 552 S.E.2d at 646 (citing *United States v. Kubrick*, 444 U.S. 111, 62 L. Ed. 2d 259 (1979)). Thus, once a plaintiff concludes he has an injury and believes the injury may have been caused by his employment, he is under an affirmative duty to investigate the potential cause of the injury. *Id.*

Applying these principles, the *Vincent* Court concluded the trial court properly dismissed the plaintiff's complaint as time-barred where the plaintiff admitted in his deposition that breathing difficulties caused him to seek medical treatment in 1984; where he believed at that time that his difficulties may have been caused by dust exposure at the workplace; where the plaintiff failed to discuss this belief with his doctors; and where the plaintiff did not seek any other medical treatment until 1998 when he saw a physician upon the advice of an attorney. *Id.* at 705, 552 S.E.2d at 647. The Court held the plaintiff had failed to fulfill his affirmative duty to investigate the cause of his breathing difficulties:

> [O]nce plaintiff's breathing difficulties manifested themselves and plaintiff attributed these breathing difficulties to the dust in his workplace, he possessed sufficient information that he knew, or should have known, that he had been injured by his work with

> the railroad. Because he failed to file his action within the requisite time period, summary judgment in favor of defendant was proper.

Id.

The evidence in the present case establishes that plaintiff suffered from breathing and stomach difficulties that had manifested themselves by 1993 or 1994, and that plaintiff had attributed those difficulties to asbestos exposure at his workplace. Thus, under *Vincent*, plaintiff had sufficient information to know he may have suffered a workplace injury. Plaintiff had a duty to investigate whether, in fact, he had suffered such an injury. However, the evidence fails to show a genuine issue of fact as to whether plaintiff fulfilled this duty.

The evidence is clear that plaintiff knew exposure to asbestos was dangerous beginning in the 1980's, before his breathing and stomach difficulties manifested themselves. During the 1980's, when plaintiff became concerned about exposure, he began to look around his workplace for signs of asbestos. Plaintiff expressed to co-workers in the early 1990's that he believed asbestos was "probably going to kill us all." Plaintiff began experiencing stomach problems around 1993-94, which problems he believed to be related to asbestos exposure at the workplace. Plaintiff also began experiencing breathing difficulties sometime prior to 1994, which difficulties he also attributed to asbestos exposure. In 1994, plaintiff sought medical assistance only for his stomach ailments from Dr. Grier. Dr. Grier performed a procedure on plaintiff wherein plaintiff's esophagus was stretched. Plaintiff testified the procedure only brought relief from his symptoms for about a month, and that afterwards, his symptoms returned. He did not believe Dr. Grier had properly treated him. Nevertheless, plaintiff did not seek further medical assistance for his stomach problems.

In short, during the several years between 1993 and 1999 that plaintiff suffered from stomach and breathing problems which he believed to have been caused by asbestos exposure at the workplace, plaintiff sought medical treatment only once; the treatment did not solve plaintiff's stomach problems; plaintiff did not believe he had been properly treated for his stomach problems; and yet plaintiff failed to seek further assistance until approximately five years later upon the advice of an attorney. Additionally, the evidence is uncontradicted that despite suffering from breathing difficulties beginning prior to 1994, and despite believing the difficulties were related to

asbestos exposure at the workplace, plaintiff never sought any medical treatment for his breathing ailments prior to 1999. Nor does the evidence show plaintiff took any other steps to investigate whether, in fact, his breathing ailments were related to asbestos exposure. Thus, there is no genuine issue of material fact as to whether plaintiff fulfilled his duty to investigate his injuries with reasonable diligence.

In arguing that a genuine issue of material fact existed as to his diligence in assessing any injury, plaintiff cites to an affidavit which he filed 27 August 2001, ten days after defendant moved for summary judgment, and three days prior to the motion's hearing. In that affidavit, plaintiff testified, for the first time, that Dr. Grier advised him in 1994 that his stomach problems were unrelated to asbestos exposure, and that because of this opinion, he "concluded that [he] had not suffered any injury related to occupational exposure to asbestos dust and [he] was no longer concerned about that issue." With respect to his breathing problems, plaintiff stated in his affidavit that his "shortness of breath was not severe enough or of enough concern to cause [him] to seek medical care until the problem became more persistent in 1999."

However, plaintiff's affidavit contradicts his deposition testimony, and we have held that a party opposing a motion for summary judgment cannot create a genuine issue of material fact by filing an affidavit contradicting his prior sworn testimony. *See, e.g., Mitchell v. Golden*, 107 N.C. App. 413, 420 S.E.2d 482 (1992), *affirmed*, 333 N.C. 570, 429 S.E.2d 348 (1993); *Rollins v. Junior Miller Roofing Co.*, 55 N.C. App. 158, 284 S.E.2d 697 (1981).

At no point in his deposition did plaintiff claim that Dr. Grier had affirmatively stated his stomach ailments were not related to asbestos exposure and that he relied on such a statement to conclude he had not suffered any injury from asbestos exposure and was no longer concerned about that issue. Rather, plaintiff testified he did not believe Dr. Grier had properly treated him or "had the solution." Plaintiff testified he had been concerned about asbestos exposure in relation to long-term health issues since the 1980's, and that he continued to be concerned about it even as he testified at his deposition.

With respect to his breathing problems, plaintiff testified his health concerns began in the 1980's and included a concern that he would eventually be required "to walk around with a bottle of oxygen

on [his] back." In any event, regardless of whether plaintiff's breathing problems became more severe in 1999, the evidence affirmatively establishes that plaintiff did suffer from continuing breathing difficulties beginning prior to 1994, and that plaintiff believed at the time those difficulties began that they were the result of asbestos exposure. Thus, regardless of when the problems were most severe, plaintiff knew or should have known by 1994 that he was suffering from a potential workplace injury, and he therefore had a duty to investigate.

Plaintiff will not be allowed to create issues of fact by a last-minute filing of an affidavit which is contradictory to his deposition testimony as a whole. *See Mitchell*, 107 N.C. App. at 416, 420 S.E.2d at 484. Accordingly, we do not agree with plaintiff that this affidavit properly establishes genuine issues of material fact. This argument is overruled.

In a related argument, plaintiff maintains the trial court erred in determining that his shortness of breath was sufficient to charge him with knowledge of a potential occupational injury. The essence of plaintiff's argument is that shortness of breath is too general a symptom to give rise to knowledge of a potential injury or a duty to investigate. Plaintiff relies on *Young v. Clinchfield R. Co.*, 288 F.2d 499 (4th Cir. 1961), in which the Fourth Circuit held that the law does not require a plaintiff to know he has suffered the workplace injury of silicosis on the mere fact that he experiences shortness of breath and comes "from a mining region where silicosis is fairly common." *Id.* at 503. However, that case involved the plaintiff's "[f]ailure to associate" his shortness of breath with a condition arising from workplace exposure. *Id.* The *Young* case did not address the duties of a plaintiff who suffers from shortness of breath, attributes that symptom to workplace exposure, but does not seek medical attention as a result of the symptom.

In the present case, plaintiff testified that when he began experiencing shortness of breath, he attributed the symptom to asbestos exposure at the workplace. Under *Vincent*, the onset of plaintiff's shortness of breath, coupled with his definite belief that the symptom was a result of workplace exposure, is sufficient information from which plaintiff knew or should have known that he may have sustained a workplace injury, thereby giving rise to a duty to determine whether this was the case.

In summary, we agree with the trial court that the instant case cannot be significantly distinguished from *Vincent*, and we conclude

there were no genuine issues of material fact. Plaintiff knew or should have known of his occupational injuries more than three years prior to plaintiff's 1999 diagnosis and March 2000 filing of this complaint. The evidence affirmatively establishes that plaintiff knew, or should have known, at the time his breathing and stomach ailments emerged prior to 1993 or 1994 that he may have suffered a workplace injury, and he was required by law to diligently investigate the truth of his belief that exposure to asbestos dust was causing his ailments. The evidence also establishes plaintiff did not fulfill such duty. Summary judgment in favor of defendant is affirmed.

Affirmed.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

JOSEPH DEVLIN, JR., EMPLOYEE, PLAINTIFF v. APPLE GOLD, INC., EMPLOYER AND ZENITH INSURANCE CO., CARRIER, DEFENDANTS

No. COA01-1389

(Filed 15 October 2002)

Workers' Compensation— wage-earning capacity—continuing disability—earnings from self-employment

The Industrial Commission erred in a workers' compensation case by finding that plaintiff employee had regained his wage-earning capacity and by concluding that plaintiff failed to meet his burden of showing continuing disability under N.C.G.S. § 97-2(9) based on plaintiff's earnings from self-employment, because the Commission's findings are insufficient to determine plaintiff's actual wage-earning capacity.

Appeal by plaintiff from opinion and award entered 13 June 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 September 2002.

The Law Office of Leslie O. Wickham, Jr., by Mark H. Woltz, for plaintiff-appellant.

Morris York Williams Surles & Barringer, LLP, by Kim E. Taylor, for defendant-appellees.

THOMAS, Judge.

Plaintiff, Joseph Devlin, Jr., appeals from an Opinion and Award of the North Carolina Industrial Commission. The Commission found he had regained wage-earning capacity and concluded he had failed to meet his burden of showing continuing disability.

Plaintiff, however, contends his attempt at self-employment is not sufficient to show either that his wage-earning capacity is at pre-injury levels or that he has marketable skills. We reverse and remand.

On 18 June 1995, Devlin slipped and injured his left knee while in the course and scope of his employment with defendant Apple Gold, Inc. A claims representative for defendant Zenith Insurance Co., Apple Gold's carrier, executed a Form 63 on 13 September 1995, advising Devlin that payment of workers' compensation benefits would be made without prejudice to defendants' right to later contest the claim or their liability. Defendants did not contest either the claim or their liability within the statutory period set forth in N.C. Gen. Stat. § 97-18(d). Therefore, plaintiff's entitlement to compensation became an award of the Commission pursuant to N.C. Gen. Stat. § 97-82(b). *See Shah v. Howard Johnson*, 140 N.C. App. 58, 63-64, 535 S.E.2d 577, 581 (2000), *disc. review denied*, 353 N.C. 381, 547 S.E.2d 17 (2001); *Higgins v. Michael Powell Builders*, 132 N.C. App. 720, 723-24, 515 S.E.2d 17, 20 (1999). Pursuant to the executed Form 63, plaintiff received temporary total disability benefits in the amount of $370.35 per week from 12 September 1995 through 26 August 1997.

Defendants eventually filed a Form 24 application seeking to terminate payment of compensation. It was approved by the Special Deputy Commissioner and filed on 26 August 1997. Plaintiff's temporary total disability benefits were retroactively terminated beginning 16 January 1997, which the Special Deputy Commissioner concluded to be the date plaintiff's self-employment business receipts demonstrated some wage-earning capacity.

Plaintiff requested a hearing to contest the Commission's approval of defendants' Form 24. He also filed a claim for additional medical compensation pursuant to N.C. Gen. Stat. § 97-25.1.

On 17 May 1999, the matter was heard by Deputy Commissioner Wanda Blanche Taylor. She found as fact that plaintiff started a gutter and roofing business with a neighbor in November 1996 and continued to help operate it. She also found that plaintiff's trial return to

work was successful and plaintiff had failed to produce evidence of his continued diminished earning capacity. She concluded:

> 3. Plaintiff has not shown that he is disabled in that [he] has not shown that he does not have the capacity to earn the wages which he was earning at the time of his compensable injury; nor, has the plaintiff established a diminution in that ability.

She further determined plaintiff to be "entitled to compensation at the rate of $370.34 per week for a period of 50 weeks for his [25%] permanent partial disability of the left leg." She allowed defendants an offset for the temporary total disability benefits paid from 16 January 1997 through 25 August 1997. Finally, she concluded that defendants are liable for all medical expenses incurred by plaintiff as a result of his compensable injury, including any future medical expenses. The parties appealed.

On 13 June 2001, the full Commission affirmed the opinion and award of the deputy commissioner with Commissioner Bernadine S. Ballance filing a dissenting opinion. The full Commission's findings of fact included, *inter alia*, the following: At the time of the hearing before the Deputy Commissioner, plaintiff was a forty-year-old male with a GED. Prior to his injury, he had worked primarily in restaurants, with brief periods of employment with IBM and driving a delivery truck. Plaintiff began working as a cook at Applebee's, a restaurant owned by defendant Apple Gold, in August 1993. Prior to his injury in June 1995, he had progressed from cook to shift supervisor to assistant general manager. On 14 November 1996, plaintiff reached maximum medical improvement and was discharged from medical treatment. He retained a twenty-five percent (25%) permanent partial disability rating to his left leg. When released from medical care, plaintiff was restricted from activities requiring climbing, working on unlevel surfaces, and scaffolding. He was advised to avoid prolonged squatting and kneeling and was told he would not be able to perform those functions on a repetitive basis.

The full Commission made the following further findings of fact:

> 11. In November 1996, plaintiff started a gutter business, D & D Gutter and Roofing, with a neighbor. This business manufactured and installed gutters and performed some roofing. Plaintiff's wife is listed as the owner and president of the business; however, she is also employed full-time as a manager of an apartment complex. Plaintiff is the vice president of the business and responsible for

talking with contractors, writing invoices, ordering materials, generating business, performing technical consultations, inspecting jobs, and making job quotes. Plaintiff's wife keeps the financial records and calculates the taxes. The company has had as many as eight employees, but generally has three or four. Plaintiff has never physically worked on the roofs or carried bundles of shingles around the job site.

12. Plaintiff submitted business records from D & D Gutter and Roofing. However, these records did not include a complete list of checks drawn on the checking account from that business. Checks were sometimes written for personal rather than business expenses, and the personal items were not included in the submitted records. There was also evidence that plaintiff and his wife had occasionally loaned money to the business. Gross sales for 1996 (November and December) were $13,000.00 During that time, plaintiff continued to draw temporary total disability benefits at the rate of $370.35 per week. In 1997, the gross receipts were $54,841.00 and in 1998, the gross receipts of the company were $61,725.00. Income tax returns noted that 1998 was the first year of profit. However, deductions including depreciation, bad debt and the like, affect the profitability of the company.

13. D & D Gutter and Roofing deducts expenses for advertising, vehicles, gas, mileage, tools and equipment, materials, supplies, salaries, and consulting fees. Plaintiff's family also allocates twenty-five percent of the family's electric bill to the business as an expense. Tax records, which showed profits and losses of the company, do not accurately reflect the worth of the company and do not indicate plaintiff's actual wage earning capacity.

. . .

19. From November 1996 and continuing, plaintiff has developed and operates a gutter and roofing business. Plaintiff has dealt with advertisers, workers, suppliers, and potential customers. Although plaintiff's business has not generated a "profit," it has generated substantial revenues due in large part to his efforts and skills. It is likely that plaintiff is compensated for his substantial contribution to the business.

20. Plaintiff is capable of earning wages as a business manager as he has the skills to develop and operate his own business, and he

> held a responsible managerial position in his employment with defendant-employer.
>
> 21. Plaintiff's return to work in his own business in November 1996 was a trial return to work, because he was under work restrictions. Plaintiff's return to work was successful, and he has not produced persuasive evidence of the extent of any continuing diminished earning capacity.
>
> . . . .

The Commission concluded that plaintiff had failed to meet his burden of showing continuing disability under N.C. Gen. Stat. § 97-2(9). The Commission further concluded plaintiff retained a twenty-five percent (25%) permanent partial disability to the left leg and ordered defendants to pay plaintiff $370.34 per week for fifty weeks. Defendants were allowed an offset from that amount due to its payment of temporary total disability benefits from 16 January 1997 through 25 August 1997.

Commissioner Ballance dissented from the majority opinion, stating there was insufficient evidence of (1) plaintiff having adequate skills as a manager to obtain work in the general marketplace, or (2) plaintiff being capable of earning wages equal to or greater than his pre-injury wages.

In reviewing an opinion and award of the Industrial Commission, this Court is bound by the Commission's findings of fact when supported by any competent evidence, but the Commission's legal conclusions are fully reviewable. *See Lanning v. Fieldcrest-Cannon, Inc.*, 352 N.C. 98, 106, 530 S.E.2d 54, 60 (2000). This Court does not weigh the evidence and decide the issue on the basis of its weight; rather, this Court's duty goes no further than to determine whether the record contains any evidence tending to support the finding. *See Anderson v. Construction Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965). If the findings of the Commission are insufficient to determine the rights of the parties, this Court may remand to the Industrial Commission for additional findings. *See Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982).

The Workers' Compensation Act defines "disability" as the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2001). "Compensation must be based upon loss of wage-earning power rather than the amount actually

received." *Hill v. DuBose*, 234 N.C. 446, 447-48, 67 S.E.2d 371, 372 (1951). If wage-earning power is only diminished, the employee is entitled to benefits under N.C. Gen. Stat. § 97-30. *Gupton v. Builders Transport*, 320 N.C. 38, 42, 357 S.E.2d 674, 678 (1987). If wage-earning power is totally obliterated, the employee may recover under N.C. Gen. Stat. § 97-29. *Id.* "The focus of this determination is not on 'whether all or some persons with plaintiff's degree of injury are capable of working and earning wages, but whether plaintiff [him]self has such capacity.' " *Lanning*, 352 N.C. at 105, 530 S.E.2d at 59-60 (quoting *Little v. Anson County Sch. Food Serv.*, 295 N.C. 527, 531, 246 S.E.2d 743, 746 (1978)). The earning capacity of an injured employee must be evaluated "by the employee's own ability to compete in the labor market. If post-injury earnings do not reflect this ability to compete with others for wages, they are not a proper measure of earning capacity." *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 437, 342 S.E.2d 798, 805-06 (1986). The employee's age, education, and work experience are factors to be considered in determining the person's capacity to earn wages. *Little v. Anson County Sch. Food Serv.*, 295 N.C. 527, 532, 246 S.E.2d 743, 746 (1978).

In *Lanning*, the Supreme Court addressed when an injured employee's earnings from self-employment can support a finding of wage-earning capacity. The Court stated:

> While an employee's management skills may be significant in the operation of certain businesses . . . different skills may be relevant to and necessary for the operation of other types of personal businesses. The determinative issue is whether the skills—be they management, computer, accounting, sales, consulting, or something else—utilized by the employee in the active operation of his own business, when considered in conjunction with the employee's impairment, age, education, and experience, would enable the employee to compete in the labor market. *See Peoples*, 316 N.C. at 438, 342 S.E.2d at 806. We hold, therefore, that the test for determining whether the self-employed injured employee has wage-earning capacity is that the employee (i) be actively involved in the day to day operation of the business and (ii) utilize skills which would enable the employee to be employable in the competitive market place not withstanding the employee's physical limitations, age, education and experience.

Lanning, 352 N.C. at 107, 530 S.E.2d at 60-61; *see also McGee v. Estes Express Lines*, 125 N.C. App. 298, 480 S.E.2d 416 (1997).

The determination of whether a disability exists is a conclusion of law that must be based upon findings of fact supported by competent evidence. *Hilliard*, 305 N.C. at 594-95, 290 S.E.2d at 683. However, "[w]hether plaintiff's management skills are marketable and whether plaintiff is actively involved in the business' personal management are questions of fact" to be determined by the Commission. *Lanning*, 352 N.C. at 108, 530 S.E.2d at 61.

Here, the Commission found as fact that plaintiff was vice president of the gutter and roofing business and "responsible for talking with contractors, writing invoices, ordering materials, generating business, performing technical consultations, inspecting jobs, and making job quotes." This is akin to a finding that plaintiff was actively involved in the day to day operation of the business. However, the Commission made no finding that plaintiff's management skills are competitively marketable in light of his physical limitations, age, education and experience. Further, the Commission made no determination of whether plaintiff's wage-earning capacity was equal to or greater than his pre-injury wage-earning capacity. The Commission simply found that plaintiff's business had generated substantial revenues due in large part to his efforts and skills, that plaintiff was likely being compensated, and that he "had some wage-earning capacity." The Commission's findings are insufficient to determine plaintiff's actual wage-earning capacity.

Since the Commission failed to make findings necessary to determine plaintiff's actual wage-earning capacity and the rights of the parties, we reverse the Commission's opinion and award. We remand to the Commission for findings consistent with the legal principles stated in this opinion. *See Lanning*, 352 N.C. at 109, 530 S.E.2d at 61.

Reversed and remanded.

Chief Judge EAGLES and Judge MARTIN concur.

JOEL T. LEWIS, PETITIONER v. N.C. DEPARTMENT OF CORRECTION, RESPONDENT

No. COA01-1386

(Filed 15 October 2002)

Public Officers and Employees— sexual remarks—personal misconduct or sexual harassment—appellate review

The trial court did not err by reversing the decision of the State Personnel Commission to demote and transfer a correctional sergeant who had made sexual remarks to two female correctional officers. Although grounds may exist for establishing unacceptable personal conduct, the issue specified by the Administrative Law Judge (and neither rejected nor amended by the SPC) was whether there was just cause to demote petitioner because of sexual harassment, which does not appear to have occurred.

Judge McCULLOUGH dissenting.

Appeal by respondent from order entered 10 August 2001 by Judge A. Moses Massey in Stokes County Superior Court. Heard in the Court of Appeals 21 August 2002.

Anderson D. Cromer, PC, by Anderson D. Cromer, for petitioner.

Attorney General Roy Cooper, by Assistant Attorney General Neil Dalton, for respondent.

BRYANT, Judge.

On 7 September 1999, petitioner Joel T. Lewis initiated a petition for a contested case hearing pursuant to N.C.G.S. § 150B-23(a), appealing the 25 May 1999 decision of respondent N.C. Department of Correction (DOC) to demote and transfer Lewis from the position of correctional sergeant at Forsyth Correctional Center to the position of correctional officer with a ten percent reduction in pay. Lewis's demotion was for just cause, premised on several "unprofessional comments of a sexual nature" that he made to two female correctional officers with whom he was employed. The unprofessional comments included offering money to correctional officer Pleasants to go with him to the beach, telling officer Pleasants that she was being stingy with her "coochie," and asking officer Pleasants and fellow correctional officer Lattimore what color panties they were wearing.

The contested case came for hearing before Administrative Law Judge (ALJ) Robert Roosevelt Reilly, Jr., on 25 April 2000. On 31 May 2000, Judge Reilly issued a recommended decision in favor of Lewis. The State Personnel Commission (SPC) declined to adopt the recommended decision as written and instead adopted an amended decision and order dated 31 August 2000 in favor of DOC. From the decision and order of the SPC, Lewis petitioned for judicial review.

This matter came for judicial review at the 3 January 2001 term of Stokes County Superior Court with the Honorable A. Moses Massey presiding. By order filed 10 August 2001, the superior court reversed the decision and order of the SPC to demote and transfer Lewis. DOC appeals.

Standard of review

At the trial court level, the court must first determine *de novo* whether the SPC heard new evidence after receiving the ALJ's recommended decision; and if the SPC did not adopt the ALJ's recommended decision, whether the SPC stated specific reasons explaining its new findings. *See* N.C.G.S. § 150B-51(a) (2001). After the initial determination is made, the court must then determine *de novo* whether an error of law occurred. *See Associated Mechanical Contractors, Inc. v. Payne*, 342 N.C. 825, 831, 467 S.E.2d 398, 401 (1996). If the allegation is that the findings of fact and conclusions of law are unsupported by competent evidence or are arbitrary and capricious, then the court must utilize the whole record test. *See Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994).

When this Court reviews appeals from superior court either affirming or reversing the decision of an administrative agency, our scope of review is twofold, and is limited to determine: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard. *In re Appeal by McCrary*, 112 N.C. App. 161, 166, 435 S.E.2d 359, 363 (1993). However, this Court's obligation to review a superior court order for errors of law can be accomplished by addressing the dispositive issue(s) before the agency and the superior court without examining the scope of review utilized by the superior court and remanding the case if the standard of review utilized by the superior court cannot be ascertained. *Capital Outdoor, Inc. v. Guilford County Board of Adjustment*, 152 N.C. App. 474, 475, 567 S.E.2d 440, 441 (2002).

Upon review of the superior court's order, it appears that the superior court utilized the appropriate standard of review as to each issue presented. This Court must now determine whether it properly applied the standard of review.

Dispositive issue

DOC presents several issues on appeal, however, we find the dispositive issue to be whether the superior court erred in determining that Lewis's conduct had to rise to the level of sexual harassment to justify his demotion and transfer. For the following reasons, we affirm the superior court's conclusion on this issue.

N.C.G.S. § 126-35 (2001), states that "[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Admin. Code tit. 25, r.1J0604(b) (June 2002), defines just cause as discipline or dismissal based on either unsatisfactory job performance or unacceptable personal conduct.

N.C. Admin. Code tit. 25, r.1J0614(i) (June 2002), enumerates several examples of unacceptable personal conduct including: 1) "conduct for which no reasonable person should expect to receive a prior warning; or" 2) "job-related conduct which constitutes a violation of state or federal law; or" 3) "the willful violation of known or written work rules; or" 4) "conduct unbecoming a state employee that is detrimental to state service; or" 5) "the abuse of client(s), patient(s), student(s), or person(s) over whom the employee has charge or to whom the employee has a responsibility. . . ."

Effective 1 September 1992, DOC implemented a sexual harassment policy. The SPC concluded,

> Sexual harassment usually involves an employee being personally subjected to one or more of the following behaviors:
>
> (a) Unwelcome sexual advances;
>
> (b) Acts of gender-based animosity (hostile conduct based on the victim's gender); or
>
> (c) Sexually charged workplace behavior (conduct that is offensive on the basis of gender to persons whether or not they are the targets of the conduct).
>
> [] Sexual harassment is unlawful sex discrimination under one or two legal theories: "quid pro quo" or "hostile environ-

ment." All three forms of behavior referenced may constitute a hostile environment, but a claim of quid pro quo harassment necessarily involves unwelcome sexual advances. Sexual harassment claims are usually analyzed as disparate treatment claims.

[] The essence of a quid pro quo claim is that an individual has been forced to choose between suffering an employment detriment and submitting to sexual demands. . . .

[] The essence of a hostile environment claim is that an individual has been required to endure a work environment that, while not necessarily causing any direct economic harm, or even significant psychological or emotional harm, substantially affects a term or condition of employment. . . .

Lewis was a career State employee prior to his demotion/transfer and was subject to the provisions of N.C.G.S. § 126, *et seq.* (State Personnel Act). By letter dated 25 May 1999, Lewis was notified that an investigation of the incidents at issue, revealed that he made unprofessional comments of a sexual nature to both officers Pleasants and Lattimore. In addition, the letter stated that a recommendation for his demotion for unacceptable personal conduct had been approved effective 1 June 1999.

After an unsuccessful internal appeal, Lewis appealed to the Office of Administrative Hearings for a contested case hearing. By decision dated 31 August 2000, the presiding ALJ specified the issue as, "Did the respondent have just cause to demote petitioner because of sexual harassment?" The SPC did not reject nor amend this articulation of the issue. Rather the SPC stated in its decision and order, "Sexual harassment is unlawful sex discrimination under one of two legal theories: 'quid pro quo' or 'hostile environment'. . . . [P]etitioner's behavior must be analyzed to determine whether his behavior created a hostile working environment that substantially affected a term or condition of Ms. Pleasant's (sic) employment." The SPC went further to conclude, "Regardless of whether Petitioner's conduct rose to the level of sexual harassment as defined above, Petitioner's conduct did constitute personal misconduct 'for which no reasonable person should expect to receive a prior warning,' thereby subjecting Petitioner to disciplinary action as provided for in 25 NCAC 1J.0162 and .0613 and in DOC's Disciplinary Policy and Procedures, Section 6, p.38, resulting in his demotion and transfer."

Based upon our reading of the case, the issue before the ALJ was whether just cause existed to demote Lewis because of sexual harassment. The SPC did not articulate a different issue for consideration. The SPC concluded there were no allegations of quid pro quo sexual harassment in this case. In addition, the SPC found that "Neither Ms. Pleasants nor Ms. Lattimore stated that the Petitioner's statements had or may have had [] direct employment consequences resulting from either the acceptance or rejection of the statements or that the statements created an intimidating, hostile or offensive environment or that the statements interfered with their performance." Notwithstanding, the SPC ordered that the recommended decision of the ALJ be rejected and respondent's disciplinary action for unacceptable personal conduct be upheld.

In light of the above noted findings and conclusions, it appears that unacceptable personal conduct based on sexual harassment did not occur as sexual harassment has been previously defined. Although several grounds may exist for establishing unacceptable personal conduct, the ground specified as the basis for Lewis's demotion and transfer was sexual harassment. The superior court did not err in reversing the decision and order of the SPC. Therefore, this assignment of error is overruled and we affirm the order of the superior court.

AFFIRMED.

Judge McGEE concurs.

Judge McCULLOUGH dissents with a separate opinion.

McCULLOUGH, Judge, dissenting.

The majority affirms a ruling of the superior court reversing an order of the State Personnel Commission (SPC) which demoted, transferred and decreased the respondent's salary due to comments of a crude sexual nature made by respondent to female correctional officers with whom he worked. From this ruling, I respectfully dissent.

The record shows that respondent offered a female correctional officer money to go to the beach with him, stated that she was being stingy with her "coochie," that she would have to sell a lot of "coochie" to make her car payment, and asked this officer and another officer what color underpants they were wearing.

Both the Administrative Law Judge (ALJ) who originally heard this matter, and the superior court judge who heard the Petition For Judicial Review, concluded that, to be actionable, (1) sexual comments had to rise to the level of sexual harassment as defined by the Department of Correction (DOC); and (2) such comments that do not rise to that level cannot qualify as "unacceptable personal behavior," as that term is defined in the Office of State Personnel Policy Manual, codified at N.C. Admin. Code tit. 25, r.1J.0614(i)(1) (June 2002). In affirming, the majority concurs with the shared viewpoint expressed by the ALJ and the superior court. The majority opinion sets forth the DOC sexual harassment policy in detail. Upon reading the DOC policy statement, it is apparent that not all crude sexual remarks meet the test set forth therein.

I would reverse the order of the superior court which reversed respondent's discipline, as I believe that the SPC gave an adequate explanation of why it did not adopt the reasoning and conclusions of the ALJ. A point-by-point refutation of the ALJ's findings and conclusions is not required. *Webb v. N.C. Dept. of Envir., Health and Nat. Resources*, 102 N.C. App. 767, 404 S.E.2d 29 (1991). I believe the SPC addressed the case adequately and complied with N.C. Gen. Stat. § 150B-51 (2001) when it included Conclusion of Law No. 8 in its order. That conclusion stated:

> 8. Regardless of whether Petitioner's conduct rose to the level of sexual harassment as defined above, Petitioner's conduct did constitute personal misconduct, "for which no reasonable person should expect to receive a prior warning," thereby subjecting Petitioner to disciplinary action as provided for in 25 NCAC 1J.0612 and .0613 and in DOC's Disciplinary Policy and Procedures, Section 6, p. 38, resulting in his demotion and transfer.

Respondent was well aware that comments of a sexual nature could lead to some form of discipline, whether or not they rose to the level of sexual harassment. The record indicates that, on 19 November 1996, respondent signed a Human Relations in the Workplace memorandum to that effect. His conduct was therefore a willful violation of a work rule, which is also unacceptable personal conduct for which he could be disciplined. *See* N.C. Admin. Code tit. 25, r.1J.0614(i)(4); and *North Carolina Department of Correction v. McNeely*, 135 N.C. App. 587, 521 S.E.2d 730 (1999).

The majority seems to hold that, although the SPC inserted Conclusion of Law No. 8 into its Order as an alternative basis for discipline, such was of no import. The majority then accepts the superior court's determination that the sole issue before that court (and, by implication, this Court as well) was whether the complained-of comments constituted sexual harassment as defined by the DOC policy statement. With this assessment, I disagree. In so doing, I believe the superior court made an error of law, which we review *de novo. Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 397 S.E.2d 350 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).

While crude sexual comments may not always rise to the level of sexual harassment as defined in the DOC policy statement, they are nevertheless capable of subjecting an employee to discipline. The SPC never attempted to rely solely on sexual harassment as the only ground for discipline, and this Court should not overlook the SPC's attempt to base the discipline imposed on its Conclusion of Law No. 8 set forth above. In summary, I would reverse the order of the superior court and uphold the SPC and the discipline it imposed.

STATE OF NORTH CAROLINA v. JAMES KARREL CANADY

No. COA01-1413

(Filed 15 October 2002)

1. Appeal and Error— preservation of issues—*Alford* plea

Assignments of error concerning the factual basis for an *Alford* plea were not properly before the Court of Appeals where defendant stipulated that there was a factual basis for the plea, did not object to the trial court finding that there was a sufficient factual basis for the plea, did not object to the acceptance of the plea, and did not move to withdraw the plea. Defendant did not raise or argue plain error in his brief.

2. Probation and Parole— consecutive five year terms—prohibited

The trial court erred by imposing two consecutive five year probation periods for indecent liberties. A trial court is prohibited from imposing such a sentence under the plain terms of N.C.G.S. § 15A-1346.

3. Probation and Parole— restitution—victims' future treatment—not punitive

The trial court did not err by imposing restitution of up to $2,000 for future treatment of indecent liberties victims as a condition of probation where the record contained supporting evidence other than statements of the prosecutor, there was testimony tending to show that the victims were still undergoing treatment and that insurance would not cover the total cost, and the court's allowance for the cost of treatment being less than $2,000 supports the inference that the restitution was not punitive.

Appeal by defendant from judgments entered 26 June 2001 by Judge Jerry R. Tillett in Superior Court, Northampton County. Heard in the Court of Appeals 21 August 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General T. Lane Mallonee, for the State.

Osborn & Tyndall, P.L.L.C., by J. Kirk Osborn and Amos Granger Tyndall, for defendant-appellant.

McGEE, Judge.

James Karrel Canady (defendant) pleaded guilty on 26 June 2001 to four counts of taking indecent liberties with a minor. The plea was entered pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970).

Defendant stipulated to the factual basis for entry of the plea that was presented by the State, which tended to show that between 1 June 2000 and 31 July 2000 three incidents occurred in defendant's home involving defendant and his grandchild, T.C., who was ten years old at the time. On the first occasion, defendant was looking at T.C.'s private parts when he said, "if you want to have sex you can have sex with me" and "[i]f your bug ever gets hot just call me." Defendant told T.C. not to tell anyone because he might go to jail. A few weeks later, defendant pulled out his genitals, rubbed them and attempted to make T.C. look at them. On the third occasion, defendant attempted to touch T.C.'s breasts but she covered her breast area and turned away from defendant.

The State also showed that at various times when defendant's grandchild, R.B., was between the ages of four and eight, defendant

pulled out his penis, wiggled it around and asked her to touch it. Two such occurrences took place in the span of two weeks in a bathroom at defendant's house; the first occurred while defendant's wife was in the house, sleeping in her room. The following summer, defendant did the same thing to R.B. in a locked bathroom in his house, while his wife was fixing lunch. When R.B. was six years old, defendant came into her bedroom while she was sleeping, rolled R.B. over on her side and asked, "how does she like to sleep, dressed or naked." R.B. responded "dressed." Defendant attempted to touch R.B.'s breast, but she pushed him and said, "I'm going to tell grandma." Defendant responded, "I don't give a s---t." When R.B. was eight years old, defendant again took his penis out and wriggled it around in her presence.

Defendant was indicted on multiple counts of indecent liberties with children. Defendant pleaded guilty on 26 June 2001 to four counts of taking indecent liberties with children. The trial court consolidated two of the offenses for judgment and sentenced defendant to: (1) a minimum of sixteen months and a maximum of twenty months active imprisonment, (2) a minimum of twenty months and a maximum of twenty-four months, suspended with supervised probation for sixty months, and (3) another minimum of twenty months and a maximum of twenty-four months, suspended with supervised probation for sixty months, to run consecutively with the first period of probation. Defendant appeals the judgment of the trial court.

On appeal, defendant has not argued his seventh assignment of error concerning the trial court's finding of an aggravating factor in cases 01 CRS 50125 and 01 CRS 50156; therefore, this 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 an appellant's brief, and in support of which no arguments are stated or authority cited, will be deemed abandoned.").

I.

[1] Defendant argues in his first through fourth assignments of error that the trial court erred by finding a factual basis for the *Alford* plea in 01 CRS 50154-56 and 01 CRS 50125.

A guilty plea entered pursuant to *North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d. 162, 171 (1970), will be upheld when (1) a defendant intelligently concludes that his interests require the entry

of a guilty plea and (2) there is strong evidence in the record of the defendant's actual guilt. Defendant contends that the pleas in this case should not be upheld because the second of these two requirements was not met. Specifically, defendant contends that the State failed to provide strong evidence of one of the elements of the offense of taking indecent liberties with children. The elements of taking indecent liberties with children, are:

> (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he willfully took or attempted to take an indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Rhodes, 321 N.C. 102, 104-05, 361 S.E.2d 578, 580 (1987) (citation omitted); *see* N.C. Gen. Stat. § 14-202.1 (2001). Defendant asserts that the State failed to present strong evidence of the last element, that defendant's conduct was "for the purpose of arousing or gratifying sexual desire." *Rhodes*, 321 N.C. at 102, 361 S.E.2d at 580.

We agree with the State's argument that *State v. Kimble*, 141 N.C. App. 144, 539 S.E.2d 342 (2000), *disc. review denied*, 353 N.C. 391, 548 S.E.2d 150 (2001), is controlling in this case. The defendant in *Kimble* failed to object to the State's summary of the factual basis for the entry of judgment against the defendant at a plea hearing. *Id.* at 147, 539 S.E.2d at 344. Further, in *Kimble*, when the "[d]efendant brought a motion to withdraw his pleas subsequent to the entry of judgment, the basis of this motion was not that there was an insufficient factual basis to support [the defendant's] pleas." *Id.* In *Kimble*, our Court held that since the issue of a sufficient factual basis for acceptance of an *Alford* plea was not raised before the trial court, it was not properly before our Court. *Id.* at 147, 539 S.E.2d at 344-45 (citing N.C.R. App. P. 10(b)(1)).

In the case before us, after the State presented the factual basis for the plea, defendant stipulated that there was a factual basis for the entry of the plea. After acceptance of the plea by the trial court, defendant neither objected to the trial court's finding that there was a sufficient factual basis for the plea, nor did defendant object to the acceptance of his plea by the trial court. The record does not show that defendant ever moved to withdraw his plea. Thus, as in *Kimble*, defendant's first through fourth assignments of error are not properly before this Court.

Defendant also argues in each of these assignments of error that if we determine that these assignments were not preserved for appeal, the trial court's actions amounted to plain error. However, as in *State v. Thompson*, defendant "does not raise or argue the errors as plain error in his brief." 141 N.C. App. 698, 705, 543 S.E.2d 160, 165, *disc. review denied*, 353 N.C. 396, 548 S.E.2d 157 (2001). We therefore deem waived any assignment of plain error concerning the *Alford* plea. *Id.* (citing N.C.R. App. P. 28(a)); *State v. Stanley*, 288 N.C. 19, 26, 215 S.E.2d 589, 593-94 (1975)). Defendant's first through fourth assignments of error are dismissed.

II.

[2] Defendant argues in his fifth assignment of error that the trial court erred by imposing two consecutive five-year probationary sentences. Defendant argues that under N.C. Gen. Stat. § 15A-1342(a) (2001), a trial court may sentence a convicted offender to probation for a maximum of five years. Defendant contends that the two five-year terms the trial court imposed effectively resulted in a ten-year probation period, and therefore the trial court erred in sentencing. The State argues, however, that the five-year limit defendant cites only applies to single offenses, and therefore, should not be construed to cover multiple offenses.

The State further contends that N.C. Gen. Stat. § 15A-1346 does not answer the specific question presented in this case. The text of this statute reads:

> (a) Commencement of Probation.—Except as provided in subsection (b), a period of probation commences on the day it is imposed and runs concurrently with any other period of probation, parole, or imprisonment to which the defendant is subject during that period.
>
> (b) Consecutive and Concurrent Sentences.—If a period of probation is being imposed at the same time a period of imprisonment is being imposed or if it is being imposed on a person already subject to an undischarged term of imprisonment, the period of probation may run either concurrently or consecutively with the term of imprisonment, as determined by the court. If not specified, it runs concurrently.

N.C.G.S. § 15A-1346 (2001).

A careful reading of the statute shows that any sentence of probation must run concurrently with any other probation sentences

imposed on a defendant. The only power to adjust the timing of a probation sentence is that found under N.C. Gen. Stat. § 15A-1346(b). *See* N.C. Gen. Stat. § 15A-1346(a) (2001). However, this exception only applies to the commencement of a probationary sentence when the defendant is already serving or is going to be serving a prison sentence as well. N.C.G.S. § 15A-1346(b). In that this is the *only* exception to N.C.G.S. § 15A-1346(a), the trial court could not impose a period of probation to run consecutively with another probation period. In the case before us, the trial court could have imposed the probation sentences to run consecutively with the sixteen to twenty months of active imprisonment imposed in the consolidated judgment. *See* N.C.G.S. § 15A-1346(b). However, under the plain terms of N.C.G.S. § 15A-1346, a trial court is prohibited from imposing a sentence of two consecutive probation periods of five years each. Although we recognize that the trial court was attempting to craft a sentence that would serve to protect the victims in this family, we must nonetheless remand this matter to the trial court for resentencing consistent with N.C.G.S. § 15A-1346.

III.

[3] Defendant argues in his sixth assignment of error that the trial court erred by imposing as a condition of his probation that he pay restitution in an amount up to $2,000.00 for future treatment of the victims. However, "[i]n order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make[.]" N.C.R. App. P. 10(b)(1). Where a defendant fails to object to the judgment or the amount of restitution ordered at the sentencing hearing or to a trial court's order that a defendant make restitution, an appeal concerning the appropriateness of an imposition of restitution is not properly before this Court. *State v. Hughes*, 136 N.C. App. 92, 97-98, 524 S.E.2d 63, 66 (1999), *disc. review denied*, 351 N.C. 644, 543 S.E.2d 878 (2000).

Our Court may consider, under Rule 2 of the North Carolina Rules of Appellate Procedure, defendant's argument that the trial court erred by imposing up to $2,000.00 restitution on defendant. *See Hughes* at 98, 524 S.E.2d at 67. Accordingly, we will review defendant's sixth assignment of error on its merits.

Restitution may be ordered as a condition of probation pursuant to N.C. Gen. Stat. § 15A-1343(d) (2001). In *State v. Hunt*, our Court discussed the appropriateness of an award of restitution:

> We held in a recent case that a recommendation of restitution must be supported by the evidence before the trial court. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557 (1986). Our Supreme Court has also recently held that a trial court need not make specific findings in support of its recommendation of probation. *State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986). . . . When, as here, there is some evidence as to the appropriate amount of restitution, the recommendation will not be overruled on appeal. We note, however, that restitution is intended to compensate victims for loss or damage, and not as a punitive measure against defendants. A trial court's recommendation may easily fall into this latter, and disfavored, realm when there is no basis to support it.

State v. Hunt, 80 N.C. App. 190, 195, 341 S.E.2d 350, 354 (1986).

> In *State v. Burkhead*, we further explained that [r]estitution is defined as "compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action." G.S. 15A-1343(d). Restitution, however, cannot be comprised of punitive damages. G.S. 15A-1343(d) states that the purpose of restitution measures are to promote rehabilitation of the criminal offender and to provide for compensation to victims of crime. They shall not be construed to be a fine or other punishment. G.S. 15A-1343(d); *State v. Killian*, 37 N.C. App. 234, 245 S.E.2d 812 (1978).

State v. Burkhead, 85 N.C. App. 535, 536, 355 S.E.2d 175, 176 (1987).

In the case before us, defendant argues that the restitution award should not be upheld because it was based upon the unsworn statements of the prosecutor. *See State v. Buchanan*, 108 N.C. App. 338, 341, 423 S.E.2d 819, 821 (1992) (holding that an unsworn statement by the prosecutor "does not constitute evidence and cannot support the amount of restitution recommended"). If statements of the prosecutor were the only bases for the award, our Court would be required to reverse the restitution award. *See id.* However, in this case, the record contains other evidence to support the amount of restitution awarded. There was both testimony and documentation showing that the victims had already accumulated $680.00 in treatment bills over the span of a few months. In fact, defendant does not challenge the trial court's imposition of an additional $680.00 in restitution to cover these previous treatment costs. Further, there was testimony tending to show that the victims were still undergoing treatment as a result of

defendant's actions. There was testimony that the insurance of the victims' parents would not cover the total cost of the treatment, which would be needed for an appreciable amount of time after the sentencing. In light of this evidence, the trial court did not err in setting the maximum amount of restitution for future treatment of the victims at $2,000.00. We also note that the fact that the trial court made allowance for the situation where the cost of treatment was less than $2,000.00 supports the inference that the restitution in this case was not punitive and thus met the requirements of N.C.G.S. § 15A-1343.

We affirm the trial court's award of restitution.

Affirmed in part; and remanded for re-sentencing.

Judges McCULLOUGH and BRYANT concur.

STATE OF NORTH CAROLINA v. HARRY REED, JR.

No. COA01-1371

(Filed 15 October 2002)

1. Evidence— hearsay—statement to detective—explanation of subsequent conduct

The trial court did not err in a prosecution for possessing alcoholic beverages for sale without a permit by admitting an unidentified witness's statement to a detective where the statement was offered only to explain the detective's subsequent conduct. Furthermore, defendant did not renew his objection when additional testimony about the witness' statement was offered.

2. Evidence— admissions—business card

The trial court did not err in a prosecution for possessing alcoholic beverages for sale without a permit by admitting a copy of a business card found during a search of defendant's house where the card represented that defendant's house was open for alcohol, food, and fun. The card was properly authenticated as an admission by defendant, based on its distinctive characteristics taken in conjunction with circumstances.

3. Alcoholic Beverages— possession for sale without permit—quantities

The trial court did not err by denying defendant's motion to dismiss a charge of possessing alcoholic beverages for sale without a permit where the defendant contended that the quantities of liquor found in his house were insufficient to establish a prima facie case under N.C.G.S. § 18B-304(b), but the minimum quantities listed in subsection (b) are not necessary for an N.C.G.S. § 18B-304(a) violation.

Appeal by defendant from judgment entered 22 September 2000 by Judge Abraham P. Jones in Wake County Superior Court. Heard in the Court of Appeals 20 August 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General P. Bly Hall, for the State.

John T. Hall for defendant-appellant.

HUNTER, Judge.

Harry Reed, Jr. ("defendant") appeals his conviction and sentencing for possession of alcoholic beverages for sale without a permit. We find no error requiring reversal of the trial court's decision.

On the night of 9 January 2000, a motor vehicle accident occurred in front of defendant's house that resulted in a stabbing and another assault between the vehicle occupants. When the police arrived, they noticed the stabbing victims and witnesses all had "mini" bottles of liquor in their possession. Detective A. E. Talley ("Detective Talley"), the primary officer in charge of the investigation, was told by several of the witnesses that they had been at "Harry's place" prior to the accident and assaults. One of these witnesses (an unidentified woman) further stated that she had been at "Harry's liquor house" and proceeded to point to defendant's house.

Detective Talley subsequently instructed two detectives to interview defendant about the accident and related assaults. Defendant told the detectives that he was unaware of the events that had occurred outside his house and that no one had been at his residence prior to the accident. As the detectives questioned defendant from his doorway, they could see in plain view what appeared to be evidence of a liquor operation inside defendant's house.

Upon receiving a report of the detectives' interview and observations, Detective Talley contacted the ABC Commission. The ABC Commission informed Detective Talley about three previously executed search warrants for defendant's house by ABC Agent Ricky D. Barbour ("Agent Barbour") on 3 April 1998, 16 April 1998, and October of 1999. Those searches had resulted in the seizure of approximately fifty-two liters, twenty-eight liters, and at least eight liters of spirituous liquor respectively. During the 16 April 1998 search, Agent Barbour had specifically informed defendant that he would need an ABC permit and state and local revenue licenses to sell liquor. Detective Talley used the information from the report and the ABC Commission to obtain a search warrant for defendant's house.

Defendant's house was searched on 10 January 2000. As a result of the search, the police seized approximately five liters of spirituous liquor (which included seventy-five "mini" bottles of liquor), seventy-eight cans of beer, two bottles of champagne, and $946.00 in small bills (mostly one dollar bills). The police also found a box of "business cards" containing defendant's address, telephone number, and the statement, "Harry's open house for alcohol, food, and fun[.]" Finally, a piece of paper labeled "Harry's house rules" was seized during the search that included the motto: "Your money belong[s] in my pocket" and a rule stating "[n]o . . . begging. No . . . credit. . . . You don't get nothing here free." Thereafter, defendant was cited for possessing for sale "alcoholic beverages without first obtaining the applicable ABC permit and revenue licenses[,]" a misdemeanor under Section 18B-304(a) of the North Carolina General Statutes. Defendant was convicted on 8 March 2000 in Wake County District Court and immediately appealed his conviction to the Wake County Superior Court.

Defendant's appeal was heard in superior court on 21 September 2000. At trial, the court allowed the State to admit into evidence, over defendant's objection, the unidentified witness' statement regarding "Harry's liquor house" and a copy of the business card found during the search. Defendant testified on his own behalf and denied operating a liquor house. He further testified that the alcohol found in his home was left over from his New Year's Eve party and that he was intending to use the remaining alcohol for his birthday party on 16 January. Finally, when questioned about "Harry's house rules," defendant testified that he does give away alcohol when he has a party.

Defendant's trial concluded on 22 September 2000 when the jury returned a verdict of guilty of possession of alcoholic beverages for sale without a permit. As a result, defendant was sentenced to a term of forty-five days in the North Carolina Department of Correction, which was suspended for thirty-six months with supervised probation, a fine of $100.00, and $1,000.00 in attorney's fees to reimburse the state for court-appointed counsel. Defendant appeals.

I.

By defendant's first two assignments of error he argues the trial court committed reversible error by allowing the State to introduce (A) the hearsay statement of an unidentified witness, and (B) the hearsay statement contained on a business card found in defendant's house during the police search.

Our statutes define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2001). The general rule is that hearsay statements are inadmissible as evidence. N.C. Gen. Stat. § 8C-1, Rule 802 (2001). However, our statutes do allow for the admissibility of some hearsay statements if they fall within certain recognized exceptions. *See* N.C. Gen. Stat. § 8C-1, Rules 803 and 804 (2001).

A.

[1] By his first assignment of error, defendant argues the unidentified witness' statement to Detective Talley regarding "Harry's liquor house" was inadmissible hearsay. We disagree.

Our Supreme Court "has held that the statements of one person to another are admissible [as non-hearsay] to explain the subsequent conduct of the person to whom the statement was made." *State v. Maynard*, 311 N.C. 1, 16, 316 S.E.2d 197, 205 (1984) (citing *State v. Tate*, 307 N.C. 242, 245, 297 S.E.2d 581, 583 (1982)). In the case *sub judice*, upon hearing the witness' statement and learning the location of defendant's house, Detective Talley instructed two detectives to interview defendant about the accident and assaults that occurred in front of his home. It was the results of their interview and the information provided by the ABC Commission that led to defendant's house being searched. Thus, the witness' statement was offered only to explain Detective Talley's conduct subsequent to hearing the statement and not to show that defendant's home was actually a "liquor house."

Furthermore, assuming *arguendo* that the witness' statement was inadmissible, our Supreme Court has long held that when "evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Maccia*, 311 N.C. 222, 229, 316 S.E.2d 241, 245 (1984) (citations omitted). Here, after the trial court overruled defendant's objection to Detective Talley's testimony regarding the witness' reference to "Harry's liquor house," the detective testified: "I had that witness follow myself in a police car . . . and had her actually identify by pointing out which house she was stating was Harry's liquor house." Defendant did not object. Defendant's failure to renew his objection when additional testimony about the witness' statement was offered resulted in his waiving this issue on appeal.

Accordingly, we overrule defendant's first assignment of error.

B.

[2] By his second assignment of error, defendant argues the trial court's admission of a copy of the business card found during the search of his house contained an inadmissible hearsay statement. In ruling that the card was admissible, the trial judge stated:

> I'm going to overrule [defendant's] objection for the reason that the matter is offered not for what's asserted but for the fact that this item was found at the scene and has been testified to that it was found in the residence of the defendant on the occasion of the search on January the 10th and for that reason it's part of the evidentiary package and ergo arc liable under 804, 803.24 what I call a catch all because it's a reliable item found on the scene of the defendant offered to show that it was in there found not for what's said on there. And so it is hearsay . . . .

At the outset, we note that this ruling does not clearly provide whether the court admitted the statement on the card because it was (1) non-hearsay or (2) hearsay pursuant to Rule 803(24) of our statutes. *See* N.C. Gen. Stat. § 8C-1, Rule 803(24). Nevertheless, we conclude the card was actually admissible as evidence under Rule 801(d) as an exception to the hearsay rule.

Rule 801(d) provides an exception to the hearsay rule for admissions by a party-opponent. N.C. Gen. Stat. § 8C-1, Rule 801(d) (2001). In pertinent part, Rule 801(d) states that "[a] statement is admissible as an exception to the hearsay rule if it is offered against

a party and it is [] his own statement, in either his individual or a representative capacity[.]" *Id.*

In the present case, the business card represented that defendant's house was open for alcohol, food, and fun. Although the statement on the card was not in defendant's handwriting and defendant did not testify to the card's authenticity, the card was properly authenticated by the State based on its "distinctive characteristics, taken in conjunction with circumstances." N.C. Gen. Stat. § 8C-1, Rule 901(b)(4) (2001). Those characteristics and circumstances included: (1) the card being one of many identical business cards found in a box in defendant's bedroom during the search; (2) the card containing defendant's name, address, and telephone number; and (3) defendant being the sole occupant of the house in which the card was found. With respect to (3), this Court has previously held that a showing that defendant was the sole occupant of the residence where documents were found "is sufficient for [those documents] to be admitted into evidence, and the weight given the evidence is for the jury to decide." *State v. Mercer*, 89 N.C. App. 714, 716, 367 S.E.2d 9, 11 (1988). Therefore, the card was properly authenticated as an admission by defendant. The court did not err in offering the card into evidence for the jury to decide what weight, if any, should have been given to it.

II.

[3] By defendant's third assignment of error he argues the trial court erred in denying his motion to dismiss the charge against him at the close of all the evidence. We disagree.

When ruling on a motion to dismiss in a criminal action, the trial court is to consider the evidence in the light most favorable to the State, which entitles the State "to every reasonable intendment and every reasonable inference to be drawn from the evidence[.]" *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 653 (1982). The evidence considered must be "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." *Id.* at 65-66, 296 S.E.2d at 651. 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). Therefore, "[t]he trial court's function is to determine whether the evidence allows a '*reasonable inference*' to be drawn as to the defendant's guilt of the crimes charged." *Earnhardt*, 307 N.C. at 67, 296 S.E.2d at 652 (citation omitted).

Here, the State's evidence established that three prior searches of defendant's house were executed by the ABC Commission. Each of those searches resulted in the seizure of quantities of spiritous liquor that were substantial enough to establish a *prima facie* case for possessing for sale alcoholic beverages without first obtaining the applicable ABC permit and revenue licenses under Section 18B-304(b). *See* N.C. Gen. Stat. § 18B-304(b).[1] Defendant contends that since the quantities of liquor seized during the search at issue were insufficient to establish such a *prima facie* case, the charge against him should have been dismissed. We disagree. It is not necessary, for a Section 18B-304(a) violation, that defendant have in his possession the quantities of alcoholic beverages listed in Section 18B-304(b). The ultimate question is whether there is substantial evidence defendant sold or possessed for sale "any" amount of alcoholic beverage without having an applicable ABC permit and revenue licenses. In this case, there is such substantial evidence. This evidence consisted of the police finding approximately five liters of spirituous liquor stored in various closets and refrigerators throughout defendant's house, approximately $946.00 in small bills, packaging items, and seventy-eight cans of beer. The police also found a box of business cards and a copy of "Harry's house rules," which indicated that nothing was "free." Finally, there was evidence that defendant admitted telling the local newspaper that the state's monopoly on liquor sales is like a communist dictatorship. Therefore, when considering all the substantial evidence in the light most favorable to the State, the court did not err in denying defendant's motion to dismiss at the close of the evidence.

For the aforementioned reasons, we conclude that defendant's conviction and sentencing should be upheld.

No error.

Judges GREENE and TIMMONS-GOODSON concur.

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1. Section 18B-304(b) provides that:

Possession of the following amounts of alcoholic beverages, without a permit authorizing that possession, shall be prima facie evidence that the possessor is possessing those alcoholic beverages for sale:

(1) More that 80 liters of malt beverages, other that draft malt beverages in kegs;

(2) More that eight liters of spirituous liquor; or

(3) Any amount of nontaxpaid alcoholic beverages.

N.C. Gen. Stat. § 18B-304(b) (2001).

JAMES CHARLES RACKLEY, JR., EMPLOYEE, PLAINTIFF v. COASTAL PAINTING, EMPLOYER, AND COMPANION PROPERTY & CASUALTY INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA01-1363

(Filed 15 October 2002)

1. Workers' Compensation— painter's fall from ladder—epilepsy—compensable

The Industrial Commission did not err in a workers' compensation action by ruling that plaintiff-painter sustained a compensable injury by accident when he fell from a 32-foot ladder as he leaned back to paint trim where defendant argued that the fall was caused by plaintiff's idiopathic condition (epilepsy). Compensation should be allowed when an injury is associated with risk attributable to the employment even though an idiopathic condition precipitated or contributed to the injury.

2. Workers' Compensation— attorney fees—not apportioned

An award of attorney fees in a workers' compensation case was affirmed where defendants' brief concerned only the issue of unreasonable defense under N.C.G.S. § 97-88.1, the Commission did not apportion the award between N.C.G.S. § 97-88.1 and N.C.G.S. § 97-88 (unsuccessful appeal), and it could be assumed that the entire award would have been proper under N.C.G.S. § 97-88.

Appeal by defendants from opinion and award entered 13 June 2001 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 22 August 2002.

Taft, Taft & Haigler, P.A., by Thomas Taft, Sr., and Patterson, Harkavy & Lawrence, L.L.P., by Martha A. Geer, for plaintiff-appellee.

Morris York Williams Surles & Barringer, LLP, by John F. Morris and Amy E. Echerd, for defendant-appellants.

MARTIN, Judge.

Defendants appeal from the Commission's award to plaintiff of permanent total disability benefits and medical expenses, as well as an award for costs and attorney's fees under G.S. §§ 97-88 and 97-88.1. Evidence before the Commission tends to show that on 9 August

1996, plaintiff, who was 21 years of age, was employed by defendant Coastal Painting as a house painter. Around 8:30 a.m. on 9 August 1996, plaintiff and his co-workers arrived at the work site, a three-story condominium on the south end of Topsail Island. Plaintiff began his work painting the trim and fascia on the exterior of the third floor of the building, working from a 32-foot ladder that was leaned against the building and had no safety harnesses. Plaintiff's work required that he stand on the ladder, but lean back and hold onto the eave or shingles. At some point before 9:00 a.m., plaintiff fell from the ladder to the ground and sustained a "burst compression fracture at C5", resulting in quadriplegia. After surgery and rehabilitation, he remains completely disabled from work. Since his release from rehabilitation, plaintiff has resided in Florida with his mother, who has provided him with home health care.

Plaintiff does not know how he fell and there were no witnesses to the fall. Plaintiff stated that all he could remember was painting the trim and then lying on the ground in pain and unable to move his limbs. Plaintiff's co-workers were at other sides of the house when the accident happened. The owner of the house testified that she had seen the top of plaintiff's head through a window while he was painting on the ladder and then heard "a thump." Upon hearing the sound and then seeing plaintiff lying on the ground below the ladder, she ran downstairs to him. She testified that the ladder had not moved from its position against the house.

The evidence also tended to show that plaintiff suffered from photoconvulsive epilepsy, having been diagnosed with the condition at age 15. His seizures, which are grand mal seizures, are triggered by flashing lights and have occurred when he has played video games or seen the sun breaking through trees. Since his diagnosis with epilepsy, plaintiff has been on two anti-seizure medications, Dilantin, then Tegretol. When he had attempted to go off the medication in the past, plaintiff had experienced seizures. The record indicates that he may have had about eight seizures total between age 15 and the time of the accident.

There was evidence that directly after the fall, the homeowner and his co-worker saw him "shaking." Plaintiff stated to the paramedics who arrived on the scene that he may have fallen due to a seizure. According to expert medical testimony, shaking movements and blackouts are possible indications of an epileptic seizure. Plaintiff, however, had no memory loss of earlier events in the day, as he had in the past when he had seizures. He was conscious and not

disoriented immediately after the fall and there was no evidence that he vomited, drooled, chewed his tongue, or voided his bowels.

Plaintiff's post-accident blood tests showed that he had a subtherapeutic level of Tegretol in his system on the day of the accident. Generally, a therapeutic level measures between 4-12 micrograms per milliliter of blood, but plaintiff's results showed only 2.5 micrograms. The blood tests also show recent marijuana consumption by plaintiff and the Commission found that plaintiff smoked marijuana with his co-workers, including the owner of defendant Coastal Painting, before work on the morning he was injured.

Defendant's expert medical witness, Dr. Karner, testified that plaintiff "probably" fell because he had a seizure on the ladder. However, other expert medical witnesses testified that they could not say with any certainty that plaintiff had a seizure on the ladder or at all that day and noted that he could have had one while falling or as a result of the fall once on the ground.

Soon after the accident, plaintiff filed a Form 18 which stated that he was painting and fell. In contrast, defendant-employer's Form 19 asserted that plaintiff had a seizure and fell. In a Form 61, defendants denied plaintiff's claim, stating that it was the result of his idiopathic condition, which has no causal connection to his employment, and therefore the injury did not arise out of plaintiff's employment. The claim was heard by a deputy commissioner, who filed an opinion and award finding that the claim was compensable and awarding plaintiff permanent total disability. Defendants appealed to the Full Commission, which affirmed the deputy commissioner's opinion and award. In addition, the Commission awarded plaintiff costs and attorney's fees in the amount of $800.00 pursuant to G.S. § 97-88 and G.S. § 97-88.1, for defendants' "unsuccessful appeal to the Full Commission and their unreasonable defense of this claim." Defendants filed a Notice of Appeal to this Court.

The scope of appellate review of decisions of the Industrial Commission is limited to a determination of whether there is competent evidence in the record to support the Commission's findings of fact and whether the findings support the conclusions of law on which the award is based. *See Boles v. U.S. Air, Inc.*, 148 N.C. App. 493, 560 S.E.2d 809 (2002). The issues raised by defendant in this appeal are (1) whether the Commission erred in determining that plaintiff was injured as a result of a compensable accident arising out

of and in the course of his employment, rather than as a result of an idiopathic condition independent of his employment, and (2) whether the Commission erred in awarding attorney's fees pursuant to G.S. §§ 97-88 and 97-88.1.

In order to be compensable under the Act, an employee's injury by accident must arise out of and in the scope of employment. *See* N.C. Gen. Stat. § 97-2(6) (2002). In the case at hand, there is no dispute as to whether plaintiff sustained an injury by accident, a fall having long been accepted as the kind of unusual event that comprises an "accident." *See Taylor v. Twin City Club*, 260 N.C. 435, 437, 132 S.E.2d 865, 867 (1963). Likewise, the parties agree that the accident occurred in the scope of employment, having taken place during work hours and while plaintiff was engaged in the performance of his duties. *Id.* at 437-38, 132 S.E.2d at 867.

[1] The only issue in dispute regarding the compensability of plaintiff's claim is whether the accident arose out of his employment. In support of their contention that the injury did not arise out of plaintiff's employment, defendants argue that when an injury is caused solely by a plaintiff's idiopathic condition, there is no link with employment and no compensation award should be made. *See Hollar v. Montclair Furniture Co., Inc.*, 48 N.C. App. 489, 269 S.E.2d 667 (1980). The Commission found that "the greater weight of the evidence does not show that an idiopathic condition, plaintiff's epilepsy, was the sole proximate cause of the injuries plaintiff sustained" and that the cause of plaintiff's fall was, in fact, "unclear." Defendants argue that the evidence, particularly the testimony of Dr. Karner and the fact that witnesses said that plaintiff appeared to be shaking or convulsing after the fall, indicate that plaintiff's fall was caused by a seizure alone. However, defendants' interpretation of the evidence is not the only reasonable interpretation. It is for the Commission to determine the credibility of the witnesses, the weight to be given the evidence, and the inferences to be drawn from it. *See Adams v. AVX Corp.*, 349 N.C. 676, 509 S.E.2d 411 (1998). As long as the Commission's findings are supported by competent evidence of record, they will not be overturned on appeal. *See De Vine v. Steel Co.*, 227 N.C. 684, 685, 44 S.E.2d 77, 78 (1947).

We hold that the Commission's findings regarding the cause of plaintiff's injury are adequately supported by the evidence. There was contradictory evidence as to whether plaintiff had a seizure, there were no witnesses to the fall, and the evidence showed that plaintiff had to lean away from the ladder to paint the trim without anything

more than the trim to hold. Moreover, it is not inappropriate for the Commission to find that the cause of an employee's fall is "unclear." *See id.* at 685, 44 S.E.2d at 78 (noting that the "exact cause of the fall is not determined" but that the record supported the Commission's finding that the accident arose out of the employment). This is true even where there is some evidence providing possible explanations for the fall. *See Taylor*, 260 N.C. at 438-39, 132 S.E.2d at 867-68 (rejecting the defendant's explanation of the accident as arising from the plaintiff's angina where there were facts to support the Commission's finding and conclusion that the accident arose out of the plaintiff's employment).

As part of their argument that plaintiff's fall was caused solely by his idiopathic condition, defendants also challenge the Commission's findings and conclusions regarding the risk created by plaintiff's position on the ladder. Under *Hollar*, 48 N.C. App. at 496, 269 S.E.2d at 672, "where the injury is associated with any risk attributable to the employment, compensation should be allowed, even though the employee may have suffered from an idiopathic condition which precipitated or contributed to the injury." *See also, e.g., Allred v. Allred-Gardner, Inc.*, 253 N.C. 554, 557, 117 S.E.2d 476, 478-79 (1960). Similarly, where the cause of a fall is unexplained, but related to a "risk or hazard incident to plaintiff's employment," the injury will be compensable. *Janney v. J.W. Jones Lumber Co.*, 145 N.C. App. 402, 407, 550 S.E.2d 543, 547 (2001) (citing *Robbins v. Hosiery Mills*, 220 N.C. 246, 248, 17 S.E.2d 20, 21 (1941)).

As stated above, the Commission found that the cause of plaintiff's fall was "unclear" and that any role his idiopathic condition played in the fall was partial. The Commission also found that "[c]limbing and painting on a 32-foot ladder, particularly with no harness or other safety equipment, are inherently risky activities that are attributable to plaintiff's employment as a painter" and that "special hazards attributable to or incidental to plaintiff's employment existed and, in fact were a contributing proximate cause of plaintiff's accident and resulting injuries."

There was evidence in the record that being atop a ladder is dangerous and that plaintiff himself felt insecure on the day of the accident as he leaned back from the ladder with no harnesses in order to paint the exterior trim. This evidence supports the Commission's findings regarding the hazard posed by working on a ladder. Furthermore, the Commission was entitled to infer from that evidence, as well as evidence of the fall from the ladder and

the nature of the injury, that the hazard contributed to plaintiff's injury.

In *Allred*, 253 N.C. 554, 558, 117 S.E.2d 476, 479, the claimant was driving a truck for work when he blacked out and hit a pole. The fact that the plaintiff blacked out due to an idiopathic condition and that he was driving a truck for work at the time was sufficient to support a finding that the accident arose out of claimant's employment. No findings were required that the claimant's injury was made more severe or caused solely by the fact that he was driving a truck. Rather, the Court made the "common sense" observation that "[h]ad he been in the office or walking on the street, probably no injury—certainly not this one—would have occurred." *Id.* at 557, 117 S.E.2d at 478. A similar conclusion by the Commission was reasonable in the present case.

Defendants rely heavily on *Vause* v. *Vause Farm Equipment Co.*, 233 N.C. 88, 63 S.E.2d 173 (1951), claiming that its facts resemble those in the case at hand, thus requiring a similar outcome. In *Vause*, an employee who had epilepsy was driving for work when he sensed an oncoming seizure. He pulled off the road and laid down across the seat of the truck before losing consciousness. When he came to, the plaintiff was hanging out the driver's side door from the steering wheel and had injured his left leg. The Supreme Court held that the Commission's finding that driving a truck for work exposed the plaintiff to a special hazard was supported by evidence in the record. *Id.* at 98, 63 S.E.2d at 180. However, the Court then held that because the plaintiff was not driving at the time of his accident, but rather had positioned himself in a "place of apparent safety," there was "no showing that any hazard of the employment contributed in any degree" to the accident and injury. *Id.* In the case at hand, plaintiff was not in a position of safety at the time of his accident; he was 30 feet up a ladder. Therefore, *Vause* is not analogous to the case at hand.

Based on its findings of fact, the Commission concluded that:

> Hazards or risks incidental to plaintiff's employment existed, and were a contributing proximate cause of plaintiff's accident and resulting injuries. Therefore, plaintiff's injury arose out of plaintiff's employment, even though an idiopathic condition . . . may have contributed to the accident and, as a result, plaintiff's injury by accident is compensable under the . . . Act.

These conclusions were supported by the findings of fact and correct as a matter of law. Therefore, we affirm the Industrial Commission's ruling that plaintiff sustained a compensable injury by accident and is thus entitled to the permanent total disability benefits awarded by the Commission.

[2] Defendants also challenge the Full Commission's award of attorneys' fees to plaintiff under both G.S. § § 97-88 and 97-88.1. The two statutes allow the award of fees and costs on different bases. G.S. § 97-88 permits the Full Commission or an appellate court to award fees and costs based on an insurer's unsuccessful appeal. G.S. § 97-88.1, on the other hand, allows an award of fees only if defendants were without reasonable grounds to defend the claim. In their brief, defendants' argument against the fee award addresses only the issue of unreasonable defense, not whether the Commission should have awarded fees based on the unsuccessful appeal. Therefore, based on Rule 28(b)(6) of the Rules of Appellate Procedure, we decline to address whether the award was properly based on G.S. § 97-88. Moreover, because the Commission did not apportion the $800.00 award between the two statutes and we may assume that the entire award would have been proper under § 97-88, this Court need not address whether the award was proper under § 97-88.1. Therefore, the award of attorneys' fees by the Full Commission will not be disturbed.

Affirmed.

Judges TYSON and THOMAS concur.

CHRISTINE OKALE AND BLAISE OKALE-WEEKS BY AND THROUGH HIS GUARDIAN AD LITEM, CHRISTINE OKALE, PETITIONERS v. NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA02-96

(Filed 15 October 2002)

Public Assistance— emergency Medicaid coverage—state residency requirement

A de novo review revealed that the trial court did not err by affirming respondent Department of Health and Human Services' final agency decision to deny petitioner mother's

request for emergency Medicaid coverage for the birth of her child based on petitioner's failure to meet the state residency requirement, because: (1) petitioner mother, who was visiting the United States from Africa, expressed her intention of remaining only temporarily in the United States by entering on a tourist visa which had yet to expire when she gave birth; and (2) the unexpired tourist temporary visa created the verification to doubt petitioner's asserted intent to remain in the state.

Appeal by petitioners from judgment entered 31 August 2001 by Judge Orlando F. Hudson, Jr. in Wake County Superior Court. Heard in the Court of Appeals 18 September 2002.

East Central Community Legal Services, by Celia Pistolis and Lila T. Forro, and North Carolina Justice and Community Development Center, by Jack Holtzman, for petitioners-appellants.

Attorney General Roy Cooper, by Assistant Attorney General Grady L. Balentine, Jr., for respondent-appellee.

TYSON, Judge.

Petitioners sought judicial review of Respondent's final agency decision denying petitioners' claim for emergency Medicaid coverage on the grounds that petitioners failed to meet the state residency requirement. The trial court affirmed the final agency decision. Petitioners appeal. We affirm the decision of the trial court.

I. Facts

On 30 January 2000, Christine Okale (Okale) entered the United States from Africa with her husband and two children under a tourist visa which was to expire on 30 July 2000. Okale admits that when she entered the United States on the tourist visa, she had no intention of just visiting. Okale was approximately three months pregnant at that time. Okale and her family subsequently came to North Carolina. On 25 June 2000, Okale gave birth to a son, Blaise Okale-Weeks (Blaise). At the time of Blaise's birth, Okale had (1) entered into a lease for an apartment in Raleigh, (2) opened a checking account, (3) enrolled her two other children in the Wake County Public School System, and (4) obtained a North Carolina identification card and a driver's license.

On 28 June 2000, Okale applied with Wake County Department of Social Services (DSS) for Medicaid to cover the costs associated with

Blaise's birth. On 3 July 2000, her application was denied on the grounds that neither she nor her son met state residency requirements. Okale appealed the decision to a local appeal hearing which upheld the denial of benefits. Okale requested a state appeal hearing before a hearing officer for respondent who issued a decision on 29 January 2001 affirming the 3 July 2000 decision. Okale further appealed to the chief hearing officer of respondent who issued a final agency decision on 23 February 2001 again affirming the 3 July 2000 decision. The evidentiary hearing audiotapes from the 23 February 2000 hearing were accidentally erased. Another hearing was held and the 3 July 2000 decision to deny emergency medicaid benefits was again upheld on 7 May 2001.

On 2 April 2001, petitioners filed a Petition for Judicial Review of the agency decision. Following a hearing, the trial court affirmed the final agency decision denying emergency medicaid to Okale and Blaise on 6 September 2001. Petitioners appeal.

II. Issue

Petitioners contend: (1) the final agency decision was based on a rule which was not promulgated in accordance with the North Carolina Administrative Procedure Act and (2) the rule created an irrebuttable presumption which is contrary to federal and state law and regulation.

III. Standard of Review

Under the North Carolina Administrative Procedure Act (NCAPA), an aggrieved party has the right to judicial review of a final agency decision in a contested case. N.C. Gen. Stat. § 150B-43 (2001). The standard of review depends on the issues presented for judicial review. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1991), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). If the contention is that the agency's decision was a legal error, *de novo* review is used. *Id.* If the contention is that the decision was not supported by the evidence or was arbitrary or capricious the "whole record test" is used. *Id.* As petitioners contend respondent made legal errors, we review this decision *de novo*. *Id.*

IV. MAF Manual

Respondent publishes the "North Carolina Family and Children's Medicaid Manual" ("MAF Manual"). (The MAF Manual has subsequently changed to an on-line format with changes in the section

numbers. All numbers referenced hereinafter will be to the sections as they appeared at the time petitioner sought Medicaid coverage.) The stated purpose of the MAF Manual is as follows:

> The Family and Children's Medicaid Manual describes the North Carolina Medicaid and Health Choice programs. These programs provide medical insurance coverage for qualifying citizens of North Carolina.
>
> The Manual describes who may be covered under North Carolina Medicaid for Families and Children or NC Health Choice. It provides requirements that a person must meet to qualify for medical coverage and the process by which coverage is determined. (There is another manual for Medicaid for the Aged, Blind and Disabled.)
>
> Additionally, the Manual explains the rights and responsibilities of a person requesting or receiving North Carolina Medicaid for Families and Children or NC Health Choice and provides an overview of the benefits of this medical insurance coverage.

MA-3100(I). Petitioners contend that the MAF Manual is a rule which has not been promulgated in accordance with the NCAPA.

The NCAPA defines "rule" as:

> any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. . . . The term *does not* include the following:
>
> . . .
>
> c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

N.C. Gen. Stat. § 150B-2(8a) (emphasis added).

The MAF Manual is a nonbinding statement from the agency which defines, interprets, and explains the statutes and rules for Medicaid. Although the MAF Manual sets out the requirements for Medicaid eligibility, it merely explains the definitions that currently exist in the federal and state statutes, rules, and regulations. Violations of or failure to comply with the MAF Manual is of no effect but failure to meet the requirements set out in the federal and state

statutes and regulations is a ground to deny medicaid payments. The MAF Manual falls squarely within the exception to rules created in N.C. Gen. Stat. § 150B-2(8a). Respondent was not required to complete the procedural requirements for rule-making to publish the MAF Manual. This assignment of error is overruled.

V. State Residency

The MAF Manual states "Non-immigrants may be legally admitted to the U.S., but only for a temporary or specified time. These aliens are NOT ELIGIBLE for full Medicaid or emergency medical services because they do not meet the N.C. residency requirement. Refer to MA-3230, State Residence." MA-3404(III.E.3) (emphasis in original). Petitioners contend that "[t]he MAF Manual provision mandating that a non-immigrant alien can never meet state residence requirements is contrary to federal and state law."

A. Medicaid Regulatory Scheme

The Medicaid program, established by Congress through the Social Security Act, 42 U.S.C. §§ 1396 *et seq* (2001), is a joint federal-state program. A state that elects to participate is bound by the controlling federal statutes and regulations. North Carolina elected to participate by establishing its Medicaid program through the adoption of N.C. Gen. Stat. §§ 108A-54 through 108A-70.5. The program is governed under and administered by respondent.

An alien's status determines the extent of medicaid benefits she is eligible to obtain. If otherwise entitled to receive Medicaid, a qualified alien is entitled to full medicaid benefits. 10 NCAC 50B .0302 (July 2002). A non-qualified alien is only entitled to emergency medicaid benefits. 10 NCAC 50B .0302(c). A qualified alien is defined as:

(1) an alien who is lawfully admitted for permanent residence under the Immigration and Nationality Act,

(2) an alien who is granted asylum under section 208 of such Act,

(3) a refugee who is admitted to the United States under section 207 of such Act,

(4) an alien who is paroled in the United States under section 212(d)(5) of such Act for a period of at least 1 year,

(5) an alien whose deportation is being withheld under section 243(h) of such Act (as in effect immediately before the effective

date of section 307 of division C of Public Law 104-208) or section 241(b)(3) of such Act (as amended by section 305(a) of division C of Public Law 104-208).

(6) an alien who is granted conditional entry pursuant to section 203(a)(7) of such Act as in effect prior to April 1, 1980; or

(7) an alien who is a Cuban and Haitian entrant . . . .

8 U.S.C. 1641(b) (2001); 10 NCAC 50B .0302(b)(2). It is undisputed that Okale failed to qualify under any of these seven categories at the time she requested medicaid benefits. Any other alien is a non-qualified alien. 10 NCAC 50B .0302(c). Emergency medical services include payments for emergency labor and birth. 42 C.F.R. 435.406(b) (2001); 42 U.S.C. 1396b(v). The Code of Federal Regulations expressly states: "None of the categories allows Medicaid eligibility for non-immigrants: for example, students or visitors." 42 C.F.R. 435.408(b).

B. State Residency

One of the other eligibility requirements to receive medicaid benefits is state residency. North Carolina relies on the federal regulations to define who is a resident of the state. 10 NCAC 50B .0303(a). Under the federal regulations, the state of residence for an individual over the age of 21, who is not residing in an institution, is the state where the individual is "[l]iving with the intention to remain there permanently or for an indefinite period of time." 42 C.F.R. § 435.403(i)(1)(i). For an individual under the age of 21 who is not residing in an institution and is not emancipated, the residency of the child is based on the residency of the parent. 42 C.F.R. § 435.403(h)(3). Petitioners must meet the Medicaid requirements established under the state and federal Laws regardless of the stated interpretation in the MAF Manual. Because Okale was lawfully in the United States on an unexpired tourist visa at the time of the request for Medicaid payment, she was a non-qualified alien and ineligible for full medicaid payments. Okale is only entitled to emergency medicaid payments for her labor and birth if she meets the other Medicaid requirements including North Carolina residency.

Residency is defined in the federal regulation as "living in the State voluntarily with the intention of making his or her home there and not for a temporary purpose. . . . Residence may not depend upon the reason for which the individual entered the State, except insofar

as it may bear upon whether the individual is there voluntarily or for a temporary purpose." 45 C.F.R. § 233.40(a)(1)(i). "An individual visiting in the state without intent to remain shall be ineligible for Medicaid." 10 N.C.A.C. 50B .0303(c). "The client's statement shall be accepted as verification unless there is reason to doubt it." 10 N.C.A.C. 50B .0303(f).

Here, Okale expressed her intention of remaining only temporarily in the United States by entering on a tourist visa. The tourist visa had yet to expire when she gave birth. Her tourist visa declared that she intended to remain no later than 30 July 2000. While Okale stated that she intended to remain in North Carolina permanently and presented evidence of her intent to remain at the evidentiary hearings, this intent was called into doubt by her unexpired tourist visa. Her original application for a tourist visa necessarily includes her promise and understanding to leave North Carolina and America on or before the expiration date of her tourist visa. Okale's original declaration that she intends to leave the state and the country no later than 30 July 2000 is contrary to an "intention to remain there permanently or for an indefinite period of time" as required by law. 42 C.F.R. § 435.403(i)(1)(i). The unexpired tourist temporary visa creates the verification to doubt Okale's asserted intent to remain in the state. To hold otherwise, we must presume that Okale will violate the law and attempt to illegally stay beyond her latest declared date of departure from this state and country. This assignment of error is overruled.

VI. Conclusion

Okale failed to establish state residency. As Okale was not a resident of the state for Medicaid payment purposes, Blaise was also not a resident of North Carolina. We affirm the trial court's order affirming the final agency decision to deny Okale emergency Medicaid payments.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

ROBERT ANTHONY DAVID, PLAINTIFF v. SHARON ALICIA FERGUSON, DEFENDANT

No. COA02-84

(Filed 15 October 2002)

1. Child Support, Custody, and Visitation— custody—jurisdiction—residence of children—preceding six months

The North Carolina court did not err by assuming jurisdiction over a custody dispute between the parents of illegitimate children where the children had been living in Maryland with their mother but lived with plaintiff in North Carolina for the six months before commencement of the proceeding. N.C.G.S. § 50A-102(7); N.C.G.S. § 50A-201.

2. Child Support, Custody, and Visitation— custody—parental kidnapping—no formal agreement

The Parental Kidnapping Prevention Act did not prevent a North Carolina court from making an initial custody determination for children of unmarried parents where a parent who lived in Maryland alleged only a custody informal agreement and no action by any court.

3. Child Support, Custody, and Visitation— custody—best interest analysis—illegitimate children

The trial court erred in a child custody dispute by applying a best interest analysis where the parties were never married and the record does not indicate that the children were ever legitimated pursuant to N.C.G.S. § 49-10 or that paternity was judicially established pursuant to N.C.G.S. § 49-14.

4. Child Support, Custody, and Visitation— custody—private agreement—jurisdiction of court

In a child custody case decided on another issue, it was noted that a private custody agreement between the parties that was not entered by any court in any state could not divest the courts of their statutory authority to make custody determinations.

Appeal by defendant from order entered 21 June 2001 by Judge Christopher W. Bragg in Richmond County District Court. Heard in the Court of Appeals 18 September 2002.

Deane, Williams & Deane, by Jason T. Deane, for plaintiff.

Henry T. Drake for defendant.

BRYANT, Judge.

Plaintiff Robert Anthony David is the father of Crystal Alanda David, born 20 June 1999, and Nicole Ashley David, born 7 October 1994. The children were born during plaintiff's relationship with defendant Sharon Alicia Ferguson. Although not married, the parties lived together with the children in Richmond County, North Carolina for approximately six years. Sometime in February 2000, however, defendant moved to Maryland and took the children with her.

In June 2000, defendant sent the children back to plaintiff, in North Carolina, so that she could pursue full-time employment. According to defendant, the parties agreed that at some time in the future, the children would be returned to defendant in Maryland. However, when defendant attempted to come get the children in December 2000, plaintiff allegedly hid the children from her. Thereafter, plaintiff filed a custody action on 12 January 2001.

This matter came for hearing on 10-11 May 2001 at Richmond County District Court with the Honorable Christopher W. Bragg presiding. The trial court concluded that both parties were fit and proper persons to have custody of the children but that it was in the best interest of the children for plaintiff to be awarded primary custody. The trial court's order was filed on 21 June 2001. Defendant gave notice of appeal on 17 July 2001.

I.

[1] First, defendant argues that the trial court erred in assuming jurisdiction over the matter because the children were domiciled in the state of Maryland. We disagree.

The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is a jurisdictional statute relating to child custody, and is codified in Chapter 50A of the North Carolina General Statutes. The jurisdictional requirements of the UCCJEA must be satisfied even though N.C.G.S. § 50-13.1 generally provides our courts jurisdiction to determine custody matters. We first note that the parties in this matter voluntarily submitted to the jurisdiction of the trial court.

N.C.G.S. § 50A-201 (2001), provides in pertinent part:

> (a) Except as otherwise provided in G.S. 50A-204, a court of this State has jurisdiction to make an initial child-custody determination only if:

(1) This State is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from this State but a parent or person acting as a parent continues to live in this State;

(2) A court of another state does not have jurisdiction under subdivision (1). . . ;

(3) All courts having jurisdiction under subdivision (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under G.S. 50A-207 or G.S. 50A-208; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2), or (3).

(b) Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State.

(c) Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child-custody determination.

N.C.G.S. § 50A-102(7) (2001), in pertinent part, defines home state as "the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. . . . A period of temporary absence of any of the mentioned persons is part of the period."

In the instant case, the facts clearly reveal that for a period of at least six months immediately preceding the commencement of this proceeding, from June 2000 to January 2001, the children lived with plaintiff in North Carolina. Based on this fact, the trial court was vested with jurisdiction to make an initial custody determination, as North Carolina was the home state of the children.

[2] Defendant asserts that the Parental Kidnaping Prevention Act (PKPA) prevented the trial court from modifying an existing agreement that was enforceable in Maryland. However, the PKPA applies to "any custody determination or visitation determination made consistently with the provisions of this section *by a court of another*

State." 28 U.S.C.A. § 1738A(a) (2002) (emphasis added). The PKPA does not apply to the facts in our case as defendant only alleges the existence of an informal agreement between the parties and no action by a court of any state.

The facts indicate that North Carolina is the home state of the children as home state is defined pursuant to the UCCJEA. Therefore, the trial court was of competent jurisdiction to make an initial custody determination in this matter. This assignment of error is overruled.

II.

[3] Second, defendant argues that the trial court committed error in granting custody of the two illegitimate children to plaintiff when defendant was found to be a good, proper and fit person to have custody of the children. Based on binding authority established in *Rosero v. Blake*, we find that the trial court committed error in applying the best interest test to our case facts. *Rosero v. Blake*, 150 N.C. App. 250, 563 S.E.2d 248, *temporary stay allowed*, 355 N.C. 751, 565 S.E.2d 670, *review allowed, writ allowed*, 356 N.C. 166, —— S.E.2d ——, 2002 WL 2005421 (2002). Therefore, for the following reasons, we reverse the trial court's order granting custody to plaintiff.

In *Rosero*, the father and mother were the parents of Kayla Alexandria Rosero, who was born on 20 March 1996. The parties had a brief relationship in 1995, and in December 1995, the father moved to the state of Oklahoma. After Kayla's birth, the father agreed to submit to paternity testing which confirmed that he was the biological father of Kayla. The father acknowledged paternity by signing an acknowledgment of paternity form on 3 March 1997. The parties agreed that Kayla would remain in her mother's custody and that the father would provide support for the child.

During the next three years, Kayla visited with her father and his wife on several occasions. The father maintained contact with Kayla through letters, telephone calls, and visits when he traveled to North Carolina.

On 22 March 2000, the father filed an action seeking custody of Kayla. The mother responded and filed a counterclaim for custody, alleging that although the father was a fit and proper person to have visitation with Kayla, it was in Kayla's best interest for the child to remain in her custody. The trial court found that both parties were fit

parents and awarded primary custody to the father and secondary custody to the mother. The mother appealed.

On appeal, our Court stated in pertinent part:

> Our Supreme Court held . . . that: " 'It is well settled law in this State . . . that the mother of an illegitimate child . . . has the legal right to [the] custody, care and control, if a suitable person, even though others may offer more material advantages in life for the child[.]' " The Supreme Court stated that " '[a]s between the putative father and the mother of illegitimate children, it is well established that the mother's right of custody is superior. . . .' " The Court further held that "[a]s against the right of the mother of an illegitimate child to its custody, the putative father may defend only on the ground that the mother, by reason of character or special circumstances, is unfit or unable to have the care of her child[.]"
>
> The common law presumption in favor of the mother of an illegitimate child stems in part from an issue peculiar to the illegitimate child's situation: uncertainty as to the identity of the father of the child. . . .
>
> . . . The General Assembly has specifically established procedures whereby a putative father is given the opportunity to establish his factual or legal identity as a child's father, and thus shift his status from putative father to that of a natural or legal parent. . . .
>
> . . . .
>
> . . . [A]fter the putative father legitimates his child according to statutory provision, or submits to a judicial determination of paternity, the child's parents stand on an equal footing as regards to custody.
>
> As to whether plaintiff has taken the necessary steps to legitimate Kayla, this Court has identified several procedures by which a biological father may legitimate his child: (1) through a verified petition filed with the superior court seeking to have the child declared legitimate, (2) by subsequent marriage to the mother, or (3) through a civil action to establish paternity filed pursuant to N.C. Gen. Stat. § 49-14.
>
> In this case . . . plaintiff has not taken any of the steps . . . to legitimate Kayla. The parties concede that plaintiff neither legiti-

> mated Kayla as provided by statute, nor did he seek a judicial determination of paternity under N.C.G.S. § 49-14.
>
> . . . .
>
> In this case, the record shows that plaintiff has acknowledged paternity pursuant to N.C.G.S. § 110-132 and has held Kayla out as his child. . . . However, these actions did not dissolve the presumption in favor of defendant.
>
> . . . .
>
> . . . Based upon the facts of this case, the trial court incorrectly applied the "best interest of the child" analysis and should have applied the common law presumption set forth in *Jolly* . . . . The decision of the trial court is reversed and the matter is remanded for a new hearing applying the common law presumption in favor of defendant.

Rosero, 150 N.C. App. at 255-60, 563 S.E.2d at 252-55. (citations omitted)

The facts in the instant case are significantly similar to those reviewed by the *Rosero* Court. In the instant case, the record does not indicate the children were ever legitimated pursuant to N.C.G.S. § 49-10 or that paternity was judicially established pursuant to N.C.G.S. § 49-14. As *Rosero* is binding precedent and because one panel of this Court cannot overturn a prior decision of this Court, we are bound by the determinations made in *Rosero*. Therefore, we conclude that the trial court erred in applying the best interest analysis based on the facts in the instant case. Moreover, because the trial court has already established that defendant is a proper and fit person to have custody of the children, we reverse the decision of the trial court and remand for the trial court to order custody in favor of defendant.

III.

[4] Third, defendant argues that the trial court erred in modifying an existing custody agreement without finding a substantial change of circumstances.

A diligent review of the record does not indicate that a prior custody agreement had been entered by any court of any state regarding the children. Any prior, existing agreement was at best a private agreement between the parties; and such private agreement would not have the inherent, sole ability to divest the courts of their statu-

tory authority to make custody determinations. However, because we have already found that the trial court committed error in its application of the best interest test and in awarding custody to plaintiff, we deem it unnecessary to further analyze this issue.

IV.

Fourth, defendant argues that the trial court erred in finding that a parental grandparent of illegitimate children had a superior right of custody over a good, proper and fit mother.

Our diligent review of the custody order in dispute reveals that the paternal grandparent was not granted custody rights, as alleged by defendant. Rather, the trial court considered as a factor in making its best interest analysis that the paternal grandparent would be able to assist in the care of the children. We have already found that the trial court committed error in its application of the best interest test and in awarding custody to plaintiff and deem it unnecessary to provide any additional analysis of this issue.

MANDATE

The order of the trial court is reversed and remanded for the trial court to enter custody in favor of defendant pursuant to the analysis provided *supra* issue II.

Reversed and remanded.

Judges McCULLOUGH and TYSON concur.

JOHN ANDREW CLAYTON, III, PLAINTIFF v. T.H. BRANSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, THE GREENSBORO POLICE DEPARTMENT, AND THE CITY OF GREENSBORO, DEFENDANTS

No. COA02-65

(Filed 15 October 2002)

1. Public Officers and Employees— police officer—accident while driving—prisoner injured—individual liability—mere negligence

The trial court erred by failing to dismiss a claim for mere negligence against a police officer in his individual capacity

where plaintiff was injured by colliding with the prisoner shield inside a police car when the car was involved in an accident.

2. Public Officers and Employees— police officer—accident while driving—prisoner injured—individual liability—gross negligence

The trial court did not err by denying summary judgment against defendant-officer in his individual capacity on a claim for actions which went beyond mere negligence where plaintiff alleged that the officer placed him in the backseat of a police car without a seatbelt and was operating his vehicle at 70 miles an hour on a city street.

3. Immunity— waiver—insurance coverage

A police officer and the city for which he worked waived immunity to the extent of insurance coverage where the city had coverage for liability of more than 2 million but less than 4 million dollars.

4. Civil Rights— municipality—immunity—section 1983 claim

A city and its police officer have no defense of governmental immunity to a 42 U.S.C. § 1983 claim that they violated plaintiff's due process and equal protection rights by failing to compensate him for injuries suffered in an accident after his arrest.

Appeal by defendants from judgment entered 28 September 2001 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 18 September 2002.

Harold F. Greeson, for plaintiff-appellee.

Fred T. Hamlet, for defendants-appellants.

Pinto Coates Kyre & Brown, PLLC, by Paul D. Coates and Brady A. Yntema, for unnamed defendant-appellee.

TYSON, Judge.

John A. Clayton, III, (plaintiff) sued T.H. Branson, (Branson), the Greensboro Police Department (defendant police) and the City of Greensboro (defendant city) for negligently injuring plaintiff and negligent construction and installation of prisoner shields in the police cars. Defendants asserted governmental immunity on the grounds that all of the alleged actions were within the performance of a governmental function and there was no waiver of immunity. Defendants

moved for summary judgment which was denied. We affirm in part and reverse in part the ruling of the trial court.

I. Facts

On 20 December 1994, Branson went to plaintiff's house with a warrant for his arrest for failure to appear in court on 21 November 1994. Plaintiff informed Branson that he had appeared, but Branson advised plaintiff that he was under arrest. Plaintiff, without being placed in handcuffs, walked to Branson's police vehicle and attempted to get into the backseat. Plaintiff could not enter because of the prisoner shield mounted on the back of the front seat. Branson advised plaintiff to stretch his legs across the backseat and lean against the back passenger door. Plaintiff stated he "followed the officer's instructions word for word." Because of the way he was seated, plaintiff claims he was unable to wear a seatbelt. Plaintiff's father followed Branson and plaintiff in a separate vehicle.

According to plaintiff, Branson was speeding on Lawndale Drive when Branson realized a vehicle had stopped in front of him waiting to turn left. To avoid a collision, Branson slammed the brakes and swerved to the right. Plaintiff was thrown forward into the prisoner shield hitting his face, shoulder, and knee and twisting his body and back severely. After being released from the magistrate's office, plaintiff's father took him to the emergency room. Plaintiff has undergone three surgeries on his back because of his injuries.

Plaintiff filed suit against Branson both individually and in his official capacity for compensation for plaintiff's injuries. Plaintiff asserted multiple claims against defendant city: (1) imputed liability for the negligence of Branson; (2) direct liability for negligently fabricating and installing the prisoner shields; and (3) a 42 U.S.C. § 1983 claim based on the alleged custom and policy of defendant city of waiving governmental immunity and paying claims for damages to tort claimants similar to plaintiff. Defendants moved for summary judgment claiming sovereign immunity. The trial court found that defendant police was not an entity that could be sued separately and ordered dismissal. Plaintiff does not contest this dismissal.

The trial court also found and concluded:

> 1. The City of Greensboro has not waived governmental immunity by participation in a Local Government Risk Pool under the provisions of N.C.G.S. 58-23-5.

> 2. The City has purchased liability insurance for liability of more than $2 million but less than $4 million and has therefore waived its governmental immunity as to liability falling within that range, but has not waived its governmental immunity for amounts of liability less than $2 million dollars by the purchase of liability insurance.
>
> 3. The City's alleged fabrication and installation of prisoner shields in Greensboro Police cars is a governmental function, and not a proprietary function as alleged in the Plaintiff's Complaint.
>
> The Court finds that Plaintiff has forecast evidence sufficient to show a genuine issue of material fact as to whether Defendant Branson exceeded the scope of his official authority and as to whether Defendant Branson engaged in wilful and wanton conduct. Therefore, Defendant Branson's Motion for Summary Judgment based on his claim of official immunity, both in his individual and official capacities, is denied.
>
> Further, Plaintiff has forecast evidence which, based upon prevailing law, shows a genuine issue of material fact as to whether the City of Greensboro has deprived Plaintiff of his due process and equal protection rights under both the United States and North Carolina Constitutions by claiming governmental immunity as to Plaintiff while waiving governmental immunity and paying the claims of others similarly situated to Plaintiff. The City's Motion for Summary Judgment is therefore denied.

Defendants appeal.

II. Issues

Defendants assign as error the trial court's order (1) denying defendants' motion for summary judgment as to Branson and defendant city and (2) finding that defendant city waived immunity by paying claims to those similarly situated to plaintiff.

III. Standard of Review

The denial of a motion for summary judgment is interlocutory and is not generally appealable. *Slade v. Vernon*, 110 N.C. App. 422, 425, 429 S.E.2d 744, 745 (1993). Where the summary judgment motion was based on a substantial claim of immunity, a party may immediately appeal the denial of summary judgment. *Id.* at 425,

429 S.E.2d at 746. Defendants assert a claim of sovereign immunity. We address only the issue of whether these claims are barred by sovereign immunity.

IV. Summary Judgment as to Branson in his individual capacity

A. Negligence Claim

[1] "[P]ublic officials cannot be held individually liable for damages caused by mere negligence in the performance of their governmental or discretionary duties." *Willis v. Town of Beaufort*, 143 N.C. App. 106, 110, 544 S.E.2d 600, 604, *disc. rev. denied*, 354 N.C. 371, 555 S.E.2d 280 (2001) (*quoting Meyer v. Walls*, 347 N.C. 97, 112, 489 S.E.2d 880, 888 (1997)). Police officers are public officials. *Id.* at 111, 544 S.E.2d at 605; *State v. Hord*, 264 N.C. 149, 155, 141 S.E.2d 241, 245 (1965). Branson was carrying out his official duties of serving a warrant and transporting plaintiff to the magistrate's office at the time of the incident. Branson is not individually liable for damages allegedly caused by mere negligence. Any claims against Branson individually for negligence should have been dismissed. The trial court erred in failing to dismiss plaintiff's claim for mere negligence against Branson.

B. Gross Negligence and Willful and Wanton Misconduct

[2] A public official can be held individually liable if it is " 'prove[n] that his act, or failure to act, was corrupt or malicious, or that he acted outside of and beyond the scope of his duties.' " *Meyer*, 347 N.C. at 112, 489 S.E.2d at 888 (citations omitted). Plaintiff alleged that Branson was grossly negligent and engaged in wilful and wanton misconduct that placed him outside the scope of his official duties.

Gross negligence in motor vehicle accidents has been limited to situations where at least one of three factors is present "(1) defendant is intoxicated; (2) defendant is driving at excessive speeds; or (3) defendant is engaged in a racing competition." *Yancey v. Lea*, 354 N.C. 48, 53-54, 550 S.E.2d 155, 158 (2001) (citations omitted). An act arises to the level of gross negligence when it is done "purposely and with knowledge that such act is a breach of duty to others, i.e., a *conscious* disregard of the safety of others." *Id.* at 53, 550 S.E.2d at 158. Plaintiff alleged that Branson placed him in the backseat without a seatbelt to use and was operating his vehicle in heavy traffic at speeds up to 70 miles an hour, on a city street with a speed limit of 35

miles per hour. The determination of whether gross negligence exists is a question of fact for a jury to determine. *Phillips v. Restaurant Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 215, 552 S.E.2d 686, 694 (2001), *disc. rev. denied*, 355 N.C. 214, 560 S.E.2d 132 (2002). The trial court found that whether Branson acted outside the scope of his duties by acting in such a manner was a question of material fact. We affirm the trial court's denial of summary judgment against Branson in his individual capacity for actions allegedly outside the scope of his duties and which go beyond mere negligence.

V. Waiver through Purchase of Insurance

[3] A municipality and its agents are immune from liability for the torts of its officers and employees "if the torts are committed while they are performing a governmental function." *Williams v. Holsclaw*, 128 N.C. App. 205, 208, 495 S.E.2d 166, 168, *aff'd*, 349 N.C. 225, 504 S.E.2d 784 (1998) (*quoting Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993), *disc. rev. denied*, 336 N.C. 77, 445 S.E.2d 46 (1994)). "Law enforcement is well established as a governmental function." *Id.* (*citing Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *disc. rev. denied*, 327 N.C. 634, 399 S.E.2d 121 (1990)). An officer acting in his official capacity shares the municipalities immunity or waiver. *Taylor*, 112 N.C. App. at 608, 436 S.E.2d at 279.

Immunity is waived to the extent that the municipality is indemnified by an insurance contract or a local government risk pool. *Willis*, 143 N.C. App. at 110, 544 S.E.2d at 604; N.C. Gen. Stat. § 160A-485 (2001). The trial court found that "the City of Greensboro has not waived governmental immunity by participation in a Local Government Risk Pool under the provisions of N.C.G.S. 58-23-5." It further found that "the purchase of liability insurance for liability of more than $2 million but less than $4 million" did not waive its immunity for liability less than $2 million. These findings are uncontested. Plaintiff alleges that damages could exceed $3 million in this case, placing it within the limits of the policy. To the extent that defendant city has purchased liability insurance coverage, immunity is waived. Branson, in his official capacity, has also waived immunity to the extent of the insurance coverage.

VI. 42 U.S.C. § 1983 Claim

[4] The trial court found that there was "a genuine issue of material fact as to whether the City of Greensboro has deprived Plaintiff of his due process and equal protection rights under both the United States

and North Carolina Constitutions by claiming governmental immunity as to Plaintiff while waiving governmental immunity and paying the claims of others similarly situated to Plaintiff."

"It is well settled that a municipal entity has no claim to immunity in a section 1983 suit." *Moore v. City of Creedmoor*, 345 N.C. 356, 366, 481 S.E.2d 14, 21 (1997) (*citing Owen v. City of Independence*, 445 U.S. 622, 657, 63 L. Ed. 2d 673, 697 (1980)). As defendants have no defense of governmental immunity against the § 1983 claim, we affirm the trial court's denial of summary judgment as to plaintiff's § 1983 claim on the grounds of governmental immunity. Any other grounds of appeal of the trial court's denial of summary judgment are interlocutory and are not properly before this Court.

VII. Conclusion

The trial court erred in denying summary judgment as to claims of mere negligence against Branson in his individual capacity. That portion of the trial court's order is reversed. We affirm the trial court's denial of summary judgment as to Branson in his individual capacity for actions allegedly outside the scope of his duties. We affirm the trial court's denial of summary judgment as to defendant city to the extent it waived sovereign immunity by the purchase of insurance.

Affirmed in part, reversed in part, and remanded for further proceedings.

Judges McCULLOUGH and BRYANT concur.

RANDY B. ROYAL, EDWIN BOOTH, OWEN BURNEY, JR., ED CARTER, GARY GRANT, AILEEN FORD, WILLIAM HARPER, MARY JO LOFTIN, DANIEL MALLISON, GARY PHILLIPS, FANNIE WALDEN, DANIEL JOHNSON WILLIS, THE NORTH CAROLINA STATE CONFERENCE OF NAACP BRANCHES, NORTH CAROLINA FAIR SHARE, THE CONCERNED CITIZENS OF TILLERY, THE NORTH CAROLINA ALLIANCE FOR DEMOCRACY, THE NORTH CAROLINA WASTE AWARENESS REDUCTION NETWORK, CITIZENS FOR RESPONSIBLE GOVERNMENT OF GUILFORD COUNTY, AND THE NORTH CAROLINA CONSUMERS COUNCIL v. THE STATE OF NORTH CAROLINA AND THE NORTH CAROLINA BOARD OF ELECTIONS

No. COA01-1311

(Filed 15 October 2002)

Elections— appealability—public financing of political campaigns—legislative issue

The trial court's order dismissing plaintiffs' lawsuit seeking a declaratory judgment under N.C.G.S. § 7A-245(a)(4) and an injunction in an effort to require the State of North Carolina to create a scheme for publicly financing elections is affirmed, because there is no constitutional requirement that election campaigns be publicly financed, and public financing of political campaigns is a legislative issue.

Appeal by plaintiffs from order entered 2 August 2001 by Judge Howard E. Manning, Jr., in Wake County Superior Court. Heard in the Court of Appeals 14 August 2002.

Smith Helms Mulliss & Moore, L.L.P., by James G. Exum, Jr.; National Voting Rights Institute, by Lisa J. Danetz; Gregory Luke; Harry C. Martin; Ferguson, Stein, Chambers, Wallas, Adkins, Gresham & Sumter, P.A., by Adam Stein; Advocates for Children's Services, Legal Services of North Carolina, by Lewis Pitts, for plaintiff appellants.

Attorney General Roy Cooper, by Special Deputy Attorneys General James Peeler Smith and Norma S. Harrell, for defendant appellees.

McCULLOUGH, Judge.

Plaintiffs are former or potential candidates for the General Assembly, voters, and certain public interest groups. On 28 December 1999, plaintiffs filed suit seeking a declaratory judgment pursuant to N.C. Gen. Stat. § 7A-245(a)(4) (2001) and the Uniform Declaratory

Judgment Act, N.C. Gen. Stat. § 1-253 to -267 (2001), as well as an injunction ordering defendants

> to take all steps necessary to remedy the exclusion of Plaintiffs, and other citizens without access to substantial wealth, from meaningful participation in all integral aspects of the electoral process for North Carolina legislative elections by providing adequate public financing which will allow any and all qualified citizens to compete meaningfully for public office, regardless of their economic status or personal associations[.]

On 25 February 2000, defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and (6) (2002). Defendants contended the trial court lacked subject matter jurisdiction because plaintiffs did not have standing and the issues they raised constituted a non-justiciable political question. Defendants also contended that none of plaintiffs' six claims for relief stated a claim upon which relief could be granted. On 2 August 2001, the trial court entered an order dismissing plaintiffs' amended complaint after concluding "[t]he Amended Complaint, in all respects, fails to state a claim upon which relief can be granted and is hereby dismissed." From this ruling, plaintiffs appealed.

In reaching its determination, the trial court assumed plaintiffs had standing and that it had subject matter jurisdiction. We shall make the same assumptions and address this case on the merits, although the issue of standing is far from certain. *See State v. Rippy*, 80 N.C. App. 232, 341 S.E.2d 98 (1986) (manager of fishing pier could not collaterally attack constitutionality of a statute regulating a 750-foot zone next to the pier because he could not establish he had been injured).

In general, plaintiffs claim that only those persons who are personally wealthy or who can raise large sums of money are viable candidates for election to public office and that the proper interpretation of several North Carolina constitutional provisions would require the State to create a scheme for publicly financing elections. Plaintiffs allege this financial barrier, which they define as a "wealth primary," operates to exclude non-wealthy citizens from candidacy.

Plaintiffs divide their complaint into six counts, as follows:

Count 1: Equal Protection

Here, plaintiffs rely on Article I, § 19 of the North Carolina Constitution, which provides:

[Article I] Sec. 19. *Law of the land; equal protection of the laws.* No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land. No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of race, color, religion, or national origin.

Count 2: Property Qualifications Affecting the Right to Vote or Hold Office

In this count, plaintiffs rely on the following sections of the North Carolina Constitution: Article I, §§ 10 and 11, Article II, §§ 6 and 7, and Article VI, § 6. These provisions provide:

[Article I] Sec. 10. *Free elections.* All elections shall be free.

[Article I] Sec. 11. *Property qualifications.* As political rights and privileges are not dependent upon or modified by property, no property qualification shall affect the right to vote or hold office.

[Article II] Sec. 6. *Qualifications for Senator.* Each Senator, at the time of his election, shall be not less than 25 years of age, shall be a qualified voter of the State, and shall have resided in the State as a citizen for two years and in the district for which he is chosen for one year immediately preceding his election.

[Article II] Sec. 7. *Qualifications for Representative.* Each Representative, at the time of his election, shall be a qualified voter of the State, and shall have resided in the district for which he is chosen for one year immediately preceding his election.

[Article VI] Sec. 6. *Eligibility to elective office.* Every qualified voter in North Carolina who is 21 years of age, except as in this Constitution disqualified, shall be eligible for election by the people to office.

Count 3: Freedom of Conscience and Association

Here, plaintiffs rely on Article I, §§ 12 and 13 of the North Carolina Constitution. These provisions provide:

[Article I] Sec. 12. *Right of assembly and petition.* The people have a right to assemble together to consult for their common good, to instruct their representatives, and to apply to the General Assembly for redress of grievances; but secret political

> societies are dangerous to the liberties of a free people and shall not be tolerated.
>
> [Article I] Sec. 13. *Religious liberty.* All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.

Count 4: Special Privileges and Emoluments

This count relies on Article I, § 32 of the North Carolina Constitution, which provides:

> [Article I] Sec. 32. *Exclusive emoluments.* No person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services.

Count 5: Popular Sovereignty and Representation

Here, plaintiffs rely on Article I, §§ 2 and 8 of the North Carolina Constitution. These provisions provide:

> [Article I] Sec. 2. *Sovereignty of the people.* All political power is vested in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole.
>
> [Article I] Sec. 8. *Representation and taxation.* The people of this State shall not be taxed or made subject to the payment of any impost or duty without the consent of themselves or their representatives in the General Assembly, freely given.

Count 6: Free Elections

In their final count, plaintiffs rely on Article I, § 10 of the North Carolina Constitution (set forth previously in Count 2). Having set forth the constitutional provisions relied upon by plaintiffs, we turn to the question presented by this appeal. When reviewing the dismissal of a complaint pursuant to Rule 12(b)(6), we recognize that

> we are to liberally construe the complaint and determine whether, as a matter of law, the allegations of the complaint, taken as true, are sufficient to state some *legally recognized claim* or claims upon which relief may be granted to plaintiffs.

> While the well-pled allegations of the complaint are taken as true, conclusions of law or "unwarranted deductions of fact" are not deemed admitted.

Norman v. Nash Johnson and Sons' Farms, Inc., 140 N.C. App. 390, 394, 537 S.E.2d 248, 252 (2000) (emphasis added) (citations omitted), *disc. reviews on other issues denied*, 353 N.C. 378, 547 S.E.2d 13-14 (2001). In reviewing plaintiffs' amended complaint and the constitutional provisions relied on, it is clear that plaintiffs would like this Court to rule on an issue that is properly within the province of the legislature. As noted in defendants' brief, public financing of political campaigns is an issue that has been debated in our state and "has been played out for decades in state houses across the country and in our nation's capitol."

To reach their desired result, plaintiffs would have this Court read a meaning into the word "qualification" that is not present in its definition. As applied to elections, the word "qualification" means "[t]he possession of qualities or properties (such as fitness or capacity) inherently or legally necessary to make one eligible for a position or office, or to perform a public duty or function[.]" *Black's Law Dictionary* 1253 (7th ed. 1999). Nowhere in the constitutional provisions set forth previously and relied on by plaintiffs is there any direct requirement that campaigns be publicly financed, although the same cannot be said for the financing of education. *See* N.C. Const. art. IX, § 2(1).

Inadequate funding of public educational opportunity is an issue the courts are able to address. *See Leandro v. State of North Carolina*, 346 N.C. 336, 488 S.E.2d 249 (1997). Plaintiffs are not the first litigants who have attempted to have the courts rule on issues that are properly the subject of legislative determination. *See Martin v. Housing Corp.*, 277 N.C. 29, 175 S.E.2d 665 (1970) (upholding the constitutionality of the North Carolina Housing Corporation, as the decision to create the corporation was within the legislature's powers); *Insurance Company v. McDonald*, 277 N.C. 275, 285, 177 S.E.2d 291, 298 (1970) (stating that in the absence of constitutional provisions or necessary implications therefrom, "questions as to public policy are for legislative determination"). We likewise decline plaintiffs' invitation in this case.

Based on the foregoing, we hold that public financing of political campaigns is clearly a legislative issue. The trial court's order dismissing plaintiffs' lawsuit is therefore

Affirmed.

Judges McGEE and BRYANT concur.

STATE OF NORTH CAROLINA v. JEFFREY SCOTT BARBOUR

No. COA01-1320

(Filed 15 October 2002)

Larceny— by trick—test driving automobile

The trial court did not err by denying defendant's motion to dismiss a charge of felonious larceny of a motor vehicle and by instructing the jury on larceny by trick where defendant was given permission to take a truck for a test drive but was not given permission to keep the truck, defendant did not return the truck by the time he was expressly told to do so, defendant was discovered driving the truck several days later, and there was evidence that defendant had been convicted of similar crimes. Larceny by trick is not distinct from common law larceny, it is not necessary for the State to allege the manner in which the stolen property was taken and carried away, and the words "by trick" need not be found in an indictment charging larceny.

Appeal by defendant from judgment entered 3 May 2001 by Judge Preston Cornelius in Richmond County Superior Court. Heard in the Court of Appeals 15 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Thomas H. Moore, for the State.

Michael J. Reece for defendant-appellant.

THOMAS, Judge.

Defendant, Jeffrey Scott Barbour, was found guilty of felonious larceny of a motor vehicle and pled guilty to being an habitual felon. He was sentenced to a term of 168 to 211 months imprisonment. He now appeals.

Defendant contends the trial court erred in denying his motions to dismiss the charge of felonious larceny of a motor vehicle because

the evidence shows he initially obtained possession with the consent of the owner. Defendant also contends the trial court erred in instructing the jury on "larceny by trick." We find no error.

The State's evidence tends to show that on 27 September 2000 defendant went to C&W Auto Sales in Rockingham, North Carolina. He asked Robert Coble, one of the dealership's owners, if he could test drive a 1992 Isuzu Pup truck which was for sale. Defendant told Coble he was the nephew of Wilson and Alice Thomas, who were acquaintances of Coble. Coble, who thought highly of the Thomases, allowed defendant to test drive the truck without supervision. Defendant, however, was only given permission to "drive [the truck] down the street."

Approximately an hour later, he telephoned Coble. Defendant claimed he was at the bank inquiring about a loan to purchase the truck. Coble told defendant it would be too late to close the deal that day since both C&W Auto Sales and the Division of Motor Vehicles office closed at 5:00 p.m. Coble also told defendant to return the truck to C&W Auto Sales by 5:00 p.m.

When defendant failed to return the truck by 5:00 p.m., Coble contacted Alice Thomas. After Coble's conversation with Thomas, Coble's business partner called the police and reported the truck stolen. Two days later, Coble went to the police station and identified defendant in a photographic lineup as the one who had taken the Isuzu Pup truck.

On 1 October 2000, Deputy Creed Freeman of the Richmond County Sheriff's Department spotted defendant driving the truck. Freeman, knowing the truck was stolen, pursued defendant. By the time Freeman caught up to the truck, it was pulled over and defendant was missing. The only person in the truck was a female who was lying in the seat. Defendant was not found that night but was subsequently arrested on 19 October 2000.

At the close of the State's evidence, defendant made a motion to dismiss for insufficiency of the evidence. The trial court denied the motion. Defendant did not present any evidence and renewed his motion to dismiss. Again, it was denied. Defendant appeals.

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is

such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998).

The essential elements of larceny are: (1) the taking of the property of another; (2) carrying it away; (3) without the owner's consent; and (4) with the intent to permanently deprive the owner of the property. *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982). When the property has a value of more than one thousand dollars ($1,000), the larceny is a Class H felony. N.C. Gen. Stat. § 14-72(a) (2001).

Defendant concedes there is substantial evidence that he took the property of another, carried it away and intended to permanently deprive the owner of its use. It is undisputed that the truck was valued at more than $1,000. However, since the owner of the truck gave him the keys and allowed him to drive the truck off the lot, defendant contends the State has failed to show he took the truck without the owner's consent.

In support of his argument, defendant relies on this Court's decision in *State v. Kelly*, 75 N.C. App. 461, 331 S.E.2d 227 (1985). In *Kelly*, the Court addressed whether the defendant was subjected to double jeopardy where an initial indictment for larceny of an automobile was dismissed and the defendant subsequently was indicted and convicted of obtaining property by false pretenses based on the same set of facts. The Court ruled it did not constitute double jeopardy because the two crimes are separate and distinguishable offenses, each having an essential element that the other does not. *Id.* at 463-64, 331 S.E.2d at 229-30. In reaching its decision, the Court stated the following about the elements of larceny:

> [A] key element of larceny is that the property be wrongfully taken without the owner's consent. If the property was initially obtained with the consent of the owner, then there can be no larceny.

Id. at 464, 331 S.E.2d at 230. Defendant relies on this statement to support his contention in the instant case that the State failed to prove the property was taken without the owner's consent. We find defendant's reliance on *Kelly* misplaced.

In *Kelly*, the Court was not asked to address the question raised here—the sufficiency of the evidence of larceny. The Court did not address the application of the elements of larceny in a situation where the property was obtained by trick or fraud; instead, it merely determined the issue of double jeopardy. Accordingly, *Kelly* is not controlling in the instant case.

Larceny involves a trespass, either actual or constructive. *See State v. Bowers*, 273 N.C. 652, 655, 161 S.E.2d 11, 14 (1968); *In re Glenn*, 73 N.C. App. 302, 304, 326 S.E.2d 646, 647 (1985). " 'The taker must have had the intent to steal at the time he unlawfully takes the property from the owner's possession by an act of trespass.' " *Bowers*, 273 N.C. at 655, 161 S.E.2d at 14 (quoting *State v. Griffin*, 239 N.C. 41, 45, 79 S.E.2d 230, 232 (1953)). However, an actual trespass is not a necessary element of larceny when possession of the property is fraudulently obtained by some trick or artifice. *Id.*; *see also State v. Harris*, 35 N.C. App. 401, 402, 241 S.E.2d 370, 371 (1978). " 'Larceny by trick' is not a crime separate and distinct from common law larceny, but the term is often used to describe a larceny when possession was obtained by trick or fraud." *Harris*, 35 N.C. App. at 402, 241 S.E.2d at 371. It is not necessary for the State to allege the manner in which the stolen property was taken and carried away, and the words "by trick" need not be found in an indictment charging larceny. *Id.* (citing *State v. Lyerly*, 169 N.C. 377, 85 S.E. 302 (1915)).

Here, the evidence shows defendant was given permission to take the truck for a test drive but was not given permission to keep the truck. An hour later, defendant was expressly told to return the truck by 5:00 p.m. He did not, and was discovered driving the truck several days later.

There was also evidence presented that defendant had been previously convicted of two similar crimes where he drove vehicles off dealership lots with permission to take them for a test drive but then failed to return the vehicles to the owners.

Viewed in the light most favorable to the State, we find this evidence sufficient to support a reasonable inference that defendant obtained possession of the truck in question by trick or fraud with the intent to permanently deprive the owner of its use. Accordingly, the trial court did not err in denying defendant's motions to dismiss and by instructing the jury on "larceny by trick."

No error.

Judges MARTIN and TYSON concur.

DARRYL T. BURR, PLAINTIFF v. DONNA H. BURR, DEFENDANT

No. COA01-1288

(Filed 15 October 2002)

Costs— attorney fees—child support—child custody—termination of parental rights

The trial court did not abuse its discretion by its award of attorney fees to defendant mother for the child custody and support portions of this lawsuit based on the findings that defendant was an interested party acting in good faith and defendant had insufficient means to defray the costs of the lawsuit, even though she did not prevail at trial; however, the case is remanded to the trial court for a factual determination of the portion of the award of attorney fees that can be properly attributed to the custody and support actions because any award of attorney fees for the termination of parental rights action was error since there is no statutory authority for that portion of the action.

Appeal by plaintiff from order entered 11 April 2001 by Judge C.W. Bragg in Anson County District Court. Heard in the Court of Appeals 17 September 2002.

Henry T. Drake for plaintiff-appellant.

No brief filed for defendant-appellee.

EAGLES, Chief Judge.

Darryl Burr ("plaintiff") appeals from the award of attorney's fees to Donna Burr ("defendant") in an action for payment of child support, child custody and the termination of parental rights. Plaintiff asserts on appeal that the trial court erred by awarding attorney's fees to defendant. We agree in part and remand the case to the trial court for further factual determinations regarding the payment of attorney's fees.

The evidence tends to show the following. In an order dated 14 November 1997, the District Court of Anson County concluded that defendant had abandoned her child. The court awarded custody to plaintiff, with visitation to defendant "on such terms as [were] mutually agreeable." The visitation terms were not stated in the district court's order.

Plaintiff filed an action to terminate defendant's parental rights 24 February 1999. On 16 July 1999, plaintiff filed a motion in the cause seeking child support. On 6 October 2000, defendant served a motion seeking modification of the custody order, based on an alleged substantial change in circumstances. Plaintiff moved to dismiss the motion seeking modification of the custody order, or alternatively to combine the consideration of that motion with the original termination action. The trial court did not address either alternative of plaintiff's motion.

The motion seeking termination of parental rights was denied by order on 11 April 2001. In a separate order on 11 April 2001, the trial court concluded that defendant should have been paying child support for her son. The trial court found that defendant was unemployed, but reasonably capable of earning up to $1039 per month and that defendant owed plaintiff $7420 in past due child support. The trial court ordered defendant to pay $188 per month as current child support, and $112 per month to be applied to past due child support. The trial court continued primary custody of the child with plaintiff. However, the court's order on 11 April 2001 set forth specific visitation times for defendant, unlike the previous custody order.

The trial court concluded that the plaintiff had sufficient means to defray the cost of the lawsuit, but found that defendant had no assets other than her car and some household furniture. The trial court found that "Defendant was a party acting in good faith with insufficient means to defray the expense of the suit." Mr. Hodgins, defendant's attorney, filed an affidavit detailing legal services outlining 59 hours of work and requesting $100 per hour for his services. The court concluded that the rate was reasonable, but awarded Hodgins an attorney's fee totaling $3,000. The order stated that plaintiff was to pay the fee within 90 days of the order's filing. Plaintiff appeals.

Plaintiff contends that under G.S. § 50-13.6 the trial court failed to find the adequate facts to support the award of attorney's fees. We agree. The statute in question reads:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, **the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit.** Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding; provided however, should the court find as a fact that the supporting party has initiated a frivolous action or proceeding the court may order payment of reasonable attorney's fees to an interested party as deemed appropriate under the circumstances.

G.S. § 50-13.6 (2001) (emphasis added). Plaintiff here argues that because defendant did not prevail at trial, the award of attorney's fees to defendant was improper. We disagree.

The recovery of attorney's fees is a right created by statute. *See McGinnis Point Owners Ass'n v. Joyner*, 135 N.C. App. 752, 522 S.E.2d 317 (1999). A party can recover attorney's fees only if "such a recovery is expressly authorized by statute." *Id.* at 756, 522 S.E.2d at 320. Here, the trial court considered three substantive issues: the termination of parental rights, the award of child custody, and the payment of child support. Following the determination of child custody and support actions, the trial court is permitted to award attorney's fees among the parties according to G.S. § 50-13.6.

This award of attorney's fees is not left to the court's unbridled discretion; it must find facts to support its award. *See Stanback v. Stanback*, 287 N.C. 448, 215 S.E.2d 30 (1975), *Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980). Specifically, the trial court was required to make two findings of fact: that the party to whom attorney's fees were awarded was (1) acting in good faith and (2) has insufficient means to defray the expense of the suit. *Hudson*, 299 N.C. at 472, 263 S.E.2d at 723. "When the statutory requirements have been met, the *amount* of attorney's fees to be awarded rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion." *Hudson*, 299 N.C. at 472, 263 S.E.2d at 724.

Here, the court found as a fact that defendant was an interested party acting in good faith. The trial court also found that defendant had insufficient means to defray the costs of the lawsuit. Since the trial court had considered both child custody and child support issues, the court was not required to make an additional finding of fact regarding a refusal to provide support in order to award defendant attorney's fees according to the second sentence of G.S. § 50-13.6. *See Stanback v. Stanback*, 287 N.C. 448, 215 S.E.2d 30 (1975), *Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980), *Plott v. Plott*, 74 N.C. App. 82, 327 S.E.2d 273 (1985). A factual finding regarding refusal to provide support is only necessary when child support is not determined in the same proceeding with child custody. *Id.*

However, the termination of parental rights statute, G.S. § 7B-1100 *et seq.*, does not provide specifically for the shifting of attorney's fees. The statute allows the trial court to tax the *costs* of the termination action to any party. G.S. § 7B-1110(e) (2001). However, an award of attorney's fees is not synonymous with costs. The order to pay attorney's fees is enforceable by contempt for disobedience, while taxed costs only represent a civil judgment against a party. *See Smith v. Price*, 315 N.C. 523, 538, 340 S.E.2d 408, 417 (1986). In order to award attorney's fees to defendant for the portion of the trial dedicated to the termination action, the trial court would be required to tax the costs of the action to plaintiff and include attorney's fees within those costs. Since the trial court failed to tax costs to plaintiff, its award of attorney's fees for the termination portion of the trial was not supported by statutory authority.

We find no abuse of discretion in the award of attorney's fees for the child custody and support portions of the lawsuit, since the trial court made sufficient factual findings to sustain an award on those bases. However, since there is no statutory authority for the award of attorney's fees for the portion of the trial devoted to the consideration of the termination of parental rights action, any award of attorney's fees for the termination action is in error. Accordingly, we remand the matter to the trial court for a factual determination of the portion of the award of attorney's fees that properly can be attributed to the custody and support actions only and for entry of an appropriate award of attorney's fees.

Affirmed in part, reversed in part, and remanded.

Judges MARTIN and THOMAS concur.

STATE OF NORTH CAROLINA v. TIMOTHY RAY RUSSELL

No. COA01-1494

(Filed 15 October 2002)

Criminal Law— plea agreement—motion to withdraw

The trial court's denial of defendant's post-sentencing motion to withdraw his guilty plea to the charge of conspiracy to commit assault inflicting serious bodily injury did not result in manifest injustice, because: (1) even though defendant contends the plea agreement would allow him to go to trial if he refused to testify against his codefendants, the plea agreement gave the State the option of declaring the plea null and void, necessitating a trial, or praying for judgment, and the State chose to pray for judgment; (2) there was no contention the trial court failed to inform defendant of the maximum sentence available; and (3) defendant signed a transcript of plea form and the trial court conducted the proper inquiry which was sufficient to show defendant's plea was entered into knowingly and voluntarily with full awareness of the direct consequences of his plea.

Appeal by defendant from judgment dated 12 April 2001 by Judge D. Jack Hooks, Jr. in Brunswick County Superior Court. Heard in the Court of Appeals 17 September 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

A. Michelle FormyDuval for defendant appellant.

GREENE, Judge.

Timothy Ray Russell (Defendant) appeals a judgment dated 12 April 2001 and the denial of his motion to withdraw a guilty plea entered 12 April 2001.

At a hearing on 6 December 2000, Defendant entered a plea of guilty to the charge of conspiracy to commit assault inflicting serious bodily injury pursuant to N.C. Gen. Stat. §14-32.4. This guilty plea was entered in accordance with a plea agreement, which provided a prayer for judgment would be entered until Defendant had the opportunity to testify against co-defendants in the case. The plea agreement further provided if Defendant complied with its terms, the State would agree to an active sentence of ten-twelve months to run con-

currently with other sentences Defendant was already serving. If Defendant refused to testify against his co-defendants, "the State, at its option, [could] declare this agreement null and void or pray judgment on this plea."

The trial court conducted an inquiry into Defendant's competency and understanding of the charges, the guilty plea and the plea agreement, the maximum sentence for the charge, and Defendant's satisfaction with the representation and advice of his attorney. Defendant also completed and signed a "Transcript of Plea" form that included a written recitation of the court's oral inquiry and the terms of the plea agreement. In the Transcript of Plea, Defendant acknowledged his full understanding of the terms of the agreement and that his guilty plea was knowing and voluntary.

At a hearing on 12 April 2001, the State prayed for judgment on the plea based on Defendant's refusal to testify against a co-defendant. Defendant did not contest his failure to comply with the plea agreement, asserting only his fear of testifying due to threats he had received, allegedly from the co-defendant, while in prison on unrelated charges and asked for either a concurrent or probationary sentence. The trial court imposed a sentence of ten-twelve months to run consecutively with Defendant's prior sentences. Defendant then moved to withdraw his guilty plea, and the motion was denied.

The issues are whether (I) the actual sentence entered in this case is consistent with the plea agreement; and (II) Defendant must be allowed to withdraw his plea because to do otherwise would constitute a manifest injustice.

A plea agreement is treated as contractual in nature, and the parties are bound by its terms. *See State v. Rodriguez*, 111 N.C. App. 141, 144, 431 S.E.2d 788, 790 (1993). Thus, if a trial court enters a sentence inconsistent with the agreed plea, the defendant is entitled to withdraw his guilty plea as a matter of right. N.C.G.S. § 15A-1024 (2001). If the sentence imposed is consistent with the plea agreement, the defendant is entitled to withdraw his plea upon a showing of manifest injustice. *See State v. Suites*, 109 N.C. App. 373, 375, 427 S.E.2d 318, 320 (1993). Factors to be considered in determining the existence of manifest injustice include whether: Defendant was represented by competent counsel; Defendant is asserting innocence; and Defendant's plea was made knowingly and voluntarily or was the result of misunderstanding, haste, coercion, or confusion. *See State v. Handy*, 326 N.C. 532, 539, 391 S.E.2d 159, 163 (1990).

I

Defendant first contends a reasonable construction of the plea agreement would allow him to "go to trial" if he refused to testify against his co-defendants and thus, he should have been allowed to withdraw his plea after the sentence was entered.[1] We disagree.

There was no ambiguity in the plea agreement. It simply stated that if Defendant refused to testify against his co-defendants the State had the option of declaring the plea "null and void," necessitating a trial, or praying for judgment. The plea agreement set no limits on the actual sentence the trial court could impose if prayer for judgment was requested where Defendant did not provide the agreed to testimony. Here, the State chose to pray for judgment and the trial court was free to enter judgment consistent with the sentencing statutes. Defendant makes no contention the sentence is not within the statutory guidelines. Accordingly, Defendant was not entitled to withdraw his plea pursuant to section 15A-1024.

II

In the alternative, Defendant argues his post-sentence motion to withdraw his plea should have been allowed because of manifest injustice on the grounds he was not fully informed, at the time his plea was entered, of the sentencing consequences of his plea.[2]

A

Defendant first contends the trial court when receiving his plea did not inform him that, in the event he did not testify against his co-defendants, the sentence he could receive in this case could be made to run at the expiration of the sentences he was currently serving for unrelated criminal convictions. Consequently, Defendant argues, he entered his plea without a full understanding of its real consequences. We disagree. The trial court is only required to inform a defendant of the maximum possible sentence, including consecutive

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1. Defendant argues in his brief to this Court the trial court committed error in not conducting an evidentiary hearing prior to entering judgment to determine if Defendant had any fair and just reason to withdraw his plea. *See Suites*, 109 N.C. App. at 375, 427 S.E.2d at 320 (guilty plea may usually be withdrawn before sentencing for any fair and just reason). We do not address this issue because Defendant made no motion to the trial court before sentence was entered. Furthermore, Defendant's assertion of plain error is not appropriate, as the alleged error is not within the scope of plain error as recognized by our courts. *See State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002).

2. Defendant asserts no other grounds for supporting his manifest injustice claim.

sentences, on the charge or charges for which the defendant is being sentenced. N.C.G.S. § 15A-1022(a)(6) (2001). In this case, there is no contention the trial court failed to inform Defendant of the maximum sentence available for the crime for which he was currently charged.

B

Defendant next contends the trial court was required to inform him that if he did not testify against his co-defendants, the State had the option of praying for judgment and if the State made that election, he would not be entitled to a trial.

A court may accept a guilty plea only if it is "made knowingly and voluntarily." *State v. Wilkins*, 131 N.C. App. 220, 224, 506 S.E.2d 274, 277 (1998) (citing *Boykin v. Alabama*, 395 U.S. 238, 23 L. Ed. 2d 274 (1969)). A plea is voluntarily and knowingly made if the defendant is made fully aware of the direct consequences of his plea. *Wilkins*, 131 N.C. App. at 224, 506 S.E.2d at 277 (citing *Brady v. United States*, 397 U.S. 742, 755, 25 L. Ed. 2d 747, 760 (1970)). Further, if the defendant signed a Transcript of Plea and the record reveals the trial court made "a careful inquiry" of the defendant, it is sufficient to show the defendant's plea was knowingly and voluntarily made, with full awareness of the direct consequences. *Wilkins*, 131 N.C. App. at 224, 506 S.E.2d at 277.

In this case, the record reveals Defendant completed and signed a Transcript of Plea form and the trial court conducted the proper inquiry. This is sufficient to show Defendant's plea was entered into knowingly and voluntarily, with full awareness of the direct consequences of his plea. Accordingly, the denial of Defendant's post-sentencing motion to withdraw his guilty plea did not result in manifest injustice.

Affirmed.

Judges WYNN and BIGGS concur.

STATE OF NORTH CAROLINA BY AND THROUGH THE RICHMOND COUNTY CHILD SUPPORT AGENCY EX. REL TRACY DAVIS, PLAINTIFF-APPELLEE v. DON ADAMS, DEFENDANT-APPELLANT

No. COA01-1500

(Filed 15 October 2002)

1. Civil Procedure— motion in the cause to void paternity—treated as Rule 60 motion

The trial court correctly considered defendant's motion to void his acknowledgment of paternity and voluntary support agreement as a motion pursuant to N.C.G.S. § 1A-1, Rule 60 after DNA testing excluded defendant as the father. Defendant's motion was a challenge in the same action, not an independent motion, and, although defendant now contends that he was seeking relief pursuant to N.C.G.S. § 110-132(a), he did not refer to any statute in his motion and did not cite any case in which paternity was challenged in a motion pursuant to N.C.G.S. § 110-132(a).

2. Paternity— motion to void acknowledgment—untimely

The trial court did not abuse its discretion by denying defendant's Rule 60 motion to void defendant's acknowledgment of paternity and his voluntary support agreement after DNA testing where the motion was untimely.

Appeal by defendant from order entered 2 August 2001 by Judge Tanya Wallace in District Court, Richmond County. Heard in the Court of Appeals 11 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for the State.

Dawkins & Sullivan, by Donald M. Dawkins, for defendant-appellant.

McGEE, Judge.

Don Adams (defendant) executed an Affirmation Acknowledgment and Order of Paternity on 10 July 1995, acknowledging he was the father of Jalen T. Davis, born 12 September 1994 to Tracy Davis. Defendant also executed a Voluntary Support Agreement and Order, agreeing to contribute to the support of Jalen T. Davis. The trial court entered the Voluntary Support Agreement as an order of the court on

21 July 1995. Defendant executed an Amended Voluntary Support Agreement and Order on 5 November 1996, acknowledging he was the father of a second child born to Tracy Davis, named Donte' E. Davis, and re-acknowledging he was the father of Jalen T. Davis. In this Amended Voluntary Support Agreement and Order, defendant also agreed to contribute to the support of both Jalen T. Davis and Donte' E. Davis. The trial court entered the Amended Voluntary Support Agreement and Order as an order of the court. Defendant alleges that he began to hear rumors that he might not be the father of Jalen T. Davis. Defendant underwent a "DNA Parentage Test" on or about 22 July 1999. The results of this test excluded defendant as the biological father of Jalen T. Davis. Defendant alleges that before the rumors, he had no reason to believe he was not the father of Jalen T. Davis.

Defendant filed a motion on 10 August 2000 asking the trial court to void the Acknowledgment and Order of Paternity he executed on 10 July 1995 and the Amended Voluntary Support Agreement and Order entered 5 November 1996. The motion further asked the trial court to admit into evidence a DNA Parentage Test Report dated 22 July 1999 and to order the State Registrar of Vital Statistics to remove defendant's name as the father of Jalen T. Davis. The trial court denied defendant's motion to strike the existing order of paternity for Jalen T. Davis on 2 August 2001. Defendant appeals the order of the trial court.

Defendant argues in his sole assignment of error that the trial court erred in denying defendant's motion because the DNA test excluded defendant as the biological father of Jalen T. Davis. Our Court held in *Leach v. Alford* that although an order of paternity cannot be collaterally attacked in a proceeding relating solely to an order of support, it can be directly attacked. 63 N.C. App. 118, 122-24, 304 S.E.2d 265, 267-69 (1983). In the case before us, defendant has directly attacked the orders of paternity concerning Jalen T. Davis through his motion.

[1] The trial court considered defendant's pleading as a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60. This rule states that "[t]he procedure for obtaining *any* relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action." N.C. Gen. Stat. § 1A-1, Rule 60 (2001) (emphasis added). Defendant's motion is a challenge in the same action, not an independent action; therefore, the trial court correctly considered

defendant's motion in the cause as a motion pursuant to Rule 60. *See id.* Our Court has held that a motion pursuant to N.C.G.S. § 1A-1, Rule 60 is the appropriate method of challenging acknowledgments of paternity. *See Leach*, 63 N.C. App. at 124, 304 S.E.2d at 269 (holding that the doctrine of *res judicata* "does not establish an absolute bar to relief, pursuant to G.S. 1A-1, Rule 60(b)(6), from the underlying acknowledgment (judgment) of paternity"); *see also Garrison ex rel. Chavis v. Barnes*, 117 N.C. App. 206, 207-09, 450 S.E.2d 554, 555-56 (1994) (challenging the paternity determination by way of a motion for relief from judgment pursuant to N.C.G.S. § 1A-1, Rule 60(b)).

Defendant argues that his motion was not captioned as a motion pursuant to N.C.G.S. § 1A-1, Rule 60, and that the trial court improperly considered it as such. Defendant now contends he was seeking relief pursuant to N.C. Gen. Stat. § 110-132(a). Defendant does not cite any case in which paternity was challenged in a motion made pursuant to N.C.G.S. § 110-132(a). It should also be noted that defendant did not refer to any statute in his motion pursuant to which his motion was being made. As our Court stated in *Carter v. Clowers*, "moving papers that are mislabeled in other ways may be treated as motions under Rule 60(b) when relief would be proper under that rule." 102 N.C. App. 247, 253, 401 S.E.2d 662, 665 (1991) (citation omitted). The technical requirements of a motion pursuant to N.C.G.S. § 1A-1, Rule 60(b) require that the motion identify the original error and identify the relief sought. *Id.* Defendant's motion in the cause met these technical requirements. The trial court properly considered defendant's motion as one pursuant to N.C.G.S. § 1A-1, Rule 60.

The cases defendant cites from courts in other jurisdictions involve motions pursuant to the analogous rule to N.C.G.S. § 1A-1, Rule 60, not motions pursuant to the specific paternity statute of that jurisdiction. For example, in *K.W. v. State ex rel. S.G.*, a defendant challenged, by motion, his earlier acknowledgment of paternity of the plaintiff's child. 581 So.2d 855, 856 (Ala. Civ. App. 1991). The facts in *K.W. v. State ex rel. S.G.* tended to show that the defendant, after acknowledging his paternity in court and being adjudicated the father of a child born out-of-wedlock to the plaintiff, was told by the plaintiff that he was not the father of the child. *Id.* The defendant, the plaintiff, and the child all submitted to blood testing, which excluded the defendant as the father of the child. *Id.* The defendant filed motions challenging the acknowledgment and adjudication of paternity, which the court then treated as motions under Rule 60(b) of the

Alabama Rules of Civil Procedure, not motions pursuant to the paternity statute involved in the case. *Id.*

[2] Having determined that the trial court correctly decided defendant's motion pursuant to N.C.G.S. § 1A-1, Rule 60(b), our review is limited to determining whether the trial court abused its discretion. *Goodwin v. Cashwell*, 102 N.C. App. 275, 277, 401 S.E.2d 840, 842 (1991) (citing *Greenhill v. Crabtree*, 45 N.C. App. 49, 262 S.E.2d 315, *aff'd by an equally divided court*, 301 N.C. 520, 271 S.E.2d 908 (1980)); *Cole v. Cole*, 90 N.C. App. 724, 727, 370 S.E.2d 272, 273, *disc. review denied*, 323 N.C. 475, 373 S.E.2d 862 (1988) (citing *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975)). "A judge is subject to reversal for abuse of discretion only upon a showing by a litigant that the challenged actions are manifestly unsupported by reason." *Clark v. Clark*, 301 N.C. 123, 129, 271 S.E.2d 58, 63 (1980) (citation omitted).

Defendant in this case argues the 10 July 1995 Acknowledgment and Order of Paternity should be voided on the basis of either mistake or fraud. However, N.C.G.S. § 1A-1, Rule 60(b) contains a time limitation. A motion based on Rule 60(b)(1) for "mistake" or Rule 60(b)(3) for "fraud" must be made within a "reasonable time, and . . . not more than one year after the judgment, order, or proceeding was entered or taken." N.C.G.S. § 1A-1, Rule 60(b). The one-year time limitation in N.C.G.S. § 1A-1, Rule 60(b) is an explicit requirement which our Court cannot ignore. *See Bruton v. Sea Captain Properties*, 96 N.C. App. 485, 488, 386 S.E.2d 58, 59 (1989); *see also Bell v. Martin*, 43 N.C. App. 134, 141-43, 258 S.E.2d 403, 408 (1979) (finding no authority that would allow the tolling of the one-year limitation in N.C.G.S. § 1A-1, Rule 60(b)), *rev'd on other grounds*, 299 N.C. 715, 264 S.E.2d 101 (1980). Further, defendant's motion cannot be considered as one for relief under Rule 60(b)(6) to circumvent this one-year limitation since the facts supporting the motion are facts which, even defendant points out, more appropriately would support consideration pursuant to (b)(1) or (b)(3). *Bruton*, 96 N.C. App. at 488, 386 S.E.2d at 59-60. The most recent order in the present case was entered 5 November 1996. Defendant filed his motion in the cause on 10 August 2000, more than three years after the order was entered, clearly making defendant's motion untimely under N.C.G.S. § 1A-1, Rule 60(b).

The order of the trial court denying defendant's motion pursuant to Rule 60(b) is affirmed.

Affirmed.

Judges WALKER and THOMAS concur.

STATE OF NORTH CAROLINA v. ERIC STEPHEN BLYMYER

No. COA01-1487

(Filed 15 October 2002)

Assault— deadly weapon with intent to kill inflicting serious injury—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss a charge of assault with a deadly weapon with intent to kill inflicting serious injury where the evidence tended to show that defendant had been involved in two altercations with the victim in the victim's home on the night in question; defendant was instructed both times to leave; defendant "flipped off" the victim and drove his truck directly at the victim; after he pinned the victim against a mobile home, defendant pumped the clutch a couple of times and asked how it felt; defendant said after the incident that next time he would have to stab the victim and kill him; and the victim suffered life-threatening injuries and underwent twenty surgeries.

Appeal by defendant from judgment entered 8 August 2001 by Judge Michael E. Beale in Rowan County Superior Court. Heard in the Court of Appeals 17 September 2002.

Attorney General Roy Cooper, by Thomas B. Wood, for the State.

J. Clark Fischer for defendant-appellant.

THOMAS, Judge.

Defendant, Eric Stephen Blymyer, was convicted of assault with a deadly weapon with intent to kill inflicting serious injury. He was sentenced to a term of 108 to 132 months imprisonment.

Defendant appeals, contending the State failed to present substantial evidence of intent to kill. Based on the reasons herein, we find no error.

The State's evidence tends to show defendant visited the home of Richard Lee Ronquest at approximately 11:30 p.m. on Christmas Eve, 1999. Ronquest, Martha Clodfelter, who is Ronquest's sister, and Valerie Furman were all present.

According to Ronquest, problems started between defendant and him when defendant spoke disrespectfully to Furman. Ronquest told defendant to "chill out" after defendant cursed at Furman. Defendant cursed again and threw a full, open can of beer on the floor. When defendant refused to clean it up, Ronquest cursed in telling him to leave. The two men then briefly fought, wrestling on the floor, with defendant eventually agreeing to leave.

Defendant left but shortly returned to Ronquest's home. The two scuffled and exchanged words a second time. Ronquest shoved defendant into the hamper, held him down, and told him that unless he agreed to leave he would not be let up. Defendant agreed, Ronquest let him up, and defendant walked onto the porch "cussing and carrying on real loud." Ronquest also walked outside. While standing in the doorway of his truck, defendant "flipped off" Ronquest.

Ronquest then stepped from the porch to an area underneath a canopy in front of his home. Defendant jumped in the truck and locked the door. He revved the engine, with Ronquest telling him, "Just go, Just go." As defendant began to back out of the driveway, Ronquest turned to walk inside. Suddenly, Ronquest heard roaring tires spinning in the gravel and turned to see two headlights coming toward him.

Defendant drove directly at Ronquest, striking him with the truck. With Ronquest pinned against the mobile home and telling defendant to get the truck off of him, defendant pumped the clutch a couple of times and stated, "How's that feel, you son of a bitch." After defendant finally drove away, Ronquest dragged himself to the porch and collapsed.

As a result, Ronquest suffered multiple pelvic fractures and other internal injuries. He underwent approximately twenty surgeries.

Dr. Wayne Cline, Jr., an expert in urology, testified he examined Ronquest after the incident and that Ronquest's pelvic fractures resulted from significant force caused by a high speed impact or being crushed against an immovable object.

Eddie Christopher Howard, a deputy with the Rowan County Sheriff's Department, went to defendant's residence shortly after the incident and discovered defendant fighting with his two brothers. Howard broke up the fight. According to Howard, defendant appeared agitated and was using profane language. Defendant also had a strong odor of alcohol.

Howard testified defendant made several spontaneous utterances, including, "I guess the next time I'll just have to stab his ass in the neck and kill him next time," and "I guess I'll just have to stab him, stab him next time."

Defendant did not present any evidence.

Defendant contends the trial court erred in denying his motion to dismiss at the close of the State's evidence and at the close of all the evidence. Specifically, defendant argues the State failed to present substantial evidence that he intended to kill Ronquest. He asks this Court to set aside his conviction and enter judgment on the lesser included offense of assault with a deadly weapon inflicting serious injury. We disagree with defendant's contention.

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). The dispositive issue here is whether the State presented substantial evidence that defendant intended to kill Ronquest.

"An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties, and other relevant circumstances." *State v. Thacker*, 281 N.C. 447, 455, 189 S.E.2d 145, 150 (1972).

In *State v. Hinson*, 85 N.C. App. 558, 355 S.E.2d 232 (1987), this court addressed the issue of whether the evidence was sufficient to support an intent to kill where the alleged deadly weapon was a motor vehicle. In *Hinson*, the defendant drove a truck toward a

road where five sheriff's deputies were standing, waved one arm out the window, and screamed, "Stand right there, you son of a bitches. I'll kill you." He drove the truck straight at the deputies before colliding with two automobiles and running into a ditch. This Court held that such evidence, when viewed in the light most favorable to the State, raised a reasonable inference that defendant acted with the requisite specific intent to kill the deputies. *Id.* at 565, 355 S.E.2d at 236.

Here, the State's evidence tends to show defendant had been involved in two altercations with Ronquest in Ronquest's home on the night in question. He had been instructed both times to leave. Prior to getting into his truck after the second incident, defendant "flipped off" Ronquest. Defendant then drove the truck directly at Ronquest. After pinning him against the mobile home, defendant pumped the clutch a couple of times and said, "How's that feel, you son of a bitch." Following the incident, defendant stated, "I guess the next time I'll just have to stab his ass in the neck and kill him next time," and "I guess I'll just have to stab him, stab him next time." We find this evidence sufficiently similar to the evidence presented in *Hinson* to mandate a similar conclusion.

We further note that Ronquest's injuries were life-threatening. He suffered internal injuries to his organs, as well as bone fractures, and had to undergo approximately twenty surgeries.

Viewed in the light most favorable to the State, this evidence raises a reasonable inference that defendant acted with the requisite intent to kill Ronquest. Accordingly, the trial court did not err in denying defendant's motions to dismiss and allowing the issue to be submitted to the jury.

No error.

Chief Judge EAGLES and Judge MARTIN concur.

WANDA M. GORE, PLAINTIFF v. NATIONSBANC INSURANCE COMPANY, INC., DEFENDANT

No. COA02-324

(Filed 15 October 2002)

Insurance— accident and health—monthly benefit payments—motion for judgment on the pleadings

The trial court did not err in a breach of contract case arising out of an accident and health insurance policy issued by defendant insurance company to plaintiff by granting defendant's motion for judgment on the pleadings on the issue of the term of monthly benefit payments, because: (1) even when the policy is read in the light most favorable to plaintiff, there is no ambiguity; and (2) the contract of insurance plainly and explicitly limited the term of monthly benefit payments to thirty-six months.

Appeal by plaintiff from order entered 11 January 2002 by Judge Herbert O. Phillips, III, in New Hanover County Superior Court. Heard in the Court of Appeals 7 October 2002.

Johnson & Lambeth, by Maynard M. Brown, for plaintiff appellant.

Kennedy Covington Lobdell & Hickman, L.L.P., by John H. Capitano, for defendant appellee.

McCULLOUGH, Judge.

This is a breach of contract claim arising out of an accident and health insurance policy issued by Nationsbanc Insurance Company, Inc. (Nationsbanc), to plaintiff Wanda M. Gore. The facts leading to the lawsuit are as follows: In May 1995, plaintiff Gore and her husband refinanced their home. As part of the refinancing, Nationsbanc sold plaintiff an accident and health insurance policy. Under the terms of the policy, if plaintiff became totally disabled during the term of the policy, Nationsbanc would pay "Accident and Health monthly benefits" equal to the amount of plaintiff's monthly loan payment amount, $719.33. The policy further stated that the Loan Term Period was 180 months and that the "Benefit Term Period" was 120 months. Additionally, the policy stated that benefits were limited to the term of the policy, or a maximum of thirty-six "monthly benefit payments . . . , whichever is less." Plaintiff subsequently became

disabled and Nationsbanc began making the monthly benefit payments pursuant to the policy. After thirty-six months, Nationsbanc refused to make further payment.

On 8 August 2001, plaintiff filed a complaint seeking damages for breach of contract. Nationsbanc answered and admitted making thirty-six payments pursuant to the terms of the policy. On 29 October 2001, Nationsbanc moved for judgment on the pleadings. On 11 January 2002, the trial court determined there was no genuine issue of material fact and defendant was entitled to dismissal of all of plaintiff's claims as a matter of law, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(c) (2001). Plaintiff appealed.

Plaintiff's sole argument on appeal is that the trial court erred in granting Nationsbanc's motion for judgment on the pleadings. Plaintiff contends that nowhere in the policy were the terms "Benefit Term Period" or "Monthly Benefits" defined. Plaintiff therefore argues that the policy is ambiguous on its face and should be construed in her favor so as to provide coverage for the full 120-month "Benefit Term Period." After careful review of the record, briefs and contentions of the parties, we disagree with plaintiff's arguments and affirm the order of the trial court.

This Court has stated:

> "Judgment on the pleadings, pursuant to Rule 12(c), is appropriate ' "when all the material allegations of fact are admitted in the pleadings and only questions of law remain." ' The trial court must ' "view the facts and permissible inferences in the light most favorable to the non-moving party[]," ' taking all well-pleaded factual allegations in the non-moving party's pleadings as true.
>
> When ruling on a motion for judgment on the pleadings, the trial court 'is to consider only the pleadings and any attached exhibits, which become part of the pleadings.' "
>
> Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party.

Groves v. Community Hous. Corp., 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (citations omitted). Here, the only issue in dispute is the term of the monthly benefit payments. Plaintiff contends the benefits should extend for 120 months, the "Benefit Term Period" listed

in the policy. However, benefit payments clearly were limited to a term of thirty-six months in three portions of the policy. First, the policy states that "[b]enefits hereunder are limited to the term shown in the schedule or a maximum total of thirty six (36) monthly benefit payments during the term of this policy, *whichever is less.*" (Emphasis added.) On page two of the policy, it is again stated that "[t]he amount of Monthly Benefit Payment shall be LIMITED TO A MAXIMUM OF THIRTY-SIX (36) Monthly Benefits. . . ." (Emphasis in original.) Finally, the policy states that "**[t]he CUMULATIVE TOTAL** of ALL MONTHLY BENEFITS SHALL NOT EXCEED THIRTY-SIX (36) BENEFITS times the benefit amount shown in the schedule [$719.33]." (Emphasis in original.)

This Court has stated:

> Our courts have established several rules pertaining to the construction of insurance policies, the most rudimentary being that the language of the policy controls its interpretation. "The various terms of an insurance policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect."
>
> "Where the language of a contract is plain and unambiguous, construction of the agreement is a matter of law; and the court may not ignore or delete any of its provisions, nor insert words into it, but must construe the contract as written, in light of the undisputed evidence as to the custom, usage and meaning of its terms."

DeMent v. Nationwide Mut. Ins. Co., 142 N.C. App. 598, 601, 544 S.E.2d 797, 799-800 (2001) (citations omitted). In this case, even when the policy is read in the light most favorable to plaintiff, there is no ambiguity. The contract of insurance plainly and explicitly limited the term of monthly benefit payments to thirty-six months. Accordingly, we conclude that the trial court did not err, and defendant was entitled to judgment on the pleadings.

Affirmed.

Chief Judge EAGLES and Judge HUDSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 15 OCTOBER 2002

BUCKEYE FIRE EQUIP. CO. v. GIBBY No. 02-362	Gaston (00CVS3356)	Appeal dismissed
COUNTY OF DURHAM ex rel. HARRIS v. MANGUM No. 02-389	Durham (90CVD4729)	Affirmed
ENGLAND v. BOGLE No. 02-515	Gaston (97CVS4726)	Appeal dismissed
EWING v. EWING No. 01-1592	Gaston (00CVD3693)	Dismissed
F&H MORTGAGE INVESTORS, INC. v. CITY OF BESSEMER CITY No. 01-868	Gaston (00CVS3515)	Dismissed
FORNER v. GABRIEL No. 02-34	Catawba (97CVD1317)	Affirmed
HALL-ALSTON v. SMITH No. 01-1545	Wake (00CVS854)	Affirmed
HARRIS v. ENMARK STATION, INC. No. 01-1279	Transylvania (99CVS219)	Affirmed
IN RE GILLESPIE No. 02-590	McDowell (99J43) (99J44) (00J22)	Affirmed
IN RE HARVEY No. 02-465	Cabarrus (99J91)	Affirmed
IN RE McBROOM No. 02-102	Durham (98J147)	Affirmed
IN RE McNEIL No. 02-125	Cumberland (00J352)	Affirmed
IN RE S.M. No. 01-1429	Durham (01J21)	Affirmed
JEFFERSON v. COUNTY OF VANCE No. 01-1370	Vance (01CVS177)	Affirmed
LAUGHTER v. SHIELDS No. 01-1302	Mecklenburg (99CVS14564)	Affirmed

STATE v. ALLAH No. 01-1348	Pitt (00CRS5462) (00CRS54026)	No error
STATE v. BARNES No. 02-410	Wilson (00CRS54292)	No error
STATE v. CALLOWAY No. 01-1538	Avery (99CRS2215)	No error
STATE v. CHESTNUT No. 02-19	Columbus (00CRS50497) (00CRS50498)	No error
STATE v. COOPER No. 01-1469	Davidson (00CRS3241)	No error
STATE v. CRUZ No. 01-1473	Forsyth (94CRS24889) (94CRS26310)	Affirmed
STATE v. CURTIS No. 02-104	Wake (00CRS83703)	No error
STATE v. DIXON No. 02-161	Alamance (00CRS60682)	Affirmed
STATE v. DOVE No. 01-1085	Lenoir (99CRS2586)	No error
STATE v. FORBES No. 02-71	Halifax (00CRS51859)	No error
STATE v. GIBBS No. 02-280	Buncombe (00CRS9104) (00CRS9883) (00CRS9884) (00CRS9885) (00CRS9886) (00CRS9887)	Affirmed
STATE v. GRIMES No. 01-1576	Guilford (99CRS66743)	Appeal dismissed; petition for writ of certiorari denied
STATE v. HARRIS No. 02-355	Guilford (00CRS23535) (00CRS96300)	No error; remanded for correction of a clerical error in the judgment
STATE v. JONES No. 02-310	Johnston (01CRS50549)	Vacated and remanded
STATE v. KELLY No. 02-51	Lenoir (96CRS11146)	Affirmed

STATE v. KEYS No. 02-44	Cumberland (00CRS58099)	No error
STATE v. LEAK No. 02-346	Union (00CRS11363) (00CRS11365) (00CRS52988)	No error as to defendant's convictions in possession of firearm by a felon and robbery with a dangerous weapon; judgment arrested as to habitual felon status; remanded for re-sentencing
STATE v. LEE No. 02-255	Wake (94CRS85399)	No error
STATE v. McADOO No. 02-143	Guilford (00CRS23344) (00CRS23345) (00CRS23346)	No error
STATE v. McDANIEL No. 02-341	Wake (00CRS39864)	No error
STATE v. McDANIEL No. 02-17	Rowan (00CRS12000)	No error
STATE v. McGILBERRY No. 02-241	Pasquotank (00CRS2942)	No error
STATE v. PIERCE No. 01-1455	Cumberland (99CRS73297) (99CRS73301)	No error
STATE v. PITTMAN No. 02-384	Martin (00CRS3835) (01CRS379) (01CRS1949)	No error
STATE v. PRICE No. 02-434	Rutherford (00CRS9291)	No error
STATE v. ROBINSON No. 02-128	Robeson (00CRS12735) (00CRS12736) (00CRS12745)	No error
STATE v. ROSS No. 01-1555	Cabarrus (99CRS15116) (00CRS6801)	Appeal dismissed

STATE v. SHEHADEH No. 02-407	Nash (99CRS13782) (01CRS5275) (01CRS5276) (01CRS5277)	No error
STATE v. VALLADARES No. 01-1497	New Hanover (99CRS1723)	No error
STATE v. WILLIAMS No. 01-1561	New Hanover (00CRS531)	No error
STATE v. WILLIAMS No. 02-83	New Hanover (99CRS51897)	No error
STATE v. WILLIAMSON No. 02-23	Alamance (99CRS6490)	No error

AFFORDABLE CARE, INC., AMERICAN DENTAL PARTNERS, INC., AMERICAN DENTAL PARTNERS OF NORTH CAROLINA, INC., DENTAL CARE PARTNERS, INC., AND DENTAL HEALTH MANAGEMENT, INC., PLAINTIFFS v. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS; THE NORTH CAROLINA RULES REVIEW COMMISSION, AND JULIAN MANN, III, IN HIS OFFICIAL CAPACITY AS THE CODIFIER OF RULES, DEFENDANTS

No. COA01-1526

(Filed 5 November 2002)

1. Administrative Law— rule-making proceeding—dentistry management arrangements—failure to exhaust administrative remedies

The trial court did not err in an action seeking to invalidate administrative rule 21 NCAC 16X.0101(a) regarding the propriety of dentistry management arrangements by granting defendant Board of Dental Examiners' motion for judgment on the pleadings with respect to the nonconstitutional claims based on plaintiffs' failure to first exhaust all available administrative remedies including the right to petition for a declaratory judgment under N.C.G.S. § 150B-4 and the ability to petition the Rules Review Commission for adoption or amendment of a rule under N.C.G.S. § 150B-20, because: (1) nothing in the statutes or our case law suggests these remedies are no longer available or worthwhile; (2) plaintiffs did not allege futility in the complaint nor other facts justifying avoidance of the administrative process; (3) plaintiffs' amendment to the record on appeal to show that they filed requests for a declaratory judgment ruling from the Board under N.C.G.S. § 150B-4 were not before the trial court when it considered defendants' motions since these requests were filed after the trial court dismissed plaintiffs' complaint; and (4) the record as amended still failed to show that plaintiffs availed themselves of the remedy available under N.C.G.S. § 150B-20.

2. Dentists; Constitutional Law— rule-making proceeding—dentistry management arrangements—substantive due process—rational basis—facial challenge—vagueness

The trial court did not err in an action seeking to invalidate administrative rule 21 NCAC 16X.0101(a) regarding the propriety of dentistry management arrangements by determining that defendant Board of Dental Examiners was entitled to judgment as a matter of law on the constitutional claim of substantive due

process, because: (1) the rule is rationally related to a legitimate government interest since its purpose is to protect the public health and welfare with respect to the practice of dentistry; (2) plaintiffs' facial challenge that the rule is unconstitutional based on it being unduly burdensome and its failure to provide a time-frame for Board review of contracts does not succeed since it cannot be said that there is no set of circumstances under which the rule would be valid; (3) the rule only prohibits contracts which grant improper control of dental practices to nonlicensed entities; (4) the Board could exempt any management contract submitted for review from public record by reviewing the contract under N.C.G.S. § 90-41; and (5) the rule is not vague since it sets forth in some detail the types of contract provisions which grant improper control over a dentist practice and provides guidance for the Board's review.

3. Dentists; Constitutional Law— rule-making proceeding—dentistry management arrangements—procedural due process—notice and opportunity to be heard

The trial court did not err in an action seeking to invalidate administrative rule 21 NCAC 16X.0101(a) regarding the propriety of dentistry management arrangements by determining that defendant Board of Dental Examiners was entitled to judgment as a matter of law on the constitutional claim of procedural due process, because: (1) plaintiffs had ample notice of the rule-making proceedings and took advantage of various opportunities to be heard prior to the rule's adoption; and (2) defendants substantially complied with Administrative Procedure Act procedures in adopting the rule.

4. Dentists; Constitutional Law— rule-making proceeding—dentistry management arrangements—equal protection—rational basis

The trial court did not err in an action seeking to invalidate administrative rule 21 NCAC 16X.0101(a) regarding the propriety of dentistry management arrangements by determining that defendant Board of Dental Examiners was entitled to judgment as a matter of law on the constitutional claim of equal protection based on the alleged impermissible distinction between a dental service provider offering more than one service to a dentist (or bundled services) and those offering single services, because: (1) the rule does not distinguish between companies offering bundled services and single service providers; and (2)

any distinctions in the rule are rationally related to the rule's legitimate governmental interest.

5. Dentists— rule-making proceeding—dentistry management arrangements—motion to dismiss—failure to state claim

The trial court did not err in an action seeking to invalidate administrative rule 21 NCAC 16X.0101(a) regarding the propriety of dentistry management arrangements by dismissing plaintiff companies' claims against defendant Rules Review Commission based on plaintiffs' failure to state a claim for relief, because: (1) the rule does not violate plaintiffs' constitutional rights; and (2) neither defendant Board of Dental Examiners nor defendant Commission violated administrative law in proposing and adopting the rule.

Appeal by plaintiffs from orders entered 24 August 2001 and 4 September 2001 by Judge Orlando F. Hudson, Jr., in Wake County Superior Court. Heard in the Court of Appeals 9 September 2002.

Kilpatrick Stockton LLP, by Noah H. Huffstetler, III, Sharon L. McConnell, and Emily A. Moseley, for plaintiff-appellants.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Grady L. Balentine, Jr., for defendant-appellee North Carolina Rules Review Commission.

Ellis & Winters, LLP, by Richard W. Ellis and Paul K. Sun, Jr., for defendant-appellee North Carolina State Board of Dental Examiners.

MARTIN, Judge.

Affordable Care, Inc., American Dental Partners, Inc., American Dental Partners of North Carolina, Inc., Dental Care Partners, Inc., and Dental Health Management, Inc. ("plaintiffs") filed this action in the superior court challenging the validity of administrative Rule 21 NCAC 16X.0101, entitled "Management Arrangements Rule" (hereinafter "the Rule") proposed by the North Carolina State Board of Dental Examiners ("the Board") and adopted into law by the North Carolina Rules Review Commission ("the Commission") (collectively, "defendants"). Plaintiffs are companies which provide non-clinical business services to dental practices; they allege their businesses have been negatively impacted by the Rule, and that

the Rule is both unconstitutional and was adopted in violation of administrative law.

The Board, an administrative agency, has authority pursuant to the Dental Practice Act to regulate the practice of dentistry for the protection of public health, and to make regulations to enforce that objective. *See* N.C. Gen. Stat. § 90-22, *et seq.* (2001). The Commission reviews and, when appropriate, adopts rules and regulations proposed by administrative agencies such as the Board. On 1 June 2000, the Board published in the North Carolina Register notice of a rule-making proceeding involving the types of management arrangements into which dentists may enter. The text of the proposed Rule was published on 15 August 2000, along with notice of a public hearing. Some of plaintiffs submitted written comments on the Rule. Following a public hearing on 30 September 2000, the Board amended the Rule to narrow its scope, and thereafter submitted it to the Commission.

The Commission met to review the Rule on 16 November 2000. Plaintiffs attended the meeting and objected to the Rule, arguing that it would have a substantial economic impact. Accordingly, the Commission referred the Rule to the Office of State Budget, Planning and Management ("OSBPM") for a determination of the Rule's economic impact. Plaintiffs submitted affidavits to the OSBPM, attesting, among other things, to the fact that the Rule would cause them to lose their business. The OSBPM considered plaintiffs' materials and concluded the Rule would not have a substantial economic impact and, therefore, no fiscal note was required for the Rule pursuant to G.S. § 150B-21.4(b1).

The Commission conducted a hearing with respect to the Rule on 21 December 2000. Plaintiffs were represented at the hearing and argued, among other things, that a particular section of the Rule, section (f), was ambiguous. The Commission agreed with plaintiffs, and voted to approve the Rule as it appeared before them with section (f) deleted. Following the meeting, the Board deleted section (f) from the Rule. The Commission approved the Rule, and it was published in the North Carolina Register on 15 February 2001 and became effective 1 April 2001.

The Rule provides:

> No dentist or professional entity shall enter into a management arrangement, contractual agreement, stipulation, or other legal binding instrument with a business entity, corporation, propri-

> etorship, or other business entity, for the provision of defined business services, bundled business services, or other business services, the effect of which may provide control of business activities or clinical/professional services of that dentist or professional entity.

21 NCAC 16X.0101(a) (2002). The Rule exempts agreements "for the provision of legal, financial, or other services not related to the provision of management services for a fee or to employment arrangements between an employee and the dentist or professional entity." 21 NCAC 16X.0101(a) (2002). The Rule sets forth the types of agreement provisions which would provide improper control of a practice's business and which are prohibited. The Rule also provides that the Board will review management arrangements. 21 NCAC 16X.0101(b)(2) (2002).

Plaintiffs filed their complaint in this action on 3 April 2001 seeking to invalidate the Rule, alleging its substance and manner of adoption violated their due process and equal protection rights, and that defendants exceeded their statutory authority in proposing and adopting the Rule. The Commission, along with co-defendant Julian Mann, III, moved to dismiss the complaint under Rule 12(b)(6) of the Rules of Civil Procedure on 7 May 2001. The Board filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the Rules of Civil Procedure on 4 June 2001. Both motions were heard on 22 August 2001, after which the trial court entered an order dismissing Mann from the case, without objection from plaintiffs. On 24 August 2001, the trial court entered an order granting the Board's motion for judgment on the pleadings after finding plaintiffs had failed to exhaust all administrative remedies available to them with respect to their non-constitutional claims, and that no genuine issue of material fact existed as to plaintiffs' constitutional claims. The trial court entered a separate order on 4 September 2001 granting the Commission's motion to dismiss after finding plaintiffs had failed to state a claim for relief because the Commission had not violated its controlling statutes. Plaintiffs appeal from both orders. Plaintiff Dental Health Management Inc.'s "Motion to Withdraw from Further Participation in Appeal" was allowed on 21 May 2002.

Plaintiffs bring forward four assignments of error on appeal within the following arguments: (1) the trial court erred in finding plaintiffs failed to exhaust administrative remedies with respect to the non-constitutional claims and in granting the Board's motion on

these claims; (2) the trial court erred in determining the Board was entitled to judgment as a matter of law on the constitutional claims and in granting the Board's motion on these claims; and (3) the trial court erred in determining plaintiffs failed to state a claim for relief against the Commission and in granting the Commission's motion to dismiss. We address the arguments serially.

As a preliminary matter, plaintiffs maintain the trial court employed an incorrect standard of review in ruling upon both motions. Plaintiffs correctly note that in ruling upon motions under Rule 12(b)(6) and 12(c), the trial court must take the factual allegations of the complaint as true. The standard of review for a Rule 12(b)(6) motion 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.' " *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (citation omitted). The standard of review for a Rule 12(c) motion is whether the moving party has shown that no material issue of fact exists upon the pleadings and that he is clearly entitled to judgment. *Garrett v. Winfree*, 120 N.C. App. 689, 463 S.E.2d 411 (1995). In reviewing this motion, the trial court must take the allegations in the complaint as true and consider them in the light most favorable to the non-movant. *Id.*

Plaintiffs argue the trial court failed to follow these standards here because, if the court had taken all allegations as true, it would have agreed with plaintiffs that defendants exceeded their statutory authority and violated plaintiffs' rights. The argument, essentially that the trial court's failure to agree with plaintiffs' legal conclusions is conclusive evidence that the trial court did not take the allegations in the complaint as true, is illogical and we reject it. Though the trial court is obligated to take all of the allegations of the complaint as true in ruling upon the motion, it is elementary that the trial court must draw its own legal conclusions from those facts, and that it may draw conclusions which may differ from those advocated by plaintiffs.

I.

[1] Plaintiffs first argue the trial court erred in granting the Board's motion for judgment on the pleadings with respect to the non-constitutional claims for plaintiffs' failure to first exhaust all available administrative remedies. We disagree. " '[W]here 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.' " *Shell Island Homeowners Ass'n, Inc. v. Tomlinson*, 134 N.C. App. 217, 220-21, 517 S.E.2d 406, 410 (1999) (citation omitted). In order to seek judicial review of an adverse administrative action, the party must establish that "(1) the party is an aggrieved party; (2) there is a contested case; (3) there has been a final agency decision; (4) all administrative remedies have been exhausted; and (5) no other adequate procedure for judicial review is provided by another statute." *Id.* at 221, 517 S.E.2d at 410.

Defendants contend plaintiffs failed to exhaust all possible remedies under the Administrative Procedure Act ("APA"), G.S. § 150B-1 *et seq.*, because plaintiffs failed to seek relief under G.S. § 150B-4 and G.S. § 150B-20 prior to filing the complaint. G.S. § 150B-4 provides plaintiffs the right to seek a declaratory ruling as to the validity of the Rule and as to its applicability to a given state of facts. N.C. Gen. Stat. § 150B-4(a) (2001). The ruling would be binding on the agency and plaintiffs unless altered or set aside by a court, and any ruling would be subject to judicial review in the same manner as an order in a contested case. N.C. Gen. Stat. § 150B-4(a) (2001). G.S. § 150B-20 provides plaintiffs with the right to petition for amendment or change to the Rule. N.C. Gen. Stat. § 150B-20(a) (2001). Plaintiffs took neither of these actions prior to filing their complaint.

Plaintiffs argue they were not required to avail themselves of these remedies following a 1995 amendment to the APA. Plaintiffs maintain that prior to the amendment, Commission decisions were not final and binding, and therefore, it was worthwhile for a party to seek an amendment or change a rule. However, plaintiffs contend that because the 1995 amendment made Commission decisions final and binding absent action by the General Assembly to disapprove a rule, G.S. § 150B-4 and G.S. § 150B-20 "are no longer the avenues for administrative relief."

However, nothing in the statutes or our case law suggests these remedies are no longer available or worthwhile. In fact, since the 1995 amendment, this Court has held that a party failed to exhaust administrative remedies where the party failed to seek various forms of administrative relief, including the right to petition for a declaratory ruling under G.S. § 150B-4. *See Shell Island Homeowners Ass'n*, 134 N.C. App. at 222, 517 S.E.2d at 411. Moreover, our Supreme Court has recognized since 1995 a party's ability to petition the Commission for adoption or amendment of a rule pursuant to G.S. § 150B-20. *See ACT-UP Triangle v. Commission for Health Services of the State of N.C.*, 345 N.C. 699, 483 S.E.2d 388 (1997); *see also Beneficial North*

Carolina, Inc. v. State ex rel. North Carolina State Banking Com'n, 126 N.C. App. 117, 484 S.E.2d 808 (1997).

Plaintiffs additionally argue they were not required to seek relief under G.S. § 150B-4 and G.S. § 150B-20 because those remedies would be futile and inadequate. Plaintiffs support this argument by alleging the Board already demonstrated its position with respect to the Rule and to plaintiffs' concerns, and thus, it would be futile to seek relief from the same agency that had just rejected plaintiffs' claims. It is true that a party need not exhaust an administrative remedy where the remedy is inadequate. *Shell Island Homeowners Ass'n*, 134 N.C. App. at 222, 517 S.E.2d at 411. However, futility cannot be established by plaintiffs' prediction or anticipation that the Commission would again rule adversely to plaintiffs' interests. *See id.* at 223, 517 S.E.2d at 411-12. In any event, " '[t]he burden of showing the inadequacy of the administrative remedy is on the party claiming the inadequacy, and the party making such a claim must include such allegation in the complaint.' " *Swain v. Elfland*, 145 N.C. App. 383, 390, 550 S.E.2d 530, 535 (citation omitted), *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001); *see also Bryant v. Hogarth*, 127 N.C. App. 79, 86, 488 S.E.2d 269, 273 ("[w]hile exhaustion of administrative remedies prior to seeking judicial review may not be required in exceptional circumstances . . . allegations of the facts justifying avoidance of the administrative process must be pled in the complaint"), *disc. review denied*, 347 N.C. 396, 494 S.E.2d 406 (1997).

In this case, the complaint merely alleges plaintiffs exhausted all administrative remedies by submitting comments on the proposed Rule and appearing before the Commission in opposition to the Rule. Plaintiffs did not allege futility in the complaint, nor other facts justifying avoidance of the administrative process. We agree with the trial court that plaintiffs failed to carry their burden of establishing exhaustion of all available administrative remedies.

By amendment to the record on appeal, plaintiffs have shown that, on 18 January 2002, they filed requests for a declaratory ruling from the Board pursuant to G.S. § 150B-4. However, these requests were filed after the trial court dismissed plaintiffs' complaint, and thus, were not before the trial court when it considered defendants' motions. Therefore, in assessing whether the trial court erred, we may not consider for the first time on appeal the fact that plaintiffs sought relief under G.S. § 150B-4, as that fact was not considered by the trial court. In any event, the record as amended still fails to show

that plaintiffs availed themselves of the remedy available under G.S. § 150B-20. The trial court did not err in granting the Board's motion for judgment on the pleadings with respect to plaintiffs' non-constitutional claims.

II.

Plaintiffs next argue the trial court erred in its determination that the Board was entitled to judgment as a matter of law on plaintiff's constitutional claims and in granting the Board's motion with respect to those claims. "Where an aggrieved party challenges the constitutionality of a regulation or statute, administrative remedies are deemed to be inadequate and exhaustion thereof is not required." *Shell Island Homeowners Ass'n*, 134 N.C. App. at 224, 517 S.E.2d at 412. Plaintiffs assert the Rule violates their rights to substantive due process, that defendants violated their procedural due process rights, and that the Rule violates their right to equal protection of the law. Again, we disagree.

A. Substantive Due Process

[2] Plaintiffs first argue the Rule violates their substantive due process rights because (1) the Rule bears no relation to a legitimate government interest; (2) the means to effectuate the Rule's policy are not reasonable; and (3) the Rule is impermissibly vague. For these reasons, plaintiffs maintain the Rule violates article I, section 19 of the North Carolina Constitution, the "Law of the Land" clause, providing that "[n]o person shall be . . . in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19.

Not every deprivation of liberty or property constitutes a violation of substantive due process granted under article I, section 19. *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 562 S.E.2d 82 (2002). Generally, any such deprivation is only unconstitutional where the challenged law bears no rational relation to a valid state objective. *Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590 (2000), *appeal dismissed as improvidently allowed*, 355 N.C. 205, 558 S.E.2d 174 (2002). In order to determine whether a law violates substantive due process, we must first determine whether the right infringed upon is a fundamental right. *Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 542 S.E.2d 668, *disc. review denied*, 353 N.C. 450, 548 S.E.2d 524 (2001). If the right is constitutionally fundamental, then the court must apply a strict scrutiny analysis wherein the party seeking to apply the law must demonstrate that it serves a compelling state

interest. *Id.* at 357, 542 S.E.2d at 673. If the right infringed upon is not fundamental in the constitutional sense, the party seeking to apply it need only meet the traditional test of establishing that the law is rationally related to a legitimate state interest. *Id.* at 357-58, 542 S.E.2d at 673. In other words, the law will survive this test "if it bears 'some rational relationship to a conceivable legitimate interest of government.' " *Id.* at 358, 542 S.E.2d at 674 (citation omitted). Under this "rational relation" test, the law in question is presumed to be constitutional. *Id.*

In the present case, plaintiffs do not argue that any fundamental right has been infringed, and they appear to concede in this argument that defendants need only show the Rule bears a rational relation to a legitimate governmental interest. Interestingly, however, in their subsequent equal protection argument, plaintiffs do assert the Rule violates their fundamental right to engage in lawful business activities, thereby warranting a strict scrutiny equal protection analysis. We therefore address whether the right upon which the Rule allegedly infringes (i.e., plaintiffs' right to engage in business with dentists) is a fundamental right which requires defendants to show the Rule serves a compelling state interest. We conclude it is not.

In arguing a fundamental right is affected for purposes of equal protection, plaintiffs rely on our Supreme Court's decision in *In re Certificate of Need for Aston Park Hospital, Inc.*, 282 N.C. 542, 193 S.E.2d 729 (1973). In that case, the court invalidated a law granting the North Carolina Medical Care Commission the ability to prevent construction of a hospital with private funds and on private property which met all necessary hospital standards, for the sole reason that the area already maintained enough hospital beds sufficient to meet the needs of the community. *Id.* at 548, 193 S.E.2d at 733. The court determined due process would not allow the law to prevent the hospital from engaging in the business of caring for the sick because the law bore no rational relation between the public health and the denial of an entity's right to construct and operate with its own funds an otherwise lawful medical facility. *Id.* at 551, 193 S.E.2d at 735. It is clear from the opinion that, in so holding, the Supreme Court applied the rational relation test, not strict scrutiny.

Indeed, the *Aston Park* decision contains no authority for the proposition that a regulation affecting one's ability to engage in otherwise lawful business or other economic regulation is subject to strict scrutiny. To the contrary, the case establishes the appropriate analysis is the rational relation test. While the court did observe that,

"[t]o deny a person, association or corporation the right to engage in a business, otherwise lawful, is a far greater restriction upon his or its liberty than to deny the right to charge in that business whatever prices the owner sees fit to charge for service," it determined the only consequence of this fact is that the party seeking to apply the law must show a greater likelihood of public benefit. *Id.* at 550, 193 S.E.2d at 735. Nevertheless, the court applied the rational relation test.

The courts of this State have more recently emphasized that economic rules and regulations do not affect a fundamental right for purposes of due process and equal protection. *See, e.g., State ex rel. Utilities Com'n v. Carolina Utility Customers Ass'n, Inc.*, 336 N.C. 657, 446 S.E.2d 332 (1994); *Town of Beech Mountain v. County of Watauga*, 324 N.C. 409, 378 S.E.2d 780, *cert. denied*, 493 U.S. 954, 107 L. Ed. 2d 351 (1989); *Clark v. Sanger Clinic, P.A.*, 142 N.C. App. 350, 542 S.E.2d 668 (2001); *Matter of Consolidated Appeals of Certain Timber Companies from Denial of Use Value Assessment and Taxation by Certain Counties*, 98 N.C. App. 412, 391 S.E.2d 503 (1990). This Court has observed that "the Supreme Court's reluctance to invalidate economic legislation suggests that the right to engage in legitimate business is not 'fundamental' for purposes of federal due process analysis." *Treants Enterprises, Inc. v. Onslow County*, 83 N.C. App. 345, 352, 350 S.E.2d 365, 370 (1986), *affirmed*, 320 N.C. 776, 360 S.E.2d 783 (1987).

Plaintiffs have cited no authority establishing that an economic regulation, such as one affecting the right to engage in business, affects a fundamental right or has been subjected to strict scrutiny by our courts; nor have plaintiffs argued the Rule is not an economic regulation. Relying on the authorities cited above, we hold the Rule is not subject to strict scrutiny for purposes of substantive due process or equal protection. Therefore, for purposes of due process, the Rule must be upheld if it is rationally related to a legitimate governmental interest, and in so assessing, we must presume the Rule's validity. *See Clark*, 142 N.C. App. at 358, 542 S.E.2d at 674.

1. Legitimate Governmental Interest

We agree with defendants that the Rule's purpose is to protect the public health and welfare with respect to the practice of dentistry, and that this purpose is a legitimate governmental interest. Plaintiffs argue the administrative record does not contain any reference to public health or to the Board's purpose in promulgating the Rule, and that defendants cannot now, following the commencement of litiga-

tion, assert the Rule's purpose is to protect public health and welfare. Plaintiffs cite to various pages of transcript from the 21 December 2000 Commission meeting to support their position that the Board did not promulgate the Rule to protect public health. However, those pages reveal that the Board's representative clearly stated before the Commission that the purpose of the Rule was to effectuate the mandate of the Dental Practice Act and the position of the Attorney General that the corporate management of dental practices is prohibited because it "endangers the public." The Board stated its position that the Rule is "to protect the public's health, safety and welfare," because when corporations which are unlicensed to practice dentistry gain improper control over dental practices, "the concern is that patient care becomes secondary to profits." In fact, plaintiffs' representative stated before the Commission that plaintiffs "agree with the public purpose for the[] rule[], which is clearly to make sure that there's high quality, cost effective dental care." Thus, we disagree with plaintiffs' assertion that the Board was silent as to the purpose of the Rule until the commencement of this action.

The first paragraph of the Rule clearly states that its purpose is to prohibit management arrangements which provide improper control over the clinical or professional services of a dentist to a business entity. The Dental Practice Act establishes this to be a legitimate governmental purpose inasmuch as it declares that "the practice of dentistry . . . affect[s] the public health, safety and welfare," and as such, is "subject to regulation and control in the public interest." N.C. Gen. Stat. § 90-22(a) (2001). The Act defines "the practice of dentistry" as occurring when one "[o]wns, manages, supervises, controls or conducts" various dental acts, and it prohibits the practice by unlicensed persons. N.C. Gen. Stat. §§ 90-29(b)(11), 90-40 (2001). Our Supreme Court has recognized that a rule's implementation of a purpose set forth by the General Assembly constitutes a legitimate governmental objective. *See In re North Carolina Pesticide Bd. File Nos. IR94-128, IR94-151, IR94-155*, 349 N.C. 656, 509 S.E.2d 165 (1998). We hold the Rule has a legitimate governmental purpose.

2. Rational Means

Plaintiffs contend that even if the Rule furthers a legitimate purpose, the means it provides to effectuate that purpose are not rational and the burden outweighs any public benefit. Specifically, they argue the Rule's provision requiring Board review of all management contracts places a significant burden on both companies and dentists, and that the Rule provides no meaningful time-frame or standards for

review. In addition, plaintiffs argue that when they submit contracts to the Board for review, confidential business information will become public record.

These challenges to the Rule are facial challenges, as plaintiffs do not assert the Rule has actually been applied unconstitutionally to them. Our Supreme Court has recognized that a facial challenge to a law is " 'the most difficult challenge to mount successfully.' " *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 281 (1998) (quoting *United States v. Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 707 (1987)). In a facial challenge, the presumption is that the law is constitutional, and a court may not strike it down if it may be upheld on any reasonable ground. *Id.* at 491, 508 S.E.2d at 281-82. "An individual challenging the facial constitutionality of a legislative act 'must establish that no set of circumstances exists under which the [a]ct would be valid.' " *Id.* at 491, 508 S.E.2d at 282 (citation omitted). "The fact that a statute 'might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.' " *Id.* (citation omitted).

Plaintiffs argue the Rule is unconstitutional because it would be unduly burdensome and fails to provide a time-frame for Board review of contracts. Under this facial challenge, we cannot agree that there is no set of circumstances under which the Rule would be valid. The Rule was changed from requiring Board approval of all contracts to simply requiring Board review of all contracts, and thus, companies like plaintiffs are not delayed in entering agreements with dentists. In a 22 March 2002 declaratory ruling issued subsequent to the dismissal of plaintiffs' complaint, the Board notes management companies are not required to terminate their agreements or modify their terms while the agreement is being reviewed by the Board, and that the Dental Practice Act will only be enforced against a management company or dentist when the Board has affirmatively ruled that an agreement violates the Rule and the parties thereafter refuse to modify its terms to comply with the Rule.

Moreover, although plaintiffs assert the Rule effectively precludes them from engaging in business, the Rule only prohibits contracts which grant improper control of dental practices to non-licensed entities. Plaintiffs are otherwise free to contract with dentists in any other legal manner. Defendants argue, and we agree, that Board review of contracts is not an unreasonable means to effectuate the Board's legitimate governmental interest. Rules requiring agency review of contracts are not extraordinary. *See, e.g.*, 4 NCAC

3C.0110 (2002); 11 NCAC 20.0204 (2002); 11 NCAC 13.0512 (2001). Neither does the absence of a time-frame for review necessarily invalidate the Rule. The Rule could be applied constitutionally where Board review does not involve undue delay or otherwise significantly impede the operation of contracts within a reasonable time-frame.

Moreover, in regard to plaintiffs' concern that contracts would become public record when submitted for Board review, it is conceivable the Board could exempt any management contract submitted for review from public record by reviewing the contract under G.S. § 90-41. Under that statute, all "[r]ecords, papers, and other documents containing information collected or compiled by the Board . . . as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter, shall not be considered public records . . . ." N.C. Gen. Stat. § 90-41(g) (2001). G.S. § 90-41 grants the Board authority to take action when a dentist has engaged in any act or practice which violates any rules promulgated by the Board, which necessarily includes the Rule at issue in this case, or has assisted another entity in violation of Board rules. N.C. Gen. Stat. § 90-41(a)(6). Board review of management contracts to determine whether they give improper control of a dentist's practice to a non-licensed management service provider could constitute an investigation or inquiry into whether a dentist has violated the Rule. Under G.S. § 90-41(g), anything collected in connection with such an inquiry would not be public record, even though the Board may determine that no violation occurred. Indeed, in its 22 March 2002 declaratory ruling, the Board ruled that agreements under review will not be public record, as G.S. § 90-41(g) applies to Board review of agreements.

3. Vagueness

In their final substantive due process argument, plaintiffs contend the Rule is unconstitutionally vague. "The test for 'vagueness' recognized by our Supreme Court holds that 'a statute is unconstitutionally vague if it either: (1) fails to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited"; or (2) fails to "provide explicit standards for those who apply [the law]." ' " *State v. Sanford Video & News, Inc.*, 146 N.C. App. 554, 556, 553 S.E.2d 217, 218 (2001) (citations omitted), *disc. review denied*, 355 N.C. 221, 560 S.E.2d 359 (2002). Plaintiffs argue the Rule is vague because it fails to specifically state what types of arrangements are prohibited and fails to provide the Board with specific standards for enforcement.

Upon review of the Rule's provisions, we disagree. The Rule sets forth in some detail the types of contract provisions which grant improper control over a dental practice. We believe its provisions are specific enough to give dentists and companies like plaintiffs a reasonable understanding of what is prohibited by the Rule. Moreover, we cannot agree with plaintiffs' position that the Rule provides the Board no guidance for its enforcement. The same provisions that provide plaintiffs a reasonable opportunity to know what is prohibited also guide the Board in its review. Under this facial challenge, we must presume the Board will follow the Rule and adjudicate the legality of the contracts based on the Rule's specific provisions as to what is prohibited. *See Thompson*, 349 N.C. at 491, 508 S.E.2d at 281-82. These arguments are overruled.

B. Procedural Due Process

[3] Plaintiffs next argue defendants violated their procedural due process rights in proposing and adopting the Rule by (1) failing to provide plaintiffs notice and an opportunity to be heard and failing to follow APA procedures in this regard; and (2) exceeding their statutory authority.

The basic premise of procedural due process protection is notice and the opportunity to be heard in a meaningful manner. *Summers v. City of Charlotte*, 149 N.C. App. 509, 562 S.E.2d 18, *disc. review denied*, 355 N.C. 758, 566 S.E.2d 482 (2002). Plaintiffs argue they were deprived of both notice and an opportunity to be heard during the rule-making process. However, the record establishes that plaintiffs received notice of the initial rule-making proceedings on 1 June 2000; that they received notice of the actual text of the proposed Rule on 15 August 2000; that on the same date, plaintiffs received notice of a public hearing on the proposed Rule; that prior to the hearing, plaintiffs submitted comments to the Board regarding the proposed Rule; that at the 30 September 2000 public hearing, the Board considered plaintiffs' comments, and in light thereof, referred the proposed Rule to its staff for review and revision; that plaintiffs submitted affidavits regarding the Rule's economic impact which were considered by the Commission and OSBPM; that plaintiffs were represented and had the opportunity to argue before the Commission during a 16 November 2000 meeting regarding the Rule; and that plaintiffs appeared in opposition to the Rule at the final 21 December 2000 meeting of the Commission following which the Rule was approved. Indeed, on more than one occasion, defendants altered or amended

the Rule in response to plaintiffs' comments and objections. Plaintiffs had notice and opportunities to be heard sufficient to comport with due process.

Plaintiffs also argue their due process rights were violated because defendants failed to comply with APA procedures in promulgating the Rule. Plaintiffs first contend the Board violated APA procedure when it failed to republish the text of the proposed Rule after making changes following its 30 September 2000 meeting. Following that meeting, at which the Board considered plaintiffs' comments, the Board amended the proposed Rule to clarify its scope, and thereafter submitted the Rule to the Commission for review. Plaintiffs contend the Board's failure to republish the Rule in the North Carolina Register following these changes was a violation of G.S. § 150B-21.2(g), providing that "[a]n agency shall not adopt a rule that differs substantially from the text of the proposed rule published in the North Carolina Register unless the agency publishes the text of the proposed different rule in the North Carolina Register and accepts comments on the proposed different rule . . . ." N.C. Gen. Stat. § 150B-21.2(g) (2001).

However, republication is only required where the changed rule differs "substantially" from the original proposed rule. A substantial change is one that either (1) affects the interests of persons who could not reasonably have determined that the rule would affect their interests based on notice and publication in the North Carolina Register; (2) addresses a new subject matter; or (3) produces an effect that could not reasonably have been expected based on the text of the original proposed rule. N.C. Gen. Stat. § 150B-21.2(g)(1),(2),(3) (2001). Defendants assert, and we agree, that the changes to the Rule following its initial publication in the North Carolina Register, while narrowing the Rule's scope, were not substantial within the meaning of G.S. § 150B-21.2(g), and therefore, republication was not required.

Following its initial publication, the Board amended the Rule to (1) exempt the provision of legal, financial, or other services unrelated to the provision of management services, (2) insert section (f), which addressed the granting of *de facto* control of a dental practice to a management company, (3) change the requirement that the Board approve all contracts to a requirement that the Board simply review all contracts, and (4) eliminate the requirement that contracts be commercially reasonable. The Rule also contained various inconsequential alterations. The addition of section (f) is a non-issue, as that

section was later deleted. As to the remaining changes, we do not believe they either (1) affected the interests of persons who could not have reasonably determined so based on the prior publication, (2) addressed a new subject matter, or (3) produced an effect not reasonably to be expected based on the initial proposed Rule. Rather, the changes simply clarified and narrowed the scope of the Rule. Accordingly, republication was not required.

Plaintiffs also argue the Commission violated APA procedure when it voted to adopt the Rule with section (f) deleted without first sending a written objection to the proposed Rule containing section (f) to the Board. Plaintiffs observe this is a violation of G.S. § 150B-21.12(a), which provides that when the Commission objects to a proposed rule, the Commission must "send the agency that adopted the rule a written statement of the objection and the reason for the objection." N.C. Gen. Stat. § 150B-21.12(a) (2001). While we agree with plaintiffs that, technically, the APA requires the Commission to send a written notice of objection to the Board, we do not believe its failure to do so here amounted to a violation of plaintiffs' procedural due process rights. The Commission had before it the full text of the Rule which it approved and was clear in stating to plaintiffs and the Board that it would approve the Rule so long as section (f) was deleted, in accordance with plaintiffs' request. The purpose of G.S. § 150B-21.12(a), to ensure the Board is clear as to the Commission's objection, was served. A Rule is valid so long as it is adopted "in substantial compliance" with APA procedures. N.C. Gen. Stat. § 150B-18 (2001). The Commission substantially complied with APA procedures in adopting the Rule, and to the extent it deviated slightly from proscribed procedures, plaintiffs' due process rights were not violated.

Plaintiffs additionally maintain defendants exceeded their statutory authority in adopting the Rule. Specifically, they argue defendants had no authority to promulgate the Rule because it had no bearing on public health and welfare, and because only the legislature has authority to regulate management contracts in the manner accomplished by the Rule. We have already determined the Rule embodies a legitimate governmental purpose of protecting the public health and welfare, and we thus reject plaintiffs' argument on that basis.

Moreover, the legislature has clearly granted the Board the "full power and authority to enact rules and regulations governing the practice of dentistry within the State," and to effectuate the purpose

of the Dental Practice Act of regulating dentistry for the protection of public health and welfare. N.C. Gen. Stat. §§ 90-48, 90-22(a) (2001). The legislature has prohibited unlicensed persons or entities from practicing dentistry in this State, and defines the practice of dentistry as occurring when an entity "[o]wns, manages, supervises, controls or conducts" dental procedures. N.C. Gen. Stat. § 90-29(b)(11) (2001). Thus, the legislature has explicitly granted the Board authority to promulgate regulations ensuring that companies such as plaintiffs do not exert improper control or supervision over dental practices. Moreover, "[i]n addition to express powers, administrative agencies have implied powers reasonably necessary for the proper execution of their express purposes." *In re Declaratory Ruling by North Carolina Com'r of Ins. Regarding 11 NCAC 12.0319*, 134 N.C. App. 22, 26, 517 S.E.2d 134, 138, (citations omitted), *disc. review denied*, 351 N.C. 105, 540 S.E.2d 356 (1999). The legislature declared in G.S. § 90-22(b) that the Board's purpose is to regulate the practice of dentistry in this State. The Board's promulgation of the Rule did not exceed its statutory authority.

In summary, defendants substantially complied with APA procedures in adopting the Rule, and plaintiffs had ample notice of the rule-making proceedings and took advantage of various opportunities to be heard prior to the Rule's adoption. We discern no violation of plaintiffs' due process rights.

C. Equal Protection

[4] Finally, plaintiffs argue the Rule violates their right to equal protection of the laws because it impermissibly distinguishes between a dental service provider offering more than one service to a dentist, or "bundled" services, and those offering single services. The Equal Protection Clause prohibits the State from denying any person equal protection of the laws. N.C. Const. art. I, § 19.

"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." *Transylvania County v. Moody*, 151 N.C. App. 389, 397, 565 S.E.2d 720, 726 (2002). "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.* We have already held there is no fundamental right at issue in this case, and plaintiffs do not assert they are a suspect class. Thus, any distinction in the Rule must simply bear a rational relation-

ship to its legitimate interest in ensuring only licensed dentists assert control over their dental practices.

Defendants argue, and we agree, that the Rule does not distinguish between companies offering "bundled" services and single service providers, as the first paragraph of the Rule declares that it applies to "the provision of defined business services, bundled business services, or other business services" which effectively provide control of the practice to the provider. The Rule does not exempt single service providers if the effect of the service is to convey control of the practice to the provider. To the extent the Rule exempts providers of legal, financial, or other services not related to the provision of management services, this distinction rationally relates to the purpose of the Rule, as a provider of these types of services does not possess the same potential to exert improper control over a dental practice as do companies providing management services. We conclude any distinctions are, in fact, rationally related to the Rule's legitimate governmental interest. Accordingly, the Rule does not violate plaintiffs' equal protection rights.

III.

[5] Plaintiffs also argue the trial court erred in dismissing its claims against the Commission for its failure to state a claim for relief. Having held the Rule does not violate plaintiffs' constitutional rights, and having held that neither the Board nor the Commission violated administrative law in proposing and adopting the Rule, we conclude the trial court did not err in granting both motions and in dismissing plaintiffs' complaint. The orders of the trial court are therefore affirmed.

Affirmed.

Chief Judge EAGLES and Judge TIMMONS-GOODSON concur.

STATE OF NORTH CAROLINA v. JOHN BLAINE O'HANLAN

No. COA01-1227

(Filed 5 November 2002)

1. Indictment and Information— short-form indictment—rape, sexual offense

Short form indictments for first-degree rape and first-degree sexual offense, and first-degree kidnapping are constitutional.

2. Evidence— sexual assault—emergency room physician's testimony—victim's emotional state

There was no plain error in a prosecution for first-degree rape, first-degree sexual offense, and first-degree kidnapping in the admission of an emergency room physician's opinion testimony that the victim's emotional state was consistent with sexual assault and that a sexual assault had actually occurred because the challenged testimony summarized the pattern of injuries and constituted a medical conclusion which the witness was qualified to render.

3. Evidence— sexual assault—emergency room physician's testimony—credibility of victim

An emergency room physician's opinion testimony that the victim's emotional state was consistent with someone who had been sexually assaulted and that a sexual assault had occurred did not improperly bolster the credibility of the victim so as to constitute plain error in a rape and sexual offense prosecution. The treating physician is permitted to give the background reasons for his diagnosis and he was never asked whether he believed the victim was sincere.

4. Evidence— sexual assault—emergency room physician's opinion

There was no plain error in a prosecution for first-degree rape, first-degree sexual offense, and first-degree kidnapping where an emergency room physician who had assumed care after a shift change testified that the victim had been sexually assaulted where the doctor's opinion was based on her expertise in treating sexually abused patients, the victim's emotional state in the emergency room, the victim's physical appearance, and what the victim had said during the course of treatment.

5. Evidence— kidnapping and rape—emergency room doctor's characterization

There was no plain error where an emergency room doctor testified that a patient was kidnapped and raped. Even though the testimony was improper because the legal meanings of "rape" and "kidnapping" are outside the doctor's area of expertise, the trial court gave a limiting instruction and there was overwhelming evidence of defendant's guilt.

6. Evidence— rape victim—defendant's arrest—emergency room reassurances of safety

There was no prejudicial error in a prosecution for first-degree rape, first-degree sexual offense, and first-degree kidnapping in the admission of testimony that an emergency room doctor had told the victim that she was safe, and that "this person" was behind bars. The doctor did not identify defendant as being in custody, made a generalized statement to reassure the victim as a part of her treatment, and there was other testimony, admitted without objection, that a detective told the victim that defendant was in jail.

7. Evidence— sexual assault—importance of psychiatric history

There was no error in a prosecution for first-degree rape, first-degree sexual offense, and first-degree kidnapping in the admission of an emergency room doctor's testimony that a victim's psychiatric history is important to her recovery. The testimony was general and helpful to the jury in that it showed the type of information upon which the doctor relied in forming her opinions.

8. Evidence— sexual assault and kidnapping—victim's PTSD diagnosis—opening door

Although it was error to admit a sexual assault and kidnapping victim's Post Traumatic Stress Disorder diagnosis substantively without a limiting instruction, defendant opened the door by raising the inference that the victim was unstable prior to the assault.

9. Evidence— extent of investigation—cross-examination—identification of defendant by victim

There was no error in a prosecution for first-degree rape, first-degree sexual offense, and first-degree kidnapping in the admission of cross-examination testimony from a detec-

tive that he had not done more scientific testing of evidence because the victim had survived the attack and identified her attacker.

10. Rape— first-degree—instructions—serious injury

There was no plain error in a first-degree rape prosecution where the judge instructed the jury that a conviction required a finding of "personal injury" rather than "serious personal injury." In context, the error had no probable impact because there was specific testimony about the victim's injuries and the court included serious injury in its instructions on the elements of first-degree rape.

11. Constitutional Law— effective assistance of counsel—failure to object

A sexual assault and kidnapping defendant did not suffer ineffective assistance of counsel from his counsel's failure to object at certain points during the trial, given the overwhelming evidence of defendant's guilt.

Appeal by defendant from judgment entered 11 April 2000 by Judge Zoro J. Guice, Jr., in Swain County Superior Court. Heard in the Court of Appeals 12 June 2002.

Attorney General Roy Cooper, by Assistant Attorney General Amy C. Kunstling, for the State.

David G. Belser for defendant appellant.

McCULLOUGH, Judge.

The Swain County Grand Jury indicted defendant John Blaine O'Hanlan on 7 February 2000 for first-degree kidnapping, two counts of first-degree rape, three counts of first-degree sexual offense, assault with a deadly weapon inflicting serious injury, and felonious larceny. Defendant was tried on these charges at the 3 April 2000 Criminal Session of Swain County Superior Court before a jury and the Honorable Zoro J. Guice, Jr. The jury found defendant guilty of all charges. Defendant was sentenced to a minimum of 288 months and a maximum of 355 months for each first-degree sex offense charge, a minimum of 29 months and a maximum of 44 months for the consolidated assault and larceny charges, a minimum of 100 months and a maximum of 129 months for the first-degree kidnapping conviction, and a minimum of 288 months and a maximum of 355 months in

prison for each of the first-degree rape convictions, all sentences to run consecutively. Defendant appeals.

At trial, the State presented evidence as follows: The victim lived and worked as a waitress at the Nantahala Outdoor Center in 1999, in the Mashburn's Housing Complex, which is comprised of five cabins in a wooded area near Wesser Creek. Each cabin is divided into three or four private rooms.

Defendant, who went by the name of "Jack" or "Jack O," worked as a cook at River's End Restaurant at the Nantahala Outdoor Center. He lived in the same cabin as the victim in an adjacent room.

The victim had planned to leave the Center on 5 November 1999 to return to Asheville and had told several people of her plans to do so. Around 11:00 a.m. on that day, the victim had her belongings on the cabin porch ready to be loaded into her Jeep. She asked defendant to watch her belongings while she was gone, and defendant agreed to do so. When she returned, defendant insisted on helping her load her belongings into her Jeep. After loading the Jeep, the victim returned to the cabin to do some final cleaning. As she carried out the trash and recycling, she felt a hard blow to the head from behind. She turned around and saw defendant holding a sock full of rocks. She asked defendant what he was doing, to which he responded by telling her to shut up and hitting her on the head with the sock again. Defendant pushed her to the ground, got on top of her, and began choking her. After struggling with the victim, defendant tied her hands and legs together with duct tape and shoved her into her Jeep. According to the victim, defendant informed her that he would kill her and anyone who came to her aid if she screamed.

Defendant drove the victim's Jeep into the middle of the woods and stopped. Defendant untaped her, took off her jeans, and then kissed her face and rubbed her body. Defendant performed oral sex on her, becoming angry when she did not have an orgasm. Defendant then got on top of her and penetrated her vagina with his penis. He finally stopped and went to the Jeep, where he retrieved the victim's toothbrush and inserted it into her rectum.

Later, defendant moved the Jeep into another location. Defendant penetrated her vagina again with his penis but had troubling maintaining an erection. He became more angry and brutal. At one point, defendant paused, retrieved some bath gel, and anally raped her.

When defendant finished, he taped her arms and legs again, put a gag in her mouth, covered her eyes with duct tape, and put her in the backseat with her belongings. Defendant left her there and told her not to escape. However, the victim did manage to escape while defendant was gone and ran down a nearby trail through the woods. She eventually reached the home of the Evans family at about 8:45 a.m. on 6 November 1999.

Chief Deputy Jackie Fortner of the Swain County Sheriff's Department was summoned to the Evans' home. The victim told Fortner that "Jack O" had kidnapped and raped her. She was then transported by ambulance to the Swain County Emergency Room.

Deputy Fortner arrested defendant at his place of work on the morning of 6 November 1999. At the time of his arrest, defendant had multiple cuts and scrapes on his arms and hands, his knuckles were red and dirty, his knees were skinned, and he had a scratch on his left shoulder. Deputy Fortner recovered the victim's watch which she had lost during the assault and a piece of duct tape from the person of defendant. Deputy Fortner also recovered various items of physical evidence, such as the Jeep and the items inside of it.

Defendant assigns forty-six errors on appeal. He mentions only thirteen assignments of error in his brief. The assignments of error not mentioned in his brief are deemed abandoned according to N.C.R. App. P. 28(b)(5) (2002). Defendant's remaining 13 assignments of error are grouped into four main arguments in his brief.

Defendant argues on appeal that (I) the short form indictments for first-degree rape and first-degree sexual offense failed to allege the elements of each offense sufficiently to charge defendant with these crimes and should be held unconstitutional; (II) the trial court committed reversible error when it admitted for substantive purposes the testimony of Dr. Patrick Hanaway, Dr. Lisa Lichtig and Detective Jack Fortner that the victim had been sexually assaulted, kidnapped, and raped; (III) the trial court committed plain error when it instructed the jury that the State need only establish "personal injury" for a first-degree rape conviction; and (IV) defendant's convictions should be vacated as a result of the ineffective assistance of trial counsel. For the reasons set forth we find no error.

I.

[1] In his first assignment of error, defendant argues that the trial court erred in allowing the short form indictments for first-degree

rape and first-degree sexual offense as they failed to allege the elements of each offense sufficiently to charge defendant with these crimes and contends the short form indictments should be held unconstitutional. Defendant recognizes that the North Carolina Supreme Court has upheld the short form as constitutional. *See State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). Defendant urges this Court to reconsider such holdings. Our Court has previously addressed this matter as it pertained to N.C. Gen. Stat. § 15-144.1 (2001) for rape and N.C. Gen. Stat. § 15-144.2 (2001) for sexual offense and upheld the short form. *See State v. Harris*, 140 N.C. App. 208, 215-16, 535 S.E.2d 614, 619, *appeal dismissed, disc. review denied*, 353 N.C. 271, 546 S.E.2d 122 (2000). We find nothing in our previous cases or in defendant's argument that persuades us the short form indictments for rape or sexual offense are invalid or unconstitutional. Accordingly, defendant's assignment of error is overruled.

II.

In his second assignment of error, defendant argues that the trial court committed reversible error when it admitted the testimony of Dr. Patrick Hanaway, Dr. Lisa Lichtig, and Detective Jack Fortner that the victim had been sexually assaulted, kidnapped, and raped. We disagree.

The rule governing testimony by experts is N.C. Gen. Stat. § 8C-1, Rule 702 (2001). Rule 702 states that "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion." *Id.* "The subject matter of the expert testimony must merely be such that it would be helpful to the fact finder." *State v. Crawford*, 329 N.C. 466, 477, 406 S.E.2d 579, 585 (1991). Under N.C. Gen. Stat. § 8C-1, Rule 704, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. Gen. Stat. § 8C-1, Rule 704 (2001). Expert testimony is not allowed, however, regarding a " ' "legal conclusion . . . at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness." ' " *Crawford*, 329 N.C. at 477, 406 S.E.2d at 585 (quoting *State v. Rose*, 323 N.C. 455, 459, 373 S.E.2d 426, 429 (1988) (quoting *State v. Smith*, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985))).

Dr. Hanaway

Dr. Patrick Hanaway testified as an expert for the State. He is a board-certified family physician. He received his medical degree in 1987 and has worked in emergency rooms since 1988. He has been involved in 32 sexual assault examinations. Dr. Hanaway was qualified without objection as an expert in emergency medicine with a speciality dealing with rape victims.

Dr. Hanaway treated the victim in the emergency room and observed her physical condition. According to Dr. Hanaway, she described the assault in detail to him. Dr. Hanaway testified at trial that she seemed visibly shaken and scared. He also performed a rape kit examination. Dr. Hanaway found that she had multiple abrasions, bruises and scratches all over her body. Her back was bruised and scraped, her elbows rubbed raw, and her nipples bruised. Several of her front teeth were broken. Using a florescent light to examine the victim's genitals, Dr. Hanaway observed the lighting up of sperm across the victim's vaginal area.

In addition to her physical condition, Dr. Hanaway noted the victim's mental state. He described her demeanor as "visibly shaken," "scared," "stunned," "clearly afraid" and "spontaneously breaking down in tears at times."

At trial, Dr. Hanaway testified as follows:

> Q. Tell the jury the things that you explained and the dialogue back and forth between you and [the victim]?
>
> . . . .
>
> . . . She didn't seem to be able to receive the information that I was giving her. *It seemed that her emotional state was consistent with having been assaulted in some manner, and then it's my job to determine what the extent of that assault is..*

(Emphasis added.)

Further, the doctor stated:

> [Dr. Hanaway]: I've indicated to you that I've been involved in more than thirty of these cases. I've definitely been involved in cases where it was my firm opinion at the end of the history and physical that there had not been a sexual assault that had occurred, because the pieces did not fit together.

> *In this case it seemed pretty clear that there had been some type of assault that had occurred from the history and from—*
>
> [Defense Counsel]: Objection, Your Honor.
>
> [Court]: Overruled.
>
> [Prosecutor]: You may continue?
>
> [Dr. Hanaway]: . . . *from the history and the physical observation that I had made to that point in time. So, I felt clear that there was some assault that had happened.* I was not yet clear, based on the gathering of evidence, of whether any sexual assault had occurred, though *her emotional state was consistent with a very severe and significant assault which happened.*

(Emphasis added.)

Later, Dr. Hanaway testified that he had ordered an HIV test to be done "so that it could be followed up in three to six months time to determine if [the victim] was exposed to HIV through that sexual encounter, sexual assault." Finally, Dr. Hanaway testified this case was the most "intense and gruesome" of the more than thirty alleged sexual assault cases he had seen.

As the transcript excerpt reveals, defendant only objected once to the testimony he now assigns as error. "[W]hen . . . evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Maccia*, 311 N.C. 222, 229, 316 S.E.2d 241, 245 (1984). Thus, defendant's contentions are reviewable only for plain error. Under this standard, defendant is entitled to relief if he can show " '(i) that a different result probably would have been reached but for the error or (ii) that the error was so fundamental as to result in a miscarriage of justice or denial of a fair trial.' " *State v. Stanfield*, 134 N.C. App. 685, 689, 518 S.E.2d 541, 544 (1999) (quoting *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)).

[2] Defendant first contends the trial court erred in admitting portions of Dr. Hanaway's testimony because he expressed his opinion that the victim's emotional state was consistent with sexual assault, and further that a sexual assault actually occurred.

In the present case, Dr. Hanaway was tendered and accepted as an expert in emergency medicine with a speciality dealing with rape victims. A qualified expert may testify, like any other witness, to his

or her own observations. *State v. Wade*, 296 N.C. 454, 462, 251 S.E.2d 407, 412 (1979). The challenged testimony summarized the pattern of injuries and constituted a medical conclusion which the witness was fully qualified to render. In a similar case the Supreme Court has held that:

> [The expert] used the term "sexual assault, attack" merely to describe the pattern of injuries. Again, and to the extent that [the expert] stated a legal conclusion, "sexual assault or attack" is not a legal term of art which carries a specific meaning not readily apparent to the witness. Like "torture," "sexual assault" does not carry a precise legal definition involving elements of intent as well as acts, nor does it have a legal meaning that varies from the common understanding of the term.

State v. Jennings, 333 N.C. 579, 601, 430 S.E.2d 188, 198, *cert. denied*, 510 U.S. 1028, 126 L. Ed. 2d 602 (1993). It is clear from the record and transcript that there existed ample foundation for Dr. Hanaway's expertise and his characterization of what happened to the victim as a sexual assault. In the present case there was physical evidence to support a diagnosis that the victim had been sexually assaulted. Dr. Hanaway, who was qualified as an expert, examined her and noted substantial visible physical injuries consistent with assault. He testified to her injuries as listed above. Specifically as to sexual assault, Dr. Hanaway testified that when he used the florescent light there was "lighting up of presumably sperm across [the victim]'s vaginal area." Dr. Hanaway's testimony concerning this issue was in accordance with N.C.R. Evid. 702 and does not constitute plain error.

[3] Secondly, defendant contends that Dr. Hanaway's testimony impermissibly bolstered the credibility of the victim.

In *State v. Marine*, 135 N.C. App. 279, 520 S.E.2d 65 (1999), this Court stated:

> Rule 608(a) of the North Carolina Rules of Evidence permits the use of reputation or opinion testimony in order to bolster another witness' credibility, so long as it is done in accordance with Rule 405(a). Rule 405(a) then explicitly prohibits expert testimony regarding a witness' character. When read together, the Rules of Evidence thus prohibit an expert witness from commenting on the credibility of another witness. *State v. Wise*, 326 N.C. 421, 426, 390 S.E.2d 142, 145, *cert. denied*, 498 U.S. 853, 112 L. Ed. 2d 113 (1990).

> On the other side of the coin, however, Rule 702 permits expert witnesses to explain the bases of their opinions. Thus, "a witness who renders an expert opinion may also testify as to the reliability of the information upon which he based his opinion." *State v. Jones*, 339 N.C. 114, 146, 451 S.E.2d 826, 842, (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). Furthermore, the mental and emotional state of the victim before, during, and after a rape or sexual assault is relevant testimony that can help assist the trier of fact in understanding the basis of that expert's opinion. *State v. Kennedy*, 320 N.C. 20, 30-31, 357 S.E.2d 359, 366 (1987).

Id. at 281, 520 S.E.2d at 66-67.

As *Marine* noted, the cases dealing with the line between discussing one's expert opinion and improperly commenting on a witness' credibility have made it a thin one. *See State v. Jenkins*, 83 N.C. App. 616, 623-25, 351 S.E.2d 299, 303-04 (1986), *cert. denied*, 319 N.C. 675, 356 S.E.2d 791 (1987); *State v. Heath*, 316 N.C. 337, 339-44, 341 S.E.2d 565, 567-69 (1986); *State v. Wise*, 326 N.C. at 425-28, 390 S.E.2d at 145-47 (1990); and *State v. Bright*, 131 N.C. App. 57, 60-61, 505 S.E.2d 317, 319-20, *disc. review allowed, cert. allowed*, 349 N.C. 366, 525 S.E.2d 179 (1998), *disc. review dismissed as improvidently allowed*, 350 N.C. 82, 511 S.E.2d 639 (1999). However, in the case *sub judice*, Dr. Hanaway's testimony did not improperly bolster the believability of the victim. His testimony, as set forth above, was that the victim's emotional state was consistent with someone who had been sexually assaulted; indeed, a severe sexual assault. We note that the doctor was never asked whether he believed the victim was sincere. Dr. Hanaway explained how he concluded that she had been sexually assaulted through the physical evidence, the victim's statements, and her emotional condition. While his testimony may in some way have bolstered the victim's claim that she had been sexually assaulted, this is incidental to the doctor's testimony. He was the treating physician when she came to the hospital and is permitted to give the background reasons and basis for his diagnosis. Thus, defendant's assignment of error, as it pertains to Dr. Hanaway, is overruled.

Dr. Lichtig

[4] Dr. Lisa Lichtig also testified as an expert for the State. Dr. Lichtig has been a physician for ten years and is a board-certified family physician. She has extensive prior experience in treating sexual

assault victims. Dr. Lichtig was tendered and admitted as an expert in the fields of family practice, emergency room practice, and the treatment of sexually abused patients.

She saw and treated the victim in this case in the emergency room, as she took over for Dr. Hanaway when his shift ended. In the emergency room, Dr. Lichtig observed the victim's emotional and physical state. She testified that the victim was "quite frightened" and "crying intermittently." Dr. Lichtig also noted that the victim had bruising and abrasions all over her body. The bruising was so severe according to the doctor, she ordered a CAT scan to rule out the possibility of a skull fracture.

At trial, Dr. Lichtig testified as follows:

> Q. . . . did you have an opportunity to form an opinion as to whether or not all of those findings, psychological, physical, medical, whether or not all of those findings *were consistent with a woman who had been sexually assaulted, that is raped, based on your experience*?
>
> A. Yes.
>
> Q. What was your opinion?
>
> [Defense Counsel]: Objection, Your Honor.
>
> [Court]: Overruled.
>
> A. *My opinion is that [the victim] was sexually assaulted, she was kidnapped, she was sexually raped* and abused on multiple occasions in an eighteen hour period of time. . . . *[I]t was the worst sexual assault case that I had ever been involved with in my career.*
>
> Q. In your ten-year career?
>
> A. Yes, *it was the worst one I had ever seen.*

(Emphasis added.)

The trial court then gave the jury the following limiting instruction:

> [Court]: Members of the jury, the Court has allowed this witness to express opinions in the field of family medicine, emergency room practice and the treatment of sexually abused patients. You ladies and gentlemen are the fact finders in this

case. The credibility and the weight of this evidence is a matter for you the jury to determine and to decide.

As was the case with the testimony of Dr. Hanaway, defendant has lost the benefit of his objection by allowing the evidence to be introduced without objection. Therefore, we address his arguments here, as above, under the plain error standard. *See State v. Whitley*, 311 N.C. 656, 661, 319 S.E.2d 584, 588 (1984).

Defendant contends that the trial court erred in admitting Dr. Lichtig's expert opinion that the victim had been sexually assaulted, kidnapped, and raped as it impermissibly goes beyond the scope of expert opinion.

We have already held with the testimony of Dr. Hanaway that a conclusion of sexual abuse is permitted if concluded upon proper foundation. Likewise, Dr. Lichtig's opinion regarding sexual assault was based on her expertise in treating sexually abused patients, the victim's emotional state in the emergency room, her physical appearance and from what the victim had told her during the course of treatment. This is a proper foundation for her expert opinion that the victim was sexually assaulted in accordance with N.C.R. Evid. 702.

[5] However, Dr. Lichtig's opinion that the victim was kidnapped and raped was improper. "An expert may not testify regarding whether a legal standard or conclusion has been met 'at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness.' " *State v. Parker*, 354 N.C. 268, 289, 553 S.E.2d 885, 900 (2001), *cert. denied*, — U.S. —, 153 L. Ed. 2d 162 (2002) (quoting *State v. Ledford*, 315 N.C. 599, 617, 340 S.E.2d 309, 321 (1986); *State v. Smith*, 315 N.C. 76, 100, 337 S.E.2d 833, 849 (1985)). " 'Rape' is a legal term of art . . . ." *State v. Najewicz*, 112 N.C. App. 280, 293, 436 S.E.2d 132, 140 (1993), *disc. review denied*, 335 N.C. 563, 441 S.E.2d 130 (1994); *see also State v. Galloway*, 304 N.C. 485, 489, 284 S.E.2d 509, 512 (1981) ("Clearly, a medical expert may not testify that the defendant raped the prosecuting witness."); *Smith*, 315 N.C. at 100, 337 S.E.2d at 849 (The medical witness could testify that injuries were caused by a male sex organ, an ultimate issue, noting that witness "did not testify that [victim] had been raped, nor that the defendant raped her.").

Like the term "rape," the term "kidnap" has its own meaning in the eyes of the law that is not readily apparent to the witness. Thus,

it was also improper for Dr. Lichtig to render such an opinion, especially since it is clearly outside of her expertise.

It is clear that the jury is solely responsible for determining if one was kidnapped or raped. Dr. Lichtig's testimony goes beyond the scope of her permissible expert opinion as she was in no better position than the jury in concluding those facts.

Nevertheless, we do not believe that the error rises to the level of plain error. There was overwhelming evidence of defendant's guilt; and following the testimony, the trial court gave a limiting instruction reminding the jurors that Dr. Lichtig's opinion is limited in certain areas and that they are the fact-finder. Any error in the admission of this testimony is harmless and does not rise to the level of plain error.

Briefly, defendant also contends, as he did in reference to Dr. Hanaway's testimony, that Dr. Lichtig's testimony above improperly bolstered the victim's credibility. We find that this situation is indistinguishable from Dr. Hanaway's, and refer to the above discussion.

[6] Defendant next contends that the trial court erred when it admitted Dr. Lichtig's testimony that she told the victim at the hospital

> A. That she was safe, that this person was behind bars right now—
>
> [Defense counsel]: Objection, Your Honor.
>
> [Court]: Overruled.
>
> A. That they had him in custody, and that she was going to get better from this.

Defendant argues this implies not only that the victim had in fact been assaulted, but that defendant was guilty of the assault constituting prejudicial error. We disagree.

The State points out that Dr. Lichtig did not identify defendant as being the person who was in custody as she referred only to "this person" and "him." Dr. Lichtig was concerned about the victim's emotional well-being and was attempting to reassure her that she was safe. It was a generalized statement made as a part of the victim's treatment. The doctor had a very emotional patient she believed may have been suicidal. Dr. Lichtig said that she was trying to "plant the seeds of hope" in the victim that she could begin to recover. Furthermore, there was also other evidence of defendant being

behind bars, as the jury heard without objection the testimony of Detective Fortner that he arrested defendant and told the victim that defendant was in jail. Thus, this evidence is cumulative, and its admission could not have prejudiced defendant. *See State v. Taylor*, 344 N.C. 31, 47, 473 S.E.2d 596, 605 (1996).

[7] Defendant next contends that the trial court erroneously admitted Dr. Lichtig's testimony that the victim's psychiatric history was relevant because "when people recover from traumatic events in their life, it's important to know what other kinds of things they have been through." We disagree. The testimony complained of is as follows:

> Q. Any of this stuff the defense has brought up about the fact of anything about her past when she was a baby, does any of that have any impact whatsoever on the opinion that you gave this jury that this woman was raped?
>
> A. Absolutely not, it's totally irrelevant. The only relevance it has—
>
> [Defense Counsel]: Objection, Your Honor.
>
> [Court]: Overruled.
>
> A. . . . in my opinion is in terms of her recovery. When people recover from traumatic events in their life it's important to know what other kinds of things they have been through so we can offer our compassion, we can offer medications when appropriate, we can offer them the kind of guidance they need in going on to live a normal healthy life . . . .

Defendant has not shown this testimony, which was general in nature, to be prejudicial. This testimony was relevant in showing the type of information Dr. Lichtig relies upon in forming her opinions and was helpful to the jury in determining how much weight to give her testimony. This testimony was within the scope of permissible expert opinion under N.C.R. Evid. 702 and was not prejudicial in any way. N.C. Gen. Stat. § 8C-1, Rule 702 (2001).

[8] Finally, defendant contends that the trial court erred in allowing Dr. Lichtig's testimony concerning the contents of a psychiatric evaluation of the victim after the alleged rape, which included a diagnosis of post-traumatic stress disorder (PTSD) as a result of severe trauma from kidnapping and rape by a co-worker at the Nantahala Outdoor Center. Defendant argues that no limiting instruction was given as required by *State v. Hall*, 330 N.C. 808, 412 S.E.2d 833 (1992),

and the testimony was admitted for substantive purposes which was also error. We disagree.

> Evidence from an expert that a prosecuting witness is suffering from PTSD is admissible, for corroborative purposes to assist the jury in understanding the behavioral patterns of sexual assault victims. The expert witness may not, however, explicitly or implicitly indicate the PTSD was caused or contributed to by the actions of the defendant that are the subject of the trial. On this factual question, whether a defendant actually committed the act with which he is charged, the expert is "in no better position to have an opinion than the jury."

State v. Chavis, 141 N.C. App. 553, 565-66, 540 S.E.2d 404, 413-14 (2000) (citations omitted). "If admitted, the trial judge should take pains to explain to the jurors the limited uses for which the evidence is admitted. In no case may the evidence be admitted substantively for the sole purpose of proving that a rape or sexual abuse has in fact occurred." *Hall*, 330 N.C. at 822, 412 S.E.2d at 891.

In the present case, Dr. Lichtig testified that the victim suffered from PTSD as a result of the events that took place in November of 1999 while on redirect examination by the State. No limiting instruction followed. Thus, defendant contends that this was admitted for the sole purpose that the rape took place.

The State argues that defendant opened the door to the PTSD testimony. While cross-examining Dr. Lichtig, defendant asked questions pertaining to the victim's mental treatment, in particular, a psychiatric evaluation of the victim. This line of questioning elicited responses that could have given the jury the impression that the victim was mentally unstable prior to the time of the assault. On redirect examination, the State introduced the rest of the report to put the evidence introduced by defendant into context, namely that the victim only began suffering such mental problems after that attack. It was here that evidence of PTSD was admitted.

Presumably, an instruction by the trial court in accordance with *Hall* and *Chavis* would have been required. However, this testimony is not violative of the *Hall/Chavis* principle. The reference to PTSD was being used to rebut the inference by defendant that the victim was mentally unstable prior to the assault and rape rather than to prove the assault and rape happened. Therefore, the evidence was admissible, but not as substantive evidence. Defendant would have

been entitled to request the *Hall/Chavis* limiting instruction. However, since he did not, "[t]he admission of evidence which is competent for a restricted purpose will not be held error in the absence of a request by the defendant for limiting instructions." *State v. Jones*, 322 N.C. 406, 414, 368 S.E.2d 844, 848 (1988).

In addition, evidence which is otherwise inadmissible is admissible to explain or rebut evidence introduced by defendant. *State v. Garner*, 330 N.C. 273, 290, 410 S.E.2d 861, 870 (1991); *State v. Albert*, 303 N.C. 173, 177, 277 S.E.2d 439, 441 (1981). This is true even if a defendant admits evidence during cross-examination of a State's witness, prompting the State to introduce otherwise inadmissible evidence in rebuttal. *State v. McKinnon*, 328 N.C. 668, 673, 403 S.E.2d 474, 477 (1991). Therefore, where a defendant examines a witness so as to raise an inference favorable to defendant, which is contrary to the facts, defendant opens the door to the introduction of the State's rebuttal or explanatory evidence about the matter. *State v. Bullard*, 312 N.C. 129, 157-58, 322 S.E.2d 370, 386 (1984).

Although it was error to admit evidence of PTSD substantively (or to not give the limiting instruction), defendant nonetheless opened the door to such evidence being admitted. Defendant's assignment of error as to Dr. Lichtig is overruled.

Detective Fortner

[9] Defendant contends Chief Deputy Fortner gave improper opinion testimony which was tantamount to expert testimony. As with the previous two witnesses, defendant argues that the trial court erred in permitting him to bolster the credibility of the complaining witness, and to testify essentially that she had in fact been assaulted, raped, and kidnapped.

Defendant heavily cross-examined Deputy Fortner as to his investigation and why certain procedures were done and not done. Specifically, defendant was asking the deputy why more items were not sent off for scientific testing. The challenged testimony at trial is as follows:

Q. You know what evidence—what it means to have evidence that shows innocence of the accused, don't you?

A. Yes sir.

Q. Did you find any?

A. Any evidence of—

Q. Or were you looking for any?

A. I didn't need much evidence, sir, because I have a victim that had told me who her attacker was and from the look that her physical person was and the way she described the attack and her bruising and her scars, she told me who the attacker was and she gave me a name and a description. That's what I needed because I was fortunate I had an eye witness [sic] victim that survived.

The State, on redirect examination touched on the earlier testimony:

Q. There was a lot of questions here from counsel for the defendant about the fact that you didn't send this off, you didn't send that off, you didn't do this or that check. What can you tell this jury about why you didn't have these things checked?

A. I had a victim that survived her attack. She could positively identify her assailant, the person that kidnapped, raped, and brutally beat her. If she had died—

[Defense Counsel]: Objection, Your Honor, speculative.

[Court]: Overruled.

Q. Go ahead?

A. . . . I would have done more fingerprinting, more checking under fingernails, more fiber transfer, because I wouldn't have known who done it. But she positively told me who done it and I arrested him.

Defendant notes that Deputy Fortner was not tendered as an expert at trial. However, defendant contends that he is a professional law enforcement officer who had extensive experience investigating crimes over a lengthy career, and that his testimony was tantamount to expert testimony.

The context in which this testimony was given makes it clear Fortner was not offering his opinion that the victim had been assaulted, kidnapped, and raped by defendant, but was explaining why he did not pursue as much scientific testing of physical evidence in this case as he would a murder case because the victim in this case survived and was able to identify her assailant. His testimony was rationally based on his perception and experience as a detective investigating an assault, kidnapping, and rape. His testimony was

helpful to the fact-finder in presenting a clear understanding of his investigative process. Further, defendant brought out this testimony by attacking the investigation on cross-examination. His testimony was in accordance with the rule for lay opinion testimony. N.C. Gen. Stat. § 8C-1, Rule 701 (2001). Defendant's assignment of error as it pertains to Chief Deputy Fortner is overruled.

After examining defendant's assignments of error as they pertain to the above witnesses' testimony, if there was any error, it does not rise to the level of plain error.

III.

[10] In his next assignment of error, defendant contends that the trial court committed plain error when it instructed the jury that the State need only establish "personal injury" for a first-degree rape conviction. Defendant admits the trial court initially instructed the jury that the State had to prove defendant inflicted serious personal injury upon the victim to prove first-degree rape; however, defendant contends the trial court erred when the instructions followed with a mandate that required the jury to convict defendant of first-degree rape upon a finding of "personal injury," rather than "serious personal injury" as required by N.C. Gen. Stat. § 14-27.2(a) (2001). We disagree.

N.C. Gen. Stat. § 14-27.2(a)(2)(b) provides that a person is guilty of first-degree rape if the person engages in vaginal intercourse with another person and inflicts "serious personal injury upon the victim or another person[.]" *Id.* Defendant did not object to this aspect of the jury instructions at trial. Accordingly, the challenged instruction is reviewable only for plain error. N.C.R. App. P. 10(b)(2); *State v. Odom,* 307 N.C. 655, 300 S.E.2d 375 (1983). "In 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." *Odom,* 307 N.C. at 661, 300 S.E.2d at 378-79. In the present case, a review of the whole record reveals no plain error as the instructional error had no probable impact on the jury's finding of guilt.

The State presented the victim who testified that defendant raped, kidnapped, and assaulted her. This testimony was corroborated by witnesses who treated the victim's injuries. The victim's injuries included extensive bruises, abrasions all over her body, broken teeth, burst blood vessels in her eye, a shoulder injury, and psychological effects. These injuries satisfy the definition of serious

personal injury. *See, e.g.*, *State v. Jean*, 310 N.C. 157, 170, 311 S.E.2d 266, 273 (1984); *State v. Herring*, 322 N.C. 733, 738-39, 370 S.E.2d 363, 367-68 (1988); *State v. Ackerman*, 144 N.C. App. 452, 459-61, 551 S.E.2d 139, 144-45, *cert. denied*, 354 N.C. 221, 554 S.E.2d 344 (2001).

In addition, the trial court correctly listed for the jury all of the elements of first-degree rape in accordance with the language in the Pattern Jury Instructions. N.C.P.I. Crim. 207.10 (2002). This included telling the jury that they must find that the State proved beyond a reasonable doubt that "the defendant inflicted serious personal injury upon the victim." After listing the elements in detail, the trial court summarized what the State must prove and the trial court used the phrase "personal injury" instead of "serious personal injury." The trial court's charge to the jury must be construed contextually and isolated portions of it will not be held prejudicial error when the charge as a whole is correct. *State v. Boykin*, 310 N.C. 118, 124, 310 S.E.2d 315, 319 (1984). " 'Where the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous affords no grounds for reversal.' " *Id.* at 125, 310 S.E.2d at 319 (quoting *State v. Jones*, 294 N.C. 642, 653, 243 S.E.2d 118, 125 (1978)).

Applying the foregoing principles to the instant case, we hold that, although "serious personal injury" was omitted once, when the entire jury charge is viewed contextually, it reveals no plain error as the instructional error had no impact on the jury's finding of guilt. Defendant's assignment of error is overruled.

IV.

[11] In his final assignment of error, defendant contends that his convictions should be vacated as a result of the ineffective assistance of trial counsel. Defendant argues that his trial counsel failed on numerous occasions to object to repeated opinion testimony from Dr. Hanaway, Dr. Lichtig, and Chief Detective Fortner. In addition, defendant asserts that his trial counsel performed unreasonably when he failed to object to the trial court's mandate to the jury that it find first-degree rape upon proof of "personal injury," instead of "serious personal injury." Defendant argues that but for these errors, defendant would have obtained a different result at trial.

> In order to establish ineffective assistance of counsel, a defendant must establish (1) that his attorney's performance fell below an objective standard of reasonableness; and (2) that the defend-

ant was prejudiced by his attorney's performance to the extent there exists a reasonable probability that the result of the trial would have been different absent the error.

State v. Skipper, 146 N.C. App. 532, 537-38, 553 S.E.2d 690, 694 (2001); *State v. Jaynes*, 353 N.C. 534, 547-48, 549 S.E.2d 179, 191 (2001), *cert. denied*, — U.S. —, 152 L. Ed. 2d 220 (2002); *see Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674 (1984). Defendant has not satisfied either prong of this test.

In the present case, defendant has failed to prove the attorney's performance fell below the objective standard of reasonableness or to show that his error was such that the result of defendant's trial would have been different. In light of the overwhelming evidence of defendant's guilt, the failure to object in certain instances would not make it more probable that the outcome of trial would have been different as the testimony complained of was at most harmless error and the jury instructions as a whole were correct. Defendant's assignment of error is overruled.

Because we find that defendant had a fair trial free from prejudicial error, we find

No error.

Judges McGEE and BRYANT concur.

IN THE MATTER OF: JAMES DAVID FAIRCLOTH, JR., DAKOTA LEE FAIRCLOTH, AMANDA SUE LYNN FAIRCLOTH, AND MARGARET IRENE FAIRCLOTH, JUVENILES

No. COA01-1524

(Filed 5 November 2002)

1. Judges— termination of parental rights—same judge at prior abuse hearing—recusal not required

The trial judge did not err by not recusing himself from a termination of parental rights hearing where he had presided over a prior abuse and neglect hearing and had adjudicated the children abused and neglected (although that ruling was reversed and remanded on appeal).

2. Termination of Parental Rights— pending remanded abuse and neglect hearing—not a condition precedent for termination hearing

There was no error where a trial judge held a termination of parental rights hearing without first rehearing a remanded abuse and neglect proceeding. Such a hearing is not a condition precedent for a termination hearing.

3. Termination of Parental Rights— appointed counsel—effectiveness

The trial court did not err by not removing respondent's attorney from a termination of parental rights hearing where respondent claimed that his appointed attorney was ineffective, but did not show that his attorney's performance was so deficient as to deprive him of a fair hearing.

4. Trials— removal of disruptive respondent—no abuse of discretion

The trial court did not abuse its discretion by removing respondent from a termination of parental rights hearing without providing a means for him to testify where respondent was profane and belligerent, refused to be affirmed prior to questioning, interrupted and argued, and was removed after a final warning from the judge.

5. Termination of Parental Rights— failure to deny or present argument about certain grounds—only one ground needed

No prejudicial error was found in a termination of parental rights proceeding where respondent admitted some of the allegations in the petition by failing to deny them and did not present an appellate argument about some of the grounds for termination found by the court. Because the trial court needs to find only one of the statutory grounds for termination, any error in the remaining assignments of error was not prejudicial.

Judge TYSON concurring.

Appeal by respondent from order entered 26 July 2001 by Judge John W. Dickson in Cumberland County District Court. Heard in the Court of Appeals 15 August 2002.

David L. Kennedy for petitioner-appellee Cumberland County Department of Social Services.

Susan J. Hall for respondent-appellant.

THOMAS, Judge.

James Faircloth, Sr., respondent, appeals from an order terminating his parental rights to four children.

He contends the trial court committed reversible error (1) by denying his motion to recuse the trial judge from the termination of parental rights hearing; (2) by denying his attorney's motion to withdraw, and his oral motion to remove his attorney, based on ineffective assistance of counsel; (3) by ejecting him from the proceedings without affording him a means to participate other than through his attorney; (4) by finding that his *Alford* plea was an admission of his abuse of the children; and (5) by finding he had left the children in foster care for more than twelve months without showing reasonable progress in correcting the conditions which led to the removal of the children. For the reasons discussed herein, we affirm the trial court.

Faircloth is the father of James, born 4 June 1987; Dakota, born 22 September 1990; Amanda, born 7 August 1992; and Margaret, born 26 January 1995.

Prior to the filing of the termination petition, Faircloth was charged with numerous criminal offenses involving Amanda. On 11 October 1999, he entered an *Alford* plea to first degree rape, two counts of first degree sexual offense, felonious child abuse, crime against nature, felonious incest, and indecent liberties. He was sentenced to a term of 384 to 470 months in prison.

A petition to terminate Faircloth's parental rights and the parental rights of the children's mother, Tesha Faircloth Lewis, was filed on 3 August 2000 by the Cumberland County Department of Social Services (DSS). It alleges, *inter alia*, that: (1) Faircloth physically abused the children by hitting them with his hands and other objects; (2) he rubbed underwear soaked in urine and feces in Amanda's face in the presence of the other children; (3) he sexually abused Amanda and Margaret; (4) he emotionally abused the children; (5) the children were exposed to sexual activity, domestic violence, and their parents' excessive drinking and drug use; (6)

Faircloth willfully left the children in foster care for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made to correct the conditions which led to the children's removal; and (7) for six months immediately preceding the filing of the petition, Faircloth did not pay a reasonable portion of the cost of care for the children although physically and financially able to do so.

The hearing at issue did not include adjudication of the mother's parental rights. The record is silent as to when or whether the section of the petition against the mother was heard.

The hearing on the section involving Faircloth's parental rights occurred 26 July 2001. The trial court found by clear and convincing evidence that (a) on 11 October 1999, Faircloth entered an *Alford* plea to the sexual offenses committed against Amanda and was sentenced to 384 to 470 months in prison; (b) Faircloth's incarceration beginning 8 January 1998 was due to willful actions on his part; (c) the children have been in DSS care continuously since 3 July 1997; and (d) Faircloth has received no treatment for his abuse of Amanda and there is a substantial likelihood that the abuse will continue.

The trial court then reached the following conclusions of law: (1) Faircloth abused Amanda within the meaning of N.C. Gen. Stat. § 7B-101(1); (2) he neglected the children within the meaning of N.C. Gen. Stat. § 7B-101(15) by not providing proper care, supervision or discipline; (3) he willfully left the children in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances had been made to correct the conditions which led to the removal of the children; (4) the children have been in DSS custody since 3 July 1997, and for six months immediately preceding the filing of the petition, Faircloth failed to pay a reasonable portion of the cost of care for the children although physically and financially able to do so; (5) Faircloth is incapable of providing proper care and supervision for the children, such that the children are dependent children within the meaning of N.C. Gen. Stat. § 7B-101(9), and there is a reasonable probability that such incapability will continue for the foreseeable future; (6) he willfully abandoned the children for at least six consecutive months immediately preceding the filing of the petition; (7) he committed a felony assault resulting in serious bodily injury against Amanda in violation of N.C. Gen. Stat. § 7B-1111(8); (8) Faircloth's rights to Amanda have been involuntarily terminated and he lacks the ability or willingness

to establish a safe home in violation of N.C. Gen. Stat. § 7B-1111(9). In its eighth and final conclusion of law, the trial court used the termination of Faircloth's parental rights to Amanda in the instant case to support a separate ground for terminating his parental rights to the other three children.

The trial court's conclusions of law are in part findings of fact based on clear and convincing evidence that statutory grounds for termination exist. That these findings are mislabeled conclusions of law is not fatal to the trial court's adjudicatory order. *Cf. Highway Church of Christ v. Barber*, 72 N.C. App. 481, 483-84, 325 S.E.2d 305, 307 (1985) (as long as findings of fact and conclusions of law are clearly stated and easily distinguishable, the mere fact they are not separately and properly labeled, does not violate N.C. R. Civ. P. 52(a)(1)).

At disposition, the trial court found no evidence that it would be in the best interests of the children not to terminate Faircloth's parental rights and thus ordered Faircloth's parental rights to the four children terminated. Faircloth appeals.

[1] By his first assignment of error, Faircloth contends Judge John W. Dickson erred in refusing to recuse himself from the termination hearing. He argues that Judge Dickson had a personal bias or prejudice and/or personal knowledge of disputed evidentiary facts and therefore should not have been the hearing judge. We disagree.

Judge Dickson presided over an earlier hearing on allegations that the four children were abused and neglected. Judge Dickson adjudicated the four children abused and neglected; however, on appeal, this Court reversed the order. *In re Faircloth*, 137 N.C. App. 311, 527 S.E.2d 679 (2000). The ground for reversal was that the trial court applied an erroneous legal standard in denying Faircloth's request to call three of the children as witnesses. *Id.* at 318, 527 S.E.2d at 684. The matter was remanded for a new hearing but it did not occur.

Faircloth contends Judge Dickson was biased and could not be impartial because he heard evidence against Faircloth in the previous abuse and neglect proceeding without hearing from the three children Faircloth sought to call as witnesses. Faircloth further contends Judge Dickson's bias is evidenced by his failure to hold a new hearing in the abuse and neglect proceeding before hearing the petition to terminate.

The Code of Judicial Conduct provides in pertinent part:

> C. *Disqualification*
>
> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings;
>
> . . . .

Code of Judicial Conduct Canon 3(C)(1)(a), 2002 Ann. R. N.C. 306-07.

When a party requests such a recusal by the trial court, the party must " 'demonstrate objectively that grounds for disqualification actually exist.' " *In re LaRue*, 113 N.C. App. 807, 809, 440 S.E.2d 301, 303 (1994) (quoting *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993) (citations omitted)). The requesting party has the burden of showing through substantial evidence that the judge has such a personal bias, prejudice or interest that he would be unable to rule impartially. *See State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987); *State v. Honaker*, 111 N.C. App. 216, 219, 431 S.E.2d 869, 871 (1993). If there is sufficient force to the allegations contained in a recusal motion to proceed to find facts, or if a reasonable man knowing all of the circumstances would have doubts about the judge's ability to rule on the motion to recuse in an impartial manner, the trial judge should either recuse himself or refer the recusal motion to another judge. *See State v. Poole*, 305 N.C. 308, 320, 289 S.E.2d 335, 343 (1982); *Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976).

In the instant case, Faircloth's claim of bias and prejudice is based on Judge Dickson having presided over the earlier abuse and neglect hearing. However, this Court has held that knowledge of evidentiary facts gained by a trial judge from an earlier proceeding does not require disqualification. *In re LaRue*, 113 N.C. App. at 810, 440 S.E.2d at 303 (holding that a trial judge who had conducted an earlier review hearing, concluded that three children should remain with DSS, and recommended that DSS pursue termination of parental rights, was not subject to disqualification based on personal bias or prejudice in the subsequent termination proceeding). Furthermore, we reject any contention that Judge Dickson should be disqualified

because he earlier adjudicated the four children abused and neglected. *See id.*

[2] Finally, Faircloth has failed to show error arising from the trial court's failure to hold a rehearing in the abuse and neglect proceeding prior to the instant case. An adjudicatory hearing on abuse and neglect allegations is not a condition precedent to a termination hearing. In fact, N.C. Gen. Stat. § 7B-1111 provides grounds for terminating parental rights which are not conditioned on a determination that a child is abused or neglected. N.C. Gen. Stat. §§ 7B-1111(3), (5), (6) (2001). We further note that N.C. Gen. Stat. § 7B-1102 allows parties to file motions to terminate parental rights in pending child abuse or neglect proceedings and gives the trial court authority to consolidate the actions pursuant to N.C. R. Civ. P. 42. N.C. Gen. Stat. § 7B-1102(a), (c) (2001). A review of N.C.G.S. § 1102, as well as the rest of Chapter 7B, Article 11, reveals no requirement as suggested by Faircloth. Here, such a hearing on abuse and neglect may well have been merely redundant with parts of the termination hearing. Further, considering the length of delay resulting from the earlier appeal, the status of the children and the need to determine permanency may well have changed.

As he fails to advance any further argument to substantiate his claim of personal bias or prejudice on the part of Judge Dickson, Faircloth's first assignment of error is rejected.

[3] In his next assignment of error, Faircloth contends the trial court erred in not removing his attorney from the case. We disagree.

N.C. Gen. Stat. §§ 7B-1101 and 7B-1109(b) guarantee a parent's right to counsel, including appointed counsel in cases of indigency, in all proceedings related to the termination of parental rights. *See In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 396 (1996) (recognizing these rights under former N.C. Gen. Stat. § 7A-289(23)). Implicit in this right to counsel is the right to effective assistance of counsel. *Id.* at 436, 473 S.E.2d at 396; *In re Bishop*, 92 N.C. App. 662, 665, 375 S.E.2d 676, 678 (1989). To prevail on a claim of ineffective assistance of counsel, Faircloth "must show that counsel's performance was deficient and the deficiency was so serious as to deprive [him] of a fair hearing." *In re Bishop*, 92 N.C. App. at 665, 375 S.E.2d at 679.

Counsel was appointed for Faircloth and has represented him in the instant case, the earlier abuse and neglect proceeding, and the

prior appeal. Faircloth claims evidence of counsel's deficient performance can be found in the failure to schedule a new hearing in the abuse and neglect proceeding, the failure to issue subpoenas and file pre-trial motions prior to the termination hearing as requested by Faircloth, and the failure to object to testimony offered by the prosecutor of Faircloth's criminal case. Faircloth, however, does not show prejudice arising from there being no rehearing in the abuse and neglect proceeding prior to the termination hearing. As noted earlier, such a hearing was not required. He also fails to indicate the nature of the pre-trial motions counsel should have filed or the identity of witnesses counsel should have subpoenaed. Thus, we cannot hold that counsel's failure to do so resulted in prejudice to Faircloth or denied him a fair hearing.

The record actually shows counsel objected at several points during the testimony of the State's prosecutor, including when hearsay evidence was being offered by the prosecutor regarding reports by two of the children that had not been offered at Faircloth's criminal trial. Counsel also cross-examined the State's prosecutor concerning the details of Faircloth's *Alford* plea. In sum, Faircloth fails to demonstrate that counsel's conduct at trial was so deficient as to deprive him of a fair hearing. The trial court did not err in failing to remove counsel from the case.

[4] By his third assignment of error, Faircloth contends the trial court abused its discretion in removing him from the hearing while not providing a means for him to testify when called by counsel. We disagree.

The record shows Faircloth repeatedly disrupted the proceedings. Following the denial of his attorney's motion to withdraw and Faircloth's oral motion to remove counsel, Faircloth told the judge, "You can't force me to have that man for my damn attorney." He then argued with the trial court concerning the judge's decision not to recuse himself. During this exchange, Faircloth repeatedly cursed and acted in a belligerent fashion. At one point, he was told by the bailiff to turn around and keep his feet under the table, to which Faircloth responded, "Take me out of this motherfucker." He refused to be affirmed prior to questioning by counsel for DSS. He was then asked whether he had pled guilty to the sexual offenses committed against Amanda and he denied it. His counsel then declined an opportunity to question him. He continuously interrupted the testimony of the State's prosecutor with the trial court telling him to direct any questions he had for witnesses to his attorney. Nevertheless,

Faircloth continued interrupting and using profane language. The trial court finally warned Faircloth he would be removed from the courtroom if he used "one more bit of profanity." Faircloth responded by yet again cursing the judge. The trial court then stated:

> All right. The court having warned Mr. Faircloth that if there was any more profanity from him he would be removed from this courtroom; that within less than 60 seconds, more profanity issued from him. He is ordered removed from this courtroom. He may be returned to the Department of Corrections.

Following the presentation of DSS' case, counsel for Faircloth attempted to call Faircloth as a witness. Faircloth was not present and no steps were taken to secure his testimony.

A termination of parental rights hearing is a civil rather than criminal action, with the right to be present, to testify, and to confront witnesses subject to "due limitations." *In re Murphy*, 105 N.C. App. 651, 658, 414 S.E.2d 396, 400, *aff'd*, 332 N.C. 663, 422 S.E.2d 577 (1992); *In re Barkley*, 61 N.C. App. 267, 270, 300 S.E.2d 713, 715 (1983). In *Murphy*, this Court held that an incarcerated parent's presence at a termination of parental rights hearing was not required as a matter of law, but rather was a matter for determination by the trial court subject to appellate review. *Murphy*, 105 N.C. App. at 654, 414 S.E.2d at 398. The Court further held that the three-factor balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 47 L. Ed. 2d 18 (1976), was the appropriate measure for determining if the process afforded in a parental termination proceeding meets the "rigors of the due process clause." *Id.* at 653, 414 S.E.2d at 397. The *Mathews/Eldridge* factors are: "[1] the private interests affected by the proceeding; [2] the risk of error created by the State's chosen procedure; and [3] the countervailing governmental interest supporting use of the challenged procedure." *Santosky v. Kramer*, 455 U.S. 745, 754, 71 L. Ed. 2d 599, 607 (1982).

Analysis of the *Mathews/Eldridge* factors shows Faircloth's due process rights were not violated. The first factor, his private interest, weighs against the trial court's decision to remove him from the courtroom without providing a means through which he could testify. The importance of a natural parent's right to the care, custody and management of his or her children cannot be denied and "[a] parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one[.]" *Id.* at 758-59,

71 L. Ed. 2d at 610 (citations omitted). One faced with the possible dissolution of parental rights has a strong interest in being present at the hearing and having the opportunity to testify.

However, the third factor, the countervailing governmental interest, weighs in support of the trial court's decision. The State has an interest in ensuring a fair hearing and a correct decision and protecting the dignity of the courtroom. Faircloth's conduct here severely disrupted the proceeding. He refused to respond to the clerk's attempts to take his oath of affirmation when called to testify by DSS. He was repeatedly warned by the trial court to direct questions to his attorney after he verbally harassed and attempted to question a witness. Finally, he was warned by the court he would be removed for continued use of profanity. Faircloth persisted and only then was taken from the courtroom. Clearly, there was an adequate basis for the trial court to determine that Faircloth's disruptive behavior prevented a proper adjudicatory hearing and demonstrated contempt for court.

The second *Mathews/Eldridge* factor, the risk of error created by the State's procedure, also weighs in favor of the State. On this record, the risk of error created by Faircloth's removal from the courtroom without being provided means through which to testify was slight. Although Faircloth was called to testify, and his counsel objected to Faircloth's inability to testify, Faircloth has made no argument that his testimony would have provided a defense to the termination, nor does he indicate how he was prejudiced by not being present and not being allowed to testify. Further, his actions during the hearing undermine any claim that he was prejudiced by removal. His disregard for the procedure of the court and failure to be affirmed when called to testify by DSS indicate he did not value his right to testify. His disruptive behavior following repeated warnings clearly demonstrates he did not value his right to be present for the remainder of the hearing.

In sum, the strength of the governmental interest in assuring a fair and just adjudication and protecting the dignity of the courtroom, and the low risk of error created by Faircloth's inability to testify, lead to the conclusion his due process rights were not violated. The trial court did not abuse its discretion in removing Faircloth from the courtroom without providing a means for him to personally participate in the remainder of the hearing.

By his remaining two assignments of error, Faircloth attacks some of the grounds on which the trial court based its order terminating his parental rights.

"There is a two-step process in a termination of parental rights proceeding." *In re Blackburn*, 142 N.C. App. 607, 610, 543 S.E.2d 906, 908 (2001). The two stages are distinct. *In re Lambert-Stowers*, 146 N.C. App. 438, 440, 552 S.E.2d 278, 280 (2001). At 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. *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002); *In re Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908. We note that Chapter 7B, Article 11 interchangeably uses the "clear, cogent and convincing" and the "clear and convincing" standards. *Compare* N.C. Gen. Stat. § 7B-1109 ("The burden in such proceedings shall be upon the petitioner or movant and all findings of fact shall be based on clear, cogent, and convincing evidence.") *with* N.C. Gen. Stat. § 7B-1111 ("The burden in such proceedings shall be upon the petitioner or movant to prove the facts justifying such termination by clear and convincing evidence."). These two standards are synonymous. *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984).

If a ground for termination is so established, the trial court must proceed to the second stage and hold a dispositional hearing. *In re Lambert-Stowers*, 146 N.C. App. at 440, 552 S.E.2d at 280. There, the trial court must consider whether termination is in the best interests of the child. *In re Anderson*, 151 N.C. App. at 98, 564 S.E.2d at 602. Unless the trial court determines that the best interests of the child require otherwise, the termination order shall be issued. N.C. Gen. Stat. § 7B-1110; *In re Blackburn*, 142 N.C. App. at 610, 543 S.E.2d at 908.

Here, the trial court determined the following statutory grounds for termination existed: (1) Faircloth abused Amanda within the meaning of N.C.G.S. § 7B-101(1); (2) he neglected the children within the meaning of N.C.G.S. § 7B-101(15) by not providing proper care, supervision or discipline; (3) he willfully left the children in foster care for more than twelve months without showing to the satisfaction of the Court that reasonable progress under the circumstances had been made to correct the conditions which led to the children's removal; (4) the children have been placed in DSS custody and for six months immediately preceding the filing of the petition Faircloth failed to pay a reasonable portion of the cost of care for the children

although physically and financially able to do so; (5) Faircloth is incapable of providing proper care and supervision for the children, such that they are dependent children within the meaning of N.C.G.S. § 7B-101(9), and there is a reasonable probability that such incapability will continue for the foreseeable future; (6) he willfully abandoned the children for at least six consecutive months immediately preceding the filing of the petition; (7) he committed a felony assault resulting in serious bodily injury against Amanda in violation of N.C.G.S. § 7B-1111(8); and (8) his parental rights to Amanda have been involuntarily terminated and he lacks the ability or willingness to establish a safe home in violation of N.C.G.S. § 7B-1111(9).

In his brief, Faircloth only presents argument against the following statutory grounds for termination: (1) that he abused Amanda; (2) that he willfully left the children in foster care for twelve months without showing reasonable progress in correcting the conditions which led to removal; and (3) that he is incapable of providing proper care and supervision such that the juveniles are dependent children under N.C.G.S. § 7A-101(9), and there is a reasonable probability that such incapability will continue for the foreseeable future.

He presents no argument against the following grounds for termination: (1) that he neglected the children; (2) that for a period of six months immediately preceding the filing of the petition he failed a pay a reasonable portion of the children's cost of care although able to do so; and (3) that he willfully abandoned the children for at least six consecutive months immediately preceding the filing of the petition.

[5] The trial court need only find one of the statutory grounds for termination. N.C.G.S. § 7B-1111(a). Furthermore, this Court's appellate review is limited to those assignments of error set out in the record on appeal and properly presented and discussed in the party's brief. N.C. R. App. P. 10(a) (2002); N.C. R. App. P. 28(a) (2002). Questions not so raised and presented are deemed abandoned. Since Faircloth has failed to present argument against several of the statutory grounds for termination found by the trial court, we do not review those grounds. In addition, by failing to deny in his answer certain allegations contained in the petition, Faircloth, in fact, admitted he willfully left the children in foster care for more than twelve months without showing reasonable progress and failed to pay a reasonable portion of the children's cost of care for a period of six months immediately preceding the filing of the petition although able to do so. *See* N.C. Gen. Stat. §§ 7B-1107, 7B-1108(a) (2001). Accordingly, even as-

suming Faircloth's two remaining assignments of error have merit, any such errors are not prejudicial in this case since other substantial grounds for termination were established.

We hold that the trial court did not err in failing to recuse itself, did not err in failing to remove Faircloth's counsel from the case, did not abuse its discretion in removing Faircloth from the proceedings and did find sufficient grounds for termination. We affirm the trial court's order terminating Faircloth's parental rights to the four children.

Affirmed.

Judge MARTIN concurs.

Judge TYSON concurs in the result only.

TYSON, Judge concurring.

I concur in the result of the majority's opinion.

I. Facts

On 15 December 1998, Judge Dickson held a hearing on the petition to adjudicate the children abused and neglected. At the hearing, respondent, represented by Attorney William Brown, called the children to testify. Judge Dickson found that none of the children could testify because of the detrimental effect on the children to face their father. Respondent appealed. Attorney Brown also represented defendant on his first appeal to this Court. On 4 April 2000, this Court held:

> Because the trial court applied an erroneous legal standard in denying respondent father's request to call the children as witnesses, we must reverse the adjudication order in this case and remand the matter to the District Court for a new hearing at which the competence of the children to testify, should they be called as witnesses, shall be determined in accordance with G.S. § 8C-1, Rule 601. In the event the children's mental condition does not render them incompetent to testify, and they are called as witnesses, the trial court shall take appropriate measures to mitigate, insofar as possible, any harmful effects to them of being required to testify.

In re Faircloth, 137 N.C. App. 311, 318, 527 S.E.2d 679, 684 (2000).

More than ninety days after this Court's mandate issued, DSS petitioned on 3 August 2000 for termination of respondent's parental rights without calendaring the hearing on remand on the petition to adjudicate the children abused and neglected. On 6 September 2000, respondent requested that William Brown be appointed his counsel for the termination of parental rights cases. This request was granted.

On 19 March 2001, Mr. Brown filed a motion for Judge Dickson to recuse himself claiming that: (1) Judge Dickson was the presiding judge over the abuse and neglect matter; (2) Judge Dickson's "judgment in [that matter] was overturned by the North Carolina Court of Appeals"; (3) the matter was set for termination of parental rights on 23 March 2001; and (4) Judge "Dickson may have pre-conceived judgment in this matter." On 7 May 2001, Mr. Brown filed a motion to withdraw as counsel at the request of his client.

Neither of these motions were calendared for prior hearing nor were the children subpoenaed to testify at the termination proceeding. Respondent has been incarcerated since 8 January 1998. He was brought from North Carolina Central Prison for the hearing on termination of his parental rights.

At the hearing, the trial court heard respondent's pending motions. Judge Dickson stated "Mr. Brown, you have motions?" Mr. Brown responded:

> Your honor, my first motion is for me to withdraw. Within the confines of this courtroom, in front of this judge, Mr. Faircloth has on many occasions expressed his displeasure with my representations, saying there's a conflict and that inadequate representation. I also received a letter from him on 5/19, and without breaching the lawyer-client privilege, it is simply, among other things, saying that he's displeased with my representations, that he feels that I am inadequately representing him, your honor.

Mr. Faircloth agreed there was a conflict of interest and stated: "I asked this man to file motions. I asked him to file subpoenas. I asked him to do things that he should have been doing. He ain't even done—he ain't even tried to fight the case. Even on appeal, that I was supposed to have went before another—on another, a new trial. I ain't been to no new trial yet. That been over two, three years. That's my constitutional right, to have another trial." Judge Dickson denied Mr. Brown's motion to withdraw and ruled that the "motion

to have Mr. Brown removed as counsel orally made by the Respondent Father is denied." Mr. Faircloth became angry and argumentative by this ruling.

Mr. Brown then presented the motion to recuse based upon respondent's belief "that [Judge Dickson] may have a preconceived idea as to how to rule on this case." Mr. Faircloth stated to Judge Dickson "You biased and you're prejudiced, and you need to get the f—k off my d—n case." In response, Judge Dickson stated "This Court has no preconceived opinions in this matter. This is a different matter from the matter previously heard by this Court. The motion to recuse is denied." Respondent became more argumentative and profane and was removed from the proceeding and transported back to prison.

II. Motion to Recuse

The Code of Judicial Conduct provides in pertinent part:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) He has a personal bias or prejudice concerning a party. . . .

Code of Judicial Conduct, Cannon 3(C) (2002). "The burden is on the party moving for recusal to demonstrate objectively that grounds for disqualification actually exist." *State v. Kennedy*, 110 N.C. App. 302, 305, 429 S.E.2d 449, 451 (1993) (citations omitted) (internal quotation marks omitted). "The moving party may carry this burden with a showing of substantial evidence that there exists such a personal bias, prejudice or interest on the part of the judge that he would be unable to rule impartially or a showing that the circumstances are such that a reasonable person would question whether the judge could rule impartially." *Id.* (citations omitted) (internal quotations omitted). "[W]hen the trial judge found sufficient force in the allegations contained in defendant's motion to proceed to find facts he should have either disqualified himself or referred the matter to another judge." *Bank v. Gillespie*, 291 N.C. 303, 311, 230 S.E.2d 375, 380 (1976).

"Bias or prejudice does not refer to any views a judge may entertain toward the subject matter involved in the case." *Kennedy*, 110 N.C. App. at 305, 429 S.E.2d at 451. "[T]he fact that a trial judge has repeatedly ruled against a party is not grounds for disqualification of that judge absent substantial evidence to support allegations of inter-

est or prejudice." *Love v. Pressley*, 34 N.C. App. 503, 506, 239 S.E.2d 574, 577 (1977), *cert. denied*, 394 N.C. 441, 241 S.E.2d 843 (1978).

Here, the only allegations in support of respondent's motion to recuse is that Judge Dickson presided over the prior abuse and neglect proceeding which was overturned on appeal and that "Judge John W. Dickson may have a pre-conceived judgment in this matter." Previously holding a hearing on abuse and neglect is not grounds for disqualification in the present action. *Id.* Without further allegations of bias or prejudice, the trial court did not err in denying respondent's motion to recuse.

III. Motion to Withdraw

Parents in a termination of parental rights action are guaranteed the right to appointed counsel if they are found indigent. N.C. Gen. Stat. § 7B-1109. "Although the right of an indigent defendant to have competent counsel is unquestionable, *cf. State v. Sweezy*, 291 N.C. 366, 371, 230 S.E.2d 524, 528 (1976), an accused does not have the right to have the counsel *of his choice* appointed for him, nor the right to insist that his attorney be dismissed and new counsel appointed merely because the defendant becomes dissatisfied with the attorney's services. *Id.*" *State v. Tucker*, 111 N.C. App. 907, 908, 433 S.E.2d 476, 477, *disc. rev. denied*, 355 N.C. 564, 439 S.E.2d 160 (1993). "A trial judge is only constitutionally required to appoint substitute counsel when the initial appointment has not afforded defendant his constitutional right to counsel." *Id.*

Here, Mr. Brown moved to withdraw as counsel for respondent based on the request of respondent. The trial court was not required to appoint substitute counsel in place of Mr. Brown. Judge Dickson specifically told respondent "You can either have Mr. Brown or you can proceed without an attorney. That is your choice, Sir. I am not going to appoint another attorney to represent you." Respondent did not request to proceed *pro se*; he stated: "I wish to have me another attorney." The trial court did not err in denying the motion for Mr. Brown to withdraw as counsel for respondent.

IV. Termination Hearing

The trial court found eight separate statutory grounds for termination. Respondent made a blanket assignment of error as to all of the findings and conclusions but failed to argue against four of the statutory grounds in its brief: (1) respondent leaving the children in

foster care for a continuous period of 6 months immediately preceding the petition for termination being filed without paying a reasonable portion of cost of care although physically and financially able to do so, N.C. Gen. Stat. § 7B-1111(a)(3); (2) respondent willfully abandoning the children for at least six consecutive months preceding the filing of the petition, N.C. Gen. Stat. § 7B-1111(a)(7); (3) respondent being incapable of providing for the proper care and supervision of the child such that the children are dependent within the meaning of N.C. Gen. Stat. § 7B-101(9) and there is a reasonable probability that such incapability will continue for the foreseeable future, N.C. Gen. Stat. § 7B-1111(a)(6); and (4) the parental rights of respondent with respect to Amanda had been involuntarily terminated and respondent lacked the ability or willingness to establish a safe home, N.C. Gen. Stat. § 7B-1111(9).

Only one statutory ground need exist for a trial court to terminate parental rights. N.C. Gen. Stat. § 7B-1111(a). By failing to argue error in the findings or conclusions that these statutory grounds exist, respondent has abandoned these issues on appeal. N.C. R. App. P. 10(a), 28(a).

STATE OF NORTH CAROLINA v. EUGENE PAVIN STRICKLAND

No. COA01-1449

(Filed 5 November 2002)

1. Constitutional Law— right to speedy trial—long period of pretrial incarceration

The trial court did not violate a defendant's right to a speedy trial under U.S. Const. amend. VI and N.C. Const. art. I, § 18 in a second-degree rape and misdemeanor breaking and entering case even though defendant was incarcerated awaiting trial for 940 days, because: (1) the prosecutor offered evidence to show that the long period of defendant's pretrial incarceration was the result of a prosecutorial backlog of other serious felony cases, and defendant did not present any evidence of neglect or willfulness by the prosecutor or that the delay was purposeful or oppressive to him; (2) defendant did not allege any prejudice created by the two and one-half year delay before his trial other than prolonged anxiety and concern; and (3) defendant did not

even allege that any witnesses had disappeared, died, or were otherwise unavailable, and defendant did not assert the loss, deterioration or disintegration of physical evidence.

2. Constitutional Law— right to present defense—sufficient opportunity to question witness on cross-examination

The trial court did not violate a defendant's right to present a defense in a second-degree rape and misdemeanor breaking and entering case even though the trial court sustained seven of the prosecutor's objections during defense counsel's cross-examination of the victim ex-wife, because: (1) defendant had sufficient opportunity to question the victim extensively despite the State's successful objections in response to a line of questioning regarding defendant's interaction with the victim after their separation; and (2) defendant testified on his own behalf and presented three other witnesses.

3. Evidence-prior crimes or bad acts— history of abuse of victim

The trial court did not err in a second-degree rape and misdemeanor breaking and entering case by admitting evidence of past crimes under N.C.G.S. § 8C-1, Rule 404(b) including defendant's history of abuse of his victim ex-wife during their marriage, because: (1) defendant's physical abuse towards the victim is not too remote in time to be relevant; (2) the incidents are sufficiently similar, whether sexual in nature or not, since defendant had a history of attacking the victim and asserting his physical power over her; (3) the evidence was relevant to prove defendant's pattern of physical intimidation of the victim; and (4) the evidence has bearing on defendant's state of mind at the time of the attack in June 1998.

4. Criminal Law— improper testimony—objection sustained—no duty to strike testimony or issue curative instruction

The trial court did not err in a second-degree rape and misdemeanor breaking and entering case by failing to strike improper testimony from the record upon defense counsel's request and by failing to issue a curative jury instruction after the trial court sustained defendant's objection to the testimony, because: (1) the trial court's act of sustaining defendant's objection to improper testimony meant the trial court had no duty to strike the testimony or issue a curative instruction; and (2) the

general instructions given at the beginning of the trial were sufficient to prevent any prejudicial effect produced by the failure to strike the improper testimony.

5. Evidence— prior crimes or bad acts—impeachment—opening door to details

The trial court did not abuse its discretion in a second-degree rape and misdemeanor breaking and entering case by denying defendant's motion for a mistrial even though the State cross-examined defendant about the details of his prior convictions that were being used for impeachment purposes, because defendant opened the door to the details of his previous convictions by: (1) his detailed explanations of the actions which gave rise to these charges; and (2) on cross-examination, requesting from the prosecutor more specific information about his prior misconduct on several occasions.

6. Rape— second-degree—actual or constructive force—motion to dismiss—sufficiency of evidence

The trial court did not err by failing to dismiss the charge of second-degree rape even though defendant contends that there was no evidence of the actual or constructive force necessary, because: (1) the victim testified that she was afraid of defendant and struggled with him physically to prevent intercourse; and (2) this testimony taken in the light most favorable to the State was proof of both actual and constructive force sufficient to support defendant's conviction.

7. Witnesses— assistant clerk of court—custodial officer—minimal contact with jurors

The trial court did not err in a second-degree rape and misdemeanor breaking and entering case by allowing the assistant clerk of court to testify even though defendant contends she was a custodial officer in charge of the jury, because: (1) there is no evidence that the assistant clerk's contacts with the jury were prejudicial to defendant in any way when her interaction with the jury was entirely within the courtroom as part of her job, and at no point did she take control over the jury or transport them outside the courtroom; and (2) the assistant clerk was never alone with any one juror or group of jurors, and the assistant clerk's interaction with the jury was minimal.

Appeal by defendant from judgment entered 30 January 2001 by Judge B. Craig Ellis in Robeson County Superior Court. Heard in the Court of Appeals 17 September 2002.

Attorney General Roy Cooper, by Assistant Attorney General Donald W. Laton, for the State.

William L. Davis, III, for defendant-appellant.

EAGLES, Chief Judge.

Eugene Pavin Strickland ("defendant") appeals from the trial court's judgment entered on a jury verdict finding him guilty of second-degree rape and misdemeanor breaking and entering. Defendant asserts seven assignments of error: (1) that defendant's right to a speedy trial was denied; (2) defendant was denied his right to present a defense; (3) the trial court admitted improper evidence of past crimes; (4) the trial court failed to issue a curative jury instruction; (5) defendant's motion for mistrial should have been granted; (6) the evidence against defendant was insufficient to support a conviction; and (7) that the trial court allowed improper testimony from an officer of the court. After reviewing the record and briefs, we find no error.

The evidence tends to show the following. Serena Blanks ("victim") was married to defendant for six years until their divorce in May 1997. Defendant and victim had two daughters. Defendant was violent towards victim throughout the marriage and physically abused victim at least ten times. On at least one occasion, victim assaulted defendant in return. Victim left the marital home in February 1996. Defendant testified that he and victim continued to have a sexual relationship after the separation and saw each other on a regular basis. The victim denied any sexual intercourse with defendant after their separation. She testified that she had taken her children to visit with defendant and that she had cut defendant's hair for him once while they were separated.

On 27 June 1998, victim fell asleep at approximately 10:00 p.m. in her living room. She woke up at approximately midnight and checked to make sure both of her doors were locked. She then went to her bedroom and laid down on the bed. Defendant appeared in victim's bedroom and grabbed her arms. Defendant told victim that he was miserable without her and wanted to resume their relationship. Defendant went to the restroom and walked outside for a cigarette

during the course of his conversation with victim. Victim did not use the telephone or lock the door while defendant was outside her home because she wanted to keep him calm. When defendant came back inside the trailer, he began rubbing victim's breasts and pulling at her shirt and shorts. Victim pushed defendant's hands away and struggled with him. Defendant pulled victim to the floor and forced her to have intercourse. After the attack, defendant asked victim to follow him outside, where he showed her a loose window pane in her trailer. Defendant informed victim that he entered the trailer through the broken window.

Defendant was arrested on 27 June 1998. A true bill of indictment was returned against defendant on 14 December 1998. Defendant filed three motions for reduction of his bond, on 6 August 1999, 4 May 2000 and 7 December 2000. On 4 May 2000 and 7 December 2000, defendant also moved to dismiss the charges against him because he had been denied a speedy trial. All of defendant's motions were denied. Defendant's trial began on 23 January 2001, approximately 940 days after he had been arrested.

At trial, defendant testified that he had a continuing sexual relationship with victim after their separation and divorce. Defendant testified that victim had picked him up and had driven him to victim's trailer, where they argued on 26 June 1998. Defendant further testified that victim drove him back to his mother's house that evening and that he did not return to victim's trailer later that night. At the close of evidence, the jury found defendant guilty of misdemeanor breaking and entering and guilty of second-degree rape. Defendant appeals.

I

[1] On appeal, defendant first argues that he was denied the right to a speedy trial. Defendant was incarcerated awaiting trial for 940 days. Although his pretrial incarceration was exceptionally lengthy, we hold that his right to a speedy trial was not violated.

The right to have a speedy trial is protected by both the United States and North Carolina Constitutions. U.S. Const. amend. VI, N.C. Const. art. I, § 18. The right to a speedy trial attaches when a defendant is formally charged with a crime, which is usually upon arrest. *See Dillingham v. United States*, 423 U.S. 64, 46 L. Ed. 2d 205 (1975), *cert. denied*, 434 U.S. 1018, 54 L. Ed. 2d 764 (1978); *State v. McKoy*, 303 N.C. 1, 277 S.E.2d 515 (1981). When determining whether an

accused's right to a speedy trial has been violated, the court should consider four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. *Doggett v. United States*, 505 U.S. 647, 120 L. Ed. 2d 520 (1992); *Barker v. Wingo*, 407 U.S. 514, 33 L. Ed. 2d 101 (1972). Of the four factors to be considered, no single factor is determinative of the issue of whether a trial was sufficiently speedy. *State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994); *State v. Johnson*, 124 N.C. App. 462, 466, 478 S.E.2d 16, 19 (1996).

Once a defendant shows that his trial has been delayed for an exceptional amount of time, the delay triggers the court's consideration of the remaining *Barker* factors. *See Webster*, 337 N.C. at 679, 447 S.E.2d at 351; *Johnson*, 124 N.C. App. at 466, 478 S.E.2d at 19. In North Carolina, a delay of sixteen months was deemed lengthy enough to trigger the trial court's examination of the other three *Barker* factors. *See Webster*, 337 N.C. at 679, 447 S.E.2d at 351. If a defendant proves that a delay was particularly lengthy, the defendant creates a prima facie showing that the delay was caused by the negligence of the prosecutor. *State v. Chaplin*, 122 N.C. App. 659, 664, 471 S.E.2d 653, 655-56 (1996) (1055 day delay); *State v. Pippin*, 72 N.C. App. 387, 392, 324 S.E.2d 900, 904, *disc. rev. denied*, 313 N.C. 609, 330 S.E.2d 615 (1985) (14 month delay). The prosecutor may rebut the prima facie case by showing a valid reason for the delay. *State v. Avery*, 95 N.C. App. 572, 577, 383 S.E.2d 224, 226 (1989), *disc. rev. denied*, 326 N.C. 51, 389 S.E.2d 96 (1990). Once the prosecutor offers a reason for the lengthy delay of defendant's trial, the burden of proof shifts back to the defendant to show neglect or willfulness by the prosecutor. *Avery*, 95 N.C. App. at 577, 383 S.E.2d at 226. If the delay is not proven to be purposeful or oppressive, this factor weighs in favor of the State. *See State v. Hammonds*, 141 N.C. App. 152, 541 S.E.2d 166 (2000), *aff'd*, 354 N.C. 353, 554 S.E.2d 645 (2001), *cert. denied*, 536 U.S. 907, 153 L. Ed. 2d 184 (2002).

Here, defendant was imprisoned for 940 days between his arrest and his trial. This exceptional length of pretrial incarceration supports defendant's claim that his right to a speedy trial was denied and triggers consideration of the remaining *Barker* factors.

The second factor in *Barker* concerns the reason for the delay. Here, defendant's trial was delayed for such a great amount of time that it creates the prima facie showing that the delay was created by prosecutorial negligence. *See Chaplin*, 122 N.C. App. at 664, 471

S.E.2d at 655-56; *Pippin*, 72 N.C. App. 392, 324 S.E.2d at 904. However, the prosecutor offered evidence to rebut this presumption by showing that the long period of defendant's pretrial incarceration was the result of a prosecutorial backlog of other serious felony cases. *See State v. Spivey*, 150 N.C. App. 189, 563 S.E.2d 12 (2002). Although case backlogs should not be encouraged, the defendant did not present any evidence of neglect or willfulness by the prosecutor. The defendant did not prove that the delay of his trial was purposeful or oppressive to him. As a result, the second *Barker* factor weighs in favor of the State.

The third *Barker* factor examines whether defendant has asserted his right to a speedy trial. A criminal defendant who vigorously asserts his right to a speedy trial will be considered in a more favorable light than a defendant who does not. *See Barker*, 407 U.S. at 528-29, 33 L. Ed. 2d at 115-16. Here, defendant's attorney filed two motions to dismiss based on the lack of a speedy trial. The first of these motions was filed on 4 May 2000, when defendant had been incarcerated for nearly two years. The second motion, filed 7 December 2000, led to the defendant's trial in January 2001. Because defendant asserted his right to a speedy trial, the third *Barker* factor weighs in favor of the defendant.

The fourth factor in the *Barker* test hinges on the defendant's ability to show prejudice to his defense caused by the delay in trial. In *Doggett v. United States*, 505 U.S. 647, 655, 120 L. Ed. 2d 520, 531 (1992), the Supreme Court stated that a delay of eight and one-half years before trial "presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." A specific showing of prejudice to the defendant is difficult, because "time's erosion of exculpatory evidence and testimony can rarely be shown." *Doggett*, 505 U.S. at 655, 120 L. Ed. 2d at 530-31. Here, defendant did not **allege** any prejudice created by the two and one-half year delay before his trial, other than "prolonged anxiety and concern." Although proving the loss of evidence or testimony is a nearly impossible feat, defendant did not even **allege** that any witnesses had disappeared, died or were otherwise unavailable. *See Chaplin*, 122 N.C. App. 659, 665, 471 S.E.2d 653, 657 (1996) (where defendant could show prejudice from delay because a key exculpatory defense witness had been released from prison and was beyond the court's subpoena power). Likewise, defendant did not assert the loss, deterioration or disintegration of any physical evidence. We cannot assume prejudice in the absence of an allegation of prejudice, especially

when the pretrial delay is not as egregious as the delay in *Doggett*. Therefore, the fourth *Barker* factor weighs against defendant.

After consideration of all the factors outlined in *Barker*, we conclude that defendant's excessive post-accusation incarceration before trial is outweighed by the defendant's inability to prove neglect or willfulness by the prosecutor combined with the lack of allegation or proof of prejudice. Accordingly, this assignment of error is overruled.

II

[2] Defendant's second assignment of error alleges that the trial court denied his right to present a defense. We disagree.

According to the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, every criminal defendant has a right to defend himself against criminal charges. However, the presentation of evidence and witness testimony is subject to the reasonable judgment of the trial court. *See State v. Demos*, 148 N.C. App. 343, 351, 559 S.E.2d 17, 23, *cert. denied*, 355 N.C. 495, 564 S.E.2d 47 (2002). If a defendant is permitted sufficient opportunity to question witnesses on direct or cross-examination, no prejudicial error occurs. *Id.* at 351, 559 S.E.2d at 23.

Here, the trial court sustained seven of the prosecutor's objections during defense counsel's cross-examination of victim. The successful objections were in response to a line of questioning regarding defendant's interaction with victim after their separation. Despite these unanswered questions, defense counsel had opportunity to cross-examine victim extensively. In fact, the transcript of victim's cross-examination occupies sixty-nine pages of the total trial transcript. Defendant also testified in his own defense and presented three other witnesses. Because defendant was not barred from presenting a defense, this assignment of error is overruled.

III

[3] Defendant also assigns error to the trial court's admission of evidence of defendant's history of abuse of the victim. Defendant contends that this evidence should have been barred by G.S. § 8C-1, Rule 404(b). We disagree.

Rule of Evidence 404(b) states, in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in

> conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

G.S. § 8C-1, Rule 404(b) (2001). Evidence should be excluded if its only probative value is to show the defendant's propensity to commit the crime for which he is currently charged. *See State v. West*, 103 N.C. App. 1, 404 S.E.2d 191 (1991). If a prior crime or act shows defendant's propensity to commit a crime, it is still admissible under Rule 404(b) if it is relevant for another purpose. The admission of Rule 404(b) evidence is guided by similarity and temporal proximity. The less similar or further apart in time two incidents are, the less probative value is attached to them. *State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 824 (1988).

Here, defendant objected to the admission of victim's testimony about previous acts of abuse towards her by defendant during their marriage. Victim was allowed to testify that defendant had beaten her and threatened her family during the marriage:

> Q: What happened; what did he do to you?
>
> A: Pulled a trash bag over my head; put a double-barrel shotgun to my mouth; drug me down dirt roads; beat me with vacuum cleaner pipes, brooms.
>
> . . . .
>
> Q: And how did the Defendant place the plastic bag over your head?
>
> A: He took a—like a rope, tied my hands and legs together behind me and took a trash bag and put it over me. Took duct tape, wrapped the bottom of the trash bag. And I was—stayed in it, seemed about approximately five or ten minutes.

Defendant argued that these actions were not relevant to the case at bar because they occurred almost twelve years before his trial. In addition, defendant argued that the evidence of previous abuse was not a sufficiently similar act. Defendant asserts that because the previous assaults were not sexual in nature they have no bearing on the current accusations. We disagree. The evidence of defendant's physical abuse towards victim is not too remote in time to be relevant.

Victim stated that she suffered physical abuse throughout her marriage to defendant, which ended approximately one year before the attack on victim that gave rise to defendant's current charges. One year is sufficiently close in time as to be relevant. The incidents are also sufficiently similar to be admissible. Whether sexual in nature or not, defendant had a history of attacking victim and asserting his physical power over her. The evidence of defendant's prior abuse of victim was relevant to prove his pattern of physical intimidation of victim. Also, the evidence has bearing on victim's state of mind at the time of the attack in June 1998. Therefore, we overrule this assignment of error.

IV

[4] Defendant also argues that the trial court committed reversible error by its failure to strike improper testimony and give the jury instructions to disregard testimony after the court sustained defendant's objection to testimony by a witness for the State. We are not persuaded.

At trial, the State called Ms. Shelby Foy from the Domestic Violence Center as a witness. Ms. Foy testified that "when [victim] came to the office, we noticed that she had extensive bruises about her neck . . . legs and arms. And when we see that, we immediately take photographs of that as best we could, and for proof of the injuries." Her testimony on this point was objected to by defense counsel, and the objection was sustained by the trial court. However, the trial court failed to strike the testimony from the record upon defense counsel's request. Also, the trial court did not issue a curative instruction to the jury. Defendant claims these rulings allowed improper evidence before the jury and prejudiced defendant's case. We disagree.

The trial court was under no obligation to issue curative instructions or strike the forbidden testimony from the record. The trial court instructed the jury at the beginning of trial:

> It is the right of the attorneys to object when testimony or other evidence is offered which they believe not to be admissible. When the Court sustains an objection to a question, the jurors must disregard the question and the answer, if one has been given, and draw no inference from the question or speculate as to what the witness would have said if permitted to answer the question. Evidence stricken from the record must, likewise, be disregarded by the jury.

These general instructions, given at the beginning of the trial, are sufficient to prevent any prejudicial effect produced by the failure to strike the improper testimony. *State v. Vines*, 105 N.C. App. 147, 153, 412 S.E.2d 156, 160-61 (1992). Since the trial court sustained defendant's objection, it had no duty to strike the testimony or issue a curative instruction. This assignment of error is overruled.

V

[5] Next, defendant assigns error to the trial court's failure to grant his motion for mistrial. Defendant claims that the improper introduction of evidence by the prosecutor entitles defendant to a mistrial. We disagree.

A judge must declare a mistrial if there is an error or legal defect in the proceedings or conduct in or out of the courtroom that results in substantial and irreparable prejudice to defendant's case. G.S. § 15A-1061 (2001). A declaration of mistrial is within the trial court's discretion and a failure to declare a mistrial will not be disturbed unless an abuse of discretion is shown. *State v. Calloway*, 305 N.C. 747, 754, 291 S.E.2d 622, 627 (1982). If no prejudicial effect is shown, the denial of a mistrial motion is appropriate. *See State v. Mills*, 39 N.C. App. 47, 249 S.E.2d 446 (1978), *disc. rev. denied*, 296 N.C. 588, 254 S.E.2d 33 (1979).

Here, defendant contends that the trial court allowed the State to cross-examine defendant improperly about the details of his prior convictions for trespass, communicating threats, assault on a female and stalking. Defendant claims that the prosecutor should have been limited to asking about the time, place and punishment of those crimes. Normally, when a conviction is used for impeachment purposes on cross-examination, the prosecutor cannot go into the details of the previous crimes without creating reversible error. *State v. Gallagher*, 101 N.C. App. 208, 398 S.E.2d 491 (1990); *State v. Rathbone*, 78 N.C. App. 58, 336 S.E.2d 702 (1985), *disc. rev. denied*, 316 N.C. 200, 341 S.E.2d 582 (1986). However, in this case, defendant himself opened the door to the details of his previous convictions:

> Q: Is that, sir, admitting that you were convicted of second degree trespass when you went to the Robeson County Counseling Center and they asked you to leave and you would not leave and Patrolman J. Katzenberger charged you with that offense?
>
> MR. DAVIS: Objection.

THE WITNESS: I—I reckon that you—

THE COURT: Overruled.

THE WITNESS: I reckon that you can call it second degree trespassing after the judge sent me there. And once I—if it was up to me, I would have never went there. So, when the judge tells me to go, I'm going there.

. . . .

THE WITNESS: When Theodora, Serena, Dora Sampson come barging into my home, and I'm sitting there, and these people attacked me in my house, then the policemen—I called the police. The police arrived at my residence—you can ask the officer. . . . [T]hese people follow me down here to the courthouse: the mother, the daughter, the other daughter. They get up here and swear these complaints out. He said this, he did this, he said he was going to kill me. . . . Ms. Theodora Hunt tells them I placed a communicating threat on her. Dora Hines says I was trespassing on her land. Serena Strickland says I was threatening to kill her and, plus, Serena Strickland says I assaulted her.

. . . .

Q: Now as to that particular charge that was filed in 93-Cr-11069.

A: Yes, ma'am.

Q: Were you convicted in 94-Cr-15377 of second degree trespass?

A: Who is the complainant?

Q: Dora Sampson, offense date August 6, 1994, at 128 Riley Circle in Lumberton, North Carolina.

A: When you have three people—

Q: Sir, if you could answer my question.

. . . .

Q: Were you convicted in 94-Cr-15378 of communicating threats to Theodora Hunt on August 6, 1994 for orally telling her you were going to kill her?

A: I don't see how I was going to kill Ms. Sampson and all three of them was on me.

. . . .

Q: Were you convicted of assault on a female in 95-Cr-13982 on August 4th, 1995?

A: This is on Serena Strickland, right?

Q: Where it was alleged that you assaulted Serena Strickland by hitting her in the mouth with your fist?

. . . .

Q: Were you convicted in 94-Cr-15134 for harassing phone calls to Teresa Baily?

A: I was calling to get my things that Serena let her walk out of the house with.

. . . .

Q: Were you convicted in 95-Cr-11125, date of offense May 28th, 1995, for assault on a female of Serena Strickland by beating her about the arms with a belt, causing numerous bruises where you entered a plea of guilty?

Although we do not approve of the prosecutor's going beyond the normal level of detail on prior crimes used for impeachment, the prosecutor's questions here did not create reversible error. Instead, defendant's detailed explanations of the actions which gave rise to these charges opened the door and allowed the prosecutor to divulge more details about the crimes in question. During his cross-examination, the defendant requested more specific information about his prior misconduct on several occasions from the prosecutor. The prosecutor in response went into some identifying detail about the prior misconduct, but she did not, in effect, explain the entire prior crime to the jury. The prosecutor may have inquired about a few too many details of defendant's prior criminal record, but defendant has not alleged or shown any prejudicial error from the prosecutor's mistakes. As a result, this assignment of error is overruled.

VI

[6] Defendant's sixth assignment of error is that the evidence was not sufficient to support the jury's finding of guilt for second-degree rape. Defendant argues that there was no evidence of the actual or constructive force necessary for a second-degree rape conviction and that the trial court should have dismissed the charge. We disagree.

The crime of second-degree rape is defined as follows:

> A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person: (1) By force and against the will of the other person; or (2) Who is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless.

G.S. § 14-27.3(a) (2001). When faced with a motion to dismiss, the issue is whether there is sufficient evidence in the record to establish every element of a crime and identify the accused as its perpetrator. *See State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982). Upon consideration of a motion to dismiss, the evidence must be considered in the light most favorable to the State, giving the State the benefit of every reasonable inference that can be drawn from it. *Id.* at 67, 296 S.E.2d at 652-53.

Here, the victim testified that she was afraid of defendant and struggled with him physically to prevent intercourse. This testimony, taken in the light most favorable to the State, gives proof of both actual and constructive force sufficient to support defendant's conviction. This assignment of error is overruled.

VII

[7] Defendant's final assignment of error refers to the testimony of an assistant clerk of court whom defendant argues was a custodial officer in charge of the jury. Defendant asserts that the clerk's interaction with the jury as she swore them in disqualified her from testifying on behalf of the State. We disagree.

An officer of the court who is a custodial officer in charge of the jury is disqualified from testifying for the State. *State v. Mettrick*, 305 N.C. 383, 385, 289 S.E.2d 354, 356 (1982). Prejudice is conclusively presumed in those situations. *State v. Bailey*, 307 N.C. 110, 112, 296 S.E.2d 287, 289 (1982). However, the relationship between the State's witness and the jury must be scrutinized before the conclusive presumption of prejudice is applied. *State v. Mettrick*, 305 N.C. 383, 386, 289 S.E.2d 354, 356 (1982).

Here, the relationship between the jury and the assistant clerk who offered testimony for the State was not extensive enough to disqualify her testimony. The assistant clerk administered oaths to wit-

nesses and to the jury when it was empaneled. In addition, the assistant clerk also called the jury roll. There is no evidence that the assistant clerk's contacts with the jury were prejudicial to defendant in any way. Her interaction with the jury was entirely within the courtroom, as part of her job. At no point did she take control over the jury, nor did she transport them outside the courtroom. *See Mettrick*, 305 N.C. 383, 289 S.E.2d 354 (1982) (where testifying sheriff drove jury to court and to lunch and was alone with jury for almost three hours); *Bailey*, 307 N.C. 110, 296 S.E.2d 287 (1982) (where testifying sheriff took three jurors out to dinner after two different judges had instructed him not to have contact with jurors). Of similar import, the assistant clerk was never alone with any one juror or group of jurors. Since the assistant clerk's interaction with the jury was minimal, there was no error in permitting her testimony. This assignment of error is overruled.

In sum, we conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges MARTIN and THOMAS concur.

LEON KEA, PETITIONER v. DEPARTMENT OF HEALTH AND HUMAN SERVICES, O'BERRY CENTER, RESPONDENT

No. COA01-612

(Filed 5 November 2002)

1. Administrative Law— judicial review—questions of law—de novo standard

The trial court did not err by applying the de novo standard of review to a State Personnel Commission decision terminating petitioner for sexual harassment where petitioner sought judicial review of the Commission's decision based in part on questions of whether some of the Commission's conclusions were supported by the record, whether respondent failed to act as required by law, and whether petitioner's dismissal was without just cause. These are questions of law subject to de novo review.

2. Public Officers and Employees— notification of specific allegations—disciplinary action—simultaneous

The trial court erred by holding that a state employee dismissed for sexual harassment did not receive due process where petitioner received the predisciplinary conference required under 25 N.C.A.C. § 1J.0608(b) and the notification mandated by N.C.G.S. § 126-35 in that he was informed of the allegations against him and given a chance to respond in an initial meeting at which he was asked to submit a written statement; a second meeting occurred; petitioner subsequently received a letter which set forth in detail the allegations against him and informed him of a predisciplinary conference; and, following that conference, petitioner received a dismissal letter which set out the specific acts or omissions supporting his dismissal.

3. Public Officers and Employees— predisciplinary conference—prior conclusions—no due process violation

The trial court erred by ruling that a state employee accused of sexual harassment was denied due process by biased decision-making where the employee contended that a deputy director had reached conclusions prior to the predisciplinary conference, but those conclusions were based on an extensive investigation and the decision to dismiss petitioner was upheld by both the State Personnel Commission and the Secretary of the Department of Health and Human Services. Due process was not violated by the deputy director acting as investigator or reaching prior conclusions, absent evidence of a disqualifying personal bias.

4. Public Officers and Employees— unacceptable personal conduct—sexual harassment—sufficiency of evidence

The trial court erred by ruling that a state employee dismissed for sexual harassment was denied due process where there was sufficient evidence to support the State Personnel Commission's findings and those findings supported the conclusion that petitioner was dismissed for just cause based on unacceptable personal conduct.

Judge HUDSON dissenting.

Appeal by respondent from order entered 2 April 2001 by Judge Narley C. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 21 February 2002.

Pueschel & Associates, by Janet I. Pueschel, for petitioner-appellee.

Attorney General Roy Cooper, by Assistant Attorney General Lisa Granberry Corbett, for respondent-appellant.

CAMPBELL, Judge.

The North Carolina Department of Health and Human Services ("respondent") appeals from the trial court's order reversing the State Personnel Commission's ("Commission") Decision and Order upholding the dismissal of Leon Kea ("petitioner") from his employment at O'Berry Center, a State facility for the mentally retarded. After careful consideration of the record and briefs, we reverse the trial court's order and remand for reinstatement of the Decision and Order of the Commission.

Petitioner was dismissed from his position as Cluster Administrator at O'Berry Center on 13 August 1998. The reason given for his dismissal was unacceptable personal conduct. The misconduct arose out of his relationship with a subordinate employee, Veronica Ham ("Ham"), and respondent's subsequent investigation of that relationship. Specifically, petitioner was dismissed for: (1) treating Ham in a special and preferential way; (2) sexually harassing Ham; (3) retaliating against Ham; (4) disobeying a direct order by reporting to work and discussing the investigation with staff while on investigative status; (5) failing to follow educational leave procedures regarding Ham's educational leave in the Spring of 1998; and (6) failing to follow procedures by allowing Ham to enter requisitions without prior authorization. Petitioner was informed of his dismissal by letter dated 12 August 1998. Petitioner followed respondent's internal grievance procedure. Petitioner's dismissal was subsequently upheld by the Secretary of the Department of Health and Human Services by letter dated 19 November 1998. On 11 December 1998, pursuant to N.C. Gen. Stat. §§ 126-34.1 and 150B-23, petitioner filed a contested case petition with the Office of Administrative Hearings. Petitioner alleged he was terminated without just cause in violation of N.C. Gen. Stat. § 126-35, his due process rights were violated in that he was not provided with an unbiased pre-termination hearing, and respondent violated the specificity requirements of N.C. Gen. Stat. § 126-35. Petitioner sought reinstatement with back pay and benefits.

Following a hearing, an administrative law judge ("ALJ") issued a Recommended Decision on 22 December 1999. The ALJ made the fol-

lowing findings of fact: Petitioner began working as a Cluster Administrator at O'Berry Center on 1 February 1993. As Cluster Administrator, petitioner was responsible for overseeing the staff that provided care for the residents in his cluster, which consisted of four units referred to as group homes. In 1996, Veronica Ham was hired as a DT/Escort for Cluster 1, the cluster administered by petitioner. Each cluster had a DT/Escort staff position. As a DT/Escort, Ham's job duties included "normal Developmental Technician [DT] daily client care duties and additional duties of providing transportation and escort to clients needing services off of the home unit." Ham's work hours were 7:00 a.m.-3:30 p.m. She was supervised by Deborah Martin ("Martin"), Group Home Director for Group Home 1. Martin supervised Ham until Ham took maternity leave.

While Ham was home on leave, petitioner called and asked if she would like an office when she returned to work and told her that her work hours would be 8:00 a.m-5:00 p.m. with holidays and weekends off. Ham returned to work in October 1996 and was given office space in Cluster 1. While her job position remained DT/Escort, she was now assigned to Group Home 2, whose Director was Greg Anderson ("Anderson"). However, Ham was not supervised by Anderson. Instead, she reported directly to petitioner. Petitioner instructed Ham to perform various office clerical duties, including requisitions, work schedules, and answering phones. These duties were different from the job duties of a DT/Escort. Petitioner also instructed Ham to use the budget code number of another employee in order to make requisition requests to the central budget office. The ALJ found that petitioner knew allowing Ham to use another employee's budget code violated State Budget Office procedures requiring only the person assigned a budget code be given access to the code and requisition system in order to avoid fraud.

In the Spring of 1998, petitioner allowed Ham to take time off from work to pursue a degree at Wayne Community College. Ham never filled out a request for educational leave and was informed by petitioner that she did not have to account for the time. Petitioner never talked to Ham about using compensatory time for her classes and her time sheets reflect she listed her time in class as time worked. The ALJ found that petitioner was familiar with O'Berry Center's policy on educational leave, and his failure to properly approve and supervise Ham's educational leave was a violation of O'Berry Center's policy.

Following Ham's return to work in October 1996, petitioner frequently asked her to lunch and frequently complimented her on her appearance. Ham never accepted petitioner's lunch invitations. Petitioner commented to Ham that large penises ran in his family, asked her if she was on birth control so that when the two of them had sex he would know she was protected, and invited her to go to Raleigh to stay with him and have sex. He also had other conversations with Ham about his sexual attraction to her.

Ham was subsequently accepted to Nursing School at Wayne Community College. She informed petitioner and was told to fill out the educational leave form and that it would be no problem for her to attend the classes.

On 8 June 1998, the day petitioner completed Ham's performance review, he resumed talking about the possibility of the two of them having a relationship. Ham responded, "We can't do this . . . [y]ou've got a wife. You're a minister. This is wrong. I've already told you 'no'." The next day, petitioner apologized to Ham for his conduct and told her he could no longer supervise her. Ham was informed that she was being transferred back to Group Home 1, where she would be supervised by Deborah Martin. Martin would now be responsible for approving Ham's educational leave. Ham would no longer have office space, her work hours would revert back to normal DT/Escort hours, and she would be assigned normal DT/Escort duties. At the time of the transfer, petitioner knew of past problems between Ham and Martin. However, following the transfer, petitioner refused to consider options for Ham to continue her education and told her the decision was up to Martin.

Ham spoke with Greg Anderson, Group Home Director for Group Home 2, about petitioner's sexual interest in her and told Anderson she believed her transfer was retaliation for her refusal to have sex with petitioner. Anderson suggested Ham report petitioner's conduct to Eugene Hightower, respondent's Employee Relations Specialist. On 15 July 1998, Ham filed a sexual harassment complaint against petitioner. Specifically, the complaint alleged that petitioner, in retaliation for Ham's refusal to have sex with him, disapproved her educational leave that he had previously verbally supported and threatened to transfer her to a work site where she had previously experienced problems.

On 17 July 1998, Eugene Hightower and Frank Farrell ("Farrell"), respondent's Deputy Director of Client Services, met with petitioner

to discuss the sexual harassment complaint. Petitioner admitted he had asked Ham to meet him for dinner on his way back from Raleigh. Petitioner also admitted that and he and Ham once had a conversation about the possibility of having sex. However, petitioner denied ever asking Ham for sex or harassing her in any way. Petitioner told Farrell he had elected to transfer Ham because there was an attraction between the two of them and he felt it was inappropriate for him to continue supervising her.

On 17 July 1998, petitioner was placed on investigative status with pay and advised not to return to O'Berry Center or speak to anyone about the investigation. Petitioner was only given permission to attend Public Manager's training in Raleigh on 20 July and 21 July. Nevertheless, after being placed on investigative status on 17 July, petitioner spoke with three employees and informed them of his suspension. In addition, petitioner came to O'Berry Center on 21 July and spoke with Deborah Martin about Ham's sexual harassment complaint. Finally, on 22 July, petitioner returned to work at the normal time and was told to leave campus immediately.

Petitioner met with Farrell again on 27 July 1998, at which time petitioner changed his story and denied having asked Ham to dinner and having had a conversation with Ham about the possibility of the two of them having sex.

On 30 July 1998, Farrell sent petitioner a letter setting out the specific allegations against him and the conclusions that had been reached up to that point in the investigation. Petitioner was informed that a predisciplinary conference was scheduled for 4 August 1998. Petitioner submitted a written statement to Farrell and the two men discussed the allegations at the predisciplinary conference. Following the conference, petitioner was notified by letter dated 12 August 1998 that he was dismissed for unacceptable personal conduct and informed of the reasons.

The ALJ found as fact that petitioner's credibility was questionable because he had changed his story during the course of the investigation.

Based on his findings of fact, the ALJ made the following pertinent conclusions of law:

> 3. A violation of known and written work rules constitutes unacceptable personal conduct.

4. Preferential treatment combined with sexual harassment of an employee constitutes unacceptable personal conduct.

5. Petitioner failed to meet his burden of proof. The greater weight of the evidence is that Petitioner violated known and written work rules, gave an employee preferential treatment, sexually harassed an employee, and disobeyed a direct order of his supervisor.

6. Respondent DHHS has just cause to discipline Petitioner up to and including dismissal.

7. Petitioner was afforded his statutory due process rights at each stage of the dismissal process including proper notice of the grounds for his dismissal.

Based on his findings and conclusions, the ALJ recommended petitioner's dismissal be affirmed.

On 11 May 2000, the State Personnel Commission adopted the recommended findings of fact and conclusions of law of the ALJ *in toto* and ordered that respondent's dismissal of petitioner be affirmed.

Pursuant to N.C. Gen. Stat. § 150B-43, petitioner sought judicial review of the Commission's decision on the grounds that certain findings of fact and conclusions of law were not "complete, accurate or supported by the record," that respondent failed to act as required by law, that respondent acted erroneously and capriciously, and that petitioner's dismissal was without just cause.

On 30 March 2001, the superior court entered an order reversing the Commission's decision and ordering that petitioner be reinstated and awarded back pay and benefits. The superior court's decision was based on the following conclusions:

6. That Petitioner Kea was not afforded constitutionally guaranteed due process by Respondent during the process of his discharge from the O'Berry Center and that the Commission's decision was in violation of Constitutional provisions, affected by error of law, and unsupported by substantial evidence admissible under N.C.G.S. § [150B]-29(a), [150B]-30, or 150[B]-31;

Respondent appeals.

A final agency decision may be reversed or modified by the superior court if the agency's findings, inferences, conclusions or decisions are:

(1) In violation of constitutional provisions;

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

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2001). The standard of review employed by the superior court is determined by the type of error asserted by the petitioner; errors of law are reviewed *de novo*, while the whole record test is applied to review allegations that the agency decision was not supported by the evidence, or was arbitrary and capricious. *Zimmerman v. Appalachian State Univ.*, 149 N.C. App. 121, 129, 560 S.E.2d 374, 379 (2002) (citing *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 443 S.E.2d 114 (1994). "*De novo* review requires a court to consider the question anew, as if the agency has not addressed it." *Blalock v. N.C. Dep't of Health and Human Servs.*, 143 N.C. App. 470, 475-76, 546 S.E.2d 177, 182 (2001). Under the whole record test, "the reviewing court [must] examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.' " *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). In reviewing a superior court order from an appeal of an agency decision, this Court has a two-fold task: "(1) determine whether the trial court exercised the appropriate scope of review and, if appropriate; (2) decide whether the court did so properly." *Deep River Citizen's Coalition v. N.C. Dep't of Env't & Natural Res.*, 149 N.C. App. 211, 213, 560 S.E.2d 814, 816 (2002).

[1] Respondent first contends the superior court erred in applying the *de novo* standard of review because petitioner never raised errors of law for the superior court to review. We disagree.

Petitioner sought judicial review of the Commission's final agency decision on the grounds that many of its findings of fact were not supported by the whole record and that respondent's decision was capricious. Such errors are subject to the whole record test. *See Zimmerman*, 149 N.C. App. at 129, 560 S.E.2d at 379. However, petitioner also alleged that several of the Commission's conclusions of law, including its conclusion that petitioner was afforded due process and given proper notice of the grounds for his dismissal, were not supported by the record, that respondent failed to act as required by law, and that petitioner's dismissal was without just cause. These are all questions of law which are subject to *de novo* review. *See id.* In its order, the superior court recited that it had reviewed the whole record and conducted a *de novo* review. Accordingly, we conclude the superior court applied the proper standards of review and we must now determine whether it applied these standards correctly.

[2] As grounds for its decision to reverse the State Personnel Commission, the superior court concluded petitioner was not afforded due process by respondent during the course of his dismissal. Respondent argues that petitioner's due process rights were not violated. Petitioner contends he was not given sufficient notice of the grounds for his dismissal and was not given the required oral and written warnings. Petitioner further contends he was denied a fair and impartial decision maker because Farrell had reached certain conclusions prior to the predisciplinary conference.

Pursuant to N.C. Gen. Stat. § 126-35(a) (2001), "[n]o career State employee subject to the State Personnel Act ["Act"] shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." "Just cause" for dismissal of a career State employee subject to the Act includes unsatisfactory job performance and unacceptable personal conduct. 25 N.C.A.C. § 1J.0604(b) (2002). Prior to dismissal for unsatisfactory job performance, a career State employee "must first receive two prior disciplinary actions[.]" 25 N.C.A.C. § 1J.0605(b). The employee is entitled to (1) one or more written warnings followed by (2) "a warning or other disciplinary action which notifies the employee that failure to make the required performance improvements may result in dismissal." *Id.* However, an employee "may be dismissed for a current incident of unacceptable personal conduct, without any prior disciplinary action." 25 N.C.A.C. § 1J.0608(a). Dismissals for unacceptable personal conduct only require (1) a pre-dismissal conference between the employee and the person recommending dismissal, and (2) written notification of the

specific reasons for the dismissal and the employee's right to appeal. 25 N.C.A.C. § 1J.0608(b), (c); N.C. Gen. Stat. § 126-35(a). Unacceptable personal conduct includes:

> (1) conduct for which no reasonable person should expect to receive prior warning; or
>
> (2) job-related conduct which constitutes a violation of state or federal law; or
>
> . . .
>
> (4) the willful violation of known or written work rules; or
>
> (5) conduct unbecoming a state employee that is detrimental to state service; or
>
> . . . .

25 N.C.A.C. § 1J.0614(i).

Petitioner was dismissed for, *inter alia*, violating known and written work rules, sexually harassing a subordinate employee, and disobeying a direct order from a supervisor. We find that all of these grounds fall within the definition of unacceptable personal conduct. Therefore, petitioner was not entitled to oral or written warnings or prior disciplinary action. However, as he contends, petitioner was entitled to a pre-dismissal conference and sufficient notification under N.C. Gen. Stat. § 126-35.

The record shows petitioner was informed of the allegations against him and given a chance to respond in a meeting with Eugene Hightower and Frank Farrell on 17 July 1998. At the meeting, petitioner was asked to submit a written statement in response to the allegations. Petitioner submitted the written statement and had a second meeting with Farrell on 27 July 1998, at which petitioner again denied the allegations against him. Petitioner then received a letter dated 30 July 1998 which set forth in detail the allegations against him and informed him of a predisciplinary conference to be held on 4 August 1998. Following the 4 August predisciplinary conference, petitioner received the dismissal letter, dated 12 August 1998, which set forth the specific acts or omissions supporting his dismissal, as well as his appeal rights. The fact that this notice was given simultaneously with the disciplinary action in this case is not a violation of N.C. Gen. Stat. § 126-35. *See Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 350-51, 342 S.E.2d 914, 922-23 (1986). Based on this record,

we conclude petitioner received the pre-dismissal conference required under 25 N.C.A.C. § 1J.0608(b) and the notification mandated by N.C. Gen. Stat. § 126-35.

[3] Petitioner also contends he was deprived of an impartial and unbiased decision maker because Frank Farrell had reached certain conclusions prior to the predisciplinary conference. A public employee facing an administrative hearing is entitled to an unbiased, impartial decision maker as a requirement of due process. *Id.* at 354, 342 S.E.2d at 924; *see also Crump v. Bd. of Education*, 326 N.C. 603, 615, 392 S.E.2d 579, 585 (1990). "To make out a due process claim based on this theory, an employee must show that the decision-making board or individual possesses a disqualifying personal bias." *Leiphart*, 80 N.C. App. at 354, 342 S.E.2d at 924. Mere familiarity with the facts of a case gained by an agency or individual in the performance of its statutory role does not, however, disqualify, a decision maker. *Id.* at 354, 342 S.E.2d at 925 (citing *Hortonville Dist. v. Hortonville Ed. Asso.*, 426 U.S. 482, 493, 49 L. Ed. 2d 1, 9 (1976).

The record shows that Frank Farrell, the individual who made the initial decision to dismiss petitioner, had reached certain conclusions concerning petitioner's situation as of 30 July 1998, prior to the 4 August 1998 predisciplinary conference. These conclusions were reached after Farrell had conducted an investigation into the allegations against petitioner, including speaking with petitioner on two separate occasions and considering the written statement submitted by petitioner. Following the predisciplinary conference and further investigation, Farrell made the decision to dismiss petitioner. According to the dismissal letter, Farrell had not altered the conclusions he had reached as of 30 July 1998. Accordingly, petitioner contends Farrell could not have been an impartial decision maker. We disagree.

The United States Supreme Court has held that there is no *per se* violation of due process when an administrative tribunal acts as both investigator and adjudicator on the same matter. *Withrow v. Larkin*, 421 U.S. 35, 58, 43 L. Ed. 2d 712, 730 (1975). There is nothing in the record to indicate that Frank Farrell had any disqualifying personal bias against petitioner. The mere fact Farrell was familiar with the facts of petitioner's case and acted as investigator and adjudicator on the matter is not a *per se* violation of due process. *Leiphart*, 80 N.C. App. at 354, 342 S.E.2d at 924-25. Further, in the absence of any evidence that Farrell had a disqualifying personal bias against petitioner,

the fact he had reached conclusions concerning petitioner's situation prior to the predisciplinary conference does not amount to a due process violation. The conclusions Farrell had reached were based on an extensive investigation, which included interviewing numerous individuals familiar with the situation, as well as twice speaking with petitioner and considering petitioner's written statement. Finally, we note that Farrell's decision to dismiss petitioner was subsequently upheld by both the Secretary of the Department of Health and Human Services, H. David Bruton, and the State Personnel Commission. Accordingly, we conclude petitioner has failed to show he was deprived of an impartial decision-making process.

[4] In reversing the Commission, the superior court additionally concluded that its Decision and Order was not supported by substantial evidence. However, having reviewed the whole record, we conclude there was substantial evidence to support the Commission's findings of fact and these findings support the conclusion that petitioner was dismissed for just cause based on unacceptable personal conduct.

In summary, we find substantial competent evidence to support the conclusion that respondent had just cause to dismiss petitioner from his employment for unacceptable personal conduct. In addition, we hold that petitioner's due process rights were not violated during the course of his dismissal. Accordingly, we reverse the trial court's order and remand for reinstatement of the Commission's Decision and Order upholding respondent's dismissal of petitioner.

Reversed and remanded.

Judge MARTIN concurs.

Judge HUDSON dissents in a separate opinion.

HUDSON, Judge, dissenting.

While I agree with the majority that we should remand this case to the superior court, I do not believe that we are in a position to order reinstatement of the Decision and Order of the State Personnel Commission (SPC). Instead, I believe that a remand is appropriate because the order of the superior court does not separately delineate which standard of review it applied to which issue before it. Thus, according to applicable precedent, remand is necessary for the superior court to so delineate, before we may review the merits.

Our appellate Courts have held repeatedly that "[t]he proper standard of review by the trial court [of an administrative appeal] depends upon the particular issues presented by the appeal." *Deep River Citizen's Coalition v. N. C. Dep't of Env't and Natural Res.*, 149 N.C. App. 211, 213 S.E.2d 814, 816 (2002), *citing ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997); *Brooks v. McWhirter Grading Co., Inc.*, 303 N.C. 573, 580, 281 S.E.2d 24, 28 (1981). In *Deep River*, where the trial court simply stated that it was applying the standard of review set forth in the briefs, we remanded to the trial court for delineation of the standard of review applicable to each issue. In so doing, we relied upon the cases cited above, and upon *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 543 S.E.2d 169 (2001), where we held:

> [T]he trial court in the case *sub judice* stated the proper standards of review sought by petitioner. However, it . . . "failed to delineate which standard the court utilized in resolving each separate issue raised." Furthermore, it is difficult to discern whether the trial court actually conducted both a "whole record" and *de novo* review . . . . We are left to question whether [the trial court] referred to only a "whole record" review, *de novo* review, or both . . . . Given the nature of the trial court's order, we find ourselves unable to conduct our necessary threshold review.

Id. at 349, 543 S.E.2d at 176 (citations omitted). Here, the order refers to the standard of review only in the introductory paragraph, where it states that it reached its conclusions based "[o]n consideration of the oral arguments, a review of the whole record, and conducting a *de novo* review." Because I do not see a meaningful distinction between the order in this case and the orders in *Deep River* and *Hedgepeth*, I would remand, as we did in those cases, for the trial court to:

> (1) advance its own characterization of the issues presented by petitioners; and (2) clearly delineate the standards of review, detailing the standards used to resolve each distinct issue raised.

Deep River, 149 N.C. App. at 215, 560 S.E.2d at 817.

WHITACRE PARTNERSHIP, PLAINTIFF v. BIOSIGNIA, INC., T. NELSON CAMPBELL AND T. COLIN CAMPBELL, DEFENDANTS

No. COA01-1549

(Filed 5 November 2002)

Securities— conversion and wrongful cancellation—judicial estoppel—prior bankruptcy hearing

The trial court erred by granting summary judgment for defendants based upon judicial estoppel in an action for conversion and wrongful cancellation of stock arising from statements made in a bankruptcy proceeding. There were issues involving the changed position element of judicial estoppel (whether the statements by a general partner at the bankruptcy proceeding were made as an individual or a partner and whether the certificates concerned were those listed as personal assets or those owned by plaintiff partnership); even if the statements are imputed to plaintiff, the general partner did not intentionally manipulate the truth if he was mistaken about the validity of restrictions on the stock; and dismissal of the bankruptcy petition was not an adjudication on the merits if statements misled or were accepted by the court.

Appeal by Plaintiff from judgment entered 13 July 2001 by Judge David Q. LaBarre in Orange County Superior Court. Heard in the Court of Appeals 11 September 2002.

Farmer and Watlington, L.L.P., by R. Lee Farmer and Bill T. Walker, for plaintiff-appellant.

Parker, Poe, Bernstein, & Adams, P.C., by Robert W. Spearman, and Steptoe & Johnson, LLP, by J. William Koegel, Jr., for defendants-appellees.

TYSON, Judge.

Whitacre Partnership appeals from an award of summary judgment in favor of defendants, BioSignia, Inc., T. Nelson Campbell and T. Colin Campbell entered 13 July 2001. We reverse and remand for further proceedings.

I. Facts

Whitacre Partnership ("Partnership" or "plaintiff") is an Illinois limited partnership. The general partners are Dr. Mark E. Whitacre

and his wife, Ginger L. Whitacre, ("the Whitacres") and the limited partners are the children of the Whitacres. The Whitacres own as general partners 2% of the Partnership. Their children own the remaining 98% as limited partners.

BioSignia and Biomar are incorporated in the state of Delaware and are registered as foreign corporations doing business in North Carolina, with their principal place of business located in Chapel Hill, North Carolina. Defendants T. Nelson Campbell and T. Colin Campbell are co-founders and officers of BioSignia as well as its predecessor companies.

A. Stock Transactions

1. Advocacy Communications, Inc.

Advocacy Communications, Inc. ("Advocacy"), a Delaware corporation, by stock certificate #9, issued 250 shares of stock to Mark E. Whitacre on 1 October 1995. These shares were transferred to plaintiff on 1 January 1996. In Advocacy's Unanimous Written Consent in Lieu of a Joint Special Meeting of the Board of Directors and Shareholders dated 26 April 1996, Advocacy ratified its hiring of Mark E. Whitacre as President, Chief Executive Officer, and Director of Advocacy as of 1 October 1995. Advocacy also ratified the issuance of 250 shares to Whitacre representing 20% of total ownership of Advocacy, "in lieu of payment of compensation in cash equal to $110,000 and for reimbursement of expenses incurred by Mark E. Whitacre in the amount of $40,000 . . ." The Unanimous Consent amended the certificate of incorporation to increase the number of authorized shares of common stock to 15 million. The consent resolved,

> that the officers of the Corporation and its counsel be, and they hereby are, authorized and directed to issue to each holder of record of an Old Share as of the close of business on the date of the Certificate of Amendment referred to in the foregoing resolution becomes effective, upon the surrender of their existing certificate or certificates for an Old Share, a certificate representing 8,000 New Shares of common stock with a par value of $0.00000125 per share for each Old Share of common stock represented by the certificate of such holder.

The consent was executed by Advocacy's shareholders including plaintiff as "Whitacre Partnership, a Limited Partnership by Mark E. Whitacre, General Partner." Dr. Whitacre and the Campbell

defendants also signed the Consent individually as directors of Advocacy.

Three days later, on 29 April 1996, Advocacy filed a certificate of amendment with the Delaware Secretary of State changing its corporate name to Biomar International, Inc. Two million shares of Biomar stock were issued to plaintiff on 30 April 1996, and the 250 shares of Advocacy stock were marked cancelled. No restrictive legend or other limiting indication appears on the face of either certificate.

2. Future Health Technologies Company

Dr. Whitacre allegedly commenced employment with Future Health Technologies Company ("FHT") in September 1995. Plaintiff alleges that FHT is an unincorporated entity. Dr. Whitacre and FHT agreed that he would be issued "20% of the outstanding shares of FHT" as part of the consideration for the employment contract. This agreement is confirmed in a letter dated 12 October 1995 signed by T. Colin Campbell and Mark E. Whitacre. The letter requires Dr. Whitacre to contribute "a total of $150,000 to FHT ('required contribution'). Any expense that you incur and pay prior to the placement date, and which we deem a reimbursable expense of FHT, will reduce the required contribution by the amount of such expense."

Under the terms of 12 October 1995 letter, Dr. Whitacre could not voluntarily retire from his position as Chief Executive Officer or otherwise terminate his continuing relationship with FHT before "FHT's first private placement" for the ownership of stock to be unqualified.

Dr. Whitacre and Defendant Nelson Campbell, "a corporate officer and co-founder of FHT," executed a Restricted Stock Agreement ("RSA"), effective 23 October 1995. The RSA refers to an "employment agreement" but not specifically the 12 October 1995 letter, and requires Dr. Whitacre to remain employed as an officer of FHT or one of its subsidiaries "for a period of five years in order to be fully vested" with respect to the stock. Neither the 12 October 1995 letter nor the RSA makes any reference to Advocacy.

3. Biomar International, Inc. and its Successor, BioSignia

Biomar issued share certificate #8 in the name of plaintiff for 2,000,000 shares dated 30 April 1996. Plaintiff received a letter from Biomar's attorney enclosing the certificate.

> This stock certificate replaces the stock certificate of the original corporation, Advocacy Communications, Inc. The originals of

> those certificates were marked cancelled and placed in the corporate book of Advocacy Communications, Inc. which is maintained in our office along with the corporate book of Biomar International, Inc.

Neither the cover letter nor the certificate contains any restrictive legend referencing a vesting schedule.

On 3 September 1996, Biomar issued stock certificate # 17 for 1,750,000 shares to Whitacre Partnership. On 15 January 1997, a federal grand jury indicted Dr. Whitacre on 45 counts of fraud and conspiracy. Neither Defendant BioSignia nor its predecessor entities were involved in any of the matters that led to the indictments. In early February 1997 upon request from Dr. Whitacre, Biomar also reissued 250,000 of plaintiff's shares, 150,000 and 100,000 shares respectively, in certificates # 18 and # 19 to attorneys, Bill T. Walker ("Walker") and Richard F. Kurth ("Kurth"). These two share certificates were allegedly backdated to 3 September 1996. The stock ledger notes the transfer of these shares from plaintiff. None of these stock certificates contained any evidence of vesting requirements or other restrictions on the face of the certificates.

On 11 February 1997, Dr. Whitacre resigned as President and Chief Executive Officer of Biomar. In his letter of resignation to Nelson Campbell, Dr. Whitacre agreed to forfeit 500,000 Biomar shares and tendered his share certificate. In accepting Dr. Whitacre's resignation, T. Colin Campbell acknowledged in a letter dated 20 February 1997 that the "total number of shares owned by your family partnership (prior to any share distributions to your attorneys) is 1,250,000 shares." Dr. Whitacre individually signed the letter under "Agreed to". The stock ledger records plaintiff's surrender of 750,000 shares.

As requested by Dr. Whitacre's resignation letter, Biomar issued stock certificate #21 was to W.F.P. Management Co., Inc. for 1,000,000 shares on 20 February 1997. The stock ledger indicates that this stock was a transfer from Whitacre Partnership. Biomar issued certificate #27, signed by defendant T. Colin Campbell, as President, and Nelson Campbell, as Secretary, also on 20 February 1997 to the plaintiff for the 1,000,000 shares at issue here. The stock ledger shows these shares were transferred from W.F.P. Management Co., Inc. Although the record is unclear, stock certificate #21 was apparently surrendered at this time. None of the stock certificates issued on 20 February 1997 bore a legend or any other restrictions concerning

the vesting of the shares nor did any of the correspondence between the parties reflect a discussion of restrictions on the stock or its transfer.

Upon Dr. Whitacre's resignation as Chief Executive Officer of Biomar, he was elected to serve as Chief Executive Officer of Clintech, a new subsidiary of Biomar.

Following the resignation and hiring at Clintech, an Addendum to the 23 October 1995 RSA was executed. It provided as follows:

> On March 4, 1997 this agreement was reached among the *Principals* of Biomar International, Inc. that Dr. Mark E. Whitacre would become the *CEO/President* of a subsidiary of Biomar to establish a joint venture company that will provide biostatistical services to pharmaceutical companies and HMOs. In this position, 1.25 million shares of stock (including the shares used to pay attorneys) *will be maintained in the Whitacre Limited Partnership.* 50% of the 1.25 million shares will be vested in 1.5 years from the above date (¾/97), and 100% within four years.

(R. 200) (Emphasis supplied). The record does not indicate whether any additional shares were issued after the RSA was amended. On 1 October 1997, Dr. Whitacre resigned his position as President and Chief Executive Officer of the Company's subsidiary, Clintech.

B. Bankruptcy Filing and Testimony

The Whitacres individually filed under Chapter 7 of the Bankruptcy Code for discharge of their debts on 11 September 1997. Plaintiff was not a party to this filing. 1.25 million shares of Biomar stock owned by plaintiff were listed by the Whitacres as personal property on Schedule B, which also stated that the shares were conditioned on a restricted stock agreement.

On 24 October 1997, during the § 341 meeting of creditors in the bankruptcy proceeding, the Whitacres, with their attorneys present, testified under oath that they knowingly signed their submissions under penalty of perjury and that they anticipated no more amendments to them. Dr. Whitacre testified before the bankruptcy trustee that the 1.25 million shares of stock, listed as restricted on Schedule B, was an asset the Whitacres would not realize due to Dr. Whitacre's 1 October 1997 resignation. The Whitacre's bankruptcy petition was voluntarily dismissed by the Whitacres on 12 March

1998. No adjudication on the Whitacres' petition was entered by the bankruptcy court.

BioSignia cancelled share certificate #27 issued to plaintiff on or before 28 October 1999. Plaintiff filed this action on 8 May 2000 alleging wrongful cancellation of the stock and, in the alternative, conversion. After discovery closed in June 2001, BioSignia filed a motion for summary judgment, along with supporting memoranda and an affidavit of T. Nelson Campbell, asserting judicial estoppel. Oral argument was heard on 9 July 2001, and the Order granting summary judgment in favor of defendants was filed on 13 July 2001. Plaintiff appeals.

II. Issues

Plaintiff assigns and argues as error the trial court's (1) grant of defendants' summary judgment on the basis of judicial estoppel and, (2)(a) denial of plaintiff's motion to strike and exclude the affidavit of T. Nelson Campbell, and (b) reliance on the affidavit, defective on its face in form and format, in rendering summary judgment.

III. Standard of Review

> Our Court's standard of review on appeal from summary judgment requires a two-part analysis. Summary judgment is appropriate if (1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law.

Gaunt v. Pittaway, 135 N.C. App. 442, 447, 520 S.E.2d 603, 607 (1999) (citing N.C.R. Civ. P. 56(c) (2001)). The evidence at a summary judgment hearing should be viewed in the light most favorable to the non-moving party. *Purchase Nursery Inc. v. Edgerton*, 153 N.C. App. 156, 160, 568 S.E.2d 904, 907 (2002).

Applying this standard, we hold that genuine issues of material fact exist and that defendants are not entitled to judgment as a matter of law.

IV. Judicial Estoppel

The trial court granted defendants' motion for summary judgment on the basis of judicial estoppel.

"Judicial estoppel, or preclusion against inconsistent positions, is an equitable doctrine designed to protect the integrity of the courts

and the judicial process." *Medicare Rentals, Inc. v. Advanced Services*, 119 N.C. App. 767, 769, 460 S.E.2d 361, 363, *disc. review denied*, 342 N.C. 415, 467 S.E.2d 700 (1995) (citing *Guiness PLC v. Ward*, 955 F.2d 875, 899 (4th Cir. 1992)). "Judicial estoppel forbids a party from asserting a legal position inconsistent with one taken earlier in the *same or related litigation*." *Id.* (citing *Virginia Sprinkler Co. v. Local Union 669*, 868 F.2d 116, 120 (4th Cir. 1989) (emphasis supplied)). The doctrine seeks to prevent the use of intentional self-contradiction as a means of obtaining unfair advantage in a judicial forum. *Id.* (citing *Scarano v. Central R. Co. of New Jersey*, 203 F.2d 510, 513 (3rd Cir. 1953)). When an action pled is barred by a legal impediment, such as judicial estoppel, there are no triable issues of fact as a matter of law. *See Andrews v. Davenport*, 84 N.C. App. 675, 677, 353 S.E.2d 671, 673, *disc. review denied*, 319 N.C. 671, 356 S.E.2d 774 (1987).

The trial court found that plaintiff was precluded from asserting any claim to the stock because Dr. Whitacre made an inconsistent statement in a prior bankruptcy hearing. Defendants assert that the vesting of the stock was conditioned on Dr. Whitacre's continued employment with the Company. Dr. Whitacre told his creditors that the stock had not and would not vest while under oath in the § 341 bankruptcy hearing.

Defendants encourage this Court to adopt the federal court's test for judicial estoppel. This three-pronged test requires that (1) the estopped party assert a position that is factually inconsistent with that taken in prior litigation; (2) the estopped party intentionally mislead the court to gain an unfair advantage; and (3) the prior position be accepted by the court. *See Sedlack v. Braswell Services Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998) (citation omitted).

This Court has taken a narrower view of the doctrine of judicial estoppel than that urged by defendants. In *Medicare Rentals, Inc.*, we stated "[j]udicial estoppel is a harsh doctrine and requires at a *minimum* that the party against whom the doctrine is asserted [(1)] intentionally have [(2)] changed its position in order to gain an advantage." *Medicare Rental's Inc.*, 119 N.C. App. at 771, 460 S.E.2d at 364 (emphasis supplied) (citation omitted). The defendants failed to show this minimum requirement as a matter of law.

A. Changed Position

Plaintiff seeks a declaratory judgment on the legality of defendants' cancellation of the share certificate and, in the alternative, dam-

ages for conversion. Defendants issued the shares in the name of Whitacre Partnership. Plaintiff's claim of an enforceable interest in the stock is *factually inconsistent* with Dr. Whitacre's statements at the bankruptcy § 341 hearing that the shares had not vested.

"[A] general partner of a limited partnership has the rights and powers and is subject to the restrictions and liabilities of a partner in a partnership without limited partners." N.C.G.S. § 59-403(a) (2001).

> Every partner is an agent of the partnership *for the purpose of its business*, and the act of every partner, *including the execution in the partnership name of any instrument*, for *apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership*, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority. (Emphasis supplied).

N.C.G.S. § 59-39(a) (2001).

A question remains whether Dr. Whitacre's statements at the bankruptcy § 341 hearing were individual statements or whether the statements were made as general partner of plaintiff "for the purpose of its business, and . . . carrying on in the usual way the business of the partnership. . . ." N.C.G.S. § 59-39(a) (2001). There is also a factual inconsistency of whether Whitacre's statements applied to certificate #27, for 1,000,000 shares at issue here or the 1.25 million shares that were mentioned in the 4 March 1997 addendum to the RSA. The Whitacres listed 1.25 million shares on schedule B. Because the 1.25 million shares were listed as personal assets, but 1,000,000 were clearly owned by plaintiff, an issue of fact exists whether Dr. Whitacre's statements concerned plaintiff and were binding on plaintiff. Defendants have failed to show as a matter of law that Dr. Whitacre's statements, made at an individual bankruptcy § 341 hearing to which plaintiff was not a party, were "for the purpose of its business," and were made for "carrying on in the usual way the business of the partnership" so as to bind the partnership. N.C.G.S. § 59-39(a) (2001).

B. Intentional Misleading

The second requirement for judicial estoppel is intentional misleading by the party estopped. Although Dr. Whitacre's statements could be imputed to the Partnership if the standard above was met,

there is no evidence that Dr. Whitacre intentionally misled the court. For Dr. Whitacre to mislead, he would have had to intentionally manipulate or hide the truth to gain an unfair advantage.

Dr. Whitacre would not be intentionally manipulating the truth if he was mistaken concerning the legal validity of the restrictions as to the plaintiff at the time of his statements.

In North Carolina, share certificates must bear a legend indicating any restrictions. N.C.G.S. § 55-6-27(b) (2001). The absence of the restrictive legend renders the restriction void unless the holder has "actual written notice" of the restriction. N.C.G.S. § 55-6-27(b). As noted, Defendants BioSignia and Biomar are Delaware corporations licensed to do business in North Carolina. Delaware has similar rules concerning share restrictions. Del. Code Ann. tit. 8, § 202(a) (2001) (requiring notation conspicuously on the certificates representing the securities restricted)). None of the multitude of share certificates issued by Defendant Biomar or its predecessor entities are restricted by a legend on the face of the certificate.

The original 250 shares of Advocacy Communications, Inc. stock were issued unrestricted on their face and are not referenced in either the letter of 12 October 1995 or the RSA dated 23 October 1995. The RSA of 23 October 1995 provides

> 'Restricted Shares' means all outstanding Provided Shares provided to the Employee in the Company and/or its subsidiaries or joint ventures pursuant to this Agreement; all shares hereinafter issued as Restricted Shares; all shares distributed with respect to any Restricted Shares in a share split, share dividend or other recapitalization, and any other outstanding Shares that otherwise become subject to this Agreement.

The referenced "Provided Shares" only applies to the shares to be provided to Dr. Whitacre upon joining FHT "or any future name for Future Health Technologies Company". It is undisputed that the two million shares in certificate #8 that Biomar issued to plaintiff replaced the original 250 Advocacy shares that were issued unrestricted.

Dr. Whitacre signed the RSA after the original Advocacy share certificate was issued without facial restrictions. A question remains whether the RSA as amended or any other purported restriction is legally sufficient to restrict plaintiff's shares. North Carolina General Statutes also provide, "[a] restriction does not affect shares issued

before the restriction was adopted unless the holders of the shares are parties to the restriction agreement or voted in favor of the restriction." N.C.G.S. § 55-6-27(a) (2001).

Share certificate #27 was issued for 1 million shares on 20 February 1997, before the addendum was entered into on 4 March 1997 by Dr. Whitacre and defendants. Plaintiff is not a party to the original RSA or the addendum. Dr. Whitacre did not execute the addendum in his capacity as general partner for plaintiff as he had signed the Unanimous Consent for Advocacy. A general partner of plaintiff, in that capacity, would have had to have voted to approve the restrictions in order to be retroactively effective. We hold that the 1.25 million shares issued before the 4 March 1997 addendum to the RSA are not restricted unless defendants can show that FHT is a predecessor corporation to Advocacy. While defendants assert in a footnote in their brief and affidavit that defendant BioSignia "was previously known as Future Health Technologies Company," such assertions are inadequate to prove that FHT is a predecessor corporation of Advocacy as a matter of law.

C. Summary

Genuine issues of material fact exist to preclude summary judgment. Our state has taken a narrow view of judicial estoppel. *See Medicare Rentals, Inc., supra.* We find the doctrine inapplicable here. Judicial estoppel is no legal impediment to affirm summary judgment at bar.

Viewed in the light most favorable to plaintiff, Dr. Whitacre's statements that the shares were restricted were based upon agreements he signed individually to which plaintiff was not a party. Dr. Whitacre did not intentionally mislead the court or gain any unfair advantage by making assertions that may be inconsistent with the legality of the restrictions to the shares at issue.

FHT promised share ownership in the hiring letter of 12 October 1995. Dr. Whitacre had already been issued shares of Advocacy. There are significant discrepancies in the record involving the issuance of shares, the lack of a restrictive legend on the face of any of the certificates, and the original employment and other agreements between Dr. Whitacre and Advocacy, FHT, Biomar, BioSignia, or Clintech. Nothing in the corporate documents in the record reflects FHT's relationship, if any, to Advocacy, Biomar, BioSignia, or Clintech. None of the Advocacy corporate documents in the record refers to FHT.

Advocacy ratified the decision to employ Dr. Whitacre as its President, Chief Executive Officer, and Director, the issuance of the 250 shares, representing 20% ownership of the company, and provided that the authorized shares be increased to 15 million, with 8,000 shares to be issued for each share of Advocacy.

D. Conclusion

We reverse summary judgment in favor of defendants on the basis of judicial estoppel. We hold that judicial estoppel is inapplicable to the facts at bar: (1) plaintiff was not a party to the prior bankruptcy proceeding, (2) defendants produced no evidence that Dr. Whitacre's statements were made in his capacity as a general partner of plaintiff or that these statements were made to carry on plaintiff's business in the usual way, and (3) dismissal of the Whitacres' bankruptcy petition was not an adjudication on the merits where statements misled or were accepted by the court.

We remand to the trial court for further proceedings consistent with this opinion. In light of our holding, it is unnecessary to reach, and we do not consider plaintiff's second assignment of error. The summary judgment entered in favor of defendants is reversed.

Reversed and remanded.

Judges McCULLOUGH and BRYANT concur.

SARAH H. COFFMAN AND HARSE H. COFFMAN, PLAINTIFFS v. W. EARL ROBERSON, M.D., P.A., WILLIAM EARL ROBERSON, M.D., AND STEPHEN L. BREWBAKER, M.D., DEFENDANTS

SARAH H. COFFMAN AND HARSE H. COFFMAN, PLAINTIFFS v. DELANEY RADIOLOGISTS GROUP, L.L.P.; AND MARK WILLIAM RAGOZZINO, M.D., DEFENDANTS

No. COA02-100

(Filed 5 November 2002)

1. Medical Malpractice; Witnesses— expert—doctor with same specialty

The trial court did not err in a medical malpractice action by admitting the medical expert testimony of a doctor under N.C.G.S. § 8C-1, Rule 702, because: (1) the witness doctor spe-

cialized in the same specialty, obstetrics/gynecology, as defendant doctor; and (2) during the year preceding 29 March 1997, the witness doctor spent all of his professional time teaching at an accredited health professional school and the majority of it teaching from the vantage point of OB/GYN.

2. Medical Malpractice; Witnesses— expert—doctor familiar with community standard

The trial court did not err in a medical malpractice action by admitting the medical expert testimony of two doctors even though defendants contend they were not familiar with the community standard as required by N.C.G.S. § 8C-1, Rule 702, because: (1) the doctor that practiced in Charlotte, North Carolina satisfied the requirements by testifying that he was familiar with the standard of care with respect to obstetrics, gynecology, and sonography in communities similar to Wilmington, North Carolina, and that he based his opinion on internet research about the size of the hospital, the training program, and the Area Health Education program; and (2) the other doctor, a board certified specialist in obstetrics/gynecology who was licensed to practice in California and Colorado, also satisfied the requirements by testifying that he was familiar with the standard of care in communities similar to Wilmington.

3. Discovery— medical malpractice—list of expert witnesses

The trial court did not err in a medical malpractice action by admitting the testimony of two doctors as expert witnesses even though they were not listed on pretrial discovery in the action against defendants but they were listed in plaintiffs' action against another doctor which was consolidated with the action against defendants, because: (1) the purpose of the discovery rules under N.C.G.S. § 1A-1, Rule 26(f1) was achieved and defendants were not prejudiced by any actions of plaintiffs in failing to timely notify defendants of experts in the action; (2) all parties had the opportunity to depose both doctors as experts before trial; and (3) defendants cannot claim surprise by the expert testimony of either doctor and have failed to show that the trial court abused its discretion in allowing into evidence the testimony of both doctors.

4. Medical Malpractice— judgment notwithstanding verdict—motion for new trial—sufficiency of evidence

The trial court did not err in a medical malpractice action by denying defendants' motion for judgment notwithstanding the verdict, or in the alternative for a new trial, because plaintiffs presented sufficient evidence for the jury to determine the issue of the negligence of defendants.

5. Costs— medical malpractice—expert witness fees—subpoena—fees unrelated to expert testimony

The trial court did not err in a medical malpractice action by granting plaintiffs' motion for costs even though defendants contend there is no evidence in the record that plaintiffs' experts testified at trial pursuant to a subpoena as required by law and that plaintiffs may not recover expert witness fees that are unrelated to the testimony before the court, because: (1) the record clearly reflects, through the sworn affidavit of plaintiffs' attorney, that all of the expert witnesses testified at trial pursuant to a subpoena, and plaintiffs' attorney attached to his affidavit the signed return receipts as proof of service; and (2) defendants failed to show the trial court abused its discretion in allowing costs to be taxed to defendants for court costs, mediation costs, deposition costs, expert fees and expenses, witnesses' mileage expenses, service of subpoenas, trial exhibits, and travel expenses for hearings that were properly allowed under the authority of N.C.G.S. § 6-20 and N.C.G.S. § 7A-305.

Appeal by defendants from judgment entered 7 December 2000 by Judge Wiley F. Bowen in the Columbus County Superior Court. Writ of Certiorari granted 3 October 2001. Heard in the Court of Appeals 14 October 2002.

Law office of William F. Maready, by Gary V. Mauney, for plaintiffs-appellees.

Wilson & Iseman, L.L.P., by G. Gray Wilson and Kevin B. Cartledge, for defendants-appellants.

TYSON, Judge.

I. Facts

On 28 May 1997, Sarah H. Coffman ("Sarah") went to her treating obstetrician/gynecologist, W. Earl Roberson, M.D. ("Dr. Roberson"),

after a urine pregnancy test showed she was pregnant. Dr. Roberson performed an hCG test which revealed that the human chorionic gonadotropin hormone level in her blood was elevated, suggestive of pregnancy, although his physical exam "did not show a pregnancy in the uterus." Dr. Roberson referred Sarah for an ultrasound test. On 29 May 1997, an ultrasound was performed by Mark W. Ragozzino, M.D. ("Dr. Ragozzino") that led him to suspect that Sarah had an ectopic pregnancy. Dr. Roberson was called in his car on the way to vacation and was read the ultrasound report over the phone. He never reviewed the ultrasound personally. The report stated that the radiologist "strongly suspect[ed]" an ectopic pregnancy. While still driving to vacation, Dr. Roberson called Sarah to discuss the ultrasound. Because of the danger from an ectopic pregnancy, Dr. Roberson referred Sarah to Stephen L. Brewbaker, M.D. ("Dr. Brewbaker") who, based on the opinion of Dr. Roberson, prescribed the administration of a shot of Methotrate to terminate the pregnancy which was administered on 30 May 1997 at New Hanover Regional Medical Center. In late June 1997, Sarah began having cramps and feeling sick. On 26 June 1997, a second ultrasound revealed an intrauterine pregnancy without a heartbeat. A dilation and evacuation procedure was performed by Dr. Roberson on Sarah on 27 June 1997.

On 13 October 1998, Sarah and her husband Harse H. Coffman ("plaintiffs") filed a complaint alleging medical malpractice against Dr. Roberson, W. Earl Roberson, M.D. P.A. ("Roberson P.A."), Dr. Brewbaker, Dr. Ragozzino, and Delany Radiologists Group, L.L.P. ("Delany"). On 3 August 1999, plaintiffs voluntarily dismissed without prejudice their claims as to Dr. Ragozzino and Delaney. On 28 September 1999, plaintiffs filed a separate complaint against Dr. Ragozzino and Delany. On 21 July 2000, the trial court granted plaintiffs' motion to consolidate the two actions pursuant to Rules 20 and 21 of the North Carolina Rules of Civil Procedure. On 23 October 2000, a jury returned a verdict finding that plaintiff Sarah was injured by the negligence of Dr. Roberson and Roberson P.A. in the amount of $250,000. It further found Sarah was not injured by the negligence of Drs. Brewbaker and Ragozzino. It also found plaintiff Harse Coffman was not injured by the negligence of any defendant. On 7 December 2000, the trial court denied defendants' Dr. Roberson and Roberson, P.A. motion for judgment notwithstanding the verdict ("JNOV") and their motion for a new trial. The trial court also granted Sarah's motion for costs against defendants Dr. Roberson and Roberson, P.A.

Only defendants Dr. Roberson and Roberson, P.A. appealed. On 27 August 2001, the trial court dismissed defendants' appeal. On 3 October 2001, this Court granted a Writ of Certiorari to Dr. Roberson and Roberson, P.A. only.

II. Issues

Defendants contend that the trial court erred by (1) allowing Dr. Linton to testify without being properly qualified as an expert witness; (2) allowing Dr. Horner and Dr. Otto to testify because they were not familiar with the community standard of care; (3) allowing Dr. Warren and Dr. Tonn to testify without a limiting instruction because they were not properly designated during discovery; (4) allowing Dr. Tonn and Dr. Warren to testify to plaintiffs' damages; (5) denying defendants' motion for JNOV; and (6) awarding costs to plaintiff.

III. Testimony of Dr. Linton

[1] Defendants contend that the trial court erred by admitting the medical expert testimony of Eugene Linton, M.D. ("Dr. Linton") "on the ground that he was not properly qualified under Rule 702 of the North Carolina Rules of Evidence." We disagree.

Rule 702 of the North Carolina Rules of Evidence states in part:

> (b) In a medical malpractice action as defined in G.S. 90-21.11, a person shall not give expert testimony on the appropriate standard of health care as defined in G.S. 90-21.12 unless the person is a licensed health care provider in this State or another state and meets the following 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.

Ordinarily, the determination of whether a witness qualifies as an expert lies within the discretion of the trial court. *Edwards v. Wall*, 142 N.C. App. 111, 115, 542 S.E.2d 258, 262 (2001). "However, '[w]here an appeal presents questions of statutory interpretation, full review is appropriate, and [a trial court's] "conclusions of law are reviewable *de novo*." ' " *Id.* (Citations omitted).

At trial, Dr. Linton testified as follows:

Q. And have you continued any work in the medical field since [31 December 1994 when you retired from private practice]?

A. Yes, I have. I did some volunteer teaching at the medical school at Bowman Gray School of Medicine.

. . .

Q. Were you assisting in that program from the vantage point of an OB/GYN?

A. Yes, I was. We discussed cases other than obstetrics/gynecology but, again, as a primary care physician for women from a point of view of obstetric/gynecology, you must have a broad grasp of the other medical fields other than just the obstetrics/gynecology.

Q. Were you continuing in that endeavor the year prior to May of 1997?

A. Yes. The year 1997, that school year, I was in, I think, both semesters of that particular school year.

> Q. Was that a majority of your professional time during that period of time?
>
> A. It didn't take up a great deal of time. But that's all I did professionally during that period of time.

Dr. Linton specialized in the same specialty, obstetrics/gynecology, as Dr. Roberson. During the year preceding 29 March 1997, Dr. Linton spent all of his professional time teaching at an accredited health professional school and the majority of it teaching "from the vantage point of OB/GYN." This is sufficient evidence to meet the requirements of Rule 702. The trial court did not err in qualifying Dr. Linton as an expert and admitting his testimony into evidence. This assignment of error is overruled.

IV. Testimony of Drs. Horner and Otto

[2] Defendant contends that the trial court erred in admitting the expert testimony of Drs. Horner and Otto "on the ground that these physicians were not familiar with the community standard" as required by N.C. Gen. Stat. § 90-21.12. We disagree.

N.C. Gen. Stat. § 90-21.12 provides:

> In any action for damages for personal injury or death arising out of the furnishing or the failure to furnish professional services in the performance of medical, dental, or other health care, the defendant shall not be liable for the payment of damages unless the trier of the 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 situated in the same or similar communities at the time of the alleged act giving rise to the cause of action.

A. Dr. Horner

Dr. Horner testified that he practiced in the Charlotte, North Carolina area and was licensed to practice throughout the state. At trial, Dr. Horner testified that he was familiar with the standard of care with respect to obstetrics, gynecology and sonography in communities similar to Wilmington, North Carolina. He based this opinion on Internet research about the size of the hospital, the training program, and the AHEC (Area Health Education Center) program. He testified that the hospital involved was "a training hospital, very sophisticated." This testimony is sufficient to satisfy the require-

ments for N.C. Gen. Stat. § 90-21.12. The trial court did not err in admitting the expert testimony of Dr. Horner.

B. Dr. Otto

Dr. Otto, a board certified specialist in obstetrics/gynecology, is licensed to practice medicine in California and Colorado. He testified as follows:

> Q. Have you seen [in Internet records on New Hanover] that this hospital, New Hanover, is a teaching school? They teach residents and that sort of thing, obstetrics, gynecology?
>
> A. Yes.
>
> Q. After looking at this, do you feel comfortable being able to compare, say, a community in California that's similar to a place like this in making comments on standard of care based on those type of comparisons?
>
> A. I see no reason to think that their standard of care would be any different than where I practice now or where I have practiced in the past.

Dr. Otto sufficiently testified to familiarity with the standard of care in communities similar to Wilmington to satisfy N.C. Gen. Stat. § 90-21.12. The trial court did not err in admitting Dr. Otto's testimony of the standard of care. This assignment of error is overruled.

V. Testimony of Drs. Warren and Tonn

[3] Defendants contend that because Drs. Warren and Tonn were not listed on pre-trial discovery in the action against them, although they were listed in the action against Dr. Ragozzino, it was improper for the trial court to admit their testimony into evidence against them. We disagree.

In medical malpractice cases, North Carolina Rules of Civil Procedure require a discovery conference to set deadlines for designating experts and conducting discovery. N.C. Gen. Stat. § 1A-1, Rule 26(f1). Rule 26(f1) provides in part:

> If a party fails to identify an expert witness as ordered, the court shall, upon motion by the moving party, impose an appropriate sanction, which may include dismissal of the action, entry of default against the defendant, or exclusion of the testimony of the expert witness at trial.

"The goal of the discovery rules is to facilitate the disclosure, prior to trial, of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of basic issues and facts to go to trial." *Willoughby v. Wilkins*, 65 N.C. App. 626, 642, 310 S.E.2d 90, 100 (1983), *disc. rev. denied*, 310 N.C. 631, 315 S.E.2d 697 (1984). Defendants rely on the following language of *Willoughby*:

> Federal cases have held that testimony must be excluded when the party from whom discovery was requested failed to exercise reasonable diligence to give the party requesting discovery adequate information concerning witnesses or theories of the case and provided only last-minute responses to requests for discovery. To allow such practices would be unfair and constitutes prejudice to the party seeking discovery inasmuch as that party would be deprived of the right and ability to adequately prepare for cross examination or the right to obtain and present rebuttal evidence

Id. at 641, 310 S.E.2d at 99 (citations omitted).

Prior to the voluntary dismissal of the complaint against Dr. Ragozzino, a discovery conference was held. Neither Dr. Tonn nor Dr. Warren were identified as potential expert witnesses at that conference. However, Dr. Tonn was a treating physician of plaintiff. In the Ragozzino action, there was a separate conference, at which Dr. Warren was designated as a potential expert witness. The record reflects that Dr. Tonn was later identified as an expert. After the designation of expert witnesses was completed, the trial court consolidated the two actions pursuant to Rule 20 and 21 of the North Carolina Rules of Civil Procedure. Dr. Tonn was deposed in both actions in separate depositions. Defendants contend that they only deposed him as a treating physician and not an expert. However, the deposition testimony included defendants questioning him as an expert witness. Dr. Warren was only deposed once, after the consolidation order was entered. Although Dr. Roberson and his attorney were not present at the deposition of Dr. Warren, they were duly notified and did not appear or object. At trial, Drs. Tonn and Warren were called as expert witnesses against all defendants.

At bar, the purpose of the discovery rules was achieved and defendants were not prejudiced by any actions of plaintiffs in failing to timely notify defendants of experts in this action. All parties had the opportunity to depose both Drs. Tonn and Warren as experts

before trial. Defendants cannot claim "surprise" by the expert testimony of either physician and have failed to show that the trial court abused its discretion in allowing into evidence the expert testimony of Drs. Tonn and Warren. This assignment of error is overruled.

VI. Denial of Motion for JUDGMENT NOTWITHSTANDING THE VERDICT

[4] Defendants contend that testimony of Drs. Tonn and Warren should have been excluded because they were "speculative" and insufficient to establish damages. Defendants also contend the trial court erred by denying their motions for direct verdict, JNOV, or in the alternative a new trial "on the grounds that the evidence is legally and factually insufficient to support the finding of defendants' negligence." We address these assignments of error together.

"A motion for judgment notwithstanding the verdict 'is cautiously and sparingly granted.' The bar is high for the moving party; the trial court should deny the motion if there is more than a scintilla of evidence to support the plaintiff's prima facie case." *Whitaker v. Akers*, 137 N.C. App. 274, 276-77, 527 S.E.2d 721, 723-24, *disc. rev. denied*, 352 N.C. 157, 544 S.E.2d 245 (2000) (citations omitted).

"In order to withstand the defendants' motion for a directed verdict on their negligence claim, plaintiffs were required to offer evidence establishing the following: (1) the standard of care; (2) breach of the standard of care; (3) proximate causation; and (4) damages." *Bridges v. Shelby Women's Clinic, P.A.*, 72 N.C. App. 15, 19, 323 S.E.2d 372, 375 (1984), *disc. rev. denied*, 313 N.C. 596, 330 S.E.2d 605 (1985) (citing *Lowery v. Newton*, 52 N.C. App. 234, 237, 278 S.E.2d 566, 570 (1981)).

Here, multiple doctors testified to their knowledge of the standard of care in the Wilmington community or in similar communities and their opinion of whether defendants breached that standard of care. Dr. Linton testified, "My opinion is with a reasonable degree of medical certainty that [Dr. Roberson's] treatment of Sarah Coffman did not meet the standards of his community." This is sufficient evidence for the jury to decide whether defendants breached the standard of care and of proximate cause.

As to damages, both Drs. Tonn and Warren testified to plaintiffs' severe emotional distress resulting from the negligence of defendants. Defendants contend that the testimony of Tonn and Warren is too speculative to support damages. However, proof of severe emo-

tional distress does not require medical expert testimony. *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 300, 395 S.E.2d 85, 95 (1990) ("Common sense and precedent tell us that a defendant's negligent act toward one person may proximately and foreseeably cause emotional distress to another person and justify his recovering damages, depending upon their relationship and other factors present in the particular case.") In addition to the testimony of Drs. Tonn and Warren regarding proximate cause and damages, Sarah, her friends, her family, and her pastor testified to the severe emotional distress she suffered and continues to suffer as a result of defendants' negligence.

Plaintiffs presented sufficient evidence for a jury to determine issue of the negligence of defendants. The trial court did not err in denying defendants motion for a directed verdict, JNOV, or a new trial. This assignment of error is overruled.

VII. Motion for Costs

[5] Defendants contend that the trial court erred in granting plaintiffs' motion for costs "because these costs are not permitted under North Carolina Law." Defendants argue that costs for expert witnesses are not proper because there is no evidence in the record that plaintiffs' experts testified at trial pursuant to a subpoena as required by law.

Witness' fees are not recognized as costs unless an expert witness is subpoenaed. *Wade v. Wade*, 72 N.C. App. 372, 384, 325 S.E.2d 260, 271, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). Where the record fails to show that the expert witnesses were testifying pursuant to a subpoena, costs should not be awarded. *Whiteside Estates, Inc., v. Highlands Cove, L.L.C.*, 146 N.C. App. 449, 470, 553 S.E.2d 431, 445 (2001). At bar, the record clearly reflects, through the sworn affidavit of plaintiffs' attorney, that all of the expert witnesses testified at trial pursuant to a subpoena. In addition, plaintiffs' attorney attached to his affidavit the signed return receipts as proof of service. The trial court did not err by taxing the cost of expert witnesses to defendants.

Defendants also argue that plaintiffs may not recover expert witness fees that are unrelated to the testimony before the court. We disagree.

"N.C. Gen. Stat. § 6-20 provides that in those civil actions not enumerated in § 6-18, 'costs may be allowed or not, in the discretion of

the court, unless otherwise provided by law.' " *Lewis v. Setty*, 140 N.C. App. 536, 538, 537 S.E.2d 505, 506 (2000) (quoting N.C. Gen. Stat. § 6-20). Since medical malpractice actions are not enumerated within N.C. Gen. Stat. § 6-18, this case falls within N.C. Gen. Stat. § 6-20. A trial court's determination to award costs is not reviewable on appeal absent an abuse of discretion. *Id.* at 538, 537 S.E.2d at 507. "We note that § 7A-305, which specifies in subsection (d) the costs recoverable in civil actions, also provides in subsection (e) that '[n]othing in this section shall affect the liability of the respective parties for costs as provided by law.' Consequently, we find that the authority of trial courts to tax deposition expenses as costs, pursuant to § 6-20, remains undisturbed." *Alsup v. Pitman*, 98 N.C. App. 389, 391, 390 S.E.2d 750, 751 (1990). "While case law has found that deposition costs are allowable under section 6-20, it has in no way precluded the trial court from taxing other costs that may be 'reasonable and necessary.' " *Minton v. Lowe's Food Stores*, 121 N.C. App. 675, 680, 468 S.E.2d 513, 516, *disc. rev. denied*, 344 N.C. 438, 476 S.E.2d 119 (1996).

Here, the trial court taxed costs to defendants for court costs, N.C. Gen. Stat. § 7A-305(a), 305(d)(6), mediation costs, *Sara Lee Corp. v. Carter*, 129 N.C. App. 464, 500 S.E.2d 732 (1998), *rev'd on other grounds*, 351 N.C. 27, 519 S.E.2d 308 (1999), deposition costs, *Sealy v. Grine*, 115 N.C. App. 343, 444 S.E.2d 632 (1994), expert fees and expenses, *supra.*, witnesses' mileage expenses, N.C. Gen. Stat. § 7A-314(b), service of subpoenas, N.C. Gen. Stat. § 705(b)(4), trial exhibits, and travel expenses for hearings and trial, *Smith v. Underwood*, 127 N.C. App. 1, 13, 487 S.E.2d 807, 815, *disc. rev. denied*, 347 N.C. 398, 494 S.E.2d 410 (1997) ("Since the enumerated costs sought by plaintiffs are not expressly provided for by law, it was within the discretion of the trial court whether to award them. Plaintiffs have not shown an abuse of discretion."). These costs were properly allowed under the authority of N.C. Gen. Stat. § 6-20 and N.C. Gen. Stat. § 7A-305. Defendants have failed to show the trial court abused its discretion in allowing these costs to be taxed to defendants. This assignment of error is overruled.

VIII. Conclusion

We hold that the trial court did not err in the admission of the expert testimony of Drs. Linton, Otto, Horner, Warren and Tonn. We also affirm the trial court's orders denying defendants' motion for judgment notwithstanding the verdict and granting plaintiffs' motion for costs.

No error as to trial. Affirmed as to defendant's motion for JNOV and plaintiff's motion for costs.

Chief Judge EAGLES and Judge THOMAS concur.

STATE OF NORTH CAROLINA v. MICHAEL RAY TRULL

No. COA01-1428

(Filed 5 November 2002)

1. Criminal Law— request for separate arraignment—request to reschedule trial—waiver

The trial court did not err in an attempted first-degree murder, possession of a handgun by a felon, and discharging a firearm into occupied property case by denying defendant's request for a separate arraignment and to reschedule his trial at least one week thereafter, because: (1) defendant waived the requirement of N.C.G.S. § 15A-943(b) by failing to request formal arraignment; and (2) although defendant contends he never received notice of the twenty-one day limit for filing a request for arraignment as required under N.C.G.S. § 15A-941(d), N.C. R. App. P. 10(b)(1) provides that his failure to raise the issue at trial precludes his raising it on appeal, and in any event the argument is based on the content of documents which are not included in the record on appeal.

2. Confessions and Incriminating Statements— interrogation—not in custody—Miranda warnings not required

The trial court did not err in an attempted first-degree murder, possession of a handgun by a felon, and discharging a firearm into occupied property case by denying defendant's motion to suppress statements he made to the police when defendant had not been given Miranda warnings, because: (1) with respect to statements made to an officer during the ride to the station or while waiting in the interview room, defendant was not interrogated by that officer and therefore Miranda does not apply; and (2) although defendant was interrogated with respect to statements made to two other officers, he was not in custody during the interrogation and was not therefore entitled to Miranda warnings.

3. Evidence— refusal to submit to gunshot residue test

The trial court did not err in an attempted first-degree murder, possession of a handgun by a felon, and discharging a firearm into occupied property case by admitting evidence that defendant had refused to consent to a gunshot residue test, because: (1) to the extent that defendant's argument rests on use of videotape evidence, it is without merit since the portion relating to defendant's refusal to submit to the test was not played for the jury; (2) there was no fruit of the poisonous tree since the administration of a gun residue test without defendant's consent did not violate defendant's Fourth Amendment rights; (3) the admission of the evidence of the refusal could not have penalized defendant's due process rights since defendant did not have a right to refuse to take the test; and (4) evidence of a defendant's refusal to submit to a lawful testing or identification procedure has been held admissible when offered as circumstantial evidence of guilt.

4. Homicide— attempted first-degree murder—short-form indictment

The trial court did not err by failing to dismiss the charge of attempted first-degree murder on the ground that the short-form indictment did not allege each element of the offense, because use of the short-form indictment has been upheld for first or second-degree murder as well as for attempted first-degree murder.

Appeal by defendant from judgments entered 26 March 2001 by Judge Michael E. Beale in Cabarrus County Superior Court. Heard in the Court of Appeals 17 September 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Daniel F. McLawhorn, for the State.

Osborn & Tyndall, P.L.L.C., by J. Kirk Osborn and Amos Granger Tyndall, for defendant-appellant.

MARTIN, Judge.

Defendant appeals from judgments entered upon jury verdicts finding him guilty of attempted first degree murder, possession of a handgun by a felon, discharging a firearm into occupied property, and being an habitual felon.

The State's evidence at trial tended to show that prior to 3 March 2000, defendant and Mack Jones had developed a tense and

unfriendly relationship that had included violent encounters. On 3 March 2000, defendant was at the home of Danny Hilton when Jones drove up in front of the house. Defendant shot at him through the car window several times. Jones drove away and defendant got in his truck and followed him. Upon catching up with him, defendant rammed Jones' vehicle with his own, then fired more shots at him. Jones testified that he heard defendant say: "I'm going to kill you, ----- f-----." Jones returned fire with his own pistol and then managed to escape his vehicle, run to a nearby house, and call the police. Defendant returned to Hilton's house where he was soon located by the police.

The officers handcuffed defendant to frisk him for weapons, then removed the handcuffs. The officers told defendant that his truck had been involved in a shooting and he expressed surprise, indicating to the officers that he had last seen the truck when he parked it on the street in front of Hilton's house. The officers asked defendant if he would voluntarily accompany them to the police station so they could investigate what had happened with his truck. He agreed to go with the officers; he was not questioned or handcuffed during the ride to the station. While he was being transported to the station, and after he arrived there, defendant made certain statements to, and asked certain questions of, Officer Tierney, the officer with whom he had ridden, concerning the collision involving his truck, indicating to the officer that defendant knew more about the collision than had been related to him by the officers. Defendant subsequently made a statement to Detectives Rummage and Inman in which he initially denied knowing Jones, but later said that Jones had been threatening him and that Jones had set him up. He claimed that his truck had been stolen.

Defendant was asked to submit to a gunshot residue test, but he refused. He was subsequently placed under arrest. Upon his continued refusal to submit to the gunshot residue test, defendant was physically subdued by officers so that the test could be administered. The incident was recorded on videotape. The results of the gunshot residue test were not introduced into evidence at trial, however, the State was permitted, over defendant's objection, to introduce evidence of defendant's refusal to submit to the test.

The record on appeal contains twenty-five separate assignments of error. Defendant brings forward seven of the assignments of error in the four arguments contained in his brief. In those arguments,

defendant asserts the trial court erred by (1) denying his request for a separate arraignment and to reschedule his trial at least one week thereafter, (2) admitting evidence that he refused to consent to the gunshot residue test, (3) admitting statements made by defendant to the police when he had not been given *Miranda* warnings, and (4) failing to dismiss the charge of attempted first degree murder on the grounds that the "short-form indictment did not allege each element of the offense." The remaining assignments of error are deemed abandoned. N.C.R. App. 28(a), 28(b)(6). We find no error requiring that defendant receive a new trial.

I.

[1] Defendant contends he is entitled to a new trial by reason of the State's failure to schedule his arraignment at least a week before his trial, and the trial court's refusal to postpone the trial for at least a week after his arraignment. He relies primarily on G.S. § 15A-943, which provides in subsection (a) that in counties where there are twenty or more weeks per year of superior court scheduled for the hearing of criminal cases, arraignments must be scheduled "on at least the first day of every other week in which criminal cases are heard," and in subsection (b) that "[w]hen a defendant pleads not guilty at an arraignment required by subsection (a), he may not be tried without his consent in the week in which he is arraigned." Defendant argues that no arraignment was scheduled according to G.S. § 15A-943(a), and that he objected to proceeding to trial on the same day he was arraigned but was denied the week's interval between arraignment and trial to which he was entitled under G.S. § 15A-943(b).

In *State v. Shook*, 293 N.C. 315, 319-20, 237 S.E.2d 843, 847 (1977), the Supreme Court held that it was reversible error to proceed with a defendant's trial on the same day as arraignment without his consent in violation of G.S. § 15A-943(b). Indeed, if defendant here had been subjected to such a violation, he would be entitled to a new trial. However, the circumstances of this case indicate that he was not.

In response to defendant's insistence upon a formal arraignment at least a week prior to his trial, the trial court found that the record contained no request for arraignment by defendant, particularly not one filed within 21 days of notice of return of the bill of indictment. Thus, the trial court concluded that defendant had waived the requirement of G.S. 15A-943(b). G.S. § 15A-941 provides:

> (a) Arraignment consists of bringing a defendant in open court . . . advising him of the charges pending against him, and directing him to plead. The prosecutor must read the charges or fairly summarize them to the defendant. If the defendant fails to plead, the court must record that fact, and the defendant must be tried as if he had pleaded not guilty.
>
> . . .
>
> (d) A defendant will be arraigned in accordance with this section only if the defendant files a written request with the clerk of superior court for an arraignment not later than 21 days after service of the bill of indictment . . . [or if applicable] not later than 21 days from the date of the return of the indictment as a true bill. Upon the return of the indictment as a true bill, the court must immediately cause notice of the 21-day time limit within which the defendant may request an arraignment to be mailed or otherwise given to the defendant and . . . counsel of record, if any. If the defendant does not file a written request for arraignment, then the court shall enter a not guilty plea on behalf of the defendant.

Defendant concedes that he filed no request for formal arraignment. However, he argues, without citing authority, that the arraignment scheduling requirements of G.S. § 15A-943 required the State to schedule an arraignment regardless of the provisions of G.S. § 15A-941(d). We hold that it would be illogical to require the State to schedule an arraignment pursuant to one statute where the right to such has been waived pursuant to another, and we decline to do so.

Alternatively, he argues for the first time on appeal that the trial court's ruling was flawed because defendant never received notice of the 21-day limit for filing a request for arraignment as required under G.S. § 15A-941(d). His failure to raise the issue at trial precludes his raising it on appeal. N.C.R. App. P. 10(b)(1). In any event, the argument is based on the content of documents which are not included in the record on appeal. *See* N.C.R. App. P. 9(a). It is the defendant's duty to see that the record on appeal is complete and "when the matter complained of does not appear of record, defendant has failed to show prejudicial error." *State v. Fox*, 305 N.C. 280, 283, 287 S.E.2d 887, 889 (1982), (quoting *State v. Cutshall*, 278 N.C. 334, 346, 180 S.E.2d 745, 752 (1971)). This assignment of error is overruled.

II.

[2] Next, defendant argues that the trial court erred by admitting into evidence statements made by defendant while he was being transported to the police station and, once there, during an interview with Detectives Inman and Rummage. Defendant moved to suppress the evidence, alleging that he was in custody when he made the statements and that he had not been given the warnings required by *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d. 694 (1966). Defendant asserts that the trial court's denial of the motion and admission of the evidence violated his rights under the Fifth Amendment of the United States Constitution and similar provisions in the North Carolina Constitution. U.S. Const. Amend. V.; N.C. Const. Art. I., § 23.

In reviewing the decision of a trial court to deny a motion to suppress, this Court may evaluate whether the findings of fact are supported by the evidence and whether those findings support the conclusions of law. *See State v. Steen*, 352 N.C. 227, 536 S.E.2d 1 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). Although defendant assigned error to certain findings made by the trial judge in his orders denying the motion to suppress, he did not address the allegedly erroneous findings in his brief. Therefore, we deem the related assignments of error to be abandoned. N.C.R. App. P. 28(b)(6). Unchallenged by defendant, the trial court's findings of fact are binding on this Court on appeal. *See Steen*, 352 N.C. at 238, 536 S.E.2d at 8.

Defendant's brief and remaining assignments of error on this issue address only whether the trial judge erred in concluding that defendant was in custody (a) while he was being transported to the station and waiting in the interview room with Officer Tierney and (b) while being interviewed by Detectives Rummage and Inman. This Court may review the trial court's legal conclusions *de novo*. *Id.*; *State v. Mahaley*, 332 N.C. 583, 423 S.E.2d 58 (1992). The determination of whether defendant was in custody when he made the statements is important because, generally, statements made by a defendant during custodial interrogation should be excluded from evidence if the defendant can show that he made them without benefit of *Miranda* warnings. *See Miranda, supra.*

With respect to statements made by defendant to Officer Tierney during the ride to the station or while waiting in the interview room, however, this Court need not reach the issue of custody. In its order, the trial court concluded that defendant was not interrogated by

Officer Tierney. Defendant did not assign error to this conclusion or challenge it in his brief. Therefore, it is not within the scope of review and is binding on appeal. N.C.R. App. P. 10(a), 10(b)(1), 28(b)(6). Because *Miranda* applies only to statements made as a result of custodial *interrogation*, the trial court's conclusion that there was no interrogation by Officer Tierney is fatal to defendant's argument on this point.

With respect to statements made by defendant to Detectives Rummage and Inman, the trial court concluded that although defendant was interrogated, he was not in custody during the interrogation and was not, therefore, entitled to *Miranda* warnings. In *State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001); *opinion after remand*, 355 N.C. 264, 559 S.E.2d 785, *reconsideration denied*, 355 N.C. 495, 563 S.E.2d 187 (2002), our Supreme Court clarified the test for determining whether a defendant is in custody for purposes of *Miranda*. Prior to *Buchanan*, several cases had focused, when considering whether a defendant was in custody at the time of interrogation, upon the question of whether a reasonable person would have felt "free to leave" under the circumstances. *See id.* at 339-40, 543 S.E.2d at 828. In *Buchanan*, however, the Court declared that:

> based on United States Supreme Court precedent and the precedent of this Court, the appropriate inquiry in determining whether a defendant is "in custody" for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest."

Id. The Court referred to this test as the "ultimate inquiry" test.

For purposes of comparison with the present case, it is important to note that in *Buchanan*, the trial court had granted the motion to suppress based on its conclusion that defendant was in custody at the time of his statement. *See id.* at 333, 543 S.E.2d at 824. The Supreme Court described the "free to leave" test as a broader test than the "ultimate inquiry" test and remanded the case for reconsideration. *See id.* at 339-40, 543 S.E.2d at 828. If under the narrower "ultimate inquiry" test the trial court concluded that the defendant was not "in custody," the motion would be denied and the State could introduce the statements at issue into evidence.

In the present case, however, the circumstances are reversed in that the defendant's motion to suppress was denied. The trial court

based its denial of the motion with regard to the statements made by defendant in the interview on the conclusion that "[d]efendant was never formally arrested and a reasonable person, under the totality of the circumstances then existing, would have believed that he was free to leave and not under arrest." At worst, this conclusion seems to be based on a combination of the "free to leave" and "ultimate inquiry" tests. However, even if it is solely based on the "free to leave" test, there is no need for us to remand. In an analogous case, this Court stated that:

> [s]ince the trial court determined that under the less restrictive "free to leave" test that defendant's statement should not be suppressed, it follows that an application of the more restrictive "formal arrest" test would yield the same conclusion, that, "defendant was not in custody" for purposes of *Miranda*.

State v. Kornegay, 149 N.C. App. 390, 395, 562 S.E.2d 541, 545, *disc. review denied*, 355 N.C. 497, 564 S.E.2d 51 (2002) (quoting *Buchanan, supra*).

Having settled that the trial court committed no prejudicial errors of law, we must also evaluate whether the findings of fact in the order support the conclusion that defendant was not in custody. The findings indicate that defendant was only briefly restrained with handcuffs for a weapons frisk and that he thereafter voluntarily went to the station with the police, submitted to an interview, and signed a written statement that specifically affirmed his understanding of the situation and his voluntary cooperation. He was informed several times that he was free to leave, including after he indicated interest in having an attorney present, but made no effort to do so. These and other facts found by the trial judge support the conclusions that defendant was not in custody, could not reasonably have believed he was in custody, and thus had no right to be informed of his *Miranda* rights. *See State v. Gaines*, 345 N.C. 647, 662-63, 483 S.E.2d 396, 405, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997) (upholding conclusion that defendant was not in custody where he was told several times that he was not under arrest and was free to leave, and defendant signed a statement including a clause to that effect). Furthermore, defendant's additional argument that his request for an attorney should have put an end to the questioning is without merit. If defendant was not in custody, then a request for an attorney would have no Fifth Amendment implications. *See Edwards v. Arizona*, 451 U.S. 477, 68 L. Ed. 2d 378, *reh'g denied*, 452 U.S. 973, 69 L. Ed. 2d 984 (1981). The trial court properly concluded that none of defend-

ant's constitutional rights had been violated and denied the motion to suppress.

III.

[3] Defendant also assigns error to the admission of evidence of his refusal to submit to the gunshot residue test. He argues that he had a constitutional right to refuse the test and that the use of evidence of that refusal at trial amounted to unlawful punishment for the exercise of his rights. Defendant further argues that even if the use of the evidence is not unlawful, the evidence was both irrelevant and prejudicial. The arguments in defendant's brief focus primarily on the admission and alleged playing before the jury of the portion of the videotape showing his refusal to submit to the test and his subsequent struggle with the officers. A careful review of the transcript, especially the pages cited by defendant, reveal, however, that although the entire videotape was admitted as an exhibit, the portion related to defendant's refusal to submit to the test was not played for the jury. Therefore, to the extent that defendant's argument rests on use of the videotape evidence, it is without merit.

Defendant challenges the admission of the evidence of his refusal to submit to the residue test based on his alleged right to refuse to consent to the test, the officers' alleged lack of authority to proceed without consent or court order, and the asserted irrelevance of the evidence and resulting prejudice. In his brief, defendant addresses not only these points, but also argues that his right to the assistance of counsel was violated. Because it was not argued at trial or included in his assignment of error, this Court declines to address this aspect of defendant's argument on appeal. N.C.R. App. P. 10(a).

Both at trial and on appeal, defendant makes what is essentially a "fruit of the poisonous tree" argument. *See, e.g., State v. Graves*, 135 N.C. App. 216, 221, 519 S.E.2d 770, 773 (1999). Defendant asserts that the administration of the gunshot residue test was an unconstitutional search of his person under the Fourth Amendment. U.S. Const. Amend. IV. Thus, he contends the statements by defendant and the video of his physical resistance that resulted from the search should have been excluded. However, in making this Fourth Amendment argument, defendant has failed to address the basis for the trial court's ruling to admit the evidence.

The Fourth Amendment of the United States Constitution protects the public from "*unreasonable* searches and seizures" (emphasis added). Generally, a warrant is required for any search or seizure,

and such warrant must be based upon "probable cause." *See State v. Coplen*, 138 N.C. App. 48, 54, 530 S.E.2d 313, 318 (2000). "However, an exception arises when law enforcement officers have probable cause to search and 'the circumstances of a particular case render impracticable a delay to obtain a warrant.' " *Id.* (citations omitted). "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (quoting *Brinegar v. United States*, 338 U.S. 160, 175-76, 93 L. Ed. 1879, 1890 (1949)). In support of its ruling, the trial court concluded that the officers had probable cause to conduct the test and that exigent circumstances required that it be done immediately without a court order. In *State v. Coplen, supra*, this Court held that those two circumstances made the administration of a gunshot residue test without a court order lawful.

Although the trial court made no findings of fact preceding its conclusions, the evidence from which it would have drawn the requisite findings was not controverted and supported the conclusions. *See State v. Richardson*, 295 N.C. 309, 245 S.E.2d 754 (1978). Moreover, defendant did not take exception to the lack of findings at trial or on appeal. N.C.R. App. P. 10(b)(1). On the issue of probable cause, the trial court ascertained during the hearing that the search occurred after the police had gathered information regarding the defendant and the shooting in interviews with Mr. Jones and Mr. Hilton. Further, the *voir dire* witness, Officer Ledwell, responded to inquiry by the trial court that a gunshot residue test must be performed within three to four hours of the shooting. This evidence provided an adequate basis to support the conclusion that the search was reasonable under the circumstances. *See State v. Richardson, supra.*

Because the search was reasonable and not a violation of defendant's Fourth Amendment rights, statements or actions made by defendant as a result of the request for and administration of the test cannot be "fruit of the poisonous tree." *See Graves, supra.* Furthermore, the admission of evidence of the refusal could not have penalized defendant for exercise of his constitutional rights in violation of due process because defendant did not have the right to refuse to take the test. U.S. Const. Amend. XIV.

Defendant further argues that even if the search was lawful, the evidence of his refusal to submit to the test should have been

excluded because it was both irrelevant and prejudicial. N.C. Gen. Stat. § 8C-1, Rules 401-403 (2002). In the two specific portions of the transcript to which defendant directs our attention, defendant did not object to the officers' testimony on the basis of relevance. Although he argued at trial that the evidence was prejudicial, his theory was grounded in the constitutional arguments analyzed above, not in the claims made in his brief that the evidence of his refusal cast defendant as a danger to society, someone who had to be wrestled to the ground by police, thus resulting in unfair prejudice. Because defendant's brief has not directed this Court to any objections or rulings on the issues of relevance or prejudice within the transcript, we decline to address them. N.C.R. App. P. 10(b)(1). Nevertheless, we note that evidence of a defendant's refusal to submit to a lawful testing or identification procedure has been held admissible when offered as circumstantial evidence of guilt. *See, e.g., United States v. Parhms*, 424 F.2d 152, 154-55 (9th Cir. 1970) (refusal to participate in line-up); *United States v. Nix*, 465 F.2d 90, 92-94, *cert. denied*, 409 U.S. 1013, 34 L. Ed. 2d 307 (5th Cir. 1972) (refusal to produce handwriting sample); *State v. Odom*, 303 N.C. 163, 277 S.E.2d 352, *cert. denied*, 454 U.S.1052, 70 L. Ed. 2d 587 (1981) (refusal to submit to gunshot residue test). We find no error in the trial court's admission of evidence that defendant refused to submit to the gunshot residue test.

IV.

[4] In his final argument, defendant challenges the use of the short form indictment for the charge of attempted first degree murder, contending the indictment was insufficient because it did not allege each of the specific elements of the offense. In his brief, defendant concedes that the use of short form indictments for first or second degree murder was upheld 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). Furthermore, this Court applied *Wallace* and other similar cases to uphold the use of the short form indictment for attempted first degree murder in *State v. Choppy*, 141 N.C. App. 32, 539 S.E.2d 44 (2000), *disc. review denied*, 353 N.C. 384, 547 S.E.2d 817 (2001). This assignment of error is overruled.

Defendant received a fair trial, free from prejudicial error.

No error.

Chief Judge EAGLES and Judge THOMAS concur.

STATE OF NORTH CAROLINA v. ROBERT BRYAN SEXTON

No. COA01-1402

(Filed 5 November 2002)

1. Arson— first-degree—burning of occupied mobile home—sufficiency of evidence

The trial court did not err by refusing to dismiss for insufficient evidence charges of first-degree arson, willful and malicious damage to occupied real property through use of an incendiary device, and possession of a weapon of mass death and destruction. Defendant was involved in a confrontation with Bobby and Joe Neal on the evening prior to the fire; the next morning defendant was observed pacing in his yard and staring at Joe Neal's mobile home, periodically breathing into a plastic bag; defendant was seen running from Joe Neal's mobile home after the fire started; defendant ran into the woods when confronted by Bobby Neal; Brenda Neal heard breaking glass from the rear of the mobile home immediately before the fire began and defendant had a cut on his arm when he was arrested; two plastic fuel containers were found in defendant's home; and an SBI agent concluded that the fire was started by a plastic bottle filled with gasoline and ignited by a fabric fuse. Discrepancies in the evidence are for the jury to resolve.

2. Real Property— malicious damage—sufficiency of evidence

There was sufficient evidence of malice in a prosecution of malicious damage to occupied real property by use of an incendiary device in the evidence of past disagreements, confrontations and the conduct of defendant prior to the fire.

3. Real Property— malicious damage—instructions—malice

There was no plain error in a prosecution for malicious damage to occupied real property in the court's instruction on express and implied malice. There is nothing in N.C.G.S. § 14-49.1 or the case law to preclude a definition of malice analogous to that used in homicide, and the instruction was taken verbatim from the Pattern Jury Instruction.

4. Evidence— drug use—chain of circumstances

The trial court did not err in a prosecution arising from the burning of an occupied mobile home by admitting evidence of defendant's drug use on the morning of the crime where the evi-

dence served the purpose of establishing a chain of circumstances leading to the fire. Moreover, its probative value was not outweighed by the danger of unfair prejudice.

5. Evidence— deputy fire marshal's opinion—not qualified as expert

The trial court did not err in a prosecution arising from the burning of an occupied mobile home by allowing a deputy fire marshal who had investigated the fire but who had not been qualified as an expert to give his opinion as to the cause of the fire. Defendant did not object at trial to the qualifications of the witness as an expert and the witness was better qualified than the jury to form an opinion on the cause of the fire.

Appeal by defendant from judgments entered 28 June 2001 by Judge Richard D. Boner in Gaston County Superior Court. Heard in the Court of Appeals 22 August 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kevin Anderson, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Jarvis John Edgerton, IV, for defendant-appellant.

THOMAS, Judge.

Defendant, Robert Sexton, appeals convictions of willful and malicious burning of an occupied mobile home used as the dwelling house of another (first degree arson), willful and malicious damage to occupied real property by use of an incendiary device, and possession of a weapon of mass death and destruction.

Defendant contends: (1) there was insufficient evidence he committed the three crimes; (2) there was insufficient evidence of the express malice needed to prove malicious damage to occupied real property; (3) the trial court improperly instructed the jury on implied malice as it relates to the crime of malicious damage to occupied real property; (4) the trial court erroneously admitted irrelevant and prejudicial evidence of prior bad acts; and (5) the trial court improperly allowed the testimony of a layperson as an expert witness. For the reasons discussed herein, we find no error.

The State's evidence tends to show the following: On the afternoon of 4 June 2000, a homemade incendiary device caused a mobile home rented to Joe Neal to burn to the ground.

The previous evening, defendant had been involved in a confrontation with Joe Neal and Joe Neal's son, Bobby Neal. The three men lived in the same mobile home park. Defendant lived behind Joe Neal. Bobby Neal and his mother, Brenda Neal, who is Joe Neal's estranged wife, lived beside Joe Neal.

The confrontation among the three men began when defendant asked Bobby Neal to leave his home. Bobby Neal responded by throwing an unopened can of beer at defendant. Defendant grabbed a baseball bat and chased Bobby Neal. The two started wrestling with Bobby Neal eventually gaining control of defendant's bat and hitting him with it. Defendant ran home, retrieved a second bat, and pursued Bobby Neal. Joe Neal then joined the fray, coming out of his mobile home with a hatchet and baseball bat and telling defendant to leave his property. The fight ended for the night.

The following morning, defendant chased Bobby Neal and threw an unopened can of beer at him. Defendant spent the remainder of the morning pacing in his yard, watching Joe Neal's mobile home, and according to the State's witnesses, breathing at different intervals into a plastic bag.

Later that morning, Brenda Neal, who was cooking breakfast in Joe Neal's mobile home, heard a crash which sounded like breaking glass. It seemed to come from near the back of the mobile home. She then saw flames. After hearing his mother calling out for help, Bobby Neal saw defendant run from behind Joe Neal's mobile home to defendant's mobile home. After Bobby Neal telephoned 911 to report the fire, he told defendant the police were coming and that defendant was going to jail. Defendant responded by running through the woods.

Officer J.J. Burrell of the Gaston County Police Department found defendant later that day walking along a nearby highway. Defendant, who had suffered a cut on his arm requiring stitches, was taken into custody. Investigators were later given permission by Hilda Seeley to search the mobile home she shared with defendant. They discovered two plastic fuel containers, one under the porch and one behind the living room couch.

John Bendure, Special Agent for the State Bureau of Investigation, testified that the fire started when a plastic bottle filled with gasoline was ignited by a fabric fuse. Eric Hendrix, deputy fire marshal for the Gaston County Fire Department, testified that

the fire began under a window in the bedroom where the plastic bottle was found.

Defendant's evidence, meanwhile, tends to show the following: Defendant was involved in a confrontation with members of the Neal family on the night of 3 June 2000, but he did not leave his own mobile home the following day until after observing Joe Neal's mobile home on fire. Upon leaving, he briefly spoke with Bobby Neal and began walking to his brother's home.

Seeley testified that defendant remained at home on the morning of the fire with the two of them first exiting the mobile home that day to investigate the blaze. She claimed the cut on defendant's arm resulted from the fight with Bobby Neal the previous night.

The jury convicted defendant of all three offenses. He was sentenced to concurrent prison terms of sixty-four to eighty-six months for the property offenses. For possession of a weapon of mass death and destruction, he received a suspended sentence of nineteen to twenty-three months, was placed on supervised probation for sixty months, and assigned to the Intensive Supervision Program for six months. His suspended sentence is set to run at the expiration of his active sentence for the other two offenses.

[1] Defendant first contends the trial court erred by denying his motion to dismiss because there was insufficient evidence he committed the crimes. We disagree.

A motion to dismiss is properly denied if "there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "When ruling on a motion to dismiss, all of the evidence should be considered in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence." *State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). The test of sufficiency of the evidence is the same whether the evidence is direct, circumstantial, or both. *See State v. Cook*, 334 N.C. 564, 569, 433 S.E.2d 730, 733 (1993); *State v. Cain*, 79 N.C. App. 35, 46, 338 S.E.2d 898, 905 (1986). Circumstantial evidence may be sufficient to withstand a motion to dismiss even when the evidence does not rule out every hypothesis of innocence.

State v. Foreman, 133 N.C. App. 292, 298, 515 S.E.2d 488, 493 (1999), *modified on other grounds and aff'd*, 351 N.C. 627, 527 S.E.2d 921 (2000). Contradictions or discrepancies in the evidence "are for the jury to resolve and do not warrant dismissal of a case." *State v. Jarrell*, 133 N.C. App. 264, 268, 515 S.E.2d 247, 250 (1999).

Defendant argues there was insufficient evidence he started the fire because the testimony of Bobby Neal placed him near Brenda Neal's mobile home immediately prior to the fire. According to defendant, he was not seen near Joe Neal's mobile home until after the fire was discovered. Further, defendant claims discrepancies in the evidence regarding his apparel undermine Bobby Neal's testimony placing him outside pacing in his yard and staring at Joe Neal's mobile home on the morning of the fire. He also maintains the State failed to establish there was gasoline in the containers discovered in his mobile home.

However, when viewed in the light most favorable to the State, and giving the State the benefit of all reasonable inferences, the evidence tends to show that defendant was involved in a confrontation with Bobby and Joe Neal on the evening prior to the fire. Defendant was observed the next morning pacing in his yard and staring at Joe Neal's mobile home, periodically breathing into a plastic bag. After the fire started, defendant was seen running from Joe Neal's mobile home to his own. When confronted by Bobby Neal and accused of starting the fire, defendant ran into the woods. In addition, Brenda Neal heard breaking glass from the rear of the mobile home immediately before the fire began. When defendant was apprehended by police, he was discovered to have a cut on his arm that required stitches. A subsequent search of defendant's home revealed the presence of two plastic fuel containers. The SBI agent investigating the fire concluded it was started by a plastic bottle filled with gasoline which was ignited by a fabric fuse. This evidence is sufficient to support the trial court's denial of defendant's motion to dismiss.

Furthermore, defendant's contention that the State's evidence contained discrepancies as to his exact location just prior to and immediately after the fire started, what kind of pants he was wearing that morning, and whether the fuel containers stored gasoline or kerosene, does not merit dismissal by the trial court. Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *See id.* Accordingly, we hold defendant's first contention lacks merit.

[2] Defendant next contends the trial court should have dismissed the malicious damage to occupied real property charge because the evidence is insufficient to demonstrate he acted with malice toward Joe Neal. Defendant maintains the State failed to show he had "a feeling of animosity, hatred or ill will toward the owner, possessor, or the occupant" of the mobile home that was burned. *State v. Conrad*, 275 N.C. 342, 352, 168 S.E.2d 39, 46 (1969). A showing of malice is required under N.C. Gen. Stat. § 14-49.1. *See id.* Defendant concedes the State's evidence demonstrates ill will toward Bobby Neal. However, defendant contends there is little evidence of ill will toward Joe Neal. We disagree.

Malice, as with intent, is a state of mind seldom provable by direct evidence. It ordinarily is proven by circumstantial evidence from which it may be inferred. *See State v. Bostic*, 121 N.C. App. 90, 99, 465 S.E.2d 20, 25 (1995). As earlier noted, circumstantial evidence is sufficient to withstand a motion to dismiss even if the evidence does not rule out every hypothesis of innocence. *Foreman*, 133 N.C. App. at 298, 515 S.E.2d at 493. The circumstantial evidence "need only give rise to a reasonable inference of guilt in order for it to be properly submitted to the jury for a determination of defendant's guilt beyond a reasonable doubt." *State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

Here, there was evidence defendant hit Joe Neal's truck repeatedly with his baseball bat while chasing Bobby Neal the night before the fire. Shortly thereafter, defendant was threatened by Joe Neal with a hatchet and a baseball bat. Defendant testified he remained on the couch throughout the night because he was concerned about what the Neal family might do. The next morning, defendant was observed pacing in his yard and staring at Joe Neal's mobile home, periodically breathing into a plastic bag. In addition, Joe Neal testified about a disagreement between defendant and him the previous month which resulted in police being called.

The evidence of past disagreements and confrontations between defendant and Joe Neal, and the conduct of defendant prior to the fire, when viewed in the light most favorable to the State, is sufficient to support a reasonable inference of malice under the circumstances. Accordingly, defendant's argument to the contrary is without merit.

[3] Defendant next contends the trial court committed plain error by instructing the jury on express *and* implied malice as it relates

to the offense of malicious damage to occupied real property. Defendant argues the instruction on implied malice was erroneous. We disagree.

The trial court instructed the jury on the element of malice as follows:

> Malice means not only hatred, ill will, or spite, as it is ordinarily understood; to be sure, that is malice; but it also means that condition of mind which prompts a person to intentionally inflict damage without just cause, excuse, or justification.

This definition of malice was taken verbatim from the North Carolina Pattern Jury Instructions. *See* N.C.P.I., Crim. 213.20. "This Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 13 (1994).

Further, the courts of this State have consistently recognized three kinds of malice in our law of homicide. *See State v. Snyder*, 311 N.C. 391, 393-94, 317 S.E.2d 394, 395 (1984); *State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982). The first kind is "express hatred, ill-will or spite, sometimes called actual, express, or particular malice." *Reynolds*, 307 N.C. at 191, 297 S.E.2d at 536. The second kind of malice "arises when an act which is inherently dangerous to human life is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." *Id.* The third kind of malice is " 'that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.' " *Id.* (quoting *State v. Foust*, 258 N.C. 453, 458, 128 S.E.2d 889, 893 (1962)). We find nothing in N.C. Gen. Stat. § 14-49.1 or caselaw to indicate that an analogous definition of malice should not apply to the crime of malicious damage to occupied real property. Accordingly, the trial court's instruction on implied malice—"that condition of mind which prompts a person to intentionally inflict *damage* without just cause, excuse, or justification"—was proper.

[4] Defendant next contends the trial court erred in admitting evidence of his alleged illegal drug use on the morning of the fire. Bobby Neal, Joe Neal, and Brenda Neal each testified defendant was seen pacing in his yard, staring at Joe Neal's mobile home, and inhaling intoxicants from a plastic bag, or "huffing," prior to

the fire. Defendant was also cross-examined about inhaling intoxicants. He argues that such evidence is irrelevant under N.C.R. Evid. 401, more prejudicial than probative under N.C.R. Evid. 403, and evidence of prior bad acts inadmissible under N.C.R. Evid. 404(b). We disagree.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401 (2001). The Supreme Court has held "[e]vidence tending to establish the context or chain of circumstances of a crime, which incidentally establishes the commission of a prior bad act," to be relevant. *State v. Agee*, 326 N.C. 542, 547, 391 S.E.2d 171, 174 (1990). This rule is known as the "same transaction" rule, the "complete story" rule, or the "course of conduct" rule. *Id.* (citing *Crozier v. State*, 723 P.2d 42, 49 (Wyo. 1986)). Such "chain of circumstances" evidence is admissible if it forms part of the history of the event or serves to enhance the natural development of the facts. *Id.* (citations omitted). As the Court stated in *Agee*:

> "Evidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or [if it] forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury."

Id. at 548, 391 S.E.2d at 174-75 (quoting *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985)).

Here, testimony regarding defendant's pacing in the yard, staring at Joe Neal's mobile home, and inhaling intoxicants from a plastic bag shortly before the mobile home was ignited established the chain of events or circumstances leading to the time of the fire. Because this context incidentally involved defendant's alleged illegal use of drugs does not make the evidence irrelevant.

Defendant argues that even if the evidence of his alleged illegal drug use was properly admitted as relevant, it nonetheless should have been excluded under Rule 404(b). We disagree.

Rule 404(b) states:

> *Other crimes, wrongs, or acts.*—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a per-

> son in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident . . . .

N.C.R. Evid. 404(b) (2001). The Supreme Court has made it clear that Rule 404(b) is a

> rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). "Therefore, as long as evidence of other crimes, wrongs, or acts is relevant to any other fact or issue other than the defendant's propensity to commit the crime for which he is being tried, the evidence is admissible." *State v. Carillo*, 149 N.C. App. 543, 550, 562 S.E.2d 47, 51-52 (2002). In *Agee*, the Supreme Court held that evidence of other crimes, wrongs, or acts is admissible for the purpose of " 'complet[ing] the story of a crime by proving the immediate context of events near in time and place.' " *Agee*, 326 N.C. at 549, 391 S.E.2d at 175 (quoting *United States v. Currier*, 821 F.2d 52, 55 (1st. Cir. 1987)).

Here, because the evidence of defendant's alleged illegal drug use served the purpose of establishing the chain of events and circumstances leading to the fire, Rule 404(b) did not require its exclusion. *See id.*

Defendant also argues that the evidence of his alleged illegal drug use should have been excluded under Rule 403 because its probative value was substantially outweighed by the danger of unfair prejudice. We again disagree.

"Whether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court . . . Evidence which is probative of the State's case necessarily will have a prejudicial effect upon the defendant; the question is one of degree." *Coffey*, 326 N.C. at 281, 389 S.E.2d at 56 (citations omitted). A trial court will be held to have abused its discretion "only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision." *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55,

59 (1986). Having reviewed the record, we conclude the trial court did not abuse its discretion under Rule 403 in admitting the evidence of defendant's alleged "huffing," nor did it err in admitting the evidence under Rules 401 and 404(b).

[5] Defendant next asserts the trial court erred in allowing Eric Hendrix, the deputy fire marshal who investigated the fire, to state his opinion concerning the cause of the fire. We find no error in the trial court's decision to allow the testimony.

Defendant argues that the testimony of Hendrix should have been excluded because Hendrix was never qualified as an expert. However, defendant failed to properly preserve this issue for appeal.

In North Carolina, unless a party specifically objects to the qualifications of an expert, "a ruling permitting opinion testimony is tantamount to a finding by the trial court that the witness is qualified to state an opinion." *State v. Westall*, 116 N.C. App. 534, 542, 449 S.E.2d 24, 29 (1994). In *State v. Aguallo*, 322 N.C. 818, 370 S.E.2d 676 (1988), the Supreme Court commented on the issue as follows:

> In considering this assignment of error, we find instructive this Court's decision in *State v. Phifer*, 290 N.C. 203, 225 S.E.2d 786 (1976). There, the defendant objected to the trial judge's decision to allow into evidence the testimony of two SBI agents. One agent gave his opinion as to whether the washing of one's hands would destroy any possibility of a valid gun residue test, and a second agent explained the differences between a latent lift and a fingerprint. Neither of the agents had been formally qualified as experts. We held that because of the nature of their jobs and the experience which they had, they were better qualified than the jury to form an opinion on these matters. *Id.* at 213, 225 S.E.2d at 793. The Court further held that because the defendant never requested a finding by the trial court as to the witnesses' qualifications as experts, such finding was deemed implicit in the ruling admitting the opinion testimony. *Id.* at 213-14, 225 S.E.2d at 793.

Id. at 821, 370 S.E.2d at 677. Further, " '[a]n objection to a witness's qualifications as an expert in a given field or upon a particular subject is waived if it is not made in apt time upon this special ground, and a mere general objection to the content of the witness's testimony will not ordinarily suffice to preserve the matter for subsequent review.' "

Riddick, 315 N.C. at 758, 340 S.E.2d at 60 (quoting *State v. Hunt*, 305 N.C. 238, 243, 287 S.E.2d 818, 821 (1982)).

Here, defendant did not object to the qualifications of Hendrix as an expert. Only one general objection was made to Hendrix's testimony. That objection was to a question concerning what was indicated by the discovery of a fabric extending from a container of accelerant. No additional objections were made to the State's later questions concerning Hendrix's opinion of the cause of the fire. Accordingly, defendant waived the right to challenge Hendrix's qualifications as an expert on appeal. *See Westall*, 116 N.C. App. at 543, 449 S.E.2d at 29.

As an expert, Hendrix testified that the fire was started by an incendiary device which was ignited using an open flame and placed in a bedroom of Joe Neal's mobile home. Hendrix was the deputy fire marshal assigned to the conflagration. He was a professional fire investigator whose job was to determine the cause of fires, particularly in a case where local firefighters were unable to readily ascertain its origin. His experience, the nature of his job, and his personal investigation of the fire scene show he was better qualified than the jury to form an opinion on the cause of the fire. *See* N.C.R. Evid. 702(a) (2001) ("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."). Accordingly, we find no error in the admission of Hendrix's expert opinion testimony. *See State v. Phifer*, 290 N.C. 203, 213, 225 S.E.2d 786, 793 (1976) (allowing admission of testimony of SBI agents regarding fingerprints and tests for gun residue).

Defendant raises three additional assignments of error in the record on appeal. Since they are not argued or supported in his brief, they are deemed abandoned. N.C.R. App. 28(b)(6) (2001).

NO ERROR.

Judges MARTIN and TYSON concur.

MARY HEDGEPETH, PETITIONER v. NORTH CAROLINA DIVISION OF SERVICES FOR THE BLIND, RESPONDENT

No. COA02-165

(Filed 5 November 2002)

1. Jurisdiction— agency review—law of the case

Respondent Division of Service for the Blind's jurisdictional challenge is overruled because it did not seek review of the earlier decision of the Court of Appeals holding that the superior court had jurisdiction to hear petitioner's appeal from an agency's final decision, making it the law of the case.

2. Public Assistance— final agency decision—individualized written rehabilitation program—joint development of plan—consideration of employee's capabilities

The trial court did not err by affirming the Division of Services for the Blind's final agency decision denying petitioner's request to amend her individualized written rehabilitation program (IWRP) even though petitioner alleges the agency's decision to unilaterally discontinue education assistance was illegal when IWRPs must be jointly developed and that the alleged unilateral changing of the IWRP was done without consideration of the employee's capabilities, because: (1) presuming the agency's decision to offer only job placement was unilateral, petitioner's signature on the last IWRP amendment as well as her failure to challenge the action for ten weeks constitute a waiver; and (2) the agency considered petitioner employee's capabilities since it worked with petitioner during a twelve-year period and knew of her capabilities, and there is substantial evidence that the agency considered her employable.

3. Public Assistance— final agency decision—individualized written rehabilitation program—job placement services—education

The trial court did not err by affirming the Division of Services for the Blind's final agency decision denying petitioner's request to amend her individualized written rehabilitation program (IWRP) even though petitioner contends the agency's contention that petitioner is employable coupled with its decision to provide only job placement services violates the Rehabilitation Act, federal regulations, and the agency's policy, because: (1) there is no indication that the agency ever suspended its efforts

to maximize petitioner's employment and the Rehabilitation Act does not stand for the proposition that petitioner was entitled to assistance in receiving the best possible education, 29 U.S.C. § 701(b)(1); (2) the employment outcome test under 34 C.F.R. § 361.56 is only applicable to an agency's decision to terminate services altogether, and the agency continued to provide job placement services to petitioner; (3) there is no set guideline as to what level of education the agency is responsible for assisting individuals to obtain; and (4) the agency's finding that petitioner was employable after having helped petitioner to achieve two associate degrees and participate in a rehabilitation program was supported by competent evidence.

4. Public Assistance— final agency decision—individualized written rehabilitation program—arbitrary and capricious standard

A whole record review reveals that the trial court's decision affirming the Division of Services for the Blind's final agency decision denying petitioner's request to amend her individualized written rehabilitation program (IWRP) was not arbitrary and capricious, because the testimony of the agency's counselors show that the agency never terminated its services to petitioner and that its decision to discontinue funding of petitioner's education was based upon proper determinations of petitioner's performance and employability.

Appeal by petitioner from order signed 14 September 2001 by Judge Frank R. Brown in Nash County Superior Court. Heard in the Court of Appeals 9 October 2002.

Eastern Carolina Legal Services, by Hazel Mack-Hilliard, for petitioner-appellant.

Attorney General Roy Cooper, by Assistant Attorney General Diane Martin Pomper, for respondent-appellee.

TYSON, Judge.

Mary Hedgepeth ("petitioner") obtains review through this Court's grant of a writ of certiorari to the trial court's order that affirmed the final agency decision of the Division of Services for the Blind ("Agency") denying petitioner's request to amend her Individualized Written Rehabilitation Program ("IWRP"). We affirm the trial court's order.

I. Facts

Petitioner began losing her eyesight in 1985 due to congenital cataracts, while she was enrolled in a legal secretary curriculum at Nash Community College. On 8 October 1985, petitioner applied for services from the Agency. She was accepted as a candidate for Vocational Rehabilitation ("VR") services pursuant to 34 C.F.R. § 361.42. On 2 January 1986, petitioner entered into the first IWRP agreement which stated that petitioner's vocational goal was "Occupations in Business", that the Agency would provide various services, and that plaintiff's goal would be completed by January of 1989. Petitioner graduated with an Associate Degree in Business in the Spring of 1988. Thereafter, she worked with Comfort Inn as a night auditor. She left after a month because her employer could not accommodate her visual impairment.

On 3 March 1989, petitioner and the Agency agreed to amend petitioner's IWRP. The amendment states the goal to be "Business Administration" and provides for petitioner to obtain additional training at the Rehabilitation Center for the Blind, ("Center"). Petitioner attended classes at the Center. While enrolled, petitioner was evaluated by two consulting psychologists. One classified her academic abilities to be in the "low average range," and the other reported her I.Q. to be "quite above average."

On 1 August 1989, a second IWRP amendment was adopted which stated a new vocational goal of "paralegal." In 1990, a third amendment to the IWRP was made which stated a vocational goal of "Social Work," which petitioner and the Agency representatives understood to include a four-year degree. The services under this amendment included a work-study program at Edgecombe Community College. Petitioner did not take any courses at Edgecombe Community College between 1990 and 1995.

In February of 1993, petitioner started working part-time with the Opportunities Industrialization Center in Rocky Mount, as a Case Manager/Assistant Coordinator. She was terminated after 23 months while on sick leave.

Petitioner informed the Agency that she wished to pursue a four year degree in social work. On 26 July 1995, petitioner requested financial assistance from the Agency. A fourth IWRP amendment was agreed to on 11 October 1995 which stated the vocational goal to be "Social Work Assistant" and provided that petitioner was to obtain an

associate degree in social work from Edgecombe Community College. A four-year degree was not required for this goal. The Agency agreed to cover the costs. The ending date for this plan was August of 1997. Petitioner graduated and obtained her second associate degree in the summer of 1997.

Thereafter, petitioner was accepted at North Carolina Wesleyan College where she planned to further her studies in social work. In September of 1997, petitioner met with the Agency to discuss petitioner's future. At the meeting, the Agency advised petitioner that they would help her find employment but they would not pay for additional education. Petitioner wanted the Agency to help pay for her further schooling at North Carolina Wesleyan. Petitioner and Agency executed a fifth amendment to the IWRP to reflect petitioner's vocational goal as "Occupations in Social Work." Educational tuition was not included in this amendment.

On 8 December 1997, petitioner wrote the Agency to request further amendment of her IWRP to show a vocational goal of a Licensed Professional Counselor. A Masters Degree in counseling or a graduate degree in a related field, two years of counseling experience, and passing a licensing test are required to meet this vocational goal. On 12 December 1997, the Agency wrote petitioner denying the request. On 26 January 1997, petitioner sent a written request for appeal of the Agency's decision. On 18 May 1998, Agency issued a final agency decision denying petitioner's appeal. On 21 June 1999, the superior court affirmed the final agency decision. On 29 July 1999, petitioner appealed to this Court. On 6 March 2001, this Court issued an opinion reversing the superior court's order and remanding for a more specific order in accordance with the opinion. *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 543 S.E.2d 169 (2001). On 14 September 2001, the superior court entered an order on remand. On 17 December 2001, petitioner's petition for writ of certiorari was filed with this Court and was granted on 27 December 2001.

II. Issues

Petitioner argues that the superior court erred in (1) affirming certain findings and conclusions by the agency that unilaterally discontinued educational assistance to petitioner and refused to amend petitioner's work plan goal to complete a four-year degree in order to pursue professional counseling, without considering petitioner's capacity and capabilities, and (2) affirming that the Agency's decision was based on (a) relevant laws, (b) substantial evidence, and (c) was

neither arbitrary nor capricious. The Agency counters that this appeal should be dismissed on the grounds that this Court's prior holding that the superior court had jurisdiction was erroneous.

III. Jurisdiction

[1] The Agency contends that the superior court did not have jurisdiction. Since this is a threshold issue and significantly impacts any other arguments raised, we address it first. The Agency argues that petitioner's reliance on 29 U.S.C. § 722 to provide a remedy is misplaced as the U.S. Code provision was enacted after the agency decision. There was no clear path to judicial review under the prior version of the U.S. Code.

We held in the prior appeal that the superior court had jurisdiction to hear petitioner's appeal from the Agency's final decision as the proceeding was sufficient to constitute a "contested case". *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 345, 543 S.E.2d 169, 174 (2001).

The Agency contends that the issue of subject matter jurisdiction can be raised at any time. Because the Agency did not seek review of the earlier decision of this Court, it is the law of the case. *See Save Our Rivers, Inc. et al v. Town of Highlands, et al*, 341 N.C. 635, 638, 461 S.E.2d 333, 335 (1995) (although the holding of the Court of Appeals had been overruled in a subsequent case, it was res judicata and remained the law of the case). The Agency's jurisdictional challenge is overruled.

IV. The Rehabilitation Act

> The purpose of the Rehabilitation Act is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." 29 U.S.C.A. § 701(b)(1) (West Supp.1995). The Rehabilitation Act authorizes grants to states to provide vocational rehabilitation to individuals with disabilities. *Buchanan v. Ives*, 793 F.Supp. 361, 363 (D.Me.1991). State participation is voluntary, but those states choosing to participate must comply with federal regulations. *Id.* The purpose of the vocational rehabilitation program of the Act is to assist states in providing "services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, and capabilities, so that such individuals may prepare for and engage in gainful employment." 29 U.S.C.A. § 720(a)(2) (West Supp.1995). [FN1] The scope of vocational

> services provided is defined in 29 U.S.C.A. § 723(a) (West Supp.1995), which states: "Vocational rehabilitation services provided under this chapter are any goods or services *necessary* to render an individual with a disability employable. . . ." (Emphasis added.)

Zingher v. Department of Aging and Disabilities, 664 A.2d 256, 259 (Vt. 1995). The Rehabilitation Act was amended in 1998, after petitioner's incident occurred.

V. Unilateral Decision without Determination of Capabilities

A. Unilateral Decision

[2] Petitioner contends that the Agency's decision to discontinue education assistance was unilateral and illegal. Petitioner cites the Rehabilitation Act to require an IWRP and its amendments to be "jointly developed" and agreed to by a VR counselor and the individual. *See* Development of the Individualized Written Rehabilitation Program, 34 C.F.R. 361.45 (1997). Petitioner contends that the plan was not "jointly developed" and asserts that the Agency made a unilateral decision to offer "job placement" only to petitioner prior to meeting with petitioner and discussing the change.

The statute contemplates jointly developed amendments to IWRPs. "[J]ointly" implies "equal participation and involvement on the part of the client and counsellor [sic] in the development of an IWRP." *Buchanan v. Ives*, 793 F. Supp. 361, 366 (D. Me. 1991). The two cases of *Tourville v. Office of Educational Services for Individuals with Disabilities, New York State Education Department*, 663 N.Y.S.2d 368 (N.Y. App. Div. 1997) and *Barbee v. Office of Educational Services for Individuals with Disabilities, New York Education Department*, 650 N.Y.S.2d 488 (N.Y. App. Div. 1996) are illustrative. The New York Supreme Court held that "choice" did not mean the disabled individuals had complete control over the programs and that IWRPs were to be jointly developed by the eligible individual and the VR counselor. *Id.* Petitioner cites these cases to support the premise that neither the disabled individual nor the VR counselor can individually have complete control over the programs.

We agree that IWRPs must be "jointly developed." Petitioner's IWRP and its five amendments *were jointly developed* between petitioner and the counselors and specialists of the Agency in the meeting of 24 September 1997. Presuming the Agency had already decided

to offer only "job placement" does not change the fact that the petitioner agreed to the proposed amendment.

Petitioner testified that she felt overwhelmed during the meeting by the presence of three counselors, was forced to sign the new amendment, and was in a vulnerable state due to her father's recent death and her own health problems. Petitioner presented this evidence at the agency hearing. The hearing officer found that petitioner failed to object until 10 weeks after having signed the amendment.

The question over whether the IWRP amendment was jointly developed is a question of fact. The "whole record test" limits our review of the Agency's findings of fact. *Hearne v. Sherman*, 350 N.C. 612, 614, 516 S.E.2d 864, 866 (1999). The "whole record" review "does not allow the reviewing court to replace the . . . [agency's] judgment as between two reasonably conflicting views," but requires the court to review all the evidence and determine whether substantial evidence in the record supports the decision. *Associated Mechanical Contractors v. Payne*, 342 N.C. 825, 832, 467 S.E.2d 398, 401 (1996) (citation omitted). The hearing officer's factual determination that the IWRP and amendments were jointly developed is supported by substantial evidence in the record.

Presuming the agency's decision to offer only job placement was unilateral, petitioner's signature on the last IWRP amendment as well as her failure to challenge the action for 10 weeks constitute a waiver. We affirm the agency's finding that the IWRP amendment of 24 September 1997 was developed jointly.

B. Consideration of Petitioner's Capabilities

Petitioner also argues that the Agency in unilaterally deciding to offer petitioner "job placement" only, neglected to consider petitioner's capabilities. Petitioner cites the Rehabilitation Act, which requires "each Individualized Written Rehabilitation Program shall be designed to achieve the employment objective of the individual consistent with the unique strengths, resources, priorities, concerns, abilities, and capabilities of the individual." 29 U.S.C. § 722 (b)(1)(B) (1997). The Act also requires that IWRPs "be reviewed annually, at which time such individual . . . will be afforded an opportunity to review such program and jointly redevelop and agree to its terms." 29 U.S.C. § 722(b)(2) (1997).

Petitioner cites 34 C.F.R. 361.45(c)(2)(ii)(B) for the requirement that the Agency consider the individual's personality, career interests,

educational achievements, personal and social adjustments, and employment opportunities. According to 34 C.F.R. 361.45(c)(2)(ii)(B), these factors are not requirements but *may* be used to identify rehabilitation needs and develop the IWRP where preparation is based on a *comprehensive assessment*. Petitioner has not contended that she falls within the category of those needing a comprehensive assessment nor are these actual requirements but mere guidelines.

Petitioner argues that the unilateral changing of the IWRP was done without consideration of employee's capabilities. Because we hold that there was substantial evidence supporting the finding that the amendment to the IWRP was "jointly developed," there has been no unilateral action by the Agency. The Agency worked with petitioner during a 12-year period and knew of her capabilities. There is substantial evidence that the Agency considered her employable. Because the purpose of the Rehabilitation Act as of 1992 was "to empower [individuals] to maximize employment, . . ." there is no reason to find that the Agency's actions were improper. 29 U.S.C. § 701(2)(b)(1) (1992).

VI. Agency's Decision Does Not Violate the Law

[3] Petitioner asserts that the Agency's contention that petitioner is employable coupled with its decision to provide only job placement services violates the Rehabilitation Act, Federal Regulations, and the Agency's policy. Alleged errors of law are appropriate for *de novo* review. *Hedgepeth v. N.C. Div. of Servs. for the Blind*, 142 N.C. App. 338, 346, 543 S.E.2d 169, 174 (2001).

Petitioner argues that the Federal Rehabilitation Act requires *maximized employment* consistent with petitioner's strengths, resources, priorities, concerns, abilities, capabilities, and informed choice. 29 U.S.C. § 701(b)(1). There is no indication that the Agency ever suspended its effort to maximize petitioner's employment. The counselors at the Agency agreed that petitioner was employable and continued to aid in her search for her employment. The Rehabilitation Act does not stand for the proposition that petitioner was entitled to assistance in receiving the best possible education. *Zhinger v. Department of Aging and Disabilities*, 664 A.2d 256 (Vt. 1995); *Campbell v. Office of Vocational and Educational Services for Individuals with Disabilities, et al.*, 682 N.Y.S.2d 694 (N.Y. App. Div. 1998).

Petitioner asserts that "employment outcome" can only be achieved if all four elements of 34 C.F.R. § 361.56 are met, and that the

Agency fails to meet these. The Agency argues that this test is only applicable to an agency's decision to terminate services altogether. We agree. The Agency continued to provide job placement services to petitioner. The Agency has not violated the statute, and need not show an "employment outcome" as it never terminated its benefits, just its tuition assistance for further education.

Petitioner asserts that VR services are designed to enable one to reach his highest achievable vocational goal and not merely find "suitable employment" and that the Agency has failed to provide her with her highest achievable vocational goal by refusing to provide tuition assistance for a degree program to which she had already been admitted. Petitioner relies on *Polkabla v. Commission for the Blind and Visually Handicapped of the New York State Dep't of Social Services*, 583 N.Y.S.2d 464 (N.Y. App. Div. 1992).

Murphy v. Office of Vocational and Educational Services for Individuals with Disabilities, 705 N.E.2d 1180, 1183-1184 (N.Y., 1998) distinguished *Polkabla.*

> First, the aspirational rhetoric regarding "highest level of achievement" is not a standard expressed in the Act itself. In addition, the Appellate Division's reasoning in Polkabla is distinguishable in part because it was decided just prior to the 1992 amendments—the latter even removed the statutory language relied on by that court when it held that VESID [Vocation and Educational Services for Individuals with Disabilities] must "maximize" "employability".

Murphy v. Office of Vocational and Educational Services for Individuals with Disabilities, 705 N.E.2d 1180, 1183-84 (N.Y. 1998) (quoting *Polkabla* at 464 (emphasis added)). We find no error in the Agency and superior court interpretation of the Rehabilitation Act, particularly in light of the 1992 amendments to the Act.

Petitioner asserts that similar VR recipients in other states were only denied financial assistance after having at least completed a bachelor's degree to support her contention that she deserves financial assistance to receive another degree. *See Romano v. Office of Vocational and Educational Services for Individuals with Disabilities et al.*, 636 N.Y.S.2d 179, 180 (N.Y. App. Div. 1996); *Murphy v. Office of Vocational and Educational Services for Individuals with Disabilities et al.*, 705 N.E.2d 1180 (N.Y. 1998); *Campbell v. Office of Vocational and Educational Services for*

Individuals with Disabilities et al., 682 N.Y.S.2d 694 (N.Y. App. Div. 1998). There is no set guideline as to what level of education the Agency is responsible for assisting individuals to obtain.

Petitioner contends that the Agency did not follow through on a promise to assist her in obtaining a four-year degree. While that plan was admittedly discussed with the Agency, petitioner offered no evidence of Agency's pre-approval to pay for the education.

The Agency, through its counselors, testified at the hearing that the policy objectives for the Rehabilitation Act were understood. An Agency counselor researched what credit hours would transfer should petitioner enroll in a state university bachelor's program, and the probability of petitioner's successful completion of a master's program, required to obtain her newly desired goal of Licensed Professional Counselor. The Agency's finding that she was employable after having helped petitioner to achieve two associate degrees and participate in a rehabilitation program is supported by competent evidence. This finding of employability is bolstered by the fact that petitioner held a job for nearly two years before obtaining an associate degree in social work.

<u>VII. The Agency's Action was not Arbitrary or Capricious</u>

[4] Petitioner contends that the action of the Agency in denying her request to amend the IWRP was arbitrary and capricious. The standard for determining whether an action was arbitrary or capricious is the "whole record" review. This Court cannot "override decisions within agency discretion when that discretion is exercised in good faith and in accordance with law." *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (citations omitted).

"Agency actions have been found to be arbitrary and capricious when such actions are whimsical because they indicate a lack of fair and careful consideration; when they fail to indicate any course of reasoning and the exercise of judgment." *White v. N.C. Dept. of E.H.N.R.*, 117 N.C. App. 545, 547-48, 451 S.E.2d 376, 378 (1995) (quoting *Comr. of Insurance v. Rate Bureau*, 300 N.C. 381, 420, 269 S.E.2d 547, 573, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980)).

In reviewing the whole record, we find insufficient evidence of an "arbitrary" or "capricious" action by the Agency. The testimony of the Agency's counselors show that the Agency never terminated its services to petitioner and that its decision to discontinue funding of peti-

tioner's education was based upon proper determinations of petitioner's performance and employability.

VIII. Conclusion

The Agency adopted the recommended decision of the hearing officer who made substantial findings of fact which support his conclusions of law. The superior court, pursuant to this Court's direction on remand, entered a specific order that stated its standards of review. The superior court applied the correct standards of review.

We affirm the decision of the superior court affirming the Agency's decision not to amend petitioner's IWRP.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

PAMELA PRIEST AND BETTY LOU SKINNER, PLAINTIFFS v. THOMAS SOBECK AND MAKE-UP ARTISTS AND HAIR STYLISTS LOCAL 798, OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOTION PICTURE OPERATORS OF THE UNITED STATES AND CANADA, DEFENDANTS

No. COA01-1476

(Filed 5 November 2002)

1. **Appeal and Error— appealability—grant of partial summary judgment—interlocutory order—no final judgment**

Plaintiffs' appeal in a defamation action from the trial court's grant of partial summary judgment in favor of defendants is dismissed as an appeal from an interlocutory order even though the trial court certified this case for immediate review under N.C.G.S. § 1A-1, Rule 54(b), because there has not been a final judgment when the trial court's order essentially left intact plaintiffs' defamation allegations based on the statement that they stood by while a non-union member was hired.

2. **Appeal and Error— appealability—denial of partial summary judgment—interlocutory order—no substantial right**

Defendants' appeal in a defamation action from the trial court's denial of partial summary judgment is dismissed as an appeal from an interlocutory order even though the trial court

certified this case for immediate review under N.C.G.S. § 1A-1, Rule 54(b), because: (1) there was no final judgment; and (2) defendants have failed to show that the trial court placed any First Amendment restrictions or prohibitions upon them that affect a substantial right.

Judge GREENE dissenting.

Appeals by plaintiffs and defendants from order granting partial summary judgment in favor of defendants entered 4 September 2001 by Judge Melzer A. Morgan, Jr., Superior Court, Moore County. Heard in the Court of Appeals 10 September 2002.

Barringer, Barringer, Stephenson & Schiller by David G. Schiller and Marvin Schiller for plaintiffs.

Smith, James, Rowlett & Cohen by Seth R. Cohen and Stanford, Fagan & Giolito, L.L.C., by Robert S. Giolito and Jeffrey D. Sodko for defendants.

WYNN, Judge.

This appeal concerns a defamation action brought by labor union members Pamela Priest and Betty Lou Skinner against their labor union and its representative. They appeal from the trial court's grant of partial summary judgment in favor of defendants; likewise, defendants appeal from that part of the summary judgment that was not granted in their favor. On review, notwithstanding the trial court's certification of this matter for immediate review under Rule 54(b), we conclude that the partial grant of summary judgment neither constitutes a final judgment nor affects a substantial right. Accordingly, we dismiss this appeal as interlocutory.

The underlying facts to this appeal show that defendant Make-up Artists and Hair Stylists Local 798, of the International Alliance of Theatrical Stage Employees and Motion Picture Operators of the United States and Canada, hereinafter "Local 798," is the collective bargaining representative of most make-up artists and hairstylists in the film industry throughout the eastern half of the United States. Defendant Thomas Sobeck is the District Field Representative for Local 798; Priest and Skinner have been members of Local 798 for several years.

In June 1999, Priest was hired as head of the hair department on the CBS film "Shake, Rattle & Roll," a production governed by a col-

lective bargaining agreement with Local 798. Priest then hired Skinner as "third hair" and filled all of the positions in her department with union members. When Priest arrived in Charlotte, North Carolina, to begin work on the production, she learned that a non-union worker had been hired as "second" in the make-up department. Priest later learned that Kelly Gore Jefferson, head of the make-up department, was dissatisfied with the selection of the non-union worker. Priest advised her to speak with the union production manager about her concerns.

Meanwhile, Sobeck, the union district representative, had been receiving complaints from union members about non-union members working on the production. Sobeck called Priest to find out what she knew about the hiring of non-union make-up employees. Priest asked Sobeck if they could speak at a later time since she was fatigued from working that day. In response, Sobeck faxed Priest and Skinner a letter informing them they could not be forced to work with or hire non-union workers. The next day Priest approached the unit production manager and told him that he needed to call Sobeck about the hiring of non-union workers. According to Priest, the unit production manager (in a previous conversation), informed her that Sobeck was aware of the situation and that the non-union worker had been hired at the request of the film's producer. The unit production manager called Sobeck and after the phone conversation, told Priest the matter had been resolved.

However, in the next union newsletter, Sobeck stated the following:

> I received a call from one of our members in the Carolina's. She was asking me, why as a paid up dues paying member of our local, she was not hired, but passed over for a non-member make-up person.
>
> . . .
>
> I was aware of the problem and sent faxes to both Heads of the Department, Pam Priest and Kelly Gore Jefferson, stating that the Production cannot force them to hire non-members. I have not heard one word from either Head of Department. It is time you, the Membership file complaints and get rid of these not thinking members.
>
> . . .

> So there it is. Now it's up to you, the Membership, to advise this Local how you all would like to proceed on these issues when they arise.
>
> . . .
>
> Kelly Gore Jefferson did in fact hire non-union make-up over her own sisters and brothers and gave permission to the person to hire additional make-up and that the other Head of the Hair Department stood by, along with two other Local 798 Members, Roy Bryson and Betty Lou Skinner, on the production "Shake Rattle & Roll" being shot in Charlotte, North Carolina.
>
> . . .
>
> O.K. now all of you Members who have been complaining about this kind of problem can put a stop to it. Write your Business Agent and advise him how you want him to deal with this problem.
>
> I have given you Members the ammunition now it's up to you to use it.

As a result of the newsletter comments and its dissemination to union members, Priest and Skinner brought this action alleging libel per se, class two libel and libel per quod. In granting partial summary judgment in favor of the defendants, the trial court stated:

> There are no genuine issues of material fact with respect to any of the claims alleged except as to whether the defendant Sobeck with malice published in the August newsletter and subsequent newsletters that plaintiffs stood by when Henrita Jones, not a member of Local 798, was hired in mid to late June 1999 when such hiring was actually initially approved by union representative Vincent Callaghan and when defendant Sobeck himself later allegedly approved, explicitly or implicitly, the hiring of Ms. Jones. . . . Except with respect to the hiring of Ms. Jones and defendant Sobeck's assertion that plaintiffs stood by while Ms. Jones was hired, when he allegedly knew that he had himself approved the hire, no malice has been shown on the part of the defendants as to any other factual scenario.

Thus, the court granted partial summary judgment as to any and all claims "except any claim based upon the limited assertion that defendant Sobeck maliciously published that it was plaintiffs who stood by when Ms. Jones was hired when he knew he had approved

the hire himself." Thereafter, the trial court, exercising its discretion under N.C. Gen. Stat. § 1A-1, Rule 54(b), determined that there was no just reason for delay of appellate review of this judgment which determined less than all of the claims of the plaintiffs.

Plaintiffs' Interlocutory Appeal

[1] It is well settled that 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, Inc. v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). However, there are two situations in which one may seek appellate review of an interlocutory order. First, in claims involving multiple claims or multiple parties, if a final judgment is entered as to one, but not all, of the claims or parties and the trial judge certifies in the judgment that "there is no just reason for delay," such judgment is then subject to judicial review. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2001). Second, if delaying the appeal would prejudice a substantial right, then there may be judicial review. *Liggett*, 113 N.C. App. at 23-24, 437 S.E.2d at 677.

In general, a trial court's certification of an order for immediate appeal under Rule 54(b) permits the parties to prosecute an interlocutory appeal. *Sharpe v. Worland*, 351 N.C. 159, 161-62, 522 S.E.2d 577, 579 (1999) (quoting *DKH Corp. v. Rankin-Patterson Oil Comp., Inc.*, 348 N.C. 583, 585, 500 S.E.2d 666, 668 (1998)). "Nonetheless, the trial court may not, by certification, render its decree immediately appealable if '[it] is not a final judgment.' " *Sharpe*, 351 N.C. at 162, 522 S.E.2d at 579; *Lamb v. Wedgewood South Corp.*, 308 N.C. 419, 425, 302 S.E.2d 868, 871 (1983); *see Tridyn Indus. v. American Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979) ("That the trial court declared it to be a final, declaratory judgment does not make it so.").

In this case, plaintiffs presented three causes of action, libel per se, class 2 libel, and libel per quod based on the essence of one statement in the union newsletter: Defendants' statement that "Plaintiffs Priest and Skinner 'stood by' while 'Jefferson . . . hire[d] non-union make-up' on the Production is false."

In granting partial summary judgment, the trial judge dismissed all claims "except any claim based upon the limited assertion that defendant Sobeck maliciously published that it was plaintiffs who stood by when Ms. Jones was hired when he knew he had approved the hire himself." Thus, the trial judge's order of partial summary

judgment essentially left in tact the plaintiffs' defamation allegations based on the statement that they "stood by" while the non-union member was hired. Accordingly, there has not been a final judgment and the plaintiffs' appeal must be dismissed as interlocutory.

Defendants' Interlocutory Appeal

[2] Defendants appeal the trial court's partial denial of summary judgment. It is well settled that "[d]enial of a motion for summary judgment is not a final judgment and is generally (unless affecting a "substantial right") not immediately appealable, even if the trial court has attempted to certify it for appeal under Rule 54(b)." *First Atlantic v. Dunlea Realty*, 131 N.C. App. 242, 247, 507 S.E.2d 56, 60 (1998) (quoting *Cagle v. Teachy*, 111 N.C. App. 244, 247, 431 S.E.2d 801, 803 (1993)). In this case, the trial court's denial of summary judgment was not a final judgment. Since this appeal arises from a non-final judgment, we hold that the trial court's certification under Rule 54(b) does not render it ready for appeal.

Nonetheless, as an alternative basis for their appeal, defendants' argue the partial denial of summary judgment affects their substantial right to free speech.

> It is well settled that an interlocutory order affects a substantial right if the order "deprives the appealing party of a substantial right which will be lost if the order is not reviewed before a final judgment is entered." "Essentially a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury . . . if not corrected before appeal from final judgment." . . . Nevertheless, "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 the appeal was sought was entered."

Sharpe v. Worland, 351 N.C. 159, 162-63, 522 S.E.2d 577, 580 (1999) (quoting *Cook v. Bankers Life & Cas. Co.*, 329 N.C. 488, 491, 406 S.E.2d 848, 850 (1991); *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990); *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)).

Defendant cites two North Carolina cases, *Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 714, 504 S.E.2d 802 (1998) and *Kaplan v. Prolife Action League*, 111 N.C. App. 1, 431 S.E.2d 828, 834 (1993), in which this Court held that an order affecting First Amendment free-

doms affects a substantial right sufficient to permit an immediate appeal from an interlocutory order. Both of these cases are distinguishable from the case *sub judice.*

In *Sherrill*, this Court stated that a trial court's gag order prohibiting the parties and attorneys from communicating with any person or entity not a party to the case, operated to forbid expression before it took place and constituted a prior restraint. 130 N.C. App. 714, 720, 504 S.E.2d 802, 808 (1998). In *Kaplan*, we reviewed a trial court's grant of a preliminary injunction, effective only during the trial's duration, restraining the manner and place in which defendants could picket plaintiff's home. This Court stated that the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. *Kaplan v. Prolife Action League*, 111 N.C. App. 1, 15, 431 S.E.2d 828, 834 (1993). Both cases involved court-imposed restrictions upon the exercise of First Amendment rights prior to the resolution of the cases. These court-imposed restrictions constituted either a prior restraint or the loss of a First Amendment right for a short period of time. Thus, in *Sherrill* and *Kaplan*, we found that substantial rights were affected because of the court-imposed restrictions prohibiting the parties from exercising First Amendment rights during the pendency of the trial.

In this case, the trial court did not impose any preliminary restrictions upon the parties. Any change in defendants' behavior because of this case is self-imposed. Thus, we reject defendant's argument based on our holdings in *Sherrill* and *Kaplan.*

Defendants also argue that in cases where the *New York Times v. Sullivan* rule[1] applies, an interlocutory appeal from an order denying summary judgment is necessary to ensure that a defendant's right to free speech is adequately protected. Defendants further contend that because "the U.S. Supreme Court has long-recognized the primary importance of 'uninhibited, robust and wide-open debate' in labor disputes," interlocutory review in cases involving labor disputes and the exercise of First Amendment rights is justified in every case. We disagree.

In *Old Dominion Branch No. 496, Nat'l Assoc. of Letter Carriers, AFL-CIO v. Austin*, the United States Supreme Court

1. Defendants allude to *Linn v. United Plant Guard Workers of America, Local 114*, 383 U.S. 53 (1966), where the Court adopted the *New York Times v. Sullivan* standard for libel cases arising out of labor disputes, requiring plaintiffs to establish that defamatory statements were made with actual malice.

stated that federal labor policy favors uninhibited, robust and wide-open debate in labor disputes. 418 U.S. 264, 272-73, 94 S.Ct. 2770, 2775 (1974). However, the Court in analyzing its prior holding in *New York Times v. Sullivan*, limited the application of this statement to a consideration of the federal labor policy, not as a basis for finding a substantial right in libel actions involving a labor union. Thus, the Court stated:

> [The] freewheeling use of the written and spoken word, we found, has been expressly fostered by Congress and approved by the NLRB. Thus, Mr. Justice Clark acknowledged that there was 'a congressional intent to encourage free debate on issues dividing labor and management,' and noted that 'the Board has given frequent consideration to the type of statements circulated during labor controversies, and . . . it has allowed wide latitude to competing parties.'
>
> The Court therefore found it necessary to impose substantive restrictions on the state libel laws to be applied to defamatory statements in labor disputes in order to prevent 'unwarranted intrusion upon free discussion envisioned by the Act.' The Court looked to the NLRB's decisions, and found that 'although the Board tolerates intemperate, abusive and inaccurate statements made by the union during attempts to organize employees, it does not interpret the Act as giving either party license to injure the other intentionally by circulating defamatory or insulting material known to be false. The Court therefore found it appropriate to adopt by analogy the standards of New York Times Co. v. Sullivan.

Id. (citations omitted).

Following the holding in *Old Dominion*, we conclude that under the facts of this case, the defendants have failed to show that the trial court placed any First Amendment restrictions or prohibitions upon them that affect a substantial right requiring a review of their interlocutory appeal. Accordingly, we decline to find a substantial right of the defendants has been impinged.

Dismissed.

Judge BIGGS concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

I disagree with the majority's conclusions that: (I) there was no final judgment on any of plaintiffs' claims; and (II) the partial denial of defendants' summary judgment motion did not affect their First Amendment rights.

I

A trial court's certification of an interlocutory order for appeal is proper if the order is a final judgment as to one or more claims and there is no just reason for delay. *See* N.C.G.S. § 1A-1, Rule 54(b) (2001). A claim is defined as a "cause of action." *Black's Law Dictionary* 247 (6th ed. 1990) [hereinafter *Black's*]. A cause of action is defined as "[t]he fact or facts which give a person a right to judicial redress or relief against another." *Black's* at 221; *see also Brown v. Glade Valley Sch. Inc.*, 77 N.C. App. 83, 86, 334 S.E.2d 404, 406 (1985) (the facts alleged in a complaint determine the validity of a claim, not the legal theories asserted).

In this case, plaintiffs alleged defamation under three different legal theories based on a series of statements published in two union newsletters. While the trial court did not render final judgment on any of plaintiffs' legal theories, the trial court did render summary judgment on all of plaintiffs' factual claims, except for those "based on the limited assertion that defendant . . . maliciously published that it was plaintiffs who stood by when Ms. Jones was hired, when [defendant] knew he had approved the hire himself." Thus, there was a final judgment as to one or more of plaintiffs' claims, and the trial court properly certified the interlocutory order for appeal under Rule 54(b). Accordingly, this Court should address the question raised in plaintiffs' appeal of whether the *New York Times v. Sullivan* "actual malice" standard applies to the facts of this case.

II

I also disagree with the majority's conclusion that partial denial of defendants' summary judgment motion did not affect a substantial right. Defendants contend the trial court misapplied the *New York Times v. Sullivan* "actual malice" standard, infringing on their First Amendment right to free speech. Because misapplication of the actual malice standard, detrimental to defendants, would have a chilling effect on their rights of free speech, the trial court's order does affect a substantial right. *See Sherrill v. Amerada Hess Corp.*, 130 N.C. App. 711, 719, 504 S.E.2d 802, 807 (1998) (order implicating First

Amendment rights affects a substantial right). Accordingly, this Court should also address the merits of defendants' appeal.

STATE OF NORTH CAROLINA v. LEONARD KEITT, DEFENDANT

No. COA01-943

(Filed 5 November 2002)

1. Burglary and Unlawful Breaking or Entering— inference of intent—intoxication

The trial court did not err by denying a motion to dismiss a first-degree burglary charge for insufficient evidence where defendant fell within the scope of the McBryde inference of intent to commit larceny in that he entered the dwelling place of another at night, attempted to stop the victim from screaming, and tried to flee. Defendant did not rebut the presumption of intent with evidence of intoxication, given his behavior inside the house.

2. Appeal and Error— preservation of issues—instruction denied

A first-degree burglary defendant preserved for appeal the failure of the court to instruct on voluntary intoxication where defendant did not formally object at trial, but requested an instruction on misdemeanor breaking and entering based upon defendant's intoxication. No formal objection is required if a party submits a request to alter an instruction during the charge conference and the trial judge considers and refuses the request.

3. Criminal Law— defenses—voluntary intoxication—evidence sufficient

The trial court erred by not giving an instruction on voluntary intoxication where defendant was so intoxicated on the night of the break-in that he was barely able to stand; the victim smelled alcohol on him; defendant had trouble leaving her home, fumbling at the door; and the arresting officer smelled alcohol on him the next morning. The central issue was intent, and there was a reasonable possibility of a different result if the instruction had been given.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 1 March 2001 by Judge Melzer A. Morgan in Montgomery County Superior Court. Heard in the Court of Appeals 4 June 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Ziko, for the State.

Russell J. Hollers, III, for the defendant-appellant.

HUDSON, Judge.

Defendant was convicted of first-degree burglary in Montgomery County Superior Court on 28 February 2001 and sentenced to a term of imprisonment for a minimum of 103 months and a maximum of 133 months. Defendant appeals his conviction, arguing: (1) the trial court erred in denying his motion to dismiss as there was no evidence that he intended to commit larceny; (2) the court should have intervened to prevent improper argument and conduct by the prosecution; (3) the court erred in allowing the testimony of Officer Jamie Hunsucker; and (4) the court improperly failed to instruct the jury on the issue of voluntary intoxication. We agree that the trial court erred in not instructing the jury on voluntary intoxication and remand for a new trial.

The evidence presented at trial tended to show the following: on 1 September 2000, at about 2:00 a.m., Ms. Phyllis Scott awoke and saw a man standing near the foot of her bed. When she began to scream, he ran towards her and put his hand over her mouth. She smelled alcohol on his breath. Ms. Scott freed herself and starting screaming again, and her next door neighbor turned on her porch light. Ms. Scott's intruder fell down, then got up and ran out of the room toward the back door. Then he came back through the house and, after fumbling with the front door and screen door, he managed to exit the house.

Ms. Scott called the police while the man was still in her house. Officer Jamie Hunsucker and Sergeant R.D. Lawing of the Troy Police Department responded to the call. Sergeant Lawing, after searching the area, determined that entry into the house had been made through a bathroom window. The window had been reached by climbing onto a tall bucket, from there onto an oil tank beneath the window, and removing the screen over the window. Ms. Scott told Officer Hunsucker that she had seen the intruder the previous day climbing the utility pole next to her house. Based upon prior knowledge, Officer Hunsucker suspected that the defendant had been her

assailant. Officer Hunsucker assembled a photographic lineup which contained a photograph of the defendant and seven others with similar appearance. Ms. Scott quickly selected defendant's photograph. Officer Hunsucker then obtained a warrant, and went to the defendant's residence to arrest him. At about 4:50 a.m., defendant's brother let Officer Hunsucker into the defendant's residence. At that time, defendant was in bed in his room. Officer Hunsucker testified that the defendant was not dressed and that he smelled of alcohol. Officer Hunsucker placed the defendant under arrest and took him to the magistrate's office, where he read the defendant his *Miranda* rights. Defendant waived his rights and Officer Hunsucker interviewed him before the defendant decided not to speak anymore. However, defendant told the officer that "he had been drinking with his friends the night—the evening before, the night before, and that he had gotten so drunk at that time that he couldn't tell me exactly when he left from where him and his friends were drinking."

Mr. Kerry Drake testified that about 8:30 that evening, he saw the defendant trying to cross the road on a bicycle. Mr. Drake described the defendant as so drunk that he took his bicycle out into traffic and "I yelled at him get out the road, man, before you get ran over." After defendant got across the road, "he dropped his bicycle, then he fell over the bicycle, then I helped him up." Defendant was unable to get back on the bicycle, so Mr. Drake picked him up, put his arm around his waist, and walked him to his home, about a block away. Lilas Edward Keitt, the defendant's brother, testified that after Mr. Drake brought the defendant home, Lilas helped the defendant to his room where he went to bed. At that time, defendant was so badly intoxicated he could barely stand on his own. Lilas Keitt left the home shortly thereafter and returned at around 11:00 p.m. At that time, the defendant was still in his room. Lilas Keitt testified that to his knowledge, defendant did not leave the house during the night.

At the close of the State's evidence, the defense made a motion to dismiss, which the trial court denied. At the close of all evidence, the defense requested that the court instruct the jury on misdemeanor breaking and entering based upon evidence of intoxication. The court declined to give the instruction on misdemeanor breaking and entering based on intoxication, but then decided to give the instruction because the evidence of intent was equivocal. The court did not instruct the jury on voluntary intoxication.

The jury returned a verdict of guilty of first-degree burglary on 28 February 2001. The court sentenced the defendant to a minimum

term of 103 months and a maximum of 133 months. Defendant appealed and raised ten assignments of error. He has brought forward numbers 1, and 5 through 10. Thus, he has abandoned assignments of error 2, 3, and 4. *See* N.C. R. App. Proc. 10(a) (2001).

[1] In his first argument, defendant contends that the trial court erred in denying his motion to dismiss on the grounds of insufficiency of the evidence. "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. McDonald*, 151 N.C. App. 236, 242, 565 S.E.2d 273, 277 (2002) (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." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). When ruling on a motion to dismiss, "[t]he evidence is to be considered in the light most favorable to the State; the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom; contradictions and discrepancies are for the jury to resolve and do not warrant dismissal." *State v. Bumgarner*, 147 N.C. App. 409, 412, 556 S.E.2d 324, 327-28 (2001).

Here, the offense charged is first-degree burglary. "The elements of first-degree burglary are: (1) breaking, (2) and entering, (3) at night, (4) into the dwelling, (5) of another, (6) that is occupied, (7) with the intent to commit a felony therein." *State v. Lucas*, 353 N.C. 568, 581, 548 S.E.2d 712, 721-22 (2001); *see also* N.C. Gen. Stat. § 14-51 (2001). On appeal, the defendant contests only the sufficiency of the evidence pertaining to the element of intent to commit a felony.

The State argued, and the trial court agreed that the well-established "*McBryde* inference" applied to allow the jury to infer the defendant's intent to commit the felony of larceny. In *State v. McBryde*, the Court explained the inference:

> The intelligent mind will take cognizance of the fact, that people do not usually enter the dwellings of others in the night time, when the inmates are asleep, with innocent intent. The most usual intent is to steal, and when there is no explanation or evidence of a different intent, the ordinary mind will infer this also. The fact of the entry alone, in the night time, accompanied by flight when discovered, is some evidence of guilt, and in the absence of any other proof, or evidence of other intent, and with

no explanatory facts or circumstances, may warrant a reasonable inference of guilty intent.

State v. McBryde, 97 N.C. 393, 397, 1 S.E. 925, 927 (1887).

Defendant argues that in a series of more recent cases, the appellate courts have held that the State is not entitled to the *McBryde* inference when the defendant produces evidence to rebut the presumption of intent to commit a felony. *See, e.g., State v. Moore*, 62 N.C. App. 431, 303 S.E.2d 230 (1983) (holding that the State could not infer intent to commit larceny because defendant produced evidence that he was coerced into entering the dwelling); *State v. Lamson*, 75 N.C. App. 132, 330 S.E.2d 68, *disc review denied*, 314 N.C. 545, 335 S.E.2d 318 (1985) (noting that the defendant produced evidence that he mistakenly thought he was entering his neighbor's house, where a friend of his was staying); *State v. Humphries*, 82 N.C. App. 749, 348 S.E.2d 167 (1986), *disc. review improv. allowed*, 320 N.C. 165, 357 S.E.2d 359 (1987) (describing how defendants each mistakenly thought the other had permission to enter the dwelling). Defendant argues that because he introduced evidence that he was so intoxicated "that he was mistaken about where he was and what he was doing," that he rebutted the *McBryde* inference, and it should not apply. Thus, defendant argues that because there was no other evidence of the element of intent, the burglary charges should have been dismissed.

In the context of a motion to dismiss, however, we review all evidence in the light most favorable to the State. *See State v. Davis*, 130 N.C. App. 675, 679, 505 S.E.2d 138, 141 (1998). "[T]he defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence." *State v. Jones*, 147 N.C. App. 527, 545, 556 S.E.2d 644, 655 (2001), *disc. review denied*, 355 N.C. 351, 562 S.E.2d 427 (2002). Moreover, in *Bumgarner*, this Court recently faced the issue of whether the State, relying upon the *McBryde* inference, sufficiently showed evidence of intent to commit larceny. The Court ruled that "[t]he indictment having identified the intent necessary, the State was held to the proof of that intent. Of course, intent or absence of it may be inferred from the circumstances surrounding the occurrence, but the inference must be drawn by the jury." *Bumgarner*, 147 N.C. App. at 416, 556 S.E.2d at 330. Here, defendant falls within the scope of the *McBryde* rule, as he entered the dwelling place of another at night, he attempted to keep Ms. Scott from screaming, and then he tried to flee. *See McBryde*, 97 N.C. at 397, 1 S.E. at 927 (1887). In the cases he cites, each defendant pre-

sented evidence of both intoxication and an alternative explanation for his presence in the dwelling. Here, defendant presented evidence of intoxication, but nothing more. In light of his incriminating behavior inside the house, we do not believe he rebutted the presumption. Thus we conclude, viewing the evidence in the light most favorable to the State, that the trial court properly denied the defendant's motion to dismiss.

[2] Defendant next argues that the trial court erred in refusing to instruct the jury on the issue of voluntary intoxication. The State argues that the defendant waived this argument by not formally objecting to the instructions before the jury retired to deliberate, as is generally required under North Carolina Rule of Appellate Procedure 10(b)(2) (2001). *See Kinsey v. Spann*, 139 N.C. App. 370, 373, 533 S.E.2d 487, 490 (2000). Formal objection to the instructions, however, is not the only way of preserving the issue for appeal. *See Guyther v. Nationwide Insurance Co.*, 109 N.C. App. 506, 428 S.E.2d 238 (1993). "No formal objection . . . is required under Rule 10(b)(2) if a party submits a request to alter an instruction during the charge conference and the trial judge considers and refuses the request to alter." *Id.* at 516-17, 428 S.E.2d at 244. Here, the defendant requested that the trial court instruct the jury on misdemeanor breaking and entering, based upon the defendant's intoxication, and the trial court refused. Although the trial court did instruct on misdemeanor breaking and entering, it did not instruct on voluntary intoxication. Before the jury retired to deliberate, the following exchange occurred:

> THE COURT: Do you desire to being [sic] forward your exception that the Court did not instruct on intoxication?
>
> MR. ATKINSON (defense counsel): Yes, Your Honor, we would.
>
> THE COURT: That is brought forward and preserved.

Therefore, this issue is properly before this Court.

[3] We recently explained the rule concerning jury instructions on voluntary intoxication as follows:

> Before the trial court will be required to instruct on voluntary intoxication, defendant must produce substantial evidence which would support a conclusion by the trial court that at the time of the crime for which he is being tried defendant's mind and reason were so completely intoxicated and overthrown as to render him utterly incapable of forming [the requisite intent to commit the

> crime.] In the absence of some evidence of intoxication to such degree, the court is not required to charge the jury thereon.

State v. Kornegay, 149 N.C. App. 390, 395, 562 S.E.2d 541, 545 (2002) (citations omitted) (internal quotations omitted), *disc. review denied*, 355 N.C. 497, 564 S.E.2d 51 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Franklin*, 327 N.C. at 171, 393 S.E.2d at 787. "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to the defendant." *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988).

Viewing the evidence in the light most favorable to the defendant, we conclude that the defendant did produce substantial evidence to show that at the time of the crime for which he was tried, his mind was so completely intoxicated that he was utterly incapable of forming the necessary intent to commit larceny. Mr. Drake testified that at some time between 8:30 p.m. and 9:00 p.m. on the night of the break-in, the defendant was so intoxicated that he was unable to ride a bicycle or even walk home on his own. Lilas Keitt testified that when Mr. Drake brought the defendant home, the defendant was barely able to stand on his own. Ms. Scott testified that she smelled alcohol on defendant and that when he was trying to leave her home, he had trouble navigating and fumbled with the door and screen door, trying to get them open. Finally, when Officer Hunsucker went to arrest the defendant the next morning, he smelled alcohol on the defendant. Seen in the light most favorable to the defendant, a reasonable jury could conceivably accept this evidence as giving rise to an inference that at the time of the crime, the defendant was too intoxicated to form the necessary intent to commit larceny. In *State v. Golden*, where defendant requested a jury instruction on voluntary intoxication and presented evidence to support his request, this Court noted "if a request be made for a special instruction, which is correct in itself and supported by evidence, the court must give the instruction at least in substance." *State v. Golden*, 143 N.C. App. 426, 434, 546 S.E.2d 163, 168 (2001) (citations omitted) (internal quotations omitted). We find, therefore, that the trial court erred in denying the defendant's request for a jury instruction on voluntary intoxication.

The question then becomes whether the trial court's error requires a new trial. Under N.C. Gen. Stat. § 15A-1443 (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.

In *Mash*, defendant requested, and was given, a jury instruction on voluntary intoxication as a defense to negate specific intent. The jury was instructed on first degree murder, which requires a specific intent; second degree murder, which does not; and voluntary intoxication. *See Mash*, 323 N.C. at 344-45, 372 S.E.2d at 535-36. However, the trial court incorrectly phrased the instruction on voluntary intoxication, and impermissibly placed the burden of persuasion on the defendant. *See id.* The Supreme Court ruled that because the central issue at trial was that of intent, "had the error in the instruction on intoxication not been made, there is a reasonable possibility that a different result would have obtained at trial." *Id.* at 350, 372 S.E.2d at 538-39. Although the error here was not in misstating the instruction but rather not giving it at all, we conclude that defendant has shown a reasonable possibility that a different result would have occurred had the instruction been given. Because of this error, the defendant must be accorded a new trial.

New trial.

Judge BIGGS concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

Because I believe the *McBryde* inference is inapplicable in this case, I respectfully dissent. While I agree with the majority that the trial court erred in failing to instruct the jury on the issue of voluntary intoxication, I do not reach this issue in my analysis.

In proving the elements of the crime of burglary, the State may attempt to rely on the *McBryde* inference to establish the defendant's intent to commit larceny. *State v. McBryde*, 97 N.C. 393, 396-97, 1 S.E. 925, 927 (1887). In *McBryde*, our Supreme Court stated a defendant's entry into a dwelling, at night time, coupled with the defendant's subsequent flight upon discovery "may warrant a reasonable inference of

guilty intent," the most common being the intent to steal. *Id.* This inference, however, only applies "in the absence of *any* other proof, or evidence of other intent, and with no explanatory facts or circumstances." *Id.* at 397, 1 S.E. at 927 (emphasis added). Thus, if there is any evidence tending to show the defendant lacked the requisite intent, the State cannot overcome a challenge for insufficiency of the evidence by resting on the *McBryde* inference.[1] In analyzing the applicability of the *McBryde* inference, the evidence must be viewed in the light most favorable to the defendant because use of the inference greatly lowers the otherwise high burden of proof the State must meet in a criminal prosecution. *See, e.g., State v. Lamson*, 75 N.C. App. 132, 135, 330 S.E.2d 68, 70 (1985) (considering only the defendant's evidence, not the State's inculpatory evidence, in deciding applicability of *McBryde* inference).

In this case, the evidence establishes defendant was heavily intoxicated on the night of the alleged burglary. When the victim discovered defendant in her home, she saw no indication he "had taken anything or was attempting to take anything." The evidence further indicates the victim's house as being situated within three blocks of three "drink houses" and between defendant's home and two of those "drink houses." This circumstantial evidence, viewed in the light most favorable to defendant, is some evidence supporting a reasonable inference defendant mistakenly entered the victim's house because he was too intoxicated to distinguish between the victim's house and his home or the nearby "drink houses." As the *McBryde* inference thus did not apply and the State did not present any evidence of intent to commit larceny, defendant's motion to dismiss the burglary charge should have been granted. Furthermore, as the jury found the existence of all the elements of the lesser-included offense of misdemeanor breaking or entering, this case should be remanded for entry of judgment and sentencing on the crime of misdemeanor breaking or entering. *See State v. Lawrence*, 352 N.C. 1, 18, 530 S.E.2d 807, 818 (2000) (misdemeanor breaking or entering, a lesser-included offense of first-degree burglary, does not require intent to commit a felony within the dwelling). Because of the need to remand this case, I do not address whether the State's statements to the jury were improper.

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1. Whether the *McBryde* inference applies in a given case is a preliminary analysis that occurs before the court engages in the traditional consideration of the State's evidence to determine whether, seen in the light most favorable to the State, it is substantial as to each element of the offense charged.

STATE OF NORTH CAROLINA v. ROBERT A. BARTLETT, SR.

No. COA01-1003

(Filed 5 November 2002)

1. Criminal Law— additional instructions after deliberations begun—discretion exercised

The trial court did not refuse to exercise its discretion in a prosecution for first-degree sexual offense by refusing to give defendant's requested instruction on intent after the jury had twice requested re-instruction on the elements of the offense. Contrary to defendant's assertions, the court's comments indicate that it was exercising its discretion in determining whether the additional instruction should be made under the facts and circumstances of the case.

2. Sexual Offenses— first-degree—deliberate touching of child—prurient intent not required

The trial court properly declined to instruct the jury on accidental or inadvertent touching as requested by a first-degree sexual offense defendant where there was no evidence that the physical contact between defendant and his children was not deliberate. The offense of first-degree sexual offense does not require prurient intent as proposed in the instruction.

3. Sexual Offenses— first-degree—sufficiency of evidence—sexual intent—not required

The trial court did not err by denying a motion to dismiss charges of first-degree sexual offense where defendant argued that there was insufficient evidence of sexual intent, but the intent to commit a first-degree sexual offense is inferred from the commission of the act and there was substantial evidence to support the essential elements of the offense.

4. Evidence— sexual misconduct—substantive evidence

There was no plain error in a prosecution for first-degree sexual offenses in the admission of sexual misconduct by defendant where most of the evidence was offered to prove the acts of which defendant was accused. Furthermore defendant did not show a fundamental error that induced the jury to reach a verdict different from that it would otherwise have reached.

5. Sexual Offenses— first-degree—innocent touching of children—parental rights

The first-degree sexual offense statute was not unconstitutional as applied to defendant where defendant contended that punishing a parent for innocent touching violates fundamental parenting interests which are constitutionally protected, but defendant was being punished for unlawful sexual acts which were not innocent.

6. Constitutional Law— cruel and unusual punishment—life imprisonment for first-degree sexual offense

Life imprisonment under the first-degree sexual offense statute does not constitute cruel and unusual punishment.

7. Criminal Law— motion to withdraw counsel denied—no abuse of discretion

The trial court did not abuse its discretion by denying defendant's motions to withdraw counsel and for a continuance where three attorneys had been assigned and withdrawn and the court regarded defendant's motions as an attempt to further delay defendant's trial. Defendant failed to demonstrate any resulting prejudice from the denial of his motions.

8. Evidence— first-degree sexual offense against children—issues from earlier custody trial—false allegations—irrelevant

The trial court did not err in a prosecution for first-degree sexual offense by excluding evidence from an earlier custody trial that defendant's wife had created false allegations against him where much of the evidence defendant sought to introduce was simply an attempt to re-litigate allegations and accusations from the earlier civil trial and was irrelevant to the issues before the jury.

9. Sexual Offenses— first-degree—short-from indictment

The short-form indictment for first-degree sexual offense is constitutional.

Appeal by defendant from judgment entered 14 July 2000 by Judge Stafford G. Bullock in Alamance County Superior Court. Heard in the Court of Appeals 16 May 2002.

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

Miles & Montgomery, by Mark D. Montgomery, for defendant appellant.

TIMMONS-GOODSON, Judge.

Robert Andrew Bartlett, Sr. ("defendant") appeals from his convictions of three counts of first-degree sexual offense. For the reasons discussed herein, we affirm defendant's convictions.

The evidence at trial tended to show the following: Defendant and Pamela Gustafson Poteat ("Pamela") married in 1988. Defendant and Pamela had three children during their marriage: "L" (age eleven at the time of trial); "R" (age ten at the time of trial); and "R's" twin brother, "A." During the marriage, defendant cared for the three children while Pamela worked outside of the home. The three children testified that, while Pamela was working and away from the home, defendant engaged in improper touching of their private parts.

At trial, "L" confirmed that defendant repeatedly "rub[bed] her body against his" and that "her front private parts touch[ed] his front private parts." "L" testified that defendant kissed her on both her "bottom" and "top" private parts, including kissing her between her legs while she was undressed. She asserted that defendant often kissed the children on their private parts after their baths and referred to such kisses as "clean kisses."

"A" and "R" similarly testified that defendant touched them inappropriately. "A" testified that defendant referred to his penis as his "Bo Jo." "A" described how defendant often "played" with "A's" "Bo Jo" and stated that, on numerous occasions, defendant inserted "his Bo Jo up my butt and he'd kiss my private parts." "A" further testified that defendant forced him to "get down on my knees and kiss his private parts[,]" after which "white stuff would come out [of defendant's penis]." "A" stated that, "[i]f [defendant] didn't feel my lips on [his penis] then he'd spank me until I did."

"R" testified that defendant "st[u]ck his private into ours and this white stuff came out." "R" described how defendant "would touch his front private between the legs and then he would fix my sandwich and when I got to school that day I didn't eat my sandwich because I felt like I was going to throw up every single time."

Defendant testified and described his education and experience both as an attorney and as a school teacher. He admitted to giving the children "clean kisses" from head to toe when they were younger, but stated that it was a "family tradition." He denied improper touching and contended that if any occurred, such touching was made without sexual intent.

Following the denial of his motion to dismiss, defendant was convicted of three counts of first-degree sexual offense and sentenced to a term of life imprisonment. Defendant appeals.

Defendant presents seven assignments of error on appeal, arguing that the trial court erred by (1) declining to instruct the jury on intent; (2) denying his motion to dismiss; and (3) admitting evidence of prior sexual misconduct by defendant. Defendant also contends that (4) the first-degree sexual offense statute under which he was convicted is unconstitutional. Further, defendant argues that the trial court (5) abused its discretion in denying his motion to dismiss his counsel and motion to continue, and (6) erred in excluding certain evidence. Finally, defendant asserts that (7) the short-form first-degree sexual offense indictment is unconstitutional. We address defendant's arguments in turn.

Jury Instructions

[1] In his first assignment of error, defendant contends that the trial court erred in failing to exercise its discretion and in declining to give defendant's requested instruction regarding *mens rea*. We disagree.

At the close of the State's evidence and following the charge conference, the trial court asked the State and defendant whether they had any objections, corrections or additions to the instructions proposed by the trial court. Defense counsel did not object to the proposed instructions and specifically declined the request for an additional instruction. The trial court then instructed the jury in part as follows:

> Now, I charge that for you to find the Defendant guilty of first degree sexual offense the State must prove three things beyond a reasonable doubt. First, that the Defendant engaged in a sexual act with the victim. A sexual act means cunnilingus, which is any touching however slight by the lips or the tongue of one person to any part of the female sex organ of another; fellatio, which is

> any touching by the lips or tongue of one person and the male sex organ of another; anal intercourse, which is any penetration, however slight, of the anus by any person by the male sexual organ of another. Second, that at the time the acts alleged the victim was a child under the age of 13. And third, that at the time of the alleged offense, the Defendant was at least 12 years old, and was four years older than the victim.

After the jury instructions were given, the jury retired to deliberate. During the jury's deliberation, the jury asked the court for re-instruction on the elements of first-degree sexual offense. Based on the jury's inquiry, the court re-instructed the jury as recited above. Following a second request for re-instruction on the elements of first-degree sexual offense, the court provided the jury with a written instruction on first-degree sexual offense as set out above. Defendant then requested that the jury be instructed that the crime of first-degree sexual offense "requires a prurient intent" and that "[a] mere innocent, inadvertent or accidental touching is not a criminal offense." The trial court denied the request, noting that it "should have been made before the jury was charged the first time."

Following the overnight recess, defendant personally addressed the court, arguing that the instruction was appropriate and supported by the evidence. The State objected to the additional instruction. In declining defendant's request, the trial court stated that, "you just don't charge the jury, deliberate, then they come back and you charge some more. I think it's very inappropriate for that to happen." Defendant then suggested to the court that the jury was "having a crisis of conscience" as evidenced by the repeated requests for re-instruction on the elements of first-degree sexual offense. The court responded, "[t]hat might be, but it still does not authorize or allow me to continue giving them additional charges[,]" and accordingly denied defendant's request for the additional instruction.

Defendant now contends that the trial court erred when it ruled that it was without discretion to give the additional instruction based on the jury's inquiry. Defendant's contention is without merit.

Section 15A-1234 of the North Carolina General Statutes provides in pertinent part that

> After the jury retires for deliberation, the judge may give appropriate additional instructions to:

> (1) Respond to an inquiry of the jury made in open court; or
>
> (2) Correct or withdraw an erroneous instruction; or
>
> (3) Clarify an ambiguous instruction; or
>
> (4) Instruct the jury on a point of law which should have been covered in the original instructions.

N.C. Gen. Stat. § 15A-1234(a) (2001). "[T]he trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis [to be] placed on a particular portion of the court's instructions." *State v. Prevette*, 317 N.C. 148, 164, 345 S.E.2d 159, 169 (1986). Whether or not to give additional instructions rests within the sound discretion of the trial court and will not be overturned absent abuse of that discretion. *See id.* Where the trial court fails to exercise its discretion, however, such failure constitutes reversible error. *See State v. Thompkins*, 83 N.C. App. 42, 45-46, 348 S.E.2d 605, 607 (1986).

Contrary to defendant's assertions in the instant case, it is clear that the trial judge exercised his discretion in denying defendant's request for the *mens rea* instruction. The trial judge's response to defendant's request fully reflects his thoughts and reasoning on the propriety of providing an additional instruction as evidenced by the following colloquy:

> Mr. Bartlett, you just don't charge the jury, deliberate, then they come back and you charge some more. I think it's very inappropriate for that to happen . . . . I understand your request and in essence what I'm saying to you, I'm going to deny it because I think it's inappropriate to go back and recharge the jury again and especially when it's being opposed to one party—being opposed by one party.

Clearly, the trial court was of the opinion that the requested instruction came too late and would not aid the jury in its deliberations. His comments to the State and defendant indicate that he was exercising his discretion in determining whether the additional instruction should be made under the facts and circumstances of this case. Because the trial court properly exercised its discretion, and because we perceive no abuse of that discretion, we conclude that the trial court did not err in refusing to provide the additional instruction requested by defendant.

[2] Moreover, we note that defendant's requested instruction does not comport with the law of the State and the evidence of this case. First-degree sexual offense is codified in section 14-27.4 of the North Carolina General Statutes and provides that:

> A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim[.]

N.C. Gen. Stat. § 14-27.4(a) (2001). Our Supreme Court has unequivocally held that "[f]irst-degree sexual offense is not a specific-intent crime[.]" *State v. Daughtry*, 340 N.C. 488, 516, 459 S.E.2d 747, 761 (1995), *cert. denied*, 516 U.S. 1079, 133 L. Ed. 2d 739 (1996). "[T]he intent to commit the crime of sexual offense is inferred from the commission of the act" and thus "intent is not an essential element of the crime of first-degree sexual offense[.]" *State v. Boone*, 307 N.C. 198, 209, 297 S.E.2d 585, 592 (1982), *overruled in part on other grounds*, *State v. Richmond*, 347 N.C. 412, 430, 495 S.E.2d 677, 687 (1998). The offense of first-degree sexual offense therefore does not require "prurient intent" as proposed in the instruction requested by defendant. Furthermore, there was no evidence to support defendant's instruction regarding an "inadvertent" or "accidental" touching. None of the evidence, including the evidence offered by defendant, tended to show that defendant touched his children accidently or inadvertently. Defendant does not deny that he gave the children "clean kisses;" rather, he disputes the characterization of such physical contact. Because there was no evidence that the physical contact that occurred between defendant and his children was not deliberate, the trial court properly declined to instruct the jury on "accidental" or "inadvertent" touching as requested by defendant. We therefore overrule this assignment of error.

Motion to Dismiss

[3] In his second assignment of error, defendant contends that the trial court erred in denying his motion to dismiss. We disagree.

"In ruling upon a motion to dismiss, the trial court must examine the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences which may be drawn from the evidence." *State v. Hairston*, 137 N.C. App. 352, 354, 528 S.E.2d 29, 30 (2000). "When a defendant moves for dismissal, the trial court is to

determine only whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). If there is substantial evidence of each element of the charged offense and of the defendant being the perpetrator of the offense, the case is for the jury and the motion to dismiss should therefore be denied. *See State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988).

In the instant case, defendant argues that there was insufficient evidence that the acts committed by defendant were made with any sexual intent. As noted *supra*, however, the intent to perpetrate a first-degree sexual offense is inferred from the commission of the act. *See Boone*, 307 N.C. at 209, 297 S.E.2d at 592. Furthermore, there was substantial evidence before the trial court to support the essential elements of first-degree sexual offense. All three children testified to the egregious acts committed by defendant. Both "L" and "R" testified to numerous encounters with defendant during which he would "stick his private" into their "private parts" and "white stuff would come out." "A" testified that defendant would "jiggle" and "play" with "A's" "Bo Jo" and "stick his Bo Jo" into "A's" "butt." Viewing the evidence in the light most favorable to the State, the trial court properly denied defendant's motion to dismiss. This assignment of error is overruled.

Evidence of Prior Sexual Misconduct

[4] Defendant next assigns error to the admission of evidence concerning alleged prior sexual misconduct by defendant. Specifically, defendant contends that the admission of evidence tending to show that defendant "repeatedly raped his children, that he masturbated in front of them, fondled them, [and] walked around the house naked" was inadmissible and prejudicial. Having failed to object to the admission of this evidence at trial, defendant now contends that the trial court's failure to exclude this evidence constituted plain error. We disagree.

Most of the evidence to which defendant objects was substantive evidence, offered by the State to prove the very acts of which defendant was accused. Thus, evidence that defendant raped or fondled his children was not evidence of "prior bad acts," but rather evidence tending to show that defendant committed the crime of first-degree sexual offense.

Further, defendant has failed to demonstrate plain error by the trial court. Plain error is "fundamental error" amounting to a miscar-

riage of justice or having a substantial and prejudicial impact on the jury verdict. *See State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999), *cert. denied*, 528 U.S. 1084, 145 L. Ed. 2d 681 (2000). Defendant has not shown any fundamental error that induced the jury to reach a different verdict than it otherwise would have reached. Accordingly, this assignment of error is overruled.

Constitutionality of the First-Degree Sexual Offense Statute

[5] By his fourth assignment of error, defendant contends that the first-degree sexual offense statute is unconstitutional as applied to defendant. Defendant concedes that the appellate courts have held the statute to be constitutional on its face, but nevertheless argues that the statute violates defendant's constitutional rights in several ways. We disagree.

Defendant first argues that punishing a parent for the "innocent touching" of his children violates fundamental parenting interests protected by the United States Constitution. Our Supreme Court in *State v. Elam*, 302 N.C. 157, 273 S.E.2d 661 (1981), addressed a similar argument wherein the defendant contended that section 14-202.1, the statute outlawing the taking of indecent liberties with children, was unconstitutionally overbroad in that it proscribed "innocent displays of affection in violation of the First Amendment." *Id.* at 163, 273 S.E.2d at 665. Rejecting defendant's argument, the Court held that

> [t]he statute has never been so interpreted and it was certainly not so applied in this case. Defendant has no standing to attack the statute on these grounds. He has no First Amendment right to express himself through unlawful actions. This is not activity which the State is forbidden by the Constitution to regulate.

Id. Similarly, in the present case, defendant is not being punished for innocent acts; rather, he is being punished for unlawful sexual acts he committed upon his children, which are the acts proscribed by the first-degree sexual offense statute.

[6] Defendant further argues that the punishment of life imprisonment under the first-degree sexual offense statute constitutes cruel and unusual punishment. This argument was squarely rejected by our Supreme Court in *State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985), in which the Court stated that

> [c]learly the legislature determined that whether or not accompanied by violence or force, acts of a sexual nature when performed

> upon a child are sufficiently serious to warrant the punishment mandated . . . . Since it is the function of the legislature and not the judiciary to determine the extent of punishment to be imposed, we accord substantial deference to the wisdom of that body. The imposition of a mandatory sentence of life imprisonment for first-degree sexual offense is not so disproportionate as to constitute a violation of the eighth amendment of the Constitution of the United States.

Id. at 763-74, 324 S.E.2d at 837 (citation omitted). Accordingly, defendant's argument is meritless and we overrule this assignment of error.

Motions to Withdraw and Continue

[7] Defendant next argues that the trial court abused its discretion in denying defendant's motions to withdraw counsel and to continue. While defendant cites general authority regarding the right to present a defense and the right to due process under the United States and North Carolina Constitutions, he fails to demonstrate how he was prejudiced by the denial of his motions. Instead, the record reveals that three attorneys had previously been assigned and withdrawn from defendant's case. Clearly, the court regarded defendant's motions as an attempt to further delay defendant's trial. As defendant has failed to demonstrate any resulting prejudice from the denial of his motions, and as we discern no abuse of the trial court's discretion in denying such motions, we overrule this assignment of error.

Exclusion of Evidence

[8] In his sixth assignment of error, defendant contends that the trial court erred in excluding certain evidence. Specifically, defendant argues that the trial court erred in excluding evidence that, according to defendant, tended to show that Pamela "poisoned" the children's minds and created false allegations against defendant. We disagree.

Rule 401 of the North Carolina Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2001). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . . " N.C. Gen. Stat. § 8C-1, Rule 403 (2001). The

decision to exclude evidence under Rule 403 is within the discretion of the trial court and may only be reversed upon a showing of an abuse of discretion. *See State v. Mickey*, 347 N.C. 508, 518, 495 S.E.2d 669, 676, *cert. denied*, 525 U.S. 853, 142 L. Ed. 2d 106 (1998).

In the instant case, defendant sought to introduce matters into evidence that were part of an earlier custody trial between defendant and Pamela. According to defendant, such evidence tended to support his theory that Pamela created false allegations against defendant. Defendant concedes that some evidence tending to support his theory was presented to the jury. Moreover, after careful review of the transcript, we conclude that much of the evidence defendant sought to introduce was simply an attempt by defendant to re-litigate allegations and accusations from the earlier civil trial, and that furthermore, the evidence was irrelevant to the issues before the jury. We therefore hold that the trial court properly exercised its discretion in excluding the evidence, and we overrule this assignment of error.

Short-Form Indictment

[9] In his final assignment of error, defendant contends that the short-form indictment for the crime of first-degree sexual offense is unconstitutional, as it fails to give sufficient notice of the sexual act the defendant is alleged to have committed. This argument is without merit.

In *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987), our Supreme Court held that the first-degree sexual offense short-form indictments were sufficient "to put the defendant on notice of the charges" against him and thus did not deprive the defendant of any rights under the United States or North Carolina Constitutions. *Id.* at 24, 357 S.E.2d at 362. The Court further noted that an indictment that charges a first-degree sexual offense without specifying which sexual act was committed is nonetheless "sufficient to charge the crime of first degree sexual offense and to put the defendant on notice of the accusation." *Id.* This Court has also held that section 14-27.4 is "constitutional under both our state and federal constitutions and . . . do[es] not serve to deprive defendant of his right to prepare his case or his right to due process and equal protection under the law." *State v. Blackmon*, 130 N.C. App. 692, 700, 507 S.E.2d 42, 47, *cert. denied*, 349 N.C. 531, 526 S.E.2d 470 (1998). Accordingly, we overrule this assignment of error.

Based on the foregoing analysis, we hold that defendant received a trial free from prejudicial error.

No error.

Judges CAMPBELL and LEWIS concur.

SHANNON N. JORDAN, PLAINTIFF v. CIVIL SERVICE BOARD FOR THE CITY OF CHARLOTTE ET AL, DEFENDANTS

No. COA01-418

(Filed 5 November 2002)

1. Police Officers— discharge from employment—deadly force—imminent danger

A de novo review reveals that the trial court did not err by upholding defendant Civil Service Board's termination of plaintiff police officer's employment after plaintiff fatally shot a civilian in the course of his employment even though plaintiff contends the Board failed to find that plaintiff did not reasonably believe that deadly force was necessary to protect himself or a third party so as to make his use of force excessive, because: (1) though the better practice may have been to make a specific finding concerning the unreasonableness of plaintiff's belief, the Board's failure to do so was not fatal in light of the uncontroverted facts in this case; and (2) plaintiff's actions in firing into the rear of the vehicle after its passing were not based upon any reasonable fear of imminent danger under General Order #2 Section V.E., and therefore, those actions constituted excessive force under Rule of Conduct #28A.

2. Constitutional Law— right to fair trial—due process—administrative tribunal both investigator and adjudicator

A de novo review reveals that the trial court did not err by upholding defendant Civil Service Board's termination of plaintiff police officer's employment after plaintiff fatally shot a civilian in the course of his employment even though plaintiff contends he was denied his right to an impartial tribunal when the chairperson of the Board was simultaneously employed as an investigator for the Public Defender's Office which was representing the driver of the vehicle fired upon by plaintiff, because: (1) there is

no per se violation of due process when an administrative tribunal acts as both investigator and adjudicator on the same matter; and (2) plaintiff presented no evidence to rebut the showing of impartiality.

3. Constitutional Law— equal protection—differing levels of culpability—rational basis

The trial court did not err by upholding defendant Civil Service Board's termination of plaintiff police officer's employment after plaintiff fatally shot a civilian in the course of his employment even though plaintiff contends his equal protection rights were violated based on the fact that another officer who also fired upon the vehicle was suspended while plaintiff was terminated, because: (1) while both officers fired upon the vehicle, one of the shots fired by plaintiff struck and killed the passenger which gave the officers differing levels of culpability; and (2) the suspension of the other officer and the termination of plaintiff were founded upon a rational basis.

Appeal by plaintiff from judgment entered 15 February 2001 by Judge James U. Downs in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 January 2002.

Lesesne & Connette, by Louis L. Lesesne, Jr. and Richard L. Hattendorf, for plaintiff-appellant.

Dozier, Miller, Pollard & Murphy, by W. Joseph Dozier, Jr., for defendants-appellees.

TIMMONS-GOODSON, Judge.

This is the second time this case has been before this Court on appeal. Defendant Civil Service Board for the City of Charlotte ("Board") discharged plaintiff Shannon N. Jordan from his employment with the Charlotte-Mecklenburg Police Department ("Police Department") after plaintiff fatally shot a civilian in the course of his employment. The facts surrounding the shooting, and ultimately leading to plaintiff's dismissal are largely uncontroverted. Plaintiff was working at a license check point constructed by the Police Department in Charlotte on the evening of 8 April 1997, when a vehicle approached the check point but failed to stop. In response to a police radio broadcast from a fellow officer to stop the car, plaintiff positioned himself in the middle of the roadway. At that time, the vehicle was approximately ninety feet away and approaching plaintiff

at an undetermined rate of speed. Despite warnings from a nearby officer, Don Belz, plaintiff remained in the roadway as the vehicle continued in his direction. Plaintiff began to fire his weapon at the approaching vehicle. After firing three times into the front of the vehicle, plaintiff moved aside, only to fire two additional shots into the side of the vehicle. After the vehicle had passed, plaintiff fired five additional shots into the rear of the vehicle. One of the shots fired by plaintiff after the vehicle passed struck and killed a passenger in the vehicle.

Plaintiff was cited on 2 August 1997 by the Charlotte-Mecklenburg Chief of Police for alleged violations of certain departmental rules and procedures governing the use of deadly force by Charlotte-Mecklenburg police officers. Based upon these alleged violations, the Police Chief suspended plaintiff without pay and recommended that the Board terminate his employment. This matter was heard by the Board on 13-17 October 1997, and thereafter, the Board concluded that plaintiff had violated both the Rule of Conduct #28A and General Order #2, as alleged by the Police Chief.

Plaintiff appealed the Board's decision to the Mecklenburg County Superior Court, pursuant to Section 4.61(7)(e) of the Charter of the City of Charlotte. The superior court affirmed the Board's decision, and plaintiff appealed to this Court. This Court, "[u]nable to determine what standard of review the [superior] court applied," reversed and remanded this matter to the superior court, *Jordan v. Civil Serv. Bd. of Charlotte*, 137 N.C. App. 575, 575, 528 S.E.2d 927, 928 (2000) (hereinafter "*Jordan I*"), with instructions to "(1) make its own characterization of the issues before it, and (2) clearly set out the standard(s) for its review, delineating which standard it used to resolve each separate issue raised by the parties." *Id.* at 578, 528 S.E.2d at 930. On remand, the superior court conducted a *de novo* review of the Board's decision, and again, affirmed the decision of the Board. Once again, plaintiff appeals.

Our role now is to review the trial court's order for errors of law. *Crowell Constructors, Inc. v. North Carolina Dep't of Env't, Health & Natural Resources*, 107 N.C. App. 716, 719, 421 S.E.2d 612, 613 (1992), *disc. review denied*, 333 N.C. 343, 426 S.E.2d 704 (1993). As this Court stated in *Jordan I*, once the superior court has conducted its review and entered its order accordingly, "should one of the parties appeal to this Court '[o]ur task, in reviewing a superior court order entered after a review of a board decision is two-fold: (1) to

determine whether the trial court exercised the proper scope of review, and (2) to review whether the trial court correctly applied this scope of review.' " *Jordan I*, 137 N.C. App. at 577, 528 S.E.2d at 929 (quoting *Whiteco Outdoor Adver. v. Johnston County Bd. of Adjust.*, 132 N.C. App. 465, 468, 513 S.E.2d 70, 73 (1999)). "The scope of this Court's appellate review of the trial court's decision is the same as that utilized by the trial court." *Wallace v. Board of Tr.*, 145 N.C. App. 264, 274, 550 S.E.2d 552, 558, *disc. review denied*, 354 N.C. 580, 559 S.E.2d 553 (2001).

In determining whether the trial court utilized the proper scope of review, we must first determine the nature of the issues presented on appeal. "If it is alleged that an agency's decision was based on an error of law then a *de novo* review is required. A review of whether the agency decision is supported by the evidence, or is arbitrary or capricious, requires the court to employ the whole record test." *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990) (citations omitted), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). " '*De novo* review' requires a court to consider a question anew, as if not considered or decided by the agency." *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62, 468 S.E.2d 557, 559 (citations omitted), *cert. denied*, 344 N.C. 629, 477 S.E.2d 37 (1996). "The court may 'freely substitute its own judgment for that of the agency.' " *Id.* (citations omitted). Indeed, it is the court's duty to do so, "mak[ing] its own findings of fact and conclusions of law." *Jordan I*, 137 N.C. App. at 577, 528 S.E.2d at 929. To the contrary, the "whole record," requires only the examination of all of the competent evidence before the court to determine if the agency's decision is supported by substantial evidence. *Id.*

Plaintiff has brought forth three arguments on appeal, which encompass some nine assignments of error. As conceded by plaintiff in his appellate brief, these arguments are premised upon errors of law committed by the Board. Therefore, the superior court was required to conduct a *de novo* review of the Board's decision. To that end, a reading of the superior court's order, reveals that the court did, indeed, employ the "*de novo*" standard of review, which is the proper standard in this case.

[1] Having determined that the proper standard of review was used by the superior court in its review of the Board's decision dismissing plaintiff, we now move to the question of whether the superior court properly applied the "*de novo*" standard in its review. In his first argu-

ment on appeal, which encompasses his first through fifth, and eighth and ninth assignments of error, plaintiff questions the legality of his dismissal. Specifically, plaintiff contends that the Board failed to find that he did not reasonably believe that deadly force was necessary to protect himself or a third party, under General Order #2 Section V.E., so as to make his use of force excessive. Without such a finding, plaintiff submits that his dismissal was not legal.

In the instant case, plaintiff was discharged based upon his violation of Rule of Conduct #28(A) and General Order #2 Section V.E. Rule of Conduct #28(A): Use of Force, mandates: "A. Officers shall use no more force than necessary in the performance of their duties and shall then do so only in accordance with Departmental procedures and the law." General Order #2: Section V; The Use of Force by Police Officers, provides in pertinent part:

> E. Firing At Or From A Moving Vehicle
>
> > This action may be used only when the officer reasonably believes that there is an imminent threat of serious bodily injury or death for the officer or for a third person if the officer does not do so. Before discharging a firearm at or from a moving vehicle, an officer must reasonably believe that the only reasonable means of protecting him or herself and/or a third party is the use of deadly force.

Again, the evidence surrounding the 8 April 1997 shooting, which led to plaintiff's discharge from employment is undisputed. Based upon this evidence, the Board made the following pertinent findings of fact:

> 19. At 9:58:27 p.m., Officer R.S. Cochran stated over the police radio "stop that car up there, stop that car." . . . At the same time officers in the street at State Street and Gesco Street were yelling loudly to stop the car. The commands to stop the car were heard by Officers Belz, Jordan and Mr. Colvin at their location.
>
> . . . .
>
> 21. Officer Jordan left his position, proceeded past his police car and into the roadway. He stood a little past the center of the roadway in the eastbound lane of State Street. . . . Officer Jordan saw the white Corsica at the railroad tracks closest to Gesco Street, approximately sixty (60) yards from his location. Officer Jordan held his flashlight in his left hand and began shining it at the car, signaling the driver to stop.

22. The white Corsica . . . continued to accelerate toward Officer Jordan's position.

23. Officer Belz shouted to Officer Jordan to get out of the way and Officer Belz simultaneously began to move into the roadway. . . . At this point, Officer Jordan darted to his right toward the curb of the eastbound lane to avoid the car.

24. As Officer Jordan moved to his right, the car moved farther into the eastbound lane and continued to drive directly toward him.

. . . .

26. At this point, Officer Jordan believed his life was in danger and the only recourse was the use of deadly force to stop the threat to his life. Officer Belz also believed Officer Jordan was about to be run over and seriously injured or killed by this white Corsica.

27. Officer Jordan fired his service weapon twelve (12) times at the white Corsica. His shots struck the car as follows: three (3) times in the front of the car on the driver's side of the hood . . . , two (2) times in the driver's side . . . . and at least five (5) times in the rear . . . .

. . . .

32. One of the shots . . . fired at the rear of the vehicle by Officer Jordan struck passenger Carolyn Sue Boetticher in the back of the head, fatally injuring her. Ms. Boetticher was seated in the right front passenger seat.

. . . .

36. A departmental procedure prohibiting officers from stepping in front of automobiles when stopping vehicles does not exist.

37. Officers of the Charlotte-Mecklenburg Police Department commonly step in front of automobiles when attempting to stop vehicles.

38. Officer Belz saw Officer Jordan with his service weapon drawn when Officer Jordan was approximately ninety (90) feet away from the white Corsica.

39. Officer Belz warned Officer Jordan to "get out of the way" at least three times.

> 40. Officer Jordan placed himself in a position for the white Corsica to become an imminent threat of bodily harm.
>
> 41. Officer Jordan had time to remove himself from the threat of bodily harm.
>
> 42. Officer Jordan failed to use all options available to him by not removing himself from the threat of bodily harm; thereby making the use of deadly force unnecessary and unjustified.

Based upon these findings, the Board concluded:

> 1. Officer Jordan did not violate departmental procedures by stepping out in front of the white Corsica in an attempt to stop the vehicle.
>
> 2. Officer Jordan violated departmental procedure General Order #02, V.,E, "Firing At Or From A Moving Vehicle" by not using all available options to remove himself from the threat of deadly force.
>
> 3. Officer Jordan used excessive force when he discharged his service weapon at a white 1995 Chevrolet Corsica driven by Mr. Robert Gardner Lundy on State Street resulting in the death of Ms. Carolyn Sue Boetticher.

Based on these conclusions, the Board terminated plaintiff.

Plaintiff contends that the Board erred in terminating his employment with the Police Department without specifically finding that his belief that he was in imminent harm was unreasonable. Plaintiff fails to recognize, however, that the superior court, conducting *de novo* review of the Board's dismissal, was free to review the evidence and make its own findings and conclusions, which it did here. Though the superior court agreed with the decision of the Board to terminate plaintiff's dismissal, the court made the following pertinent findings in addition to those made by the Board:

> (7) On April 8, 1967 [sic], Appellant Jordan fired his weapon twelve (12) times at a moving vehicle that failed to stop for a routine license check and at least five (5) of the twelve (12) shots were discharged by the said Jordan into the rear of the vehicle including the fatal bullet that struck the passenger, Carolyn Sue Boetticher, in the back of the head.
>
> . . . .

(9) Before firing his weapon Appellant Jordan saw the vehicle moving toward him at a distance of at least 180 feet and he placed himself in a position in the path of travel of the vehicle causing the vehicle to become an imminent threat of bodily harm to himself.

(10) Officer Jordan had time to remove himself from the threat of bodily harm because he had been warned by Officer Belz to get out of the way at least three (3) times and further took the time to exercise the option of discharging his weapon three (3) times into the front of the vehicle.

(11) Once the front of the vehicle had passed Officer Jordan, there was no longer any imminent threat of serious bodily injury or death to himself or a third party.

The court went on to conclude, "The Board fairly interpreted Rule of Conduct #28A which prohibits the use of excessive force by concluding that Officer Jordan continued to discharge his weapon after there was no threat of bodily harm or death to himself or a third party thereby violating General Order #2, V., E. and consequently using excessive force in violation of Rule of Conduct #28 (A)."

Though the better practice may have been to make a specific finding concerning the unreasonableness of plaintiff's belief, the Board's failure to do so was not fatal in light of the uncontroverted facts in this case. *See Ballas v. Town of Weaversville*, 121 N.C. App. 346, 350-51, 465 S.E.2d 324, 327 (1996) (providing that, a failure to make a finding of fact is not fatal if the record sufficiently informs the court of the basis of decision of the material issues or if the facts are undisputed and different inferences are not permissible). The question of "[w]hether an officer has used excessive force is judged by a standard of objective reasonableness." *Clem v. Corbeau*, 284 F.3d 543, 550 (2002). Without any " 'precise definition or mechanical application,' " *id.* (quoting *Bell v. Wolfish*, 441 U.S. 520, 559, 60 L. Ed. 2d 447, 481 (1979)), this test " 'requires careful attention to the facts and circumstances of each particular case.' " *Id.* (quoting *Graham v. Conner*, 490 U.S. 386, 396, 104 L. Ed. 2d 443, 455 (1989)).

In the instant case, the facts are not in dispute. Looking at this matter anew as we are required on *de novo* review, we conclude that plaintiff's exercise of force was excessive under the facts and circumstances of this record. Having placed himself in the pathway of the car, resulting in imminent danger to himself, plaintiff had suffi-

cient time to extricate himself from the pathway of the car, but failed to do so. Moreover, for any reasonable, prudent officer in the same or similar circumstances, the fear of imminent danger was removed after the vehicle sped past plaintiff at the check point on the evening of 8 April 1997. Accordingly, it naturally follows that plaintiff's actions in firing into the rear of the vehicle after its passing were not based upon any reasonable fear of imminent danger under General Order #2 V.E., and therefore, those actions constituted excessive force under Rule of Conduct #28A. We conclude that the Board's interpretation of Rule of Conduct #28A and General Order #2 V.E. was correct. Plaintiff's arguments to the contrary are unpersuasive.

[2] Having so concluded, we move to plaintiff's sixth assignment of error, by which he argues that his right to an impartial tribunal was denied when Valerie Woodard, the Chairperson of the Board, was simultaneously employed as an investigator for the Public Defender's Office, which was representing the driver, Mr. Lundy, of the vehicle fired upon by plaintiff. Plaintiff contends that Ms. Woodard's involvement in the case violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Law of the Land Clause of Article I, Section 19 of the North Carolina Constitution. We disagree.

As with plaintiff's first argument, *de novo* review is applicable here, and therefore, we consider this matter anew. *See Air-A-Plane Corp. v. North Carolina Dept. of Environment, Health and Natural Resources*, 118 N.C. App. 118, 124, 454 S.E.2d 297, 301 (stating that *de novo* review is required where constitutional violations or unlawful procedure is alleged), *disc. review denied*, 340 N.C. 358, 458 S.E.2d 184 (1995). In *Avant v. Sandhills Center for Mental Health*, 132 N.C. App. 542, 513 S.E.2d 79 (1999), this Court noted, "The United State Supreme Court has held " 'that there is no *per se* violation of due process when an administrative tribunal acts as both investigator and adjudicator on the same matter.' " Id. at 549, 513 S.E.2d at 84 (quoting *Hope v. Charlotte-Mecklenburg Bd. of Educ.*, 110 N.C. App. 599, 603-04, 430 S.E.2d 472, 474-75 (1993)). In *Hope*, the Court noted that mere allegations, "[a]bsent a showing of actual bias or unfair prejudice," are not sufficient to overcome the presumption that the Board acted properly. *Hope*, 110 N.C. App. at 604, 430 S.E.2d at 475. Similarly, our Supreme Court in *Crump v. Board of Education*, 326 N.C. 603, 392 S.E.2d 579 (1990), noted that a petitioner "must show that the decision-making board or individual possesses a disqualifying personal bias" to make out a due process claim premised upon a

theory of impartial decision-maker. *Id.* at 618, 392 S.E.2d at 586-87 (quoting *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 354, 342 S.E.2d 914, 924 (1986), *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986)). "[T]o prove bias, it must be shown that the decision-maker has made some sort of commitment, due to bias, to decide the case in a particular way." *Evers v. Pender County Bd. of Educ.*, 104 N.C. App. 1, 15, 407 S.E.2d 879, 887 (1991).

Here, the record shows that a hearing was held on plaintiff's motion to have Ms. Woodard recuse herself. At the hearing, Ms. Woodard testified that she had not acquired any information about the instant case through her employment with the Public Defender's office. She also testified that she had no knowledge of the case, that she did not know anything about the parties, and that she could be fair and impartial at the hearing and serve on the Board. It was also shown that Ms. Woodard's supervisor at the Public Defender's Office sent a memo to the attorney working on the Lundy case, instructing the attorney not to discuss the case with Ms. Wooodard. As plaintiff presented no evidence to rebut this showing of impartiality, we hold the superior court did not err in concluding that the Board acted properly.

[3] As to plaintiff's equal protection argument, which corresponds to his seventh assignment of error, we hold similarly. Without belaboring the point, we note that there has been no showing of disparate treatment in this case to support an equal protection claim. While both plaintiff and Officer Belz fired upon the vehicle, one of the shots fired by plaintiff struck and killed the passenger. The two officers therefore enjoyed differing levels of culpability. As the suspension of Officer Belz and termination of plaintiff were founded upon a rational basis, we conclude that the accepted principles of equal protection were not violated. *See Durham Council of the Blind v. Edmisten, Att'y General*, 79 N.C. App. 156, 158, 339 S.E.2d 84, 86 (1986) (providing that the Equal Protection Clause is violated if two persons, similarly situated, are treated differently without rational basis), *appeal dismissed and cert. denied*, 316 N.C. 552, 344 S.E.2d 5 (1986).

Having so concluded, the superior court's order upholding the Board's termination of plaintiff's employment is affirmed.

Affirmed.

Judges MARTIN and BRYANT concur.

STATE OF NORTH CAROLINA v. JOHN EVERETTE MOTLEY, III

No. COA01-1597

(Filed 5 November 2002)

Evidence; Search and Seizure— release of rifle by one law enforcement agency to another—test results—no reasonable expectation of privacy

The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury and discharging a weapon into occupied property case by determining that the release of defendant's Colt rifle by one law enforcement agency to another did not constitute an illegal search or seizure and by allowing the S.B.I. report to be admitted into evidence, because: (1) the actions by the first law enforcement agency resulted in a lawful search and seizure when defendant's consent to the search was voluntary and the rifle was also in plain view of the officers; (2) the subsequent transfer of the rifle to a detective was proper and did not constitute a separate search and seizure since defendant no longer possessed a reasonable expectation of privacy in the rifle once it was lawfully obtained by law enforcement officers; and (3) defendant never made a request or motion for the rifle to be returned to him after the previous charges were dismissed.

Appeal by defendant from judgments entered 17 May 2001 by Judge W. Erwin Spainhour in Rowan County Superior Court. Heard in the Court of Appeals 18 September 2002.

Attorney General Roy Cooper, by Special Deputy Attorney General George W. Boylan, for the State.

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

McCULLOUGH, Judge.

Defendant John Everette Motley, III, was tried before a jury at the 15 May 2001 Criminal Session of Rowan County Superior Court after being charged with one count of assault with a deadly weapon with intent to kill inflicting serious injury and one count of discharging a weapon into occupied property. The State's evidence at trial showed that in July 1998, Esequil Martinez was living with his brothers, their wives, one child and two friends in Salisbury, North Carolina. Around

1:30 a.m. on 29 July 1998, Martinez was sleeping in the living room, located at the front of the house, when he was awakened by a knock at the door. When Martinez answered the door, a man, later identified as defendant, stated, "I'm here to sell you a gun." After Martinez refused to buy a gun, defendant became angry and stated, "I'm not going to play around. I'm going to come back with a bigger one." According to Martinez, "[Defendant] looked bad. He looked like he was on drugs or had been drinking." Defendant left, and Martinez went back to sleep.

Approximately one hour later, Martinez woke to the sound of gunshots. Martinez testified he covered his ears, shut his eyes, and hid near the sofa until the shooting subsided. After five to ten minutes, Martinez called the Salisbury police. Several officers responded to the call within five minutes. They noted that the front of the house was full of gunshot holes, while the interior of the house had sustained great damage. Additionally, the officers discovered that Martinez's brother Victor suffered a gunshot wound to his left foot and called an ambulance for him.

Detective Tom Lowe of the Salisbury Police Department testified that he began investigating the shooting at Martinez's home on 30 July 1998. During the course of his investigation, Detective Lowe assembled photographic lineups of suspects, took them to Mr. Martinez, and asked whether any of the photographs depicted the man who tried to sell him a gun on 29 July. The first lineup did not contain a photograph of defendant, and Mr. Martinez stated that he did not recognize anyone in that set of photographs. After further investigation, Detective Lowe assembled a second photographic lineup containing defendant's photograph and showed it to Mr. Martinez in late August 1998. Mr. Martinez immediately identified defendant as the man who attempted to sell him a gun on 29 July.

Detective Lowe examined defendant's criminal history and noted that he had been arrested on 9 August 1998 in Yadkin County for carrying a concealed weapon, a knife, and for being intoxicated and disruptive. During that arrest, Deputy Richard Nixon of the Yadkin County Sheriff's Office obtained defendant's consent to search defendant's Ford truck. Deputy Nixon took several weapons into custody, including a Colt AR 15 semiautomatic rifle in plain view in the back of the truck. Deputy Nixon also confiscated 575 rounds of ammunition, which were lying next to the rifles inside defendant's truck.

Detective Lowe contacted the District Attorney's Office and was instructed to obtain the Colt rifle and the ammunition from the Yadkin County Sheriff's Office. He also went to Mr. Martinez's house and recovered two bullet fragments from the bedroom on 30 September 1998. Detective Lowe filled out custody slips on all the items, then sent them to the State Bureau of Investigation (S.B.I.) for analysis on 15 October 1998. On 22 April 1999, the SBI report was returned to Detective Lowe; it confirmed that the 39 shell casings collected from the crime scene early in the investigation were fired from defendant's Colt rifle.

Defendant testified on his own behalf and stated he had never been to Mr. Martinez's house in Salisbury and that he had never seen Mr. Martinez or any member of his family. When asked whether he shot at the testifying witnesses or into their residence, defendant stated, "No, I did not." Defendant admitted the Colt AR 15 rifle was in his truck when he was arrested by Yadkin County deputies on 9 August 1998, but stated he had the gun because he was a member of a shooting range. After elaborating on the events surrounding his arrest and other matters, defendant rested.

After deliberating, the jury found defendant guilty on both counts. The trial court sentenced defendant to consecutive terms of 116-141 months' imprisonment for his conviction of assault with a deadly weapon with intent to kill inflicting serious injury and 34-50 months' imprisonment for his conviction of discharging a weapon into occupied property. Defendant gave notice of appeal in open court.

By his sole assignment of error, defendant contends the trial court erred by determining that the release of the Colt rifle by one law enforcement agency to another did not constitute an illegal search or seizure and allowing the S.B.I. report to be admitted into evidence. After careful examination of the record and the arguments presented by the parties, we disagree and conclude defendant received a trial free from the errors assigned.

"A 'search' proscribed by the Fourth Amendment contemplates an unreasonable governmental intrusion into an area in which a person has a justifiable expectation of privacy. The fundamental inquiry in considering Fourth Amendment issues is whether a search or seizure is reasonable under all the circumstances." *State v. Francum*, 39 N.C. App. 429, 431-32, 250 S.E.2d 705, 706-07 (1979) (citations omitted). "[A] critical premise of the Fourth Amendment is that a govern-

mental search of private property or effects without prior judicial approval is *per se* unreasonable unless the search fits into a well-delineated exception to the warrant requirement and is conducted under circumstances that are, in fact, exigent." *State v. Hall*, 52 N.C. App. 492, 498, 279 S.E.2d 111, 115, *appeal dismissed, disc. review denied*, 304 N.C. 198, 285 S.E.2d 104 (1981). With these concepts in mind, we turn to the case at hand.

While defendant admits the search and seizure by Deputy Nixon on 9 August 1998 was lawful, he argues the Yadkin County Sheriff's Department lacked authority to later turn the Colt rifle over to Detective Lowe and the Salisbury Police Department because the transfer of the rifle from one law enforcement agency to another exceeded the scope of the original search. Defendant maintains that, once the investigation surrounding his Yadkin County arrest was completed, the Yadkin County law enforcement officers lost the right to retain or further examine defendant's property, since the Yadkin County arrest had nothing to do with the 29 July 1998 incident in Salisbury. Defendant also notes there was nothing illegal, *per se*, about his possession of the Colt rifle on the day he was arrested. Defendant was arrested for carrying a concealed weapon; however, that weapon was a knife, not the Colt rifle. Thus, according to defendant, there was no reason for the Yadkin County officials to hold his rifle after the 9 August 1998 incident was resolved.

Under defendant's reasoning, the Yadkin County officials also lost the authority to turn the rifle over to Detective Lowe once their investigation was over, because at that point, they were merely holding the rifle for safekeeping. Defendant contends the transfer and testing of the rifle constituted a second search and seizure which exceeded the permissible scope of the original search and seizure and violated the Fourth Amendment because the transfer was not necessary for the safeguarding of defendant's property and the S.B.I.'s ballistics examination was not reasonable under the circumstances. *See Francum*, 39 N.C. App. 429, 250 S.E.2d 705. According to defendant, the only way Detective Lowe could have lawfully obtained custody of the rifle was pursuant to a search warrant. Defendant maintains Detective Lowe's failure to procure a search warrant violated the Fourth Amendment and should have resulted in suppression of the S.B.I. report at his trial.

Upon review of the record, we agree with the State that the release of the rifle by one law enforcement agency to another did not constitute an illegal search or seizure. Immediately after Mr. Martinez

testified about the shooting at his home on 29 July 1998, the State called Deputy Nixon to provide *voir dire* testimony regarding defendant's arrest on 9 August 1998 in Yadkin County. Deputy Nixon stated that he responded to a call concerning a man (later identified as defendant) who was threatening another man with an assault rifle in a church parking lot. Once at the scene, Deputy Nixon and another officer saw defendant standing near a Ford truck. As they approached, they handcuffed defendant for their safety while they assessed the situation. The other man, Mr. Roger Sizemore, stated that defendant pointed an assault rifle at him and threatened to kill him. After speaking to Mr. Sizemore and another witness, Deputy Nixon arrested defendant for being intoxicated and disruptive. While performing a pat-down search of defendant's person, Deputy Nixon discovered a sharp dagger in defendant's belt and also arrested defendant for carrying a concealed weapon. Because defendant was standing within a few feet of the Ford truck, Deputy Nixon asked defendant's permission to search it. Deputy Nixon testified as follows:

Q. [Prosecutor] And, how was it you came to search the Ford truck that the defendant was near?

A. [Deputy Nixon] The defendant gave us consent to search his vehicle.

Q. You specifically asked him for consent?

A. Yes, ma'am.

Q. And, what, if anything unusual, did you find in the Ford truck?

A. When we approached the defendant and put him into—to take him into custody, the bed of the truck had a camper shell on it, the tailgate was down and the camper shell lid was open and immediately when we approached, we noticed where the rifle was laying in the bed of the truck near the tailgate area.

Q. The tailgate was up or down?

A. It was down.

Q. All right, and were these weapons to the best of your recollection touching the tailgate area, or were they up into the bed of the truck?

A. No, ma'am. They were right at the tailgate.

Q. Okay, towards the edge of the bed?

A. Yes, ma'am.

Q. And, what kind of weapons did you see at that point?

A. One was an AR 15[.]

After considering Deputy Nixon's *voir dire* testimony, the trial court concluded the warrantless search of defendant's truck was proper under *State v. Isleib*, 319 N.C. 634, 356 S.E.2d 573 (1987). The trial court further concluded the rifle was properly seized after defendant consented to the search of his truck. Defendant then argued that a separate search and seizure occurred when Detective Lowe obtained the rifle, and that those actions violated the Fourth Amendment because they were done without a warrant and in connection with the investigation of an entirely separate crime. After listening to defendant's argument, the trial court stated:

> THE COURT: Well, wouldn't it be a bit more reasonable to say that once [the rifle is] out of the possession of the defendant having been seized pursuant to a lawful arrest, incident to arrest, and in plain view by one law enforcement agency, that that's the only search and seizure that takes place? Wouldn't that be reasonable? I mean, you're saying that anytime another law enforcement agency gets control over the instrumentality of the latest crime, that a separate search is occurring. Therefore, a search warrant ought to be issued on each such occasion. Is that what your point is?

According to the trial court, even though the Yadkin County charges were dismissed on 25 November 1998 and there was no ongoing investigation of that incident as of the date Detective Lowe obtained custody of the rifle, Detective Lowe's seizure was reasonable.

We agree with the trial court that (1) the actions by the Yadkin County officials on 9 August 1998 resulted in a lawful search and seizure, and (2) the subsequent transfer of the rifle to Detective Lowe was proper and did not constitute a separate search and seizure. Defendant was arrested after Deputy Nixon and his fellow officer spoke to two witnesses and determined that defendant had acted unlawfully. Defendant's rifle was seized only after Deputy Nixon procured defendant's consent.

Consent searches have long been recognized as a "special situation excepted from the warrant requirement, and a search is

> not unreasonable within the meaning of the Fourth Amendment when lawful consent to the search is given." *State v. Smith*, 346 N.C.[] 794, 799, 488 S.E.2d 210, 214 (1997). "Consent to search, freely and intelligently given, renders competent the evidence thus obtained." *State v. Frank*, 284 N.C. 137, 143, 200 S.E.2d 169, 174 (1973) (citations omitted). "[T]he question whether consent to a search was in fact 'voluntary' or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of all the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 36 L. Ed. 2d 854, 862-63 (1973).

State v. Graham, 149 N.C. App. 215, 218-19, 562 S.E.2d 286, 288 (2002). Defendant's consent was voluntary and obviated the need for a warrant. The evidence also indicates that the rifle was in plain view of the officers, providing yet another proper basis for the search and seizure by Deputy Nixon.

The trial court concluded, and we agree, that extension of defendant's logic would not make sense. According to defendant, anytime a second law enforcement agency takes custody of an instrumentality of crime from the seizing agency, a separate search occurs, thus requiring that a search warrant be issued on each such occasion. The United States Supreme Court has said "it is difficult to perceive what is unreasonable about the police examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest." *United States v. Edwards*, 415 U.S. 800, 806, 39 L. Ed. 2d 771, 777 (1974). Here, defendant conceded that the search and seizure by Yadkin County officials on 9 August 1998 was lawful.

Moreover, the transfer of defendant's rifle from one law enforcement agency to another did not constitute a search or seizure subject to constitutional scrutiny because defendant no longer possessed a reasonable expectation of privacy in the rifle once it was lawfully obtained by law enforcement officials in Yadkin County. *See State v. Steen*, 352 N.C. 227, 241, 536 S.E.2d 1, 9-10 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). Defendant never made a request or motion for the Colt rifle to be returned to him, after the previous charges were dismissed.

Our Court has previously held that once evidence is validly obtained, the owner no longer has a possessory or ownership interest in it, and any legal expectation of privacy has disappeared. *State v. Barkley*, 144 N.C. App. 514, 551 S.E.2d 131, *appeal dismissed*, 354

N.C. 221, 554 S.E.2d 646 (2001). In *Barkley*, the defendant's blood had been drawn as part of a murder investigation which was wholly separate from his trial for first-degree rape and first-degree kidnapping. *Id.* at 516-17, 551 S.E.2d at 133-34. When defendant learned the blood evidence would be introduced at trial, he moved to suppress it. *Id.* The *Barkley* Court rejected defendant's argument that a blood sample obtained in relation to one uncharged crime could not be used as evidence against him in another unrelated crime without violating his Fourth Amendment rights. *Id.* at 518, 551 S.E.2d at 134. The *Barkley* Court concluded the blood sample could be used to investigate both the crimes for which defendant was being tried and the unrelated murder without violating the Fourth Amendment, because in those circumstances, "a reasonable person would have understood by the exchange [between himself and law enforcement officers] that his blood analysis could be used generally for investigative purposes, not exclusively for the murder investigation." *Id.* at 521, 551 S.E.2d at 136. In reaching its conclusion, the *Barkley* Court quoted *People v. King*, 663 N.Y.S.2d 610, 232 A.D.2d 111, which stated:

> "It is also clear that once a person's blood sample has been obtained lawfully, he can no longer assert either privacy claims or unreasonable search and seizure arguments with respect to the use of that sample. Privacy concerns are no longer relevant once the sample has already lawfully been removed from the body, and the scientific analysis of a sample does not involve any further search and seizure of a defendant's person. In this regard we note that the defendant could not plausibly assert any expectation of privacy with respect to the scientific analysis of a lawfully seized item of tangible property, such as a gun or a controlled substance. Although human blood, with its unique genetic properties, may initially be quantitatively different from such evidence, once constitutional concerns have been satisfied, a blood sample is not unlike other tangible property which can be subject to a battery of scientific tests."

Barkley, 144 N.C. App. at 519, 551 S.E.2d at 134-35 (quoting *People v. King*, 663 N.Y.S.2d at 614-15, 232 A.D.2d at 117-18).

Though *Barkley* dealt with a blood sample obtained from the defendant, we believe the logic of *Barkley* reasonably extends to encompass other types of evidence, including data obtained from ballistics testing of defendant's rifle. Upon review of the present case, we believe the trial court properly admitted the S.B.I. test results at defendant's trial after concluding that the release of the Colt rifle by

one law enforcement agency to another did not constitute an illegal search and seizure. We hold that the transfer of properly seized tangible items from one law enforcement agency to another for scientific testing or further analysis does not constitute an impermissible seizure, as defendant lacks a reasonable expectation of privacy in the object. Consequently, a defendant cannot object when the item lawfully seized is subsequently introduced at trial. After thoughtful consideration of the record and the arguments of the parties, we conclude defendant received a fair trial free from error.

No error.

Judges TYSON and BRYANT concur.

ERIE INSURANCE EXCHANGE, PLAINTIFF-APPELLANT v. ST. STEPHEN'S EPISCOPAL CHURCH, BRIAN RUFF, AMY RUFF, AND LEVI RUFF, DEFENDANTS-APPELLEES

No. COA01-1372

(Filed 5 November 2002)

Insurance— homeowners—exclusion—intentional acts—child playing with matches

Summary judgment should have been granted for plaintiff-insurance company in a declaratory judgment action to determine whether a homeowners insurance policy provided coverage for property damage incurred when the insured's son started a fire while finding out if choir robes would burn. The policy contained an intentional acts exclusion which applied because the evidence indicated that a child of similar knowledge, experience, capacity, and discretion should have reasonably expected the results of his intentional acts.

Appeal by plaintiff from an order entered 26 June 2001 by Judge Orlando Hudson in Superior Court, Durham County. Heard in the Court of Appeals 21 August 2002.

Edgar & Paul, by Patrick M. Anders, for plaintiff-appellant.

Brown, Crump, Vanore & Tierney, LLP, by Andrew A. Vanore, III and Christopher G. Lewis, for defendant-appellee St. Stephen's Episcopal Church.

McGEE, Judge.

Erie Insurance Exchange (plaintiff) filed an action for declaratory judgment on 8 November 2000 seeking a judicial determination as to whether a homeowners insurance policy it issued to defendant Brian Ruff provided coverage for property damage incurred by defendant St. Stephen's Episcopal Church (St. Stephen's) in a fire. Defendants filed answers to plaintiff's complaint. Defendant Levi Ruff (Levi), the son of defendants Brian and Amy Ruff, was deposed in the present case on 2 February 2001 and on 7 April 2000 in a separate suit filed earlier based on the same facts. Defendant St. Stephen's filed a motion for summary judgment in the present action on 12 March 2001. Plaintiff filed a motion for summary judgment on 3 April 2001. Following a hearing, the trial court denied plaintiff's motion for summary judgment in an order entered 26 January 2001; the trial court granted summary judgment for defendant St. Stephen's, determining that the policy issued by plaintiff did provide coverage for the fire. Plaintiff appeals.

In his depositions, Levi testified he was at St. Stephen's with his mother and siblings for the siblings' choir practice on 1 June 1998. Levi went to an unoccupied office in the back of the church to study. While in the office, Levi found a box of matches and decided to find out if the choir robes hanging in the office closet would burn. Levi lit a match and held it up against one of the robes. The robe ignited and the flame spread to an area the size of a nickel or quarter. Levi left the room to find his mother. He told her that he would be in the office but failed to tell her about the fire. When he returned to the office, the fire had spread throughout the closet. Levi left the room again and informed the church secretary that the office was on fire. The fire caused damages in excess of $10,000 through loss of personal property and smoke and water damage to the church.

Levi also testified that he had used matches before with his parents in lighting a fire in a fireplace at home. He knew that some materials, such as baby pajamas would not burn. He also knew that carelessness with matches could result in fire and damage to property.

At the time of the fire, Brian Ruff had an insurance policy with plaintiff, which provided coverage for the Ruffs' home, their personal property, and damages to property of a third party for which the insured was liable. The policy contained the following exclusion of liability:

1. Coverage E—Personal Liability and Coverage F—Medical payments to Others do not apply to bodily injury or property damage:

   a. which is intended by or which may reasonably be expected to result from the intentional acts or omissions or criminal acts or omissions of one or more insured persons. This exclusion applies even if:

      1) the insured persons lack the mental capacity to govern their own conduct;

      2) the bodily injury or property damage is of a different kind, quality or degree then [sic] intended or reasonably expected; or;

      3) the bodily injury or property damage is sustained by a different person or entity than intended or reasonably expected.

   This exclusion applies regardless of whether or not one or more insured persons are actually charged with, or convicted of, a crime.

Plaintiff argues the trial court erred in granting summary judgment for St. Stephen's and denying summary judgment for plaintiff on the issue that damage caused when Levi intentionally set fire to church property was covered under the insureds' homeowners policy. "Summary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Snipes v. Jackson*, 69 N.C. App. 64, 71-72, 316 S.E.2d 657, 661 (1984) (quoting N.C. Gen. Stat. § 1A-1, Rule 56(c)). "On appeal, this Court's standard of review involves a two-step determination of whether (1) the relevant evidence establishes the absence of a genuine issue as to any material fact, and (2) either party is entitled to judgment as a matter of law." *Guthrie v. Conroy*, 152 N.C. App. 15, 21, 567 S.E.2d 403, 408 (2002) (citations omitted). The parties conceded there is no question of material fact by submitting cross-motions for summary judgment. In determining coverage issues,

> [t]he interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction. . . . [T]he policy is subject to judicial construction only where the language used in the policy is ambiguous and reason-

> ably susceptible to more than one interpretation. In such cases, the policy must be construed in favor of coverage and against the insurer; however, if the language of the policy is clear and unambiguous, the court must enforce the contract of insurance as it is written.

Allstate Ins. Co. v. Chatterton, 135 N.C. App. 92, 94-95, 518 S.E.2d 814, 816 (1999) (citations omitted).

Plaintiff argues that the trial court should have denied coverage as a matter of law under the "intentional acts" exclusion provision of the insurance policy. In construing insurance policy exclusionary provisions, our Supreme Court has stated

> it is important to note that the rules of construction which govern the interpretation of insurance policy provisions extending coverage to the insured differ from the rules of construction governing policy provisions which exclude coverage. Those provisions in an insurance policy which extend coverage to the insured must be construed liberally so as to afford coverage whenever possible by reasonable construction. However, the converse is true when interpreting the exclusionary provisions of a policy; exclusionary provisions are not favored and, if ambiguous, will be construed against the insurer and in favor of the insured.

N.C. Farm Bureau Mut. Ins. Co. v. Stox, 330 N.C. 697, 702, 412 S.E.2d 318, 321-22 (1992) (citations omitted).

Case law interpreting and applying insurance coverage exclusions is varied and heavily dependent upon individual factual circumstances. Plaintiff relies on *N.C. Farm Bureau Mut. Ins. Co. v. Mizell*, 138 N.C. App. 530, 530 S.E.2d 93 (2000), in arguing that Levi's actions constitute an intentional act that excludes coverage under the policy. In *Mizell*, our Court held that an insurance policy's exclusion provision applied where the insured intentionally fired a weapon in the general direction of an intruder but did not intend to inflict injury. *Id.* at 533-34, 530 S.E.2d at 95. We stated that a person who fires a weapon at a nearby intruder "could reasonably expect injury or damage to result from the intentional act." *Id.* Our Court also noted that the policy excluded coverage for acts " 'which may reasonably be expected to result from the intentional act.' " *Id.* at 533, 530 S.E.2d at 95 (quoting the insurance policy exclusion provision). We reasoned that such language contained in the insurance policy suggested a more objective standard for examining the results of an intentional

act, rather than requiring subjective proof that the insured actually expected or intended his actions to result in injury. *Id.*

St. Stephen's also cites *Stox* in support of finding coverage under the policy. In *Stox*, our Supreme Court held the exclusionary provision for intentional acts did not apply where the insured pushed someone who fell and fractured her arm. 330 N.C. at 703-04, 412 S.E.2d at 322. The Court held that "the resulting injury, not merely the volitional act, . . . must be intended for [the] exclusion to apply." *Id.* While the insured intentionally pushed the victim in *Stox*, the Court held that the evidence did not require that an intent to inflict the resulting injury be inferred. *Id.* at 706, 412 S.E.2d at 324 ("Merely showing the act was intentional will not suffice.").

The issue of insurance exclusion provisions has been further addressed by our Court in *N.C. Farm Bureau Mut. Ins. Co. v. Allen*, 146 N.C. App. 539, 553 S.E.2d 420 (2001), where the defendant fired gunshots through a door and in close proximity of a suspected intruder, injuring the intruder. While the defendant argued that he did not intend to injure the intruder, we held the insurance exclusion applied because the "intentional act . . . was sufficiently certain to cause injury that [the defendant] should have expected such injury to occur." *Id.* at 546, 553 S.E.2d at 424.

This Court found an insurance exclusion provision to not apply in *Miller v. Nationwide Mutual Ins. Co.*, 126 N.C. App. 683, 486 S.E.2d 246 (1997), where an individual fired a gunshot at a stop sign, which entered the plaintiff's home and shattered an overhead light fixture above the plaintiff's sleeping children. We relied on *Stox* in holding that the character of the act did not require the inference of an intent to inflict an injury. *Id.* at 688, 486 S.E.2d at 249. We reasoned that the insured intended to shoot at the stop sign but did not intend to shoot into the children's bedroom window or cause the resulting harm, thus constituting an accident that was covered under the insurance policy. *Id.* at 686, 486 S.E.2d at 248. We further concluded that the acts of the insured were not substantially certain to cause injury and were distinguishable from similar cases that excluded coverage on that basis. *Id.* at 688, 486 S.E.2d at 248-49; *see also Nationwide Mut. Fire Ins. Co. v. Grady*, 130 N.C. App. 292, 502 S.E.2d 648 (1998) (holding that there was an issue of material fact regarding the intent to injure the plaintiff when the insured punched the plaintiff in the back).

We find *Mizell* and *Allen* controlling in the case before us. As in *Mizell*, plaintiff's insurance policy specifically excludes coverage for

acts "which may reasonably be expected to result from the intentional acts or omissions . . . of one or more insured persons." Applying the objective standard in *Mizell*, 138 N.C. App. at 533, 530 S.E.2d at 95, the test is whether Levi should have reasonably expected a fire to result from his actions. In articulating the test, we analogously look to the language used by our Courts in determining when a child is contributorily negligent. Children between the ages of seven and fourteen are presumed to be incapable of contributory negligence, but this presumption may be overcome. *Hoots v. Beeson*, 272 N.C. 644, 649, 159 S.E.2d 16, 20 (1968). This Court has stated that "the test of foreseeability is whether a child of similar 'age, capacity, discretion, knowledge, and experience' could have foreseen some injurious result from his or her use of the product." *Hastings v. Seegars Fence Co.*, 128 N.C. App. 166, 170, 493 S.E.2d 782, 785 (1997) (quoting *Hoots*, 272 N.C. at 649, 159 S.E.2d at 20); *see In re T.S.*, 133 N.C. App. 272, 277, 515 S.E.2d 230, 233 (1999) ("The child's discretion, maturity, knowledge, and experience interact in rebutting the presumption."). The record demonstrates that Levi should have reasonably expected the damages that resulted from his intentional act, in light of his knowledge, experience, capacity, and discretion.

Levi's testimony demonstrates that he intended to light the match and hold it up to the robe to see if the robe would burn. Levi testified that he saw the flames spread to the size of a nickel or quarter before leaving to find his mother. When asked why he ran back to the office where he had set the fire, Levi responded, "because I knew that cloth would burn pretty easily, and I ran because I wanted to get there soon enough to blow it out." Furthermore, Levi testified that his parents had shown him how to start a fire with matches and instructed him never to use them unless he was supervised. Levi also testified that he was aware of the danger of matches and the damage that could result from playing with them. This evidence demonstrates that a child of similar knowledge, experience, capacity, and discretion should have reasonably expected the results of his intentional acts. Based upon the evidence presented in the record, there is no issue of material fact concerning the application of the exclusion provision.

St. Stephen's argues that the qualifiers of the exclusion are inapplicable and do not bar exclusion in this case. First, St. Stephen's contends that the term "mental capacity" is not defined in the policy and is therefore ambiguous and void. St. Stephen's states that the term could refer to a mental deficiency or a person's cognitive reasoning based on age or maturity, thereby creating conflicting meanings.

> Ambiguity in the terms of the policy is not established simply because the parties contend for differing meanings to be given to the language. Non-technical words are to be given their meaning in ordinary speech unless it is clear that the parties intended the words to have a specific technical meaning. Use of the ordinary meaning of a term is the preferred construction, and in construing the ordinary meaning of a disputed term, it is appropriate to consult a standard dictionary.

Allstate, 135 N.C. App. at 94-95, 518 S.E.2d at 816-17 (citations omitted).

Mental capacity is defined in *Black's Law Dictionary* as "[t]he mental ability to understand the nature and effect of one's acts." Black's Law Dictionary 199 (7th ed. 1999). The ability to understand the nature of one's acts can be the product of multiple factors, including age, experience, or mental impairment. We reject St. Stephen's argument that mental capacity should be defined to only include mental retardation or other learning disorders. Such a definition is too narrow and does not reflect the ordinary meaning of the phrase. Furthermore, the fact that mental capacity may be influenced by multiple factors does not render the phrase ambiguous as used in the policy. We decline to find the policy's use of the term "mental capacity" ambiguous and uphold this qualification.

St. Stephen's further argues that the second qualifier fails to save the exclusion because there is no evidence as to what objective an eight-year-old could intend or reasonably expect to result from his actions, thus the qualifier cannot be used to exclude results beyond those reasonably expected. St. Stephen's relies on *Mizell* in arguing that Levi did not intend to destroy the robe and could not have anticipated the results of his actions. We have previously discussed the objective test in *Mizell* and determined that a child of similar knowledge, experience, capacity, and discretion should have reasonably expected the results of Levi's intentional acts. The policy provision that excludes resulting damage that is different or greater than that intended or reasonably expected is not ambiguous and is therefore upheld.

St. Stephen's finally argues that this case involves concurrent negligent causes of loss that would nullify the exclusion. St. Stephen's contends that some of Levi's actions constitute negligence, thereby making it impossible to differentiate between the intentional or foreseeable actions and the negligent actions. Negligent acts are not

excluded by the insurance policy. "[S]ources of liability which are excluded from [a] homeowners policy coverage must be the sole cause of the injury in order to exclude coverage under the policy." *Nationwide Mutual Ins. Co. v. Davis*, 118 N.C. App. 494, 500, 455 S.E.2d 892, 896 (1995) (quoting *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 546, 310 S.E.2d 66, 73 (1986) (emphasis omitted)). In the case before us, the sole cause of the fire and the resulting damage stemmed from Levi's action of setting fire to the robe. There are no additional events that constitute concurrent causes for the fire and the resulting damage. The fact that one might also argue some of Levi's actions were negligent does not make the terms and standards of the policy ambiguous. It also does not negate Levi's intentional actions, which the policy clearly excludes. We find St. Stephen's argument unpersuasive.

We reverse the trial court's order granting summary judgment for St. Stephen's and remand for entry of an order granting summary judgment for plaintiff.

Reversed and remanded.

Judges McCULLOUGH and BRYANT concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. ERNEST D. HILL, DEFENDANT

STATE OF NORTH CAROLINA, PLAINTIFF v. MORRIS L. HILL, DEFENDANT

No. COA01-1356; COA01-1357

(Filed 5 November 2002)

Drugs— property seized pursuant to state warrants—release of funds to federal authorities

The trial court erred by entering an order under N.C.G.S. § 15-11.1 directing that certain funds seized from defendants during a drug raid pursuant to state search warrants be returned by the county sheriff when said funds had been transferred to the United States Drug Enforcement Agency and were the subject of a civil forfeiture proceeding under 21 U.S.C. § 881, because: (1) once a federal agency has adopted a local seizure, a party may not attempt to thwart the forfeiture by collateral attack in our courts,

for at that point exclusive original jurisdiction is vested in the federal court by statute, 28 U.S.C. § 1355; (2) cooperation with federal authorities in enforcing the drug laws is mandated by N.C.G.S. § 90-113.5; and (3) routine intergovernmental co-operation between state and federal law enforcement agencies is not contrary to our statutory mechanism to safeguard seized property.

Appeal by Brunswick County from orders entered 26 June 2001 by Judge Gregory A. Weeks in Brunswick County Superior Court. Heard in the Court of Appeals 14 August 2002.

Brunswick County Attorney Huey Marshall, for respondent appellants.

Baxley and Trest, by Roy D. Trest, for Ernest D. Hill and Morris L. Hill, petitioner appellees.

McCULLOUGH, Judge.

Brunswick County appeals from orders entered 26 June 2001, pursuant to N.C. Gen. Stat. § 15-11.1 (2001) at the 21 May 2001 Criminal Session of Brunswick County Superior Court directing that certain funds seized from the above-named defendants, Morris L. Hill and Ernest D. Hill, be returned by the Sheriff of Brunswick County despite the fact that said funds had been transferred to the United States Drug Enforcement Agency (DEA) and were the subject of a civil forfeiture proceeding pursuant to 21 U.S.C. § 881. For the reasons set forth herein, we vacate the trial court's order.

The pertinent facts as elicited during the above-mentioned hearing are as follows: On 27 October 2000, the home of defendant Morris Hill was searched by officers of the Brunswick County Narcotics Squad. On 29 December 2000, the residence of defendant Ernest Hill was also searched by members of that department. Both searches were conducted pursuant to search warrants and the legality of these searches is not contested.

Each defendant was charged with drug offenses following the searches of their residences. The officers also seized currency from each defendant. On 1 May 2001, the district attorney however dismissed the criminal charges. While the exact date is not clear from the record, at some point subsequent to the search and prior to the hearing on the motion for return of property, the seized currency was

turned over to the DEA for forfeiture pursuant to 21 U.S.C. § 881. It was stipulated that each defendant was served with notice of the federal civil forfeiture action but evidently chose not to contest the federal proceeding. Despite being informed that the Sheriff no longer held the currency in question, the trial court ruled that, by turning over to federal authorities funds seized in a drug raid such as in the case at bar, the Sheriff (or any state or local law enforcement agency) violates N.C. Gen. Stat. § 15-11.1. The trial court also found that the funds seized were not subject to forfeiture under North Carolina law. The trial court further ruled that it retained jurisdiction over such funds pursuant to N.C. Gen. Stat. § 90-112 (2001) (forfeitures pursuant to N.C. Controlled Substances Act).

The issue before this Court is whether our statutory scheme is exclusive so that evidence seized by state or local officers, including property subject to state forfeiture, cannot be released to federal authorities for use in proceedings in U.S. District Court.

It is important to note that our forfeiture provisions operate *in personam* and that forfeiture normally follows conviction. *See State v. Johnson*, 124 N.C. App. 462, 478 S.E.2d 16 (1996), *cert. denied*, 345 N.C. 758, 485 S.E.2d 304 (1997). In that case this Court stated:

> G.S. § 90-112(a)(2) is a criminal, or *in personam*, forfeiture statute, as opposed to a civil or *in rem*, forfeiture statute. *See U.S. v. Winston-Salem/Forsyth County Bd. of Educ.*, 902 F.2d 267, 271 (4th Cir. 1990); *State ex rel. Thornburg v. Currency*, 324 N.C. 276, 378 S.E.2d 1 (1989).
>
> Important differences exist between *in rem* and *in personam* forfeiture. First, while *in personam* forfeiture requires a criminal conviction of the property's owner, an *in rem* proceeding only requires the government to prove that the property was used for an illegal purpose or that the property constitutes contraband. Second, the government bears a lower burden of proof in an *in rem* forfeiture action than it does in an *in personam* action. Since an *in personam* action is criminal, the government must prove the charges against the defendant beyond a reasonable doubt. In an *in rem* action, on the other hand, only proof by a preponderance of the evidence is required.

Johnson, 124 N.C. App. at 476, 478 S.E.2d at 25.

In *Penn General Casualty Co. v. Pennsylvania,* 294 U.S. 189, 79 L. Ed. 850 (1935), the U.S. Supreme Court held that where two *in rem* actions are pending, the court which first had dominion or control of the *res* retains exclusive jurisdiction. *Penn General,* 294 U.S. at 195, 79 L. Ed. at 855. *Penn General* is not controlling, however, since federal forfeiture proceedings are civil *in rem* proceedings and our state forfeiture proceedings are *in personam. See, e.g., U.S. v. One 1985 Cadillac Seville,* 866 F.2d 1142, 1145-46 (9th Cir. 1989).

While the standard for criminal conviction in either federal or state court is the same (proof beyond a reasonable doubt), forfeiture proceedings in federal court are, as previously stated, *in rem* and civil in nature. There the government must merely establish " 'probable cause for belief that a substantial connection exists between the property to be forfeited and the criminal activity' " at issue. *Boas v. Smith,* 786 F.2d 605, 609 (4th Cir. 1986) (quoting *United States v. $364,960 in U.S. Currency,* 661 F.2d 319, 323 (5th Cir. 1981)). Initial forfeiture proceedings are taken by an administrative agency, such as the DEA in the cases *sub judice,* although an aggrieved party has the right to obtain judicial review. 21 U.S.C. § 881.

In these cases, defendants argue and the trial court ruled that property seized pursuant to state search warrants may not be turned over to federal authorities and that to do so violates N.C. Gen. Stat. § 15-11.1 and runs afoul of N.C. Gen. Stat. § 90-112.

N.C. Gen. Stat. § 15-11.1 directs that when a state or local law enforcement officer seizes property, such shall be retained as evidence until either the district attorney releases the property or a court orders its return pursuant to a motion after a hearing. N.C. Gen. Stat. § 15-11.1(a). However, the statute also permits the introduction of substitute evidence at trial so long as such does not prejudice the defendant:

> Notwithstanding any other provision of law, photographs or other identification or analyses made of the property may be introduced at the time of the trial provided that the court determines that the introduction of such substitute evidence is not likely to substantially prejudice the rights of the defendant in the criminal trial.

Id. This provision recognizes that seized property, such as currency or drugs, may not always be available for use at trial and that a photograph or other identification may be used instead. *State v. Alston,*

91 N.C. App. 707, 712-13, 373 S.E.2d 306, 310-11 (1988); *State v. Jones*, 97 N.C. App. 189, 199, 388 S.E.2d 213, 219 (1990).

N.C. Gen. Stat. § 90-112(a) describes items that are subject to forfeiture pursuant to the N.C. Controlled Substances Act. The statute makes forfeitable all controlled substances, conveyances (if used in felony violations of the drug laws), containers, money, raw materials or mixing agents and books, records or formulas utilized in the manufacture or distribution of controlled substances. N.C. Gen. Stat. § 90-112(a)(1)-(5).

While defendants' attack is limited to currency, the logic would equally apply to contraband, evidentiary items such as books, records and formulas, as well as firearms, conveyances or raw materials, in short, any item that is capable of seizure under "lawful process." Currency is only one of many items capable of seizure and neither statute (N.C. Gen. Stat. §§ 15-11.1 nor 90-112) has special rules applicable only to currency. By implication, if it is violative of § 15-11.1 to deliver currency to federal authorities when a federal agency "adopts" a local seizure, it would also be a violation to turn over seized contraband or the clothing worn by a bank robber whose residence was first searched by state or local officers. To hold that such sharing of evidentiary items is prohibited would raise serious constitutional issues regarding the exercise of prosecutorial discretion and the applicability of the federal supremacy clause. *See* U.S. Const. art. VI, § 2. This we decline to do.

Instead, we recognize that American law enforcement is predicated on cooperation and mutual assistance. The need for flexibility in prosecutive decisions is desirable in that it safeguards us all without depriving any citizen of due process protections.

There are numerous court decisions recognizing the constitutionality and desirability of inter-governmental cooperation between federal, state and local law enforcement agencies. *See Bartkus v. Illinois*, 359 U.S. 121, 123, 3 L. Ed. 2d 684, 687 (1959) (valid for F.B.I. agents to provide evidence to state prosecutor); *U.S. v. Louisville Edible Oil Products, Inc.*, 926 F.2d 584, 586-88 (6th Cir.), *cert. denied*, 502 U.S. 859, 116 L. Ed. 2d 140 (1991) (county environmental board proceedings valid and not sham despite cooperation and correspondence with federal EPA); *U.S. v. Koon*, 34 F.3d 1416, 1438-39 (9th Cir. 1994), *aff'd in part, rev'd in part*, 518 U.S. 81, 135 L. Ed. 2d 392 (1996) (proper for federal and state officials to share information and evidence); *U.S. v. Trammell*, 133 F.3d 1343, 1349-51 (10th Cir. 1998)

(federal prosecution valid even though encouraged by state prosecutor); and *U.S. v. Arena*, 180 F.3d 380, 399 (2d Cir. 1999), *cert. denied*, 531 U.S. 811, 148 L. Ed. 2d 13 (2000) (finding federal prosecution valid despite cooperation with local authorities).

Numerous offenses are capable of prosecution in either federal or state court. They range from sophisticated financial crimes to bank robbery, drug trafficking or the manufacture of non-tax paid whiskey to name only a few. An ALE agent does not violate N.C. Gen. Stat. § 15-11.1 by providing evidence of a "moonshine" ring to the Federal Bureau of Alcohol, Tobacco and Firearms nor does a local police department violate this statute by providing to the F.B.I. evidence gained in the search of a bank robbery suspect's residence or vehicle. To say that such conduct violates our statutes, which are of a "housekeeping" nature, would be to erect judicial barriers to the exercise of important constitutional prerogatives. It should be noted that N.C. Gen. Stat. § 15-11.1 immediately follows N.C. Gen. Stat. § 15-11, which requires law enforcement agencies to maintain a register of all seized property including a notation as to how the property was disposed of.

In fact, our legislature has already spoken to this issue. State and local agencies are allowed to cooperate and assist each other in enforcing the drug laws. N.C. Gen. Stat. § 90-95.2 (2001). Cooperation by state and local officers with federal agencies is *mandated* by N.C. Gen. Stat. § 90-113.5 which provides:

> It is *hereby made the duty* of . . . all peace officers within the State, including agents of the North Carolina Department of Justice, and all State's attorneys, to enforce all provisions of this Article [Controlled Substances Act] . . . *and to cooperate with all agencies charged with the enforcement of the laws of the United States*, of this State, and all other States, relating to controlled substances.

N.C. Gen. Stat. § 90-113.5 (2001) (emphasis added).

The prosecution of drug traffickers is not within the exclusive province of the superior court (compare N.C. Gen. Stat. §§ 90-86 thru 90-113.7 with 21 U.S.C. § 801, *et seq.*) nor is the forfeiture of contraband, conveyances or currency (compare N.C. Gen. Stat. § 90-112 with 21 U.S.C. § 881). Those who violate the drug laws are subject to prosecution in either forum and their illicit property may be forfeited by either sovereign as well. *Rinaldi v. U.S.*, 434 U.S. 22, 28, 54

L. Ed. 2d 207, 213 (1977) (if Double Jeopardy Clause prohibited successive prosecutions by different sovereigns, sovereign with lesser interest might proceed first and preclude prosecution by sovereign with greater interest); *Abbate v. U.S.*, 359 U.S. 187, 3 L. Ed. 2d 729 (1959) (successive prosecutions by federal and state governments not prohibited as such would undermine federal law enforcement, especially when criminal acts affect federal interest more seriously); *Bartkus*, 359 U.S. 121, 3 L. Ed. 2d 684 (Double Jeopardy Clauses no bar to state robbery prosecution following federal acquittal).

Once a federal agency has adopted a local seizure, a party may not attempt to thwart the forfeiture by collateral attack in our courts, for at that point exclusive original jurisdiction is vested in the federal court by statute. 28 U.S.C. § 1355. We note that other courts, when faced with similar issues, have ruled as we do today. *See Michigan State Police v. 33rd Dist. Court*, 138 Mich. App. 390, 360 N.W.2d 196 (1984) (Where cash is subject to federal forfeiture, the state court had no jurisdiction to order disposition.).

Although our Court has not had an occasion to deal with this issue previously, a school board contested a federal forfeiture in federal court, claiming that since the currency at issue was seized by a local police department, it should have been forfeited to the school board. *Winston-Salem/Forsyth*, 902 F.2d 267 (4th Cir. 1990). We find the reasoning set forth in that case persuasive. *Id.* at 270-72. There the Board contended that seizure by state or local law enforcement authorities conferred exclusive jurisdiction over the property to the Forsyth County Superior Court. *Id.* The Fourth Circuit noted that neither court had exclusive jurisdiction as the proceedings are of a different nature with the State forfeiture statute acting *in personam* while the federal statute is *in rem. Id.*

In *Winston-Salem/Forsyth*, the Court also held that the federal government may adopt a seizure even if the party transferring the currency or contraband lacked the authority to do so. *Id. See also United States v. One 1956 Ford Tudor Sedan*, 253 F.2d 725, 727 (4th Cir. 1958). In this State, cooperation with federal authorities in enforcing the drug laws is mandated by statute. N.C. Gen. Stat. § 90-113.5. We hold that routine inter-governmental cooperation between state and federal law enforcement agencies is not contrary to our statutory mechanism to safeguard seized property. A party who is aggrieved by the federal proceeding must avail himself of the remedies provided under federal law for return of seized property or judicial review of administrative forfeitures. *See* Fed. R. Crim. P. 41; 21 U.S.C. § 881.

For the reasons set forth herein we vacate the order of the trial court and remand this case to the superior court for the entry of an order denying the defendants' motions for return of seized property.

Vacated and remanded.

Judges McGEE and BRYANT concur.

STATE OF NORTH CAROLINA v. ANTHONY DEWAYNE McCONICO

No. COA01-1562

(Filed 5 November 2002)

1. Evidence— hearsay—prior crimes or bad acts—forcible robbery—credibility

The trial court did not err in a robbery with a dangerous weapon case by allowing the State to question under N.C.G.S. § 8C-1, Rule 806 a defense witness on cross-examination as to defendant's prior conviction for forcible robbery after the witness stated that defendant said he was "going to the studio" to assist in establishing an alibi for defendant on the evening of the pertinent crime, because: (1) once defendant's statement was admitted into evidence through the testimony of the witness, the State was allowed to attack defendant's credibility the same as if defendant had testified in court; and (2) N.C.G.S. § 8C-1, Rule 609(a) states that evidence of this type shall be admitted to attack the credibility of a witness, and no balancing is required prior to admission of this evidence for impeachment purposes when the conviction is less than ten years old.

2. Robbery— dangerous weapon—motion to dismiss—sufficiency of evidence

The trial court did not err by denying defendant's motion to dismiss the charges of robbery with a dangerous weapon, because the State presented substantial evidence: (1) that defendant was the man who unlawfully took the victims' personal property; (2) that a dangerous weapon was used in the robbery and that the lives of the victims were threatened; and (3) of the remaining elements of robbery with a dangerous weapon.

3. Sentencing— presumptive range—finding of mitigating factors not required

The trial court did not err in a robbery with a dangerous weapon case by failing to find any mitigating factors during sentencing because the court did not depart from the presumptive range when it sentenced defendant.

Appeal by defendant from judgments entered 27 April 2001 by Judge D. Jack Hooks, Jr. in Cumberland County Superior Court. Heard in the Court of Appeals 18 September 2002.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Victoria L. Voight, for the State.

A. Michelle FormyDuval for defendant-appellant.

HUNTER, Judge.

Anthony Dewayne McConico ("defendant") appeals from conviction and sentencing on two counts of robbery with a dangerous weapon, felonies under Section 14-87 of the North Carolina General Statutes. For the reasons stated herein, we conclude the trial court did not err.

The State's evidence tended to show that two individuals were robbed at gunpoint by the same person on 1 and 2 August of 2000. On the night of 1 August 2000, Manuel Ventura ("Ventura") was at a car wash when he was approached by a man with a gun. Ventura described the robber as dark-skinned, approximately 6'1" tall, slim, and approximately 150 pounds; he was wearing a red T-shirt and dark pants. The robber pointed the gun at Ventura and ordered him to a less visible location where he took Ventura's wallet and money, totaling approximately $300.00. Ventura's new Nokia cell phone was also stolen. Thereafter, Ventura drove to the police station to report the incident, speaking with Officers Christine Thomas and Randal Scott Bartay ("Officer Bartay").

In the early morning hours of 2 August 2000, Carlos Falcon ("Falcon") was on a gas station pay phone, when a man pulled up next to him in a dirty beige, older model car with a dealer license plate. The man exited the car and put a gun to the back of Falcon's neck before Falcon could get a good look at his face. However, Falcon did notice that the robber was approximately six feet tall, slim, and wearing a red T-shirt and dark jeans.

Falcon was forced to walk to the edge of a nearby wooded area and get down on his hands and knees. Once on the ground, Falcon was told to empty his pockets, producing $15.00. Falcon and the robber then returned to Falcon's car, and Falcon retrieved his wallet from the console. As they walked back towards the woods again, Falcon turned and attempted to grab the gun. Falcon missed the gun, but he got away and ran to the street, diving into a car that had stopped in the middle of the street. Coincidently, the driver of the car was Officer Bartay.

Officer Bartay proceeded to follow the robber's car. He was later joined by several marked police cars. The robber finally stopped his car in a field, jumped a fence, and fled through the woods. However, before he got away, Officer Bartay was able to discern that the man was a black male, approximately 6'1" tall, with a slender build; he was wearing a red T-shirt and dark pants.

A search was conducted of the car the robber left behind. During the search, a small caliber bullet and a Nokia cell phone were found. It was later determined, by matching serial numbers, that the cell phone was the one taken from Ventura's car earlier that evening. The robber's car was also dusted for fingerprints and, of the identifiable prints, all but one set matched defendant's prints. At approximately 6:30 a.m. on 2 August 2000, Annaliese Valentien ("Valentien") reported her car stolen, the same car the robber had been driving. Valentien had last seen her car the night before, after her boyfriend had dropped the car off at her home. Valentien described her boyfriend, defendant, as approximately 6'1" tall, with a slim build. She had last seen him wearing a red T-shirt and jeans.

On 4 August 2000, Ventura was shown a picture line-up of men matching the description he had given the officers on 1 August 2000. From those pictures, Ventura identified defendant as the man who robbed him.

Several witnesses testified on defendant's behalf at trial, all of whom supplied him with an alibi during the time of the robberies. One such witness, Valentien, testified that defendant had dropped off her car at about 8:00 p.m. on 1 August 2000, and he told her that he was "going to the studio." Defendant, a twenty-six year old rapper, frequently rapped at a studio located at another performer's house. She testified that defendant phoned her from the studio some time that night. Upon questioning by the State during cross-examination,

Valentien testified that defendant had previously been convicted of forcible robbery.

On 27 April 2001, a jury found defendant guilty of two counts of robbery with a dangerous weapon. He was sentenced, within the presumptive range, to 103-133 months for each conviction, to be served consecutively. Defendant appeals.

Defendant presents three assignments of error on appeal contending the errors were violations of his federal and state constitutional rights. However, defendant makes no arguments supporting the assertion that his constitutional rights were violated. Therefore, we shall only address defendant's substantive arguments.

I.

[1] By defendant's first assignment of error, he argues the trial court committed reversible error by allowing the State to question a defense witness on cross-examination as to defendant's prior conviction for forcible robbery pursuant to Rule 806 of the North Carolina Rules of Evidence. We disagree.

Rule 806 provides:

> When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

N.C. Gen. Stat. § 8C-1, Rule 806 (2001). Essentially, "this rule treats the out-of-court declarant the same as a live witness for purposes of impeachment." *State v. Small*, 131 N.C. App. 488, 492, 508 S.E.2d 799, 802 (1998).

Defendant argues that evidence of his prior conviction for forcible robbery was improperly admitted under Rule 806 because (1) the statement upon which the State relied to use Rule 806 was not hearsay, (2) the State's questioning of a defense witness as to defendant's prior conviction was not consistent with the Rules of Evidence, and (3) evidence of defendant's prior conviction was inadmissible

under Rule 403 because the prejudicial effect of the prior conviction heavily outweighed its probative value.

Defendant first argues that the statement upon which the State relied to use Rule 806 was not hearsay. The statement at issue was elicited by defense counsel during direct examination of Valentien. Valentien testified that defendant returned from work in her car around 8:00 p.m. on 1 August 2000. She was then asked, "[w]hen he brought it home, what did he do then?" Valentien testified, "[h]e told me he was going to the studio." Defendant contends that "going to the studio" is not hearsay.

Rule 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2001). During the trial, Valentien testified during direct examination, without objection, that defendant stated he was "going to the studio." This statement was followed by defense counsel asking questions which elicited further testimony that clarified and cultivated the statement's meaning. Valentien's testimony assisted in establishing an alibi for defendant that evening, and therefore, was hearsay because it was offered for the truth of the matter asserted.

Next, defendant argues that even if the statement was hearsay, the State violated Rule 806 by attacking defendant's credibility in a manner inconsistent with the Rules of Evidence. Specifically, defendant contends that since Rule 609(a) requires that evidence of a witness' prior conviction be elicited from the witness or established by public record during cross-examination or thereafter, evidence of his prior conviction could not be elicited from Valentien—only from defendant. *See* N.C. Gen. Stat. § 8C-1, Rule 609(a) (2001). However, pursuant to Rule 806, once defendant's statement was admitted into evidence through the testimony of Valentien, the State was allowed to attack defendant's credibility the same as if defendant had testified in court. Thus, testimony of defendant's prior conviction was not inconsistent with Rule 609(a) because it was properly elicited from Valentien, the witness who took the place of defendant offering live testimony.

Defendant further argues that evidence of his prior conviction for forcible robbery was inadmissible because, under Rule 403's balancing test, the prejudicial effect of his prior conviction far exceeded its probative value. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (2001).

Nevertheless, Rule 609(a) states that evidence of this type *shall* be admitted to attack the credibility of a witness. N.C. Gen. Stat. § 8C-1, Rule 609(a). Under Rule 609, when the conviction is less than ten years old, no balancing is required prior to admission of it as evidence for impeachment purposes. *See id.* Although the record and transcript do not indicate when defendant's conviction occurred, defendant, a twenty-six year old man, does not argue that this conviction was more than ten years old.

Accordingly, evidence of the defendant's prior conviction for forcible robbery was admissible to attack his credibility as a hearsay declarant.

II.

[2] By defendant's second assignment of error, he argues the trial court erred in denying his motion to dismiss for insufficient evidence. We disagree.

In considering a motion to dismiss, the trial court must consider the evidence in the light most favorable to the State, drawing every reasonable inference in the State's favor. *State v. Earnhardt*, 307 N.C. 62, 67, 296 S.E.2d 649, 652-53 (1982). To deny a motion to dismiss, there must be "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." *Id.* at 65-66, 296 S.E.2d at 651. Substantial evidence is that which a reasonable mind would consider adequate to support a conclusion. *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). Furthermore, substantial evidence can be provided by direct and circumstantial evidence. *See Earnhardt*, 307 N.C. at 68, 296 S.E.2d at 653.

In the case *sub judice*, the State presented substantial evidence to support each element of robbery with a dangerous weapon to overcome defendant's motion to dismiss. Robbery with a dangerous weapon is "(1) an unlawful taking or an attempt to take personal property from the person or in the presence of another, (2) by use or threatened use of a firearm or other dangerous weapon, (3) whereby the life of a person is endangered or threatened." *State v. Call*, 349 N.C. 382, 417, 508 S.E.2d 496, 518 (1998), *appeal after remand*, 353 N.C. 400, 545 S.E.2d 190, *cert. denied*, — U.S. —, 151 L. Ed. 2d 548 (2001).

In establishing the first element, the State presented substantial evidence that defendant was the man who unlawfully took the vic-

tims' personal property. The victims, Ventura and Falcon, both provided nearly identical descriptions of the robber's general appearance—descriptions that matched defendant's appearance. Ventura even positively identified defendant from a picture line-up as the person who robbed him the night of 1 August 2000. Ventura also testified that his new cell phone was stolen, which was later discovered by Officer Bartay in the car driven by the man who robbed Falcon. The car contained fingerprints that matched defendant's prints. Thus, given the direct and circumstantial evidence offered at trial, there was substantial evidence to support this element of robbery with a dangerous weapon.

Additionally, there was substantial evidence offered establishing that a dangerous weapon was used in the robbery and that the lives of the victims were threatened. Ventura and Falcon both testified that defendant placed a gun to the back of their heads. Although they both saw the gun, neither could specify the type of gun used by defendant. The gun was never found during the investigation of the robberies. Nevertheless, in situations where evidence is presented that a firearm was used during the commission of a robbery, and there is no evidence that the firearm was incapable of endangering or threatening the victim's life, the jury may infer that the victim's life was threatened or endangered. *State v. Hewett*, 87 N.C. App. 423, 424-25, 361 S.E.2d 104, 105 (1987). Since the trial court is to make all reasonable inferences in favor of the State when considering a defendant's motion to dismiss, that would include inferring that the gun used by defendant was a dangerous weapon capable of endangering the lives of Ventura and Falcon. Applying such an inference, the State presented substantial evidence of the remaining elements of robbery with a dangerous weapon.

Thus, the trial court did not err in denying defendant's motion to dismiss for insufficient evidence.

III.

[3] By his final assignment of error, defendant argues the trial court erred by failing to find any mitigating factors during his sentencing. However, when the court decides to stay within the presumptive range of sentencing, it is not required to make findings of aggravating or mitigating factors. *State v. Campbell*, 133 N.C. App. 531, 542, 515 S.E.2d 732, 739 (1999). The court did not depart from the presumptive range when it sentenced defendant; therefore, it was not required to make a finding of any mitigating factors.

For the foregoing reasons, we conclude that defendant's conviction and sentencing on two counts of robbery with a dangerous weapon should be upheld.

No error.

Judges WALKER and McGEE concur.

JERRY T. WHITMIRE, JAMES F. MILLER, III, AND MARK SEARCY, FOR THEMSELVES AND ON BEHALF OF ALL OTHER TAXPAYERS OF THE STATE OF NORTH CAROLINA SIMILARLY SITUATED, AND TRUDI WALEND, A DULY ELECTED REPRESENTATIVE TO THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, PLAINTIFFS v. ROY A. COOPER, ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA; JOSEPH M. HESTER, JR., CAROLINE B. ANSBACHER, JOHN DEFOREST COSTLOW, KAREN CRAGNOLIN, ALLAN HOLT GWYN, JOHN CARTER HOGAN, ALLEN MAYNARD HARDISON, WILLIAM E. HOLLAND, JR., ROBERT DARE HOWARD, ELIZABETH JOHNS, LELAND McKINLEY SIMMONS, C. LEROY SMITH, CHARLES R. WAKILD, CLAUDETTE WESTON, AND AUGUSTUS DREWRY WILLIS, III, INDIVIDUALLY AND AS TRUSTEES OF THE NORTH CAROLINA CLEAN WATER MANAGEMENT TRUST FUND; BILL HOLMAN; THE STATE OF NORTH CAROLINA; THE NORTH CAROLINA DEPARTMENT OF ADMINISTRATION; AND THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DEFENDANTS

No. COA01-1566

(Filed 5 November 2002)

1. Collateral Estoppel and Res Judicata— collateral estoppel—disposal of motion to dismiss—not a final judgment on merits

The trial court's order denying plaintiff landowners' motion to dismiss in the condemnation action did not serve as collateral estoppel in an action by taxpayers alleging that funds from the Clean Water Trust Management Trust Fund were unlawfully used to acquire a tract of land by condemnation because the order entered by the trial court in the condemnation action merely disposed of the landowners' motion to dismiss, and thus, its conclusion that the funds used for the condemnation action were properly authorized by statute and by CWMTF Trustees in the lawful exercise of their duties is not a final judgment on the merits.

2. Jurisdiction— in rem—Princess Lida doctrine

The superior court's in rem jurisdiction over the pertinent tract of land divested the trial court of jurisdiction to hear the

case, because: (1) the Princess Lida doctrine requires a court to abstain from exercising jurisdiction if the relief sought would require the court to control a particular property or res over which another court already has jurisdiction; and (2) as the superior court residing over the condemnation action was the first court to exercise in rem jurisdiction and the action has not been concluded thus far, the trial court could not exercise jurisdiction over plaintiff taxpayers' action.

3. Jurisdiction— subject matter—taxpayers—lack of standing

The trial court did not err in an action challenging defendants' acquisition via condemnation of a tract of land by dismissing plaintiff taxpayers' complaint with prejudice based on lack of subject matter jurisdiction due to plaintiffs' lack of standing, because: (1) N.C.G.S. § 143-32, which assigns the Attorney General as the proper authority to sue for the recovery of wrongfully expended State funds, provides the explicit and exclusive remedy for the recovery of damages alleged to have occurred as a result of the alleged misuse of State property; and (2) although plaintiffs argue they have complied with the prerequisites to standing by making a demand on the Attorney General that was refused, there are no allegations in the complaint that the Attorney General's refusal to act was wrongful.

Appeal by plaintiffs from order dated 26 October 2001 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 8 October 2002.

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

Attorney General Roy Cooper, by Senior Deputy Attorney General James C. Gulick and Special Deputy Attorney General John F. Maddrey for defendant appellees.

GREENE, Judge.

Plaintiffs appeal an order dated 26 October 2001 dismissing their complaint against the North Carolina Attorney General, the trustees of the North Carolina Clean Water Management Trust Fund (CWMTF), the State of North Carolina, the North Carolina Department of Administration, and the North Carolina Department of Environment and Natural Resources (NCDENR) (collectively Defendants).

On 24 September 2001, Plaintiffs, as taxpayers and citizens of Transylvania and Henderson County, filed their complaint in the Wake County Superior Court (the trial court) alleging Defendants' acquisition via condemnation of a tract of land (the Sterling Tract) lacked statutory authority and constituted an unauthorized expenditure of monies appropriated to the CWMTF. The Sterling Tract is located in Transylvania and Henderson Counties and, upon successful acquisition, was to be included in the Dupont State Forest. In their prayer for relief, Plaintiffs requested the trial court to: (1) declare the CWMTF expenditure to be illegal; (2) order the State, the North Carolina Department of Administration, and NCDENR to divest themselves of the ownership of the Sterling Tract and to recover the illegally expended funds; and (3) allow Plaintiffs to recover on behalf of the State from the CWMTF trustees in their individual and official capacities the sum of $12,500,000.00 for the wrongful expenditure or, in the alternative, by *mandamus* compel the North Carolina Attorney General to recover the same.

Attached to Plaintiffs' complaint was a letter (the request letter) addressed to the Attorney General together with the Attorney General's response thereto. The request letter, sent by Plaintiffs' counsel, raised the issue of the unlawful expenditure of State funds and asked the Attorney General to "proceed to recover these funds and restore them to the [CWMTF]." In his response, the Attorney General stated the following:

> As you are likely aware, the Attorney General provides legal counsel for the [CWMTF] Board of Trustees and the [NCDENR], as well as the Department of Administration and the Council of State. In this capacity we reviewed all legal issues relevant to the acquisition and provided appropriate advice to the involved state entities prior to [the] filing of the condemnation action. We do not believe that any improper diversion of funds has occurred in connection with this litigation.

On 1 October 2001, Defendants filed a motion to dismiss the complaint pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and (6). Some of the grounds for dismissal alleged by Defendants were: (1) Plaintiffs, as mere taxpayers, lacked standing to bring this action; (2) jurisdiction over the subject matter lay in the Henderson County Superior Court (the superior court) presiding over the pending condemnation action with respect to the Sterling Tract; (3) sovereign immunity barred suit against the State and its agencies in this case; (4) the state officials named in the complaint enjoyed qualified immu-

nity; and (5) Plaintiffs failed to state a claim for which relief could be granted. In support of the motion to dismiss, Defendants, on 1 October 2001, filed with the trial court a certified copy of an order entered by the superior court in the condemnation action in Henderson County. In this order, the superior court denied a motion to dismiss by the landowners affected by the condemnation of the Sterling Tract.[1] The superior court determined the landowners "ha[d] legal standing to challenge the statutory authority, procedure, and funding used by the State" but concluded in pertinent part that "the funds used for the condemnation action were properly authorized by statute and by CWMTF Trustees in the lawful exercise of their duties."[2]

In a motion to join additional parties dated 12 October 2001, Plaintiffs requested the trial court to allow the joinder of the secretary of the Department of Administration, the individual members of the Council of State, and the governor of the State of North Carolina. In an order dated 26 October 2001, the trial court, having reviewed the parties' pleadings and the documents filed in support thereof, granted Defendants' motion to dismiss pursuant to Rules 12(b)(1) and (6). The trial court further noted that "joinder of additional parties would not change or alter the legal effect of [its] ruling" and therefore denied Plaintiffs' motion to join additional parties. All claims set forth in Plaintiffs' complaint were dismissed with prejudice.

The issues are whether: (I) the superior court's order denying the landowners' motion to dismiss in the condemnation action serves as collateral estoppel in this case; (II) the superior court's *in rem* jurisdiction over the Sterling Tract divested the trial court of jurisdiction to hear this case; and (III) Plaintiffs have standing to bring this action.

I

Collateral Estoppel

[1] Collateral estoppel has traditionally been defined as a doctrine whereby "a final judgment on the merits prevents relitigation of issues actually litigated and necessary to the outcome of the prior action in a later suit involving a different cause of action between the parties or their privies." *Thomas M. McInnis & Assoc., Inc. v. Hall,*

1. The landowners raised several arguments in their motion to dismiss, some of which were similar to those argued by Plaintiffs in this case.

2. The superior court also concluded there was proper statutory authority for the condemnation action and proper condemnation procedures had been followed.

318 N.C. 421, 428, 349 S.E.2d 552, 557 (1986). The doctrine has since been expanded to permit the use of non-mutual collateral estoppel; however, the requirement that there must have been a final judgment on the merits before the doctrine may be applied remains. *See Rymer v. Estate of Sorrells*, 127 N.C. App. 266, 268-69, 488 S.E.2d 838, 840 (1997). The order entered by the superior court in the condemnation action merely disposed of the landowners' motion to dismiss. Thus, its conclusion that "the funds used for the condemnation action were properly authorized by statute and by CWMTF Trustees in the lawful exercise of their duties" is not a final judgment on the merits, and collateral estoppel is not applicable in this case.[3]

II

In Rem Jurisdiction

[2] It has been held that:

> if . . . two suits are *in rem*, or *quasi in rem*, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other.

Princess Lida v. Thompson, 305 U.S. 456, 466, 83 L. Ed. 285, 291 (1939). This holding, which has become known as the *Princess Lida* doctrine, requires a court to abstain from exercising jurisdiction if "the relief sought would require the court to control a particular property or res over which another court already has jurisdiction." *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 231 (4th Cir. 2000). Although the doctrine is typically applied to concurrent actions in federal and state court, the principle is equally applicable to concurrent *in rem* proceedings within a state.

"Condemnation under the power of eminent domain is a proceeding *in rem*—against the property." *Redevelopment Comm'n v. Hagins*, 258 N.C. 220, 225, 128 S.E.2d 391, 395 (1962). A taxpayers' action is also considered an *in rem* proceeding. 74 Am. Jur. 2d *Taxpayers' Actions* § 4 (2001); *Home Const. Co. v. Duncan*, 24 Ky. L. Rptr. 94, 68 S.W. 15 (1902). In this case, there are thus two *in rem* proceedings involving the same *res*: the Sterling Tract. As the superior court residing over the condemnation action was the first court to

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3. While, after the denial of their motion to dismiss, the landowners chose to apply for disbursement of the deposited funds in the condemnation action, this does not change the nature of the superior court's order.

exercise *in rem* jurisdiction and the action has not been concluded thus far,[4] the trial court could not exercise jurisdiction over Plaintiffs' taxpayers' action. Accordingly, the trial court properly dismissed the action. Dismissals pursuant to the *Princess Lida* doctrine, however, must be without prejudice. *See U.S. v. $490,920 in U.S. Currency*, 911 F. Supp. 720, 732 (S.D.N.Y. 1996); *Silberman v. Worden*, 1988 WL 96537 (N.D.Ill. 1988). In this case, the trial court dismissed the complaint with prejudice. We must therefore determine whether there exist other grounds warranting the trial court's dismissal of Plaintiffs' action with prejudice.

III

Standing

[3] In their complaint, Plaintiffs sought to recover on behalf of the State, by sale of the Sterling Tract, the expended CWMTF funds or, in the alternative, to compel the North Carolina Attorney General by *mandamus* to recover the same.

In *Flaherty v. Hunt*, this Court held that N.C. Gen. Stat. § 143-32, which assigns the Attorney General as the proper authority to sue for the recovery of wrongfully expended State funds, "provides the explicit and exclusive remedy for the recovery of damages alleged to have occurred as a result of the alleged misuse of State [property]." *Flaherty v. Hunt*, 82 N.C. App. 112, 116-17, 345 S.E.2d 426, 429 (1986); *see* N.C.G.S. § 143-32 (2001). This Court therefore concluded the taxpayer plaintiffs lacked standing to bring their damages action. This Court, however, noted that it was not addressing whether the plaintiffs had any remedies "with respect to seeking or obtaining action by the Attorney General concerning the matters asserted by [the] plaintiffs in their complaint." *Flaherty*, 82 N.C. App. at 117, 345 S.E.2d at 429.

In this case, Plaintiffs by themselves thus lack standing,[5] leaving this Court to determine whether they possess standing on behalf of the State to bring this action. Plaintiffs argue in their brief to this Court that if taxpayers are not allowed to sue on behalf of the

4. We take judicial notice of the fact that the condemnation action has not been fully resolved at this time. *State v. Thompson*, 349 N.C. 483, 497, 508 S.E.2d 277, 286 (1998) ("[t]his Court may take judicial notice of the public records of other courts within the state judicial system").

5. "Standing concerns the trial court's subject matter jurisdiction and is therefore properly challenged by a Rule 12(b)(1) motion to dismiss." *Fuller v. Easley*, 145 N.C. App. 391, 395, 553 S.E.2d 43, 46 (2001).

State, the Attorney General, having previously refused to act under section 143-32, will be "beyond the reach of the Courts" and taxpayers will be without a remedy if the money has already been expended.[6] We agree.

This Court has held that a plaintiff may have "standing to bring a taxpayer action, not as an individual taxpayer, but on behalf of a public agency or political subdivision," *Fuller*, 145 N.C. App. at 395, 553 S.E.2d at 46, if "the proper authorities have . . . wrongfully neglected or refused to act," *Branch v. Bd. of Educ.*, 233 N.C. 623, 625, 65 S.E.2d 124, 126 (1951). The taxpayer must therefore allege that: (1) he is a taxpayer of the public agency or political subdivision, *Fuller*, 145 N.C. App. at 395, 553 S.E.2d at 47; (2) there has been both a demand on and refusal by the proper authorities to institute proceedings, *id.*; and (3) the refusal to act was wrongful, *Branch*, 233 N.C. at 625, 65 S.E.2d at 126.

In this case, Plaintiffs argue they have complied with these prerequisites to standing as they made a demand on the Attorney General that was refused. There is, however, no allegation in the complaint that the Attorney General's refusal to act was wrongful. Indeed, the response to the request letter explained that upon review of "all legal issues relevant to the acquisition" of the Sterling Tract, the Attorney General did "not believe that any improper diversion of funds ha[d] occurred." This response in no way suggests that the Attorney General was derelict in his duties, and without such an allegation, Plaintiffs do not have standing to sue on behalf of the State and to compel the Attorney General to act. Accordingly, because Plaintiffs lacked standing to bring this action, the trial court was without subject matter jurisdiction to hear this case and thus properly dismissed the complaint with prejudice.[7]

Affirmed.

Judges WYNN and McGEE concur.

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6. If the funds have not yet been expended, taxpayers may bring suit to enjoin the future expenditure. *See Flaherty*, 82 N.C. App. at 114, 345 S.E.2d at 428.

7. Plaintiffs also argue the trial court erred in denying their motion to join additional parties. As this issue is not determinative to our holding, we do not address it.

IN THE MATTER OF THE APPEAL OF THE SOCIETY FOR THE PRESERVATION OF HISTORIC OAKWOOD AND MOZELLE JONES PROPERTY PIN # 1713084727 & 1713081714 AND RALEIGH RESCUE MISSION, INC., AND COGGINS CONSTRUCTION COMPANY, PETITIONERS v. BOARD OF ADJUSTMENT OF THE CITY OF RALEIGH, THE SOCIETY FOR THE PRESERVATION OF HISTORIC OAKWOOD AND MOZELLE JONES, RESPONDENTS

No. COA01-1274

(Filed 5 November 2002)

1. Administrative Law— standard of judicial review—jurisdiction issue

The trial court incorrectly applied the whole record standard of review where petitioners Raleigh Rescue and Coggins Construction had contended in their petition for certiorari to the superior court that the Board of Adjustment lacked jurisdiction. Jurisdiction is a question of law, and the correct standard is de novo review.

2. Zoning— appeal from official decision to board of adjustment—persons aggrieved

The trial court erred by determining that a board of adjustment had jurisdiction where a revised site plan was submitted to the planning committee; a deputy city attorney asked the zoning supervisor for his opinion, which was that the proposed plan met the code definition but that the use might not be permitted by the code; the planning committee recommended approval; respondents Oakwood and Jones (who opposed the plan) appealed to the board for an interpretation, citing the zoning supervisor's memo; the city council approved the revised site plan; the board ruled that the nature of the use is determinative rather than the classification and that the plan should not be allowed; and petitioners Raleigh Rescue and Coggins Construction appealed to the superior court, which affirmed the board. The zoning supervisor issued no order, decision, or determination and respondents cannot claim to be persons aggrieved who have the right of appeal to the board under N.C.G.S. § 160A-388(b).

Appeal by petitioners from an order entered 22 May 2001 by Judge David Q. LaBarre in Wake County Superior Court. Heard in the Court of Appeals 15 August 2002.

Thomas C. Worth and George B. Currin for petitioners-appellants.

Satisky & Silverstein, by John Silverstein for respondent-appellee Raleigh Board of Adjustment; Poyner & Spruill L.L.P, by Robin Tatum Morris and Kacey Coley Sewell for respondents-appellees Society for the Preservation of Historic Oakwood and Mozelle Jones.

THOMAS, Judge.

Raleigh Rescue Mission, Inc. and Coggins Construction Company, petitioners, appeal the trial court's order affirming a decision of respondent Board of Adjustment of the City of Raleigh (Board).

The Board determined that the facility which petitioners plan to construct fails to meet multi-family housing requirements because of its proposed use. In actuality, according to the Board, the facility is a form of "transitional housing." Transitional housing is not permitted in a district zoned Shopping Center, and Office and Institution-II under the Raleigh City Code. Multi-family housing, however, is permitted.

Petitioners' primary contention is that the Board lacked jurisdiction to even hear the matter. For the reasons herein, we agree and reverse the order of the trial court.

The Rescue Mission is a charitable organization providing food and shelter to the homeless and others in need. It proposes here to build a residential facility for women and children on a 7.72 acre site at the corner of New Bern Avenue and Swain Street in Raleigh, North Carolina. The area is locally known as "Historic Oakwood."

Respondents Mozelle Jones, a neighboring property owner, and the Society for the Preservation of Historic Oakwood (Oakwood) oppose the development. When the Rescue Mission initially sought site plan approval for the facility as a "hotel," Jones and Oakwood appealed to the Board for an interpretation of that term based on the Raleigh City Code. Following a hearing on 14 December 1998, the Board concluded that the Rescue Mission's proposal did not meet the definition of a hotel. The decision was not appealed. Instead, the Rescue Mission revised its site plan and re-characterized the facility as a "multi-family dwelling." In July of 1999, the revision was submitted to the Comprehensive Planning Committee of the Raleigh City Council.

Later, in response to an inquiry from Deputy City Attorney Ira Botvinick, Zoning Inspector Supervisor Larry Strickland issued a memorandum of his opinion of the contentions in the parties' briefs. Strickland stated that while the multi-family *building* proposed by petitioners is permitted by the zoning code, the proposed *use* "may not be."

On 14 September 1999, the Comprehensive Planning Committee, a subcommittee of the Raleigh City Council, reviewed the plan and determined that the facility was a permissible multi-family dwelling. It referred the matter to the City Council with a recommendation for approval. Oakwood and Jones, however, again appealed to the Board for an interpretation, citing Strickland's memorandum and the Comprehensive Planning Committee's recommendation as bases for the appeal. On 21 September 1999, the City Council approved the revised site plan while noting the pending appeal.

The hearing on the appeal came before the Board on 13 December 1999. The Rescue Mission did not participate in the hearing other than for the limited purpose of contesting the Board's authority and jurisdiction to proceed.

The Board ruled that the proposed facility can not be properly classified "multi-family housing," which is permitted in the zoning district. Rather, it would be a type of "transitional housing/emergency shelter," which is not allowed. In reaching its decision, the Board concluded, "Although the zoning classifications applicable to the subject property would permit the development of multi-family housing on the site, it is the nature of the use that determines whether it can be located in the zoning district, and not the nature of the zoning classification that determines what the proposed use is called."

Petitioners appealed to Wake County Superior Court. The trial court concluded that the Board "had jurisdiction to review the order, decision, or determination of Zoning Inspections Supervisor, Larry Strickland," and affirmed the decision of the Board. Petitioners appeal.

[1] On review of a trial court's order regarding a board's decision, we examine for error of law by determining whether the trial court: (1) exercised the proper scope of review; and (2) correctly applied this scope of review. *Tucker v. Mecklenburg County Zoning Bd. of Adjustment*, 148 N.C. App. 52, 55, 557 S.E.2d 631, 634 (2001), *disc. review allowed*, 355 N.C. 758, 566 S.E.2d 483 (2002). Here, petitioners

had contended in their petition for writ of certiorari to Wake County Superior Court that the Board lacked jurisdiction to hear the matter. The trial court stated that it applied a whole record review and ruled the Board had jurisdiction and the Board's decision contained no errors of law. Because the issue of whether the Board had jurisdiction is a question of law, the trial court applied the incorrect standard of review. The appropriate review is *de novo*. *See id.* (if petitioner argues the board's decision was based on error of law the trial court applies *de novo* review). For the same reason, this Court applies *de novo* review. *Id.* (after determining the actual nature of the contended error the appellate court then proceeds with the proper standard of review). *De novo* review requires us to consider the question anew, as if not previously considered or decided. *Id.*

[2] By their first assignment of error, petitioners claim the trial court erred in concluding that the Board had jurisdiction to review Strickland's memorandum, because it did not constitute an "order . . . decision, or determination," as required by N.C. Gen. Stat. § 160A-388(b) and the Code.

Section 160A-388(b) of the North Carolina General Statutes provides:

> The board of adjustment shall hear and decide appeals from and review any *order, requirement, decision, or determination made by an administrative official* charged with the enforcement of any ordinance adopted pursuant to this Part. An appeal may be taken by any person aggrieved or by an officer, department, board, or bureau of the city.

N.C. Gen. Stat. § 160A-388(b) (2001) (emphasis added).

Under the Raleigh Zoning Code, the Board "may exercise any and all powers prescribed by general law." Raleigh Zoning Code § 10-1061. It likewise provides that among the Board's duties is hearing "[a]ppeals from alleged errors in orders, decisions, or determinations of administrative officials charged with the enforcement *or requests by such officials for interpretations of Chapter 2 of this Part.*" Raleigh Zoning Code § 10-1061(c)(1) (emphasis added).

Additionally, section 10-2142(a) of the Code states:

> Any *person* aggrieved or any agency or *officer*, department, board, including the governing board of the City of Raleigh affected by any decision, order, requirement, or determination

> relating to the interpretation, compliance, or application of chapters 1 and 2 of this Part and made by an administrative official charged with the enforcement of these chapters *may* file an appeal to the Board of Adjustment.

Raleigh City Code § 10-2142(a) (emphasis in original). Since the Board had no authority to hear requests by Jones and Oakwood for interpretations of the Code, *see* Raleigh Zoning Code § 10-1061(c)(1), we must determine whether Jones and Oakwood appealed from an "order . . . decision, or determination" of an administrative official. N.C. Gen. Stat. § 160A-388(b); *see also* Raleigh City Code § 10-2142(a).

Both parties agree that Zoning Inspector Strickland is an "administrative official." Petitioner, however, disputes Oakwood and Jones's contention that Strickland issued an "order . . . decision, or determination" upon which they could base an appeal. We agree with petitioners that Strickland issued no appealable decision.

In response to questions by Botvinick regarding whether the proposed facility was permitted under the Code, Strickland reviewed the written arguments submitted by both parties to the Comprehensive Planning Committee. He then issued the following memorandum to Botvinick and Planning Director George Chapman:

> As we briefly discussed yesterday, I have read through the two "briefs" submitted to the [Comprehensive Planning] [C]ommittee by Mr. Worth and Ms. Morris. *Without question, the new building proposed meets the code definition of multi-family found in 10-2002.*
>
> Mr. Worth states on page 2 that signed leases will be required which will provide for monthly payment by cash based on means to pay, services performed for the mission, grants and scholarships. This appears to be vague. What means to pay? Is there a minimum amount? As I recall Reverend Foster's testimony, everyone that stays at the mission, must perform services for the mission so is this really payment? Most apartments have a minimum lease period of 3, 6, or 12 months. It appears that the mission does not.
>
> The facts presented by Ms. Morris with respect to the Board of Adjustment case should not be over looked. Much of the testimony at the meeting where the Board ruled that the proposed

> facility as represented by the testimony provided, including the approved site plan does not meet the qualifications as a hotel/motel as intended by the code, was based on the missions over all purpose. Has that changed to the point that the Board's decision is not relevant now?
>
> Clearly the existing code does not specifically permit or necessarily prohibit a facility like the Rescue Mission. *The proposed multi-family building proposed by the mission is permitted. The overall operation of the mission on this site*, based on the implication of the Board of Adjustment case, *may not be.*

(Emphasis added).

The legislature has not defined the words "order, decision . . . or determination." N.C. Gen. Stat. § 160A-388(b). We therefore accord the words their plain meaning. *See Grant Const. Co. v. McRae*, 146 N.C. App. 370, 376, 553 S.E.2d 89, 93 (2001) (where statute does not define a word, courts must accord the word plain meaning and refrain from judicial construction).

Moreover, section 10-2002 of the Code, "Definitions," states that all words "have their commonly accepted and ordinary meaning" unless specifically defined in the Code. Raleigh City Code § 10-2002. The section lists "an ordinary dictionary" as the primary source for interpreting non-legal terms. *Id.* Finally, "[w]ords and phrases of a statute 'must be construed as a part of the composite whole and accorded only that meaning which other modifying provisions and the clear intent and purpose of the act will permit.' " *Vogel v. Reed Supply Co.*, 277 N.C. 119, 131, 177 S.E.2d 273, 280 (1970) (quoting 7 Strong's N.C. Index 2d, *Statutes* § 5).

The Oxford American Dictionary defines "decision," as "1. the act or process of deciding. 2. a conclusion or resolution reached, esp. as to future action, after consideration. (*have made my decision*) 3. (often foll. by *of*) a. the settlement of a question. b. a formal judgment." *The Oxford American Dictionary* 245 (1999). "Determination" is "the process of deciding, determining, or calculating." It is further defined as "the conclusion of a dispute by the decision of an arbitrator" and "the decision reached." *Id.* at 258. "Order" is defined as "an authoritative command, direction, instruction, etc." *Id.* at 697.

Based on the above definitions, and construing the words as a part of the composite whole, the order, decision, or determination of

the administrative official must have some binding force or effect for there to be a right of appeal under section 160A-388(b). Where the decision has no binding effect, or is not "authoritative" or "a conclusion as to future action," it is merely the view, opinion, or belief of the administrative official. *See Midgette v. Pate*, 94 N.C. App. 498, 502-03, 380 S.E.2d 572, 575 (1989) (under section 160A-388(b), "Once the municipal official has acted, *for example by granting or refusing a permit*, 'any person aggrieved' may appeal to the board of adjustment.") (emphasis added). We do not believe section 160A-388(b) sets forth an appellate process where no legal rights have been affected by the "order, decision . . . or determination" of the administrative official.

Strickland had no decision-making power at the time he issued his memorandum. It was merely advisory in response to a request by Botnovick. The memorandum itself affects no rights.

Strickland's determination that "without question, the new building proposed meets the code definition of multi-family found in 10-2002," while unequivocal, was without binding force. Likewise, Strickland's equivocal statements regarding the proposed use neither constitute decisions or determinations, nor adversely affect Oakwood and Jones. He wrote: "The proposed multi-family building proposed by the mission is permitted. The overall operation of the mission on this site, based on the implication of the [14 December 1998] board of adjustment case, may not be." Strickland issued no order, decision, or determination. Therefore, Oakwood and Jones cannot claim to be "person[s] aggrieved" who have a right of appeal under N.C. Gen. Stat. § 160A-388(b).

Because we hold the trial court erred in determining that the Board had jurisdiction, we need not reach petitioners' remaining jurisdictional arguments.

REVERSED.

Judges MARTIN and TYSON concur.

LEWIS D. DOCKERY AND JAMES L. GUNTER, PLAINTIFF v. PAUL E. HOCUTT AND WIFE, CORA J. HOCUTT, AND LANE WHITAKER AND WIFE, DELOIS C. WHITAKER, DEFENDANTS

No. COA01-1457

(Filed 5 November 2002)

1. Trials— compulsory reference—converted to summary judgment

Any error by the trial court in submitting an adverse possession matter to compulsory reference was cured when the court independently reviewed the evidence presented to the referee, determined that there were no issues of fact, and effectively entered summary judgment on the issue of adverse possession.

2. Adverse Possession— summary judgment—insufficient evidence of open, hostile, exclusive possession

The trial court did not err by granting summary judgment for defendants in an adverse possession action where plaintiff's own testimony establishes irrefutably that he failed to possess the property openly, hostilely and to the exclusion of all others.

Judge GREENE dissenting.

Appeal by plaintiff Lewis D. Dockery from order filed 30 August 2001 by Judge Donald W. Stephens in Superior Court, Wake County. Heard in the Court of Appeals 10 September 2002.

Douglass & Douglass by Thomas G. Douglass, for defendants.

Hatch, Little & Bunn, L.L.P. by Tina L. Frazier, for plaintiff.

WYNN, Judge.

Plaintiff Lewis D. Dockery asserting a right to title of property by adverse possession, appeals from Superior Court Judge Donald W. Stephens' Order of Confirmation presenting one issue: Should the Order of Confirmation be set aside because Judge Stephens improperly compelled this matter to a referee? We hold that the question of whether this matter was properly referred to a referee was rendered harmless by Judge Stephens' Order which independently assessed the evidence and found as a matter of law that plaintiff failed to establish a claim of title by adverse possession.

The underlying facts of this matter tend to show that plaintiff brought an action claiming to have adversely possessed property deeded to his neighbors Paul E. and Cora J. Hocutt, and Lane and Delois C. Whitaker. The claimed property consisted of two parcels of land, .37 acre and .30 acre tracts, but excluded a garden area 35 feet wide and 100 feet long cultivated by the Hocutts and another garden area 35 feet wide and 127 feet long used by another neighbor, James L. Gunter.[1]

Defendants answered claiming rights as record owners of the property and denying plaintiff's claim under rights of adverse possession. By order dated 20 August 1999, Judge Stephens ordered this matter to compulsory reference under N. C. Gen. Stat. § 1A-1, Rule 53(a)(2) (2001) and referred the matter to Referee Robert L. Farmer (former Senior Resident Superior Court Judge for Wake County) to determine all the issues in this action. All parties objected to the compulsory reference.

After conducting a hearing, Referee Farmer reported that attorneys for both parties appeared along with "such witnesses as they elected to produce." The testimony of the witnesses was transcribed and resulted in a 232 page transcript. The referee also received as evidence maps and photographs of the property. Moreover, the attorneys for each side were allowed to question witnesses and present oral arguments to the referee. From that evidence, Referee Farmer concluded that plaintiff failed to prove his claim of adverse possession. Thereafter, plaintiff excepted to the referee's report and requested a jury trial on the matter. In response, Judge Stephens issued an Order Confirming the Referee's report based upon his independent assessment of the evidence presented to the referee. From that Order, plaintiff appeals.

[1] On appeal, plaintiff argues that since his claim of adverse possession did not involve a complicated question of boundary or required a personal view of the premises, Judge Stephens erred by submitting this matter to compulsory reference under N.C. Gen. Stat. § 1A-1, Rule 53(a)(2)(c). We hold that any error in referring this matter to a referee under Rule 53(a)(2)(c), was cured by Judge Stephens' Order of Confirmation which indicates that he independently evaluated the evidence presented by both sides and determined that as a

1. Co-plaintiff James L. Gunter is not a party to this appeal because he settled his claim against defendants and filed a voluntary dismissal of his action.

matter of law, plaintiff had failed to establish a claim of title by adverse possession.

In his order of confirmation, Judge Stephens noted, after carefully reviewing the evidence, that:

> The Court considering the evidence in the light most favorable to the Plaintiffs, could find no material facts that would support a claim for adverse possession of the subject property. The evidence presented is insufficient to raise controverted issues of fact that could support Plaintiffs' claims.

Thus, the trial court, by independently reviewing the evidence, determined that there were no issues of fact and effectively entered summary judgment on the issue of adverse possession.

Our conclusion that Judge Stephens' Order of Confirmation may be read to constitute a summary judgment is supported by well established precedent under which this Court and our Supreme Court have liberally allowed the conversion of Rule 12(b)(6) motions to be considered on appeal under a summary judgment review. *See Pinney v. State Farm Mut. Ins. Co.*, 146 N.C. App. 248, 251, 552 S.E.2d 186, 189 (2001) (treating a 12(b)(6) motion to dismiss as a motion for summary judgment if additional materials are considered); *Piedmont Consultants of Statesville, Inc. v. Baba*, 48 N.C. App. 160, 164, 268 S.E.2d 222, 224-25 (1980) (same); *Smith v. Independent Life Ins. Co.*, 43 N.C. App. 269, 273, 258 S.E.2d 864, 867 (1979) (same); *see also Fauchette v. Zimmerman*, 79 N.C. App. 265, 267-68, 338 S.E.2d 804, 806 (1986) (stating "the constitutional right to trial by jury is not absolute; rather, it is premised upon a preliminary determination by the trial judge that there indeed exist genuine issues of fact and credibility which require submission to the jury" in a discussion explaining why a party was entitled to a trial by jury only if the evidence before the referee was sufficient to raise an issue of fact); *Nantahala Power and Light Co. v. Horton*, 249 N.C. 300, 306, 106 S.E.2d 461, 465 (1959) (stating a party was entitled to trial by jury only if the evidence before the referee was sufficient to raise an issue of fact).

Indeed, in 12(b)(6) proceedings, the parties generally do not present any evidence[2]; yet, on review our appellate courts liberally

2. If in a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. N.C. Gen. Stat. § 1A-1, Rule 12(b) (2001).

allow such dismissals to be reviewed under the summary judgment standard. In stark contrast to 12(b)(6) proceedings, the Order of Confirmation in this case was rendered with the benefit of transcribed testimony of witnesses presented by both parties; evidentiary maps and photographs, and arguments of counsel. Surely, our Courts' sanction of the appellate review of 12(b)(6) motions as summary judgment motions makes it even more compelling that an order supported by the evidence presented in this case could likewise be reviewed as a summary judgment order. Accordingly, we hold that the dispositive issue on appeal is whether the evidence in a light most favorable to the plaintiff precluded summary judgment on his claim of adverse possession.[3]

[2] Based on the record on appeal, we uphold the trial court's order that "plaintiffs have failed to offer any evidence from which a jury could find (1) the existence for 20 years of known and visible lines and boundaries of the disputed property to identify the extent of any possession claimed; and (2) that Plaintiffs' possession was actual, open, hostile, exclusive and continuous for 20 years under known and visible lines and boundaries."

In his testimony before the referee, the plaintiff stated he never intended to prevent any of his neighbors from using the disputed property because they had just as much right to use the property as he did. That testimony alone is sufficient to indicate that the plaintiff's possession of the property was not open, hostile and exclusive. Additionally, viewing the evidence in the light most favorable to the plaintiff, the plaintiff has not presented any evidence from which a jury could determine the existence of known and visible lines and boundaries for twenty years. Plaintiff presented testimony that there were fences behind five of thirteen lots adjacent to the disputed property; and, that behind one of the lots, there was a tree line. However, this evidence would only establish boundary lines to less than half of the land plaintiff claims to adversely possess. Plaintiff also presented a modified 1997 survey to indicate the area he possessed. However, this map is insufficient to show known and visible lines and boundaries for the twenty year period for the boundary must be visible on the ground. *See State v. Brooks*, 275 N.C. 175, 181, 166 S.E.2d 70, 73 (1969).

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3. In their appeal, neither party contests the payment of the referee's fee based on an improper referral by the trial court; accordingly, we do not address that question in this appeal.

In sum, we conclude that plaintiff, by his own testimony, establishes irrefutably that he failed to possess the property openly, hostilely and to the exclusion of all others. We further conclude that viewing the evidence in the light most favorable to the plaintiff, the plaintiff has failed to present sufficient evidence demarcating the extent of his claimed possession for twenty years.

Affirmed.

Judge BIGGS concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

As I believe the trial court erred in ordering a compulsory reference and I disagree with the majority that any potential error was cured by the trial court's order affirming the referee's report, I dissent.

I

Under Rule 53, if the parties do not consent to a reference, the trial court may on its own motion order a reference "[w]here the case involves a complicated question of boundary, or requires a personal view of the premises." N.C.G.S. § 1A-1, Rule 53(a)(2)c. (2001). Accordingly, where "the pleadings show[] a potentially complicated boundary dispute," the trial court is empowered to order a compulsory reference. *Livermon v. Bridgett*, 77 N.C. App. 533, 536, 335 S.E.2d 753, 755 (1985).

In this case, nothing in the pleadings suggests the adverse possession claim requires resolution of a complicated boundary dispute or a personal view of the premises. *See id.* (where one of the parties to an adverse possession claim contended in his pleading that "the boundaries were not as stated in the deeds," thus justifying a compulsory reference). Defendants' answer merely challenged plaintiff's right to the property, not the boundaries thereof. Furthermore, the referee did not personally examine the property, indicating "a personal view of the premises" was not required for the determination of the issues raised by the pleadings. As such, the trial court erred in ordering a compulsory reference.

II

The majority contends because the trial court's order affirming the referee's report effectively constituted an entry of summary judgment for defendants, any error that may have occurred with respect to the compulsory reference was thereby cured.

First, I do not agree the trial court effectively entered summary judgment for defendants. If defendants had filed a summary judgment motion, defendants would have had the burden of showing plaintiff was not able to present substantial evidence of each element of his adverse possession claim. *See Best v. Perry*, 41 N.C. App. 107, 110, 254 S.E.2d 281, 284 (1979). In this case, the trial court did not place that burden on defendants but instead reviewed all the evidence before the referee and determined plaintiff had failed to meet his burden.

Second, assuming the trial court's order was tantamount to summary judgment, it did not serve to cure the prejudicial error resulting from the improper reference. Prior to the order of reference, the record in this case contains only the parties' pleadings and attachments thereto. Thus, had this case not undergone a compulsory reference and assuming defendants had filed the appropriate 12(b)(6) motion to dismiss, the trial court, in ruling on the motion, could only have considered plaintiff's complaint and not the transcript of the hearing before the referee. *See Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987) (upon a 12(b)(6) motion the trial court considers whether the allegations of the complaint, treated as true, are sufficient to state a claim for which relief can be granted); *see also Smith v. Ins. Co.*, 43 N.C. App. 269, 273, 258 S.E.2d 864, 866 (1979) (motion to dismiss converted to motion for summary judgment when matters outside the pleadings are presented to and considered by the trial court). As the complaint was sufficient to state a claim for adverse possession, the trial court would have been obligated to deny the motion, and plaintiff would have received a trial before a jury. It therefore cannot be said the trial court's review of the referee's report served to cure the effects of the erroneous reference.

Finally, again assuming the trial court effectively entered summary judgment, its order must be reversed because the evidence before the referee reveals genuine issues of material fact with respect to each of the elements of adverse possession. *See* N.C.G.S. § 1-40 (2001) (defining adverse possession). Not only did Plaintiff testify he had maintained the property for a period of twenty years and, upon

entry of the property, he had claimed it as against all others,[4] but several of plaintiff's neighbors testified they were aware of plaintiff's continuous use of the property. Accordingly, I would reverse the order of the trial court and remand this case for a jury trial.

JOHN S. GAYNOE, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFF V. FIRST UNION CORPORATION AND FIRST UNION DIRECT BANK, N.A., DEFENDANTS

No. COA01-1171

(Filed 5 November 2002)

1. Banks and Banking— credit cardholder agreement—Georgia law—amendment of APR—not breach of contract

The trial court did not err by granting summary judgment for defendant bank on the breach of contract claim arising out of a cardholder agreement for a credit card account applying Georgia law, because: (1) under Georgia law the construction of a contract is a question of law for the court; (2) plaintiff's claim that defendant breached its cardholder agreement by amending the APR during the annual period rests on an interpretation of the cardholder agreement, and such interpretation of the cardholder agreement was a question of law for the trial court to decide; and (3) the trial court properly interpreted the cardholder agreement and determined that there were no triable issues of fact.

2. Unfair Trade Practices— credit cardholder agreement—motion to dismiss—sufficiency of evidence

The trial court did not err by dismissing plaintiff's unfair and deceptive trade practices claim arising out of a cardholder agreement for a credit card account, because defendant banks acted in accordance with the cardholder agreement and there are no independent grounds for an unfair or deceptive trade practices claim under N.C.G.S. § 75-1.1.

4. While plaintiff testified he would not have prevented his neighbors from using the property when he first bought the adjacent plot, he later clarified that once he had entered the property he claimed it as his alone.

3. Civil Procedure— consideration of summary judgment motion prior to ruling on pending motion for class certification—judicial economy

The trial court did not err by granting summary judgment for defendants, on claims arising out of a cardholder agreement for a credit card account applying Georgia law, prior to ruling on plaintiff's pending motion for class certification because: (1) plaintiff moved for class certification some nineteen months after the action was filed and at a time when all discovery necessary to determine the merits of plaintiff's claim had taken place; and (2) the trial court is not precluded from considering a summary judgment motion prior to ruling on a class certification motion where, as here, the parties had stipulated that both motions could be considered simultaneously and when judicial economy is best served by allowing the trial court discretion in addressing summary judgment prior to class certification.

Appeal by plaintiff from an order entered 28 August 1998 by Judge Marvin K. Gray in the Mecklenburg County Superior Court and an order entered 18 January 2001 by Judge Ben F. Tennille in the Special Superior Court for Complex Business Cases. Heard in the Court of Appeals 15 August 2002.

Lewis & Roberts, P.L.L.C., by Gary W. Jackson and Ryan J. Adams; and Green Fauth & Jigarjian, L.L.P., by Robert S. Green and Gordon M. Fauth, Jr., for plaintiff-appellant.

James, McElroy & Diehl, P.A., by Edward T. Hinson, Jr. and Preston O. Odom, III; and Pope & Hughes, P.A., by J. Preston Turner, for defendants-appellees.

WALKER, Judge.

Plaintiff's claims arise out of a cardholder agreement pursuant to his having obtained a credit card account from defendant First Union Direct Bank, N.A. (FUDB), a Georgia corporation and wholly-owned subsidiary of defendant First Union Corporation, headquartered in Charlotte, North Carolina.

In 1993, plaintiff submitted a credit card application to FUDB on which he selected an option requiring him to pay an annual fee of $39 with an annual percentage rate (APR) of prime plus 6.9 percent. Of the six options offered by FUDB on the application, plaintiff's option featured the highest annual fee and lowest APR. The application also

stated that: "I agree to abide by the selected interest rates, fees, charges and options in this application and by the terms and conditions of the First Union Credit Card agreement that will be mailed to me."

FUDB accepted plaintiff's application and sent him a credit card and a cardholder agreement. The cardholder agreement permitted FUDB to amend any part of the agreement at any time upon advance written notice to plaintiff and gave both FUDB and plaintiff the option of cancelling the credit card account at any time. The cardholder agreement further stated that the annual fee and APR applied to plaintiff's account would be determined by the option selected on the original credit card application. The cardholder agreement provided it was to be governed by Georgia and federal law.

After renewing his option in July 1994 by again paying a $39 annual fee, plaintiff requested that the APR applicable to his account be reduced to prime plus 2.9 percent. FUDB agreed to the new APR and waived the $15 conversion fee. Plaintiff's annual fee remained at $39 from 1993 to 1997, when plaintiff closed his credit card account with FUDB.

In February 1997, FUDB notified plaintiff by letter that it was amending the applicable APR to prime plus 11.9 percent, while retaining the $39 annual fee, effective 1 April 1997. The letter also provided a contact telephone number and indicated that plaintiff could cancel his account by paying the outstanding balance prior to the effective date of 1 April 1997.

Upon receipt of written notice that the APR would be amended, plaintiff claims he contacted a First Union customer service representative who advised him that the amended APR would not apply to his account. Thereafter, plaintiff continued using the credit card and received monthly statements on his account which reflected the amended APR as of 1 April 1997.

On 3 September 1997, plaintiff sent a letter to First Union Corporation challenging FUDB's right to amend the terms of his account by increasing his APR during the annual period from July 1996 to July 1997. First Union Corporation responded by letter on 23 September 1997 and informed plaintiff that his account would not be returned to the "previous pricing option." Plaintiff paid his remaining account balance in full on 9 June 1998 under the amended APR.

Plaintiff filed this action against FUDB and First Union Corporation on 19 December 1997, alleging breach of contract and unfair and deceptive trade practices under N.C. Gen. Stat. § 75-1.1 (2001). On 28 August 1998, the trial court in Mecklenburg County granted the motion to dismiss all claims against First Union Corporation and granted the motion to dismiss the unfair and deceptive trade practices claim against FUDB, leaving only the breach of contract claim against FUDB.

On 16 August 1999, plaintiff moved for class certification and, on 23 November 1999, FUDB moved for summary judgment. On 8 December 1999, the parties stipulated that the trial court could consider the class certification and summary judgment motions simultaneously, with the summary judgment motion being considered "out of session and out of term." Thereafter, the case was assigned to Judge Ben F. Tennille, Special Superior Court Judge, who heard arguments on the cross summary judgment motions as well as the motion for class certification. In its order and opinion of 18 January 2001, the trial court denied plaintiff's summary judgment motion and granted defendant's summary judgment motion without making a ruling on class certification. Plaintiff appealed both the order granting defendants' motions to dismiss and the order granting defendants' summary judgment motion.

[1] Plaintiff contends that the trial court erred in granting summary judgment for FUDB on the breach of contract claim. Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001). The moving party bears the burden of demonstrating the lack of triable issues. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). In making the summary judgment determination, the trial court must view the evidence in the light most favorable to the non-movant and draw any reasonable inference in the non-movant's favor. *Garner v. Rentenbach Constructors, Inc.*, 350 N.C. 567, 572, 515 S.E.2d 438, 441 (1999). The trial court's duty in considering a summary judgment motion is to determine whether a genuine issue of fact exists for the jury. *Johnson v. Builder's Transport, Inc.*, 79 N.C. App. 721, 722, 340 S.E.2d 515, 516 (1986).

The parties here agree that Georgia law is applicable as specified in the cardholder agreement. Under Georgia law, "[t]he construction

of a contract is a question of law for the court." Ga. Code Ann. § 13-2-1 (2002). The court first determines if the contract language is clear and unambiguous. *Careamerica, Inc. v. Southern Care Corp.*, 494 S.E.2d 720, 722 (Ga. App. 1997). If the court finds ambiguity, it then resorts to rules of contract construction to resolve the ambiguity. *Id.* However, if the contract language is unambiguous, the court must enforce the contract as written. *Id.* Only if the court cannot resolve an ambiguity is a question of fact presented for the jury to decide. *Andrews v. Skinner*, 279 S.E.2d 523, 525 (Ga. App. 1981).

In this case, plaintiff's claim that FUDB breached its cardholder agreement by amending the APR during the annual period rests on an interpretation of the cardholder agreement. Such interpretation of the cardholder agreement was a question of law for the trial court to decide.

In the application, plaintiff selected an option requiring payment of an annual fee of $39 with an APR of prime plus 6.9 percent. Although the application and cardholder agreement described the $39 fee and interest rate as "annual," the following additional terms appeared in the cardholder agreement:

> Amendments. You [FUDB] may change any part of this Agreement at any time, as long as you give me [plaintiff] advance written notice as required by law. Any change in terms will apply to my outstanding balance existing as of the effective dates as well as to all charges made after that date.
>
> Cancellation. I can cancel my Account at any time. . . . You may cancel this Agreement at any time. However my obligation under this Agreement and any changes made prior to cancellation will continue to apply until after I have paid you all the money I owe on the Account.

FUDB contends it amended the APR after giving the required notice to plaintiff in accordance with the terms of the cardholder agreement. However, plaintiff claims that, upon payment of the $39 annual fee, he was entitled to the APR of prime plus 2.9 percent for the twelve-month period ending July 1997.

Here, the record shows that plaintiff's APR was lowered to prime plus 2.9 percent after he paid his annual fee of $39 in July 1994. He received the benefit of this lower rate until 1 April 1997. Since plaintiff was entitled under the cardholder agreement to the lower APR, defendant FUDB would likewise be entitled to increase the APR upon

proper notice when defendant's cost of operation increased. As the trial court properly concluded, the annual fee imposed was a charge for the issuance or availability of credit that was charged to the customer on an annual basis. Further, the charging of an annual fee was not consideration for favorable APR terms. Thus, the trial court correctly interpreted the cardholder agreement and determined that there were no triable issues of fact entitling defendant to summary judgment.

[2] Plaintiff further contends that defendants perpetrated a "bait and switch" on its customers by sending ambiguous communications indicating the possibility of a change in the APR regardless of the rate applicable to the individual cardholder. Further, plaintiff alleges that defendants told its cardholders, including plaintiff, who called to inquire about the change in the applicable APR, that there was no cause for concern, only to thereafter increase the APR. Plaintiff contends this conduct clearly constitutes an unfair and deceptive trade practice. We disagree. Since we have concluded that defendants acted in accordance with the cardholder agreement, a careful review of the record does not establish independent grounds for an unfair or deceptive trade practices claim under Chapter 75 of the North Carolina General Statutes. Therefore, the trial court did not err in dismissing plaintiff's unfair and deceptive trade practices claim against FUDB and First Union Corporation.

Because we have concluded that the trial court properly disposed of all claims against both defendants, we need not address plaintiff's assertion that the trial court erred in granting the motion to dismiss for failure to state any claim against First Union Corporation.

[3] Plaintiff also argues that the trial court erred in granting summary judgment prior to ruling on plaintiff's pending motion for class certification, citing this Court's recent decision in *Pitts v. American Sec. Ins. Co.*, 144 N.C. App. 1, 550 S.E.2d 179 (2001), *review allowed*, 355 N.C. 214, 560 S.E.2d 133 (2002), *aff'd by an equally divided court*, 356 N.C. 292, — S.E.2d — (2002). In support of this argument, plaintiff contends *Pitts* holds that a summary judgment motion may not be considered by a trial court prior to a ruling on class certification. In *Pitts*, plaintiff entered a collateral protection insurance program underwritten by defendant American Security Insurance Company in connection with a purchase money security agreement with defendant Wachovia Bank, N.A. *Pitts*, 144 N.C. App. at 4, 550 S.E.2d at 183-84. Plaintiff filed a complaint making several allegations, including

unfair and deceptive trade practices and breach of contract, and simultaneously filed a motion for certification of a proposed class. *Id.* at 5-6, 550 S.E.2d at 184-85. Subsequently, defendants moved for summary judgment on all of plaintiff's claims. *Id.* at 6, 550 S.E.2d at 185. The trial court denied plaintiff's motion for class certification and granted defendants' motion for summary judgment. *Id.* at 7, 550 S.E.2d at 185. On appeal, this Court held that the trial court erred in its ruling on the existence of the class and adequacy of the class representative and reversed the class certification portion of the judgment. *Id.* at 19-20, 550 S.E.2d at 193.

In *Pitts*, plaintiff's motion for class certification was filed at the time the action was filed. Here, the plaintiff moved for class certification some 19 months after the action was filed and at a time when all discovery necessary to determine the merits of plaintiff's claim had taken place. We do not read *Pitts* as precluding the trial court from considering a summary judgment motion prior to a ruling on a class certification motion where, as here, the parties had stipulated that both motions could be considered simultaneously and when judicial economy is best served by allowing the trial court discretion in addressing summary judgment prior to class certification. Thus, it is apparent that plaintiff would not want to be burdened with the time and expense of class certification if his claims could not survive summary judgment.

We have carefully reviewed plaintiff's remaining assignments of error and find them to be without merit.

Affirmed.

Chief Judge EAGLES and Judge BIGGS concur.

STATE OF NORTH CAROLINA v. CHRISTOPHER LEON CARTER, SR.

No. COA01-1532

(Filed 5 November 2002)

1. Evidence— hearsay—medical treatment exception

The trial court did not err in a felony child abuse and assault with a deadly weapon inflicting serious injury case by admitting the minor child victim's statements under the N.C.G.S. § 8C-1,

Rule 803(4) medical treatment exception to the hearsay rule without affording defendant an opportunity to have the child examined by a defense psychologist and/or to voir dire the child as to his intent when he made the statements in question, because: (1) neither a psychological examination nor a voir dire examination is necessary for the determination of whether the declarant had the requisite intent to qualify his statements under the medical treatment exception; (2) defendant did not request the trial court to conduct a voir dire examination of the child; and (3) while defendant excepted to a doctor's testimony regarding the child's statement to him, defendant waived this objection by permitting three nurses to testify without objection to the child's identical statement.

2. Assault; Child Abuse and Neglect— felony child abuse—assault with a deadly weapon inflicting serious injury—intentionally kicking child—motion to dismiss—sufficiency of evidence

The trial court did not err in a felony child abuse and assault with a deadly weapon inflicting serious injury case by denying defendant's motion to dismiss based on alleged insufficient evidence to prove that defendant intentionally kicked the minor child victim, because: (1) while the statement "my daddy kicked me" standing alone is insufficient to prove intent, the expert testimony presented indicated the minor child had sustained an extremely unusual severe and traumatic injury consistent with having been kicked; and (2) as the child's injury was the result of a high-energy impact equivalent to the force sustainable in a car wreck, it is reasonable to infer the injury was not accidental in nature but was the result of an intentional kick.

3. Assault; Child Abuse and Neglect— felony child abuse—assault with a deadly weapon inflicting serious injury—intentionally kicking child—doctrine of merger inapplicable

The trial court did not err in a felony child abuse and assault with a deadly weapon inflicting serious injury case by failing to arrest one of the felony charges under the doctrine of merger, because each of the two offenses with which defendant was charged requires proof of elements not included in the definition of the other offense.

Appeal by defendant from judgments dated 4 June 2001 by Judge Lindsay R. Davis in Rockingham County Superior Court. Heard in the Court of Appeals 8 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Kirk Randleman, for the State.

C. Orville Light for defendant appellant.

GREENE, Judge.

Christopher Leon Carter, Sr. (Defendant) appeals judgments dated 4 June 2001 entered consistent with a jury verdict finding him guilty of felony child abuse and assault with a deadly weapon inflicting serious injury.

After being charged on 2 October 2000 with (1) felony child abuse for intentionally committing an assault resulting in serious physical injury and (2) assault with a deadly weapon inflicting serious injury on his three-year-old son C.J., Defendant petitioned the trial court for the aid of a child psychologist to assist in his defense. In an order dated 22 May 2001, the trial court authorized Defendant to spend up to $1,000.00 to obtain the services of a child psychologist to assist in the case. The order, however, did "not authorize the psychologist to examine [C.J.]" Defendant subsequently filed a motion *in limine* dated 29 May 2001 in which he requested that the State be prohibited from introducing any hearsay declarations made by C.J. during his hospitalization between 9 and 10 August 2000.

During the *voir dire* hearing on the motion *in limine*, the nurses and doctors who had talked to C.J. during his hospitalization testified they had examined C.J. and upon asking him what was wrong with him, C.J. had told each of them "my daddy kicked me." The trial court found C.J.'s statements, spoken in a medical environment to personnel who were dressed in medical clothing and performing routine medical assessments, were made for the purpose of diagnosing and treating C.J. The trial court concluded the statements were thus properly admissible under the medical treatment exception to the hearsay rule.

Defendant also requested an examination of C.J. by a psychologist. Defendant argued to the trial court that "unless [C.J. was] voluntarily produced for [Defendant's] psychological expert to examine [him] . . . [, C.J.'s] declarations . . . should be inadmissible." The trial court denied Defendant's motion.

At trial, Janet Vercellino (Vercellino), a nurse at the Morehead Memorial Hospital, testified she first met C.J. when his grandmother brought him to the emergency room on the morning of 9 August 2000. Vercellino asked C.J. what was wrong with him, whereupon C.J. replied "[d]addy kicked me." When Vercellino inquired where C.J. was hurting, he pointed to the left side of his abdomen. After Vercellino took C.J.'s vital signs, C.J. was examined by two more nurses. Both of the nurses testified at trial that, upon inquiry, C.J. had told them "my daddy kicked me." Defendant did not object to the nurses' testimony.

Dr. Richard Medlin (Dr. Medlin) testified he had reviewed C.J.'s CAT scan and determined C.J. to have a transection of the pancreas, meaning it "was cut in half." As this was a potentially fatal injury, Dr. Medlin arranged C.J.'s transfer to another hospital where he underwent surgery the next day. According to Dr. Medlin, the type of injury sustained by C.J. was "extremely unusual." When asked whether a child could injure himself in this manner by falling off a bed, Dr. Medlin explained this "would be very unusual" because "this is a high-energy injury" requiring a lot of force. Furthermore, once this type of injury was sustained, Dr. Medlin would have expected symptoms to manifest themselves within minutes as opposed to days.

Dr. Shelley Kreiter (Dr. Kreiter), who testified as an expert in pediatrics with specialties in child abuse and neglect, testified C.J.'s injury was not only traumatic but consistent with having been kicked. Kreiter further stated C.J. "would not have fallen on a barbell on Monday," as alleged by Defendant, "and been a well child on Tuesday only to be a severely ill, a sick child needing surgery on Wednesday. There was too long of a well period in there." Dr. Charles Turner (Dr. Turner), whom the trial court recognized as an expert in the field of pediatric surgery, explained "[t]here[was] a significant energy to cause a rupture of the pancreas." This energy would be closely equivalent to the energy involved in a "car wreck." Over Defendant's objection, Dr. Turner testified C.J. had told him "[m]y father kicked me."

At the close of the State's evidence, Defendant moved to dismiss the charges against him. The trial court denied the motion, and Defendant proceeded to call his witnesses. C.J.'s mother, Kimberly Dillard Carter (Carter), testified for the defense that two days prior to being hospitalized C.J. had fallen off his bed and landed on a barbell. When she had asked C.J. if he was all right, he had told her he was. Carter and Defendant, however, noted that C.J. did not have much of an appetite after this incident.

At the close of all the evidence, Defendant renewed his motion to dismiss, which was again denied. The jury subsequently found Defendant guilty of felony child abuse and assault with a deadly weapon inflicting serious injury, and the trial court sentenced Defendant to two consecutive prison terms.

The issues are whether the trial court erred in: (I) admitting C.J.'s statements under the medical treatment exception to the hearsay rule without (1) affording Defendant an opportunity to have C.J. examined by a defense psychologist and/or (2) to *voir dire* C.J. as to his intent when he made the statements in question; (II) denying Defendant's motion to dismiss; and (III) failing to arrest one of the felony charges under the doctrine of merger.

I

[1] Defendant argues the trial court should have (1) permitted a defense psychologist to examine C.J. and/or (2) allowed a *voir dire* examination of C.J. in order to determine whether he possessed the requisite intent necessary for the admissibility of his statements under the medical treatment exception to the hearsay rule. We disagree.

"Statements made for purposes of medical diagnosis or treatment and describing . . . past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof" are admissible in court as an exception to the hearsay rule. N.C.G.S. § 8C-1, Rule 803(4) (2001). "Rule 803(4) requires a two-part inquiry: (1) whether the declarant's statements were made for purposes of medical diagnosis or treatment; and (2) whether the declarant's statements were reasonably pertinent to diagnosis or treatment." *State v. Hinnant*, 351 N.C. 277, 284, 523 S.E.2d 663, 667 (2000).

In *Hinnant*, the only case Defendant cites as support for his argument, our Supreme Court "recognize[d] the difficulty of determining whether a declarant[, especially a young child,] understood the purpose of his or her statements." *Id.* at 287, 523 S.E.2d at 669. The Supreme Court held that the declarant's intent could be determined by consideration of "all objective circumstances of record surrounding [the] statements."[1] *Id.* at 288, 523 S.E.2d at 670. Thus, neither a psychological examination nor a *voir dire* examination is necessary

1. As Defendant did not argue that the objective evidence in this case was insufficient to establish C.J.'s intent, we need not address this issue. *See* N.C.R. App. P. 28(a).

under *Hinnant* for the determination of whether the declarant had the requisite intent to qualify his statements under the medical treatment exception of Rule 803(4).[2]

We further note Defendant did not request the trial court to conduct a *voir dire* examination of C.J. *See* N.C.R. App. P. 10(b)(1) (in order to preserve a question for appellate review, the appellant must have presented the trial court with a timely request or motion). Moreover, while Defendant excepted to Dr. Turner's testimony regarding C.J.'s statement to him, Defendant waived this objection by permitting the three nurses to testify without objection to C.J.'s identical statement. *See State v. Campbell*, 296 N.C. 394, 399, 250 S.E.2d 228, 231 (1979) ("the admission of evidence without objection waives prior or subsequent objection to the admission of evidence of a similar character"). Accordingly, Defendant's assignments of error as to this issue are overruled.

II

[2] Defendant next contends the trial court erred in denying his motion to dismiss because the evidence presented by the State was insufficient to prove Defendant intentionally kicked C.J.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the offense charged and that the defendant is the perpetrator of the offense. *State v. Harding*, 110 N.C. App. 155, 162, 429 S.E.2d 416, 421 (1993). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Franklin*, 327 N.C. 162, 171, 393 S.E.2d 781, 787 (1990). "If the trial court determines that a reasonable inference of the defendant's guilt may be drawn from the evidence, it must deny the defendant's motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant's innocence." *State v. Smith*, 40 N.C. App. 72, 79, 252 S.E.2d 535, 540 (1979) (emphasis omitted).

One of the elements of felony child abuse the State must prove in this case, is that the defendant "intentionally commit[ted] an assault upon the child." N.C.G.S. § 14-318.4(a) (2001). Proof of assault, which naturally is also an element of assault with a deadly

2. As the facts of this case do not raise the issue, we do not address whether upon a trial court's determination that the objective evidence is insufficient to find the requisite intent, the *State* is entitled to either a psychological examination or a *voir dire* examination of the child in order to determine his subjective intent.

weapon inflicting serious injury, requires evidence of " 'an intentional attempt, by violence, to do injury to the person of another.' " *State v. Britt*, 270 N.C. 416, 419, 154 S.E.2d 519, 521 (1967) (citation omitted) (defining assault).

> "An injury is inflicted intentionally when the person who caused it intended to apply the force by which it was caused. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. An intent to apply force to the body of another may be inferred from [the act itself,] [the nature of the injury,] [the conduct or declarations of the person who applied it, or] [other relevant circumstances]."

State v. Smith, 150 N.C. App. 138, 142-43, 564 S.E.2d 237, 240 (quoting N.C.P.I.—Crim. 206.35 (1998)), *disc. review denied*, 355 N.C. 756, 566 S.E.2d 87 (2002).

While the statement "my daddy kicked me," standing alone, is insufficient to prove intent, the expert testimony presented in this case indicated C.J. had sustained an "extremely unusual," severe, and traumatic injury. Dr. Kreiter further testified C.J.'s injury was consistent with having been kicked. As C.J.'s injury was the result of a "high-energy" impact, equivalent to the force sustainable in a "car wreck," it is reasonable to infer the injury was not accidental in nature but was the result of an intentional kick. The trial court therefore properly denied Defendant's motion to dismiss.

III

[3] Finally, Defendant asserts the trial court erred in failing to arrest one of the felony charges under the doctrine of merger. We disagree.

> The common law doctrine of merger is a judicial tool to prevent the subsequent prosecution of a defendant for a lesser[-] included offense once he has been acquitted or convicted of the greater. It is primarily a device to prevent the defendant from being placed twice in jeopardy for the same offense.

State v. Moore, 34 N.C. App. 141, 142, 237 S.E.2d 339, 340 (1977). Where the offenses charged are based on "two distinct criminal statutes which require proof of different elements . . . , the punishment of each of these separate offenses by consecutive sentences does not violate the constitutional prohibition against double jeopardy." *State v. Evans*, 125 N.C. App. 301, 304, 480 S.E.2d 435, 436

(1997). In this case, each of the two offenses with which Defendant was charged requires proof of elements not included in the definition of the other offense. Thus, Defendant's argument is without merit.

No error.

Judges WYNN and McGEE concur.

JAMES E. PRICE, SR.; OLANDER R. BYNUM; CHRISTOPHER PARTIN; LEE WAYNE HUNT; AND KERRY McPHERSON, PLAINTIFFS v. THEODIS BECK, IN HIS OFFICIAL CAPACITY AS SECRETARY, NORTH CAROLINA DEPARTMENT OF CORRECTIONS; AND JUANITA BAKER, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE NORTH CAROLINA PAROLE COMMISSION, DEFENDANTS

No. COA01-1593

(Filed 5 November 2002)

1. Probation and Parole— recalculation of parole eligibility date—credits—summary judgment—ripeness

The trial court did not err by concluding a case challenging plaintiff inmate's parole eligibility date being recalculated, which required him to serve a longer term, was ripe for summary judgment even though plaintiff contends a material fact existed as to whether he was entitled to good conduct, gain time, and meritorious time credits to be applied to his life sentence because: (1) the issue of whether plaintiff has a legal right to have credits applied against his life sentence is a matter of law; and (2) there are no material facts in dispute, and the remaining issues are matters of law.

2. Sentencing— life sentence—minimum service requirement—credits

The Parole Commission did not err by failing to reduce the minimum service requirement of plaintiff's life sentence with gain time, meritorious time, and good conduct credits, because: (1) N.C.G.S. § 148-13(b) gives the Secretary of the Department of Correction discretion to issue regulations regarding deductions of time from the terms of prisoners for good behavior, meritorious conduct, and the like for Class A, B, and C felons; (2) the Secretary has not issued regulations regarding deductions of time

for Class A, B, and C felons; and (3) plaintiff does not argue that the Secretary has abused his discretion or failed to exercise his discretion by not promulgating regulations.

3. Constitutional Law— prohibition against ex post facto laws—court's construction of statute different from state agency's prior interpretation

The retroactive application of case law to plaintiff's parole eligibility resulting in a delay of two years and three months does not violate the constitutional prohibition against ex post facto laws, because: (1) the fact that the Fair Sentencing Act has not undergone substantive change subsequent to the commission of plaintiff's crimes means it is still applicable in plaintiff's case, and the pertinent case law simply construed an existing statute; and (2) a court's construction of a statute that is different from a state agency's prior interpretation is not an ex post facto legislative action.

4. Constitutional Law— due process—retroactive application of case law

The retroactive application of case law to recalculate plaintiff inmate's parole eligibility did not violate his due process rights even though plaintiff contends the pertinent case was unforeseeable and thus denied him the chance to accept a plea bargain for a term of years because even assuming the case was unexpected as it changed long-standing policy and practice of the Parole Commission, it was not indefensible by reference to prior law since the decision rested on the express and unambiguous language of N.C.G.S. § 15A-1354(b)(2).

5. Constitutional Law— equal protection—disparate treatment between inmates

Although plaintiff inmate contends disparate treatment between inmates with Class B and Class C life sentences under the Fair Sentencing Act results in a denial of equal protection of the laws, plaintiff's argument has no merit because: (1) plaintiff admits that inmates are not a suspect class; and (2) plaintiff fails to show how this disparate treatment is not based on some rational relation to a legitimate governmental objective.

Appeal by plaintiffs from order filed 16 November 1999 by Judge Cy A. Grant, Sr. in Pasquotank County Superior Court. Heard in the Court of Appeals 17 September 2002.

James E. Price, Sr. pro se plaintiff appellant.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth F. Parsons, for defendant appellees.

GREENE, Judge.

James E. Price, Sr. (Plaintiff)[1] appeals from an order filed 16 November 1999 denying his summary judgment motion and granting summary judgment in favor of Theodis Beck (the Secretary) in his official capacity as Secretary of the North Carolina Department of Corrections (the Department) and Juanita Baker (the Commissioner) in her official capacity as Commissioner of the North Carolina Parole Commission (the Commission).[2]

On 18 May 1999, Plaintiff filed a "Petition Seeking Declaratory Relief and *Writ of Mandamas*" (sic) (the petition). The petition alleged the Commission incorrectly calculated Plaintiff's parole eligibility by not including "meritorious time" and "gain time" credits toward reducing the life sentence portion of his two consecutive sentences and sought to have his parole eligibility recalculated. The petition further sought to prevent retroactive application of this Court's decision in *Robbins v. Freeman* to Plaintiff's parole eligibility as an unconstitutional *ex post facto* act and a violation of his due process and equal protection rights. All parties subsequently filed motions for summary judgment.

The undisputed evidence as presented in the petition and at the summary judgment hearing demonstrates Plaintiff is an inmate in the custody of the Department. Plaintiff began serving a Class B life sentence under the "Fair Sentencing Act" for first-degree rape and a consecutive eighteen-year sentence for second-degree kidnapping in January 1984.[3] Plaintiff was initially told by prison officials he would

1. Olander R. Bynum and Kerry McPherson did not file briefs in this Court, and we do not read Plaintiff's arguments as an attempt to argue on their behalf, as to do so would be to permit the unauthorized practice of law. *See* N.C.G.S. § 84-4 (2001). Accordingly, Olander Bynum's and Kerry McPherson's appeals are dismissed. *See* N.C.R. App. P. 13(c). Christopher Partin and Lee Wayne Hunt do not appeal.

2. As Plaintiff brought suit against the defendants in their official capacities, Secretary Beck, upon taking office, was automatically substituted for Acting Secretary Joseph Hamilton as a party to this case. *See* N.C.G.S. § 1A-1, Rule 25(f)(1) (2001).

3. The "Fair Sentencing Act" applies to offenses committed from 1981 through September 1994. *See* N.C.G.S. §§ 15A-1340.1 to -1340.7 (1993) (repealed effective October 1, 1994).

be eligible for parole on 8 December 2003, based on the required minimum service time of twenty years on the life sentence. This calculation was in accordance with the pre-*Robbins* Department and Commission policy of calculating parole eligibility separately for each sentence an inmate was serving.[4] This Court's 1997 decision in *Robbins*, however, requires parole eligibility for an inmate serving consecutive sentences to be calculated as if the inmate were serving a single term. *Robbins*, 127 N.C. App. at 164-65, 487 S.E.2d at 773. Under *Robbins*, the minimum term of imprisonment is calculated by adding together the minimum terms of consecutive sentences. *Id.*

The Commission applied *Robbins* to Plaintiff's consecutive sentences by adding the statutory minimum term of twenty years for the Class B life sentence to a minimum term, calculated for parole eligibility purposes, of two years and three months for the second-degree kidnapping sentence. This calculation delayed Plaintiff's parole eligibility until 8 March 2006. Furthermore, while the Department kept track of Plaintiff's "gain time," "meritorious time," and "good conduct" credits, they did not apply those credits to reduce the minimum service requirement of Plaintiff's life sentence, although those credits were applied in calculating Plaintiff's eligibility for parole on the eighteen-year sentence.

After a 1 November 1999 hearing, the trial court concluded, "there being no genuine issue of material fact presented, Defendant's summary judgment motion should be granted."

The issues are whether: (I) Plaintiff's claim of entitlement to "gain time," "meritorious time," and "good conduct" credits is a genuine issue of material fact; (II) the Commission erred by not reducing the minimum service requirement of Plaintiff's life sentence with "gain time," "meritorious time," and "good conduct" credits; (III) retroactive application of *Robbins* to Plaintiff's parole eligibility violates the constitutional prohibition against *ex post facto* laws; (IV) retroactive application of *Robbins* violates due process; and (V) Plaintiff has adequately established an equal protection claim based on disparate treatment between Class B and C felons under the Fair Sentencing Act.

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4. This practice was known as a "paper parole" since the inmate was simply paroled from one sentence to the next consecutive sentence. *Robbins* v. *Freeman*, 127 N.C. App. 162, 165, 487 S.E.2d 771, 773 (1997), *aff'd per curiam*, 347 N.C. 664, 496 S.E.2d 375 (1998).

I

[1] Plaintiff first contends this case was not ripe for summary judgment because a material fact existed as to whether Plaintiff was entitled to "good conduct," "gain time," and "meritorious time" credits to be applied to his life sentence. We disagree.

A case is ripe for summary judgment where there is no genuine issue of material fact and any party is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (2001). In this case, the material facts are not in issue. It is undisputed Plaintiff's parole eligibility date was recalculated and he was required to serve a longer term before becoming eligible for parole. It is also undisputed that Plaintiff is not receiving "good conduct," "gain time," or "meritorious time" credits applied to his life sentence. Whether Plaintiff has a legal right to have credits applied against his life sentence is a matter of law. Since no material facts are in dispute and the remaining issues are matters of law, this case was ripe for summary judgment. *See Pine Knoll Ass'n v. Cardon*, 126 N.C. App. 155, 158, 484 S.E.2d 446, 448 (1997) (summary judgment is appropriate in a declaratory judgment action where there is no genuine issue of material fact).

II

[2] Plaintiff next contends his parole eligibility date has been erroneously calculated by a failure to subtract "gain time," "meritorious time," and "good conduct" credits from the minimum term of his life sentence. We disagree.

Plaintiff is serving two consecutive sentences under the Fair Sentencing Act, the law applicable at the time Plaintiff committed the offenses. The first sentence is a Class B life sentence with parole eligibility after twenty years. *See* N.C.G.S. § 15A-1371 (a)(1) (1993) (repealed effective January 1, 1995). The second sentence is one for eighteen years that has been calculated, including projected credits, to require service of two years and three months before parole eligibility. These two minimum sentences were added together to create a combined minimum sentence of twenty-two years and three months before Plaintiff is eligible for parole.

Plaintiff argues this calculation is erroneous because his minimum twenty-year sentence does not include "good conduct," "gain time," and "meritorious time" credits. These credits would reduce Plaintiff's minimum required service on his life sentence, making him eligible for parole at an earlier date.

Section 148-13(b) of the North Carolina General Statutes gives the Secretary discretion to "issue regulations regarding deductions of time from the terms of . . . prisoners for good behavior, meritorious conduct . . . and the like" for Class A, B, and C felons. N.C.G.S. § 148-13(b) (1993) (repealed effective January 1, 1995). The Secretary has not issued regulations regarding deductions of time for Class A, B, and C felons. The statute does not mandate such regulations, and Plaintiff does not argue the Secretary has abused his discretion or failed to exercise his discretion by not promulgating regulations. *See Pharr v. Garibaldi*, 252 N.C. 803, 811-12, 115 S.E.2d 18, 24-25 (1960) (court will not intervene against prison commission and Director of Prisons while functioning as a state agency absent allegation of abuse of discretion); *see also Harwood v. Johnson*, 326 N.C. 231, 238, 388 S.E.2d 439, 443 (1990) (department of corrections, including parole commission, is a state agency). Since Plaintiff does not present to this Court any other authority for applying credits against his life sentence, Plaintiff's argument that his parole eligibility has been erroneously calculated must fail.

III

[3] Plaintiff contends application of *Robbins* to his consecutive sentences, resulting in a delay of two years and three months in his parole eligibility, violates constitutional prohibitions on *ex post facto* laws. We disagree.

The *ex post facto* clauses of both the U.S. and N.C. constitutions prohibit legislative action that "allows imposition of a different or greater punishment than was permitted when the crime was committed." *State v. Vance*, 328 N.C. 613, 620, 403 S.E.2d 495, 500 (1991).

Because the Fair Sentencing Act has undergone no substantive change subsequent to the commission of Plaintiff's crimes, it remains applicable in Plaintiff's case. The *Robbins* court simply construed an existing statute. A court's construction of a statute that is different from a state agency's prior interpretation is not an *ex post facto* legislative action. *See Rogers v. Tennessee*, 532 U.S. 451, 456, 149 L. Ed. 2d 697, 704 (2001) (*ex post facto* clause applies only to actions of the legislature, not judicial actions). Thus, Plaintiff cannot maintain an *ex post facto* clause violation claim.

IV

[4] Alternatively, Plaintiff argues the recalculation of his parole eligibility violated his due process rights because the *Robbins* decision

was "unforeseeable" and thus denied him the chance to accept a plea bargain for a term of years. Again, we disagree.

Judicial action must not be given retroactive effect if it is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue" such that it infringes on the "core due process concept[]" of "the right to fair warning." *Rogers*, 532 U.S. at 457-59, 149 L. Ed. 2d at 706; *see Glenn v. Johnson*, 761 F.2d 192, 195 (4th Cir. 1985) (where re-interpretation of a parole statute was based on the statute's clear language, the interpretation was "not only foreseeable but indeed was inescapable").

Assuming the *Robbins* decision was "unexpected," as it changed long-standing policy and practice of the Commission, it was not "indefensible by reference to prior law" since the decision rested on the express and unambiguous language of section 15A-1354(b)(2) of the General Statutes. *See Glenn*, 761 F.2d at 195; N.C.G.S. § 15A-1354(b)(2) (2001). Thus, this Court's decision in *Robbins*, retroactively altering Plaintiff's parole eligibility calculation, does not infringe upon his due process rights.

V

[5] Finally, Plaintiff contends disparate treatment between inmates with Class B and Class C life sentences under the Fair Sentencing Act results in a denial of equal protection of the laws. Unlike Class B life sentences, Class C life sentences are interpreted to be eligible to receive "good conduct" credit applied to the life sentence, which can reduce the minimum required service from twenty years to as little as ten years. *See* N.C.G.S. § 15A-1355(c) (2001).

Plaintiff's argument has no merit as Plaintiff admits inmates are not a "suspect class," *Moss v. Clark*, 886 F.2d 686, 690 (4th Cir. 1989), and fails to show how this different treatment is not based on some "rational relation to a legitimate governmental objective," *Rosie J. v. N.C. Dept. of Human Resources*, 347 N.C. 247, 251, 491 S.E.2d 535, 537 (1997).

Accordingly, the trial court correctly granted summary judgment in favor of the Secretary and the Commissioner.

Affirmed.

Judges WYNN and BIGGS concur.

STATE OF NORTH CAROLINA v. STEVIE ODELL STUKES

No. COA01-1565

(Filed 5 November 2002)

1. Appeal and Error— preservation of issues—no objection at trial—ruling sought by defendant

The State did not preserve for appeal the contention that the trial court erred by concluding without an evidentiary hearing that newly discovered evidence was probably true where the State argued against the need for such a hearing before the trial court.

2. Evidence— not provided to court—not considered

The trial court did not err by granting defendant a new trial without considering certain evidence of State's witnesses from a prior trial of another person. The entire transcript was not provided to the court and it is not the responsibility of the trial judge to review evidence not provided by the parties and not in the record. Moreover, that evidence will not be considered on appeal.

3. Evidence— hearsay—used for nonhearsay purpose

The trial court did not err when considering newly discovered evidence by including certain letters in its findings where the letters were hearsay but were used solely for the purpose of understanding the importance and nature of the new evidence.

Appeal by the State from order signed 24 August 2001 by Judge Russell J. Lanier, Jr. in Duplin County Superior Court. Heard in the Court of Appeals 14 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.

Nora Henry Hargrove for defendant-appellee.

TYSON, Judge.

The State appeals from Judge Lanier's order granting defendant's motion for appropriate relief on the basis of newly discovered evidence. We affirm.

I. Facts

Stevie Odell Stukes, ("defendant"), was tried and found guilty of first degree murder, robbery with a dangerous weapon, and discharging a weapon into occupied property. The State's evidence tended to show that LaLa Faison was visiting with J.W. Merritt ("victim") on a dirt road near Wallace, North Carolina. Faison saw a man known as "Pokey" in a car parked on the side of the road. Daniel Williams stood with Pokey and held a shotgun. The victim, Pokey, and Williams talked.

Pokey suggested that Williams put the gun away. Williams replied, "You don't believe I"ll pull it[.]" The victim joined by stating, "Well, pull it then." Williams fatally shot the victim in the stomach. Williams asked the victim if he wanted him to pull the trigger again. Williams got back in the car, and defendant drove the car away. Defendant never stepped outside of the car during the entire incident.

After the shooting, defendant drove up to Jackie Hall's trailer. Jackie stated that she heard defendant tell her to open the door. Her children also stated that they heard defendant. Someone fired a gun into Jackie's trailer. There was testimony at defendant's trial that defendant was seen coming up to the trailer with the gun in his hand. However, Williams testified at his own trial that he actually shot the gun into Jackie Hall's trailer.

Defendant drove Williams to Corey Plumber's Place, a local club. Robert Wright worked at the club that day and testified that defendant and Williams had been at the club earlier in the day. Williams stormed into the club by himself pointing a shotgun stating, "This is a stick up." Williams threatened Wright as Wright tried to open the cash register. When the drawer opened, Williams took the money and then started demanding money from others inside the club. Defendant then entered the club and convinced Williams to leave.

Defendant, Williams, and Pokey were stopped the next morning in Jacksonville. Consent was given to search the car. Officers found a shotgun with one shell in the chamber in the trunk, and three more shells were found in Williams' shirt pocket.

Defendant's evidence included testimony by defendant to his crack cocaine addiction. Defendant also testified to having given Williams and his girlfriend a ride to Hardee's for breakfast, to Corey's Place for pool and beer, to the dirt road to get crack cocaine, to Williams' trailer to smoke crack cocaine, and then back to the dirt

road to sell a gun. Defendant testified that he had no indication that Williams would shoot the victim, and that he drove the car as Williams demanded because he was scared.

Defendant was indicted for the murder of the victim, accessory after the fact of murder, robbery with a dangerous weapon, and for discharging a firearm into occupied property. On 10 March 1997, defendant was tried before a jury in Duplin County Superior Court with Judge James D. Llewellyn presiding. The jury found the defendant guilty of first degree murder, on the basis of aiding and abetting Williams, and guilty of the other charges. Defendant was sentenced to life without parole for first degree murder, and consecutive terms of 103 to 133 months for the robbery conviction and 34 to 50 months for discharging a weapon into occupied property. The court arrested judgment on defendant's conviction of accessory after the fact of murder. Defendant appealed to this Court, and we found no error in defendant's trial. *State v. Stukes*, 129 N.C. App. 845, 504 S.E.2d 280, *disc. review denied*, 349 N.C. 238, 516 S.E.2d 606 (1998).

After defendant's conviction, Williams was tried for the murder of the victim as well as robbery with a dangerous weapon, and discharging a firearm into occupied property on 9 June 1997. The jury found Williams guilty of second degree murder, robbery with a dangerous weapon, and discharging a weapon into occupied property. Williams received consecutive terms of 189 to 236 months for second degree murder, 77 to 102 months for robbery with a dangerous weapon, and 29 to 44 months for discharging a weapon into occupied property. During Williams' trial, he made statements that tended to exculpate defendant.

On 10 September 1999, defendant filed a motion for appropriate relief and the State responded by requesting the trial court to dismiss defendant's motion. Judge Lanier "denied and dismissed" the motion by order dated 9 August 2000. Judge Lanier, by order dated 24 August 2000, allowed the defendant to file a response to the motion to dismiss. On 30 August 2000, defendant filed an amendment to his motion for appropriate relief and a response to the State's motion to dismiss.

On 1 March 2001, defendant filed a motion for reconsideration of the motion for appropriate relief and order allowing dismissal. By order dated 7 June 2001, Judge Lanier vacated the order denying defendant's motion for appropriate relief, and allowed the State to file a response to the additional matters brought forth in defendant's amendment. The State's response was filed 3 July 2001.

On 29 August 2001, Judge Lanier allowed defendant's motion for appropriate relief and allowed a new trial on all charges. The State appeals.

II. Issues

The State assigns as error the trial court's (1) making conclusions of law that there was (a) newly discovered evidence (b) which was probably true and (c) did not tend merely to contradict, impeach or discredit the testimony of a former witness and (d) is of such nature that a different result will probably be reached at a new trial. The State argues that a trial court may not resolve questions of fact, including credibility determinations regarding witnesses without conducting an evidentiary hearing at which the court has the opportunity to hear and observe the witnesses. The State also assigns as error the trial court's (2) making credibility determinations about Williams' testimony in his trial without hearing or considering the evidence of the State's witnesses in that trial and without considering Williams' own testimony in its entirety, and (3) including in its findings of fact hearsay in the form of letters written by Williams which were not "newly discovered" evidence, and that were not "probably true."

III. Standard of Review

Defendant must establish the following to prevail upon a motion for appropriate relief on the ground of newly discovered evidence: (1) that the witness or witnesses will give newly discovered evidence, (2) that such newly discovered evidence is probably true, (3) that it is competent, material and relevant, (4) that due diligence was used and proper means were employed to procure the testimony at the trial, (5) that the newly discovered evidence is not merely cumulative, (6) that it does not tend only to contradict a former witness or to impeach or discredit him, (7) that it is of such a nature as to show that on another trial a different result will probably be reached and that the right will prevail. N.C.G.S. § 15A-1415(c) (2001); *State v. Britt*, 320 N.C. 705, 712-13, 360 S.E.2d 660, 664 (1987).

> The decision of whether to grant a new trial in a criminal case on the ground of newly discovered evidence is within the trial court's discretion and is not subject to review absent a showing of an abuse of discretion. Findings of fact made by the trial court are binding on appeal if they are supported by the evidence.

State v. Wiggins, 334 N.C. 18, 38, 431 S.E.2d 755, 767 (1993) (citations omitted).

IV. Lack of Evidentiary Hearing

[1] The State contends that the trial court erred in concluding as a matter of law that the newly discovered evidence was probably true, did not merely contradict, impeach, or discredit the testimony of a former witness, and is of such a nature that a different result will probably be reached at a new trial. The State asserts that the conclusions of law are unsupported, and argues that a trial court may not resolve questions of fact, including determinations of a witnesses' credibility, without conducting an evidentiary hearing where the court has the opportunity to hear and observe the witnesses.

This assignment of error was not preserved for appeal. We do not reach the State's argument for an evidentiary hearing. N.C.G.S. § 15A-1446 states that "error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection or motion." The statute recognizes some exceptions to this rule, none of which apply in the case at bar. Rule 10(b) of the Rules of Appellate Procedure requires a prior objection or motion for the requested ruling to preserve a question for appellate review. *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991).

At the hearing before the trial court, the State not only failed to preserve the alleged error for review, but also affirmatively argued against the need for an evidentiary hearing. In *State v. Bruno*, 108 N.C. App. 401, 412, 424 S.E.2d 440, 447 (1993), this Court held that the defendant could not complain that his own expert was not allowed to testify to impeach the data he successfully asked to be excluded. " 'A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct.' " *Id.* (citing *State v. Patterson*, 332 N.C. 409, 420 S.E.2d 98 (1992)). The State's assignment of error is overruled.

V. Consideration of Evidence form Defendant's Trial

[2] The State also argues that Judge Lanier erred in granting the new trial by failing to consider the evidence of the State's witnesses at Williams' trial and Williams' testimony in its entirety before making credibility determinations.

In support of its motion for appropriate relief, defendant included relevant transcript pages of Williams' testimony. The entire transcript was never provided to the trial court. It is not the responsibility of the

trial judge to review evidence not provided by either party nor in the record before him. The State should have provided the trial court with the entire transcript, if it was deemed necessary for consideration of the issues.

We cannot now consider that evidence on appeal. Rule 9(a) of the Rules of Appellate Procedure provides that our review is limited to the record on appeal. N.C.R. App. P. 9 (a) (2002). Such record should "consist of a plain, accurate, and concise statement of what the record shows occurred in the trial court . . ." *State v. Hickman*, 2 N.C. App. 627, 629, 163 S.E.2d 632, 633 (1968). We will not consider statements from the Williams' transcript which was not included in the proceedings appealed from, and which would violate Judge Lanier's order of 17 December 2001 that excluded the full transcript of Daniel Williams' trial from the record on appeal. This assignment of error is overruled.

VI. Previously Excluded Letters

[3] The State argues that the trial court erroneously included hearsay in its findings of fact in the form of letters written by Williams which were neither "newly discovered" evidence nor "probably true." The two letters, one from Williams to defendant in jail expressing an intention to testify to defendant's innocence and a second from Williams to defendant's trial attorney professing defendant's innocence, were offered into evidence at defendant's trial and were excluded as hearsay.

We previously found no error in the trial court's exclusion of these documents as inadmissible hearsay. *Stukes*, 129 N.C. App. 845, 504 S.E.2d 819 (1998). We agree with the State that the letters do not contain "newly discovered" evidence.

Judge Lanier never characterized the letters as "newly discovered evidence." The letters represented defendant's efforts to previously present evidence of his involvement in the crime at his trial. Judge Lanier did not use the letters for the "truth of the matter asserted." Judge Lanier relied upon the letters solely for the purpose of understanding the importance and nature of the new evidence, which was Williams' trial testimony. The letters were used for a nonhearsay purpose. We find no error in Judge Lanier's inclusion of a reference to the letters in his findings of fact.

We conclude that the trial court's findings of fact are supported by substantial evidence and that the State has failed to show

any abuse of discretion by the trial court. We affirm the judgment of the trial court that granted defendant's motion for appropriate relief and awarded a new trial.

Affirmed.

Chief Judge EAGLES and Judge THOMAS concur.

MARION I. HATCHER, EXECUTOR OF THE ESTATE OF NORMAN HATCHER, DECEASED EMPLOYEE, PLAINTIFF v. DANIEL INTERNATIONAL CORP., EMPLOYER, AND KEMPER INSURANCE CO., CARRIER, DEFENDANTS

No. COA01-1342

(Filed 5 November 2002)

1. Workers' Compensation— credibility of witness—weak and confused memory—province of Commission

The Industrial Commission's decision in a workers' compensation case concerning weight to be given the deposition testimony of an 81-year-old decedent-employee who could not remember well or who was confused by the questions was not disturbed. Although a witness who can remember nothing is not competent to testify, a weak or impaired memory goes to the weight of the testimony and it is the sole province of the Commission to determine the credibility and weight of testimony.

2. Workers' Compensation— last injurious exposure—inference

The Industrial Commission's conclusion that decedent employee's last injurious exposure to the hazards of asbestosis occurred with Mundy (a company other than defendant) was upheld where the evidence supported a reasonable inference that decedent-employee was exposed for at least 30 days or parts thereof within seven consecutive months while working for Mundy. The cases cited by plaintiff for the assertion that the Commission must be able to point to days in which exposure occurred do not limit the Commission's ability to rely on inferences that may reasonably be drawn from the evidence.

3. Workers' Compensation— last injurious exposure—proximate augmentation of lung cancer—language of finding

The findings in a workers' compensation action supported the Industrial Commission's conclusion that, with respect to lung cancer, decedent's last injurious exposure to asbestos did not occur while he was employed by defendant even though the Commission did not couch its findings in terms of proximate augmentation of lung cancer. The Commission found that decedent's lung cancer was likely caused by his exposure to asbestos.

4. Workers' Compensation— asbestos—last injurious exposure

The Industrial Commission's conclusion that decedent-employee was not last injuriously exposed to asbestos while employed by defendant-employer was supported by the evidence.

Appeal by plaintiff from opinion and award entered 26 July 2001 by the Full Commission of the North Carolina Industrial Commission. Heard in the Court of Appeals 22 August 2002.

Scudder & Hedrick, by Samuel A. Scudder, for plaintiff-appellant.

Marshall Williams & Gorham, L.L.P., by Ronald H. Woodruff, for defendant-appellees.

MARTIN, Judge.

Plaintiff appeals from an opinion and award of the Industrial Commission denying a claim for compensation and death benefits for the death of Norman Hatcher ("decedent-employee"). The record reflects that Norman Hatcher filed an Industrial Commission Form 18, dated 3 December 1991, alleging that his exposure to asbestos while working for defendant-employer had resulted in "asbestosis and other asbestos-related lung diseases." He filed a Form 33, dated 21 July 1994, requesting that the claim be assigned for a hearing. Norman Hatcher died on 25 April 1995 due to lung cancer and the executor of his estate was substituted as plaintiff.

A deputy commissioner denied the claim on 27 March 2000 and plaintiff appealed to the Full Commission. By an opinion and award filed 26 July 2001, the Full Commission found that decedent-employee had been exposed to asbestos fiber and dust throughout his 46-year career as a millwright, carpenter, and welder, and that this

exposure had "likely caused" both his asbestosis and lung cancer. The Commission also found that decedent-employee worked for defendant-employer at a location insured by defendant-carrier for several different periods, the last one ending in 1976, during which he was exposed to asbestos fiber and dust in the workplace. In addition, the Commission found that, after retiring in 1978, decedent-employee returned to work at intervals. In particular, plaintiff was employed by Mundy Industrial Contractors, Inc., ("Mundy") in 1988 and 1989.

The Commission found that:

> [w]hile employed as a millwright for defendant-employer and then for Mundy at the General Electric plant through 1989, decedent was exposed to asbestos in the form of insulation. Decedent, in some instances, actually saw and consequently inhaled the asbestos dust while working for Mundy at the General Electric plant.

It also found that decedent-employee's last employment in any capacity was with Mundy in 1989. The medical testimony indicated, and the Commission found, that decedent-employee was not disabled by asbestosis but became disabled after he developed lung cancer. The Commission concluded that plaintiff's last injurious exposure to asbestos did not occur while he was employed by defendant Daniel International Corp. and denied his claim against defendants.

On appeal, plaintiff asserts the Commission erred in denying benefits for asbestosis and lung cancer because (1) there was not competent evidence in the record to support the Commission's findings regarding decedent-employee's last injurious exposure to asbestos and (2) the Commission applied the wrong legal standard in evaluating both claims. Appellate review of a decision of the Industrial Commission is limited to a determination of whether there is competent evidence in the record to support the Commission's findings of fact and whether those findings adequately support the conclusions of law and award. *See Boles v. U.S. Air, Inc.*, 148 N.C. App. 493, 560 S.E.2d 809 (2002). If properly supported, the Commission's findings of fact are binding on appeal even though the evidence might also support contrary findings. *See Locklear v. Stedman Corp.*, 131 N.C. App. 389, 508 S.E.2d 795 (1998). The Commission's conclusions of law are reviewable by the appellate courts. N.C. Gen. Stat. § 97-86; *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982).

Under G.S. § 97-52, "[d]isablement or death of an employee resulting from an occupational disease" is compensable under the Workers' Compensation Act ("the Act"). The Act contains a list of diseases that qualify as occupational diseases. *See* N.C. Gen. Stat. § 97-53 (2002). Asbestosis is specifically enumerated under G.S. § 97-53(24) and is compensable if a causal connection is shown between the disease and employment. *See* N.C. Gen. Stat. § 97-57; *Clark v. ITT Grinnell Industrial Piping, Inc.*, 141 N.C. App. 417, 539 S.E.2d 369 (2000). Lung cancer, though not specifically enumerated, may also qualify as an occupational disease if it satisfies the requirements of the statute's catch-all provision, G.S. § 97-53(13):

> Any disease . . . 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.

Certain occupational diseases develop gradually and after cumulative or repeated exposure to the hazards of the disease. *See Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983). Because an employee may be exposed to those hazards over the course of a career with several different employers, the General Assembly set out guidelines for employer and carrier liability for occupational disease based on when the employee was "last injuriously exposed" to the hazards of the disease. N.C. Gen. Stat. § 97-57 (2002).

For purposes of asbestosis or silicosis, the statute defines injurious exposure as exposure of at least 30 days or parts thereof in seven consecutive months. *See id.* Furthermore, the statute creates a presumption that the last 30 days of work involving exposure to asbestos is the last injurious exposure for purposes of employer liability. *See Barber v. Babcock & Wilcox Constr. Co.*, 101 N.C. App. 564, 400 S.E.2d 735 (1991). For all other occupational diseases, including those which fall under G.S. § 97-53(13), last injurious exposure has been described as " 'an exposure which proximately augmented the disease to any extent, however slight.' " *Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362-63 (citations omitted).

[1] In the present case, plaintiff contends decedent-employee's last injurious exposure to the hazards of both asbestosis and lung cancer occurred in or prior to 1976 while he was employed with defendant-employer, and defendant-carrier was on the risk. As to the asbestosis claim, plaintiff argues that the Commission's finding that plaintiff was

exposed to asbestos while employed with Mundy for at least 30 days in seven consecutive months was not supported by the evidence. First, plaintiff asserts that the only evidence that could support the finding of exposure to asbestos was deposition testimony of the decedent-employee and that such testimony was not competent evidence due to the decedent-employee's age of 81 years, his indication that he could not remember well or was confused by the questions at deposition, and contradictory testimony about his exposure while working for Mundy.

Although a witness who can remember nothing is not competent to testify, a weak or impaired memory goes not to the competency of the evidence, but rather the weight to be accorded the testimony. *See State v. Witherspoon*, 210 N.C. 647, 188 S.E. 111 (1936). The deposition testimony at issue was included in the stipulated exhibits and there is no indication that plaintiff objected to its admission. Furthermore, it is the sole province of the Commission to determine the credibility of witnesses and the weight to be given their testimony. *See Boles*, *supra*. A review of the deposition of decedent-employee does not indicate that he was clearly incompetent to testify; absent such, this Court may not disturb the Commission's decision with respect to the weight to be given the evidence and the findings based upon it.

[2] Next, plaintiff argues that evidence of asbestos exposure must be "quantifiable," i.e., that the Commission must be able to point to, or count, the number of days in which exposure occurred in order to determine whether decedent sustained exposure of at least 30 days or parts thereof in seven months as required under the statute. Without such "quantifiable" evidence, plaintiff argues that the Commission cannot find as a fact that such exposure occurred. The cases plaintiff cites in support of this argument do not necessarily indicate that the Commission must point to 30 specific days of exposure as long as there is competent evidence from which such exposure can be inferred, such as an average number of days each week or month in which an employee was exposed over time. *See, e.g., Woodell v. Starr Davis Co.*, 77 N.C. App. 352, 335 S.E.2d 48 (1985). These cases, however, do not limit the Commission's ability to rely on inferences that may reasonably be drawn from the evidence of record. *See Ivey v. Fasco Industries*, 109 N.C. App. 123, 425 S.E.2d 744 (1993).

Evidence of decedent-employee's asbestos exposure at Mundy includes a social security earnings statement showing that he worked

for Mundy in 1988 and 1989, earning annual totals of $7,113.97 and $3,000.11 respectively. Decedent-employee testified at his deposition that he worked for Mundy for at least a six-month period at one point. In response to questions about the presence of asbestos dust in the work environment at Mundy, decedent-employee responded: "Sometimes. Not all the time, but just sometimes during the time I was working with Mundy." This evidence supports a reasonable inference that decedent-employee was exposed to asbestos for at least 30 days or parts thereof within seven consecutive months while working for Mundy. The Commission's finding applied the correct legal standard according to G.S. § 97-57. Therefore, we decline to disturb the Commission's conclusion that decedent-employee's last injurious exposure to the hazards of asbestosis occurred with Mundy.

[3] With respect to the lung cancer claim, plaintiff argues that the Commission applied the incorrect legal standard in determining decedent-employee's last injurious exposure to the hazards of lung cancer. In order to qualify as injurious under G.S. § 97-57, an occupational exposure to the hazards of lung cancer need only proximately augment the condition, however slightly. *See Rutledge*, *supra*. The Commission found that "[d]ecedent's lung cancer . . . was likely *caused* by his exposure to asbestos in his various work environments" (emphasis added). Thus, the exposure to asbestos sustained by decedent while working for both defendant-employer and Mundy qualifies as "injurious" under G.S. § 97-57. Other findings by the Commission clearly indicate that Mundy, not defendant-employer, was decedent's last employer. Therefore, despite the Commission's failure to couch its findings in terms of proximate augmentation of the lung cancer, we hold those findings support the Commission's conclusion with respect to the lung cancer claim that "decedent's last injurious exposure to asbestos did not occur while he was employed by the defendant-employer . . . ."

[4] Plaintiff next challenges the adequacy of the evidence to support the Commission's findings. Plaintiff asserts that all of the medical opinion testimony on causation and increased risk for lung cancer followed a question by defense counsel describing the decedent as being exposed to asbestos "on a regular basis." Plaintiff contends there is no evidence that decedent was exposed to asbestos on a regular basis with Mundy, and thus any findings based on the subsequent medical opinions offered by the witness could only lead to the conclusion that decedent was last injuriously exposed with defendant-employer. We disagree.

In response to defense counsel's question, Dr. Credle, the expert medical witness, testified that decedent-employee's occupational asbestos exposure put him at increased risk for contracting lung cancer compared to the general population and that the exposure was a significant contributing factor to his development of the disease. Dr. Credle had also testified earlier that decedent's occupational asbestos exposure "was the likely cause" of his lung cancer and, in response to earlier hypothetical questions that "the more you're exposed [to asbestos], the more likely you are to have disease and the more likely it is to be bad disease." Taken as a whole, this evidence supports the Commission's finding of a causal link between decedent's lung cancer and "his various work environments." This finding, in turn, supports the Commission's conclusion that decedent-employee was not last injuriously exposed to asbestos while employed by defendant-employer.

Affirmed.

Judges TYSON and THOMAS concur.

JAMES S. GORDON, EMPLOYEE, PLAINTIFF v. CITY OF DURHAM, EMPLOYER, SELF-INSURED, DEFENDANT

No. COA02-181

(Filed 5 November 2002)

1. Workers' Compensation— causal connection between accident and injury—sufficiency of evidence

There was sufficient evidence in a workers' compensation case to support the Industrial Commission's finding of a causal connection between the visual disturbances suffered by a firefighter and the explosion of an electrical panel during a fire where two doctors testified that the visual disturbances were caused by the incident and one of those doctors fully described the physiological changes in plaintiff's brain that trigger the visual disturbances.

2. Workers' Compensation— employment—no constructive refusal

The Industrial Commission did not err by concluding that plaintiff did not constructively refuse employment where plaintiff was given the choice of resignation, medical disability retirement, or termination due to being medically disqualified for the work; plaintiff testified that he had not previously requested medical retirement and would have remained with his employer if he had been offered suitable employment; and the employer produced no evidence that it had offered suitable employment or attempted to find plaintiff suitable employment in another field.

3. Workers' Compensation— employer's credit—plaintiff's limited wages after injury

The Industrial Commission did not err in a workers' compensation action by awarding plaintiff-firefighter benefits while allowing his former employer a credit for the limited wages plaintiff was able to earn after the injury as an electrical contractor.

Appeal by employer from Opinion and Award of the Industrial Commission filed 16 October 2001. Heard in the Court of Appeals 14 October 2002.

Clayton, Myrick, McClanahan & Coulter, PLLC, by Robert D. McClanahan, for plaintiff-appellee.

Lewis & Roberts, P.L.L.C., by Brian D. Lake and Jeffrey A. Misenheimer, for defendants-appellees.

TYSON, Judge.

The City of Durham ("employer") appeals from the North Carolina Industrial Commission's ("Commission") opinion and award which reversed the opinion of the Deputy Commissioner and granted James Scott Gordon ("plaintiff") workers' compensation benefits. We affirm.

I. Facts

Plaintiff was employed as a firefighter for employer in August of 1997, working as a driver for Engine Company 10. Plaintiff also was self-employed since 1986 as an electrical contractor. On 27 August 1997 at approximately 11:00 p.m., plaintiff responded to the scene of a fire off of Garrett Road in Durham. While plaintiff was fighting the

fire, an electrical panel began to smoke and subsequently exploded. Plaintiff was standing directly in front of the electrical panel when the explosion occurred. Plaintiff was not struck by debris or shrapnel from the explosion. The intensity of the flash from the explosion temporarily blinded plaintiff. Plaintiff's eyes subsequently readjusted and he was able to finish his shift. However, he had trouble focusing his eyes once he returned to the fire station later that day. Plaintiff left for vacation with his family the following day and his vision appeared normal. While he was driving, visual difficulties reoccurred. Plaintiff's visual problems continued upon returning from vacation that included difficulty seeing straight ahead. Initially, these incidents occurred every two to three days. Later, the incidents would occur every three to six weeks and would last for periods of 15 to 45 minutes.

Plaintiff sought medical care with his family physician, Dr. Curtis T. Eshelman. Dr. Eshelman diagnosed plaintiff with light trauma and blurred vision. Dr. Eshelman had no explanation for why plaintiff continued to have visual problems and referred plaintiff to Dr. Stuart McCracken, a licensed and board-certified ophthalmologist. Dr. McCracken examined plaintiff on 17 September 1997 and determined that plaintiff had experienced ophthalmic migraines. In Dr. McCracken's opinion, the 27 August 1997 accident was coincidental with and not the causative factor of plaintiff's visual problems. Plaintiff was referred to Dr. Michael L. Soo, a neurologist. On 13 October 1997, Dr. Soo examined and diagnosed plaintiff with repeated episodes of ophthalmic migraines following exposure to flash explosion. It was Dr. Soo's opinion that "it is more likely than not" that the 27 August 1997 accident was the cause of plaintiff's continued visual problems. Dr. Soo, with Dr. Eshelman's consent, referred plaintiff to Dr. Stephen Pollock, a neuro-ophthalmologist. Dr. Pollock examined plaintiff on 26 May 1998 and found no evidence of an ongoing eye disease. Dr. Pollock did, however, diagnose plaintiff with a form of acepholgic migraines. Dr. Pollock opined there was a temporal relationship between the onset of the plaintiff's symptoms and the bright flash of light that occurred on 27 August 1997. On 21 January 1999, plaintiff was examined by Dr. Barid S. Grimson, a neuro-ophthalmologist. In Dr. Grimson's opinion, there was a causal relationship between the 27 August 1997 explosion and plaintiff's visual problems and migraines.

On 18 August 1998, employer's physician, Dr. Stuart Manning, determined that plaintiff was medically disqualified for the position

of firefighter. Plaintiff continued his self employment as an electrical contractor after being deemed medically disabled by the employer. On 7 October 1998, Fire Chief Otis Cooper, Jr. informed plaintiff that Employee Health Services had indicated that plaintiff was not medically able to perform the essential job functions of his position. Plaintiff was then given three options by employer: resignation, medical disability retirement, or termination due to his inability to perform his job. On 1 September 1998, plaintiff medically retired from the fire department. Since being placed on medical disability by employer, plaintiff has continued to work as much as possible within his medical limits as an electrical contractor.

On 11 October 2000, the Deputy Commissioner denied plaintiff's claim for workers' compensation. On 24 August 2000, plaintiff filed a notice of appeal to the Commission. On 16 October 2001, the Commission reversed the Deputy Commissioner's Opinion and Award and determined that the plaintiff was entitled to ongoing temporary total disability benefits due to the injury sustained on 27 August 1997. The Commission found in part:

> 16. Plaintiff's recurrent visual problems and headaches are a direct and natural result of, and causally related to his 27 August 1997 injury by accident.
>
> 17. As the result of his 27 August 1997 injury by accident, plaintiff has been unable to earn wages in his former position with defendant or in any other employment, except for the limited wages earned as an electrical contractor, for the period of 7 October 1998 through the present and continuing.

The Commission concluded in part:

> 1. On 27 August 1997, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant. G.S. § 97-2(6). Plaintiff's recurrent visual problems and headaches are a direct and natural result of, and casually related to his 27 August 1997 injury by accident. Id.
>
> 2. As a result of his 27 August 1997 injury by accident, plaintiff is entitled to be paid by defendant ongoing total disability compensation at the rate of $512.00 per week for the period of 7 October 1998 through the present and continuing until such time as plaintiff returns to work earning his former wage level or until further order of the Commission. G.S. § 97-29.

3. Defendant is entitled to a credit for the limited wages plaintiff has earned as an electrical contractor since the injury. G.S. § 97-42.

4. As the result of his 27 August 1997 injury by accident, plaintiff is entitled to have defendant pay for all related medical expenses incurred or to be incurred. G.S. § 97-25; G.S. § 97-25.1

Employer appeals.

II. Issues

Employer asserts that the Commission erred in: (1) concluding that plaintiff's alleged visual problems are causally related to the incident of 27 August 1997; (2) failing to find that the plaintiff has constructively refused suitable employment; and (3) failing to find that the plaintiff has retained wage earning capacity.

III. Standard of Review

Our review of an opinion and award of the Commission is limited to two questions: (1) whether any competent evidence supports the Commission's findings of facts; and (2) whether the Commission's findings of facts support its conclusions of law. *Saums v. Raleigh Community Hospital*, 346 N.C. 760, 765, 487 S.E.2d 746, 750-51 (1997). The Commission's findings are binding on appeal if supported by any competent evidence, even though other competent evidence may support a contrary finding. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998). It is the Commission's duty to judge the credibility of the witnesses and to determine the weight given to each testimony. *Bailey v. Sears Roebuck & Co.*, 131 N.C. App. 649, 653, 508 S.E.2d 831, 834 (1998). The parties stipulated that plaintiff suffered an injury by accident arising out of and in the course and scope of his employment on 27 August 1997.

IV. Causal Connection

[1] Employer contends there is insufficient evidence to support the Commission's finding of a causal connection between the injury plaintiff suffered and the 27 August 1997 incident. We disagree.

Dr. Soo and Dr. Grimson opined that the visual disturbances suffered by the plaintiff were caused by the 27 August 1997 incident. Dr. Soo determined that a causal relationship existed and fully described the actual physiological changes in the brain of the plaintiff that trigger the visual disturbances. There was competent evi-

dence in the record to support the Commission's finding of a causal connection between visual problems and the incident that occurred on 27 August 1997.

V. Constructive Refusal of Suitable Employment

[2] Employer's contend that plaintiff constructively refused employment when he instructed the City not to look for any other employment within his restrictions in violation of N.C. Gen. Stat. § 97-32 (2001). We disagree.

If an injured employee refuses employment procured for him that is suitable to his capacity, he shall not be entitled to any compensation while the refusal continues. N.C. Gen. Stat. § 97-32. The burden is on the employer to show that plaintiff refused suitable employment.

The Commission found plaintiff unable to earn wages in his former position with employer or any other employment as a result of the 27 August 1997 accident, except for the limited wages earned as an electrical contractor. Plaintiff was given light duty after being medically disqualified from working as a firefighter. This light duty was temporary and ended on 1 September 1998. The Commission found that on 7 October 1998, plaintiff was given three choices: (1) resignation; (2) medical disability retirement; or (3) termination due to being medically disqualified to perform his job. Plaintiff testified that he never requested medical retirement until he was presented with these choices. He also testified that he would have remained with employer if he had been offered suitable employment. Employer produced no evidence that showed employer offered plaintiff suitable employment or attempted to find plaintiff suitable employment in another field. The Commission did not err by concluding that plaintiff did not constructively refuse suitable employment.

V. Wage Earning Capacity

[3] Employer contends that "plaintiff has lost no earning capacity as a result of the incident of August 27, 1997." The Commission found and the plaintiff admits that plaintiff has some wage earning capacity through his electrical contracting work. The Commission found that plaintiff has been unable to earn wages since the incident and continuing "except for the limited wages earned as an electrical contractor." It further found that there was insufficient evidence to find plaintiff's wages as an electrical contractor except for finding that the wages were "limited." The Commission awarded plaintiff temporary

total benefits but stated that "defendant is entitled to a credit for the limited wages plaintiff has earned as an electrical contractor since the injury." The Commission did not err by awarding plaintiff benefits while also allowing employer credit for wages plaintiff earned. This assignment of error is overruled.

V. Conclusion

After reviewing the record and employer's assignments of error, we find competent evidence in the record to support the findings of the Commission which in turn support its conclusions of law.

Affirmed.

Chief Judge EAGLES and Judge THOMAS concur.

JUDITH E. HARTWELL, PLAINTIFF v. ROBERT G. MAHAN, M.D., DEFENDANT

No. COA02-130

(Filed 5 November 2002)

1. **Judgments— default—summary judgment on affirmative defenses improper**

   The trial court erred in an action for wrongful termination, defamation, libel and slander, and intentional infliction of emotional distress by granting summary judgment in favor of defendant doctor on affirmative defenses after plaintiff obtained an entry of default under N.C.G.S. § 1A-1, Rule 55 against defendant, and the case is remanded for a determination of damages because where an entry of default has not been set aside and the complaint is sufficient to state a claim, the defendant in default may not defend its merits by asserting affirmative defenses in a motion for summary judgment.

2. **Judgments— default—Frow principle—no entitlement to summary judgment on joint and several liability**

   The trial court erred in an action for wrongful termination, defamation, libel and slander, and intentional infliction of emotional distress by granting summary judgment in favor of defendant doctor after plaintiff obtained an entry of default under N.C.G.S. § 1A-1, Rule 55 against defendant, and the case is re-

manded for a determination of damages even though defendant contends he is entitled to summary judgment based on the complaint only outlining joint claims for relief and the fact that the other codefendants were dismissed from this action on summary judgment, because the Frow principle is inapplicable when defendants are jointly and severally liable.

Appeal by plaintiff from judgment entered 28 September 2001 by Judge Clarence E. Horton, Jr., in Davidson County Superior Court. Heard in the Court of Appeals 9 October 2002.

Shelley Blum, for plaintiff-appellant.

Kluttz, Reamer, Blankenship, Hayes & Randolph, L.L.P., by Richard R. Reamer and E. Blake Evans, for defendant-appellee.

TYSON, Judge.

I. Facts

On 6 June 1995, plaintiff filed a complaint against Davidson County, Lexington Memorial Hospital ("hospital"), and Robert G. Mahan, M.D. ("defendant") alleging wrongful termination, defamation, libel and slander, and intentional infliction of emotional distress. Summary judgment was granted in favor of Davidson County and the hospital. On 12 July 1995, plaintiff obtained an entry of default against defendant following defendant's failure to timely file a response to plaintiff's complaint. On 25 October 1995, the trial court denied defendant's motion to set aside the entry of default. Defendant appealed. This Court dismissed the appeal as premature in COA96-36, an unpublished opinion filed on 3 October 1996.

In April of 1998, defendant moved for dismissal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure which the trial court granted. This Court affirmed the dismissal in an unpublished opinion filed on 17 August 1999, COA98-890, with Judge Ralph A. Walker dissenting. In his dissent, Judge Walker stated:

> These allegations are sufficient based on the required liberal interpretation of pleadings to assert a claim for slander *per se* under the category of impeaching plaintiff's trade or profession. . . . [P]laintiff has made an adequate claim for intentional infliction of emotional distress. . . . These allegations in plaintiff's complaint adequately establish aggravating factors sufficient to set out a claim for punitive damages.

> I note that over four years have passed since plaintiff filed her complaint and obtained a default judgment against the defendant. I conclude that the allegations in plaintiff's complaint are "sufficient to state a claim for relief." Just as the Court in *Hunter v. Spauling*, 97 N.C. App. 372, 388 S.E.2d 630 (1990), held that the plaintiffs' complaint contained the necessary elements to establish their claim so that they were entitled to a default judgment, likewise, here the trial court properly determined that plaintiff's complaint set forth claims with such sufficiency that she was entitled to a default judgment. The plaintiff should have "her day in court."

On 3 March 2000, the Supreme Court adopted Judge Walker's dissent and reversed the dismissal. *Hartwell v. Mahan*, 351 N.C. 345, 525 S.E.2d 171 (2000). On remand to the trial court, defendant filed a motion for summary judgment based on several affirmative defenses. The trial court granted defendant's motion for summary judgment. Plaintiff appeals. We reverse the order of the trial court and remand for a determination of damages.

II. Issue

Plaintiff contends that the trial court erred in granting summary judgment in favor of defendant.

III. Default

A. No Answer Filed

"When a party against whom a judgment for affirmative relief is sought has failed to plead . . . and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default." N.C. Gen. Stat. § 1A-1, Rule 55(a) (2001). "For good cause shown," a judge may set aside an entry of default or a judgment by default in accordance with Rule 60(b). N.C. Gen. Stat. § 1A-1, Rule 55(d). An entry of default remains in effect until properly set aside. *Id.*

Once an entry of default is filed, plaintiff may obtain judgment either by the clerk, when a sum is certain, or by the judge. N.C. Gen. Stat. § 1A-1, Rule 55(b). To determine the damages, the judge may hold a hearing on that issue. N.C. Gen. Stat. § 1A-1, Rule 55(b)(2)a.

When an entry of default is made and the allegations of the complaint are sufficient to state a claim, "the defendant has no further standing to contest the merits of plaintiff's right to recover. His only

recourse is to show good cause for setting aside the default and, failing that, to contest the amount of the recovery." *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 482 (1991) (quoting *Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 509-10, 181 S.E.2d 794, 798 (1971)). "The effect of an entry of default is that the defendant against whom entry of default is made is deemed to have admitted the allegations in plaintiff's complaint, and is prohibited from defending on the merits of the case." *Id.* (citing *Bell v. Martin*, 299 N.C. 715, 264 S.E.2d 101 (1980)).

Here, plaintiff obtained an entry of default which was not set aside after motion therefore was heard and denied by the superior court. Our Supreme Court held that the complaint was sufficient to state a claim for relief against defendant. *Hartwell, supra*. The trial court noted that it based its granting of summary judgment on the case of *Joe Newton, Inc. v. Tull*, 75 N.C. App. 325, 330 S.E.2d 664 (1985). Defendant contends that *Newton* holds that "a defendant is entitled to proceed with summary judgment motion even if default has been entered against him." This assertion misreads *Newton*.

In *Newton*, the defendants filed an untimely answer with the trial court. *Newton*, 75 N.C. App. at 307, 330 S.E.2d at 666. The plaintiff never sought an entry of default and no entry of default was ever entered against the defendants. *Id.* The plaintiff moved to strike the answer and counterclaim for untimeliness. *Id.* The trial court held that "[b]y waiting until answer had been filed before seeking to obtain entry of default, plaintiff waived its rights to entry of default pursuant to G.S. 1-1A, Rule 55(a). Default may not be entered after an answer has been filed, even if the answer is tardily filed." *Id.* at 328, 330 S.E.2d at 666. We held that the plaintiff could not receive an entry of default against the defendants. *Id.* In the present case, an entry of default is entered and a motion to set aside the default has been denied. No answer or motion for summary judgment was filed prior to the entry of default.

<u>B. Summary judgment on Affirmative defenses</u>

[1] The Court in *Newton* also stated "even if plaintiff's motion to strike the answer had been ruled upon and allowed before the trial court considered the motion for summary judgment, defendants would, nonetheless, have been entitled to proceed with their summary judgment motion." *Id.* Defendant contends that this language means that a defendant in default is entitled to proceed to summary judgment on affirmative defenses. We disagree.

In *Newton*, the question before this Court was whether the trial court erred in not addressing the motion to strike the answer and counterclaim before it granted the motion for summary judgment. *Id.* The Court stated that even if the motion to strike had been heard and granted, summary judgment could still be considered because affirmative defenses may be raised for the first time on summary judgment before a party files an answer. *Id.* at 328, 330 S.E.2d at 667. *Newton*'s holding arose where default had *not* been entered against the defendant. *Newton* did *not* address whether affirmative defenses could be raised on summary judgment after entry of default. We hold that where an entry of default has not been set aside and the complaint is sufficient to state a claim, the defendant in default may not defend its merits by asserting affirmative defenses in a motion for summary judgment.

C. Joint and Several Liability

[2] Defendant also contends that he is entitled to summary judgment because "the Complaint only outlined 'joint' claims for relief against two (2) or more of the original three (3) co-defendants, and the other co-defendants were dismissed from this action on summary judgment." Defendant asserts that "[t]he Plaintiff-Appellant's Complaint clearly alleges only joint liability against the Defendant-Appellee and the other co-defendants, even referring to their 'conspiracy' against her."

Defendant relies on *Leonard v. Pugh*, 86 N.C. App. 207, 356 S.E.2d 812 (1987) which held:

> Where a complaint alleges a joint claim against more than one defendant, default judgment pursuant to G.S. 1A-1, Rule 55 should not be entered against a defaulting defendant until all defendants have defaulted; or if one or more do not default, then, generally, entry of default judgment should await an adjudication as to the liability of the non-defaulting defendants. If joint liability is decided against the defending party in favor of the plaintiff, the plaintiff is entitled to judgment against all defendants. If, however, joint liability is decided against the plaintiff, the complaint should be dismissed as to all defendants.

86 N.C. App. at 210-11, 356 S.E.2d at 815 (citations omitted). This principle was enunciated by the United States Supreme Court in *Frow v. De La Vega*, 82 U.S. 552, 21 L. Ed. 60 (1872). The North Carolina Supreme Court held the *Frow* principle inapplicable when

the defendants are jointly and severally liable. *Harlow v. Voyager Communications V*, 348 N.C. 568, 571-73, 501 S.E.2d 72, 74-75 (1998).

Here, plaintiff alleges "[d]efendant Mahan and defendant Hospital, through various of the latter's agents, entered into a civil conspiracy to and did unlawfully libel and slander plaintiff and abridge her freedom of speech by creating a false and defamatory version of events. . . ." "When a cause of action lies for injury resulting from a conspiracy, 'all of the conspirators are liable, jointly and severally, for the act of any one of them done in furtherance of the agreement.'" *State ex rel. Long v. Petree Stockton, L.L.P.*, 129 N.C. App. 432, 447, 499 S.E.2d 790, 799 (1998) (*quoting Fox v. Wilson*, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987)).

At bar, the *Frow* principle is inapplicable. *Harlow*, 348 N.C. at 573, 501 S.E.2d at 75. Plaintiff alleges defendant and the other co-defendants are jointly and severally liable for damages.

III. Conclusion

The trial court erred in granting summary judgment in favor of defendant. We reverse and remand to the trial court for a determination of plaintiff's damages.

Reversed and remanded.

Judges McCULLOUGH and BRYANT concur.

DIXIE LEE FRANKS, PLAINTIFF v. BILLY EUGENE FRANKS, DEFENDANT

No. COA01-1601

(Filed 5 November 2002)

1. Divorce— equitable distribution—inventory values—not binding at trial

An equitable distribution plaintiff was not bound at trial by an inventory affidavit statement that certain items were of unknown value where defendant received a copy of plaintiff's expert's opinion of those values prior to trial.

2. Divorce— equitable distribution—valuation of painting business—methods

An equitable distribution plaintiff's expert used valuation methods that complied with standards established by law when evaluating the parties' painting business where the expert analyzed business and tax records, used the asset approach, the market approach, and the income approach in reaching his conclusion, explained in great detail how he analyzed the data, and gave an opinion of the value of the business's goodwill using the excess earning method.

Judge GREENE concurring.

Appeal by defendant from judgment entered 23 May 2001 by Judge Earl J. Fowler, Jr., District Court, Buncombe County. Heard in the Court of Appeals 8 October 2002.

Ronald C. True, Attorney for defendant-appellant.

Howard McGlohon, Attorney for plaintiff-appellee.

WYNN, Judge.

Defendant Billy Eugene Franks, appealing from an equitable distribution judgment entered 23 May 2001, presents two issues for our review: (I) Did the trial court err in considering valuation opinions outside of those expressed in plaintiff's pleadings; and (II) did the trial court err in its methods of valuation. We find no error and affirm the equitable distribution judgment.

Billy and Dixie Franks were granted an absolute divorce on 29 January 1998, with only equitable distribution issues remaining. The parties filed inventory affidavits in accordance with N.C. Gen. Stat. § 50-21 (2001). In Ms. Franks' affidavit, several assets, including "racing stuff" and the business "Franks' Painting Service," were listed with an unknown value at the date of separation. At trial, Ms. Franks presented an expert who gave an opinion assessing the value of Franks' Painting Service at the date of separation as $450,000. However, Mr. Franks' subjective impression was the business's value was $60,000. The court attributed a $450,000 value to the business, found an equal division was equitable, and ordered defendant to pay the plaintiff a distribution award of $131,240 within 90 days. The execution of this judgment was stayed pending appeal.

[1] We first consider Mr. Franks' contention that the parties to an equitable distribution action are bound by the values stated in their inventory affidavits. N.C. Gen. Stat. § 50-21(a) specifically provides: "[t]he inventory affidavits prepared and served pursuant to this subsection shall be subject to amendment and shall not be binding at trial as to completeness or value."

At trial, Mr. Franks objected to the admission of the expert's opinion as to value of the painting business because Ms. Franks "blind-sided" him by not supplementing or amending her valuation affidavit. However, the records show that Mr. Franks received a copy of the expert opinion prior to trial. Accordingly, Ms. Franks was not restricted to her affidavit; was free to present expert testimony at trial; and defendant received appropriate notice of the expert opinion.

[2] Mr. Franks also challenges the valuation methods used by the trial court to determine the value of the painting business. In his brief, he makes the following argument:

> . . . Edward Fidelman, admitted as an expert in business evaluations, . . . provided the following standard and customary definition of fair market value: "It's a price at which property would change hands between a willing buyer and a willing seller . . ." Mr. Fidelman conceded that Mr. Franks had reasonable knowledge of the relevant facts. Mr. Franks was, and is, willing to sell his interest in the business for $30,000.00, and was, and is, will to buy Mrs. Franks' interest in the business for $30,000.00.

Thus, Mr. Franks concludes that his method of valuing the painting business "is the best evidence that the trial court had as to valuation."

However, in contrast to Mr. Franks' naked testimony, Ms. Franks presented the testimony of Mr. Fidelman, an expert in forensic accounting and business valuation, who provided lengthy testimony about "Franks' Painting Service." Based upon the expert's analysis of business and tax records which included information about accounts receivables, fixed assets, tax liabilities, expenses, customers, and other business components, the expert opined the fair market value of the business to be $450,000. The expert used the asset approach, the market approach and the income approach to reach his conclusion; and, he explained in great detail how he analyzed the data.

Based upon this evidence, the trial court found that Franks' Painting Service:

> had on the date of separation accounts receivable of $243,727. It had fixed assets valued at $77,749. And the goodwill of the company may be personal to the defendant himself, but it still has value. There is clearly no way the Court could value the company at $60,000, as contended by defendant. The Court accepts Mr. Fidelman's [plaintiff's expert] value of $450,000. The Court will reduce that by the tax liability he has already paid ($68,000) for a net value of $382,000.

We hold that the trial court properly relied upon the testimony of Ms. Franks' expert to determine valuation of the painting business. Indeed, in *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266 (1985), this Court specifically mentioned the utilization of each of the methods used by Ms. Franks' expert as an appropriate method to use to determine business value. 75 N.C. App. at 419-22, 331 S.E.2d at 270-72. In addition, the expert, based upon the excess earnings method, gave an opinion about the value of the business's goodwill. In *Poore*, this Court stated the value of goodwill "should be made with the aid of expert testimony" and specifically mentioned the excess earnings method as an appropriate measure of goodwill. 75 N.C. App. at 421, 331 S.E.2d at 271. Thus, the record shows that plaintiff's expert used valuation methods that complied with the standards established by law.

Accordingly, we uphold that trial court's order of equitable distribution.

Affirmed.

Judge McGEE concurs.

Judge GREENE concurs with separate opinion.

GREENE, Judge, concurring.

I concur with the majority that the trial court did not err in considering valuation opinions outside the scope of the pleadings; however, for the reasons stated below, I would not address the second issue raised by defendant.

As recently stated by this Court in an equitable distribution case:

> A party believing the methodology used by a witness is not valid or, if valid, is not properly applied to the facts at issue, has an

> obligation to object to its admission. *See* N.C.G.S. § 8C-1, Rule 103(a)(1) (1999). If a timely objection is not lodged at trial, it cannot be argued on appeal that the trial court erred in relying on this evidence in determining the value of the asset at issue. *See* N.C.R. App. P. 10(b)(1); *State v. Lucas*, 302 N.C. 342, 349, 275 S.E.2d 433, 438 (1981) (admission of evidence without an objection is "not a proper basis for appeal").

Walter v. Walter, 149 N.C. App. 723, 733, 561 S.E.2d 571, 578 (2002).

In this case, defendant did not challenge the valuation methodology of plaintiff's expert at trial. Accordingly, he cannot argue on appeal that the trial court erred in relying on that expert's methodology. Thus, for this reason, I agree with the majority that "the trial court properly relied upon the testimony of [plaintiff's] expert."

BEE TREE MISSIONARY BAPTIST CHURCH, BY AND THROUGH ITS TRUSTEES, PLAINTIFF-APPELLANT v. RODERICK DANIEL McNEIL AND WIFE, SELENA BITTLE McNEIL, DEFENDANTS-APPELLEES

No. COA01-1479

(Filed 5 November 2002)

Collateral Estoppel and Res Judicata— collateral estoppel— validity of easement

The trial court did not err by granting summary judgment in favor of defendants on the issue of the validity of an easement based on collateral estoppel, because: (1) the issue of the existence of the easement was previously litigated and is the same issue challenged by plaintiff in this action; (2) defendants are successors-in-interest to the plaintiff in the prior action; (3) there is nothing in the record to indicate that this was only a personal easement; and (4) the easement and its location in the existing roadway are sufficiently described.

Appeal by plaintiff from judgment entered 27 March 2001 by Judge Zoro J. Guice, Jr. in Buncombe County Superior Court. Heard in the Court of Appeals 11 September 2002.

Mary E. Arrowood for plaintiff-appellant.

Adams Hendon Carson Crow & Saenger, P.A., by George W. Saenger, for defendants-appellees.

WALKER, Judge.

On 29 January 1951, Laurence and Mary Howie deeded to Herman and Frances Morgan real property located in Buncombe County, together with a "10 ft. rightof [sic] way" that ran through plaintiff's property. This deed was recorded on 4 April 1951.

On 24 August 1995, Frances Morgan deeded a portion of the subject property to Kerry Waddell, together with a perpetual non-exclusive right to use a right-of-way through plaintiff's property connecting to a public road. The deed was recorded on 13 September 1995.

Also in 1995, Morgan and Waddell brought an action against plaintiff in Buncombe County District Court (95 CVD 4572) to enforce their easement across plaintiff's property. In that case, the trial court entered judgment in 1997 and determined that Morgan had been deeded a "right of way across the property of [plaintiff], along the route as shown on Plaintiff's survey map, Defendants' Exhibit 14, which is attached hereto and made a part hereof."

On 30 July 1999, Waddell deeded to defendants a portion of the property deeded to him by Morgan on 24 August 1995, together with:

> non-exclusive appurtenant easements and rights of way for ingress, egress and regress . . . which easements and rights of way are described in 1867, at Page 267 of the Buncombe County, North Carolina Register's Office and in that certain Order as set forth in that certain civil action file bearing File No. 95-CVD-4572 of the Buncombe County Clerk of Court's Office.

Subsequently, plaintiff filed this action alleging defendants do not have an easement across plaintiff's property. After hearing evidence and arguments of counsel, the trial court entered summary judgment in favor of defendants.

Summary judgment is proper when there is no genuine issue as to any material fact and any party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001); *Coastal Leasing Corp. v. T-Bar Corp.*, 128 N.C. App. 379, 496 S.E.2d 795 (1998). A defendant,

as the moving party, bears the burden of showing that no triable issue exists. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992). A defendant may meet this burden by showing that plaintiff cannot surmount an affirmative defense. *Id.* at 63, 414 S.E.2d at 342. Once a defendant has met this burden, plaintiff must forecast evidence tending to show that a *prima facie* case exists. *Id.*

Defendants contend that plaintiff is collaterally estopped by the 1997 judgment from challenging the validity of the easement. For collateral estoppel to bar plaintiff's action, defendants must show: (1) the earlier action resulted in a final judgment on the merits, (2) the issue in question is identical to an issue actually litigated in the earlier suit, (3) the judgment on the earlier issue was necessary to that case and (4) both parties are either identical to or in privity with a party or the parties from the prior suit. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428-29, 349 S.E.2d 552, 557 (1986); *King v. Grindstaff*, 284 N.C. 348, 355, 200 S.E.2d 799, 805 (1973); *Shaw v. Eaves*, 262 N.C. 656, 661, 138 S.E.2d 520, 525 (1964).

Here, the 1997 judgment determined that Morgan had been granted an easement by deed over the property of the plaintiff, which is the same property in this action. Additionally, determination of the easement was necessary and essential to the prior case.

The first issue in the prior litigation was whether Morgan was "granted an easement over the land of [plaintiff], by deed." The deed referred to was the 1951 deed which reserved a ten-foot easement to Herman and Frances Morgan. As successors-in-interest, defendants only claim the ten-foot easement as determined by the 1997 judgment. Thus, the issue of the existence of the easement previously litigated is the same issue challenged by plaintiff in this action.

Plaintiff contends the parties to the prior litigation are not the same as in this action. However, this argument is without merit as defendants here are successors-in-interest to the plaintiff in the prior action.

Plaintiff further argues that the easement determined by the 1997 judgment was personal to Morgan and not transferable, and thus there is no privity between Morgan and defendants. A personal right-of-way or easement-in-gross, "is not appurtenant to any estate in land and does not belong to any person by virtue of his ownership of an estate in other land, but is a mere personal interest . . . and usually

ends with the death of the grantee . . . ." *Shingleton v. State*, 260 N.C. 451, 454, 133 S.E.2d 183, 185 (1963). However, "an easement appurtenant is incident to an estate" and passes with transfer of that estate. *Id.* at 454, 133 S.E.2d at 185-86. In the absence of evidence to the contrary, an easement that is a "useful adjunct of land owned by the grantee of the easement, will be declared an 'easement appurtenant,' and not 'in gross,'. . . ." *Id.* at 455, 133 S.E.2d at 186, *citing* 28 C.J.S. Easements § 4c, pp. 636-37. Moreover, "[i]n case of doubt an easement is presumed to be appurtenant . . . ." *Id.*, *citing* 17A Am. Jur., Easements, § 12, p. 628.

Here, the easement determined in the 1997 judgment was for the benefit of a right-of-way to and from the Morgan estate and for Morgan's successors-in-interest. There is nothing in the record to indicate that this was only a personal easement in favor of Morgan. Because of the successive relationship defendants are in privity with Morgan. Thus, defendants have met the requirements to be able to successfully assert collateral estoppel thereby preventing plaintiff from re-litigating the validity of this easement.

Finally, plaintiff argues that the easement was not properly described in the deed from Waddell to defendants nor in the 1997 judgment. However, where the description of the easement is "sufficient to serve as a pointer or guide to ascertainment of the location of the land" the description will not fail for vagueness. *Allen v. Duvall*, 311 N.C. 245, 249, 316 S.E.2d 267, 270 (1984), *quoting Thompson v. Umberger*, 221 N.C. 178, 180, 19 S.E.2d 484, 485 (1942); *see also King v. King*, 146 N.C. App. 442, 552 S.E.2d 262 (2001). Upon examining the 1951 deed, the 1997 judgment, and the accompanying survey, it appears the easement and its location in the existing roadway are sufficiently described, notwithstanding an erroneous reference to a thirty-foot easement in the Morgan to Waddell deed.

In summary, we affirm the trial court's granting of summary judgment in favor of defendants.

Affirmed.

Judges McGEE and THOMAS concur.

STATE OF NORTH CAROLINA v. BILLY REVARN HOWIE

No. COA01-1459

(Filed 5 November 2002)

Appeal and Error— preservation of issues—admissibility of evidence—general objection—no motion to suppress

A cocaine possession defendant who raised only general objections and did not move to suppress waived his objections to the admissibility of the evidence. N.C.G.S. § 15A-975.

Appeal by defendant from judgment entered 26 July 2001 by Judge Mark E. Klass in Union County Superior Court. Heard in the Court of Appeals 14 October 2002.

Attorney General Roy Cooper, by Assistant Attorney General Tina A. Krasner, for the State.

David Childers for defendant.

Tyson, Judge.

Billy Revarn Howie, ("defendant") appeals from a judgment entered upon a jury's verdict finding him guilty of felony possession of cocaine and of being a habitual felon. Defendant was sentenced to an active prison term of between 100 months to 129 months.

I. Facts

On 18 June 2000, City of Monroe police officers, Pierce and McAllister, responded to a call at the Economy Inn. The police spoke with two women arguing over possession of a motor vehicle and other issues in the parking lot of the motel.

One of the women invited the officers to Room 54 where the officers first saw Billy Revarn Howie, ("defendant"). Defendant invited the officers inside the room to continue the discussion about the incident in the parking lot. Officer Pierce conducted a weapons search in the room. Consent to search was neither asked for nor given to the officers.

Officer Pierce noticed that one of the "knobs" on the bathroom sink was off, and that plastic bags were located in the cavity. Officer Pierce called Officer McAllister to look at the bags. The officers determined the bags may have "illegal narcotics" in them.

They removed the bags and concluded the contents to be "crack cocaine."

Defendant was apprised of his rights against self-incrimination and the right to counsel. He signed a statement that he had rented the room and that the cocaine belonged to him. A further search was conducted, and seizure of more drugs occurred. Defendant was placed under arrest, transported to the police department, and charged with felony possession of cocaine. At trial, defendant presented no evidence prior to the sentencing phase. The jury convicted defendant of cocaine possession and found him to be a habitual felon. Defendant appeals.

II. Issues

Defendant argues that the trial court committed reversible error by allowing the state to introduce into evidence the cocaine seized from a motel room pursuant to a search without (a) consent of defendant or the other occupant of the room, (b) a search warrant, (c) exigent circumstances, or (d) sufficient probable cause. (2) The defendant also contends that the trial court's denying defendant's motions to dismiss the cocaine charges and to set aside the guilty verdict where the charges were based on illegally obtained evidence constitutes reversible error. (3) The defendant also asserts that the denial of defendant's motion to dismiss the indictment for being a habitual felon because the cocaine charge, which served as the substantive, predicate felony for habitual felon status, was based upon illegally seized evidence was reversible error.

III. Legality of the Search and Seizure

All of defendant's arguments rest upon defendant's first assertion that the trial court erred in allowing the cocaine seized pursuant to an illegal search to be introduced into evidence. The legality of the search is a threshold question with respect to our review of the other contentions. Defendant alleges that the search took place without either consent of defendant or the other occupant of the room, a search warrant, exigent circumstances, or sufficient probable cause. Defendant made general objections to the admission of this evidence at trial.

A motion to suppress made before or during trial is required to properly preserve for appeal an objection to the admissibility of evidence. N.C.G.S. § 15A-979(d) (2001) states, "[a] motion to suppress

evidence made pursuant to this Article is the exclusive method of challenging the admissibility of evidence upon the grounds specified in G.S. 15A-974." N.C.G.S. § 15A-974 (2001) outlines the procedure for excluding evidence seized in violation of the Constitutions of the United States and North Carolina as well as for substantial violations of North Carolina Criminal Procedure statutes.

Defendant contends that the search of his motel room was illegal because it was conducted without either consent, a search warrant, exigent circumstances or sufficient probable cause. These prerequisites for a legal search derive from the constitutional protection prescribed by the 4th and 14th Amendments of the U.S. Constitution and by Article I, § 20 of the N.C. Constitution. Defendant did not preserve these arguments pursuant to N.C.G.S. § 15A-979(d).

Our Supreme Court has held that failure to raise the admissibility question for evidence obtained in an allegedly unlawful search by a motion to suppress constituted a waiver by the defendant of his objection to the admission of the evidence. *State v. Hill*, 294 N.C. 320, 333, 240 S.E.2d 794, 803 (1978). In *Hill*, the trial court found that defendant had a "reasonable opportunity to move to suppress the evidence . . . ." *Id.* at 333-34, 240 S.E.2d at 803.

N.C.G.S. § 15A-975(a) specifies that a defendant must move to suppress evidence prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c). Subsections (b) and (c)

> authorize a motion to suppress during trial 'when the State has failed to notify the defendant's counsel or, if he has none, the defendant, sooner that 20 working days before trial, of its intention to use the evidence,' and the evidence is of a specified nature; or when 'additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before' the denial of his pretrial motion.

State v. Drakeford, 37 N.C. App. 340, 345, 246 S.E.2d 55, 59 (1978) (quoting N.C.G.S. § 15A-975(b), (c)).

Our Court in *State v. Drakeford* held that "15A not only requires the defendant to raise his motion according to its mandate, but also places the burden on the defendant to demonstrate that he has done so." *Id.* at 345, 246 S.E.2d at 59. The facts in *Drakeford* are similar to

those in the present case. Defendants did not move to suppress the evidence as the fruits of an alleged illegal search of a motel room prior to trial and made only general objections to that evidence at trial. *Id.* at 344, 246 S.E.2d at 58. This Court held that a motion to suppress is "the exclusive method of challenging the admissibility of evidence on constitutional or statutory grounds." *Id.* at 345, 246 S.E.2d at 59 (citation omitted).

Defendant merely raised general objections at trial and failed to move to suppress. Defendant waived his objections to the admissibility of the evidence. We find no error.

No Error.

Chief Judge EAGLES and Judge THOMAS concur.

IN RE: THE DECISION OF THE STATE BOARD OF ELECTIONS DATED NOVEMBER 19, 1999 AND ROBERT J. BARKER, SR., PETITIONER/PLAINTIFF v. NORTH CAROLINA STATE BOARD OF ELECTIONS AND WAKE COUNTY BOARD OF ELECTIONS, RESPONDENTS/DEFENDANTS

No. COA01-1424

(Filed 5 November 2002)

Elections— access to ballots cast in election—Public Records Act

The trial court did not err by granting respondent State Board's motion to dismiss plaintiff candidate's petition for relief seeking access to ballots cast in an election pursuant to the Public Records Act because the Act does not provide a method for accessing the ballots when N.C.G.S. § 163-171 constitutes a clear statutory exemption or exception to the Act and provides the exclusive method for accessing ballots.

Appeal by plaintiff from order filed 23 July 2001 by Judge J.B. Allen, Jr. in Wake County Superior Court. Heard in the Court of Appeals 17 September 2002.

Atkins Hunt & Fearon, P.C., by Donald G. Hunt, Jr. and Belinda Keller Sukeena, for plaintiff appellant.

Attorney General Roy Cooper, by Special Deputy Attorney General Susan K. Nichols, for defendant-appellee North Carolina State Board of Elections, and Deputy County Attorney Shelley T. Eason for defendant-appellee Wake County Board of Elections.

GREENE, Judge.

Robert J. Barker, Sr. (Plaintiff) appeals from an order filed 23 July 2001 granting North Carolina State Board of Elections (the State Board) motion to dismiss Plaintiff's "Petition for Relief."

After a 16 July 2001 hearing on defendants' motion to dismiss, the trial court made findings of fact.[1] These findings show Plaintiff was a candidate for mayor of Fuquay-Varina, North Carolina, in the 2 November 1999 election (the election). On 5 November 1999, the Wake County Board of Elections (the County Board) canvassed the votes cast in the election. The results showed Plaintiff had lost the election by sixteen votes. The State Board refused Plaintiff's request for a recount and he filed this action in the superior court requesting a stay of the certification of the election to allow for an investigation of allegations of voting irregularities. The trial court denied Plaintiff's request and remanded the case to the State Board for further proceedings. On 10 December 1999, Plaintiff appealed to this Court and petitioned for a writ of supersedeas. After denial of Plaintiff's petition to this Court on 21 December 1999, Plaintiff withdrew his appeal and the State Board ordered the election certified.

On 21 January 2000, on remand from the trial court, the State Board declined to take any further action on Plaintiff's requests for a recount or on his allegations of voting irregularities. Subsequently, Plaintiff verbally requested personal access to the ballots issued, voted, or returned during the election. The State Board also refused to take any action on this request. On 28 January 2000, Plaintiff filed the "Petition for Relief" in the trial court to compel access to ballot information. At a 16 July 2001 hearing, Plaintiff presented the sole issue as "whether sealed ballots constitute[d] public records" under

1. Since Plaintiff does not assign error to these findings of fact they are deemed to be supported by competent evidence and are conclusive on appeal. *Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982).

chapter 132 of the General Statutes (the Public Records Act), "and if so, whether they were subject to public access and inspection as public records."

The trial court concluded under the election laws of Chapter 163 of the General Statutes, including section 163-171 governing the sealing of ballots after an election, that "ballots used in municipal elections are not public records as that term is used in [the Public Records Act]."

The dispositive issue is whether N.C. Gen. Stat. section 163-171 provides the sole method for obtaining access to ballots cast in an election.

Plaintiff argues ballots cast in an election are subject to inspection pursuant to the Public Records Act (the Act). There is no dispute between the parties, and we agree, that ballots cast in an election are "public records" within the meaning of the Act. *See* N.C.G.S. § 132-1(a) (2001). As a general proposition "public records" are subject to inspection "at reasonable times and under reasonable supervision," N.C.G.S. § 132-6(a) (2001), and without regard to purpose or motive, N.C.G.S. § 132-6(b) (2001). If, however, the law "otherwise specifically" provides, public records are not subject to disclosure under the Act. N.C.G.S. § 132-1(b) (2001); *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999) (not within Act if "clear statutory exemption or exception").

In this case, the General Assembly enacted, as a part of the election laws, section 163-171, which specifically provides a method for obtaining access to ballots that have been cast in an election. This section unequivocally provides that ballot boxes shall be opened only "upon the written order of the county board of elections or upon a proper order of court." N.C.G.S. § 163-171 (1999) (repealed effective January 1, 2002).[2] Thus, section 163-171 constitutes a "clear statutory exemption or exception" to the Act and provides the exclusive method for accessing ballots.[3] *See Piedmont Publ'g Co. v. City of Winston-Salem*, 334 N.C. 595, 598, 434 S.E.2d 176, 177-8 (1993) (spe-

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2. As the statute at issue in this case was repealed, we do not address the applicability of the Act with respect to ballots cast after the enactment of the current election laws.

3. Plaintiff does not assert any argument in his appeal that the State Board or the trial court erred in denying him access to the ballots under section 163-171. Accordingly, we do not address this issue.

cific statute controls over general statute where both statutes deal with the same subject matter).

Accordingly, because the Act does not provide a method for accessing the ballots, the trial court correctly allowed the State Board's motion to dismiss Plaintiff's petition.

Affirmed.

Judges WYNN and BIGGS concur.

STATE OF NORTH CAROLINA v. LANNIE BLANE SIMPSON

No. COA02-85

(Filed 5 November 2002)

Criminal Law— defendant restrained—no abuse of discretion

The trial court did not abuse its discretion by ordering that defendant be restrained during an armed robbery prosecution based on defendant's 1989 escape from a state prison where the court pledged to ensure that the jury would not see defendant restrained, and the record fails to show that the jury could see the restraints.

Appeal by defendant from judgment entered 22 August 2001 by Judge Kimberly S. Taylor in Cabarrus County Superior Court. Heard in the Court of Appeals 15 October 2002.

Attorney General Roy A. Cooper, III, by Assistant Attorney General Leonard G. Green, for the State.

J. Clark Fischer for defendant-appellant.

MARTIN, Judge.

Lannie Blane Simpson ("defendant") appeals from a judgment entered upon his conviction by a jury of robbery with a dangerous weapon and of being an habitual felon, arising out of defendant's alleged robbery, with the use of a handgun, of a CVS pharmacy on 6 January 2001. The sole assignment of error brought forward on appeal is to the trial court's order that defendant be restrained during

his trial. During a recess in the presentation of the State's evidence, and outside the presence of the jury, the trial court stated as follows:

> I will first say with regard to the security issue that I have asked the bailiff to put restraints on [defendant]; and the reason that I did that and I indicated that was because looking through the habitual felon indictment I saw that he had been previously convicted of felony escape and in light of that, I did not feel comfortable security-wise with him not being restrained in the courtroom.

The trial court noted the objection of defendant's counsel and advised counsel that the jury would be brought in and out of the courtroom before anyone else moved; that defendant would not be walked in front of the jury in shackles; that if defendant were to testify, he would be brought to the witness stand out of the presence of the jury; and that the court would otherwise "do [its] best to keep the jury from seeing that he is under restraint." The court inquired as to whether defense counsel wished to be heard further regarding the matter and counsel responded that he did not. Defendant's habitual felon indictment contained in the record and referred to by the trial court revealed that in 1989, defendant was convicted of felony escape from a state prison in Cabarrus County.

In his sole argument on appeal, defendant contends the trial court abused its discretion in ordering that he be restrained during trial, and that this error entitles him to a new trial. While we agree with defendant that the trial court did not fully comply with the requirements of G.S. § 15A-1031, he has not shown prejudice requiring a new trial.

G.S. § 15A-1031 provides:

> A trial judge may order a defendant or witness subjected to physical restraint in the courtroom when the judge finds the restraint to be reasonably necessary to maintain order, prevent the defendant's escape, or provide for the safety of persons. If the judge orders a defendant or witness restrained, he must:
>
> (1) Enter in the record out of the presence of the jury and in the presence of the person to be restrained and his counsel, if any, the reasons for his action; and
>
> (2) Give the restrained person an opportunity to object; and

(3) Unless the defendant or his attorney objects, instruct the jurors that the restraint is not to be considered in weighing evidence or determining the issue of guilt.

N.C. Gen. Stat. § 15A-1031 (2001).

In the present case, there is no indication in the record that the trial court instructed the jury that it was not to consider defendant's restraint in weighing the evidence or determining his guilt. Nor does it appear defendant or his counsel objected to the trial court's failure to give such an instruction.

While, as a general rule, a criminal defendant is entitled to be free from physical restraint at his trial, unless there are extraordinary circumstances which require otherwise, *State v. Thomas*, 344 N.C. 639, 477 S.E.2d 450 (1996), *cert. denied*, 522 U.S. 824, 139 L. Ed. 2d 41 (1997), there is no *per se* prohibition against the use of restraint when it is necessary to maintain order or prevent escape. *State v. Wright*, 82 N.C. App. 450, 346 S.E.2d 510 (1986). "What is forbidden—by the due process and fair trial guarantees of the Fourteenth Amendment to the United States Constitution and Art. I, Sec. 19 of the North Carolina Constitution—is physical restraint that improperly deprives a defendant of a fair trial." *Wright* at 451, 346 S.E.2d at 511. Such a decision must necessarily be vested in the sound discretion of the trial court.

We are unable to say that the trial court's decision to restrain defendant in the present case was an abuse of discretion. Though it is true that the escape upon which the trial court based its decision had occurred a number of years prior to the present trial, the trial court was in the better position to observe the defendant, to know the security available in the courtroom and at the courthouse, to be aware of other relevant facts and circumstances, and to make a reasoned decision, in the light of those factors, that restraint was necessary or unnecessary. Moreover, as in *Wright*, *supra*, there is no showing on this record that the jurors were affected by, or even aware of, defendant's restraint. The trial court pledged to ensure that the jury would not see defendant restrained; defendant has not argued that the court failed to do so, that the jury was able to view defendant's restraints, or that the jury was otherwise aware defendant was restrained during trial. As our Supreme Court recently noted, where the record fails to disclose that a defendant's shackles were visible to the jury, "the risk is negligible that the restraint undermined the dignity of the trial process or created prejudice in the minds of the jurors," and the

defendant will not be entitled to a new trial on that basis. *State v. Holmes*, 355 N.C. 719, 729, 565 S.E.2d 154, 163 (2002). Accordingly, we find no prejudicial error.

Defendant's remaining assignments of error are deemed abandoned. N.C.R. App. P. 28(a); 28(b)(6).

No error.

Judges GREENE and BRYANT concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 5 NOVEMBER 2002

Case	County	Disposition
BROWN v. HIGH POINT REG'L HOSP. No. 01-1458	Ind. Comm. (I.C. 472648)	Affirmed
CLAIBORNE v. KOONS No. 02-64	Mecklenburg (00CVS20023)	Appeals dismissed
COUNCIL v. SLACK No. 01-1493	Durham (01CVS3619)	Affirmed in part, reversed in part and remanded
CROSS v. HINES No. 02-211	Pitt (00CVS1402)	New trial
FRANCO-FAVELA v. WESTER No. 02-160	Franklin (99CVD605)	Affirmed
IN RE AUSTIN No. 01-1489	Wake (99J500)	Affirmed
IN RE LACEY No. 02-360	Rowan (87J85) (88J62)	Affirmed
IN RE WHITLEY No. 01-1066	Nash (00J109) (00J110)	Affirmed
IREDELL CTY. ex rel. CAMPBELL v. CLEMENT No. 02-432	Iredell (98CVD1171)	Reversed and remanded
JOHNSON v. WILDER No. 01-1605	Cherokee (00CVS67)	Affirmed
MIZE v. MIZE No. 01-1609	Catawba (98CVD1056)	Affirmed
PICKARD v. PICKARD No. 01-1211	Mecklenburg (99CVD17562)	Affirmed
PROVENZANO v. PROVENZANO No. 01-1446	Wake (00CVD6336)	Affirmed
SOUTHERN STATES COOP., INC. v. COLE No. 02-563	Jackson (00CVD467)	Dismissed
STATE v. BARNES No. 02-695	Pitt (00CRS12704)	Vacated

STATE v. DAMMONS No. 02-60	Lee (00CRS3752) (00CRS52704) (00CRS52705) (00CRS52817)	No error
STATE v. DOSWELL No. 02-576	Cumberland (00CRS57976)	No error
STATE v. ESQUIVEL No. 01-1523	Caswell (00CRS1392) (00CRS1393) (00CRS1855)	No error in part, remanded in part for a new sentencing hearing
STATE v. FISHER No. 02-141	Forsyth (99CRS54130) (00CRS12498)	No error
STATE v. HENDRIX No. 01-1537	Randolph (99CRS3742)	No error
STATE v. HILL No. 02-123	Buncombe (01CRS3483) (01CRS52602)	No error
STATE v. JOHNSON No. 01-1405	Gaston (00CRS16904) (00CRS58386) (00CRS58387) (00CRS58389) (00CRS58392)	No error
STATE v. JOHNSON No. 02-578	Pasquotank (01CRS51440)	No error as to judgment for possession with intent to sell and deliver cocaine. Vacated as to judgment for maintaining a dwelling for keeping and selling controlled substances and remanded for resentencing
STATE v. JONES No. 02-402	Forsyth (00CRS58997)	Judgment vacated; remanded for new trial
STATE v. JONES No. 01-1552	New Hanover (01CRS50029)	No error
STATE v. LOCKLEAR No. 02-442	Harnett (98CRS14102)	No error

STATE v. McAFEE No. 02-467	Buncombe (00CRS63103) (01CRS63105) (01CRS63106)	Dismissed
STATE v. McCLUNEY No. 02-359	Cleveland (01CRS51764)	New trial
STATE v. PERRY No. 02-261	Wilson (99CRS55069) (99CRS55074)	No error
STATE v. ROBINSON No. 02-419	Caldwell (95CRS7853) (95CRS7854)	No error
STATE v. ROBINSON No. 02-119	Wake (00CRS16268) (00CRS16269)	No error
STATE v. SANCHEZ No. 02-289	Henderson (00CRS4416) (00CRS4417) (00CRS55095)	No error
STATE v. SMITH No. 02-417	Forsyth (99CRS37782) (99CRS41663)	Reversed and judgment vacated
STATE v. WEST No. 02-339	Onslow (00CRS53819) (00CRS53823) (00CRS54908)	No error
STATE ex rel. DINGER v. DINGER No. 02-206	Pasquotank (92CVD289)	Affirmed
VIERA v. VIERA No. 01-1596	Wake (00CVD11702)	Affirmed in part; vacated and remanded in part
WEBB v. WEBB No. 01-1564	Rockingham (99CVD697)	Reversed and remanded
WILLIAMS v. McDOWELL No. 01-1315	Bladen (00CVS165)	Dismissed
WILLIAMS v. SARA LEE CORP. No. 02-580	Ind. Comm. (I.C. 675222)	Affirmed
WILLIAMSON v. WILLIAMSON No. 02-274	Vance (96CVD324)	Affirmed

HEADNOTE INDEX

WORD AND PHRASE INDEX

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW
ADVERSE POSSESSION
ALCOHOLIC BEVERAGES
ANIMALS
APPEAL AND ERROR
ARBITRATION AND MEDIATION
ARSON
ASSAULT

BANKS AND BANKING
BURGLARY AND UNLAWFUL BREAKING OR ENTERING

CHILD ABUSE AND NEGLECT
CHILD SUPPORT, CUSTODY, AND VISITATION
CITIES AND TOWNS
CIVIL PROCEDURE
CIVIL RIGHTS
COLLATERAL ESTOPPEL AND RES JUDICATA
CONFESSIONS AND INCRIMINATING STATEMENTS
CONSPIRACY
CONSTITUTIONAL LAW
CONSTRUCTION CLAIMS
CONTRACTS
CORPORATIONS
COSTS
CRIMINAL LAW

DECLARATORY JUDGMENTS
DEEDS
DENTISTS
DISCOVERY
DIVORCE
DRUGS

ELECTIONS
EMPLOYER AND EMPLOYEE
EVIDENCE

FIREARMS AND OTHER WEAPONS
FORGERY
FRAUD

HOMICIDE

IMMUNITY
INDICTMENT AND INFORMATION
INJUNCTION
INSURANCE
INTEREST

JUDGES
JUDGMENTS
JURISDICTION
JURY
JUVENILES

KIDNAPPING

LANDLORD AND TENANT
LARCENY
LIBEL AND SLANDER

MEDICAL MALPRACTICE

NEGLIGENCE

PARENT AND CHILD
PARTIES
PATERNITY
PENALTIES, FINES AND FORFEITURES
PLEADINGS
POLICE OFFICERS
PROBATION AND PAROLE
PRODUCTS LIABILITY
PSYCHOLOGISTS AND PSYCHIATRISTS
PUBLIC ASSISTANCE
PUBLIC OFFICERS AND EMPLOYEES

RAPE
REAL PROPERTY
ROBBERY

SEARCH AND SEIZURE
SECURITIES
SENTENCING
SEXUAL OFFENSES
STATUTE OF FRAUDS
STATUTES OF LIMITATIONS AND REPOSE

TAXATION
TERMINATION OF PARENTAL RIGHTS
TRESPASS
TRIALS

UNFAIR TRADE PRACTICES

VENDOR AND PURCHASER

WARRANTIES
WITNESSES
WORKERS' COMPENSATION

ZONING

ADMINISTRATIVE LAW

Determination of standing—exhaustion of remedies not required—The trial court had subject matter jurisdiction to grant summary judgment for plaintiffs in an action for a declaratory judgment concerning the standing of defendant to file a complaint with the Human Relations Department of the City of Durham. Although defendant contended that plaintiffs should have been required to exhaust their administrative remedies, the department is not an agency and the Administrative Procedure Act does not apply. **Lee Ray Bergman Real Estate Rentals v. N.C. Fair Housing Center, 176.**

Judicial review—questions of law—de novo standard—The trial court did not err by applying the de novo standard of review to a State Personnel Commission decision terminating petitioner for sexual harassment where petitioner sought judicial review of the Commission's decision based in part on questions of whether some of the Commission's conclusions were supported by the record, whether respondent failed to act as required by law, and whether petitioner's dismissal was without just cause. These are questions of law subject to de novo review. **Kea v. Department of Health & Human Services, 595.**

Rule-making proceeding—dentistry management arrangements—failure to exhaust administrative remedies—The trial court did not err in an action seeking to invalidate administrative rule 21 NCAC 16X.0101(a) regarding the propriety of dentistry management arrangements by granting defendant Board of Dental Examiners' motion for judgment on the pleadings with respect to the nonconstitutional claims based on plaintiffs' failure to first exhaust all available administrative remedies including the right to petition for a declaratory judgment under N.C.G.S. § 150B-4 and the ability to petition the Rules Review Commission for adoption or amendment of a rule under N.C.G.S. § 150B-20. **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

Standard of judicial review—jurisdiction issue—The trial court incorrectly applied the whole record standard of review where petitioners Raleigh Rescue and Coggins Construction had contended in their petition for certiorari to the superior court that the Board of Adjustment lacked jurisdiction. Jurisdiction is a question of law, and the correct standard is de novo review. **Raleigh Rescue Mission, Inc. v. Board of Adjust. of City of Raleigh, 737.**

ADVERSE POSSESSION

Summary judgment—insufficient evidence of open, hostile, exclusive possession—The trial court did not err by granting summary judgment for defendants in an adverse possession action where plaintiff's own testimony establishes irrefutably that he failed to possess the property openly, hostilely and to the exclusion of all others. **Dockery v. Hocutt, 744.**

ALCOHOLIC BEVERAGES

Possession for sale without permit—quantities—The trial court did not err by denying defendant's motion to dismiss a charge of possessing alcoholic beverages for sale without a permit where the defendant contended that the quantities of liquor found in his house were insufficient to establish a prima facie case under N.C.G.S. § 18B-304(b), but the minimum quantities listed in subsection (b) are not necessary for an N.C.G.S. § 18B-304(a) violation. **State v. Reed, 462.**

ANIMALS

Dog attack—liability of rental property owner—The trial court erred by denying defendant-Colonial's motion for a directed verdict where Colonial owned land and rental buildings rented to defendant Olson, who owned two dogs; the dogs attacked plaintiff; and Colonial was not the owner or keeper of the dogs. The evidence showed at most that Colonial allowed Olson to have dogs on the property and was aware of prior incidents of the dogs, but alleging that Colonial was an owner or keeper of the dogs was an essential part of plaintiff's prima facie case. **Holcomb v. Colonial Assocs., L.L.C., 413.**

APPEAL AND ERROR

Anders brief—service on juvenile—In an appeal decided on other grounds, it was noted that service of Anders documents on a juvenile was insufficient where the documents were not served on the juvenile's parents, guardian, or custodian. **In re May, 299.**

Appealability—defendant who entered guilty plea—writ of certiorari—The State's motion to dismiss a defendant's appeal as to the first eight issues raised in defendant's brief in a first-degree burglary and second-degree murder case is granted, and the dismissal is without prejudice to defendant's right to seek an evidentiary hearing at the trial court to determine whether defendant's guilty plea was entered reserving the right to appeal the denial of his motions to suppress. **State v. Pimental, 69.**

Appealability—denial of motion for summary judgment—interlocutory order—Defendant individual's appeal in a wrongful death and negligent infliction of emotional distress case from the denial of his motion for summary judgment is dismissed as an appeal from an interlocutory order. **Lovelace v. City of Shelby, 378.**

Appealability—denial of partial summary judgment—interlocutory order—no substantial right—Defendants' appeal in a defamation action from the trial court's denial of partial summary judgment is dismissed as an appeal from an interlocutory order even though the trial court certified this case for immediate review under N.C.G.S. § 1A-1, Rule 54(b). **Priest v. Sobeck, 662.**

Appealability—failure to renew motion to dismiss at close of all evidence—Respondent juvenile may not challenge on appeal the sufficiency of the evidence to support a charge of assault because respondent presented evidence following the close of the State's case but failed to renew his motion to dismiss following the close of all evidence. **In re Hodge, 102.**

Appealability—grant of partial summary judgment—interlocutory order—no final judgment—Plaintiffs' appeal in a defamation action from the trial court's grant of partial summary judgment in favor of defendants is dismissed as an appeal from an interlocutory order even though the trial court certified this case for immediate review under N.C.G.S. § 1A-1, Rule 54(b). **Priest v. Sobeck, 662.**

Assignments of error—too broad and vague—A motion to dismiss an appeal for violation of the appellate rules was denied despite broad, vague, and unspecific assignments of error. **In re Appeal of Lane Co., 119.**

APPEAL AND ERROR—Continued

Jurisdiction after appeal—continuing trial court proceedings—reasonable—The trial court did not err by continuing to exercise jurisdiction after notice of appeal in a construction contract case where defendant asserted sovereign immunity. Although the trial court has no jurisdiction over a case after perfection of an appeal, the trial court has the authority to determine whether its order affects a substantial right or is otherwise immediately appealable. **RPR & Assocs. v. University of N.C.-Chapel Hill, 342.**

Preservation of issues—admissibility of evidence—general objection—no motion to suppress—A cocaine possession defendant who raised only general objections and did not move to suppress waived his objections to the admissibility of the evidence. **State v. Howie, 801.**

Preservation of issues—Alford plea—Assignments of error concerning the factual basis for an Alford plea were not properly before the Court of Appeals where defendant stipulated that there was a factual basis for the plea, did not object to the trial court finding that there was a sufficient factual basis for the plea, did not object to the acceptance of the plea, and did not move to withdraw the plea. Defendant did not raise or argue plain error in his brief. **State v. Canady, 455.**

Preservation of issues—child support—presumption of changed circumstances—not properly raised—Issues relating to whether a defendant in an action to modify child support was entitled to a presumption of changed circumstances under the Child Support Guidelines were not properly before the Court of Appeals where defendant did not request a modification of her obligations on the basis of the Guidelines presumption and did not point to any place in the record on appeal where she raised the issue to the trial court after the appropriate time period had run. **King v. King, 181.**

Preservation of issues—failure to ask for ruling—An assignment of error was waived where plaintiff asked for leave to amend its complaint after a summary judgment ruling, the trial court did not rule on that request, and plaintiff did not ask for a ruling. **Electronic World, Inc. v. Barefoot, 387.**

Preservation of issues—failure to object at trial—failure to argue plain error—Defendant did not preserve for appellate review an issue regarding the judge's pre-trial remarks where defendant failed to object at trial and did not raise plain error in his assignments of error or argue plain error in his brief. **State v. Williams, 192.**

Preservation of issues—failure to raise issue at trial—The Court of Appeals declined to consider plaintiff's motion to dismiss defendant city's appeal of the trial court's denial of defendant's N.C.G.S. § 1A-1, Rule 12(c) motion in a wrongful death and negligent infliction of emotional distress case based on plaintiff's failure to preserve this issue where plaintiff failed to seek dismissal of defendant city's Rule 12(c) motion before the trial court on the basis she now asserts. **Lovelace v. City of Shelby, 378.**

Preservation of issues—instruction denied—A first-degree burglary defendant preserved for appeal the failure of the court to instruct on voluntary intoxication where defendant did not formally object at trial, but requested an instruction on misdemeanor breaking and entering based upon defendant's in-

APPEAL AND ERROR—Continued

toxication. No formal objection is required if a party submits a request to alter an instruction during the charge conference and the trial judge considers and refuses the request. **State v. Keitt, 671.**

Preservation of issues—no objection at trial—ruling sought by defendant—The State did not preserve for appeal the contention that the trial court erred by concluding without an evidentiary hearing that newly discovered evidence was probably true where the State argued against the need for such a hearing before the trial court. **State v. Stukes, 770.**

ARBITRATION AND MEDIATION

Attendance at hearing—someone with authority—notice—The trial court did not err by concluding that defendant's failure to attend arbitration was contrary to the rules and intent of arbitration. While the Rules for Court-Ordered Arbitration do not require a party to give prior notice that he will not attend, they do require the attendance of the party or someone with authority to act on the party's behalf. Defendant here failed to appear and there was no documentation or evidence presented at the hearing to show that the insurance representative or defendant's attorney was authorized to make binding decisions on his behalf. **Parks v. Green, 405.**

Attorney fees—no authority to modify award—The trial court properly vacated a modified arbitrator's award of attorney fees and reinstated the original award because the arbitrator was without authority under N.C.G.S. § 1-567.10 to modify the original award to include attorney fees. This modification did not constitute a clarification of the original award and the failure to include attorney fees in the original award did not constitute a mistake subject to correction. **Vanhoy v. Duncan Contr'rs, Inc., 320.**

Failure to attend—sanctions—The trial court did not abuse its discretion by striking defendant's request for a trial de novo and enforcing an arbitration award where defendant had not appeared for the hearing and there was no evidence at the time of the hearing that the two people who appeared on his behalf had the necessary authority to make decisions. The trial court had the authority to strike the request for trial de novo as a sanction. **Parks v. Green, 405.**

Party's absence—authority of those attending—required at hearing—The trial court did not err by granting plaintiff's motion to enforce an arbitration award based in part on defendant's failure to participate in good faith where defendant did not attend the arbitration hearing and did not provide documentary evidence that an insurance representative had the necessary authority to make binding decisions. The evidence must be known and provided at the arbitration. **Parks v. Green, 405.**

ARSON

First-degree—burning of occupied mobile home—sufficiency of evidence—The trial court did not err by refusing to dismiss for insufficient evidence charges of first-degree arson, willful and malicious damage to occupied real property through use of an incendiary device, and possession of a weapon of mass death and destruction. **State v. Sexton, 641.**

ASSAULT

Deadly weapon—hands and feet—sufficiency of evidence—The jury in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury was properly allowed to determine whether defendant's hands and feet constituted deadly weapons, given the severity of the victim's injuries, the size differential, and the fact that the victim was pregnant at the time of the assault. **State v. Hunt, 316.**

Deadly weapon—singular hand—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of assault with a deadly weapon with intent to kill inflicting serious injury even though the State relied on defendant's use of his singular hand as a deadly weapon. **State v. Rogers, 203.**

Deadly weapon inflicting serious injury—felony child abuse—intentionally kicking child—doctrine of merger inapplicable—The trial court did not err in a felony child abuse and assault with a deadly weapon inflicting serious injury case by failing to arrest one of the felony charges under the doctrine of merger. **State v. Carter, 756.**

Deadly weapon inflicting serious injury—felony child abuse—intentionally kicking child—motion to dismiss—sufficiency of evidence—The trial court did not err in a felony child abuse and assault with a deadly weapon inflicting serious injury case by denying defendant's motion to dismiss based on alleged insufficient evidence to prove that defendant intentionally kicked the minor child victim. **State v. Carter, 756.**

Deadly weapon with intent to kill inflicting serious injury—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss a charge of assault with a deadly weapon with intent to kill inflicting serious injury where the evidence tended to show that defendant had been involved in two altercations with the victim in the victim's home on the night in question; defendant was instructed both times to leave; defendant "flipped off" the victim and drove his truck directly at the victim; after he pinned the victim against a mobile home, defendant pumped the clutch a couple of times and asked how it felt; defendant said after the incident that next time he would have to stab the victim and kill him; and the victim suffered life-threatening injuries and underwent twenty surgeries. **State v. Blymyer, 516.**

De minimus act—unrecognized defense—The trial court did not err by adjudicating respondent delinquent based on his commission of the offense of simple assault even though respondent juvenile contends any act which he allegedly committed was de minimus and did not rise to the level of criminal activity for a simple assault charge but was only normal boyhood behavior between two brothers. **In re Hodge, 102.**

Habitual misdemeanor assault—no accompanying indictment—An indictment did not sufficiently charge defendant with the felony of habitual misdemeanor assault where the indictment only charged assault on a female and there was no accompanying indictment as required by N.C.G.S. § 15A-928(b). **State v. Williams, 192.**

Intent to kill—sufficiency of evidence—There was sufficient evidence in an assault prosecution that defendant intended to kill the victim where defendant

ASSAULT—Continued

severely beat the victim, refused to allow her to seek help, cut the telephone lines, and told the victim that she wasn't calling for help, wasn't going to the doctor, and could lie there and die. This evidence, combined with the evidence of the attack, the resulting injuries, and defendant's actions throughout, was enough to support an inference that defendant intended to kill. **State v. Hunt, 316.**

On officer with firearm—failure to instruct on self-defense—The trial court did not err in an assault on a law enforcement officer with a firearm case by failing to give an instruction on self-defense as requested by defendant. **State v. Thomas, 326.**

On officer with firearm—failure to submit lesser included offenses—no plain error—The trial court did not commit plain error in an assault on a law enforcement officer with a firearm case by failing to submit the possible verdicts of assault with a deadly weapon and assault by pointing a gun. **State v. Thomas, 326.**

On officer with firearm—jury instruction—no plain error—The trial court did not commit plain error in an assault on a law enforcement officer with a firearm case by instructing that defendant should be found guilty if defendant committed the lesser included offense of assault on an officer even though the indictment only charged defendant with assault on a law enforcement officer with a firearm. **State v. Thomas, 326.**

On officer with firearm—sufficiency of evidence—The trial court did not err by failing to vacate defendant's conviction for assault on a law enforcement officer with a firearm even though defendant contends there was insufficient evidence that he knew or had reasonable grounds to know that the person he assaulted was a law enforcement officer. **State v. Thomas, 326.**

On officer with firearm—sufficiency of indictment—The trial court did not err by failing to vacate defendant's conviction for assault on a law enforcement officer with a firearm even though defendant contends the indictment failed to allege that defendant knew or had reasonable grounds to know that the person he assaulted was a law enforcement officer. **State v. Thomas, 326.**

Simple affray—private property—The trial court should have dismissed a charge of simple affray against a juvenile which arose from a fight in the front yard of a house used as a group home for as many as eight children. Every indication in the record was that the home was private property and not a place which the public had the right to use. **In re May, 299.**

Simple assault—failure to allege specific date—The trial court did not err by adjudicating respondent delinquent based on his commission of the offense of simple assault even though respondent juvenile contends the petition was fatally defective based on the fact that it did not allege a specific date for the offense but stated it occurred between 1 April 2000 and 15 July 2000. **In re Hodge, 102.**

BANKS AND BANKING

Credit cardholder agreement—Georgia law—amendment of APR—not breach of contract—The trial court did not err by granting summary judgment for defendant bank on the breach of contract claim arising out of a cardholder agreement for a credit card account applying Georgia law where the court deter-

BANKS AND BANKING—Continued

mined that defendant did not breach the agreement by amending the APR during the annual period. **Gaynoe v. First Union Corp., 750.**

BURGLARY AND UNLAWFUL BREAKING OR ENTERING

Felonious breaking or entering—intent to commit larceny—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of felonious breaking or entering even though defendant contends there was insufficient evidence of his intent to commit a larceny. **State v. Thomas, 326.**

Inference of intent—intoxication—The trial court did not err by denying a motion to dismiss a first-degree burglary charge for insufficient evidence where defendant fell within the scope of the McBryde inference of intent to commit larceny in that he entered the dwelling place of another at night, attempted to stop the victim from screaming, and tried to flee. Defendant did not rebut the presumption of intent with evidence of intoxication, given his behavior inside the house. **State v. Keitt, 671.**

CHILD ABUSE AND NEGLECT

Felony child abuse—assault with a deadly weapon inflicting serious injury—intentionally kicking child—doctrine of merger inapplicable—The trial court did not err in a felony child abuse and assault with a deadly weapon inflicting serious injury case by failing to arrest one of the felony charges under the doctrine of merger. **State v. Carter, 756.**

Felony child abuse—assault with a deadly weapon inflicting serious injury—intentionally kicking child—motion to dismiss—sufficiency of evidence—The trial court did not err in a felony child abuse and assault with a deadly weapon inflicting serious injury case by denying defendant's motion to dismiss based on alleged insufficient evidence to prove that defendant intentionally kicked the minor child victim. **State v. Carter, 756.**

CHILD SUPPORT, CUSTODY, AND VISITATION

Custody—best interest analysis—illegitimate children—The trial court erred in a child custody dispute by applying a best interest analysis where the parties were never married and the record does not indicate that the children were ever legitimated pursuant to N.C.G.S. § 49-10 or that paternity was judicially established pursuant to N.C.G.S. § 49-14. **David v. Ferguson, 482.**

Custody—jurisdiction—residence of children—preceding six months—The North Carolina court did not err by assuming jurisdiction over a custody dispute between the parents of illegitimate children where the children had been living in Maryland with their mother but lived with plaintiff in North Carolina for the six months before commencement of the proceeding. **David v. Ferguson, 482.**

Custody—parental kidnapping—no formal agreement—The Parental Kidnapping Prevention Act did not prevent a North Carolina court from making an initial custody determination for children of unmarried parents where a parent who lived in Maryland alleged only a custody informal agreement and no action by any court. **David v. Ferguson, 482.**

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

Custody—private agreement—jurisdiction of court—In a child custody case decided on another issue, it was noted that a private custody agreement between the parties that was not entered by any court in any state could not divest the courts of their statutory authority to make custody determinations. **David v. Ferguson, 482.**

Modification—Full Faith and Credit for Child Support Orders Act—The trial court did not err by holding that a Florida court's purported modification of a North Carolina child support order did not operate as a modification of the North Carolina order. **Wilson Cty. ex rel. Egbert v. Egbert, 283.**

Support—contempt—findings supporting willfulness—The evidence fully supports the trial court's findings and conclusion that defendant was in willful contempt of a child support order where the court found that defendant had not made some payments, that defendant had and has the means to comply, and that defendant had presented no evidence as to why he should not be held in contempt. **Miller v. Miller, 40.**

Support—gainful employment ordered—A trial court did not err by ordering the defendant in a child custody action to remain gainfully employed where defendant requested that the child support payments be withheld from his wages. **Miller v. Miller, 40.**

Support—modification of temporary order—effective date of guidelines amount—The trial court properly followed the law in its 22 December 1999 order modifying a temporary child support order and did not abuse its discretion in setting 17 July 1998 as the effective date of increased child support pursuant to the child support guidelines where the temporary order provided for a certain amount of support to be paid until custody could be decided; the temporary order was terminated when the parties settled the issue of custody in a memorandum of judgment filed on 17 July 1988 which provided that child support was to be calculated pursuant to the child support guidelines; and the trial court held a hearing, determined that defendant father should pay a certain amount per week in child support under the guidelines, and set the date the memorandum of judgment was filed as the effective date of the guidelines amount of child support, with defendant being given credit for the payments made under the temporary order. **Miller v. Miller, 40.**

Support—motion to reduce—income voluntarily depressed—The trial court did not err in denying a motion to reduce child support by finding that defendant-realtor had voluntarily depressed her income and had not acted in good faith where her supervisor did not see defendant for one to two weeks prior to placing defendant on a leave of absence, defendant claimed that this trial was interfering with her work, the amount of time taken by the trial was not as great as defendant had indicated and should not have interfered with her income, and the trial court was left with no explanation for defendant's actions. **King v. King, 181.**

Support—unsigned consent order—prior signed memorandum of judgment—support not calculated—The trial court did not err in setting defendant's child support pursuant to a consent order that was not signed by defendant or his attorney where defendant had signed a prior memorandum of judgment which stated that the signatures of the parties on the formal judgment were not

CHILD SUPPORT, CUSTODY, AND VISITATION—Continued

necessary. The prior memorandum of judgment settled the question of custody and provided that support was to be calculated according to the guidelines, but that amount had not been determined when the matter was heard for final judgment. A hearing was held and competent evidence was presented which supported the judge's use of the worksheets and his findings. **Miller v. Miller, 40.**

CITIES AND TOWNS

Advertisements promoting policy during election—implicitly promoting candidates—The trial court properly granted a preliminary injunction enjoining advertisements by a town during municipal elections which promoted the town's smart growth policies where the advertisements were more than informational in nature and implicitly promoted candidates sympathetic to the policy. **Dollar v. Town of Cary, 309.**

Public duty doctrine—911 operator—The trial court did not err in a wrongful death and negligent infliction of emotional distress case by denying defendant city's N.C.G.S. § 1A-1, Rule 12(c) motion to dismiss because the public duty doctrine does not prevent plaintiff from seeking recovery for the death of her minor child based on a 911 operator's alleged delay in calling the fire department to plaintiff's burning house even though the 911 operator was a police officer. **Lovelace v. City of Shelby, 378.**

Subdivision ordinance—judicial review of application for variance—The trial court erred by dismissing under N.C.G.S. § 160A-388(e) petitioner's petition for certiorari to review a decision of a town council denying petitioner's application for a variance from the town's subdivision ordinance based on an alleged failure to comply with the thirty-day time limit for filing, and the case is remanded for a determination of whether petitioner's filing of this case was done within a reasonable time. **Hemphill-Nolan v. Town of Weddington, 144.**

CIVIL PROCEDURE

Consideration of summary judgment motion prior to ruling on pending motion for class certification—judicial economy—The trial court did not err by granting summary judgment for defendants, on claims arising out of a cardholder agreement for a credit card account applying Georgia law, prior to ruling on plaintiff's pending motion for class certification. **Gaynoe v. First Union Corp., 750.**

Motion for reconsideration—failure to attend arbitration—new evidence—The trial court did not err by denying's defendant's motion for reconsideration of an order that an arbitration award be enforced and striking defendant's request for a trial where the order was based on defendant's failure to appear at the hearing or to have evidence at the hearing that those present on his behalf had the necessary authority to act, and defendant's motion to reconsider was based on his affidavit that the insurance representative in fact had the necessary authority. Defendant's affidavit was not given until after the hearing and is not newly discovered evidence. Moreover, defendant did not explain why he was unable to obtain his own affidavit prior to the arbitration hearing, and did not show extraordinary circumstances, that justice demands relief, or a meritorious defense. **State v. Thomas, 326.**

CIVIL PROCEDURE—Continued

Motion in the cause to void paternity—treated as Rule 60 motion—The trial court correctly considered defendant's motion to void his acknowledgment of paternity and voluntary support agreement as a motion pursuant to N.C.G.S. § 1A-1, Rule 60 after DNA testing excluded defendant as the father. Defendant's motion was a challenge in the same action, not an independent motion, and, although defendant now contends that he was seeking relief pursuant to N.C.G.S. § 110-132(a), he did not refer to any statute in his motion and did not cite any case in which paternity was challenged in a motion pursuant to N.C.G.S. § 110-132(a). **State ex rel. Davis v. Adams, 512.**

CIVIL RIGHTS

Municipality immunity—section 1983 claim—A city and its police officer have no defense of governmental immunity to a 42 U.S.C. § 1983 claim that they violated plaintiff's due process and equal protection rights by failing to compensate him for injuries suffered in an accident after his arrest. **Clayton v. Branson, 488.**

COLLATERAL ESTOPPEL AND RES JUDICATA

Collateral estoppel—disposal of motion to dismiss—not a final judgment on merits—The trial court's order denying plaintiff landowners' motion to dismiss in the condemnation action did not serve as collateral estoppel in this action by taxpayers alleging that funds from the Clean Water Management Trust Fund were illegally used to acquire a tract of land by condemnation. **Whitmire v. Cooper, 730.**

Collateral estoppel—validity of easement—The trial court did not err by granting summary judgment in favor of defendants on the issue of the validity of an easement based on collateral estoppel. **Bee Tree Missionary Baptist Church v. McNeil, 797.**

CONFESSIONS AND INCRIMINATING STATEMENTS

Confession of sixteen-year-old—coercive factors—The totality and degree of coercive factors surrounding the confession of a sixteen-year-old murder and burglary defendant were not sufficient to render the confession involuntary and inadmissible considering defendant's youth and unfamiliarity with the justice system, the officer's deceptive statements, the length of the interrogation, and defendant's access to food, drink, and restroom facilities. **State v. McKinney, 369.**

Interrogation—no findings as to custody—Miranda warnings given—The trial court did not err in a burglary and murder prosecution when considering whether a confession was coerced by not making findings resolving a discrepancy about whether defendant was in custody when he confessed. All of the evidence showed that defendant was given Miranda warnings before the interrogation took place and defendant offered no evidence other than his own affidavit to show when he was brought into custody. **State v. McKinney, 369.**

Interrogation—not in custody—age—mental capacity—statements voluntary—The trial court did not err by denying defendant sixteen-year-old's motion

CONFESSIONS AND INCRIMINATING STATEMENTS—Continued

to suppress statements he made to law enforcement officers in an interview room at a police station detailing his involvement in the victim's death even though defendant contends his statements were the result of a custodial interrogation and were therefore inadmissible given his age and subnormal mental capacity. **State v. Jones, 358.**

Interrogation—not in custody—Miranda warnings not required—The trial court did not err in an attempted first-degree murder, possession of a handgun by a felon, and discharging a firearm into occupied property case by denying defendant's motion to suppress statements he made to the police when defendant had not been given Miranda warnings because defendant was not interrogated when he made statements during the ride to the station or while waiting in the interview room and he was not in custody when he made statements during interrogation. **State v. Trull, 630.**

Juvenile's statements to detective during home visit—not in custody—The trial court did not err in a simple assault case by allowing a detective to testify to statements respondent juvenile made to the detective during a home visit where respondent was neither advised of his constitutional rights nor knowingly and willingly waived those rights because respondent was not in custody at the time he made the statements. **In re Hodge, 102.**

Plea negotiations—no authority—no offer made—The trial court did not err in a prosecution for indecent liberties with a student, statutory rape and statutory sexual offenses by denying defendant's motion to suppress statements to law enforcement officers where defendant contended that the statements were made in the course of plea negotiations and were thus inadmissible under N.C.G.S. § 8C-1, Rule 410, but the assistant district attorney made clear that she had no authority to negotiate a plea and no offer was laid on the table. **State v. Curry, 260.**

Voluntary and intelligent waiver—age—mental capacity—The trial court did not err by denying defendant sixteen-year-old's motion to suppress statements he made to law enforcement officers in an interview room at a police station detailing his involvement in the victim's death even though defendant contends he was incapable of voluntarily and intelligently waiving his rights based on his age and subnormal mental capacity. **State v. Jones, 358.**

CONSPIRACY

Armed robbery—evidence sufficient—There was sufficient evidence to deny defendant's motion to dismiss a charge of conspiracy to commit armed robbery where defendant was present when "everyone agreed" to the conspiracy, rode with the others to and from the victim's house, and received a portion of the money and the drugs taken during the robbery. **State v. Kemp, 231.**

Armed robbery—inducement of others—sentence enhanced—The trial court did not abuse its discretion by imposing an aggravated sentence for conspiracy to commit armed robbery based on inducement where defendant initiated the idea of robbing the victim, defendant's inducement of others to join in the offense preceded the formation of the actual conspiracy, and inducement of others is not an element of the conspiracy. **State v. Kemp, 231.**

CONSPIRACY—Continued

Civil—lease dispute—The trial court erred by granting summary judgment for defendants on a civil conspiracy claim arising from a disputed lease. **Electronic World, Inc. v. Barefoot, 387.**

CONSTITUTIONAL LAW

Cruel and unusual punishment—life imprisonment for first-degree sexual offense—Life imprisonment under the first-degree sexual offense statute does not constitute cruel and unusual punishment. **State v. Bartlett, 680.**

Due process—retroactive application of case law—The retroactive application of case law to recalculate plaintiff inmate's parole eligibility did not violate his due process rights even though plaintiff contends the pertinent case was unforeseeable and thus denied him the chance to accept a plea bargain for a term of years. **Price v. Beck, 763.**

Effective assistance of counsel—attempt to fire court-appointed attorney—The trial court did not err in a forgery and uttering case by ordering defendant to proceed with trial immediately either with his court-appointed attorney, who defendant wanted to discharge, or pro se. **State v. Gant, 136.**

Effective assistance of counsel—failure to object—A sexual assault and kidnapping defendant did not suffer ineffective assistance of counsel from his counsel's failure to object at certain points during the trial, given the overwhelming evidence of defendant's guilt. **State v. O'Hanlan, 546.**

Equal protection—differing levels of culpability—rational basis—The trial court did not err by upholding defendant Civil Service Board's termination of plaintiff police officer's employment after plaintiff fatally shot a civilian in the course of his employment even though plaintiff contends his equal protection rights were violated based on the fact that another officer who also fired upon the vehicle was suspended while plaintiff was terminated. **Jordan v. Civil Serv. Bd. of Charlotte, 691.**

Equal protection—disparate treatment between inmates—Although plaintiff inmate contends disparate treatment between inmates with Class B and Class C life sentences under the Fair Sentencing Act results in a denial of equal protection of the laws, plaintiff's argument has no merit. **Price v. Beck, 763.**

Equal protection—rational basis—The trial court did not err in an action seeking to invalidate administrative rule 21 NCAC 16X.0101(a) regarding the propriety of dentistry management arrangements by determining that defendant Board of Dental Examiners was entitled to judgment as a matter of law on the constitutional claim of equal protection. **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

Procedural due process—notice and opportunity to be heard—The trial court did not err in an action seeking to invalidate administrative rule 21 NCAC 16X.0101(a) regarding the propriety of dentistry management arrangements by determining that defendant Board of Dental Examiners was entitled to judgment as a matter of law on the constitutional claim of violation of procedural due process. **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

CONSTITUTIONAL LAW—Continued

Prohibition against ex post facto laws—court's construction of statute different from state agency's prior interpretation—The retroactive application of case law to plaintiff's parole eligibility resulting in a delay of two years and three months does not violate the constitutional prohibition against ex post facto laws. **Price v. Beck, 763.**

Right to assistance of counsel—probation revocation hearing—The trial court erred in a probation revocation hearing by allowing defendant to proceed pro se without conducting an inquiry as required by N.C.G.S. § 15A-1242. **State v. Evans, 313.**

Right to fair trial—due process—administrative tribunal both investigator and adjudicator—A de novo review reveals that the trial court did not err by upholding defendant Civil Service Board's termination of plaintiff police officer's employment after plaintiff fatally shot a civilian in the course of his employment even though plaintiff contends he was denied his right to an impartial tribunal when the chairperson of the Board was simultaneously employed as an investigator for the Public Defender's Office which was representing the driver of the vehicle fired upon by plaintiff. **Jordan v. Civil Serv. Bd. of Charlotte, 691.**

Right to present defense—sufficient opportunity to question witness on cross-examination—The trial court did not violate a defendant's right to present a defense in a second-degree rape and misdemeanor breaking and entering case even though the trial court sustained seven of the prosecutor's objections during defense counsel's cross-examination of the victim ex-wife. **State v. Strickland, 581.**

Right to speedy trial—long period of pretrial incarceration—The trial court did not violate a defendant's right to a speedy trial under U.S. Const. amend. VI and N.C. Const. art. I, § 18 in a second-degree rape and misdemeanor breaking and entering case even though defendant was incarcerated awaiting trial for 940 days. **State v. Strickland, 581.**

Substantive due process—rational basis—facial challenge—vagueness—The trial court did not err in an action seeking to invalidate administrative rule 21 NCAC 16X.0101(a) regarding the propriety of dentistry management arrangements by determining that defendant Board of Dental Examiners was entitled to judgment as a matter of law on the constitutional claim of violation of substantive due process. **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

CONSTRUCTION CLAIMS

Damages for rock excavation—sufficiency of evidence—There was sufficient evidence to support the trial court's award of damages for direct costs for additional rock excavation on a construction claim where a civil engineer testified extensively regarding plaintiff's damages and the trial court's findings accurately and properly reflected that testimony. **RPR & Assocs. v. University of N.C.-Chapel Hill, 342.**

Delays—evidence—The trial court did not err in its award of damages for delay by defendant under a construction contract where defendant contended that the

CONSTRUCTION CLAIMS—Continued

trial court had neglected to deduct from the total the time extensions granted for a series of change orders as well as time awarded by the State Office of Construction. The expert testimony before the court included the time extensions, and defendant had refused to pay any portion of the State Office of Construction award. **RPR & Assocs. v. University of N.C.-Chapel Hill, 342.**

Excessive punchlist—findings on evidence—The trial court erred in a construction claim in its findings about damages from an excessive punchlist where the court awarded damages for costs incurred for additional labor by subcontractors but made no findings based on plaintiff's direct costs, about which plaintiff submitted substantial evidence. **RPR & Assocs. v. University of N.C.-Chapel Hill, 342.**

Masonry damages—evidence of cause rather than extent—The trial court did not err in a construction contract action by concluding that plaintiff had presented insufficient evidence of specific damages for additional costs for masonry work where the denial of the claim was based on plaintiff's failure to present sufficient evidence as to how much of the additional expense was caused by defendant's conduct rather than the extent of such damages. **RPR & Assocs. v. University of N.C.-Chapel Hill, 342.**

Offset—settlement with architect—The trial court did not err in a construction claim by allowing an offset against a judgment for monies plaintiff had received in a settlement with the architect of the project. **RPR & Assocs. v. University of N.C.-Chapel Hill, 342.**

CONTRACTS

Breach of promise implied in development plan—voluntary dismissal of claims—The trial court did not err by granting summary judgment in favor of defendant developers on plaintiffs' claim that defendant individuals breached a promise implied from the development plan because plaintiffs voluntarily dismissed all claims against defendant individuals. **Belverd v. Miles, 169.**

Changes—modification rather than new agreement—There was substantial evidence to support the trial court's finding that changes to a land sales contract represented a modification and not a new contract where the acreage conveyed and the responsibilities for drainage changed, but not the purchase price or the deferred fee. **Rich, Rich & Nance v. Carolina Constr. Corp., 149.**

CORPORATIONS

Addendum to land sale contract—signatures—An addendum to a contract for the sale of land was enforceable even though the person who was vice-president, secretary, treasurer, and a fifty percent shareholder of defendant corporation did not sign the addendum where defendant's president signed the addendum. **Rich, Rich & Nance v. Carolina Constr. Corp., 149.**

COSTS

Attorney fees—child support—child custody—termination of parental rights—The trial court did not abuse its discretion by its award of attorney fees to defendant mother for the child custody and support portions of this lawsuit

COSTS—Continued

based on the findings that defendant was an interested party acting in good faith and defendant had insufficient means to defray the costs of the lawsuit, even though she did not prevail at trial; however, the case is remanded to the trial court for a factual determination of the portion of the award of attorney fees that can be properly attributed to the custody and support actions. **Burr v. Burr, 504.**

Medical malpractice—expert witness fees—subpoena—fees unrelated to expert testimony—The trial court did not err in a medical malpractice action by granting plaintiffs' motion for costs even though defendants contend there is no evidence in the record that plaintiffs' experts testified at trial pursuant to a subpoena as required by law and that plaintiffs may not recover expert witness fees that are unrelated to the testimony before the court because an affidavit by plaintiffs' attorney shows the witnesses testified pursuant to a subpoena, and the trial court could allow costs to be taxed for expenses related to hearings allowed under statutory authority. **Coffman v. Roberson, 618.**

Psychologist disciplinary hearing—calculation—The trial court erred by reversing the assessment of costs under N.C.G.S. § 90-270.15 to petitioner psychologist for a psychology disciplinary hearing. **Farber v. N.C. Psychology Bd., 1.**

CRIMINAL LAW

Additional instructions after deliberations begun—discretion exercised—The trial court did not refuse to exercise its discretion in a prosecution for first-degree sexual offense by refusing to give defendant's requested instruction on intent after the jury had twice requested re-instruction on the elements of the offense. Contrary to defendant's assertions, the court's comments indicate that it was exercising its discretion in determining whether the additional instruction should be made under the facts and circumstances of the case. **State v. Bartlett, 680.**

Armed robbery prosecution—shooting victim allowed in courtroom—injuries apparent—no cross-examination—The trial court did not err by not excluding a shooting victim from the courtroom during a robbery prosecution where defendant contended that the jury could simply look at the victim to determine the extent of his injuries without defendant being able to cross-examine the victim because the presence of the victim in the courtroom did not constitute the presentation of evidence or its functional equivalent. **State v. Kemp, 231.**

Defendant restrained—no abuse of discretion—The trial court did not abuse its discretion by ordering that defendant be restrained during an armed robbery prosecution based on defendant's 1989 escape from a state prison where the court pledged to ensure that the jury would not see defendant restrained, and the record fails to show that the jury could see the restraints. **State v. Simpson, 807.**

Expression of opinion by trial court—asking purpose of defense counsel's questions—A defendant is not entitled to a new trial in an assault on a law enforcement officer with a firearm and felonious breaking or entering case even though defendant contends the trial court expressed an improper opinion by asking defense counsel several times about the purpose of his questions on cross-examination. **State v. Thomas, 326.**

CRIMINAL LAW—Continued

Expression of opinion by trial court—re-instruction according to pattern jury instruction—The trial court did not commit plain error in a forgery and uttering case by allegedly expressing an opinion to the jury when it re-instructed on credibility after the jury asked whether any consideration could be given to defendant's testimony that his sister wrote and cashed one of the checks where the court merely re-instructed on credibility using a pattern jury instruction. **State v. Gant, 136.**

Improper testimony—objection sustained—no duty to strike testimony or issue curative instruction—The trial court did not err in a second-degree rape and misdemeanor breaking and entering case by failing to strike improper testimony from the record upon defense counsel's request and by failing to issue a curative jury instruction after the trial court sustained defendant's objection to the testimony. **State v. Strickland, 581.**

Motion to withdraw counsel denied—no abuse of discretion—The trial court did not abuse its discretion by denying defendant's motions to withdraw counsel and for a continuance where three attorneys had been assigned and withdrawn and the court regarded defendant's motions as an attempt to further delay defendant's trial. Defendant failed to demonstrate any resulting prejudice from the denial of his motions. **State v. Bartlett, 680.**

Plea agreement—motion to withdraw—The trial court's denial of defendant's post-sentencing motion to withdraw his guilty plea to the charge of conspiracy to commit assault inflicting serious bodily injury did not result in manifest injustice. **State v. Russell, 508.**

Request for separate arraignment—request to reschedule trial—waiver—The trial court did not err in an attempted first-degree murder, possession of a handgun by a felon, and discharging a firearm into occupied property case by denying defendant's request for a separate arraignment and to reschedule his trial at least one week thereafter. **State v. Trull, 630.**

Victim's rights—presence in courtroom—exercise of rights by guardian—The trial court did not incorrectly interpret the Crime Victim's Rights Act, N.C.G.S. § 15A-830, in refusing to exclude a shooting victim from the courtroom. The Act was designed to safeguard the rights of victims as they confront the accused through the legal process and the guardianship provision should be viewed as supplemental to the victim's rights rather than as being in competition with the victim's rights. **State v. Kemp, 231.**

Voluntary intoxication—evidence sufficient—instruction required—The trial court erred by not giving an instruction on voluntary intoxication where defendant was so intoxicated on the night of the break-in that he was barely able to stand; the victim smelled alcohol on him; defendant had trouble leaving her home, fumbling at the door; and the arresting officer smelled alcohol on him the next morning. The central issue was intent, and there was a reasonable possibility of a different result if the instruction had been given. **State v. Keitt, 671.**

Voluntary intoxication—instruction not required—The trial court did not err in an attempted first-degree rape, felony breaking or entering, second-degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious

CRIMINAL LAW—Continued

injury case by denying defendant's requests for jury instructions on voluntary intoxication. **State v. Rogers, 203.**

DECLARATORY JUDGMENTS

Constitutionality of statute—conduct of licensed psychologists—The trial court did not abuse its discretion in its review of a psychology board's disciplinary hearing by declining to issue a declaratory judgment regarding the constitutionality of N.C.G.S. § 90-270.15(a)(10) which sets forth governing principles for the conduct of the American Psychological Association's licensees, and the statute contains no unconstitutional delegation of legislative authority. **Farber v. N.C. Psychology Bd., 1.**

Letter threatening legal action—no actual controversy—The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' complaint seeking a declaratory judgment to determine whether their advertising package complied with the parameters set by a consent judgment because a letter threatening legal action does not create an actual controversy. **National Travel Servs., Inc. v. State ex rel. Cooper, 289.**

DEEDS

Covenant against encumbrances—availability fee not listed in deed—subsequent purchaser—Plaintiff did not waive its right to a deferred availability fee for the sale of land where the fee was not identified as an exception to title in the general warranty deed. Defendant was a subsequent purchaser; a claim for breach of the covenant against encumbrances may be brought only by the immediate covenantee. **Rich, Rich & Nance v. Carolina Constr. Corp., 149.**

Restrictive covenants—use of lot for through-street—Subdivision restrictive covenants did not prohibit the use of a portion of a lot in the subdivision for construction of a through-street to provide access to an adjacent tract where a covenant restricting use of the subdivision lots to residential purposes was modified by another covenant providing that lots could be used for the purpose of constructing a public street to property surrounding the subdivision with the written consent of the original grantors, and the original grantors conveyed the portion of the lot used for the through-street to the developers of the adjacent tract. **Belverd v. Miles, 169.**

DENTISTS

Rule-making proceeding—dentistry management arrangements—equal protection—The trial court did not err in an action seeking to invalidate administrative rule 21 NCAC 16X.0101(a) regarding the propriety of dentistry management arrangements by determining that defendant Board of Dental Examiners was entitled to judgment as a matter of law on the constitutional claim of equal protection. **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

Rule-making proceeding—dentistry management arrangements—motion to dismiss—failure to state claim—The trial court did not err in an action seeking to invalidate administrative rule 21 NCAC 16X.0101(a) regarding the propriety of dentistry management arrangements by dismissing plaintiff companies'

DENTISTS—Continued

claims against defendant Rules Review Commission based on plaintiffs' failure to state a claim for relief. **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

Rule-making proceeding—dentistry management arrangements—procedural due process—The trial court did not err in an action seeking to invalidate administrative rule 21 NCAC 16X.0101(a) regarding the propriety of dentistry management arrangements by determining that defendant Board of Dental Examiners was entitled to judgment as a matter of law on the constitutional claim of procedural due process. **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

Rule-making proceeding—dentistry management arrangements—substantive due process—The trial court did not err in an action seeking to invalidate administrative rule 21 NCAC 16X.0101(a) regarding the propriety of dentistry management arrangements by determining that defendant Board of Dental Examiners was entitled to judgment as a matter of law on the constitutional claim of substantive due process. **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

DISCOVERY

Medical malpractice—list of expert witnesses—The trial court did not err in a medical malpractice action by admitting the testimony of two doctors as expert witnesses even though they were not listed on pretrial discovery in the action against defendants but they were listed in plaintiffs' action against another doctor which was consolidated with the action against defendants. **Coffman v. Roberson, 618.**

DIVORCE

Equitable distribution—inventory values—not binding at trial—An equitable distribution plaintiff was not bound at trial by an inventory affidavit statement that certain items were of unknown value where defendant received a copy of plaintiff's expert's opinion of those values prior to trial. **Franks v. Franks, 793.**

Equitable distribution—valuation of painting business—methods—An equitable distribution plaintiff's expert used valuation methods that complied with standards established by law when evaluating the parties' painting business where the expert analyzed business and tax records, used the asset approach, the market approach, and the income approach in reaching his conclusion, explained in great detail how he analyzed the data, and gave an opinion of the value of the business's goodwill using the excess earning method. **Franks v. Franks, 793.**

DRUGS

Constructive possession—rented car—The trial court did not err by denying defendant's motion to dismiss a cocaine possession charge where defendant was driving a rental car registered in another person's name; the car had been used by at least two individuals on a regular basis; an admitted cocaine addict testified that he had recently dropped cocaine in the car while washing it; defendant had accelerated from 0 to 60 m.p.h. in a 35 m.p.h. zone with an officer directly behind

DRUGS—Continued

him; after the stop, the officer noticed cocaine in plain view in the driver's side door handle, well within defendant's reach; defendant was sweating profusely and was nervous; the officer thought that defendant was under the influence of something; and more cocaine was found under the driver's seat, also well within defendant's reach. **State v. Tisdale, 294.**

Possession of marijuana with intent to sell or deliver—possession of LSD with intent to sell and deliver—trafficking in LSD—motion to dismiss—entrapment—The trial court did not err by failing to dismiss the charges of possession of marijuana with intent to sell or deliver, possession of LSD with intent to sell and deliver, and trafficking in LSD even though defendant pled the affirmative defense of entrapment. **State v. Branham, 91.**

Property seized pursuant to state warrants—release of funds to federal authorities—The trial court erred by entering an order under N.C.G.S. § 15-11.1 directing that certain funds seized from defendants during a drug raid pursuant to state search warrants be returned by the county sheriff when said funds had been transferred to the United States Drug Enforcement Agency and were the subject of a civil forfeiture proceeding under 21 U.S.C. § 881. **State v. Hill, 716.**

ELECTIONS

Access to ballots cast in election—Public Records Act—The trial court did not err by granting respondent State Board's motion to dismiss plaintiff candidate's petition for relief seeking access to ballots cast in an election pursuant to the Public Records Act because an action under N.C.G.S. § 163-171 is the exclusive method for accessing ballots. **In re Decision of the State Bd. of Elections, 804.**

Public financing of political campaigns—legislative issue—The trial court's order dismissing plaintiffs' lawsuit seeking a declaratory judgment under N.C.G.S. § 7A-245(a)(4) and an injunction in an effort to require the State of North Carolina to create a scheme for publicly financing elections is affirmed. **Royal v. State of N.C., 495.**

EMPLOYER AND EMPLOYEE

Covenant not to compete—preliminary injunction—The trial court did not err in an action to enforce a covenant not to compete governed by Texas law by granting a preliminary injunction in favor of plaintiff company. **Redlee/SCS, Inc. v. Pieper, 421.**

Federal Employers' Liability Act—occupational pneumoconiosis—statute of limitations—The trial court did not err by granting summary judgment in favor of defendant company based on the expiration of the pertinent three-year statute of limitations in an action under the Federal Employers' Liability Act (FELA) of 45 U.S.C. § 51 alleging plaintiff employee contracted occupational pneumoconiosis as a result of defendant's alleged negligence and statutory violations. **Pinczkowski v. Norfolk S. Ry. Co., 435.**

EVIDENCE

Admissions—business card—The trial court did not err in a prosecution for possessing alcoholic beverages for sale without a permit by admitting a copy of

EVIDENCE—Continued

a business card found during a search of defendant's house where the card represented that defendant's house was open for alcohol, food, and fun. The card was properly authenticated as an admission by defendant, based on its distinctive characteristics taken in conjunction with circumstances. **State v. Reed, 462.**

Deputy fire marshal's opinion—not qualified as expert—The trial court did not err in a prosecution arising from the burning of an occupied mobile home by allowing a deputy fire marshal who had investigated the fire but who had not been qualified as an expert to given his opinion as to the cause of the fire. Defendant did not object at trial to the qualifications of the witness as an expert and the witness was better qualified than the jury to form an opinion on the cause of the fire. **State v. Sexton, 641.**

Drug paraphernalia—illustrative purposes—The trial court did not err in a delivery of cocaine to a minor child thirteen years or younger, second-degree kidnapping, and assault on a child under the age of twelve years case by allowing an investigator to illustrate his testimony concerning crack cocaine usage by using cocaine, marijuana, and sundry items of drug paraphernalia that were neither found in defendant's residence nor otherwise connected to the events alleged to have occurred on 19 June 2000. **State v. Hyman, 396.**

Drug use—chain of circumstances—The trial court did not err in a prosecution arising from the burning of an occupied mobile home by admitting evidence of defendant's drug use on the morning of the crime where the evidence served the purpose of establishing a chain of circumstances leading to the fire. Moreover, its probative value was not outweighed by the danger of unfair prejudice. **State v. Sexton, 641.**

Extent of investigation—cross-examination—identification of defendant by victim—There was no error in a prosecution for first-degree rape, first-degree sexual offense, and first-degree kidnapping in the admission of cross-examination testimony from a detective that he had not done more scientific testing of evidence because the victim had survived the attack and identified her attacker. **State v. O'Hanlan, 546.**

First-degree sexual offense against children—issues from earlier custody trial—false allegations—irrelevant—The trial court did not err in a prosecution for first-degree sexual offense by excluding evidence from an earlier custody trial that defendant's wife had created false allegations against him where much of the evidence defendant sought to introduce was simply an attempt to re-litigate allegations and accusations from the earlier civil trial and was irrelevant to the issues before the jury. **State v. Bartlett, 680.**

Hearsay—business records exception—company deposit slips—validation reports—bank account statements—The trial court did not err in an embezzlement case by admitting certain records into evidence including company deposit slips, validation reports, and bank account statements under the N.C.G.S. § 8C-1, Rule 803(6) business records exception to the hearsay rule even though defendant contends the State failed to lay a proper foundation. **State v. Frierson, 242.**

Hearsay—medical treatment exception—The trial court did not err in a felony child abuse and assault with a deadly weapon inflicting serious injury case

EVIDENCE—Continued

by admitting the minor child victim's statements under the N.C.G.S. § 8C-1, Rule 803(4) medical treatment exception to the hearsay rule without affording defendant an opportunity to have the child examined by a defense psychologist and/or to voir dire the child as to his intent when he made the statements in question. **State v. Carter, 756.**

Hearsay—prior crimes or bad acts—forcible robbery—credibility—The trial court did not err in a robbery with a dangerous weapon case by allowing the State to question under N.C.G.S. § 8C-1, Rule 806 a defense witness on cross-examination as to defendant's prior conviction for forcible robbery after the witness stated that defendant said he was "going to the studio" to assist in establishing an alibi for defendant on the evening of the pertinent crime. **State v. McConico, 723.**

Hearsay—statement to detective—explanation of subsequent conduct—The trial court did not err in a prosecution for possessing alcoholic beverages for sale without a permit by admitting an unidentified witness's statement to a detective where the statement was offered only to explain the detective's subsequent conduct. Furthermore, defendant did not renew his objection when additional testimony about the witness' statement was offered. **State v. Reed, 462.**

Hearsay—used for nonhearsay purpose—The trial court did not err when considering newly discovered evidence by including certain letters in its findings where the letters were hearsay but were used solely for the purpose of understanding the importance and nature of the new evidence. **State v. Stukes, 770.**

Judicial notice—state board action—newspaper articles—The trial court did not err in an action for defamation and unfair trade practices arising from a political campaign by declining to take judicial notice of an order by the Board of Elections dismissing plaintiffs' complaint or of certain newspaper articles. **Boyce & Isley, PLLC v. Cooper, 25.**

Kidnapping and rape—emergency room doctor's characterization—There was no plain error where an emergency room doctor testified that a patient was kidnapped and raped. Even though the testimony was improper because the legal meanings of "rape" and "kidnapping" are outside the doctor's area of expertise, the trial court gave a limiting instruction and there was overwhelming evidence of defendant's guilt. **State v. O'Hanlan, 546.**

Lay opinion—speed of vehicle—The trial court did not abuse its discretion in an automobile accident case by not allowing two lay opinions about the speed of defendant's vehicle where the witnesses were eleven and thirteen years old at the time of the accident (but over eighteen at the time of trial), neither witness watched the vehicle continuously, and both witnesses were allowed to testify that defendant was going fast. **Marshall v. Williams, 128.**

Not provided to court—not considered—The trial court did not err by granting defendant a new trial without considering certain evidence of State's witnesses from a prior trial of another person. The entire transcript was not provided to the court and it is not the responsibility of the trial judge to review evidence not provided by the parties and not in the record. Moreover, that evidence will not be considered on appeal. **State v. Stukes, 770.**

EVIDENCE—Continued

Prior crimes or bad acts—history of abuse of victim—The trial court did not err in a second-degree rape and misdemeanor breaking and entering case by admitting evidence of past crimes under N.C.G.S. § 8C-1, Rule 404(b) including defendant's history of abuse of his victim ex-wife during their marriage. **State v. Strickland, 581.**

Prior crimes or bad acts—impeachment—opening door to details—The trial court did not abuse its discretion in a second-degree rape and misdemeanor breaking and entering case by denying defendant's motion for a mistrial even though the State cross-examined defendant about the details of his prior convictions that were being used for impeachment purposes because defendant opened the door to the details of his prior convictions during his testimony. **State v. Strickland, 581.**

Prior sexual offenses—common plan or scheme—The trial court did not err in a prosecution for indecent liberties with a student, statutory rape, and statutory sexual offenses by allowing witnesses to testify about prior sexual activities with defendant where the ages of the victims, the manner in which defendant pursued them and gained their trust, and the sexual conduct were all sufficiently similar to be probative of defendant's common plan or scheme. **State v. Curry, 260.**

Rape victim—defendant's arrest—emergency room reassurances of safety—There was no prejudicial error in a prosecution for first-degree rape, first-degree sexual offense, and first-degree kidnapping in the admission of testimony that an emergency room doctor had told the victim that she was safe, and that "this person" was behind bars. The doctor did not identify defendant as being in custody, made a generalized statement to reassure the victim as a part of her treatment, and there was other testimony, admitted without objection, that a detective told the victim that defendant was in jail. **State v. O'Hanlan, 546.**

Refusal to submit to gunshot residue test—The trial court did not err in an attempted first-degree murder, possession of a handgun by a felon, and discharging a firearm into occupied property case by admitting evidence that defendant had refused to consent to gunshot residue test. **State v. Trull, 630.**

Release of rifle by one law enforcement agency to another—test results—no reasonable expectation of privacy—The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury and discharging a weapon into occupied property case by determining that the release of defendant's Colt rifle by one law enforcement agency to another did not constitute an illegal search or seizure and by allowing the S.B.I. report to be admitted into evidence. **State v. Motley, 701.**

Sexual assault—emergency room physician's opinion—There was no plain error in a prosecution for first-degree rape, first-degree sexual offense, and first-degree kidnapping where an emergency room physician who had assumed care after a shift change testified that the victim had been sexually assaulted where the doctor's opinion was based on her expertise in treating sexually abused patients, the victim's emotional state in the emergency room, the victim's physical appearance, and what the victim had said during the course of treatment. **State v. O'Hanlan, 546.**

EVIDENCE—Continued

Sexual assault—emergency room physician's testimony—credibility of victim—An emergency room physician's opinion testimony that the victim's emotional state was consistent with someone who had been sexually assaulted and that a sexual assault had occurred did not improperly bolster the credibility of the victim so as to constitute plain error in a rape and sexual offense prosecution. The treating physician is permitted to give the background reasons for his diagnosis and he was never asked whether he believed the victim was sincere. **State v. O'Hanlan, 546.**

Sexual assault—emergency room physician's testimony—victim's emotional state—There was no plain error in a prosecution for first-degree rape, first-degree sexual offense, and first-degree kidnapping in the admission of an emergency room physician's opinion testimony that the victim's emotional state was consistent with sexual assault and that a sexual assault had actually occurred because the challenged testimony summarized the pattern of injuries and constituted a medical conclusion which the witness was qualified to render. **State v. O'Hanlan, 546.**

Sexual assault—importance of psychiatric history—There was no error in a prosecution for first-degree rape, first-degree sexual offense, and first-degree kidnapping in the admission of an emergency room doctor's testimony that a victim's psychiatric history is important to her recovery. The testimony was general and helpful to the jury in that it showed the type of information upon which the doctor relied in forming her opinions. **State v. O'Hanlan, 546.**

Sexual assault and kidnapping—victim's PTSD diagnosis—opening door—Although it was error to admit a sexual assault and kidnapping victim's Post Traumatic Stress Disorder diagnosis substantively without a limiting instruction, defendant opened the door by raising the inference that the victim was unstable prior to the assault. **State v. O'Hanlan, 546.**

Sexual misconduct—substantive evidence—There was no plain error in a prosecution for first-degree sexual offenses in the admission of sexual misconduct by defendant where most of the evidence was offered to prove the acts of which defendant was accused. Furthermore defendant did not show a fundamental error that induced the jury to reach a verdict different from that it would otherwise have reached. **State v. Bartlett, 680.**

Speed and timing of accident—testimony not allowed—The trial court did not abuse its discretion in an automobile accident case by not allowing testimony as to the speed and timing of defendant's vehicle where the witness was a land surveyor whom plaintiffs attempted to treat as an accident reconstruction expert without qualifying him as an expert in any subject. He was allowed to testify as to the distance from the crest of a hill to the location of impact. **Marshall v. Williams, 128.**

Urine test—chain of custody—The trial court did not err in a delivery of cocaine to a minor child thirteen years or younger, second-degree kidnapping, and assault on a child under the age of twelve years case by allowing into evidence the results of the test of the minor child's urine. **State v. Hyman, 396.**

FIREARMS AND OTHER WEAPONS

Possession by felon—inducement of others—sentence enhanced—The trial court did not abuse its discretion by imposing an aggravated sentence for possession of a firearm by a felon based on inducement where defendant initiated the idea of a robbery, convinced others to participate, and obtained a firearm from one of the conspirators, who also provided a gun to another conspirator. **State v. Kemp, 231.**

FORGERY

Uttering—motion to dismiss—sufficiency of evidence—The trial court did not err by failing to dismiss four counts of forgery and uttering charges against defendant where defendant's mother had not given him permission to sign checks. **State v. Gant, 136.**

FRAUD

Constructive—legal malpractice—The trial court did not err by dismissing a claim for constructive fraud against an attorney where plaintiffs failed to allege that the attorney took advantage of a position of trust to benefit himself. The allegations were claims for ordinary legal malpractice, barred by the statute of limitations. **Fender v. Deaton, 187.**

HOMICIDE

Attempted first-degree murder—short-form indictment—The trial court did not err by failing to dismiss the charge of attempted first-degree murder on the ground that the short-form indictment did not allege each element of the offense. **State v. Trull, 630.**

First-degree murder—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the two charges of first-degree murder even though defendant alleged self-defense. **State v. Revels, 163.**

First-degree murder—motion for mistrial—emotional outbursts by victim's family—The trial court did not abuse its discretion in a double first-degree murder case by denying defendant's motion for a mistrial even though there were several incidents of emotional outbursts by members of one of the victim's families. **State v. Revels, 163.**

IMMUNITY

Waiver—insurance coverage—A police officer and the city for which he worked waived immunity to the extent of insurance coverage where the city had coverage for liability of more than 2 million but less than 4 million dollars. **Clayton v. Branson, 488.**

INDICTMENT AND INFORMATION

Short-form indictment—rape, sexual offense—Short form indictments for first-degree rape and first-degree sexual offense are constitutional. **State v. O'Hanlan, 546.**

INJUNCTION

Preliminary—covenant not to compete—The trial court did not err in an action to enforce a covenant not to compete governed by Texas law by granting a preliminary injunction in favor of plaintiff company. **Redlee/SCS, Inc. v. Pieper, 421.**

Preliminary—failure to return bond posted as security—Although plaintiffs contend the trial court erred by failing to return to plaintiffs the $5,000 bond posed by plaintiffs as security for the issuance of a preliminary injunction, this issue is premature. **Belverd v. Miles, 169.**

INSURANCE

Accident and health—monthly benefit payments—motion for judgment on the pleadings—The trial court did not err in a breach of contract case arising out of an accident and health insurance policy issued by defendant insurance company to plaintiff by granting defendant's motion for judgment on the pleadings on the issue of the term of monthly benefit payments. **Gore v. NationsBanc Ins. Co., 520.**

Homeowners—exclusion—intentional acts—child playing with matches—Summary judgment should have been granted for plaintiff-insurance company in a declaratory judgment action to determine whether a homeowners insurance policy provided coverage for property damage incurred when the insured's son started a fire while finding out if choir robes would burn. The policy contained an intentional acts exclusion which applied because the evidence indicated that a child of similar knowledge, experience, capacity, and discretion should have reasonably expected the results of his intentional acts. **Erie Insurance Exchange v. St. Stephen's Episcopal Church, 709.**

INTEREST

Construction claims—breach of contract rather than unpaid balance—The trial court erred by awarding prejudgment and postjudgment interest on a construction contract with a state university where plaintiff's recovery was based on damages incurred from defendant's breaches of contract and warranty rather than from an unpaid balance due under the contract, and N.C.G.S. § 143-134.1 was inapplicable. **RPR & Assocs. v. University of N.C.-Chapel Hill North Carolina at Chapel Hill, 342.**

JUDGES

Termination of parental rights—same judge at prior abuse hearing—recusal not required—The trial judge did not err by not recusing himself from a termination of parental rights hearing where he had presided over a prior abuse and neglect hearing and had adjudicated the children abused and neglected (although that ruling was reversed and remanded on appeal). **In re Faircloth, 565.**

JUDGMENTS

Default—Frow principle—no entitlement to summary judgment on joint and several liability—The trial court erred in an action for wrongful termina-

JUDGMENTS—Continued

tion, defamation, libel and slander, and intentional infliction of emotional distress by granting summary judgment in favor of defendant doctor after plaintiff obtained an entry of default under N.C.G.S. § 1A-1, Rule 55 against defendant, and the case is remanded for a determination of damages even though defendant contends he is entitled to summary judgment based on the complaint only outlining joint claims for relief and the fact that the other codefendants were dismissed from this action on summary judgment. **Hartwell v. Mahan, 788.**

Default—summary judgment on affirmative defenses improper—The trial court erred in an action for wrongful termination, defamation, libel and slander, and intentional infliction of emotional distress by granting summary judgment in favor of defendant doctor on affirmative defenses after plaintiff obtained an entry of default under N.C.G.S. § 1A-1, Rule 55 against defendant, and the case is remanded for a determination of damages. **Hartwell v. Mahan, 788.**

JURISDICTION

Agency review—law of the case—Respondent Division of Services for the Blind's jurisdictional challenge is overruled because it did not seek review of the earlier decision of the Court of Appeals holding that the superior court had jurisdiction to hear petitioner's appeal from an agency's final decision, making it the law of the case. **Hedgepeth v. N.C. Div. of Servs. for the Blind, 652.**

Improper service—general appearance—jurisdiction—The trial court had jurisdiction over respondent juvenile with respect to a simple assault petition even though neither respondent nor a parent was served with the summons and notice of hearing issued on 8 February 2001 and the State did not make any further attempts to serve respondent or his parents with the assault petition because respondent waived any defect in service since his denial of the allegations in the petition and his participation in the hearing contributed a general appearance. **In re Hodge, 102.**

In rem—Princess Lida doctrine—The superior court's in rem jurisdiction over the pertinent tract of land in a condemnation action divested the trial court of jurisdiction to hear plaintiff taxpayers' case. **Whitmire v. Cooper, 730.**

Personal—long-arm statute—minimum contacts—The trial court did not err in a breach of contract and negligent misrepresentation case, arising out of the purchase of loans secured by mortgages or deeds of trust, by denying defendant limited liability companies' motion to dismiss based on lack of personal jurisdiction. **First Union Nat'l Bank of Del. v. Bankers Wholesale Mortgage, L.L.C., 248.**

Subject matter—taxpayers—lack of standing—The trial court did not err in an action challenging defendants' acquisition via condemnation of a tract of land by dismissing plaintiff taxpayers' complaint with prejudice based on lack of subject matter jurisdiction due to plaintiffs' lack of standing. **Whitmire v. Cooper, 730.**

JURY

Motion to replace juror—spoke to officer about trial outside courtroom—The trial court did not abuse its discretion in a delivery of cocaine

JURY—Continued

to a minor child thirteen years or younger, second-degree kidnapping, and assault on a child under the age of twelve years case by denying defendant's motion to remove and replace a juror after the juror reported that a law enforcement officer had spoken to her about the trial outside the courtroom. **State v. Hyman, 396.**

JUVENILES

Custody—right to have parent present during questioning—The trial court erred in a possession of marijuana with intent to sell or deliver, possession of LSD with intent to sell and deliver, and trafficking in LSD case by admitting defendant juvenile's out-of-court statements to officers that were obtained in violation of defendant's right to have a parent present under N.C.G.S. § 7B-2101(d). **State v. Branham, 91.**

Delinquency—simple affray—The trial court did not err by adjudicating the juvenile a delinquent based on a petition alleging simple affray in violation of N.C.G.S. § 14-33(a) even though defendant alleged self-defense. **In re Wilson, 196.**

Special condition of probation—wear juvenile criminal sign in public—The trial court erred in a felony breaking and entering and felony possession of burglary tools case by requiring as a special condition of probation that a juvenile offender publicly wear a 12" x 12" sign with the words "I am a juvenile criminal." **In re MEB, 278.**

KIDNAPPING

Unlawful removal to facilitate commission of rape—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of kidnapping based on defendant's unlawful removal of the victim from one place to another for the purpose of facilitating the commission or attempted commission of first-degree rape, because: (1) there was substantial evidence that defendant's removal of the victim through the house was for the purpose of facilitating the attempted rape; and (2) the removal of the victim was not a separate complete act independent and apart from the acts necessary to constitute the attempted rape. **State v. Rogers, 203.**

LANDLORD AND TENANT

Agricultural lease—term—definiteness—A lease for a Christmas tree farm did not fail for lack of a definite term or for lack of mutuality of contract where the term was five years plus the additional time required to grow existing trees to a marketable size. There was evidence that "marketable size" is a term of art and has a definite meaning in the Christmas tree business. **Purchase Nursery, Inc. v. Edgerton, 156.**

Lease—consideration—reference to prior lease—A new lease satisfied the Statute of Frauds by incorporating the rental consideration from the old lease. **Purchase Nursery, Inc. v. Edgerton, 156.**

Lease—description—reference to prior lease—A lease satisfied the statute of frauds where it incorporated the description from an old lease. **Purchase Nursery, Inc. v. Edgerton, 156.**

LANDLORD AND TENANT—Continued

Lease—essential elements—A valid lease contains the identity of landlord and tenant; a description of land to be leased; a statement of the term of the lease; and the rental or other consideration to be paid. A writing is sufficient if the contract provisions can be determined from separate but related writings. **Purchase Nursery, Inc. v. Edgerton, 156.**

Lease—identity of parties—reference to prior lease—A lease satisfied the statute of frauds requirement of identity of landlord and tenant where it stated that it was entered into by all the parties to the former lease and plaintiff was specifically named in the new lease. **Purchase Nursery, Inc. v. Edgerton, 156.**

Lease—new agreement rather than option exercise—A lease agreement was a new, separate lease rather than the belated exercise of an expired option in an old lease. **Purchase Nursery, Inc. v. Edgerton, 156.**

Lease—sufficiency of signatures for party not charged—immaterial—The question of whether the signature of the secretary of plaintiff-corporation on a lease was sufficient without the president's signature was immaterial because plaintiff was not the party against whom enforcement of the lease was sought. **Purchase Nursery, Inc. v. Edgerton, 156.**

Standing—discrimination claim—discrimination not suffered by defendant—The trial court correctly determined that a defendant nonprofit organization did not have standing to file a housing discrimination claim with the Human Relations Department of the City of Durham because tenants suffered the alleged discrimination rather than defendant. The only injury claimed by defendant was financial, the result of a voluntary investigation. **Lee Ray Bergman Real Estate Rentals v. N.C. Fair Housing Center, 176.**

LARCENY

By trick—test driving automobile—The trial court did not err by denying defendant's motion to dismiss a charge of felonious larceny of a motor vehicle and by instructing the jury on larceny by trick where defendant was given permission to take a truck for a test drive but was not given permission to keep the truck, defendant did not return the truck by the time he was expressly told to do so, defendant was discovered driving the truck several days later, and there was evidence that defendant had been convicted of similar crimes. Larceny by trick is not distinct from common law larceny, it is not necessary for the State to allege the manner in which the stolen property was taken and carried away, and the words "by trick" need not be found in an indictment charging larceny. **State v. Barbour, 500.**

LIBEL AND SLANDER

Political ads—claim sufficiently stated—The trial court erred by granting a Rule 12(b)(6) dismissal on a defamation claim arising from television ads during a political campaign. **Boyce & Isley, PLLC v. Cooper, 25.**

MEDICAL MALPRACTICE

Expert witness—doctor familiar with community standard—The trial court did not err in a medical malpractice action by admitting the medical expert testi-

MEDICAL MALPRACTICE—Continued

mony of two doctors even though defendants contend they were not familiar with the community standard as required by N.C.G.S. § 8C-1, Rule 702, because: (1) the doctor that practiced in Charlotte, North Carolina satisfied the requirements by testifying that he was familiar with the standard of care with respect to obstetrics, gynecology, and sonography in communities similar to Wilmington, North Carolina, and that he based his opinion on internet research about the size of the hospital, the training program, and the Area Health Education program; and (2) the other doctor, a board certified specialist in obstetrics/gynecology who was licensed to practice in California and Colorado, also satisfied the requirements by testifying that he was familiar with the standard of care in communities similar to Wilmington. **Coffman v. Roberson, 618.**

Expert witness—doctor with same specialty—The trial court did not err in a medical malpractice action by admitting the medical expert testimony of a doctor under N.C.G.S. § 8C-1, Rule 702, because: (1) the witness doctor specialized in the same specialty, obstetrics/gynecology, as defendant doctor; and (2) during the year preceding 29 March 1997, the witness doctor spent all of his professional time teaching at an accredited health professional school and the majority of it teaching from the vantage point of OB/GYN. **Coffman v. Roberson, 618.**

Judgment notwithstanding verdict—motion for new trial—sufficiency of evidence—The trial court did not err in a medical malpractice action by denying defendants' motion for judgment notwithstanding the verdict, or in the alternative for a new trial. **Coffman v. Roberson, 618.**

NEGLIGENCE

Sudden emergency—sufficiency of evidence—instruction—The trial court did not err in an automobile accident case by instructing the jury on sudden emergency where there was substantial evidence that defendant was driving his vehicle within the speed limit when an eleven-year-old child swerved his bicycle into defendant's lane of traffic; defendant attempted to avoid the accident by slamming on his brakes and pulling his car to the right away from the child; and defendant was unable to avoid the child. Moreover, any error in giving the instruction is harmless because the court instructed the jury that it must find that the sudden or unexpected danger arose through no negligence on the part of defendant. **Fender v. Deaton, 187.**

PARENT AND CHILD

Neglect—immunization—religious objections—best interest of children—The trial court did not err by issuing an order requiring the immunization of respondent parents' ten children while in custody of the Department of Social Services (DSS) even though respondents contend their parental rights have not been extinguished and they have religious objections to the immunizations. **In re Stratton, 428.**

PARTIES

Intervention—inadequate protection of interest—burden of showing—An order allowing intervention in a zoning case under N.C.G.S. § 1A-1, Rule 24(a)(2) was reversed because the intervenors did not show that their interests would not

PARTIES—Continued

be adequately represented. Contrary to the intervenors' contention, the party seeking intervention must show inadequate representation of its interest. **Harvey Fertilizer & Gas Co. v. Pitt County, 81.**

Intervention—standard of review—The de novo standard for review of N.C.G.S. § 1A-1, Rule 24(a)(2) decisions on intervention as a matter of right is expressly adopted. Although our appellate courts have not specifically stated the standard of review, they have weighed the facts of each case in light of whether the intervening party has shown a direct and immediate interest; whether denial of intervention would result in a practical impairment of the protection of that interest; and whether representation of that interest is not adequate. **Harvey Fertilizer & Gas Co. v. Pitt County, 81.**

Necessary—motion to join—The trial court did not err by denying defendant's motion to join as necessary parties all of the lot owners and the pertinent city where the case involved whether a certain land use violates restrictive covenants. **Belverd v. Miles, 169.**

PATERNITY

Motion to void acknowledgment—untimely—The trial court did not abuse its discretion by denying defendant's Rule 60 motion to void defendant's acknowledgment of paternity and his voluntary support agreement after DNA testing where the motion was untimely. **State ex rel. Davis v. Adams, 512.**

PENALTIES, FINES AND FORFEITURES

Local air quality ordinances—fines payable to county school fund—Civil fines and penalties assessed by a regional air pollution control agency for violations of local air quality ordinances and regulations are payable to the county school fund pursuant to N.C. Const. art. IX, § 7 because the local ordinances are enacted under authority delegated by the State and the Environmental Management Commission in order to enforce State-mandated air quality standards and constitute "penal laws" within the meaning of N.C. Const. art. IX, § 7. **Donoho v. City of Asheville, 110.**

PLEADINGS

Defense to lease—waived by not pleading—Defendants in a lease action waived the defense that the lease was not signed by their spouses where they did not affirmatively assert the defense in their original or amended answer. **Purchase Nursery, Inc. v. Edgerton, 156.**

POLICE OFFICERS

Discharge from employment—deadly force—imminent danger—A de novo review reveals that the trial court did not err by upholding defendant Civil Service Board's termination of plaintiff police officer's employment after plaintiff fatally shot a civilian in the course of his employment even though plaintiff contends the Board failed to find that plaintiff did not reasonably believe that deadly force was necessary to protect himself or a third party so as to make his use of force excessive. **Jordan v. Civil Serv. Bd. of Charlotte, 691.**

PROBATION AND PAROLE

Consecutive five year terms—prohibited—The trial court erred by imposing two consecutive five year probation periods for indecent liberties. A trial court is prohibited from imposing such a sentence under the plain terms of N.C.G.S. § 15A-1346. **State v. Canady, 455.**

Recalculation of parole eligibility date—credits—summary judgment—ripeness—The trial court did not err by concluding a case challenging plaintiff inmate's parole eligibility date being recalculated, which required him to serve a longer term, was ripe for summary judgment even though plaintiff contends a material fact existed as to whether he was entitled to good conduct, gain time, and meritorious time credits to be applied to his life sentence. **Price v. Beck, 763.**

Restitution—victims' future treatment—not punitive—The trial court did not err by imposing restitution of up to $2,000 for future treatment of indecent liberties victims as a condition of probation where the record contained supporting evidence other than statements of the prosecutor, there was testimony tending to show that the victims were still undergoing treatment and that insurance would not cover the total cost, and the court's allowance for the cost of treatment being less than $2,000 supports the inference that the restitution was not punitive. **State v. Canady, 455.**

Right to assistance of counsel—probation revocation hearing—The trial court erred in a probation revocation hearing by allowing defendant to proceed pro se without conducting an inquiry as required by N.C.G.S. § 15A-1242. **State v. Evans, 313.**

PRODUCTS LIABILITY

Breach of implied warranty of merchantability—directed verdict—The trial court did not err in a products liability case arising from injuries sustained from an alleged defective clamp used on an irrigation system by granting a directed verdict for defendant manufacturer on the issue of breach of implied warranty of merchantability. **Evans v. Evans, 54.**

Failure to warn—directed verdict—The trial court did not err in a products liability case arising from injuries sustained from an alleged defective clamp used on an irrigation system by granting a directed verdict for defendant manufacturer on the issue of failure to warn. **Evans v. Evans, 54.**

Requested instruction—duty regarding design—The trial court did not err in a products liability case arising from injuries sustained from an alleged defective clamp used on an irrigation system by failing to give plaintiff's requested instruction on defendant manufacturer's duty to exercise reasonable care regarding the design of the clamp and instead instructing that a manufacturer is under a duty to make reasonable efforts to correct design defects about which it knows or should have known. **Evans v. Evans, 54.**

PSYCHOLOGISTS AND PSYCHIATRISTS

Disciplinary hearing—ex parte communications—bias—administrative and investigative functions—The trial court erred in its review of a psychology board's disciplinary hearing by concluding that respondent board violated

PSYCHOLOGISTS AND PSYCHIATRISTS—Continued

petitioner psychologist's statutory and constitutional rights based on the facts that the board excluded petitioner and his counsel from the initial probable cause hearing, the board subsequently denied the petition for disqualification of board members based on allegations of bias, and the board allegedly improperly commingled its prosecutorial, investigative, and adjudication functions. **Farber v. N.C. Psychology Bd., 1.**

Disciplinary hearing—inappropriate personal relationship—The trial court did not err in its review of a psychology board's disciplinary hearing by concluding that respondent psychology board's final decision regarding petitioner psychologist's inappropriate relationship with a patient was supported by substantial evidence. **Farber v. N.C. Psychology Bd., 1.**

PUBLIC ASSISTANCE

Emergency Medicaid coverage—state residency requirement—A de novo review revealed that the trial court did not err by affirming respondent Department of Health and Human Services' final agency decision to deny petitioner mother's request for emergency Medicaid coverage for the birth of her child based on petitioner's failure to meet the state residency requirement. **Okale v. N.C. Dep't of Health & Human Servs., 475.**

Final agency decision—individualized written rehabilitation program—arbitrary and capricious standard—A whole record review reveals that the trial court's decision affirming the Division of Services for the Blind's final agency decision denying petitioner's request to amend her individualized written rehabilitation program (IWRP) was not arbitrary and capricious. **Hedgepeth v. N.C. Div. of Servs. for the Blind, 652.**

Final agency decision—individualized written rehabilitation program—job placement services—education—The trial court did not err by affirming the Division of Services for the Blind's final agency decision denying petitioner's request to amend her individualized written rehabilitation program (IWRP) even though petitioner contends the agency's contention that petitioner is employable coupled with its decision to provide only job placement services violates the Rehabilitation Act, federal regulations, and the agency's policy. **Hedgepeth v. N.C. Div. of Servs. for the Blind, 652.**

Final agency decision—individualized written rehabilitation program—joint development of plan—consideration of employee's capabilities—The trial court did not err by affirming the Division of Services for the Blind's final agency decision denying petitioner's request to amend her individualized written rehabilitation program (IWRP) even though petitioner alleges the agency's decision to unilaterally discontinue education assistance was illegal when IWRPs must be jointly developed and that the alleged unilateral changing of the IWRP was done without consideration of the employee's capabilities. **Hedgepeth v. N.C. Div. of Servs. for the Blind, 652.**

Medicaid recovery—personal injury settlement with eighteen-year-old—The trial court properly concluded that plaintiff was a beneficiary of Medicaid assistance under N.C.G.S. § 108A-57, and did not err by requiring plaintiff to reimburse defendant out of the proceeds of a personal injury settlement, where plaintiff was enrolled in the Medicaid program as a minor, was involved in an

PUBLIC ASSISTANCE—Continued

automobile accident when he was seventeen, and settled a personal injury claim one month after his eighteenth birthday. **Campbell v. N.C. Dep't of Human Res., 305.**

PUBLIC OFFICERS AND EMPLOYEES

Notification of specific allegations—disciplinary action—simultaneous— The trial court erred by holding that a state employee dismissed for sexual harassment did not receive due process where petitioner received the predisciplinary conference required under 25 N.C.A.C. § 1J.0608(b) and the notification mandated by N.C.G.S. § 126-35 in that he was informed of the allegations against him and given a chance to respond in an initial meeting at which he was asked to submit a written statement; a second meeting occurred; petitioner subsequently received a letter which set forth in detail the allegations against him and informed him of a predisciplinary conference; and, following that conference, petitioner received a dismissal letter which set out the specific acts or omissions supporting his dismissal. **Kea v. Department of Health & Human Services, 595.**

Police officer—accident while driving—prisoner injured—individual liability—gross negligence—The trial court did not err by denying summary judgment against defendant-officer in his individual capacity on a claim for actions which went beyond mere negligence where plaintiff alleged that the officer placed him in the backseat of a police car without a seatbelt and was operating his vehicle at 70 miles an hour on a city street. **Clayton v. Branson, 488.**

Police officer—accident while driving—prisoner injured—individual liability—mere negligence—The trial court erred by failing to dismiss a claim for mere negligence against a police officer in his individual capacity where plaintiff was injured by colliding with the prisoner shield inside a police car when the car was involved in an accident. **Clayton v. Branson, 488.**

Predisciplinary conference—prior conclusions—no due process violation—The trial court erred by ruling that a state employee accused of sexual harassment was denied due process by biased decision-making where the employee contended that a deputy director had reached conclusions prior to the predisciplinary conference, but those conclusions were based on an extensive investigation and the decision to dismiss petitioner was upheld by both the State Personnel Commission and the Secretary of the Department of Health and Human Services. Due process was not violated by the deputy director acting as investigator or reaching prior conclusions, absent evidence of a disqualifying personal bias. **Kea v. Department of Health & Human Services, 595.**

Sexual remarks—personal misconduct or sexual harassment—appellate review—The trial court did not err by reversing the decision of the State Personnel Commission to demote and transfer a correctional sergeant who had made sexual remarks to two female correctional officers. Although grounds may exist for establishing unacceptable personal conduct, the issue specified by the Administrative Law Judge (and neither rejected nor amended by the SPC) was whether there was just cause to demote petitioner because of sexual harassment, which does not appear to have occurred. **Lewis v. N.C. Dep't of Corr., 449.**

PUBLIC OFFICERS AND EMPLOYEES—Continued

Unacceptable personal conduct—sexual harassment—sufficiency of evidence—The trial court erred by ruling that a state employee dismissed for sexual harassment was denied due process where there was sufficient evidence to support the State Personnel Commission's findings and those findings supported the conclusion that petitioner was dismissed for just cause based on unacceptable personal conduct. **Kea v. Department of Health & Human Services, 595.**

RAPE

Attempted first-degree—jury instructions—serious personal injury on victim or another—The trial court did not err in its instructions on attempted first-degree rape by instructing the jury that it could find defendant guilty if it found that he inflicted serious personal injury on the victim or any other person. **State v. Rogers, 203.**

Attempted first-degree—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charge of attempted first-degree rape even though the State relied on the serious injuries suffered by the victim mother's daughter to elevate the offense when the daughter was not present during the attempted rape and the indictment did not allege which element the State relied on to elevate the crime to a first-degree offense. **State v. Rogers, 203.**

First-degree—instructions—serious injury—There was no plain error in a first-degree rape prosecution where the judge instructed the jury that a conviction required a finding of "personal injury" rather than "serious personal injury." In context, the error had no probable impact because there was specific testimony about the victim's injuries and the court included serious injury in its instructions on the elements of first-degree rape. **State v. O'Hanlan, 546.**

Second-degree—actual or constructive force—motion to dismiss—sufficiency of evidence—The trial court did not err by failing to dismiss the charge of second-degree rape even though defendant contends that there was no evidence of actual or constructive force. **State v. Strickland, 581.**

REAL PROPERTY

Lease—description—latently ambiguous—The trial court erred by concluding that a lease was void for an insufficient description of the land conveyed where the description referred to a highway and store, from which the property could possibly be identified with certainty. The lease was latently rather than patently ambiguous and the court should have considered extrinsic evidence before ruling on the validity of the lease. **Electronic World, Inc. v. Barefoot, 387.**

Malicious damage—instructions—malice—There was no plain error in a prosecution for malicious damage to occupied real property in the court's instruction on express and implied malice. There is nothing in N.C.G.S. § 14-49.1 or the case law to preclude a definition of malice analogous to that used in homicide, and the instruction was taken verbatim from the Pattern Jury Instruction. **State v. Sexton, 641.**

REAL PROPERTY—*Continued*

Malicious damage—sufficiency of evidence—There was sufficient evidence of malice in a prosecution of malicious damage to occupied real property in the evidence of past disagreements, confrontations and the conduct of defendant prior to the fire. **State v. Sexton, 641.**

Removal of underground gasoline tanks—claim for monies owed—summary judgment—The trial court erred by granting summary judgment for defendants on a claim for monies owed arising from a disputed lease where issues of material fact arose from the removal of gasoline tanks. **Electronic World, Inc. v. Barefoot, 387.**

ROBBERY

Dangerous weapon—motion to dismiss—sufficiency of evidence—The trial court did not err by denying defendant's motion to dismiss the charges of robbery with a dangerous weapon. **State v. McConico, 723.**

SEARCH AND SEIZURE

Release of rifle by one law enforcement agency to another—test results—no reasonable expectation of privacy—The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury and discharging a weapon into occupied property case by determining that the release of defendant's Colt rifle by one law enforcement agency to another did not constitute an illegal search or seizure and by allowing the S.B.I. report to be admitted into evidence. **State v. Motley, 701.**

SECURITIES

Conversion and wrongful cancellation—judicial estoppel—prior bankruptcy hearing—The trial court erred by granting summary judgment for defendants based upon judicial estoppel in an action for conversion and wrongful cancellation of stock arising from statements made in a bankruptcy proceeding. **Whitacre Partnership v. BioSignia, Inc., 608.**

SENTENCING

Aggravating factor—hired to commit offense—administrative error—A defendant is not entitled to a new sentencing hearing in an assault on a law enforcement officer with a firearm and felonious breaking or entering case even though the trial court allegedly found the erroneous aggravating factor that defendant was hired to commit the offense where the marking of the factor was an administrative error. **State v. Thomas, 326.**

Aggravating factor—murder committed with premeditation and deliberation—The trial court did not err by imposing an aggravated sentence for second-degree murder based on the nonstatutory aggravating factor that the murder was committed with premeditation and deliberation even though the case is remanded for correction of a clerical error containing the term malice on the sentencing form. **State v. Pimental, 69.**

Habitual felon—motion to dismiss—sufficiency of evidence—true copy of prior convictions—The trial court did not err in a forgery and uttering case by

SENTENCING—Continued

refusing to dismiss the habitual felon charge even though defendant contends the admissibility of his prior convictions was in violation of N.C.G.S. § 14-7.4 based on the fact that the State introduced those convictions as true copies instead of as certified copies. **State v. Gant, 136.**

Life sentence—minimum service requirement—credits—The Parole Commission did not err by failing to reduce the minimum service requirement of plaintiff's life sentence with gain time, meritorious time, and good conduct credits. **Price v. Beck, 763.**

Mitigating factor—support system in community—evidence insufficient—The trial court did not abuse its discretion when sentencing defendant McDowell for conspiracy to commit armed robbery, armed robbery, and possession of a firearm by a felon by not finding the mitigating factor that defendant has a strong support system in the community. **State v. Kemp, 231.**

Prayer for judgment—superceding habitual felony indictment to change date—The trial court did not abuse its discretion in a forgery and uttering case by entering a prayer for judgment to allow the State time to obtain a superceding habitual felony indictment for purposes of changing the date of the occurrence of defendant's first felony offense from 16 April 2000 to 16 April 1990. **State v. Gant, 136.**

Presumptive range—finding of mitigating factors not required—The trial court did not err in a robbery with a dangerous weapon case by failing to find any mitigating factors during sentencing because the court did not depart from the presumptive range when it sentenced defendant. **State v. McConico, 723.**

Record level—prior misdemeanor convictions obtained without counsel—The trial court did not err in an attempted first-degree rape, felony breaking or entering, second-degree kidnapping, and assault with a deadly weapon with intent to kill inflicting serious injury case by denying defendant's motion to suppress the use of two prior misdemeanor convictions used by the State to elevate defendant's prior record level for sentencing purposes from Level IV to Level V even though defendant contends the two prior convictions were obtained in violation of his right to counsel under N.C.G.S. § 15A-980. **State v. Rogers, 203.**

Statutory mitigating factors—supports family—positive employment history or gainfully employed—The trial court did not err in an assault on a law enforcement officer with a firearm and felonious breaking or entering case by failing to find the statutory mitigating factors that defendant supports his family and defendant has a positive employment history or is gainfully employed. **State v. Thomas, 326.**

SEXUAL OFFENSES

First-degree—deliberate touching of child—prurient intent not required—The trial court properly declined to instruct the jury on accidental or inadvertent touching as requested by a first-degree sexual offense defendant where there was no evidence that the physical contact between defendant and his children was not deliberate. The offense of first-degree sexual offense does not require prurient intent as proposed in the instruction. **State v. Bartlett, 680.**

SEXUAL OFFENSES—Continued

First-degree—innocent touching of children—parental rights—The first-degree sexual offense statute was not unconstitutional as applied to defendant where defendant contended that punishing a parent for innocent touching violates fundamental parenting interests which are constitutionally protected, but defendant was being punished for unlawful sexual acts which were not innocent. **State v. Bartlett, 680.**

First-degree—short-form indictment—The short-form indictment for first-degree sexual offense is constitutional. **State v. Bartlett, 680.**

First-degree—sufficiency of evidence—sexual intent—not required—The trial court did not err by denying a motion to dismiss charges of first-degree sexual offense where defendant argued that there was insufficient evidence of sexual intent, but the intent to commit a first-degree sexual offense is inferred from the commission of the act and there was substantial evidence to support the essential elements of the offense. **State v. Bartlett, 680.**

STATUTE OF FRAUDS

Lease—possibly invalid—other claims not barred—Claims for trespass, civil conspiracy, unfair and deceptive trade practices, and monies owed were not necessarily barred because they arose in connection with a lease that could be declared void under the Statute of Frauds. The Statute of Frauds bars only enforcement of the invalid contract; it does not bar other claims even though those claims arose in connection with an invalid lease. **Electronic World, Inc. v. Barefoot, 387.**

STATUTES OF LIMITATIONS AND REPOSE

Federal Employers' Liability Act—occupational pneumoconiosis—The trial court did not err by granting summary judgment in favor of defendant company based on the expiration of the pertinent three-year statute of limitations in an action under the Federal Employers' Liability Act (FELA) of 45 U.S.C. § 51 alleging plaintiff employee contracted occupational pneumoconiosis as a result of defendant's alleged negligence and statutory violations. **Pinczkowski v. Norfolk S. Ry. Co., 435.**

Legal malpractice—continuing course of conduct not applicable—The trial court did not err by holding that the statute of limitations bars a professional negligence claim against an attorney where the attorney voluntarily dismissed plaintiff's contract claim on 1 October 1990, plaintiffs discovered that the case had been dismissed in November of 1993, and plaintiffs filed this action on 9 October 1996. The last opportunity for defendant to act was on 1 October 1991, one year after the voluntary dismissal; the "continuing course of treatment" doctrine is not extended to legal malpractice. **Fender v. Deaton, 187.**

Legal malpractice—not governed by limitations for fraud—The trial court did not err by granting summary judgment for defendant-attorney under the statute of limitations for professional malpractice, N.C.G.S. § 1-15(c). Plaintiff contended that the action was governed by the statute of limitations for fraud, but the allegations in the complaint set forth nothing more than an ordinary claim for legal malpractice. **Fender v. Deaton, 187.**

TAXATION

Ad valorem—property valuation—arbitrary—Although a county contended in a property tax assessment case that the taxpayer's argument was an attack on the county's schedule of values rather than on the appraisal, the Property Tax Commission's holding that the county employed an arbitrary appraisal method was based on the finding that the county's income method did not produce a true value. The lack of sufficient data merely bolsters the argument for arbitrariness and was not an attack on the schedule of values. **In re Appeal of Lane Co., 119.**

Ad valorem—property valuation—post-octennial sales—The Property Tax Commission did not err by valuing property lower than had the county where the county's presumption of correctness was lost when the taxpayer offered substantial rebutting evidence. The post-octennial sales comparisons used in the taxpayer's appraisal were of comparable properties rather than the subject property. **In re Appeal of Lane Co., 119.**

Ad valorem—property valuation—presumption of correctness—rebutted—A taxpayer sufficiently rebutted the presumption of the correctness of the county's property tax assessment where there was testimony that the county's use of the income approach did not represent the true value and the county's original assessment substantially exceeded both the county's subsequent modified assessment and an appraisal from the taxpayer's expert. **In re Appeal of Lane Co., 119.**

Ad valorem—property valuation—sales comparison approach adopted over income approach—The Property Tax Commission did not err in finding that the county employed an arbitrary method of valuing a furniture manufacturing facility where the Commission made clear findings that it gave greater weight to expert testimony supporting the sales comparison approach rather than to testimony supporting the income approach used by the county. **In re Appeal of Lane Co., 119.**

Review of Property Tax Commission—whole record test—The standard of review of a decision of the Property Tax Commission is the whole record test, under which the reviewing court determines whether the decision of the Commission is supported by substantial evidence. **In re Appeal of Lane Co., 119.**

TERMINATION OF PARENTAL RIGHTS

Appointed counsel—effectiveness—The trial court did not err by not removing respondent's attorney from a termination of parental rights hearing where respondent claimed that his appointed attorney was ineffective, but did not show that his attorney's performance was so deficient as to deprive him of a fair hearing. **In re Faircloth, 565.**

Failure to deny or present argument about certain grounds—only one ground needed—No prejudicial error was found in a termination of parental rights proceeding where respondent admitted some of the allegations in the petition by failing to deny them and did not present an appellate argument about some of the grounds for termination found by the court. Because the trial court needs to find only one of the statutory grounds for termination, any error in the remaining assignments of error was not prejudicial. **In re Faircloth, 565.**

Pending remanded abuse and neglect hearing—not a condition precedent for termination hearing—There was no error where a trial judge held a termi-

TERMINATION OF PARENTAL RIGHTS—Continued

nation of parental rights hearing without first rehearing a remanded abuse and neglect proceeding. Such a hearing is not a condition precedent for a termination hearing. **In re Faircloth, 565.**

TRESPASS

Summary judgment—disputed lease—The trial court erred by granting summary judgment for defendant on a civil trespass claim where there was a genuine issue of material fact regarding of the extent the property rented by plaintiff. Moreover, plaintiff forecast sufficient evidence to overcome defendants' motion for summary judgment in that plaintiff was in possession, the entry by defendant was unauthorized, and plaintiff was injured. **Electronic World, Inc. v. Barefoot, 387.**

TRIALS

Bifurcation sua sponte—no due process violation—The plaintiffs in an automobile accident case were not denied due process by the trial court's sua sponte bifurcation of the trial where plaintiffs were given the opportunity to be heard on the issue and did not request additional notice or time before arguing, plaintiffs were not denied the opportunity to present evidence at trial, defendants stipulated that the injury was the direct result of the accident, and, if the jury had found negligence, plaintiffs would have been given the opportunity to present evidence on damages. **Fender v. Deaton, 187.**

Compulsory reference—converted to summary judgment—Any error by the trial court in submitting an adverse possession matter to compulsory reference was cured when the court independently reviewed the evidence presented to the referee, determined that there were no issues of fact, and effectively entered summary judgment on the issue of adverse possession. **Dockery v. Hocutt, 744.**

Removal of disruptive respondent—no abuse of discretion—The trial court did not abuse its discretion by removing respondent from a termination of parental rights hearing without providing a means for him to testify where respondent was profane and belligerent, refused to be affirmed prior to questioning, interrupted and argued, and was removed after a final warning from the judge. **In re Faircloth, 565.**

UNFAIR TRADE PRACTICES

Credit cardholder agreement—motion to dismiss—sufficiency of evidence—The trial court did not err by dismissing plaintiff's unfair and deceptive trade practices claim arising out of a cardholder agreement for a credit card account. **Gaynoe v. First Union Corp., 750.**

Disputed lease—summary judgment—The trial court erred by granting summary judgment for defendant on an unfair practices claim arising from a disputed lease. **Electronic World, Inc. v. Barefoot, 387.**

Political ads—claim sufficiently stated—The trial court erred by granting a Rule 12(b)(6) dismissal on an unfair and deceptive practices claim arising from television ads during a political campaign where plaintiffs properly pled all of the elements for a libel per se claim and the alleged libel impugned plaintiffs in their

UNFAIR TRADE PRACTICES—Continued

profession by accusing them of unethical business practices. There are no compelling grounds to distinguish defamatory remarks concerning one's trade or profession made during the course of a political campaign from those made in some other forum. It will be plaintiff's burden to show actual injury as the case progresses. **Boyce & Isley, PLLC v. Cooper, 25.**

VENDOR AND PURCHASER

Deferred sales fee—sale of entire tract—The trial court did not err in an action for breach of a real estate sales contract by ordering that the balance would come due if defendant sold the entire tract without selling each of the remaining lots. From the plain language of an addendum to the contract, the parties contemplated that defendant might sell the improved tract as a whole and did not intend this possibility to negate plaintiff's interest in deferred availability fees. **Rich, Rich & Nance v. Carolina Constr. Corp., 149.**

WARRANTIES

Breach of implied warranty of merchantability—directed verdict—The trial court did not err in a products liability case arising from injuries sustained from an alleged defective clamp used on an irrigation system by granting a directed verdict for defendant manufacturer on the issue of breach of implied warranty of merchantability. **Evans v. Evans, 54.**

WITNESSES

Assistant clerk of court—custodial officer—minimal contact with jurors—The trial court did not err in a second-degree rape and misdemeanor breaking and entering case by allowing the assistant clerk of court to testify even though defendant contends she was a custodial officer in charge of the jury where her interaction with the jury was entirely within the courtroom as part of her job. **State v. Strickland, 581.**

Expert—doctor familiar with community standard—The trial court did not err in a medical malpractice action by admitting the medical expert testimony of two doctors even though defendants contend they were not familiar with the community standard as required by N.C.G.S. § 8C-1, Rule 702, because: (1) the doctor that practiced in Charlotte, North Carolina satisfied the requirements by testifying that he was familiar with the standard of care with respect to obstetrics, gynecology, and sonography in communities similar to Wilmington, North Carolina, and that he based his opinion on internet research about the size of the hospital, the training program, and the Area Health Education program; and (2) the other doctor, a board certified specialist in obstetrics/gynecology who was licensed to practice in California and Colorado, also satisfied the requirements by testifying that he was familiar with the standard of care in communities similar to Wilmington. **Coffman v. Roberson, 618.**

Expert—doctor with same specialty—The trial court did not err in a medical malpractice action by admitting the medical expert testimony of a doctor under N.C.G.S. § 8C-1, Rule 702, because: (1) the witness doctor specialized in the same specialty, obstetrics/gynecology, as defendant doctor; and (2) during the year preceding 29 March 1997, the witness doctor spent all of his professional time teach-

ing at an accredited health professional school and the majority of it teaching from the vantage point of OB/GYN. **Coffman v. Roberson, 618.**

WORKERS' COMPENSATION

Asbestos—last injurious exposure—The Industrial Commission's conclusion that decedent-employee was not last injuriously exposed to asbestos while employed by defendant-employer was supported by the evidence. **Hatcher v. Daniel International Corp., 776.**

Attorney fees—not apportioned—An award of attorney fees in a workers' compensation case was affirmed where defendants' brief concerned only the issue of unreasonable defense under N.C.G.S. § 97-88.1, the Commission did not apportion the award between N.C.G.S. § 97-88.1 and N.C.G.S. § 97-88 (unsuccessful appeal), and it could be assumed that the entire award would have been proper under N.C.G.S. § 97-88. **Rackley v. Coastal Painting, 469.**

Carpal tunnel syndrome—findings—ability to work—There was competent evidence to support the Industrial Commission's finding in a workers' compensation carpal tunnel case that there was insufficient evidence that plaintiff's carpal tunnel syndrome precluded plaintiff from performing his work duties where the record is replete with evidence that plaintiff continued working and engaging in activities requiring significant use of his hands. **Hale v. Novo Nordisk Pharm. Indus., Inc., 272.**

Carpal tunnel syndrome—findings—causation—There was competent evidence to support the Industrial Commission's finding in a workers' compensation case that plaintiff's carpal tunnel syndrome was caused by something other than his work with defendant where the Commission found that other possible causes included his part-time employment, his work after he was terminated by defendant, his hobbies, a motorcycle accident, a car accident, and his preexisting cervical disc condition. **Hale v. Novo Nordisk Pharm. Indus., Inc., 272.**

Carpal tunnel syndrome—findings—favorable to plaintiff—favorable conclusions not mandated—The Industrial Commission did not err by not making conclusions favorable to plaintiff after making certain findings favorable to plaintiff. The Commission has the duty to weigh the evidence and the authority to conclude that plaintiff's evidence was outweighed by defendant's evidence. **Hale v. Novo Nordisk Pharm. Indus., Inc., 272.**

Carpal tunnel syndrome—findings—hobbies—There was competent evidence to support the Industrial Commission's finding in a workers' compensation carpal tunnel case that plaintiff's hobbies, activities, and part-time employment involved a significant use of his hands where there was evidence that plaintiff played his saxophone twenty minutes a day, handled baggage and cleaned airplanes as a part-time employee, and drove a motorcycle. Furthermore, for plaintiff to testify that these activities bothered his hands, he must have been using his hands. **Hale v. Novo Nordisk Pharm. Indus., Inc., 272.**

Carpal tunnel syndrome—findings—plaintiff's disc condition—There was competent evidence to support the Industrial Commission's finding in a workers' compensation carpal tunnel case that plaintiff's neurologist was not aware of plaintiff's cervical disc condition where the issue before the Commission was whether plaintiff's doctor knew that his disc condition caused numbness in plaintiff's upper right extremity and there was evidence that the doctor wrote a letter

WORKERS' COMPENSATION—Continued

relating plaintiff's pain to an automobile accident rather than to his disc condition. **Hale v. Novo Nordisk Pharm. Indus., Inc., 272.**

Causal connection between accident and injury—sufficiency of evidence—There was sufficient evidence in a workers' compensation case to support the Industrial Commission's finding of a causal connection between the visual disturbances suffered by a firefighter and the explosion of an electrical panel during a fire where two doctors testified that the visual disturbances were caused by the incident and one of those doctors fully described the physiological changes in plaintiff's brain that trigger the visual disturbances. **Gordon v. City of Durham, 782.**

Credibility of witness—weak and confused memory—province of Commission—The Industrial Commission's decision in a workers' compensation case concerning weight to be given the deposition testimony of an 81-year-old decedent-employee who could not remember well or who was confused by the questions was not disturbed. Although a witness who can remember nothing is not competent to testify, a weak or impaired memory goes to the weight of the testimony and it is the sole province of the Commission to determine the credibility and weight of testimony. **Hatcher v. Daniel International Corp., 776.**

Employer's credit—plaintiff's limited wages after injury—The Industrial Commission did not err in a workers' compensation action by awarding plaintiff—firefighter benefits while allowing his former employer a credit for the limited wages plaintiff was able to earn after the injury as an electrical contractor. **Gordon v. City of Durham, 782.**

Employment—no constructive refusal—The Industrial Commission did not err by concluding that plaintiff did not constructively refuse employment where plaintiff was given the choice of resignation, medical disability retirement, or termination due to being medically disqualified for the work; plaintiff testified that he had not previously requested medical retirement and would have remained with his employer if he had been offered suitable employment; and the employer produced no evidence that it had offered suitable employment or attempted to find plaintiff suitable employment in another field. **Gordon v. City of Durham, 782.**

Going and coming rule—contractual duty exception—not applicable—The contractual duty exception to the going and coming rule did not apply in a workers' compensation case where plaintiff was employed as a nursing aide, her employer provided reimbursement for employees who traveled over 30 miles a day, and plaintiff did not travel that distance on the day of the accident. The Commission's conclusion that this employer's reimbursement policy was arbitrary did not bring the mileage policy within the exception. **Hunt v. Tender Loving Care Home Care Agency, Inc., 266.**

Going and coming rule—traveling salesman exception—not applicable—The traveling salesman exception to the going and coming rule did not apply in a workers' compensation case where plaintiff-nursing aide had worked for the entirety of her employment at one home and was not required to attend multiple patients with no fixed work location. **Hunt v. Tender Loving Care Home Care Agency, Inc., 266.**

WORKERS' COMPENSATION—Continued

Last injurious exposure—inference—The Industrial Commission's conclusion that decedent employee's last injurious exposure to the hazards of asbestosis occurred with Mundy (a company other than defendant) was upheld where the evidence supported a reasonable inference that decedent-employee was exposed for at least 30 days or parts thereof within seven consecutive months while working for Mundy. The cases cited by plaintiff for the assertion that the Commission must be able to point to days in which exposure occurred do not limit the Commission's ability to rely on inferences that may reasonably be drawn from the evidence. **Hatcher v. Daniel International Corp., 776.**

Last injurious exposure—proximate augmentation of lung cancer—language of finding—The findings in a workers' compensation action supported the Industrial Commission's conclusion that, with respect to lung cancer, decedent's last injurious exposure to asbestos did not occur while he was employed by defendant even though the commission did not couch its findings in terms of proximate augmentation of lung cancer. The commission found that decedent's lung cancer was likely caused by his exposure to asbestos. **Hatcher v. Daniel International Corp., 776.**

Liens—modification—authority—The parties must apply to the Industrial Commission under N.C.G.S. § 97-17 to adjust a lien amount agreed to in a workers' compensation claim settlement approved by the Industrial Commission. In granting the superior court the discretion to determine subrogation amounts under N.C.G.S. § 97-10.2(j) to facilitate settlement of third party claims, the Legislature did not intend to undermine the authority of the Industrial Commission to do the same for workers' compensation claims. **Holden v. Boone, 254.**

Nurse's aide—automobile accident—The Industrial Commission erred in a workers' compensation case by concluding that plaintiff nursing aide's job duties as an in-home health care provider included traveling to and from the homes of patients where it was undisputed that plaintiff worked with one patient. Plaintiff had a fixed job location and her automobile accident does not fall under the traveling salesman exception to the going and coming rule. **Hunt v. Tender Loving Care Home Care Agency, Inc., 266.**

Painter's fall from ladder—epilepsy—compensable—The Industrial Commission did not err in a workers' compensation action by ruling that plaintiff-painter sustained a compensable injury by accident when he fell from a 32-foot ladder as he leaned back to paint trim where defendant argued that the fall was caused by plaintiff's idiopathic condition (epilepsy). Compensation should be allowed when an injury is associated with risk attributable to the employment even though an idiopathic condition precipitated or contributed to the injury. **Rackley v. Coastal Painting, 469.**

Wage-earning capacity—continuing disability—earnings from self-employment—The Industrial Commission erred in a workers' compensation case by finding that plaintiff employee had regained his wage-earning capacity and by concluding that plaintiff failed to meet his burden of showing continuing disability under N.C.G.S. § 97-2(9) based on plaintiff's earnings from self-employment. **Devlin v. Apple Gold, Inc., 442.**

ZONING

Appeal from official decision to board of adjustment—persons aggrieved—The trial court erred by determining that a board of adjustment had jurisdiction where a revised site plan was submitted to the planning committee; a deputy city attorney asked the zoning supervisor for his opinion, which was that the proposed plan met the code definition but that the use might not be permitted by the code; the planning committee recommended approval; respondents Oakwood and Jones (who opposed the plan) appealed to the board for an interpretation, citing the zoning supervisor's memo; the city council approved the revised site plan; the board ruled that the nature of the use is determinative rather than the classification and that the plan should not be allowed; and petitioners Raleigh Rescue and Coggins Construction appealed to the superior court, which affirmed the board. The zoning supervisor issued no order, decision, or determination and respondents cannot claim to be persons aggrieved who have the right of appeal to the board under N.C.G.S. § 160A-388(b). **Raleigh Rescue Mission, Inc. v. Board of Adjust. of City of Raleigh, 737.**

County's authority—prohibition on expansion of nonconforming use—The trial court did not err in a declaratory judgment action by granting defendant county's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claim regarding defendant county's authority to zone property and to regulate and prohibit the expansion of nonconforming uses, and by ruling the General Assembly did not grant exclusive authority in the Department of Environment and Natural Resources (DENR) to regulate wastewater treatment systems. **Huntington Props., L.L.C. v. Currituck Cty., 218.**

County's authority—prohibition on expansion of nonconforming use—due process—equal protection—The trial court did not violate plaintiffs' federal and state constitutional rights to due process and equal protection in a declaratory judgment action by granting defendant county's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claim regarding defendant county's authority to zone property and to regulate and prohibit the expansion of nonconforming uses. **Huntington Props., L.L.C. v. Currituck Cty., 218.**

Mobile home park—nonconforming use—vested rights doctrine—The trial court did not err in a declaratory judgment action by granting defendant county's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiffs' claim regarding defendant county's authority to zone property and to regulate and prohibit the expansion of nonconforming uses based on its interpretation of defendant county's Uniform Development Ordinance (UDO) Article 15 even though plaintiffs contend it impaired plaintiffs' vested right to repopulate the entire pertinent mobile home park up to the original capacity of 440 units. **Huntington Props., L.L.C. v. Currituck Cty., 218.**

Mobile home park—prohibition on expansion of nonconforming use—The trial court did not err in a declaratory judgment action by granting defendant county's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) based on its interpretation of defendant county's Uniform Development Ordinance (UDO) §§ 1507(3) and 1504(9) to prevent plaintiffs from upgrading their wastewater treatment system to serve existing but unoccupied rental spaces in the pertinent mobile home park. **Huntington Props., L.L.C. v. Currituck Cty., 218.**

WORD AND PHRASE INDEX

ADMINISTRATIVE LAW

Exhaustion of remedies, **Lee Ray Bergman Real Estate Rentals v. N.C. Fair Housing Ctr., 176.**

Rule for dentistry management agreements, **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

ADMISSION

Business card, **State v. Reed, 462.**

ADVERSE POSSESSION

Insufficient evidence of hostile possession, **Dockery v. Hocutt, 744.**

ADVERTISEMENTS

Promoting town policy during election, **Dollar v. Town of Cary, 309.**

AFFRAY

Allegations of self-defense, **In re Wilson, 196.**

On private property, **In re May, 299.**

AGGRAVATING FACTORS

Clerical error, **State v. Thomas, 326.**

Inducement of others, **State v. Kemp, 231.**

Murder committed with premeditation and deliberation, **State v. Pimental, 69.**

AIR POLLUTION PENALTIES

Remitted to county school fund, **Donoho v. City of Asheville, 110.**

ALCOHOLIC BEVERAGES

Possession for sale without permit, **State v. Reed, 462.**

ALUMNI CENTER

Construction claims, **RPR & Assocs. v. University of N.C.-Chapel Hill, 342.**

ANDERS BRIEF

Service on juvenile, **In re May, 299.**

APPEAL

Continuing jurisdiction after, **RPR & Assocs. v. University of N.C.-Chapel Hill, 342.**

APPEALABILITY

Certification improper when no final judgment, **Priest v. Sobeck, 662.**

Denial of summary judgment, **Lovelace v. City of Shelby, 378.**

Failure to renew motion to dismiss, **In re Hodge, 102.**

Partial summary judgment, **Priest v. Sobeck, 662.**

ARBITRATION

Modification of award, **Vanhoy v. Duncan Contr'rs, Inc., 320.**

Presence at hearing, **Parks v. Green, 405.**

ASSAULT

De minimus defense, **In re Hodge, 102.**

Evidence of intent to kill, **State v. Hunt, 316.**

Hands and feet as deadly weapons, **State v. Hunt, 316.**

Intentionally kicking child, **State v. Carter, 756.**

Knowledge victim was law officer, **State v. Thomas, 326.**

Singular hand as deadly weapon, **State v. Rogers, 203.**

With truck, **State v. Blymyer, 516.**

ATTEMPTED FIRST-DEGREE MURDER

Short-form indictment sufficient, **State v. Trull, 630.**

ATTEMPTED FIRST-DEGREE RAPE

Reliance on serious injuries suffered by another, **State v. Rogers, 203.**

ATTORNEY FEES

Child custody and support, **Burr v. Burr, 504.**

Termination of parental rights, **Burr v. Burr, 504.**

BEST INTEREST OF CHILD

Medical immunization, **In re Stratton, 428.**

BIFURCATED TRIAL

No due process violation, **Marshall v. Williams, 128.**

BREACH OF CONTRACT

Credit cardholder agreement, **Gaynoe v. First Union Corp., 750.**

BURGLARY

Inferred intent to commit larceny, **State v. Keitt, 671.**

BUSINESS RECORDS EXCEPTION

Deposit slips and bank statements, **State v. Frierson, 242.**

CHILD CUSTODY

Illegitimate children, **David v. Ferguson, 482.**

CHILD SUPPORT

Full Faith and Credit for Child Support Orders Act, **Wilson Cty. ex rel. Egbert v. Egbert, 283.**

CHILD SUPPORT—Continued

Modification by foreign court invalid, **Wilson Cty. ex rel. Egbert v. Egbert, 283.**

Retroactive, **Miller v. Miller, 40.**

Unsigned consent judgment, **Miller v. Miller, 40.**

Voluntarily reduced realtor's income, **King v. King, 181.**

CLERICAL ERROR

Aggravating factor erroneously marked, **State v. Thomas, 326.**

COLLATERAL ESTOPPEL

Denial of motion to dismiss not final judgment on merits, **Whitmire v. Cooper, 730.**

Validity of easement, **Bee Tree Missionary Baptist Church v. McNeil, 797.**

CONFESSIONS

Sixteen-year-old defendant not coerced, **State v. McKinney, 369.**

Sixteen-year-old defendant's waiver of rights, **State v. Jones, 358.**

CONSPIRACY

Armed robbery, **State v. Kemp, 231.**

CONSTRUCTION CLAIM

Damages for rock excavation and delay, **RPR & Assocs. v. University of N.C.-Chapel Hill, 342.**

CONSTRUCTIVE POSSESSION

Cocaine in rented car, **State v. Tisdale, 294.**

CONTEMPT

Child support, **Miller v. Miller, 40.**

COSTS

Psychologist disciplinary hearing, **Farber v. N.C. Psychology Bd., 1.**

COVENANT NOT TO COMPETE

Preliminary injunction, **Redlee/SCS, Inc. v. Pieper, 421.**

CREDIT CARD

Amendment of APR, **Gaynoe v. First Union Corp., 750.**

DECLARATORY JUDGMENTS

Constitutionality of statute, **Farber v. N.C. Psychology Bd., 1.**

No actual controversy, **National Travel Servs., Inc. v. State ex rel. Cooper, 289.**

DEFAULT JUDGMENTS

Affirmative defenses inapplicable after entry of default, **Hartwell v. Mahan, 788.**

DENTISTRY MANAGEMENT ARRANGEMENTS

Administrative rule, **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

DISABILITY

Wage-earning capacity, **Devlin v. Apple Gold, Inc., 442.**

DISCOVERY

List of expert witnesses, **Coffman v. Roberson, 618.**

DISCRIMINATION

Standing by nonprofit organization, **Lee Ray Bergman Real Estate Rentals v. N.C. Fair Housing Ctr., 176.**

DOG ATTACK

Liability of rental property owner, **Holcomb v. Colonial Assocs., L.L.C., 413.**

DRUGS

Release of funds seized pursuant to state warrants to federal authority, **State v. Hill, 716.**

Use part of chain of circumstances in arson case, **State v. Sexton, 641.**

DUE PROCESS

Procedural and substantive, **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

EASEMENTS

Collateral estoppel, **Bee Tree Missionary Baptist Church v. McNeil, 797.**

EFFECTIVE ASSISTANCE OF COUNSEL

Attempt to fire court-appointed attorney, **State v. Gant, 136.**

ELECTIONS

Access to ballots cast in election, **In re Decision of the State Bd. of Elections, 804.**

Advertisements promoting town policies, **Dollar v. Town of Cary, 309.**

Public financing of campaigns, **Royal v. State, 495.**

EMERGENCY MEDICAID COVERAGE

State residency requirement, **Okale v. N.C. Dep't of Health & Human Servs., 475.**

EMERGENCY ROOM DOCTOR

Evaluation of rape victim, **State v. O'Hanlan, 546.**

EMOTIONAL OUTBURSTS

Motion for mistrial, **State v. Revels, 163.**

ENTRAPMENT

Selling drugs, **State v. Branham, 91.**

EQUAL PROTECTION

Different punishments for differing levels of culpability, **Jordan v. Civil Serv. Bd. of Charlotte, 691.**

Disparate treatment between inmates, **Price v. Beck, 763.**

Rational basis, **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

EQUITABLE DISTRIBUTION

Business valuation, **Franks v. Franks, 793.**

Inventory affidavit, **Franks v. Franks, 793.**

EX POST FACTO LAWS

Court's construction of statute different from state agency's prior interpretation, **Price v. Beck, 763.**

EXPERT WITNESSES

Deputy fire marshal, **State v. Sexton, 641.**

Doctor familiar with community standard, **Coffman v. Roberson, 618.**

Doctor with same specialty, **Coffman v. Roberson, 618.**

EXPRESSION OF OPINION

Trial court's questioning purpose of cross-examination, **State v. Thomas, 326.**

FAILURE TO WARN

Defective clamp used on irrigation system, **Evans v. Evans, 54.**

FELONIOUS BREAKING OR ENTERING

Sufficiency of evidence of intent to commit larceny, **State v. Thomas, 326.**

FELONY CHILD ABUSE

Intentionally kicking child, **State v. Carter, 756.**

FIRST-DEGREE MURDER

Sufficiency of evidence, **State v. Revels, 163.**

FORGERY AND UTTERING

Sufficiency of evidence, **State v. Gant, 136.**

GUILTY PLEA

Appellate review of issues, **State v. Pimental, 69.**

GUNSHOT RESIDUE TEST

Refusal to submit to test, **State v. Trull, 630.**

HABITUAL FELON

True copy of prior convictions, **State v. Gant, 136.**

HABITUAL MISDEMEANOR ASSAULT

Necessary indictment, **State v. Williams, 192.**

HEARSAY

Business records exception, **State v. Frierson, 242.**

Medical treatment exception, **State v. Carter, 756.**

Statement to officer, **State v. Reed, 462.**

HOUSING DISCRIMINATION

Standing of nonprofit organization, **Lee Ray Bergman Real Estate Rentals v. N.C. Fair Housing Ctr., 176.**

ILLUSTRATIVE EVIDENCE

Drug paraphernalia, **State v. Hyman, 396.**

IMMUNITY

Injury while riding in police car, **Clayton v. Branson, 488.**

IMMUNIZATIONS

Religious objections by parents, **In re Stratton, 428.**

IN REM JURISDICTION

Princess Lida Doctrine, **Whitmire v. Cooper, 730.**

INCRIMINATING STATEMENTS

Juvenile not in custody during detective's home visit, **In re Hodge, 102.**

INDICTMENT

Failure to allege specific date, **In re Hodge, 102.**

Superceding indictment to change date, **State v. Gant, 136.**

INSURANCE

Intentional acts, **Erie Ins. Exch. v. St. Stephen's Episcopal Church, 709.**

Monthly benefit payments, **Gore v. Nationsbanc Ins. Co., 520.**

INTERLOCUTORY ORDER

Certification improper when no final judgment, **Priest v. Sobeck, 662.**

No substantial right, **Lovelace v. City of Shelby, 378; Priest v. Sobeck, 662.**

INTERVENTION

Burden of showing factors, **Harvey Fertilizer & Gas Co. v. Pitt Cty., 81.**

Standard of appellate review, **Harvey Fertilizer & Gas Co. v. Pitt Cty., 81.**

JURISDICTION

After appeal, **RPR & Assocs. v. University of N.C.-Chapel Hill, 342.**

JURISDICTION—Continued

Agency review, **Hedgepeth v. N.C. Div. of Servs. for the Blind, 652.**

Improper service cured by general appearance, **In re Hodge, 102.**

JURY

Motion to replace juror, **State v. Hyman, 396.**

JUVENILES

General appearance after improper service, **In re Hodge, 102.**

Right to have parent present during questioning, **State v. Branham, 91.**

Simple affray, **In re Wilson, 196.**

Simple assault, **In re Hodge, 102.**

Wear sign in public as special condition of probation, **In re MEB, 278.**

KIDNAPPING

Unlawful removal to facilitate commission of rape, **State v. Rogers, 203.**

LARCENY BY TRICK

Test driving automobile, **State v. Barbour, 500.**

LAW OF THE CASE

Failure to contest jurisdiction in prior appellate case, **Hedgepeth v. N.C. Div. of Servs. for the Blind, 652.**

LEASE

Disputed, **Electronic World, Inc. v. Barefoot, 387.**

Essential elements, **Purchase Nursery, Inc. v. Edgerton, 156.**

LEGAL MALPRACTICE

Statute of limitations, **Fender v. Deaton, 187.**

LIFE SENTENCE

Gain time and good conduct credits, **Price v. Beck, 203.**

MALICIOUS DAMAGE TO REAL PROPERTY

Sufficiency of evidence and instructions, **State v. Sexton, 641.**

MEDICAID

Reimbursement from personal injury settlement, **Campbell v. N.C. Dep't of Human Res., 305.**

Residency requirement for emergency coverage, **Okale v. N.C. Dep't of Health & Human Servs., 475.**

MEDICAL INSURANCE

Emergency Medicaid coverage, **Okale v. N.C. Dep't of Health & Human Servs., 475.**

MEDICAL MALPRACTICE

Doctor witness familiar with community standard, **Coffman v. Roberson, 618.**

Doctor witness with same specialty, **Coffman v. Roberson, 618.**

MERCHANTABILITY

Implied warranty of irrigation clamp, **Evans v. Evans, 54.**

MERGER

Inapplicable when proof of additional elements required in each offense, **State v. Carter, 756.**

MIRANDA WARNINGS

Not required when not in custody, **State v. Trull, 630.**

MISTRIAL

Emotional outbursts by victim's family, **State v. Revels, 163.**

MITIGATING FACTORS

Community support system, **State v. Kemp, 231.**

Finding not required for presumptive range, **State v. McConico, 723.**

Positive employment history, **State v. Thomas, 326.**

Supports family, **State v. Thomas, 326.**

MOBILE HOME PARK

Prohibition on expansion of nonconforming use, **Huntington Props., LLC v. Currituck Cty., 218.**

NEGLECT

Best interest of child to receive immunization, **In re Stratton, 428.**

OCCUPATIONAL PNEUMOCONIOSIS

Statute of limitations, **Pinczkowski v. Norfolk S. Ry. Co., 435.**

PAROLE

Recalculation of parole eligibility date, **Price v. Beck, 763.**

PATERNITY

Motion to void acknowledgment, **State ex rel. Davis v. Adams, 512.**

PERSONAL JURISDICTION

Long-arm statute, **First Union Nat'l Bank of Del. v. Bankers Wholesale Mortgage, LLC, 248.**

Minimum contacts, **First Union Nat'l Bank of Del. v. Bankers Wholesale Mortgage, LLC, 248.**

PLEA AGREEMENT

Motion to withdraw, **State v. Russell, 508.**

PLEA NEGOTIATIONS

Admissibility of statements, **State v. Curry, 260.**

POLICE CAR

Injury while riding in, **Clayton v. Branson, 488.**

POLICE OFFICER

Termination for unnecessary use of deadly force, **Jordan v. Civil Serv. Bd. of Charlotte, 691.**

POLITICAL ADS

Defamation and unfair practice claims, **Boyce & Isley, PLLC v. Cooper, 25.**

PRELIMINARY INJUNCTION

Covenant not to compete, **Redlee/SCS, Inc. v. Pieper, 421.**

Failure to return bond issue premature, **Belverd v. Miles, 169.**

PRESENCE AT TRIAL

Disruptive respondent, **In re Faircloth, 565.**

PRINCESS LIDA DOCTRINE

In rem jurisdiction, **Whitmire v. Cooper, 730.**

PRIOR CRIMES OR BAD ACTS

Forcible robbery, **State v. McConico, 723.**

History of abusing victim, **State v. Strickland, 581.**

Opening door to details of impeachment evidence, **State v. Strickland, 581.**

Prior sexual offenses showing common plan, **State v. Curry, 260.**

PROBATION

Consecutive terms, **State v. Canady, 455.**

PROBATION—Continued

Right to counsel at revocation hearing, **State v. Evans, 313.**

Special condition to wear sign in public, **In re MEB, 278.**

PROCEDURAL DUE PROCESS

Notice and opportunity to be heard, **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

PRODUCTS LIABILITY

Breach of implied warranty of merchantability, **Evans v. Evans, 54.**

Failure to warn, **Evans v. Evans, 54.**

PROPERTY TAX

Valuation, **In re Appeal of Lane Co., 119.**

PSYCHOLOGIST

Disciplinary hearing for inappropriate personal relationship, **Farber v. N.C. Psychology Bd., 1.**

PUBLIC DUTY DOCTRINE

Inapplicable to 911 operator, **Lovelace v. City of Shelby, 378.**

PUBLIC RECORDS ACT

Not a method for accessing election ballots, **In re Decision of the State Bd. of Elections, 804.**

REAL ESTATE SALES

Deferred fee, **Rich, Rich & Nance v. Carolina Constr. Corp., 149.**

REFERENCE

Compulsory, **Dockery v. Hocutt, 744.**

REHABILITATION PROGRAM

Job placement services and education, **Hedgepeth v. N.C. Div. of Servs. for the Blind, 652.**

RESTITUTION

Costs of future treatment, **State v. Canady, 455.**

RESTRAINT DURING TRIAL

Prior escape from prison, **State v. Simpson, 807.**

RESTRICTIVE COVENANTS

Construction of through-street in subdivision, **Belverd v. Miles, 169.**

RIGHT TO ASSISTANCE OF COUNSEL

Probation revocation hearing, **State v. Evans, 313.**

RIGHT TO FAIR TRIAL

Administrative tribunal both investigator and adjudicator, **Jordan v. Civil Serv. Bd. of Charlotte, 691.**

RIGHT TO PRESENT DEFENSE

Sufficient opportunity to question witness on cross-examination, **State v. Strickland, 581.**

RIGHT TO SPEEDY TRIAL

Long period of pretrial incarceration, **State v. Strickland, 581.**

SEARCH AND SEIZURE

Release of rifle by one law enforcement agency to another, **State v. Motley, 701.**

SECOND-DEGREE RAPE

Actual and constructive force, **State v. Strickland, 581.**

SENTENCING

Gain time and good conduct credits, **Price v. Beck, 763.**

SENTENCING—Continued

Prior misdemeanor convictions obtained without counsel, **State v. Rogers, 203.**

SEXUAL HARASSMENT

State employee, **Kea v. Department of Health & Human Servs., 595.**

SEXUAL OFFENSE

Inference of intent, **State v. Bartlett, 680.**

SEXUAL REMARKS

Prison guard, **Lewis v. N.C. Dep't of Corr., 449.**

SHORT-FORM INDICTMENT

Attempted first-degree murder, **State v. Trull, 630.**

First-degree sexual offense, **State v. O'Hanlan, 546; State v. Bartlett, 680.**

SPEED OF VEHICLE

Lay opinions inadmissible, **Marshall v. Williams, 128.**

SPEEDY TRIAL

Backlog of other felony cases, **State v. Strickland, 581.**

STANDING

Nonprofit organization in fair housing case, **Lee Ray Bergman Real Estate Rentals v. N.C. Fair Housing Ctr., 176.**

Taxpayers in condemnation case, **Whitmire v. Cooper, 730.**

STATE EMPLOYEE

Dismissal process, **Kea v. Department of Health & Human Servs., 595.**

STATE EMPLOYEE—Continued

Sexual harassment, **Lewis v. N.C. Dep't of Corr., 449; Kea v. Department of Health & Human Servs., 595.**

STATUTE OF FRAUDS

Lease descriptions, **Electronic World, Inc. v. Barefoot, 387.**

STATUTE OF LIMITATIONS

Federal Employers' Liability Act, **Pinczkowski v. Norfolk S. Ry. Co., 435.**

STATUTORY MITIGATING FACTORS

Positive employment history, **State v. Thomas, 326.**

Supports family, **State v. Thomas, 326.**

STOCK

Wrongful cancellation, **Whitacre P'ship v. BioSIGNIA, Inc., 608.**

SUBDIVISION ORDINANCE

Judicial review of application for variance, **Hemphill-Nolan v. Town of Weddington, 144.**

SUBSTANTIVE DUE PROCESS

Rational basis, facial challenge, and vagueness, **Affordable Care, Inc. v. N.C. State Bd. of Dental Exam'rs, 527.**

SUDDEN EMERGENCY

In front of car, **Marshall v. Williams, 128.**

TERMINATION OF PARENTAL RIGHTS

Prior and pending abuse hearings, **In re Faircloth, 565.**

UNFAIR TRADE PRACTICES

Credit cardholder agreement, **Gaynoe v. First Union Corp., 750.**

VESTED RIGHTS DOCTRINE

Prohibition on expansion of nonconforming use, **Huntington Props., LLC v. Currituck Cty., 218.**

VICTIM

In courtroom, **State v. Kemp, 231.**

VOLUNTARY INTOXICATION

Request for jury instruction, **State v. Rogers, 203.**

Sufficiency of evidence, **State v. Keitt, 671.**

WARRANTY OF MERCHANTABILITY

Defective irrigation system clamp, **Evans v. Evans, 54.**

WITNESSES

Assistant clerk of court, **State v. Strickland, 581.**

WORKERS' COMPENSATION

Asbestos, **Hatcher v. Daniel Int'l Corp., 776.**

Attorney fees, **Rackley v. Coastal Painting, 469.**

Carpal tunnel syndrome, **Hale v. Novo Nordisk Pharm. Indus., Inc., 272.**

Constructive refusal of employment, **Gordon v. City of Durham, 782.**

Earnings from self-employment, **Devlin v. Apple Gold, Inc., 442.**

Firefighter's vision, **Gordon v. City of Durham, 782.**

Forgetful witness, **Hatcher v. Daniel Int'l Corp., 776.**

Going and coming rule, **Hunt v. Tender Loving Care Home Care Agency, Inc., 266.**

WORKERS' COMPENSATION—Continued

Modification of liens, **Holden v. Boone, 254.**

Painter's fall from ladder, **Rackley v. Coastal Painting, 469.**

ZONING

Appeal to board of adjustment, **Raleigh Rescue Mission, Inc. v. Board of Adjust. of City of Raleigh, 737.**

Nonconforming use, **Huntington Props., LLC v. Currituck Cty., 218.**

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