

NORTH CAROLINA  
COURT OF APPEALS  
REPORTS

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1. Appointed and sworn in 22 December 2003 to replace Wiley F. Bowen.
  2. Resigned 1 January 2004.

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CASES  
ARGUED AND DETERMINED IN THE  
**COURT OF APPEALS**  
OF  
NORTH CAROLINA  
AT  
RALEIGH

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STATE OF NORTH CAROLINA v. ROBERT EARL DUNN, DEFENDANT

No. COA01-487

(Filed 19 November 2002)

**1. Discovery— laboratory protocols—drug testing**

The trial court erred in a selling heroin, delivering heroin, and possessing heroin with intent to sell and deliver case by failing to require the State to provide defendant discovery information under N.C.G.S. § 15A-903(e) pertaining to laboratory protocols, incidences of false positive results, quality control and quality assurance, and proficiency tests of the State Bureau of Investigation (SBI) laboratory when SBI chemists tested the substance that the State alleged to be heroin four times and only two of those tests returned a positive result for heroin, because allowing the discovery would enhance preparation for cross-examination and permit both sides to assess the strengths and weaknesses of this aspect of the evidence.

**2. Constitutional Law; Discovery— testimony of defendant's consulting experts—effective assistance of counsel—work product privilege**

The trial court violated a defendant's right to effective assistance of counsel and the related work product privilege in a selling heroin, delivering heroin, and possessing heroin with intent to sell and deliver case by admitting testimony concerning laboratory tests and results of a testing facility retained by defendant to independently test the substance at issue and defendant is

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entitled to a new trial, because: (1) the results and reports of tests performed by the witnesses are protected from pretrial discovery if defendant does not intend to introduce results of the testing facility's tests or to call the testers as witnesses at trial, N.C.G.S. § 15A-905(b); (2) the work product doctrine operates not only to protect the reports and potential testimony of nontestifying consulting experts, but also to increase the information available to the trier of fact by encouraging the attorney to seek, on his own, information about the case that he could not obtain from his adversary through the discovery process; (3) although the work product doctrine is a qualified privilege, not an absolute one, the State may defeat the privilege by showing a special need for the testimony of defendant's consultative expert; (4) in regard to defendant's right to effective assistance of counsel, the attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness; and (5) even when the defense waives its Sixth Amendment protection of the report of a consultative expert by announcing its intention to use the report at trial, it does not waive its right to control the testimonial use of the expert and the expert remains unavailable to the State as a witness.

Appeal by defendant from judgment entered 1 November 2000 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 14 February 2002.

*Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.*

*Lisa Anderson Williams, for defendant-appellant.*

HUDSON, Judge.

Defendant was convicted on 25 October 2000 of selling heroin, delivering heroin, and possessing heroin with the intent to sell and deliver it. He was sentenced to a minimum term of 168 months and a maximum term of 211 months. Defendant appeals his convictions.

The pertinent facts are as follows: Officer W.M. Evans, an investigator with the Durham Police Department, testified at defendant's trial that while he was working in the street crimes unit he participated in a drug bust on 30 April 1999. Officer Evans operated an unmarked "white panel van" equipped with audio and visual surveil-

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lance equipment on Elm and Hopkins Streets in Durham as part of an ongoing investigation regarding drug activity. On the evening at issue, Officer Evans pulled up to the corner, rolled down his window, and a man, later identified as the defendant, approached his window. Officer Evans asked defendant for a “bag of boy;” “[b]oy is a street term for heroin.” Defendant told Officer Evans “[f]ollow me,” then defendant “began to walk west on Hopkins Street.” The officer followed him in the van and defendant walked behind the Greater Zion Wall Baptist Church on Hopkins Street. Defendant returned to the van and gave Officer Evans “a glassine bag with a red sun on it;” Officer Evans gave defendant twenty-five dollars in return. Officer Evans drove away, made notes of what happened, put the glassine bag in a plastic evidence bag, and described defendant to other police units in the area. He then returned to headquarters, reviewed the surveillance video, and was contacted by Investigator Mike Berendson, a Durham Police Officer familiar with local drug dealers and users, when defendant was apprehended.

Officer Evans testified that he tested the substance bought from defendant with a “Marquis test system.” He explained that the Marquis test system is “an ampule [the police] have to test cocaine, marijuana, heroin, you know, different things. You break the ampule open, it has a little solution in there. You would take a paper clip, stick i[t] into the bag of heroin, get a little bit of residue on there, stick it into the bag, and if it turns purple, it means it’s tested positive for heroin.” The substance at issue here tested negative and Officer Evans sent the remaining portion to the State Bureau of Investigation (the “SBI”) lab for further testing. Officer Evans explained that one possible reason that the substance tested negative for heroin was that “[h]eroin on the street is only 30 to 35 percent [pure]” and that the other sixty-five to seventy percent of a bag of heroin sold on the street customarily is made up of manitol, a cutting agent. Manitol does not test positive in the Marquis test.

After the SBI lab finished testing the substance in the glassine bag, Officer Evans picked up the remains of the substance and, pursuant to the court’s instructions, took it to Lab Corp in Burlington, North Carolina, to be tested at the defendant’s request. Officer Evans retrieved the remaining portion of the substance from Lab Corp and returned it to the property room at the police station in Durham, where it stayed until trial.

In response to questions concerning possible identity confusion between defendant and his brother, Officer Berendson testified that

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he was familiar with both brothers. He confirmed his identification of defendant as the person who sold a substance to Officer Evans. Other employees of the Durham Police Department also testified to establish the chain of custody for the substance recovered in the drug buy.

Special Agent Wendy Cook, forensic drug analyst for the SBI, testified that the substance purchased from defendant tested negative for heroin twice, and positive for heroin twice. Cook did not conduct all of the tests herself, but read the results as indicating that less than one-tenth of a gram of heroin was present in the sample. She explained that this procedure (reading tests performed by others) was standard procedure at the SBI laboratory. During voir dire, Agent Cook acknowledged that most of the documents requested by defendant as additional discovery existed and were available. The State did not provide these documents to defendant.

Over the objection of defendant, the State called Ms. Gail Ingold and Ms. Mitzi Walker to testify. Both were employed by Lab Corp in Burlington, which had been retained by the defendant to perform independent testing on the substance. Ms. Ingold testified to the chain of custody of the sample she received from Officer Evans. Ms. Walker, a chemist, testified that her analysis “showed it to be at least 90 percent or greater match for heroin.”

The jury convicted defendant of selling heroin, delivering heroin, and possession of heroin with intent to sell or deliver it. After the verdict was entered, the same jury heard evidence and convicted defendant of the status of habitual felon pursuant to N.C. Gen. Stat. § 14-7.1 (1999). The court then sentenced defendant to a minimum of 168 months and a maximum of 211 months in prison. Defendant appealed.

**[1]** In his first assignment of error, defendant contends that the trial court erred “in failing to require the State to provide [defendant] discovery information pertaining to laboratory protocols, incidences of false positive results, quality control and quality assurance, and proficiency tests of the State Bureau of Investigation laboratory when State Bureau of Investigation chemists tested the substance that the State alleged to be heroin four times and only two of those tests returned a positive result for heroin.” Defendant filed a Motion for Discovery on 28 March 2000 requesting documents from SBI agents who tested the substance bought from defendant. He requested “access to and a copy of all case notes . . . describing, without limitation, the details of the samples received, and the condition thereof, as well as the full experimental records of the test(s) performed.”

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Defendant also asked for laboratory protocol documents, any reports documenting “false positives” in SBI laboratory results, and information about the credentials of the individuals who tested the substance on behalf of the State. Eleven pages of laboratory notes from the SBI are included in the record. The record contains no reports concerning false positives at the SBI laboratory, laboratory protocol documents, or credentials of the laboratory employees involved in this case, which apparently were not given to defendant.

The defendant’s right to discovery of exculpatory information stems from the Constitution. *See Brady v. Maryland*, 373 U.S. 83, 10 L.Ed. 2d 215 (1963). In *Brady*, the Court held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. at 87, 10 L.Ed. 2d at 218. Therefore, a defendant is entitled to discovery from the prosecutor of all information within the scope of *Brady*. However, our courts have noted that,

[w]ith the exception of evidence falling within the realm of the *Brady* rule, . . . there is no general right to discovery in criminal cases under the United States Constitution, thus a state does not violate the Due Process Clause of the Federal Constitution when it fails to grant pretrial disclosure of material relevant to defense preparation but not exculpatory.

*State v. Cunningham*, 108 N.C. App. 185, 195, 423 S.E.2d 802, 808 (1992).

In North Carolina, the General Assembly has expanded the defendant’s right to discovery through the enactment of N.C. Gen. Stat. § 15A-903. Subsection (e) provides that, “[u]pon motion of the defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examination or of tests, measurements or experiments made in connection with the case . . . .” N.C. Gen. Stat. § 15A-903(e) (1999). Defendant contends that the discovery he sought before trial would have given him and his attorney the ability to understand the test results received from the SBI laboratory, would have helped explain why the substance tested negative in two of the four SBI tests, why the SBI laboratory technicians ruled out the negative tests, and how often the SBI laboratory returns false positives on similar substances. The trial court denied defendant’s motion

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for additional discovery, and the State provided defendant with the eleven pages of tests and laboratory results which are included in the record.

Defendant relies upon *Cunningham* as authority for his argument that the trial court erred in refusing his request for the additional documents. In *Cunningham*, the defendant received through discovery only an SBI laboratory report, which was “limited to a statement that the material analyzed contained cocaine, reveals only the ultimate result of the numerous tests performed . . . .” 108 N.C. App. at 196, 423 S.E.2d at 809. Explaining that this did not “enable defendant’s counsel to determine what tests were performed and whether the testing was appropriate, or to become familiar with the test procedures,” in *Cunningham*, the Court held that this additional information was discoverable under N.C. Gen. Stat. § 15A-903(e), and that the trial court erred. *See id.* There we explained that

Because of the extraordinarily high probative value generally assigned by jurors to expert testimony, of the need for intensive trial preparation due to the difficulty involved in the cross-examination of expert witnesses, and in the inequality of investigative resources between prosecution and defense regarding evidence which must be analyzed in a laboratory, federal Rule 16 has been construed to provide criminal defendants with broad pretrial access to a wide array of medical, scientific, and other materials obtained by or prepared for the prosecution *which are material to the preparation of the defense* or are intended for use by the government in its case in chief.

*Id.* at 194, 423 S.E.2d 807-8. We concluded that there was no evidence the information sought was exculpatory, and that the error was harmless beyond a reasonable doubt in light of “overwhelming evidence of defendant’s guilt.”

Since *Cunningham*, there have been few cases in North Carolina addressing the scope of material the State must provide under 15A-903(e) beyond the bare results of laboratory tests. *See State v. Bartlett*, 130 N.C. App. 79, 502 S.E.2d 53 (1998). In *Bartlett* we granted defendant a new trial, where the State refused to provide “alco-sensor” test results in response to a discovery request under N.C. Gen. Stat. § 15A-903(e). “Admission of the alco-sensor test results was error because they were erroneously admitted as substantive evidence and the State violated the discovery rules.” *Id.* 130 N.C. App. at 84. *Cf. State v. Brewington*, 352 N.C. 489, 532 S.E.2d 496 (2000), *cert.*

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*denied*, 531 U.S. 1165, 148 L.Ed.2d 992 (2001) (holding that polygraph results, which are subjective and unreliable, do not fall within the scope of statute providing for discovery of results or reports of tests, measurements or experiments made in connection with the case); *State v. East*, 345 N.C. 535, 481 S.E.2d 652 (1997), *cert. denied*, 522 U.S. 918, 139 L.Ed.2d 236 (1997) (holding that there is nothing in statute authorizing discovery by the state, N.C. Gen. Stat. § 15A-905, which limits results or reports of physical and mental examinations of defendant to production of existing written reports). Because the cases are so sparse, we have expanded our research.

The Official Commentary to N.C. Gen. Stat. § 15A-903 indicates that it was patterned after Federal Rule of Criminal Procedure 16. *See* N.C. Gen. Stat. § 15A-903, Official Commentary; *see, also, State v. Brown*, 306 N.C. 151, 163, 293 S.E.2d 569, 578, *cert. denied*, 459 U.S. 1080, 74 L.Ed. 2d. 642 (1982). Although we are not bound by the lower federal courts, we look to cases interpreting Rule 16 for guidance in our interpretation of N.C. Gen. Stat. 15A-903. *Cf. Brewer v. Harris*, 279 N.C. 288, 292, 182 S.E.2d 345, 347 (1971), *affirmed*, 279 N.C. 288, 182 S.E.2d 345 (1971) (because federal rules are the source of the North Carolina Rules of Civil Procedure, we look to the decisions of federal jurisdictions for guidance). We also examine cases from other states interpreting discovery statutes similar to our own.

In *United States v. Wilkerson*, the defendant asked for very similar information to what defendant sought here: (a) written records, notes and documentation pertaining to the chain of evidence and testing; (b) complete technical procedures, including description of the testing process, criteria for review of data, quality assurance, and standardization; (c) quality assurance programs; (d) internal quality assurance policies and procedures and (e) information regarding the occurrence or frequency of “false positive” results. *See United States v. Wilkerson*, 189 F.R.D 14, 15 (D.Mass. 1999). The prosecution agreed that it would turn over the materials sought in (c), (d) and (e). The court determined that while the working notes of the lab and some of the procedural data were protected as the internal “working papers of the examiner,” a detailed summary of the tests was necessary to reveal the examiner’s “opinions, the bases and the reasons for those opinions.” *Id.* at 16; *see, also, Fed. R. Crim. P. 16(a)(2) and 16(a)(1)(E)*. The court concluded that such a summary must include:

a description of the sample received, what the examiner did to ready the sample for the test(s), a description of the test(s) (i.e.,

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how the test(s) work(s) to detect the drugs), what physically was done with the sample during the test(s), what physically occurred to the sample as a result of the test(s), what occurred which led the examiner to his or her conclusion that the substance was cocaine, any steps taken to review the test(s) results to insure accuracy, any other action with respect to the sample or the testing, and what the examiner did with the sample after examination.

*Id.* at 16-17. While the material ordered to be disclosed is very similar to that sought in the case at hand, the *Wilkerson* court based its decision upon Federal Rule of Criminal Procedure 16(a)(1)(E), a provision in the federal discovery rule which goes beyond N.C. Gen. Stat. § 15A-903.

In *United States v. Green*, the court ordered the government to “turn over to the defendants not only all scientific reports but also all findings, scientific or technical data upon which such reports are based.” *United States v. Green*, 144 F.R.D. 631, 639 (W.D.N.Y. 1992). Unlike *Wilkerson*, the *Green* court based its holding on Rule 16(a)(1)(C) and 16(a)(1)(D), which are the same as the North Carolina statute. *See* Fed. R. Crim. P. 16; N.C. Gen. Stat. § 15A-903. Significantly, the court favored more extensive discovery because “it would appear to facilitate trial by enabling defense counsel to assess the correctness or sufficiency of the testing and to prepare to cross examine the government’s experts and to present defense experts, if appropriate.” *Id.*

The trial court’s assertion here that “any further information in regards to that, you can surely extract from them on cross examination,” overlooks what the courts noted in both *Green* and *Cunningham*: allowing the discovery would enhance *preparation* for cross examination, and permit both sides to assess the strengths and weaknesses of this aspect of the evidence. In addition, we noted in *Cunningham* that

Like federal Rule 16(a)(1)(D), Section 15A-903(e) must be construed as entitling a criminal defendant to pretrial discovery of not only conclusory laboratory reports, but also any tests performed or *procedures utilized by chemists to reach such conclusions*. However, unlike under federal Rule 16(a)(1)(D), no requirement exists that such information be material to the preparation of the defense or intended for use by the State in its case in chief.



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*Id.* at 194-95, 423 S.E.2d at 808 (emphasis added). Thus, it is clear from *Cunningham* and *Bartlett* that this court has viewed the North Carolina rule broadly, an approach we are obligated to follow.

Similarly, courts in other states have held that the State should provide more than the bare test results and reports to the defendant in discovery under similar rules. For example, in *State v. Paul*, the Missouri Court of Appeals held that the State could not use as evidence the results of a chemical breath analysis when it would not release to the defendant upon request

'full information' concerning the chemical test of defendant's breath. They particularly asked about the type of equipment used, whether and when it had been inspected for accuracy and the result thereof, the names and qualifications of persons making the chemical analysis, the time defendant had been observed by the testing personnel, and a description of the procedure used in testing for alcoholic content of the defendant's blood.

*State v. Paul*, 437 S.W.2d 98, 101 (Mo.App. 1969) (superseded by statute that still required full information be given upon request but required a judicial determination of reasonableness, relevance and materiality before State's evidence could be suppressed. See *State v. Clark*, 723 S.W.2d 17 (Mo. App. E.D. 1986)). The Georgia Supreme Court held that "[t]he cross examiner must be able to examine the material that the expert relied upon to support her direct testimony; otherwise a thorough and sifting cross-examination of the expert's intelligence, memory, accuracy and veracity and of her scientific testing and opinion is not possible." *Eason v. State*, 396 S.E.2d 492, 494 (Ga. 1990) (although later overruled by statute, prior statute, upon which the decision was based, is like North Carolina statute).

Thus we conclude that the trial court erred by refusing to require the State to provide the defendant the discovery he sought pursuant to N.C. Gen. Stat. § 15A-903(e). However, in light of our resolution of the next issue, we need not determine whether this error alone would entitle defendant to a new trial.

**[2]** In his second assignment of error, defendant contends that the trial court erred in admitting testimony concerning laboratory tests and results of Lab Corp, a testing facility retained by defendant to independently test the substance at issue. Defendant argues that he never intended to call Lab Corp or its representatives as witnesses at

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trial, and that pursuant to N.C. Gen. Stat. § 15A-905(b), the State would only have been able to inspect results, reports, or documents made in connection with defendant's case, "if the defendant intends to offer such evidence or tests or experiments made in connection with such evidence, as an exhibit or evidence in the case." Thus, defendant contends that, by calling the Lab Corp employees to testify, the State: (1) circumvented North Carolina's rules of discovery; (2) compelled defendant to supply evidence against himself; (3) violated the defendant's Sixth Amendment right to effective assistance of counsel; and (4) violated the defense attorney's work product privilege. We agree that the State's actions violated the defendant's rights to effective assistance of counsel, and related work product privilege. As this is an issue of first impression in North Carolina, we have analyzed this issue in depth and in light of the decisions of other courts which have confronted the issue, and concluded that this result reflects the better-reasoned approach.

Defendant correctly points out that the report of Lab Corp is protected from discovery by the State under N.C. Gen. Stat. § 15A-906, which states that "[e]xcept as provided in G.S. 15A-905(b) this Article does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation or defense of the case . . ." N.C. Gen. Stat. § 15A-906 (1999). The exception provided in the statute allows the State "to inspect and copy or photograph results or reports of physical or mental examinations or of tests . . . , which were prepared by a witness *whom the defendant intends to call at the trial.*" N.C. Gen. Stat. § 15A-905(b) (1999) (emphasis added). If the defendant does not intend to call the witness at trial, the results and reports of tests performed by the witness are protected from pre-trial discovery.

Here, however, the State did not seek to obtain the report of Lab Corp in pre-trial discovery, but instead to present the testimony of Lab Corp employees at trial. Over the objection of the defendant, the trial court ruled:

I'll allow Ms. Ingold to testify, and the other employees that you have from Lab Corp. However, they may not testify to any communication, conversation, or report generated by them and delivered to counsel for the defendant, any communication between them and counsel for the defendant, and anything that was said to them by counsel for the defendant. Their testimony will be lim-

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ited to their procedures and the result of any testing which they did upon the substance which was contained in State's Exhibit 2, which was the—identified as the controlled substance.

The wording of the court's ruling and of the State's brief indicate that both believed that, while the report of Lab Corp's testing of the material was protected by N.C. Gen. Stat. § 15A-905, the results of the testing were not. We disagree.

While N.C. Gen. Stat. 15A-905(b) is headed "Reports of Examinations and Tests," the clear wording of the statute itself is that the State may "inspect and copy or photograph *results or reports* of physical or mental examinations or of tests . . . , which the defendant intends to introduce in evidence at the trial or which were prepared *by a witness whom the defendant intends to call at the trial . . .*" N.C. Gen. Stat. 15A-905(b) (1999) (emphasis added). Defendant did not intend to introduce results of Lab Corp's test, or to call the testers as witnesses; thus the results would not have been discoverable had the State asked for them.

However, the fact that the State could not have obtained the results through pre-trial discovery does not necessarily mean they may not be used at trial. In *State v. Hardy*, the defense sought pre-trial disclosure of a transcribed interview of one of the state's witnesses. See *State v. Hardy*, 293 N.C. 105, 125, 235 S.E.2d 828, 840 (1977). The State refused, claiming that the material was protected by N.C. Gen. Stat. § 15A-904, which "does not require the production of reports, memoranda, or other internal documents made by the prosecutor . . . or of statements made by witnesses or prospective witnesses of the State to anyone acting on behalf of the State." N.C. Gen. Stat. § 15A-904(a) (2001). The *Hardy* Court agreed that the material was protected from pre-trial discovery, but held that "G.S. 15A-904(a) does not bar the discovery of prosecution witnesses' statements *at trial*." *Hardy*, 293 N.C. at 125, 235 S.E.2d at 840 (emphasis added). The Court went on to state:

At trial the major concern is the "search for truth" as it is revealed through the presentation and development of all relevant facts. To insure that truth is ascertained and justice served, the judiciary must have the power to compel the disclosure of relevant facts, *not otherwise privileged*, within the framework of the rules of evidence.

*Id.* (emphasis added).

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Further, in *State v. Warren*, the North Carolina Supreme Court allowed the State to compel discovery of defendant's non-testifying expert's report for use in cross-examination of a testifying expert, stating "even when the statutes limit the trial court's authority to compel *pretrial* discovery, the court may retain inherent authority to compel discovery of the same documents at a later stage in the proceedings." *State v. Warren*, 347 N.C. 309, 325, 492 S.E.2d 609, 618 (1997), *cert. denied*, 523 U.S. 1109, 140 L.Ed.2d 818 (1998). However, this was done in the context of a capital sentencing hearing, "where the Rules of Evidence do not apply" and "the trial court must permit the State 'to present any competent evidence supporting the imposition of the death penalty.'" *Id.* at 325-26, 492 S.E.2d at 618. If the State is prevented from compelling a defense expert to testify at trial, this protection must stem from a different source than the discovery rules.

Here the issue arose because agents of the State, while in the process of delivering evidence to the defense expert for testing, served a subpoena on the expert. Under applicable discovery provisions, neither the State nor the defense are required to release the identities of non-testifying experts. *See* N.C. Gen. Stat. § 15A-904, 905 (1999). Without knowing the expert's identity, the adverse party would obviously be unable to compel his testimony. However, in a case like this, where the court instructs officers to deliver to a defense expert physical evidence held by law enforcement to maintain its chain of custody, the defense necessarily reveals the identity of its expert. The court could, as an alternative, have ordered the evidence delivered to a neutral third party for delivery to the expert in order to protect both the chain of custody and the identity of defendant's expert.

In a similar case of first impression, the Appellate Court of Illinois held that a scientific report by a non-testifying consulting expert retained by the defendant was protected from disclosure to the state. *See People v. Spiezer*, 735 N.E.2d 1017 (Ill. App.3d 2000). The Court in *Spiezer* stated:

[M]any jurisdictions have held that the reports prepared by non-testifying, consulting experts are protected from disclosure. What is unclear, however, is the proper framework for the analysis. Four distinct bases for such protection have emerged . . . : the fifth amendment privilege against self-incrimination, the sixth amendment right to effective assistance of counsel, the attorney-client privilege, and the work product doctrine.

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*Id.* at 1020. As the defendant neither addressed the attorney-client privilege in his assignments of error nor argued it in his brief, we confine our analysis to the remaining three bases.

We first address the Fifth Amendment privilege against self-incrimination. Defendant argues that by compelling the testimony of experts that he retained, the State required him in effect to supply evidence against himself. We disagree. In *United States v. Nobles*, the United States Supreme Court held that “[t]he Fifth Amendment privilege against compulsory self-incrimination is an intimate and personal one . . . . [I]t adheres basically to the person, not to information that may incriminate him.” *United States v. Nobles*, 422 U.S. 225, 233, 45 L.Ed.2d 141, 150-51 (1975). The Court concluded that allowing the disclosure to the prosecution of a report prepared by a defense investigator would not violate the defendant’s Fifth Amendment privilege which, “being personal to the defendant, does not extend to the testimony or statements of third parties called as witnesses at trial.” *Id.* at 234, 45 L.Ed.2d at 151. Although the *Nobles* Court considered the specific instance of the report of a third party who was also a testifying witness, the Court’s ruling implies that the Fifth Amendment privilege would not extend to the statements of non-testifying third party consulting experts. We therefore hold that the defendant’s privilege against self-incrimination does not bar the State from compelling testimony from a consulting expert retained by the defendant.

We next turn to the work-product doctrine, originally recognized by the United States Supreme Court in *Hickman v. Taylor*, where the Court stated:

[i]t is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients’ interest.

*Hickman v. Taylor*, 329 U.S. 495, 510-11, 91 L.Ed. 451, 462 (1947). The Court went on to establish that certain materials, prepared by the attorney in anticipation of litigation, were protected from discovery by a qualified privilege. *See id.* In *Nobles*, the Court extended the doctrine to “protect material prepared by agents for the attorney as well

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as those prepared by the attorney himself.” *Nobles*, 422 U.S. at 238-39, 35 L.Ed.2d at 154; *see, also, Hardy*, 293 N.C. at 126, 235 S.E.2d at 841. The principles of *Hickman* were embodied in Rule 26(b)(3) of the Federal Rules of Civil Procedure. Similar principles are codified in N.C. Gen. Stat. § 15A-904 and N.C. Gen. Stat. § 15A-906. Although the work product doctrine was created in the context of civil litigation, it applies in criminal cases as well. *See Hardy*, 293 N.C. at 126, 235 S.E.2d at 841. Moreover, although the statutory work product protections may be limited to pretrial discovery, the *Nobles* Court noted that “the concerns reflected in the work product doctrine do not disappear once trial has begun. Disclosure of an attorney’s efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of his case.” *Nobles*, 422 U.S. at 239, 45 L.Ed. 2d at 154. The *Nobles* Court did not define the scope of the work product doctrine’s protection at trial, holding that the defendant had waived the doctrine’s protection by presenting the defendant’s consulting expert as a witness at trial.

In *United States v. Walker*, which is closely analogous, the court held that the government was barred by the work product doctrine from calling as witnesses ballistics experts retained by the defendant, but whom the defendant did not intend to call himself. *See United States v. Walker*, 910 F.Supp. 861 (N.D.N.Y 1995). The court noted that “exhaustive research has disclosed no criminal case in which a federal court has permitted the government to elicit testimony from a defendant’s consultative expert concerning that expert’s efforts or opinions undertaken or developed at the request of a defense attorney in preparation for a criminal trial.” *Id.* at 864. While the court left open the possibility of the government obtaining the testimony of defense experts given “a showing of substantial need and undue hardship,” as a general rule the court opposed the practice. *Id.* at 865. “Absent such an area of qualified privileged [sic] within which to prepare for trial a criminal defendant’s preparation can only be crippled by the prospect of creating an unfavorable witness every time he attempts to obtain an unbiased assessment of the government’s evidence by consulting an expert.” *Id.* at 865. We note that the *Walker* court was concerned not only with the admission of the report of a defense expert, but also with the government’s attempt to compel the expert to testify, as occurred here.

Similarly, the court in *Speizer* concluded that the work product doctrine was the proper framework within which to analyze the state’s attempt to compel pretrial disclosure of the report of a non-

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testifying, consultative expert retained by the defendant. *See Speizer*, 735 N.E.2d at 1020. In its analysis, the court attempted to distinguish between the work product doctrine and the Sixth Amendment right to effective assistance of counsel. *See id.* at 1025. The court reasoned that the government “violates the right [to effective assistance of counsel] when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.” *Id.* The work product doctrine, however, operates not only to “protect the reports and potential testimony of nontestifying, consulting experts” but also “to increase the information available to the trier of fact by encouraging the attorney to seek, on his own, information about the case that he could not obtain from his adversary through the discovery process.” *Id.* at 1026-27. The court reasoned that the adversarial process of litigation requires a balance between the need of the defendant for confidentiality in developing trial strategy and the need for the trier of fact to have access to the relevant facts of the case. *See id.* at 1026. Because the work product doctrine is a qualified privilege, not an absolute one, the State may defeat the privilege by showing a special need for the testimony of the defendant’s consultative expert. *See id.* at 1026. The *Speizer* court concluded:

It is precisely this need to strike a balance between competing interests at trial that precludes protecting the reports and potential testimony of a nontestifying, consulting expert on sixth amendment grounds. If the protection were embodied in constitutional form, it would not be amenable to change by rule, statute, or further case law development. Courts and legislatures should have reasonable freedom to develop new approaches to issues concerning discovery and testimonial privilege. We believe that such freedom would be unnecessarily impaired were our holding to turn on sixth amendment analysis.

*Id.* at 1027.

Several other courts, by contrast, have held that the Sixth Amendment right to effective assistance of counsel is the proper basis upon which to bar the state from attempting to compel the testimony of a non-testifying, consultative witness retained by the defendant.

For example, in *State v. Mingo*, the New Jersey Supreme Court confronted the issue when the state sought to compel the testimony of a handwriting expert retained by the defendant. *State v. Mingo*, 392 A.2d 590 (N.J. 1978). Initially, the court noted:

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the State had no justification for calling defendant's handwriting expert as its witness. If it considered the identity of the disputed note's author to be a critical part of its case, the State was fully capable of retaining its own expert. The better practice would have been for it to have done so, and thus avoid jeopardizing any conviction it might obtain.

*Id.* at 592. The court went on to analyze the defendant's right to effective assistance of counsel, and held that in order for a defense attorney to provide the guaranteed effective assistance:

it is essential that he be permitted full investigative latitude in developing a meritorious defense on his client's behalf. This latitude will be circumscribed if defense counsel must risk a potentially crippling revelation to the State of information discovered in the course of investigation which he chooses not to use at trial.

*Id.* at 592. The court cited *United States v. Alvarez* in support of the theory that "[t]he attorney must be free to make an informed judgment with respect to the best course for the defense without the inhibition of creating a potential government witness." *United States v. Alvarez*, 519 F.2d 1036, 1047 (3rd Cir. 1975). The Sixth Amendment right to effective assistance of counsel, therefore, encompasses the right of the defense attorney to formulate strategy and conduct the defense free from government interference. *See Speizer*, 235 N.E.2d at 1025. The *Mingo* Court went on to hold that even when the defense waives its Sixth Amendment protection of the report of a consultative expert by announcing its intention to use the report at trial, it "does not waive its right to control the testimonial use of the expert; he remains unavailable to the State as a witness." *Mingo*, 392 A.2d at 595. When a defendant intends to present an expert witness at trial, the report of that expert becomes available to the State in pre-trial discovery. If the defense expert actually testifies at trial, the State may cross-examine. "However, should the defense elect not to present the expert as a witness after previously indicating to the contrary, the fact that his otherwise confidential reports have been disclosed to the prosecution does not entitle the State to call the expert as its witness over objection by the defense." *Id.* Similarly, in *State v. Williams*, the North Carolina Supreme Court held that a defendant was required to disclose to the State the report of an expert which it intended to call at trial, even though subsequently the defense did not call the expert or seek to introduce the report itself at trial. *State v. Williams*, 350 N.C. 1, 18, 510 S.E.2d 626, 638 (1999), *cert. denied*, 528 U.S. 880, 145



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L.Ed.2d 162 (1999). The *Williams* Court did not confront the issue of whether the State could call the expert to testify if the defense did not do so.

The Supreme Court of Colorado has also ruled that a “trial court’s decision to permit the prosecution to call the defense-retained expert in its case-in-chief absent waiver or compelling justification denied the defendant his constitutional right to effective assistance of counsel.” *Hutchinson v. People*, 742 P.2d 875, 876 (Colo. 1987). The court reasoned that thorough preparation is essential to effective assistance of counsel. “Without knowledgeable trial preparation, defense counsel cannot reliably exercise legal judgment and, therefore, cannot render reasonably effective assistance to his client.” *Hutchinson*, 742 P. 2d at 881. As part of that preparation, the defense counsel may need to consult experts to develop strategy for presentation or rebuttal of physical evidence.

In some instances, an expert may be needed as a defense witness to establish a defense or to rebut a case built upon the powerful investigative arsenal of the state. Consequently, it cannot be denied that a defense counsel’s access to expert assistance is a crucial element in assuring a defendant’s right to effective legal assistance, and ultimately, a fair trial.

*Id.* The *Hutchinson* Court held that if the prosecution were allowed, in effect, to co-opt the defendant’s experts, “defense attorneys might be deterred from hiring experts lest they inadvertently create or substantially contribute to the prosecution’s case against their clients.” *Id.* at 882. Or they might be motivated to hire only those experts which they have reason to believe will lean their way. Neither outcome advances the search for the truth, and both impair the defendant’s right to “effective” assistance of counsel.

Taking what we believe to be the most reasonable synthesis of these cases and principles, we conclude that the trial court erred when it allowed the State to compel testimony from employees of Lab Corp that defendant did not plan to call as witnesses. We believe that in so doing, the trial court infringed upon the defendant’s Sixth Amendment right to effective assistance of counsel, and unnecessarily breached the work-product privilege.

However, where there is an alleged violation of the defendant’s constitutional rights, the State has the burden of showing that the error was “harmless beyond a reasonable doubt.” *See* N.C. Gen. Stat.

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§ 15A-1443 (2001). Having determined that the trial court's error has constitutional dimensions, under this standard we conclude that it requires a new trial.

In the absence of the defense expert's testimony, the State's evidence was inconclusive. Two of the four tests the State ran on the substance here produced negative results, while two were positive. One test, run twice, returned different results. On cross examination, the SBI witness was unable to account for the discrepancy. The witnesses at issue here, Ingold and Walker, Lab Corp employees, retained by defendant but who testified against him, provided the test results that could very well have tipped the balance in the State's favor. Given that the defense may have been hampered upon cross-examination by the denial of their discovery request, discussed earlier in this opinion, we cannot conclude that the trial court's error was harmless beyond a reasonable doubt. As such, we reverse the defendant's conviction and remand for a new trial.

Because the defendant's remaining issues may not arise in future trial, we decline to address them now.

New trial.

Judges MARTIN and CAMPBELL concur.

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NORTH CAROLINA FORESTRY ASSOCIATION, PETITIONER v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES, DIVISION OF WATER QUALITY, AND THE NORTH CAROLINA ENVIRONMENTAL MANAGEMENT COMMISSION AND ITS NPDES COMMITTEE, RESPONDENTS, AND THE SIERRA CLUB AND DOGWOOD ALLIANCE, RESPONDENT-INTERVENORS

No. COA01-1329

(Filed 19 November 2002)

**Environmental Law— stormwater discharges—general permit—exclusion of new or expanding wood chip mills—aggrieved party**

The N.C. Forestry Association (NCF) is not an "aggrieved party" and thus lacks standing to bring a contested case proceeding for review of a final agency decision of the Environmental Management Commission that the Division of Water Quality acted

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within its authority in excluding new or expanding wood chip mills from coverage under a general timber products industry NPDES permit for stormwater discharges because (1) NCFA is not entitled to a general permit under N.C.G.S. § 143-215.1(b)(3) and (b)(4), and (2) NCFA does not claim that it or any of its members has been denied a permit since the individualized permitting process went into effect.

Judge TYSON dissenting.

Appeal by petitioner from order entered 27 March 2001 by Judge Howard E. Manning, Jr. in Wake County Superior Court. Heard in the Court of Appeals 15 August 2002.

*Hunton & Williams, by Charles D. Case, Craig A. Bromby, Jeff F. Cherry, and Julie Beddingfield, for petitioner-appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General Jill B. Hickey, for respondent-appellee Department of Environment and Natural Resources, Division of Water Quality, the Environmental Management Commission, and its NPDES Committee.*

*Southern Environmental Law Center, by Donnell Van Noppen, III, for respondent-intervenors-appellees The Sierra Club and Dogwood Alliance.*

THOMAS, Judge.

The North Carolina Forestry Association (NCFA), petitioner, appeals the trial court's order affirming in part and reversing in part a final agency decision of the North Carolina Environmental Management Commission (EMC).

The trial court upheld EMC's conclusion that the Department of Environment and Natural Resources, through the Division of Water Quality, acted within its authority in excluding new or expanding wood chip mills from coverage under a general timber products industry permit. The trial court also found EMC's decision to be timely, and a contrary Recommended Decision of an Administrative Law Judge not to be the final agency decision.

The trial court, however, did reverse the part of EMC's decision finding NCFA lacked standing to even bring the action. Respondents and respondent-intervenors cross-assign that reversal as error. For

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the reasons herein, we agree with respondents and respondent-intervenors. NCFA is not an aggrieved party and, therefore, lacks standing.

NCFA is a private organization whose members are in forest management and timber products industries, including wood chip mills.

Respondents include: (1) the North Carolina Department of Environment and Natural Resources, Division of Water Quality (DWQ); (2) EMC, which adopts rules that the Department of Environment and Natural Resources is responsible for enforcing; and (3) the National Pollutant Discharge Elimination System Committee (NPDES Committee), a committee of EMC which hears appeals of DWQ's permitting decisions. Respondent-intervenors are The Sierra Club and Dogwood Alliance.

Under the Federal Water and Pollution Control Act, industrial facilities must obtain National Pollutant Discharge Elimination System Permits (NPDES permits) for stormwater discharges. The federal act authorizes individual states to administer the NPDES permit system. 33 U.S.C. § 1342 (2001). In North Carolina, DWQ issues NPDES permits. Permits may be "general," prescribing conditions to be applied to a group or category of discharges, or "individual," tailored to the particular discharge and location. N.C. Gen. Stat. § 143-215.1 (2001).

In 1992, DWQ issued a general NPDES permit, NCG040000. The permit was valid for a period of five years and encompassed some segments of the timber products industry, including wood chip mills. It specifically excluded the logging, wood preserving, and cabinet-making segments of the industry, which had to apply for individual permits.

The 1992 general permit expired in August 1997. DWQ then issued general permit NCG210000 in April 1998. In addition to the logging, wood preserving, and cabinet-making segments of the timber products industry, wood chip mills were excluded from general permit NCG210000. As part of this decision, DWQ allowed wood chip mills that had applied for and obtained coverage under general permit NCG040000 before it expired to remain covered. Only new or expanding wood chip mills were required to apply for individual permits.

On 1 June 1998, NCFA filed a Petition for a Contested Case Hearing seeking administrative review of the decision, claiming its members "who decide to locate and permit new chip mills in North Carolina will be subject to, among other things, burdensome applica-

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tion procedures and additional monitoring and reporting requirements.” The North Carolina Department of Environment and Natural Resources, and the Sierra Club and Dogwood Alliance, filed a joint motion to dismiss.

The Administrative Law Judge denied the motion to dismiss, with both NCFA and respondents moving for summary judgment. The Administrative Law Judge recommended that summary judgment be entered in favor of NCFA and concluded that DWQ lacked statutory authority to consider secondary water quality impacts of wood chip mills, such as sedimentation and erosion, when it decided to exclude them from general permit NCG210000. The order stated that the final agency decision “shall be rendered by the NPDES Committee of the Environmental Management Commission.”

On 13 October 1999, a hearing was held before the NPDES Committee. It did not take new evidence after receiving the recommended decision from the Administrative Law Judge. The NPDES Committee held NCFA lacked standing to bring the action and therefore summary judgment should be granted in favor of respondents. Moreover, it ruled in the alternative that if NCFA did have standing, then DWQ “did not exceed its authority or jurisdiction, act erroneously, fail to act as required by law or rule, fail to use proper procedure, or act arbitrarily or capriciously in its decision to exclude wood chip mills from coverage under NPDES Stormwater General Permit No. NCG210000.” NCFA then sought judicial review of the final agency decision.

The trial court’s order includes the following: (1) NCFA is a “person aggrieved” and is therefore entitled to commence a contested case proceeding to challenge the decision not to renew a general stormwater permit to the wood chip mill industry; (2) the Director of the DWQ, acting under a delegation of authority from EMC, has the absolute power to issue or not to issue a general permit for any class of activities; and (3) EMC’s final agency decision was timely. Accordingly, the trial court reversed that portion of EMC’s decision dismissing NCFA’s petition for a contested case hearing. It affirmed that portion of EMC’s decision upholding DWQ’s determination not to include wood chip mills in general stormwater permit NCG210000.

NCFA appeals, contending the trial court: (1) erred in finding the final agency decision to be timely; (2) applied the incorrect standard of review in determining respondent had “absolute power to issue or not issue a general permit” under N.C. Gen. Stat. § 143-215.1; (3)

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failed to apply standard rules of statutory construction in determining DWQ's statutory authority under N.C. Gen. Stat. § 143-215.1; (4) failed to find the final agency decision was affected by errors of law; (5) failed to find the final agency decision was arbitrary and capricious and without substantial evidence; and (6) erred in not ruling on motions to correct and supplement the record.

Respondent and respondent-intervenors' sole cross-assignment of error is that the trial court erred in concluding NCFA is a "person aggrieved" under the North Carolina Administrative Procedure Act (NCAPA) and therefore has standing to commence a contested case proceeding.

On review of a trial court's order regarding a final agency decision, we examine for error by determining whether the trial court: (1) exercised the proper scope of review; and (2) correctly applied this scope of review. *Dillingham v. N.C. Dep't. of Human Res.*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999).

In the instant case, we proceed with *de novo* review of whether the NCAPA confers standing on NCFA, a question of law. *See id.* (after determining the actual nature of the contended error the appellate court then proceeds utilizing the proper standard of review). *De novo* review requires the court to "consider a question anew, as if not considered or decided by the agency previously" and to "make its own findings of fact and conclusions of law" rather than relying upon those made by the agency. *Jordan v. Civil Serv. Bd. of Charlotte*, 137 N.C. App. 575, 577, 528 S.E.2d 927, 929 (2000) (citation omitted).

The NCAPA provides that "[a]ny person aggrieved may commence a contested case hearing hereunder." N.C. Gen. Stat. § 150B-23(a) (2001). The contested case hearing provisions of the NCAPA apply to all agencies and all proceedings except those expressly exempted therefrom, and specifies the extent of each such exemption. N.C. Gen. Stat. § 150B-1 (2001); *see also Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 447 S.E.2d 768, *reh'g denied*, 338 N.C. 314, 451 S.E.2d 634 (1994). The General Assembly has not expressly exempted DENR from a contested case hearing in administering the stormwater permitting process. Thus, NCFA is entitled to a contested case hearing if it is a "person aggrieved." *Empire*, 337 N.C. at 588, 447 S.E.2d at 779.

"Under the NCAPA, any 'person aggrieved' within the meaning of the organic statute is entitled to an administrative hearing to deter-

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mine the person's rights, duties, or privileges." *Id.* "The organic statute . . . defines those rights, duties, or privileges, abrogation of which provides the grounds for an administrative hearing pursuant to the NCPA." *Id.* at 583; 447 S.E.2d at 776-77.

Here, the organic statute is N.C. Gen. Stat. § 143-215.1. It authorizes EMC to issue permits in order to control sources of water pollution. Accordingly, NCFA is a "person aggrieved" if section 143-215.1 defines a right of NCFA's that has been abrogated.

Subsection (b) of N.C. Gen. Stat. § 143-215.1 gives EMC authority to issue general permits:

(3) General permits may be issued under rules adopted pursuant to Chapter 150B of the General Statutes. Such rules may provide that minor activities may occur under a general permit issued in accordance with conditions set out in such rules. All persons covered under general permits shall be subject to all enforcement procedures and remedies applicable under this Article.

(4) The Commission shall have the power:

...

(d) To designate certain classes of minor activities for which a general permit may be issued, after considering: 1. The environmental impact of the activities; 2. How often the activities are carried out; 3. The need for individual permit oversight; and 4. The need for public review and comment on individual permits.

N.C. Gen. Stat. § 143-215.1(b)(3) and (b)(4) (2001). Significantly, this statute does not require EMC to make general permits available. Availability of general permits depends on, *inter alia*, the "need for individual permit oversight" and the "need for public review and comment on individual permits." N.C. Gen. Stat. § 143-215.1(b)(4).

Further, North Carolina's regulations of water resources are modeled after the Federal Water Pollution Control Act. General permits under the federal act were created after the United States Environmental Protection Agency attempted to exempt entire classes of source points from the NPDES permit requirement because "the tremendous number of sources within the exempted categories would make the permit program unworkable." *NRDC v. Train*, 396 F.Supp. 1393, 1395 (D.D.C. 1975), *aff'd*, *NRDC v. Costle*, 568 F.2d 1369

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(D.C. Cir. 1977). In *NRDC v. Train*, the Court held that the EPA had no authority to exempt entire classes of source points, but recognized that it could use “administrative devices, such as area [or general] permits, to make EPA’s workload manageable.” *Id.* at 1402. North Carolina received EPA authorization to issue general permits in 1991. *See* 1989 N.C. Sess. Laws ch. 453, § 1.

Review of N.C. Gen. Stat. § 143-215.1(b) and the history of general permits reveals their primary purpose is to alleviate EMC’s administrative burden. Accordingly, the statute does not define a right to a general permit, “abrogation of which provides the grounds for an administrative hearing pursuant to the NCPA.” *Empire*, 337 N.C. 583, 447 S.E.2d at 776-77. Wood chip mills have no more right to general permitting than do the logging, wood preserving, and cabinet-making segments of the timber industry which had been earlier, and still remain, excluded.

Moreover, NCFCA does not claim it or any of its members has been denied a permit as a result of the change in the permitting process. In essence, NCFCA’s claim for standing is that it prefers one type of permitting process over another to be utilized some time in the future. Section 143-215.1(e) allows contested case review to a “*permit applicant or permittee* who is dissatisfied with a decision of the Commission[.]” N.C. Gen. Stat. § 143-215.1(e) (2001) (emphasis added).

Accordingly, we hold NCFCA is not a “person aggrieved” on two grounds, either of which is sufficient for dismissal. First, NCFCA is not entitled to a general permit. Second, NCFCA has not been denied a permit. In fact, when the trial court rendered its decision none of its members had even attempted to file an application for a permit since the individual permitting process went into effect. Thus, there is no abrogation of any right.

The Office of Administrative Hearings, therefore, did not have subject matter jurisdiction. The order of the trial court reversing EMC’s decision to dismiss NCFCA’s petition based on lack of standing is reversed.

REVERSED.

JUDGE MARTIN concur.

JUDGE TYSON dissents.



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TYSON, Judge, dissenting.

The trial court did not err in holding that petitioner had standing. I respectfully dissent.

### I. Issues

The issue presented by respondents in their cross-assignment of error is whether petitioner had standing to commence a contested case proceeding under the North Carolina Administrative Procedure Act ("NCAPA").

The issues presented by petitioner are whether the superior court (1) erred in concluding that the Environmental Management Commission's, ("EMC"), final agency decision was timely, (2) applied the correct standard of review in determining that respondent had "absolute power" under the statute, (3) applied the correct standards of statutory construction in determining respondent's statutory authority, (4) erred in failing to address whether respondent failed to act as required by law, (5) erred in failing to address whether respondent acted arbitrarily and capriciously and without substantial evidence in support of its decision to exclude wood chip mills from General Permit No. NCG210000, and (6) erred in failing to rule on motions to correct and supplement the record.

I would affirm in part and reverse in part the order of the superior court, and remand for further proceedings.

### II. Standing

Respondents contend that the superior court erred in concluding that petitioner had standing to commence a contested case proceeding as a "person aggrieved" under § 150B-22 of the North Carolina Administrative Procedure Act ("NCAPA"). N.C. Rule of Appellate Procedure 10(d) permits an appellee, without taking an appeal, to cross-assign as error an act or omission of the lower court which deprives appellee of an alternative legal ground for supporting the judgment in its favor. *Carawan v. Tate*, 304 N.C. 696, 286 S.E.2d 99 (1982).

The NCAPA provides that "[a]ny person aggrieved may commence a contested case hearing hereunder." N.C.G.S. § 150B-23(a) (2001). The contested case hearing provisions apply to all agencies and all proceedings except those expressly exempted therefrom, and specifies the extent of such exemption. N.C.G.S. § 150B-1 (2001); see also *Empire Power Co. v. North Carolina Dep't of E.H.N.R.*, 337 N.C.

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569, 447 S.E.2d 768 (1994) (for a detailed analysis of standing under the NCAPA and the Water and Air Resources Act where third-party petitioner appealed the decision of EMC to grant an air pollution control permit). The General Assembly has not expressly exempted the Department of Environment and Natural Resources, (“DENR”) from a contested case hearing in administering the stormwater permitting process.

A. “Person Aggrieved”

Petitioner argues that it is a “person aggrieved” as defined by the NCAPA and our Supreme Court. I agree with the majority’s opinion that “NCFA is entitled to a contested case hearing if it is a ‘person aggrieved’[,]” and the organic statute, in this case N.C.G.S. § 143-215.1, does not exclude petitioner from those entitled to appeal under the statute. *Empire Power Co.* at 588, 447 S.E.2d at 779 (“Under the NCAPA, any ‘person aggrieved’ within the meaning of the organic statute is entitled to an administrative hearing to determine the person’s rights, duties, or privileges.”)

“‘Person aggrieved’ means any person or *group of persons of common interest directly or indirectly affected* substantially in his or its person, property, or employment, by an administrative decision.’” *Id.* (citing N.C.G.S. § 150B-2(6) (2001)). (Emphasis supplied). Our Supreme Court has interpreted “person aggrieved” expansively:

The expression “person aggrieved” has no technical meaning. What it means depends on the circumstances involved. It has been variously defined: “Adversely or injuriously affected; damaged, having a grievance, having suffered a loss or injury, or injured; also having cause for complaint. More specifically the word(s) may be employed meaning adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights.”

*Id.* (citations omitted).

Petitioner alleges that the removal of new and expanding wood chip mills from a general permit adversely affects them, because chip mills are now required to apply for and obtain individual permits. What was once a “generally” permitted operation by submission of a “Notice of Intent” and issuance of a “Certificate of Coverage” is now denied. Petitioner argues that this change subjects them to additional time consuming and costly burdens to seek individual permits.

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General Permit NCG040000 included wood chip mills. This general permit expired in August 1997. In April 1998, respondent DENR issued a new permit, General Permit No. NCG210000. Petitioner has appealed the issuance of a permit and not a “discretionary authority to require more extensive documentation” as argued by respondent DENR. The new general permit requirement excludes activities once included, and adversely affects the rights of a “group of persons of common interest,” represented by petitioner. *Id.* Under the facts of this case, I agree with the trial court and the Administrative Law Judge, (“ALJ”) and would hold that petitioner is a “person aggrieved” as that term has been defined by the NCAPA and by our Supreme Court. As a “person aggrieved,” petitioner has standing to commence a contested case proceeding.

B. “Licensing”

Petitioner also has standing because the action complained of concerns a “licensing.” Under the NCAPA’s definition of a “contested case,” any action involving a “licensing” is a contested case. N.C.G.S. § 150B-2(2) (2001). The new permit, General Permit No. NCG210000 is a “license.” The NCAPA defines “license” as “any certificate, *permit*, or other evidence, by whatever name called, of a right or privilege to engage in any activity. . . .” N.C.G.S. § 150B-2(3) (2001). (Emphasis added).

Whether the EMC’s decision is considered an “issuance with an unsatisfactory term” as petitioner argues, or a “decision not to issue” as respondents contend, either decision remains a “licensing” under the NCAPA. N.C.G.S. § 150B-2(4) defines “licensing” as “an administrative action issuing, *failing to issue*, suspending, or revoking a license . . .” (Emphasis added). Because wood chip mills were previously included under General Permit NCG210000, the exclusion of chip mills from the subsequent General Permit NCG210000 was a “failure to issue” a permit for the chip mills. A decision to issue or not to issue a “license”, “certificate”, or “permit” under the NCAPA gives rise to a contested case for which petitioner has standing. (*See* N.C.G.S. § 150B-2(3) (2001)).

The majority’s opinion states: “[s]ignificantly, this statute does not require the EMC to make general permits available.” Whether the issuance of a permit is ministerial or discretionary is immaterial to whether the plaintiff is a “person aggrieved” for standing. Once the EMC decided to issue the permit, the NCAPA specifically provides that petitioner as a “group of persons of common interests” was

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adversely affected by the EMC's decision. N.C.G.S. § 150B-2(6). The majority's position is even more unusual since the State admits in its brief that "... the statute does confer the right on permittees and permit applicants to challenge a permit denial or a permit condition (N.C.G.S. § 143-215.1(e))."

The majority's opinion also cites N.C.G.S. § 143-215.1(e) to limit the right of review to a "permit applicant or permittee." Petitioner's standing as a "person aggrieved" arises under the NCAPA, N.C.G.S. § 150B, and not under N.C.G.S. § 143. The NCAPA provides that petitioner is a "group of persons of common interests" who are all, as the majority's opinion quotes, "permittee[s] who [are] dissatisfied with a decision of the Commission[.]" N.C.G.S. § 150B-2(6).

Respondents' arguments and cross-assignment of error were correctly decided by the superior court and should be overruled. That portion of the superior court's order should be affirmed. As I would hold that petitioner has standing, I address petitioner's assignments of error.

### III. Final Agency Decision

#### A. Timeliness

Petitioner argues that: (1) the final agency decision of the EMC was not issued in a timely manner as required by N.C.G.S. § 150B-44 and (2) the NPDES Committee does not have statutory authority to render a final agency decision for the EMC. Petitioner contends that the recommended decision of the ALJ in favor of petitioner became the final agency decision. I disagree.

The statute as it existed then provided in pertinent part:

An agency that is subject to Article 3 of this Chapter and is a board or commission has 90 days from the day it receives the official record in a contested case from the Office of Administrative Hearings or 90 days after its next regularly scheduled meeting, whichever is longer, to make a final decision in the case. *This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 90 days.* If an agency subject to Article 3 of this Chapter has not made a final decision within these time limits, the agency is considered to have adopted the administrative law judge's recommended decision as the agency's final decision. Failure of an agency subject to Article 3A of this Chapter to make a final decision within 180 days

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of the close of the contested case hearing is justification for a person whose rights, duties, or privileges are adversely affected by the delay to seek a court order compelling action by the agency or, if the case was heard by an administrative law judge, by the administrative law judge.

N.C.G.S. § 150B-44 (1999) (emphasis supplied) (the legislature has amended the time requirements effective January 1, 2001).

In *Occaneechi Band of the Saponi Nation v. N. C. Comm'n of Indian Affairs*, 145 N.C. App. 649, 551 S.E.2d 535 (2001), this Court interpreted the time limits of N.C.G.S. § 150B-44 to be self-executing. "The plain language of G.S. § 150B-44 provides that an agency subject to Article 3 of this chapter . . . has 90 days from the day the official record is received by the Commission or 90 days after its regularly scheduled meeting, whichever is longer, to issue its final decision in the case." *Id.* at 653, 551 S.E.2d at 538. The first 90 days may be extended for an additional 90 days under two specific circumstances: "(1) by agreement of the parties and (2) for good cause shown." *Id.* (citing N.C.G.S. § 150B-44). We held that "the statute is clear that if a final decision has not been made 'within these time limits' the agency is considered to have adopted the ALJ's recommended decision." *Id.*

At bar, it is undisputed that the EMC received the recommended decision and official record from the Office of Administrative Hearings on 4 May 1999 and that its next regularly scheduled meeting was 13 May 1999. Under the statute, EMC had until 11 August 1999 to issue its final decision under the first 90 day time limit. On 14 July 1999, EMC notified the parties in writing that the matter would be scheduled for hearing at either the 13 October or 14 October 1999 EMC meeting. Petitioner made no objection to this notice or the hearing dates.

Sometime after 11 August 1999, the chairman of EMC, by order entered *nunc pro tunc* to 10 August 1999, extended the time period for making a final agency decision for an additional 90 days. This order recited that the hearing of the matter being scheduled for a decision at the 13 October 1999 meeting was the "good cause shown." The parties received the order on 27 August 1999. Petitioner did not object either to the hearing date nor the order extending the time limit. Petitioner participated in the hearing held on 13 October 1999 without objection. With the extension, EMC's deadline to issue its final decision became 9 November 1999. The final agency decision was issued on 5 November 1999.

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Petitioner contends that an “after the fact extension” by an order *nunc pro tunc* is not provided for under N.C.G.S. § 150B-44. Here, there is no need to address the issue of whether an agency may extend the time limits under N.C.G.S. § 150B-44 in this manner. Petitioner raised its timeliness argument for the first time on appeal in superior court. Petitioner has waived any objection to the extension. “A litigant may not remain mute in an administrative hearing, await the outcome of the agency decision, and, if it is unfavorable, then attack it on the ground of asserted procedural defects not called to the agency’s attention when, if in fact they were defects, they would have been correctible.” *Nantz v. Employment Sec. Comm’n of N.C.*, 28 N.C. App. 626, 630, 222 S.E.2d 474, 477 (1976) (citing *First-Citizens Bank and Trust Co. v. Camp*, 409 F.2d 1086 (4th Cir. 1969)). Petitioner waived its timeliness argument by failing to object until after the EMC hearing. That portion of the superior court’s order affirming the timeliness of EMC’s final agency decision was correct.

### B. Delegation of Authority

Petitioner further argues that the NPDES Committee does not have statutory authority to render a final agency decision for the EMC. Petitioner contends that N.C.G.S. § 150B-36(b) requires that a final agency decision in a contested case be made by the agency, and that the NPDES Committee is not an “agency” as that term is defined in the statute. I disagree. *See* N.C.G.S. § 150B-2(1a) (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.”).

The Congress of the United States authorized the Environmental Protection Agency (“EPA”) to establish effluent limitations for pollutants and toxic waste discharges by industry, agricultural operations and public and private waste treatment facilities. All public and private organizations which discharge wastes through point sources are required to obtain a NPDES permit. 33 U.S.C. § 1342 (1994). Individual states have been authorized to assume responsibility for administration of the NPDES permit system upon enacting state statutory authorization and application to the EPA. 33 U.S.C. § 1342(b) (1994).

Our General Assembly amended the Water and Air Resources Act in order to obtain state administration of the NPDES permit system. 1973 N.C. Sess. Laws ch. 1262, § 23. N.C.G.S. § 143-211 states

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the public policy underlying the Water and Air Resources Act is “to provide for the conservation of its water and air resources.” N.C.G.S. § 143-211(a) (2001). The statute confers upon the Department of Environment and Natural Resources authority “to administer a complete program of water and air conservation, pollution abatement and control . . .” and states that “the powers and duties of the Environmental Management Commission and the Department of Environment and Natural Resources be construed so as to enable the Department and Commission to qualify to administer federally mandated programs of environmental management . . . .” N.C.G.S. § 143-211(c) (2001).

N.C.G.S. § 143-215.3(a)(4) (2001) grants the EMC the power “[t]o delegate such of the powers of the [EMC] as the [EMC] deems necessary to one or more of its members, to the Secretary or any other qualified employee of the [DENR].” Pursuant to this statutory provision and federal regulations, EMC adopted Resolution 74-44 which appointed a five member committee to hear appeals of decisions or orders of designated hearing officers regarding NPDES permits, in lieu of the full EMC. Committee members are required to comply with federal requirements for membership contained in 40 C.F.R. 123.25(c). As a result, the NPDES Committee, consisting of five members of the EMC, was delegated the authority to render a final agency decision concerning petitioner’s appeal.

Petitioner contends that EMC Resolution 74-44 is invalid. Petitioner argues the resolution preceded adoption of N.C. Admin. Code tit. 15A, r. 2A.0007 (a) creating the NPDES Committee and that the resolution has not been readopted by EMC or incorporated into the rule. The General Assembly specifically conferred upon EMC the statutory authority to delegate those powers it deemed necessary. *See* N.C.G.S. § 143-215.3. The statute as it existed in 1974 provided the same authority to delegate as the present statute. EMC is not required to readopt or pass a new resolution absent a change in the statute that confers such authority.

#### IV. Standard of Review

Petitioner argues that the superior court misinterpreted N.C.G.S. § 143-215.1 as granting respondent DENR “absolute power to issue or not to issue a general permit for any class of activities whatsoever.” Petitioner asserts that the superior court failed to apply the proper standard of review of a final agency decision that petitioner contends was arbitrary and capricious. I agree.

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Petitioner initially argues that *de novo* review applies to all issues, but subsequently argues that respondents' decision should be reviewed under an arbitrary and capricious standard. Judicial review of an administrative agency decision is governed by the North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes. *Henderson v. North Carolina Dep't. of Human Resources*, 91 N.C. App. 527, 372 S.E.2d 887 (1988).

The superior court is authorized to reverse or modify an agency's final decision:

if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

N.C.G.S. § 150B-51(b) (2001). The proper standard of review to be utilized by the superior court is determined by the particular issues presented on appeal. *ACT-UP Triangle v. Commission for Health Servs.*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997) (citing *Amanini v. North Carolina Dep't of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994)). If the petitioner contends the agency decision is affected by an error of law, *de novo* review is the proper standard of review under N.C.G.S. § 150B-51(b)(1)-(4). *Dillingham v. North Carolina Dep't. of Human Resources*, 132 N.C. App. 704, 708, 513 S.E.2d 823, 826 (1999).

The whole record test is the proper standard of review, if petitioner contends the agency decision is not supported by substantial evidence, under N.C.G.S. § 150B-51(b)(5), or was arbitrary and capricious or constituted an abuse of discretion, under N.C.G.S. § 150B-51(b)(6). *Id.* The reviewing court may be required to utilize both standards of review if warranted by the nature of the issues



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raised on appeal. *In re Appeal by McCrary*, 112 N.C. App. 161, 165, 435 S.E.2d 359, 363 (1993).

These standards of review are distinct. *De novo* review requires the court to “‘consider a question anew, as if not considered or decided by the agency’ previously. . . .” and to “‘make its own findings of fact and conclusions of law . . .’” rather than relying upon those made by the agency. *Jordan v. Civil Serv. Bd. of Charlotte*, 137 N.C. App. 575, 577, 528 S.E.2d 927, 929 (2000) (citation omitted). On the other hand, “[t]he ‘whole record’ test requires the reviewing court to examine all competent evidence (the ‘whole record’) in order to determine whether the agency decision is supported by ‘substantial evidence.’” *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118. “Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion.” *Walker v. North Carolina Dep’t of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990) (citation omitted).

This Court’s scope of appellate review of a superior court order regarding an agency decision is: “the appellate court examines the trial court’s order for error of law.” *Amanini*, 114 N.C. App. at 675, 443 S.E.2d at 118-19 (citing *In re Kozy*, 91 N.C. App. 342, 344, 348, 371 S.E.2d 778, 780, 782 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989)). “The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.” *Id.* (citations omitted).

Petitioner alleged that the final agency decision exceeded statutory authority and was arbitrary and capricious. The superior court was required to employ both a *de novo* review for errors of law, and a whole record review to determine whether the decision was arbitrary and capricious. The order initially states that the court “considered the record, the briefs of all parties and the oral arguments of the parties.” The order then states that it is based on the “existing record.” Later, the order reverses conclusions of law denominated as numbers one and two of the final agency decision, stating that these conclusions “are affected by error of law.” This later language implies the court conducted a *de novo* review. There are no findings of fact and no delineation by the superior court between when it applied a *de novo* or whole record review. It is difficult to ascertain what standard of review the court utilized or whether the appropriate standard of review was applied to each allegation and conclusion of law.

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Judicial review under any standard is meaningless if, as the court found, an agency has “absolute power.” Except as to petitioner’s standing to contest the agency’s decision and that the EMC’s order was timely rendered, the remaining portion of the superior court’s order should be reversed and remanded for delineation of the appropriate standard of review of plaintiff’s claims. *See Sun Suites Holdings, LLC v. Board of Aldermen of Garner*, 139 N.C. App. 269, 272, 533 S.E.2d 525, 527-28 (2000) (“The trial court, when sitting as an appellate court to review a [decision of a quasi-judicial body], must set forth sufficient information in its order to reveal the scope of review utilized and the application of that review.”) (citations omitted).

V. Summary

I would affirm that portion of the trial court’s order that found: (1) the petitioner is a “person aggrieved” with standing to commence a contested case proceeding, and (2) EMC’s November 5, 1999 order was a final agency decision that was timely rendered and the ALJ’s recommended decision did not become the final agency decision.

As to the remaining portion of the superior court’s order, I would reverse and remand this case to the superior court to (1) characterize the issues before the court, (2) clearly delineate the standard of review used, (3) resolve each motion or issue raised by the parties, and (4) enter findings of fact and conclusions of law thereon consistent with this opinion.

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GERAL PIERCE, PLAINTIFF v. JOHN DANIEL JOHNSON, DEFENDANT

No. COA01-1109

(Filed 19 November 2002)

**Parties— failure to name real party in interest—motion to amend complaint—misnomer—relation back rule—equitable estoppel**

The trial court erred by denying plaintiff’s motion to amend her personal injury complaint under N.C.G.S. § 1A-1, Rule 15 after it was dismissed based on failure to name the real party in interest when plaintiff, who was unaware of defendant’s death, named decedent who died from medical complications unrelated to the

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accident instead of his estate as the party-defendant, because: (1) N.C.G.S. § 1A-1, Rule 15(a) allows a party to amend his pleadings once as a matter of course at any time before a responsive pleading is served, and defendant's motions to dismiss under N.C.G.S. § 1A-1, Rules 12(b), 17, and 19 were not responsive pleadings; (2) the relation back rule under N.C.G.S. § 1A-1, Rule 15(c) allows for an amendment for correction of a mere misnomer when decedent and his estate, although separate, are connected and dependent legal entities; (3) the amendment will not prejudice the intended defendant; (4) the doctrine of equitable estoppel applies since the personal representative of decedent's estate and the purported attorney for defendant took no affirmative steps to inform plaintiff or her counsel that defendant was in fact dead, and their conduct led plaintiff to believe that defendant was still alive; and (5) plaintiff's recovery is limited to the extent of decedent's liability insurance since she did not present her claim to the estate in accordance with the non-claim statute of N.C.G.S. § 28A-19-3.

Appeal by plaintiff from order entered 23 April 2001 by Judge W. Douglas Albright in Superior Court, Guilford County. Heard in the Court of Appeals 5 June 2002.

*Karl E. Phillips for plaintiff-appellant.*

*Davis & Hamrick, L.L.P., by H. Lee Davis, Jr., Kent L. Hamrick, and Ann C. Rowe, for defendant-appellee.*

WYNN, Judge.

Plaintiff Geral Pierce appeals from the dismissal of her personal injury action for failure to name the real party in interest. We hold that the failure to name the real party in this case was a misnomer; accordingly, we reverse the dismissal of this action.

In short, on 14 October 1997, Ms. Pierce sustained personal injuries from a motor vehicle accident allegedly caused by the negligent driving of John Daniel Johnson. On 4 May 1999, John Daniel Johnson died from medical complications unrelated to the accident; his son, Roby Daniel Johnson qualified as executor on 24 June 1999. In accord with his duties, the executor placed a Notice to Creditors in the local newspaper requesting all claims to be presented to the estate before 21 October 1999.

On 28 April 2000—about five months before the running of the statute of limitations—apparently unaware of John Daniel Johnson's

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death, Ms. Pierce brought an action against him to recover for her personal injuries by serving him at his last known address. On 12 May 2000, Roby Daniel Johnson, the executor for the estate of John Daniel Johnson, accepted service of the complaint by signing the name “Daniel Johnson” on the return receipt of the Certified Mail. However, rather than notify Ms. Pierce of the error in naming the decedent instead of his estate as the party-defendant, a chronology of the events that followed demonstrate that efforts were made by the executor to settle the claim.

Following the acceptance of service by the executor, on 6 June 2000, Attorney Ann C. Rowe styled as “Attorney for Defendant” moved to dismiss the action under Rules 12(b)(2), (4) and (5) for lack of jurisdiction over the person, insufficiency of process, and insufficiency of service. The motion further moved the trial court to dismiss the action for failure to name the real party in interest. In response on 10 July 2000, Ms. Pierce filed a “Proof of Service” certifying service on defendant John Daniel Johnson at his residence, along with the return receipt to the Certified Mail signed by “Daniel Johnson”. Apparently, Ms. Pierce was unaware that John Daniel Johnson died on 4 May 1999 and therefore did not seek to amend the action by substituting the estate of John Daniel Johnson as the defendant; however, as a precaution, Ms. Pierce took out alias and pluries summons and kept them current until this action was dismissed by the trial court.

Following the filing of the Proof of Service by Ms. Pierce, on 26 July 2000, defendant through Attorney Rowe, made an Offer of Judgment to Ms. Pierce in the amount of \$6,200.01, and served upon Ms. Pierce “Defendant’s First Set of Interrogatories and Request for Production of Documents.” Ms. Pierce, through counsel, obtained an extension to respond to interrogatories and filed her response on 26 September 2000. In the meantime, Attorney Rowe on behalf of defendant, made a second Offer of Judgment in the amount of \$10,001.00 on 22 August 2000, and further served a Request for Monetary Relief Sought on Ms. Pierce on 21 September 2000. The offers of judgment, interrogatories and request for production of documents, request for monetary relief sought, and certificates of service for each, were all signed by Ann C. Rowe, as “Attorney for Defendant.”

Following the running of the statute of limitations on 14 October 2000, Attorney Rowe gave Notice of Hearing on 16 February 2001 to bring defendant’s 6 June 2000 Motion to Dismiss to hearing. According to Ms. Pierce, at the hearing, Attorney Rowe revealed for

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the first time in the proceeding that her “client” died on 4 May 1999. In response, Ms. Pierce orally moved to amend and substitute the estate of John Daniel Johnson as the defendant. The trial court denied Ms. Pierce’s motion to amend, and granted the motion to dismiss the complaint, with prejudice, for failure to serve the real party in interest. Ms. Pierce now appeals to us.

In the dispositive assignment of error, Ms. Pierce argues the trial court erred by denying her motion to amend her complaint under Rule 15 of the North Carolina Rules of Civil Procedure. We agree.

Rule 15(a) of the North Carolina Rules of Civil Procedure allows a party to “amend his pleadings once as a matter of course at any time before a responsive pleading is served.” N.C. R. Civ. P. 15(a) (2001). Rule 7 of the North Carolina Rules of Civil Procedure identifies all of the pleadings that are allowed in a civil case and makes it clear that motions and other papers are not considered pleadings. N.C. R. Civ. P. 7 (2001). Therefore, threshold motions under Rule 12 and dispositive motions under other rules are not responsive pleadings that prevent an amendment without leave of court under Rule 15(a). 1 C. Gray Wilson, *North Carolina Civil Procedure* § 15-2 p. 292 (2nd ed. 1996); see also *Johnson v. Bollinger*, 86 N.C. App. 1, 7, 356 S.E.2d 378, 382 (1987).

Here, the defendant’s motions to dismiss under Rules 12(b), 17, and 19, were not responsive pleadings. Likewise, the offers of judgment, interrogatories, request for production of documents, and request for monetary relief sought, were not responsive pleadings. The record further shows that Pierce had not previously amended her complaint. Therefore, we conclude Ms. Pierce was entitled under Rule 15(a) to amend her complaint.

The defendant argues, however, that our Supreme Court’s ruling in *Crossman v. Moore* prevents the “relation back” of the amendment, and therefore, Ms. Pierce’s suit is time barred. In *Crossman*, our Supreme Court held that the relation back principle in Rule 15(c) does not apply when the amendment seeks to substitute a party defendant to the suit. *Crossman v. Moore*, 341 N.C. 185, 187, 459 S.E.2d 715, 717 (1995). In our view, however, Ms. Pierce’s failure to plead the estate of John Daniel Johnson was a misnomer, and therefore, the trial court made an error in law by not permitting an amendment under Rule 15(c).

In *Crossman*, our Supreme Court noted that North Carolina’s version of Rule 15(c) is not based on the federal counterpart; indeed,

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North Carolina's "relation back" rule is significantly different from the more "liberal" federal rule. N.C. Gen. Stat. § 1A-1, Rule 15(c) provides that:

A claim asserted in an amended pleading is deemed to have been interposed at the time the claim in the original pleading was interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

Whereas, Fed. R. Civ. P. 15(c) provides that:

An amendment of a pleading relates back to the date of the original pleading when . . . the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Thus, the federal rule provides an explicit procedure for substituting "new parties" into an action, whereas the North Carolina rule seemingly only permits the amendment of "claims." Therefore, although many federal and state courts have interpreted Rule 15 in the context we face today, those interpretations focus primarily on the "knew or should have known" language of the federal rule.<sup>1</sup>

Under the federal rule, the present case could summarily be resolved in Ms. Pierce's favor. However, North Carolina's legislature has adopted a more restrictive rule. Accordingly, the case law of foreign jurisdictions has limited relevance; instead, we must examine the origins of the North Carolina rule.

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1. The following state courts have held that 15(c) permits the substitution of an estate for a decedent after the running of the statute of limitations. *Schwartz v. Wasserburger*, 30 P.3d 1114, 1117 (Nev. 2001); *Schwartz v. Douglas*, 991 P.2d 665, 668 (Wash. App. 2000); *Indiana Farmers Mut. Ins. Co. v. Richie*, 707 N.E.2d 992, 997 (Ind. 1999) (rejecting insurance company's argument that estate and decedent are two distinct legal entities under 15(c) by holding that: "This may be correct in some formal sense." However, "[n]o one disputes the identity of the alleged tortfeasor. And, although [plaintiff] must name [the estate] as the insured, the claim is, in reality, against [the] liability insurance policy"); *Nutter v. Woodard*, 34 Mass. App. Ct. 596, 599-600, 614 N.E.2d 692, 694-95 (1993).

The following states have held that 15(c) does not permit the substitution of an estate for a decedent after the running of the statute of limitations. *Damian v. Estate of Pina*, 974 P.2d 93, 95 (Idaho 1999); *Vaughn v. Speaker*, 533 N.E.2d 885, 888-89 (Ill. 1988); *Parker v. Breckin*, 620 A.2d 229, 232 (Del. 1993); *Levering v. Riverside Methodist Hosp.*, 441 N.E.2d 290, 292 (1981).

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The *Crossman* Court noted that North Carolina's Rule 15 "is drawn from the New York Civil Practice Law and Rules, Rule 203(e)." *Crossman*, 341 N.C. at 187, 459 S.E.2d at 717. Under North Carolina's Rule 15(c), the Court held that the critical issue, in determining whether an amended pleading "relates back," is whether the "original [pleading gave] notice of the transactions or occurrences to be proved pursuant to the amended pleading." *Id.* Therefore, the Court reasoned that the relation back principle in Rule 15(c) is not, "as a matter of course," applicable to substituted parties because "the original claim cannot give notice of the transactions or occurrences to be proved in the amendment to a defendant who is not aware" of the original pleading." *Id.* To support this holding, our Supreme Court noted that this interpretation was "consistent with the interpretation given a similar statute in New York." *Id.*

However, in a string of cases, this Court has held that *Crossman* and Rule 15(c) does "allow for the relation back of an amendment to correct a mere misnomer." See e.g., *Liss v. Seamark Foods*, 147 N.C. App. 281, 283-84, 555 S.E.2d 365, 367 (2001); *Piland v. Hertford County Bd. of Comm'rs*, 141 N.C. App. 293, 299, 539 S.E.2d 669, 673 (2000). A misnomer is a '[m]istake in name; giving an incorrect name to [the] person in accusation, indictment, pleading, deed, or other instrument." BLACK'S LAW DICTIONARY 1000 (6th ed. 1990).

In *Liss*, this Court recognized that under New York law, the "correction of a misnomer in a pleading is allowed even after the expiration of the statute of limitations provided certain elements are met." *Liss*, 147 N.C. App. at 286, 555 S.E.2d at 368-69 (citations omitted). Specifically, an "amendment to correct a misnomer in the description of a party defendant may be granted after the expiration of the statute of limitations if (1) there is evidence the intended defendant has in fact been properly served, and (2) the intended defendant would not be prejudiced by the amendment." *Liss*, 147 N.C. App. at 286, 555 S.E.2d at 369 (citing *Pugliese v. Paneorama Italian Bakery Corp.*, 243 A.D.2d 548, 664 N.Y.S.2d 602 (1997)).

Three natural questions arise: (1) Was Ms. Pierce's error in listing John Daniel Johnson, instead of the personal representative or estate of John Daniel Johnson, a misnomer? (2) Is there evidence the intended defendant, the estate, was actually served? and (3) Will the estate be prejudiced by the amendment?

The first question is critically important because this Court, in accordance with *Crossman*, has consistently held that "[t]he notice

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requirement of Rule 15(c) cannot be met where an amendment has the effect of adding a new party to the action, as opposed to correcting a misnomer.” *Liss*, 147 N.C. App. at 283-84, 555 S.E.2d at 367 (quoting *Bob Killian Tire, Inc. v. Day Enters., Inc.*, 131 N.C. App. 330, 331, 506 S.E.2d 752, 753 (1998)). For instance, in *Franklin v. Winn Dixie Raleigh, Inc.*, we held that an amendment substituting “Winn Dixie Raleigh, Inc.” for “Winn Dixie Stores, Inc.” was adding a new party and not correcting a misnomer when both were separate corporations. 117 N.C. App. 28, 450 S.E.2d 24 (1994), *aff’d per curiam*, 342 N.C. 404, 464 S.E.2d 46 (1995).

The case *sub judice*, however, is distinguishable from *Winn Dixie Raleigh*. In *Winn Dixie Raleigh*, plaintiff named and served a separate and distinct legal entity, Winn Dixie Stores, Inc. We concluded that naming Winn Dixie Stores, Inc., rather than Winn Dixie Raleigh, Inc., was not a misnomer: “Quite simply, plaintiff sued the wrong corporation.” *Id.* at 35, 450 S.E.2d at 28. As a basis for this conclusion, we noted that Winn Dixie Stores, Inc. and Winn Dixie Raleigh, Inc. are the correct names of separate and distinct corporate entities. These two corporations are connected only by a similarity in name. Thus, plaintiff’s error had the effect of failing to give the intended defendant, Winn Dixie Raleigh, Inc., notice of the action. Accordingly, although plaintiff made a “mistake” by naming the wrong corporation, this mistake was not a misnomer under our laws.

Here, in contrast, John Daniel Johnson and the estate of John Daniel Johnson, although separate, are connected and dependent legal entities. Indeed, the life of John Daniel Johnson is a condition precedent to the estate of John Daniel Johnson. John Daniel Johnson, a legal entity, is transformed, after death, into the estate of John Daniel Johnson, a legal entity. Unlike Winn Dixie Raleigh, Inc. and Winn Dixie Stores, Inc., the life and estate of John Daniel Johnson are inextricably dependent: Death of the person is a point at which a legal transformation to an estate can occur. Once death occurs, the legal entity known as the life of John Daniel Johnson can never again have legal standing. As a consequence, anyone with the legal authority to accept service of process for the estate, is necessarily apprised of an adverse legal claim even if the complaint names the decedent rather than the estate as the defendant.<sup>2</sup>

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2. The Illinois Supreme Court has held that “substitution of the estate for the decedent [is] not merely the correction of a misnomer, and [15(c)] cannot be invoked for relation back.” *Vaughn v. Speaker*, 533 N.E.2d 885, 888-89 (Ill. 1988). Although the *Speaker* Court conceded an estate is the legal successor to the rights and liabilities of a decedent, the Court reasoned that an estate and a decedent must be separate and dis-



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This fact, although often ignored in case law, is clearly understood by our legislature. For instance, under the North Carolina Rules of Civil Procedure, “[n]o action abates by reason of the death of a party . . . . In such a case, the court . . . may order the substitution of said party’s personal representative . . . and allow the action to be continued by or against the substituted party.” N.C. Gen. Stat. § 1A-1, Rule 25(a) (2001). Thus, there is no need to serve process upon the estate of the decedent if one has already served the decedent prior to death. *See* N.C. Gen. Stat. § 28A-19-1(c) (“In an action pending against the decedent at the time of his death . . . the substitution of the personal representative . . . will constitute the presentation of a claim and no further presentation is necessary.”).

Accordingly, the concerns underlying *Winn Dixie* and *Crossman*, namely that (1) the substituted party will not have notice if the amendment is allowed to relate back, and (2) the wrong legal entity was named in the complaint, are satisfied where the personal representative of the estate receives notice of an impending claim against the decedent.

A contrary decision would create inequitable and illogical results. Consider, for instance, the hypothetical case wherein a grandmother is bilked out of her life savings by a maverick. The grandmother files an action against the maverick a few months before the statute is to run, and serves the maverick by certified mail at his last known address. Unbeknownst to the grandmother, the maverick died the day before she filed her complaint; however, the complaint is accepted by the personal representative for the maverick’s estate at his last known residence. Thereafter, an attorney purporting to represent the maverick, makes offers of judgment, conducts discovery, and seeks to negotiate the claim. A few months later, after the statute of limitation runs, the attorney seeks to dismiss the action for failure to serve the estate of the maverick. Following defendant’s logic in this case,

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tinct legal entities because an estate and a decedent can not exist contemporaneously. *Id.* However, this element, the impossibility of a life and an estate to simultaneously exist, is precisely the element that differentiates their status as “separate and distinct legal entities.” For example, Lexus and Lexis, or *Winn Dixie* and *Winn Dixie Raleigh*, are separate and distinct legal entities. Nevertheless, Lexus and Lexis exist contemporaneously. Because both legal entities can exist concurrently, mistakenly filing a lawsuit against Lexis will not apprise Lexus of an adverse legal claim. However, an estate and a life can not, as the *Speaker* Court correctly noted, exist contemporaneously. Rather, a life is transformed into an estate at the moment of death. This “transformation” is a bridge between the two legal entities. If one mistakenly files a lawsuit against an individual who is dead, there is logically only one other legal entity who could have been the correct subject of the litigation.

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the fact that the estate of the maverick was not served would bar the grandmother's claim for her life savings. Clearly, this result is neither just, necessary, nor in accordance with the reasoning of *Crossman* or *Winn Dixie*.

Having concluded that Pierce's error was a misnomer, *Liss* demands that we determine whether an amendment is consistent with equity. First, is there evidence that the intended defendant was actually served; if so, will the amendment prejudice the intended defendant?

Here, the personal representative of the decedent's estate, Roby Daniel Johnson, was served with the summons and complaint by certified mail on 12 May 2000. Roby Daniel Johnson, as the personal representative of the estate, was the intended defendant. Therefore, the first element of *Liss* is satisfied.

Less than three months after being served, on 26 July 2000, the personal representative had obtained counsel and made an offer of settlement. From that date forward, the record indicates that the estate, the intended defendant, was represented by competent counsel. Accordingly, the intended defendant has been aware of the adverse claim since the date of service, has prepared an adequate defense, and is represented by counsel. Therefore, the second element of *Liss* is satisfied because the amendment will not prejudice the intended defendant.

In reaching this decision, we are aware that plaintiff's claim was not presented to the personal representative of Johnson's estate within the time limitations set forth in N.C. Gen. Stat. § 28A-19-3. Section 28A-19-3 is commonly referred to as a "non-claim statute," and, though similar to a statute of limitations, it serves a different purpose. *Ragan v. Hill*, 337 N.C. 667, 671, 447 S.E.2d 371, 374 (1994). The time limitations prescribed in Section 28A-19-3 "allow the personal representative to identify all claims to be made against the assets of the estate early on in the process of administering the estate . . . [and] promotes the early and final resolution of claims by barring those not presented within the identified period of time." *Id.*

Subsection (a) of section 28A-19-3 specifically requires that claims arising before the death of the decedent be presented to the personal representative or collector by the date specified in the general notice of creditors, or in cases requiring the delivery or mailing of notice under section 28A-14-1(b), within ninety days after the date

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of delivery or mailing of the notice, if said ninety day period is later than the date specified in the general notice to creditors. The statute requires only that a claim be presented to the personal representative or collector within the stated period, with section 28A-19-1 setting out the manner in which claims may be presented. *Id.*

Under the above statutes, plaintiff in the instant case was required to present her claim to the personal representative of defendant's estate by 21 October 1999, the date specified in the general notice of creditors, and then, if not satisfied with the response, to file her personal injury action within the three-year statute of limitations period.

Ms. Pierce complied with the statute of limitations period, but did not present her claim in accordance with the non-claim statute. However, N.C. Gen. Stat. § 28A-19-3 provides:

(i) Nothing in this section shall bar:

(1) Any claim alleging the liability of the decedent or personal representative; . . .

. . . .

to the extent that the decedent or personal representative is protected by insurance coverage with respect to such claim, proceeding or judgment . . . .

N.C. Gen. Stat. § 28A-19-3(i). Accordingly, Ms. Pierce's recovery, if any, is limited to the amount of insurance coverage available for deceased defendant's alleged negligence.

In addition to our holding that the error in this matter was a misnomer, we hold that the doctrine of equitable estoppel provides an additional ground for ruling in Ms. Pierce's favor. The doctrine of equitable estoppel may be invoked to bar a defendant from relying upon the statute of limitations. *Duke University v. Stainback*, 320 N.C. 337, 357 S.E.2d 690 (1987). Equitable estoppel arises when an individual by his acts, representations, admissions or silence, or when he had a duty to speak, intentionally or through culpable negligence, induces another to believe that certain facts exist and that the other person rightfully relies on those facts to his detriment. *Carter v. Frank Shelton, Inc.*, 62 N.C. App. 378, 303 S.E.2d 184 (1983). When estoppel is based upon an affirmative representation and an inconsistent position subsequently taken, it is not necessary that the party to be estopped have any intent to mislead or deceive the party claim-

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ing the estoppel, or that the party to be estopped even be aware of the falsity of the representation when it was made. *Meacham v. Board of Educ.*, 59 N.C. App. 381, 297 S.E.2d 192 (1982).

Here, the record shows that Ms. Pierce initiated the instant action on 28 April 2000, within the statute of limitations under N.C. Gen. Stat. § 1-52(5). However, Ms. Pierce sued the decedent individually instead of bringing the suit against the personal representative or collector of defendant's estate. The summons and complaint were then served on the personal representative of defendant's estate, Roby Daniel Johnson. Instead of signing for the summons and complaint in his capacity as personal representative, Roby Daniel Johnson signed the return receipt "Daniel Johnson," the name he shared with the deceased defendant. By so doing, the personal representative of Johnson's estate missed an opportunity to inform Ms. Pierce that John Daniel Johnson was dead, and effectively, conducted the defense of the action as though John Daniel Johnson was still alive.

This misrepresentation as to the physical and legal existence of John Daniel Johnson was continued by the subsequent conduct of the purported "Attorney for Defendant." On 6 June 2000, the motion to dismiss was filed in the name of John Daniel Johnson. Although the motion to dismiss did raise the issue of Ms. Pierce's failure to name a real party in interest and failure to join a necessary party, since it was signed by the purported "Attorney for Defendant," it did not place Ms. Pierce on notice that John Daniel Johnson was in fact dead and that she needed to proceed against the personal representative of John Daniel Johnson's estate.

Additionally, after receipt of the motion, Ms. Pierce's attorney filed the proof of service certifying that service was obtained on John Daniel Johnson at his last known address. Following that, Ms. Pierce's attorney received two offers of judgment, a set of interrogatories and request for production of documents, and a request for monetary relief sought. They were all signed by the purported "Attorney for Defendant" and received within the statute of limitations. According to the record, the personal representative of John Daniel Johnson's estate and the purported "Attorney for Defendant" took no affirmative steps to inform Ms. Pierce or her counsel that defendant was in fact dead. Had they done so, Ms. Pierce would have been able to amend her complaint to substitute the personal representative as party defendant within the statute of limitations, which did not expire until 14 October 2000.

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As a result of the conduct of the personal representative and the purported “Attorney for Defendant,” Ms. Pierce was apparently led to believe that John Daniel Johnson was still alive. By the 8 March 2001 hearing, the statute of limitations expired and Ms. Pierce was without recourse. John Daniel Johnson’s estate should not benefit from such conduct. By their action, the personal representative of John Daniel Johnson’s estate and the purported “Attorney for Defendant” led Ms. Pierce to believe that John Daniel Johnson was still alive. Ms. Pierce and her counsel apparently relied on this representation. John Daniel Johnson’s estate cannot now assert an inconsistent position to the detriment of Ms. Pierce. Consequently, we hold as an additional ground for granting relief to Ms. Pierce that John Daniel Johnson’s estate was equitably estopped from asserting the statute of limitations as a defense to Pierce’s action.

In summation, we hold the trial court erred in denying Ms. Pierce’s motion to amend her complaint—Ms. Pierce’s error was a misnomer; the intended defendant was served; and the amendment will not prejudice the actual defendant. However, because Ms. Pierce did not present her claim to the estate in accordance with the non-claim statute, N.C. Gen. Stat. § 28A-19-3, Ms. Pierce’s recovery is limited to the extent of the decedent’s liability insurance.

Reversed and Remanded.

Judges HUNTER and THOMAS concur.

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STATE OF NORTH CAROLINA EX REL. SUSAN B. PILARD, ELIZABETH B. REQUENA, JOHN BERNINGER, THOMAS BERNINGER AND JOANNE BERNINGER; SUSAN B. PILARD; ELIZABETH B. REQUENA; JOHN BERNINGER; THOMAS BERNINGER; AND JOANNE BERNINGER, PLAINTIFFS V. BLANCA R. BERNINGER and GREAT AMERICAN INSURANCE COMPANY, DEFENDANTS

No. COA01-1272

(Filed 19 November 2002)

**1. Estates— necessary parties—conversion—breach of fiduciary duty—representative capacity as administratrix**

Neither decedent’s estate nor his second wife in her representative capacity as administratrix were necessary parties in a conversion action brought by decedent’s children against the wife

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in her individual capacity, although both may have been proper parties. However, the wife in her representative capacity was a necessary party to a determination of the children's claim against her for breach of fiduciary duty because it was only in that capacity that any fiduciary duty arose.

**2. Estates— subject matter jurisdiction—tort claim against administratrix of estate**

A de novo review revealed that the trial court did not err in an action for breach of fiduciary duty and conversion arising out of the administration of an estate by denying defendants' motion to dismiss based on lack of subject matter jurisdiction, because: (1) contrary to defendants' assertions, the gravamen of the complaint is not solely a claim for a proper accounting and distribution of decedent's assets when the complaint properly alleged a claim for conversion; (2) tort claims against administrators of estates resulting from the manner in which the estate was administered are within the original jurisdiction of the trial division and not the clerk of superior court; and (3) although this claim may arise in part out of the administration of an estate, it is not part of the administration, settlement, and distribution of the estate.

**3. Collateral Estoppel and Res Judicata— res judicata—no final judgment—different issues**

A conversion action brought by decedent's children against decedent's wife, who was the administratrix of his estate, was not barred by res judicata based upon a petition filed by the children with the clerk of superior court in the estate proceeding alleging that decedent's assets had not been entirely accounted for and reported by the administratrix and the resulting consent order requiring the production of bank records because (1) the conversion claim could not have been brought before the clerk; (2) neither the final account nor the consent order was a final judgment on the conversion issue; and (3) the prior estate proceedings involved different issues.

**4. Estates— certificates of deposit—purchase by decedent's wife—half ownership by decedent**

The evidence in a conversion action against decedent's wife was sufficient to support the trial court's finding and conclusion that decedent owned a legal or equitable one-half interest in certificates of deposit at the time of his death and that such interest should have been included in his estate, even though the certifi-

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cates were in only the wife's name, where it showed that the certificates of deposit were purchased with funds withdrawn from a demand deposit account of which decedent and his wife were co-owners and not from a 100% survivorship account.

**5. Conversion— certificates of deposit—decedent's wife—sufficiency of evidence**

The evidence was sufficient to support the trial court's finding and conclusion that decedent's wife converted decedent's assets where it showed that the wife withdrew money from a joint account to purchase three certificates of deposit; that decedent thus owned a one-half interest in the certificates of deposit; and that the wife assumed control of the certificates of deposit without authorization.

Appeal by defendants from judgment entered 1 June 2001 by Judge J. Richard Parker in Chowan County Superior Court. Heard in the Court of Appeals 15 August 2002.

*W. T. Culpepper, III, for plaintiff-appellee.*

*The Twiford Law Firm, L.L.P., by H.P. Williams, Jr., and R. Michael Cox, for defendant-appellant.*

MARTIN, Judge.

Plaintiffs, who are the children of John Alfred Berninger ("decedent") from his first marriage, brought this action against defendant Berninger, decedent's second wife, in her individual capacity, and Great American Insurance Company as surety, seeking damages for Berninger's alleged breach of fiduciary duty and conversion arising out of her administration of their father's estate. Defendants denied the substantive allegations of the complaint and moved to dismiss for failure to join a necessary party, lack of subject matter jurisdiction, and *res judicata*. The motion was denied.

Evidence presented at trial tended to establish that Berninger and decedent lived as husband and wife until decedent died intestate on 12 February 1992. On 15 May 1989, decedent and Berninger opened as co-owners two certificates of deposit (numbers 10130224768 and 10130224769) with Centura Bank. The certificates were set up under a depositor's contract, or signature card, bearing the account number 13-0000815, which registered the account as a joint certificate of deposit with a right of survivorship. On the same

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day, decedent and Berninger also opened a demand deposit account (number 10130158762) as co-owners, and executed a signature card registering the account as joint with survivorship to be governed by G.S. § 41-2.1 (2001).

On 29 January 1990, decedent and Berninger purchased three new certificates of deposit (numbers 10130251661, 10130251662, and 10130251663) as co-owners at Centura Bank. The certificates were purchased with monies owned jointly and equally by decedent and Berninger. Decedent and Berninger did not execute a new or separate depositor's contract or signature card at this time. The new certificates of deposit referred to "Customer Number 13-0000815," the same account number contained on the 15 May 1989 signature card. According to bank records, the only depositor's contract or signature card ever jointly executed by decedent and Berninger for a certificate of deposit was the 15 May 1989 signature card.

On or about 26 December 1991, decedent was hospitalized, where he remained until his death on 12 February 1992. Testimony of family and friends who visited decedent in the hospital established that from the time he was hospitalized until his death, decedent was incapable of communicating; he was very weak, could barely move, and could neither talk nor write legibly.

In early January 1992, Linda Evans, a customer service representative with Centura Bank, received a telephone call from Berninger. Evans testified Berninger requested to redeem the certificates of deposit held jointly with decedent and to deposit the funds into their joint demand deposit account, which was then a survivorship account. Evans testified that for signature cards executed prior to September 1989, which included the signature card for the demand deposit account executed by decedent and Berninger in May 1989, the survivorship feature only provided the survivor with one-half of the account, while the remaining half would go to the decedent's estate. Evans testified that bank policy changed in September 1989, and thereafter, customers had the option of executing signature cards making their account "a hundred percent (100%) right of survivorship account" wherein the survivor would receive 100% of the funds. Evans discussed with Berninger the possibility that she and decedent could change their demand deposit account to a 100% right of survivorship account, and Berninger expressed a desire to do so. Evans informed Berninger that she would first need to submit a written request to redeem the certificates of deposit.



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Shortly after 14 January 1992, Evans received a letter from Berninger stating that she and decedent were “in New York staying with my sister on a short vacation” and requesting transfer of the three most recent certificates of deposit (numbers 10130251661, 10130251662, and 10130251663) into their demand deposit account. Evans responded to the letter on 23 January 1992 by mailing Berninger redemption forms to redeem the certificates of deposit, and a new signature card to change decedent’s and Berninger’s demand deposit account into “a hundred percent (100%) right of survivorship account” as previously discussed. Around 28 January 1992, Evans received the redemption forms signed by Berninger and the signature card purportedly signed by decedent and Berninger. As a result, Evans redeemed the certificates as requested and deposited the proceeds into the demand deposit account controlled by the new signature card.

Plaintiffs presented expert testimony in the field of document examination to the effect that the purported signature of decedent on the 1992 signature card was not, in fact, decedent’s signature. Plaintiffs themselves also testified that the signature was not their father’s, and that decedent was incapable of having signed his name at the time the new signature card was executed.

On 10 February 1992, at Berninger’s request, Evans transferred \$225,000 from the demand deposit account into three new certificates of deposit in the amount of \$75,000 each issued solely in Berninger’s name. Evans testified that she never had any contact with decedent while handling the transactions, and that she only dealt with Berninger.

On 27 February 1992, Berninger was qualified as administratrix of decedent’s estate, and served as such until the filing of a final account on 12 November 1993. On 28 February 1992, Berninger, as principal, and defendant Great American, as surety, executed a joint and several security bond obligation to the State of North Carolina for \$50,000 conditioned on Berninger’s proper and lawful administration of decedent’s estate.

On 5 October 1992, plaintiffs filed a petition in the estate proceeding alleging decedent’s assets had not been entirely accounted for and reported by Berninger on a 90-Day Inventory filed 11 June 1992. The petition requested the production of records from various financial institutions, as well as tax returns of decedent and Berninger for various years. As a result, a Consent Order was entered

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on 12 November 1992 requiring the production of bank records from eleven separate financial institutions. No further actions resulting from the petition were taken in the estate, and a final account of the estate was filed 12 November 1993.

On 10 February 1995, plaintiffs instituted this action by filing a complaint alleging Berninger had converted three certificates of deposit, as well as various other property owned by decedent, and that Berninger breached her fiduciary duty as administratrix of decedent's estate by failing to account for and properly distribute decedent's assets. Plaintiffs also sought damages pursuant to G.S. § 28A-8-6 against Great American on the bond executed by Berninger and Great American. The matter was tried by the court sitting without a jury. At the close of plaintiffs' evidence, defendants renewed the previous motion and also moved to dismiss for insufficiency of the evidence under G.S. § 1A-1, Rule 41(b) (2001). The trial court again denied the original motion to dismiss, and granted the Rule 41(b) motion with respect to Berninger's conversion of certain items of tangible personal property and household furnishings, but not as to plaintiffs' claims based on the monies held in the three certificates of deposit. Defendants renewed both motions to dismiss at the close of all of the evidence; the motions were denied.

The trial court entered judgment in favor of plaintiffs on 1 June 2001, finding and concluding, among other things, that the signature on the new signature card for the joint demand deposit account was not decedent's; that "[a]t the time of his death . . . [decedent] was the legal or equitable owner of a one-half ( $\frac{1}{2}$ ) interest in" the three certificates of deposit Berninger opened in her sole name with funds from the joint demand deposit account; that this one-half interest should have been included in decedent's estate and administered as such; that Berninger failed to properly account for and distribute all assets of decedent's estate, and in so doing, breached her fiduciary duties as administratrix of the estate; and that Great American is therefore obligated on the surety bond. The trial court ordered that defendants pay \$67,187.93 plus interest and costs of the action, that Great American and Berninger were jointly and severally liable for \$50,000 of the amount, and that Berninger was individually liable for the remainder. Defendants appeal.

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Defendants argue on appeal that the trial court erred in denying their motions to dismiss for four reasons: (1) plaintiffs failed to join a necessary party; (2) the trial court lacked subject matter jurisdiction;

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(3) plaintiffs' action was barred by *res judicata*; and (4) the evidence was insufficient to support the trial court's finding and conclusion that plaintiffs had an interest in the monies held in the three certificates of deposit which Berninger opened solely in her name, or that Berninger was guilty of wrongdoing. We agree with defendants that Berninger, in her official capacity as administratrix of decedent's estate, was a necessary party to plaintiffs' claim for breach of fiduciary duty.

## I.

[1] Defendants first maintain the trial court should have dismissed the complaint for plaintiffs' failure to join a necessary party. Defendants argue that the estate and Berninger in her capacity as administratrix of the estate were the "real parties in interest," and that plaintiffs' failure to join Berninger in her capacity as administratrix is fatal to the complaint. "A "necessary" party is one whose presence is required for a complete determination of the claim, and is one whose interest is such that no decree can be rendered without affecting the party.'" *Godette v. Godette*, 146 N.C. App. 737, 739, 554 S.E.2d 8, 9 (2001) (citation omitted). The trial court in this case concluded that "[a]ll parties necessary for a complete determination of the issues that arise from the pleadings in this action are properly before the Court." We agree with the trial court that the estate was not a necessary party to plaintiffs' action and that Berninger in her capacity as administratrix was not necessary to a determination of their conversion claim; however, we disagree that Berninger in her representative capacity was not a necessary party to a determination of plaintiffs' claim for breach of fiduciary duty.

With respect to the conversion claim, defendants have failed to provide a legal basis for their argument that either the estate or Berninger in her representative capacity were necessary parties to a determination of that claim. Although both may have been "proper parties," or those "whose interest may be affected by a decree," the estate and Berninger as administratrix are clearly not necessary parties to adjudication of the conversion claim, inasmuch as they are not "so vitally interested in the controversy that a valid judgment cannot be rendered in the action completely and finally determining the controversy without [its] presence." See *Crosrol Carding Developments, Inc. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 451-52, 183 S.E.2d 834, 837 (1971). While a necessary party must be joined in an action, it is within the sound discretion of the trial court as to whether to join a proper party. *Id.* at 451, 183 S.E.2d at 837.

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However, with respect to the breach of fiduciary duty claim, Berninger was required to be joined in her capacity as administratrix, for it was only in that capacity that any fiduciary duty arose. Berninger owed no such duty to plaintiffs as an individual. In *Davis v. Singleton*, 259 N.C. 148, 130 S.E.2d 10 (1963), our Supreme Court held that a complaint alleging the administratrix of an estate failed to properly distribute the estate to a rightful beneficiary was a matter involving the administratrix in her official capacity, and thus, the administratrix was required to be made a party not only in her individual capacity, but also in her capacity as administratrix. *Id.* at 153, 130 S.E.2d at 14. We are bound by *Davis* to hold plaintiffs were required to join Berninger in her administrative capacity in order to pursue their claim for breach of fiduciary duty because that claim is necessarily based solely on Berninger's actions as administratrix, not as an individual. Thus, defendants' motion to dismiss plaintiffs' claim against Berninger for breach of fiduciary duty should have been granted. Likewise, because Great American's obligation on the surety bond was premised solely on Berninger's duties and actions as administratrix of decedent's estate, its motion to dismiss should have been granted.

## II.

[2] Defendants next argue the trial court erred when it denied their motion to dismiss the complaint for lack of subject matter jurisdiction. Specifically, defendants maintain plaintiffs' action is actually a claim for a proper accounting and distribution of decedent's assets and that the clerk of superior court has exclusive jurisdiction over such matters pursuant to G.S. §§ 7A-241 and 28A-2-1 (2002). Again, we disagree. "[T]he standard of review on a motion to dismiss under Rule 12(b)(1) for lack of jurisdiction is *de novo*." *County Club of Johnston County, Inc. v. United States Fidelity & Guar. Co.*, 150 N.C. App. 231, 238, 563 S.E.2d 269, 274 (2002).

First, we disagree with defendants' contention that the gravamen of the complaint is solely a claim for a proper accounting and distribution of decedent's assets. The complaint alleges a claim for conversion. A complaint states a claim for conversion when it alleges ownership and an unauthorized assumption or conversion. *See Lake Mary Ltd. Partnership v. Johnston*, 145 N.C. App. 525, 551 S.E.2d 546, *disc. review denied*, 354 N.C. 363, 557 S.E.2d 538 (2001). Here, the complaint alleged that decedent died intestate; that plaintiffs are his heirs; that Berninger purchased the three certificates of deposit in her sole name with funds owned jointly by her and decedent; that at

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the time of his death decedent owned a one-half interest in the three certificates of deposit; that Berninger failed to account for decedent's interest in the certificates while administering his estate; and that, to the contrary, Berninger "converted [decedent's interest] to her own use." The trial court found and concluded that decedent owned an interest in the funds which Berninger held in her sole name, and that Berninger wrongfully failed to include those funds as part of the estate.

This Court has specifically established that tort claims against administrators of estates resulting from the manner in which the estate was administered are within the original jurisdiction of the trial division, not the clerk of superior court. *See Ingle v. Allen*, 69 N.C. App. 192, 317 S.E.2d 1, *disc. review denied*, 311 N.C. 757, 321 S.E.2d 135 (1984). The plaintiff in *Ingle* brought suit against the administrators of her husband's estate, alleging improprieties in their handling of the estate which amounted to breach of fiduciary duty, fraud, and negligence. *Id.* at 193-94, 317 S.E.2d at 2. The defendants sought to dismiss the action for lack of subject matter jurisdiction, arguing that the clerk of superior court had exclusive jurisdiction over "the administration, settlement and distribution of estates of decedents." *Id.* at 195, 317 S.E.2d at 3 (quoting N.C. Gen. Stat. § 28A-2-1).

This Court rejected this argument, noting that claims such as breach of fiduciary duty, fraud, and negligence are " 'justiciable matters of a civil nature,' original general jurisdiction over which is vested in the trial division." *Id.* at 195-96, 317 S.E.2d at 3 (citations omitted). We held that " '[w]hile the claims arise from administration of an estate, their resolution is not a part of 'the administration, settlement and distribution of estates of decedents' so as to make jurisdiction properly exercisable initially by the clerk.' " *Id.* at 196, 317 S.E.2d at 3 (citations omitted); *see also, In re Estate of Parrish*, 143 N.C. App. 244, 251, 547 S.E.2d 74, 78 ("We recognize that an action for damages resulting from a fiduciary's breach of duty in the administration of a decedent's estate is not a claim under the original jurisdiction of the clerk of court. Such actions should, therefore, be brought as civil actions in the trial division of Superior Court."), *disc. review denied*, 354 N.C. 69, 553 S.E.2d 201 (2001); *Matter of Wills of Jacobs*, 91 N.C. App. 138, 141-42, 370 S.E.2d 860, 863 (noting "our courts distinguish cases which 'arise from' the administration of an estate from those which are 'a part of' the administration and settlement of an estate;" only those matters "a part of" the administration

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of an estate are within exclusive original jurisdiction of the clerk of superior court), *disc. review denied*, 323 N.C. 476, 373 S.E.2d 863 (1988).

In summary, plaintiffs' complaint properly alleges a claim for conversion. According to *Ingle*, although this claim may arise in part out of the administration of an estate, it is not a part of the administration, settlement and distribution of the estate. Rather, it is a "justiciable matter[] of a civil nature" over which original jurisdiction is vested in the trial court. This argument is overruled.

## III.

[3] Defendants next assert that plaintiffs' 5 October 1992 petition filed before the clerk of superior court involved the same parties and addressed the same issues as plaintiffs' complaint in this action, and thus, this action was barred by the doctrine of *res judicata*.

"The doctrine of *res judicata* provides that a final judgment on the merits in a prior action precludes a second suit based on the *same cause of action* between the same parties or those in privity with them." *Holly Farm Foods, Inc. v. Kuykendall*, 114 N.C. App. 412, 416, 442 S.E.2d 94, 97 (1994) (emphasis added). "*Res judicata* not only bars the relitigation of matters determined in the prior proceeding but also 'all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence could and should have brought forward.'" *Id.* (citations omitted). The aim of the doctrine is to protect litigants from "the burden of relitigating previously decided matters and to promote judicial economy by preventing unnecessary litigation." *Id.* at 417, 442 S.E.2d at 97.

A review of the petition, Consent Order, and complaint in this case reveals the two proceedings involved different claims. Plaintiffs were not required to have brought their conversion claim in the petition before the clerk of superior court; in fact, this claim could not have been brought before the clerk, because, as previously noted, such claims are not within the jurisdiction of the clerk of superior court, but are within the original general jurisdiction of the trial court. In any event, neither the final account nor the Consent Order which resulted from the filing of the petition was by any means a final judgment on the issue of Berninger's conversion. Indeed, the only effect of the Consent Order was to require various financial institutions to produce their copies of records pertaining to accounts owned or formerly owned by decedent. Plaintiffs were not barred from bringing this action based on *res judicata* where no previous final

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judgment on the merits of their claim in this case has been rendered, where the prior estate proceedings involved different issues, and where their claim could not have been brought before the clerk of superior court.

## IV.

Finally, defendants argue the evidence was insufficient to (1) support the trial court's finding and conclusion that, at the time of his death, decedent owned a one-half interest in the three certificates of deposit which belonged to his estate; and (2) support any claim against Berninger for either conversion or breach of fiduciary duty. These arguments stem from the denial of defendants' motion to dismiss for insufficiency of the evidence under G.S. § 1A-1, Rule 41(b). When a party moves to dismiss pursuant Rule 41(b), the trial judge becomes both the judge and jury and must weigh all competent evidence before him. *C.F.R. Foods, Inc. v. Randolph Development Co.*, 107 N.C. App. 584, 588, 421 S.E.2d 386, 388, *disc. review denied*, 333 N.C. 166, 424 S.E.2d 906 (1992). "Dismissal under this statute is left to the sound discretion of the trial court." *Matter of Oghenekevebe*, 123 N.C. App. 434, 437, 473 S.E.2d 393, 396 (1996).

**[4]** First, defendants contend the evidence does not support the trial court's findings and conclusions that decedent owned a legal or equitable one-half interest in the certificates of deposit at the time of his death, and that this interest should have been included in the estate. We disagree. The evidence clearly established that the three certificates of deposit were purchased with funds owned equally by Berninger and decedent. Thus, decedent maintained a one-half interest in the certificates.

Since the evidence supports the conclusion that decedent owned a one-half interest in the certificates of deposit at the time of his death, it necessarily follows that this interest was a part of his estate at the time of his death, as our statutes define an estate as "all the property of a decedent." *See* N.C. Gen. Stat. § 29-2(2) (2002); *see also Matter of Estate of Francis*, 327 N.C. 101, 108, 394 S.E.2d 150, 155 (1990) (defining estate as "all of the property owned by the decedent which she may direct to her legatees and devisees under a will and which would pass to her heirs and next of kin under the laws of intestacy if she died without a will."). The fact that Berninger placed decedent's interest into certificates of deposit held only in her name does not extinguish decedent's interest, as the evidence shows the certificates of deposit were purchased with funds withdrawn from the

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demand deposit account of which decedent and Berninger were co-owners, thereby making the certificates joint tenancy property.

Defendants expend much effort in arguing that a 100% right of survivorship applied to decedent's interest in the certificates at the time of his death, noting that the funds used to purchase the three certificates came from an account that had such a feature and that prior to that, the funds were contained in other certificates of deposit also carrying a right of survivorship. However, Evans' testimony established that the survivorship feature on the demand deposit account, absent execution of a new signature card, would only have provided half of the funds to Berninger, while half would have gone to decedent's estate. According to her testimony, the demand deposit account could only be changed to a 100% right of survivorship account by execution of a new signature card. However, the trial court determined the signature on the new signature card purporting to change the demand deposit account to a 100% survivorship account was not decedent's, and thus, the signature card did not meet the statutory requirements for creation of that type of account. Defendants have not disputed this finding.

In any event, even if the demand deposit account carried a 100% right of survivorship feature, any such feature became of no consequence the moment Berninger transferred its assets into new certificates of deposit. The evidence is conclusive that at the time of decedent's death, his interest was not being held in an account or certificate subject to a right of survivorship, as the certificates were held solely in Berninger's name.

Moreover, defendants' argument that Berninger should be declared the sole owner of the funds because that is what she and decedent intended is without merit; it is well-established that a right of survivorship cannot be created by the intentions of the parties without satisfaction of the statutory requirements. *See, e.g., Mutual Community Savings Bank, S.S.B. v. Boyd*, 125 N.C. App. 118, 122, 479 S.E.2d 491, 493 (1997) (extrinsic or parol evidence of parties' intent to establish joint tenancy with right of survivorship inadmissible); *Powell v. First Union Nat. Bank*, 98 N.C. App. 227, 229, 390 S.E.2d 461, 462 (1990) (regardless of clear intent of parties to establish joint savings account with right of survivorship, survivorship account not created where statutory requirements not met).

Quite simply, at the time of decedent's death, the joint funds used to purchase the three new certificates were not being held



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subject to a right of survivorship, and therefore, decedent's interest should have been included in his estate. We agree with the trial court that decedent owned a legal or equitable one-half interest in the certificates of deposit at the time of his death, and that this interest should have passed to his heirs upon his death. Therefore, the trial court did not abuse its discretion in failing to grant defendants' motion on this ground.

**[5]** Defendants also argue plaintiffs have no right to relief because the evidence failed to establish that Berninger converted decedent's assets or that she breached a fiduciary duty as administratrix of decedent's estate through her failure to disclose any conversion of decedent's property and to properly account for and distribute all assets rightfully belonging to the estate.

“The tort of conversion is well defined as “an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.”’” *Lake Mary Ltd. Partnership*, 145 N.C. App. at 531, 551 S.E.2d at 552 (citations omitted). “The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner . . . and in consequence it is of no importance what subsequent application was made of the converted property, or that defendant derived no benefit from the act.’” *Id.* at 532, 551 S.E.2d at 552 (citation omitted). Thus, “[i]t is clear then that two essential elements are necessary in a complaint for conversion—there must be ownership in the plaintiff and a wrongful conversion by defendant.” *Id.*

Moreover, a spouse may be held liable for conversion for an unauthorized withdrawal of joint funds. *Myers v. Myers*, 68 N.C. App. 177, 181, 314 S.E.2d 809, 813 (1984) (holding plaintiff-wife's allegations that she deposited funds into a joint checking account with defendant-husband, and that he converted the funds to his own use and refused to account for such funds without her knowledge or consent were sufficient to state claim for conversion and survive motions for summary judgment and directed verdict). In this case, plaintiffs have alleged and shown sufficient evidence of both an ownership interest in the property at issue, and that Berninger assumed control of that property without authorization. The evidence was sufficient to support a conclusion that Berninger converted decedent's assets, and thus, the trial court did not err in denying defendants' motion on this basis. As to plaintiffs' breach of fiduciary duty claim, we have

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already held plaintiffs were not entitled to bring that claim for their failure to join Berninger in her capacity as administratrix of decedent's estate.

Accordingly, we reverse the judgment of the trial court with respect to its determination that Berninger breached a fiduciary duty to plaintiffs, and as to Great American's liability on the surety bond. We affirm the judgment against defendant Berninger for conversion and the award of damages in the amount of \$67,187.93 plus interest and costs of the action.

Reversed in part; affirmed in part.

Judges TYSON and THOMAS concur.

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; BELLSOUTH  
TELECOMMUNICATIONS, INC., COMPLAINANT-APPELLEES V. THRIFTY CALL, INC.,  
RESPONDENT-APPELLANT

No. COA01-1466

(Filed 19 November 2002)

**1. Utilities— number of panel members—resignation of panel member**

The North Carolina Utilities Commission's order did not contravene N.C.G.S. § 62-76 even though the recommended order was decided by a panel of two commissioners after one of the panel members resigned, because: (1) one commissioner's resignation from the panel did not recharacterize the two remaining members as hearing commissioners or deprive the panel of jurisdiction to enter an order; (2) the statute does not prohibit members of a Commission panel from participating in a decision appealed to the full Commission; and (3) the statute only limits a commissioner's involvement when he has issued a recommended order in the capacity of a hearing commissioner, and the two remaining commissioners were acting as panel members and not as individual hearing commissioners.

**2. Telecommunications—audit—intrastate tariff**

The North Carolina Utilities Commission did not err by failing to require plaintiff telecommunications company to conduct an

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audit that was allegedly required by the company's intrastate tariff, because: (1) there is no language in the tariff provision that requires the company to audit defendant long distance interexchange carrier before filing a complaint to enforce its tariff; (2) reading the word "may" to mean "shall" would require an audit to be conducted any time there was a billing dispute rather than resolution through different means; (3) nothing in the record demonstrated it was the intent of the parties to require plaintiff to conduct an audit before seeking to enforce its rights under the tariff; and (4) the tariff only allows for one audit to be conducted by plaintiff each year and limits the scope of the audit to the previous quarter.

**3. Telecommunications— long distance interexchange carrier—percent interstate usage—intrastate usage**

The North Carolina Utilities Commission did not abuse its discretion by concluding that defendant long distance interexchange carrier misreported its Percent Interstate Usage (PIU) and by characterizing the pertinent calls as intrastate in nature, because: (1) FCC opinions have discussed the fact that court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications; (2) other states have held that long distance calls which originate and terminate within the state are intrastate calls even though they may be routed through a switch located in another state; and (3) evidence in the record demonstrated that over ninety percent of the calls originated and terminated in North Carolina.

**4. Telecommunications—back-billed charges—laches**

The North Carolina Utilities Commission did not err by concluding that defendant long distance interexchange carrier company is obligated to pay plaintiff telecommunications company for back-billed charges even though defendant contends the claim should have been barred under the doctrine of laches, because: (1) the record fails to demonstrate that defendant pled the defense of laches in its answer to plaintiff's complaint; (2) defendant has failed to demonstrate a change in conditions that makes the prosecution of plaintiff's claim unjust; and (3) the language of plaintiff's tariff does not prohibit the Commission from ordering back-billing since to do so would deny plaintiff nearly complete relief from the misreporting of access traffic.

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**5. Utilities—telecommunications—monetary damages**

The North Carolina Utilities Commission did not err by allegedly exceeding its statutory and jurisdictional authority in ordering money damages, because: (1) the Commission's order is simply the remedy afforded plaintiff telecommunications company to collect the unpaid access fees required under its North Carolina tariff; and (2) denying the Commission the authority to order back-billing in this case would prevent it from enforcing the tariff and protecting customers.

Appeal by respondent from order dated 14 June 2001 by the North Carolina Utilities Commission. Heard in the Court of Appeals 18 September 2002.

*Kilpatrick Stockton LLP, by M. Gray Styers, Jr., for complainant-appellee.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Marcus W. Trathen and David Kushner, for respondent-appellant.*

McGEE, Judge.

BellSouth Telecommunications, Inc. (BellSouth) filed a complaint against Thrifty Call, Inc. (Thrifty Call) on 11 May 2000 alleging that Thrifty Call intentionally and unlawfully reported erroneous Percent Interstate Usage (PIU) factors to BellSouth in violation of BellSouth's North Carolina Access Services Tariff (intrastate tariff).

The evidence presented before the North Carolina Utilities Commission (the Commission) tended to show that Thrifty Call is a long-distance, interexchange carrier that has operated in North Carolina and has been a BellSouth customer since 1996. Thrifty Call purchased access to BellSouth's local exchange network under BellSouth's Tariff FCC No. 1 (FCC tariff) and BellSouth's intrastate tariff in order to carry long distance calls to and from customers of North Carolina BellSouth. BellSouth charged Thrifty Call either interstate or intrastate access charges, depending upon the originating and terminating points of the call. The billing rates for these charges were calculated using the PIU reporting method with the data provided by Thrifty Call. Interstate access rates, which are lower than intrastate rates, are established by the FCC tariff, while intrastate access rates are established by the Commission.

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Thrifty Call routed all of the long distance calls in its network destined for North Carolina through its physical facilities in Atlanta, Georgia, including long distance calls that originated and terminated in North Carolina. Thrifty Call calculated its PIU based on the Federal Communications Commission's (FCC) entry/exit surrogate (EES) methodology and reported that ninety-eight percent of its calls in North Carolina were interstate. These calls were billed under the FCC interstate tariff rate.

The Commission referred the matter to a three-member panel to hear the case as provided under N.C. Gen. Stat. 62-76(a). The case was heard on 5 December 2000 by Commissioners Sam J. Ervin, IV, William R. Pittman, and J. Richard Conder. Commissioner Pittman resigned from the panel on 24 January 2001 and did not participate in the recommended order. The remaining panel issued a recommended order ruling on complaint (recommended order) dated 11 April 2001 ordering Thrifty Call to pay BellSouth \$1,898,685 for Thrifty Call's underreported intrastate calls. Thrifty Call filed exceptions to the recommended order on 3 May 2001 and requested oral argument, which was scheduled for 21 May 2001. The Commission issued a final order dated 14 June 2001 denying Thrifty Call's exceptions and affirming the recommended order. Thrifty Call moved for reconsideration of the final order and moved to hold the proceeding in abeyance on 10 August 2001. The Commission denied both of these motions on 27 August 2001. Thrifty Call appeals.

**[1]** Thrifty Call first argues the Commission's order contravenes N.C.G.S. § 62-76 because the recommended order was decided by a panel of two commissioners after one of the panel members resigned. N.C. Gen. Stat. § 62-76(a) (2001) states that a case may be heard by "a panel of three commissioners, hearing commissioner or examiner to whom a hearing has been referred by order of the chairman." Pursuant to N.C.G.S. § 62-76(a), the matter was referred to a three-member panel which had "all the rights, duties, powers and jurisdiction conferred by [the statute] upon the Commission." The panel issued a recommended order to which Thrifty Call filed exceptions and requested oral argument before the full Commission.

Thrifty Call contends that Commissioner Ervin should not have participated in the oral argument and the Commission's decision because he acted as a hearing commissioner in the initial decision. N.C.G.S. § 62-76(c) states:

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In all cases in which a pending proceeding shall be assigned to a hearing commissioner, such commissioner shall hear and determine the proceedings and submit his recommended order, but, in the event of a petition to the full Commission to review such recommended order, the hearing commissioner shall take no part in such review, either in hearing oral argument or in consideration of the Commission's decision, but his vote shall be counted in such decision to affirm his original order.

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 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.

In the case before us, Commissioner Ervin was a member of a panel of three commissioners to which the case was assigned; he was not serving as an individual hearing commissioner. Furthermore, Commissioner Pittman's resignation from the panel did not recharacterize the two remaining members as hearing commissioners or deprive the panel of jurisdiction to enter an order. The two remaining commissioners had the authority to issue recommended or final orders in accordance with the statute. The statute does not prohibit members of a Commission panel from participating in a decision appealed to the full Commission. The statute only limits a commissioner's involvement when he has issued a recommended order in the capacity of a hearing commissioner. Commissioners Conder and Ervin were acting as panel members and not individual hearing commissioners in this case. This assignment of error is without merit.

**[2]** Thrifty Call next argues the Commission erred by failing to require BellSouth to conduct an audit that was required by BellSouth's intrastate tariff. Thrifty Call argues that the word "may" in BellSouth's intrastate tariff requires, rather than permits, BellSouth to conduct an audit of Thrifty Call's records before filing a complaint. The relevant section of BellSouth's North Carolina tariff states:

When an IC provides a projected interstate usage percent as set for in A. preceding, or when a billing dispute arises or a regulator commission questions the projected interstate percentage for BellSouth SWA, the Company may, by written request, require the

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IC to provide the data the IC used to determine the projected interstate percentage. This written request will be considered the initiation of the audit.

BellSouth Access Services Tariff § E2.3.14(B)(1) (April 26, 2000).

This Court finds no authority governing the interpretation or construction of tariffs and must choose a method for analyzing and interpreting the tariff. We believe utility tariffs are sufficiently similar to contracts to avail themselves to the rules of contractual interpretation.

If the language of a contract “is clear and only one reasonable interpretation exists, the courts must enforce the contract as written” and cannot, under the guise of interpretation, “rewrite the contract or impose [terms] on the parties not bargained for and found” within the contract. *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978). If the contract is ambiguous, however, interpretation is a question of fact, *Barrett Kays & Assoc., P.A. v. Colonial Bldg. Co., Inc. of Raleigh*, 129 N.C. App. 525, 528, 500 S.E.2d 108, 111 (1998), and resort to extrinsic evidence is necessary, *Holshouser v. Shaner Hotel Grp. Props. One*, 134 N.C. App. 391, 397, 518 S.E.2d 17, 23, *disc. review denied*, 351 N.C. 104, 540 S.E.2d 362 (1999), *aff'd per curiam*, 351 N.C. 330, 524 S.E.2d 568 (2000). “An ambiguity exists in a contract if the ‘language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.’” *Barrett*, 129 N.C. App. at 528, 500 S.E.2d at 111 (citations omitted). Thus, if there is any uncertainty as to what the agreement is between the parties, a contract is ambiguous. *Id.* This Court’s “review of a trial court’s determination of whether a contract is ambiguous is *de novo*.” *Id.*

*Crider v. Jones Island Club, Inc.*, 147 N.C. App. 262, 266-67, 554 S.E.2d 863, 866-67 (2001).

Absent evidence of a contrary intent by the tariff drafters in the record or tariff, this Court will apply the plain meaning of the word. *Black’s Law Dictionary* defines the word “may” as (1) “Is permitted to,” (2) “Has a possibility,” and (3) “Loosely, is required to; shall; must.” *Black’s Law Dictionary* 993 (7th ed. 1999). The definition states that the first entry is the primary legal use of the word while the third entry is used “usually in an effort to effectuate legislative intent.” *Id.* Similarly, *The American Heritage Dictionary* defines

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“may” as “[t]o be allowed or permitted to” and “[t]o be obliged; must. Used in deeds and other legal documents.” The American Heritage Dictionary 839 (3rd ed. 1991).

While this Court agrees that the word “may” can be used to mean “shall” or “must,” we do not agree that the word is so used in the case before us. We choose to apply the plain meaning of the word “may” in light of the absence of evidence that a contrary definition was intended. There is no language in this tariff provision that requires BellSouth to audit Thrifty Call before filing a complaint to enforce its tariff. Furthermore, reading the word “may” to mean “shall” would require an audit to be conducted any time there was a billing dispute rather than resolution through different means. Nothing in the record demonstrates it was the intent of the parties to require BellSouth to conduct an audit before seeking to enforce its rights under the tariff. Additionally, the tariff only allows for one audit to be conducted by BellSouth each year and limits the scope of the audit to the previous quarter. Reading the word “may” to mean “shall” would allow BellSouth to enforce its rights only once a year, after conducting its one, limited audit. We find no evidence that the drafters of the tariff intended such a limitation on BellSouth’s ability to enforce its rights. A plain reading of this section of the tariff compels a conclusion that the right to seek an audit is permissive and not required. This assignment of error is without merit.

**[3]** Thrifty Call next contends the Commission erred in concluding that Thrifty Call misrepresented its PIU. Thrifty Call argues the Commission ignored the plain meaning of BellSouth’s FCC tariff language concerning interstate usage, which resulted in an erroneous and arbitrary and capricious order.

A reviewing court may reverse or modify the Commission decision if substantial rights of an appellant have been prejudiced because the Commission’s findings, inferences, conclusions or decisions are: (1) violative of constitutional provisions; (2) beyond the statutory authority or jurisdiction of the Commission; (3) based upon unlawful proceedings; (4) affected by other errors of law; (5) unsupported by competent, material and substantial evidence in view of the entire record as submitted; or (6) arbitrary or capricious.

*State ex rel. Utilities Comm’n v. N.C. Gas Service*, 128 N.C. App. 288, 291, 494 S.E.2d 621, 624 (1998); see N.C. Gen. Stat. § 62-94 (2001). The standard of review requires this Court, after reviewing the entire



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record, to determine if “the Commission’s findings and conclusions are supported by substantial, competent, and material evidence.” *N.C. Gas Service*, 128 N.C. App. at 291, 494 S.E.2d at 624. Substantial evidence is defined as any relevant evidence that would permit a reasonable mind to support a conclusion. *Utilities Comm. v. Coach Co.*, 19 N.C. App. 597, 601, 199 S.E.2d 731, 733 (1973), *cert. denied*, 284 N.C. 623, 201 S.E.2d 693 (1974). The presumption is that the Commission gave proper consideration to all competent evidence and reached a just and reasonable conclusion. *State ex rel Utilities Comm. v. Piedmont Nat. Gas Co.*, 346 N.C. 558, 569, 573, 488 S.E.2d 591, 598, 601 (1997).

Thrifty Call argues that the FCC tariff requires that the classification of the call be determined by where the call enters the subcontractor’s network under the EES methodology rather than the point from which the call originated. *See In re Amendments of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rule Making, 6 F.C.C.R. 4524, 4535-36, ¶ 66 (1991). Thrifty Call argues that if its switch is located in a different state than where the call exits the network, it is classified as interstate. Under this methodology, virtually all of Thrifty Call’s business would be classified as interstate. *Id.* It would also permit carriers to convert their intrastate minutes into interstate minutes whenever profitable simply by changing the routing of the call once it has been placed.

Thrifty Call cites several sources of authority in support of its argument. First, Thrifty Call cites to FCC decisions describing the EES methodology. The FCC has stated that

interstate usage generally ought to be estimated as though every call that enters an OCC network at a point within the same state as that in which the station designated by dialing is situated were an intrastate communication and every call for which the point of entry is in a state other than that where the called station is situated were an interstate communication.

*In re MCI Telecommunications Corp. Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service*, Memorandum Opinion and Order, FCC 85-145, 57 Rad. Reg. 2d (P&F) 1573, 1582, ¶ 25 (1985), *recon. denied*, 59 Rad. Reg. 2d (P&F) 631 (1985); *In re Determination of Interstate and Intrastate Usage of Feature Group A and Feature Group B Access Service*,

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Supplemental Notice of Proposed Rule Making, 1 F.C.C.R. 1042, 1045, ¶ 5 n.6 (1986).

Thrifty Call also cites *Western Union Tel. Co. v. Speight*, 254 U.S. 17, 18, 65 L. Ed. 104, 105 (1920), *reversing*, 178 N.C. 146, 100 S.E. 351 (1919), and argues it is controlling in the case before us. In *Speight*, the United States Supreme Court held that a telegraph that originated in Greenville, North Carolina and terminated in Rosemary, North Carolina, was considered interstate because it was routed through Richmond, Norfolk, and Roanoke Rapids, Virginia. *Id.* The Court stated that “[t]he transmission of a message through two States is interstate commerce as a matter of fact. The fact must be tested by the actual transaction.” *Id.* (citations omitted).

While *Speight* appears similar to the facts at hand, the facts are distinguishable and this Court does not find it controlling. *Speight* was decided in 1919 and has been cited only once in subsequent cases. *See Ward v. Western Union Telegraph Co.*, 22 S.W.2d 81 (Mo. Ct. App. 1929). In *Speight*, the message was telegraphed to Richmond, Virginia and then subsequently telegraphed to Weldon, North Carolina as it made its way to Rosemary. *Id.* at 19, 65 L. Ed. at 105. The telegraph did not simply travel along telegraph lines across the Virginia line and back after its initial transmission; the telegraph had to be independently transmitted by operators from each relay point. *Id.* The actual telegram was a series of communications.

In the case before this Court, there was only one telephone call made during the transmission of the call. The call switched networks and was routed through Atlanta before the transmission terminated in North Carolina, but the transmission consisted of only one call. The transmission was not divided into a series of individual transmissions as the telegraph in *Speight* was. Since the transmission originated and terminated in North Carolina and consisted of only one actual call, this case is distinguishable from *Speight*.

Additionally, federal courts and the FCC have declined to characterize calls of this nature as a series of multiple calls. The FCC “has focused on the ‘end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers.’” *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1, 4 (D.C. Cir. 2000) (quoting *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Intracarrier Compensation for ISP-Bound Traffic, 14 F.C.C.R. 3689, 3695, ¶ 10 (1999)).

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The dividing line between the regulatory jurisdictions of the FCC and states depends on “the nature of the communications which pass through the facilities [and not on] the physical location of the lines.” Every court that has considered the matter has emphasized that the nature of the communications is determinative rather than the physical location of the facilities used.

*National Association of Regulatory Utility Commissioners*, 746 F.2d 1492 (D.C. Cir. 1984) (quoting *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977) (per curiam), cert. denied, 434 U.S. 1010 (1978); citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 20 L. Ed. 2d 1001 (1968)).

FCC opinions have also discussed the fact that “court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications.” *Teleconnect Company v. The Bell Telephone Company of Pennsylvania*, File Nos. E-88-83 et seq, Memorandum Opinion and Order, 10 F.C.C.R. 1626, 1629, ¶ 12 (1995). The FCC has found that “a debit card call that originates and ends in the same state is an intrastate call, even if it is processed through an 800 switch located in another state.” *In the Matter of The Time Machine, Inc., Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services*, Memorandum Opinion and Order, 11 F.C.C.R. 1186, 1190, ¶ 30 (1995).

Similarly, other states have examined the characterization of long distance calls that originate and terminate in the same state after being routed through other states. The Idaho Public Utilities Commission found these calls to be intrastate, stating that

the simple rule adopted by the Federal Communications Commission and by this Commission is that when a call has an end user origination and termination in the same state it is jurisdictionally an intrastate call for regulatory purposes. The intermediate transport or switching does not alter the jurisdictional nature of the call even if it occurs outside the state’s boundaries.

*Northwest Telco, Inc. v. Mountain States Telephone and Telegraph Co.*, 88 Pub. Util. Rep. 4th 462, 464 (Idaho Pub. Util. Comm’n 1987). The Florida Public Utilities Commission has stated that “long distance telephone calls which originate and terminate within the State

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of Florida are intrastate calls subject to [the Florida Public Utilities Commission's] jurisdiction even though they may be routed through a switch located in another state." *In re: Show Cause Action Against Southland Systems, Inc.*, Order No. 11342, 82 FPSC 179 (1982); see also *In re Cease and Desist Order to Hart Industries of Intrastate Wide Area Toll Service*, Order No. 10256, 81 FPSC 73 (1981).

Thrifty Call has cited no controlling authority that compels us to reverse the decision of the Commission. Evidence in the record demonstrates that over ninety percent of the calls originate and terminate in North Carolina. It also shows that Thrifty Call is acting as a subcontractor for another long distance carrier for the minutes in question. Furthermore, Thrifty Call admitted that it uses the originating and terminating points of telephone calls in Georgia to determine whether the call was interstate or intrastate. Testimony presented before the Commission provided a sufficient basis for determining that a called station refers to the end-user being called, not a switch within the network. The Commission concluded that telephone traffic originating in North Carolina, routed through a switch in Atlanta, Georgia, and delivered to an end-user in North Carolina was intrastate in nature.

The Commission reviewed the FCC and intrastate tariffs and determined they were substantially similar. It found that both tariffs classified calls based on the point where they originated and were placed in the customer network by callers. Testimony indicated that Thrifty Call ordered feature group access that did not utilize the EES methodology. After an examination of the record, this Court concludes there is substantial evidence to support the conclusions of the Commission. We hold that the Commission correctly characterized these calls as intrastate in nature and did not abuse its discretion or err as a matter of law. This assignment of error is without merit.

**[4]** Thrifty Call argues the Commission erred by concluding that Thrifty Call is obligated to pay BellSouth for back-billed charges. Thrifty Call first contends there is no competent evidence that BellSouth is owed the amount alleged in the complaint. As previously stated, the standard of review requires this Court, after reviewing the entire record, to determine if "the Commission's findings and conclusions are supported by substantial, competent, and material evidence." *N.C. Gas Service*, 128 N.C. App. at 291, 494 S.E.2d at 624. Substantial evidence is defined as any relevant evidence that would permit a reasonable mind to support a conclusion. *Coach Co.*, 19 N.C. App. at 601, 199 S.E.2d at 733. The complainant bears the burden of

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proving the facts that entitle it to relief. *Utilities Commission v. Teer Co.*, 266 N.C. 366, 372-73 146 S.E.2d 511, 516 (1966).

Mike Harper (Harper) of BellSouth testified before the Commission detailing the calculations used in determining the alleged damages. Harper testified that these records demonstrated that ninety-nine percent of Thrifty Call's traffic terminating in North Carolina was intrastate. Harper also testified that Thrifty Call's records showed the difference between the application of the interstate rate and the intrastate rate totaled \$1,898,685 between January 1998 and April 2000. The Commission subsequently found this determination to be "well-supported" by the testimony before entering the order.

[T]he Commission may agree with a single witness—if the evidence supports his position—no matter how many opposing witnesses might come forward. This Court is then required to determine whether the Commission's decision is supported by "competent, material and substantial evidence in view of the entire record as submitted."

*State ex rel. Utilities Comm. v. Eddleman*, 320 N.C. 344, 352, 358 S.E.2d 339, 346 (1987) (quoting N.C. Gen. Stat. § 62-94(b)(5) (1982)). This Court finds substantial evidence in the record supporting the amount of damages alleged by BellSouth.

Thrifty Call contends BellSouth's claim for back-billing should have been barred under the doctrine of laches.

Laches is an affirmative defense that must be pled, and the burden of proof is upon the party who pleads it. The defense of laches will bar a claim when the plaintiff's delay in seeking a known remedy or right has resulted in a change of condition which would make it unjust to allow the plaintiff to prosecute the claim.

*Cieszko v. Clark*, 92 N.C. App. 290, 297, 374 S.E.2d 456, 460 (1988) (citations omitted). The record fails to demonstrate that Thrifty Call pled the defense of laches in its answer to BellSouth's complaint. Additionally, Thrifty Call has failed to demonstrate a change in conditions that makes the prosecution of BellSouth's claim unjust.

Thrifty Call also argues the Commission erred because the back-billed time period exceeds that permitted under BellSouth's tariff. Thrifty Call contends that the tariff allows BellSouth to conduct an

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audit once a year and limits any back-billing to one quarter preceding the audit. We have already stated that BellSouth is not required to seek an audit before seeking to enforce its rights before the Commission. The back-billing provision applies solely to when an audit has been undertaken by BellSouth, which is not the case before us. Additionally, we do not believe the language of the tariff prohibits the Commission from ordering back-billing because to do so would deny BellSouth nearly complete relief from the misreporting of access traffic.

**[5]** Finally, Thrifty Call argues the Commission exceeded its statutory and jurisdictional authority in ordering money damages. The Commission may “exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or incident to the proper discharge of its duties.” N.C. Gen. Stat. § 62-30 (2001). Additionally, “the Commission shall be deemed to exercise functions judicial in nature and shall have all the powers and jurisdiction of a court of general jurisdiction as to all subjects over which the Commission has or may hereafter be given jurisdiction by law.” N.C. Gen. Stat. § 62-60 (2001).

In *State ex rel. Utilities Comm. v. Southern Bell*, 88 N.C. App. 153, 363 S.E.2d 73 (1987), this Court held that a Commission-ordered compensation plan did not constitute money damages or a penalty in contravention of N.C.G.S. § 62-94(b)(2). In *Southern Bell*, we stated that a “plan requiring compensation to the LECs for lost revenues . . . is reasonably calculated to provide protection for the local exchanges who provide needed services to local exchange customers . . . . The plan is therefore statutorily authorized.” *Southern Bell*, 88 N.C. App. at 169-70, 363 S.E.2d at 83.

In the case before us, the Commission’s order requiring Thrifty Call to pay the amount owed does not constitute the award of money damages in excess of its statutory authority. The Commission’s order is simply the remedy afforded BellSouth to collect the unpaid access fees required under its North Carolina tariff. Denying the Commission the authority to order back-billing in this case would prevent it from enforcing the BellSouth tariff and protecting customers. This assignment of error is without merit.

We affirm the order of the North Carolina Utilities Commission.

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Affirmed.

Judges WALKER and HUNTER concur.

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KELVIN J. LEEKS, PETITIONER V. CUMBERLAND COUNTY MENTAL HEALTH DEVELOPMENTAL DISABILITY AND SUBSTANCE ABUSE FACILITY, RESPONDENT

No. COA02-40

(Filed 19 November 2002)

**1. Public Officers and Employees— dismissal—findings**

Certain of the trial court's findings had a rational basis in the evidence in an action arising from the dismissal of petitioner as an assistant at a youth home for recording medications which were prepared but not administered.

**2. Public Officers and Employees— dismissal—falsification of medical records—unacceptable personal conduct**

In an action arising from the dismissal of petitioner as an assistant at a youth home for recording medications which were prepared but not administered, the trial court did not err by concluding that pre-writing notes describing medications not administered constituted unacceptable personal conduct. The North Carolina Administrative Code includes job-related conduct which violates state or federal law as improper personal conduct; falsification of medical records is a violation of state law.

**3. Public Officers and Employees— dismissal—findings—not supported by evidence—no reversible error**

In an action arising from the dismissal of petitioner as an assistant at a youth home for recording medications which were prepared but not administered, some of the trial court's findings concerning petitioner's sleep disorder were contrary to evidence in the whole record, but there was no reversible error because petitioner failed to prove a claim of disability discrimination.

**4. Public Officers and Employees— dismissal—disability discrimination—not proven**

In an action arising from the dismissal of petitioner as an assistant at a youth home for recording medications which were prepared but not administered, the trial court did not err by con-

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cluding that petitioner failed to prove that his termination resulted from disability discrimination where petitioner failed to fully inform respondent of his condition, failed to prove that the depression and sleep disorder qualified as physical or mental impairment, and did not show that either condition is permanent or long-term.

Appeal by petitioner from order entered 6 June 2001 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 28 October 2002.

*Browne, Flebotte, Wilson & Horn, P.L.L.C., by Joy Rhyne Webb, for petitioner-appellant.*

*Douglas E. Canders for respondent-appellee.*

TYSON, Judge

Kelvin J. Leeks, ("petitioner"), appeals from an order which affirmed the final agency decision of the Cumberland County Mental Health Development Disabilities and Substance Abuse Facility, ("respondent"), terminating petitioner's employment. We affirm.

### I. Facts

Petitioner was rehired as a Youth Program Assistant III by respondent in December 1995 after having worked for respondent from 1981 to 1993. Petitioner worked the night shift at Borden Heights Group Home, which housed emotionally disturbed and dangerous youths.

Petitioner began suffering from depression, migraines, and a sleeping disorder. His doctor advised that he stop working the night shift. Petitioner requested a lateral transfer from the night shift to a day shift several times, beginning in May 1996. Those requests were denied.

On 22 September 1997, petitioner received a written warning that he had engaged in unacceptable personal conduct, listing: (1) not conducting proper bed checks, (2) not monitoring clients, and (3) not performing duties assigned to the lead-staff worker on a shift.

On 25 February 1998, petitioner prepared, but failed to timely administer, medications for seven of the youths. Petitioner recorded the medications by writing the date, name of medication, the number of pills administered to each client, and whether the



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medication was taken orally on the Medication Administration Record, ("MAR"). Petitioner did not record the time or initial the MAR. Around 9:10 a.m., Everett Mitchell, petitioner's supervisor, sent petitioner home.

Petitioner arrived home and fell asleep. He awoke in the afternoon and questioned whether he had administered the medications. He called the group home, and related that he had "dreamed" the medication had not been administered. Petitioner was assured by another worker, Christopher Corders, that the medications had been given. Corders relied upon petitioner's partially completed MAR.

Petitioner returned to the group home concerned that he had forgotten to administer the medication. Petitioner checked the medicine cabinet and discovered the medication that should have been distributed that morning. Petitioner contacted Supervisor Mitchell, and completed an incident report and significant event note for each client. Petitioner called the pharmacist for further instructions concerning the medication. The medication was administered according to the pharmacist's instructions, and petitioner signed the records at the time of administration.

A pre-dismissal conference was held on 23 April 1998, followed by a subsequent meeting on 27 April 1998. On 30 April 1998, petitioner was terminated from his employment. On 28 July 1998, petitioner filed a petition for a contested case hearing with the Office of Administrative Hearings. Administrative Law Judge Morrison, ("ALJ") held the hearing on 15 December 1998 and 17 December 1998. The ALJ filed a recommended decision on 11 February 1999 which upheld the decision of the respondent's director to terminate petitioner and found that respondent had just cause to terminate. The ALJ also recommended that petitioner's allegations of disparate treatment and respondent's failure to accommodate a handicapping condition be dismissed.

The State Personnel Commission, ("Commission") considered the ALJ's recommended decision on 17 and 18 June 1999, and issued a recommendation to respondent to find and conclude that the ALJ's decision be rejected and that petitioner met his burden of proving that respondent lacked just cause to dismiss plaintiff for personal misconduct. The Commission found that petitioner's actions gave respondent just cause to take disciplinary action on the basis of inadequate job performance. The Commission recommended that

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(1) petitioner be reinstated to his former position, (2) petitioner receive back pay and all other benefits of employment during the period he was not working, (3) respondent take appropriate disciplinary action against petitioner, and (4) petitioner be allowed to request attorney's fees.

On 15 September 1999, respondent issued its final decision concluding that there was "just cause" for petitioner's termination. Respondent dismissed petitioner's claims of disparate treatment and failure to accommodate his handicapping condition. An amended final decision was issued on 5 November 1999.

Petitioner petitioned for judicial review on 12 October 1999. Judge Cashwell heard arguments and affirmed the final decision of respondent. Petitioner appeals.

## II. Issues

The issues are (1) whether substantial evidence in the record supports the trial court's findings of fact that petitioner intentionally pre-wrote MARs and then called respondent after dreaming that he did not dispense the medicine, (2) whether petitioner's pre-writing MARs constitutes a falsification of medical records, a violation of state law, and unacceptable personal conduct, (3) whether substantial evidence in the record supports the trial court's findings of fact of petitioner's disability, and (4) whether petitioner sufficiently alleged a claim for disability discrimination.

## III. Standard of Review

Chapter 150B of the North Carolina General Statutes, the North Carolina Administrative Procedure Act, governs trial and appellate court review of administrative agency decisions . . . . Although G.S. § 150B-51(b) lists the grounds upon which a court may reverse or modify an administrative agency decision, the proper standard of review to be employed by the court depends upon the nature of the alleged error. *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). If a petitioner asserts that the administrative agency decision was based on an error of law, then "de novo" review is required. *Id.* . . . On the other hand, if a petitioner asserts that the administrative agency decision was not supported by the evidence, or was arbitrary and capricious, then the court employs the "whole record" test. *Id.* . . . The standard of review for an appellate court upon an appeal from an order of the superior

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court affirming or reversing an administrative agency decision is the same standard of review as that employed by the superior court. *In re Appeal of Ramseur*, 120 N.C. App. 521, 463 S.E.2d 254 (1995).

*Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62-63, 468 S.E.2d 557, 559-60 (1996).

In *ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 483 S.E.2d 388 (1997), our Supreme Court stated, “[t]he appellate court examines the trial court’s order for error of law. The process has been described as a twofold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.” 345 N.C. at 706, 483 S.E.2d at 392 (citations omitted.) The “whole record” test allows a reviewing court to determine whether an administrative decision has a rational basis in the evidence. *Id.* at 706-07, 483 S.E.2d at 392 (citations omitted).

#### IV. Findings of Fact Seven and Eight

[1] Petitioner argues that the respondent’s findings of fact seven and eight, later adopted by the superior court, were not supported by substantial evidence. Finding seven states, “[p]etitioner called the group home on the afternoon of February 25, 1998 advising that he had had a ‘dream’ that he had not given the medications that morning.” Petitioner alleges that he did much more than inform respondent of a dream. Petitioner testified that he called the home, drove to the home, checked the medicine cabinet, discovered the truth of his mistake, reported the incident, and called and followed the instructions of the pharmacist.

Petitioner’s testimony is corroborated by other witnesses, and clearly shows that petitioner did more than just “call[] the group home.” This evidence does not contradict, but supplements the finding that petitioner called the group home and told them about his dream. Testimony of other witnesses supports this statement. The trial court’s finding “has a rational basis in the evidence.” *Id.*

Finding eight states that petitioner intentionally pre-wrote the client medication charts and failed to administer medications to seven youths who were to receive their medication before leaving for school that morning. Petitioner argues that the substantial evidence does not show that he pre-wrote all of the medication notes.

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Petitioner admitted partially pre-writing the medication notes. He did not record the time of administration nor initial the record. Petitioner contends that the MAR was not complete until the MAR was signed and medication administered with the time noted and that he did not violate respondent's policy by partially pre-writing the notes. Petitioner asserts that he simply forgot to administer the medications, and this omission was not intentional.

Petitioner's testimony merely explains finding eight. This evidence does not refute the fact that petitioner intentionally partially pre-wrote false medication notes and failed to dispense the medications. There is substantial evidence in the record to support finding eight.

#### V. Conclusions of Law Five and Six

**[2]** Petitioner contends that conclusions of law five and six are erroneous as a matter of law, because the actions alleged are not improper personal conduct and are not supported by substantial evidence.

N.C.G.S. § 126-35 (2001) states “[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reason, except for just cause.” “Just cause” can be established by unacceptable job performance or unacceptable personal conduct. 25 NCAC 1J.0604(c) (2002).

Title 25 of the North Carolina Administrative Code defines unacceptable personal conduct as:

(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; . . . (4) the willful violation of known or written work rules; . . . or (6) the abuse of client(s) . . . .

25 NCAC 1J.0614(i) (2002).

This Court delineated the difference between unacceptable job performance and unacceptable personal conduct and held that termination for engaging in the latter category is appropriate for “those actions for which no reasonable person could, or should, expect to receive prior warnings.” *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 679, 443 S.E.2d 114, 120-21 (1994) (quoting *State Personnel Manual*, Sec. 9 at 3; 25 NCAC 1J.0604(b) (1984) (amended March 1994)). The State Personnel Manual lists,

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“careless errors, poor quality work, untimeliness, *failure to follow instructions or procedures*, or a pattern of regular absences or tardiness[.]” as examples of unsatisfactory job performance. *Id.* at 679, 443 S.E.2d at 121 (citing State Personnel Manual, Sec. 9, at 8.1-8.2). Unacceptable personal conduct includes “insubordination, reporting to work under the influence of drugs or alcohol, and stealing or misusing State property.” *Id.*

Conclusions of law five and six hold that petitioner intentionally pre-wrote medication notes describing client responses to medications not administered. The court concluded this action was a falsification of medical records done willfully and intentionally, that jeopardized the care of the clients, and constituted unacceptable personal conduct.

Petitioner contends that he did not willfully falsify medical records, but instead partially pre-wrote the medication notes and neglected to administer the medications. Petitioner argues that the notes were not false until he neglected to give the medications.

Petitioner cites testimony of Emile Archambault, manager of another group home, who admitted pre-writing medication notes, to support his argument that such conduct was common and did not constitute “improper personal conduct.” Petitioner asserts that if his conduct was reprehensible, it only rose to the level of unsatisfactory job performance.

Termination for “just cause” due to unsatisfactory job performance requires the employer to issue prior warnings before termination. *Parks v. Dept. of Human Resources*, 79 N.C. App. 125, 132, 338 S.E.2d 826, 829, *disc. review denied*, 316 N.C. 553, 344 S.E.2d 8 (1986). The agency must give the employee at least “one or more written warnings followed by a warning or other disciplinary action which notifies the employee that failure to make the required performance improvements may result in dismissal.” 25 NCAC 1J.0605(b) (2002). Petitioner received prior warning on 22 September 1997 which cited petitioner for improper personal conduct in not performing his duties as required. This warning was insufficient to terminate petitioner’s employment for “just cause” on the grounds of job performance. If petitioner’s conduct rose to the level of improper personal conduct, his employment could be terminated without any warning.

Petitioner cites *Parks* to support his contention that his actions did not rise to “improper personal conduct.” In *Parks*, a health care

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technician failed to report resident abuse. *Id.* at 127, 338 S.E.2d at 827. This Court held that the negligence was a basis for unsatisfactory job performance but not improper personal conduct. *Id.* at 134, 338 S.E.2d at 830. Similarly, this Court in *Amanini* found that a terminated employee's actions, leaving his nurses' station without notifying his supervisor and abandoning his patients, fell into the category of unsatisfactory job performance. *Amanini*, 114 N.C. App. at 680, 443 S.E.2d at 121.

In both cases, this Court found the employees' behavior insufficient to terminate on the grounds of improper personal conduct. The facts at bar are distinguishable and are sufficient to terminate plaintiff for improper personal conduct under the current statute.

After *Parks* and *Amanini* were decided, the N.C. Administrative Code was amended to add "job-related conduct which constitutes a violation of state or federal law" as grounds for termination for improper personal conduct. 25 NCAC 1J.0614(i)(2) (2002).

Respondent alleges that petitioner's actions in pre-writing the medication notes violated 10 NCAC 14V.0209(c)(4) (2002), which requires that "[a] Medication Administration Record (MAR) of all drugs administered to each client must be kept current. Medications administered shall be recorded immediately after administration." This administrative rule is authorized in Chapter 122C, under which the North Carolina Department of Health and Human Services regulates the licensing and operation of facilities including the group home where petitioner worked, and has the effect of law. *Gainey v. N.C. Dept. of Justice*, 121 N.C. App. 253, 259; 465 S.E.2d 36, 41 (1996) (citation omitted).

Petitioner failed to administer the medications and falsely reported giving them to the clients. The actions of the employees in *Parks* and *Amanini* were omissions to act, not affirmative acts. Petitioner knowingly and falsely pre-wrote the medication records. While petitioner's failure to administer the medications is negligence, his pre-writing the MARs is a "falsification of medical records," a job-related violation of state law.

In addition to intentionally filling out medication administration records without actually administering the medication, the respondent and superior court concluded that petitioner also "pre[wrote] high risk intervention[, ("HRI"),] notes describing the client's responses to taking medications." This conclusion is supported by substantial evidence.

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The record contains the HRI reports from 25 February 1998 regarding patients under petitioner's care. Petitioner's reports contain substantially the same note on every HRI. In the section titled "Narrative Summary of Activity and Client Progress," petitioner wrote "[s]taff monitored and assisted client in taking his A.M. medication. Staff prepared and instructed client in taking said medication. Client evidenced progress toward overall goal. Staff praised client after he took his medication." (Emphasis added).

With respect to one HRI report, the following dialogue occurred at the hearing:

Q. If you'll go about four pages in, [petitioner], where you have the HRI note.

A. Yes, sir.

Q. In the middle of the page it says, "Staff monitored and assisted client in taking his medication."

A. The same generic note, yes, sir.

Q. "Staff prepared and instructed client in taking medication. Client evident [sic] progress towards overall goal. Staff praised client after he took his medication."

A. Uh-huh.

Q. That's a false statement, isn't it?

A. Yes, that's—

Q. The client had got no medication, isn't that true?

A. Yes, sir.

Q. And you made that statement and signed it yourself, is that correct?

A. That was a prewritten statement, yes, sir.

Q. Okay. And it's false.

A. Yes, that one is.

Also, respondent asked petitioner if he "intentionally fill[ed] out these HRI notes prior to the time of the event?" Petitioner answered, "[y]es." Respondent's witness, Dr. Martin, elaborated on the possible dramatic consequences of falsely reporting drug administration. Finding this evidence credible, the trial court did not

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err in concluding that petitioner's acts established unacceptable personal conduct.

#### VI. Findings of Fact Seventeen through Twenty

**[3]** Petitioner argues that findings of fact seventeen through twenty are not supported by substantial evidence and that the trial court erred by concluding that petitioner failed to prove he was terminated for reasons associated with his handicapping condition.

Findings of fact seventeen through twenty state:

17. The job of Youth Program Assistant (Petitioner's job) in high-risk adolescent group homes requires an employee to be able to work all shifts as needed by the Mental Health Center.

18. Petitioner submitted a sick slip to his supervisor requesting a transfer from the night shift because of an alleged sleeping disorder, but Petitioner submitted no other medical information to the Mental Health Center to support this claim. Petitioner refused to sign a medical release form allowing the Mental Health Center to get more information from his doctor regarding his condition. He did not otherwise provide any information regarding his medical condition except his annual physical.

19. Petitioner did not apply for other vacant YPA III positions although he was aware of their availability[.]

20. Petitioner's physical examination completed March 5, 1998; documented no findings other than hypertension.

As to finding of fact 17, the testimony of petitioner, co-worker Mims, and Director of Child and Family Services Jenkins, showed that most YPAs worked a specific shift. There is no evidence to support this finding other than respondent's contention that petitioner was expected to work all shifts needed. Substantial evidence supports the contrary finding. Finding of fact 17 is contrary to substantial evidence in the whole record.

Finding of fact 18 is also not supported by substantial evidence in the record. The testimony of petitioner, Jenkins, and Murphy, Residential Services Supervisor, supported petitioner's contention that respondent was aware of petitioner's health problems by presentation of prescriptions. Petitioner submitted a sick slip to Mr. Mitchell, petitioner's immediate supervisor, and requested transfer to the day shift. Mr. Mitchell spoke to Diane Toler, Human Resources



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[154 N.C. App. 71 (2002)]

Director for respondent. Toler advised Mitchell to try and obtain a medical release form for petitioner's doctor. Respondent never requested such a form. Respondent's policy was silent on what documentation was needed to show a disability and did not mandate a particular form. The trial court erred in concluding that petitioner only provided respondent with a sick slip. Uncontested evidence shows that petitioner also provided his prescriptions. Petitioner's failure to sign a medical release is supported by the substantial evidence. Its relevance is dubious given the testimony of petitioner that respondent never requested a form and the testimony of Toler that respondent's policy did not mandate its use.

Finding of fact 19, which states petitioner did not apply for other vacant YPA III positions although he knew of their availability, is not supported by substantial evidence. Several exhibits evidence lateral transfer requests by petitioner. The finding is not supported by any evidence and is contradicted by substantial evidence.

Finding of fact 20, that petitioner's physical examination documented no findings other than hypertension, is supported by the examination record. Petitioner alleges that the substantial evidence bears witness to petitioner's other medical problems. Presuming that to be true does not change the validity of the conclusions of the physical examination. Substantial evidence in the record supports the trial court's finding this fact.

### VII. Disability Discrimination

[4] Although petitioner has alleged and shown there is no rational basis in the evidence for part of findings of fact 17, 18, and 19, petitioner does not assert that he is "disabled" and entitled to the protection of the North Carolina Persons with Disabilities Protection Act, ("NCPDPA") and the Americans with Disabilities Act, ("ADA"). N.C.G.S. § 168A (2001); 42 U.S.C. § 12102(2) (2001).

To prevail on an ADA claim, petitioner must prove that: (1) he has a disability as defined by the ADA; (2) he is qualified for the job; and (3) he was unlawfully discriminated against by an employer because of his disability. *Johnson v. Trustees of Durham Tech Cmty. Coll.*, 139 N.C. App. 676, 684, 535 S.E.2d 357, 363 (2000) (citing *Martinson v. Kinney Shoe Corp.*, 104 F.3d 683 (4th Cir. 1997)). Under the ADA, the term "disability" is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual[.]" 42 U.S.C. § 12102(2)(A) (2001). "Major life activi-

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ties” are defined as those of central importance to daily life. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197, 151 L. Ed. 2d 615, 631 (2002). “The impairment’s impact must also be permanent or long-term.” *Id.* at 196, 151 L. 2d. 2d at 631.

Under NCPDPA, a “[p]erson with a disability” means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment.” N.C.G.S. § 168A-3 (2001). The term “[p]hysical or mental impairment” in this subdivision, “excludes (A) sexual preferences; (B) active alcoholism or drug addiction or abuse; and (C) *any disorder, condition or disfigurement which is temporary in nature leaving no residual impairment.*” N.C.G.S. § 168A-3 (2001) (emphasis supplied).

Petitioner discussed his headaches with Supervisor Mitchell. He also showed his drug prescriptions to Mitchell, Murphy, and Jenkins. These facts could be sufficient for respondent to find and treat petitioner as a “person with a disability.” Petitioner failed to fully inform respondent of his condition. Petitioner failed to prove that the depression and sleep disorder qualify as “physical or mental impairments.” There is no showing that either condition is *permanent or long-term* as required by the North Carolina statute and federal case law. N.C.G.S. § 168A-3(7)(a)(iii)(c) (2001), *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197, 151 L. Ed. 2d 615, 631 (2002).

We find no error in the trial court’s conclusion that petitioner failed to prove his termination resulted from disability discrimination.

### VIII. Summary

There was a rational basis in the evidence for the trial court to make findings of fact seven and eight. These findings support the trial court’s conclusions of law five and six.

Findings of fact seventeen and nineteen were not supported by substantial evidence in the whole record. Finding twenty was fully supported, and finding eighteen was partially supported by the evidence.

Findings of fact seventeen through twenty pertain to petitioner’s claim of disability discrimination. The lack of evidence to support these findings is not reversible error. Petitioner failed to prove a claim of disability discrimination.

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[154 N.C. App. 83 (2002)]

We affirm the award of summary judgment by the trial court, that petitioner engaged in unacceptable personal conduct when he falsified the MARs in violation of state law.

Affirmed.

Chief Judge EAGLES and THOMAS concur.

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TERRY VARES, INDIVIDUALLY, AND AS GUARDIAN AD LITEM FOR JUSTICE VARES, PLAINTIFF  
v. GREGORY VARES, BERT L. BENNETT, JR., JOHN BENNETT, SEAN  
MCPARTLAND, AND ANN BENNETT PHILLIPS, DEFENDANTS

No. COA01-1411

(Filed 19 November 2002)

**1. Agency— injury during family farm day—activities not planned at owner's request**

Defendant Bennett had no liability based on agency where his grandson was injured by a falling tree on a day when Bennett family members performed maintenance on Bennett's farm. Bennett's daughter, defendant Phillips, planned activities for the family's "Farm Day," but there was no evidence that Phillips was acting on Bennett's behalf or at his request, or that Phillips's actions were subject to Bennett's control.

**2. Premises Liability— injured child—supervision by parent**

The trial court properly granted summary judgment to defendant Bennett on a premises liability claim where Bennett's grandson was injured while his father was cutting down trees on Bennett's land. The father was actively supervising his son and was performing the act which plaintiff asserts was inherently dangerous, and the duty of care to protect the grandson belonged to his father and not to Bennett.

**3. Judgments— entry of default—setting aside—delay caused by insurance company**

The trial court did not abuse its discretion by setting aside an entry of default against defendant Phillips where her initial delay in answering the complaint was primarily due to negligence

**VARES v. VARES**

[154 N.C. App. 83 (2002)]

by the insurance company. Moreover, the delay from setting aside the entry of default was short and caused no prejudice to plaintiff.

**4. Negligence-injury to child— supervision by parent**

The trial court did not err by granting summary judgment for defendant Phillips on a negligence claim where Justice Vares was injured during the family's "Farm Day" while his father performed maintenance activities scheduled by Phillips. Justice was supervised by his father; there was no evidence that Phillips assumed supervision of Justice, owed a duty to Justice, or injured Justice by her actions.

**5. Agency— coordinator of family farm maintenance—voluntary family event—no agency**

Summary judgment for defendant Phillips on an agency claim was proper where six-year-old Justice Vares was injured during the family's "Farm Day" while his father cut a tree. Although Phillips organized and coordinated the Farm Day, it was a voluntary family event that took place each year for the benefit of the entire extended family and there was no evidence Vares or other family members acted on Phillips's behalf or that they were obligated to perform the specific tasks assigned to them.

**6. Appeal and Error— record—failure to include depositions not submitted—no error**

The trial court did not err by not admitting into the record in a negligence action certain depositions where there was no evidence that plaintiff ever offered the depositions by physically conveying them to the judge or otherwise submitting them to the court's review. Moreover, the trial court did not rely on the depositions in ruling on the motions and the exclusion of the evidence from the record could not have prejudiced plaintiff.

Appeal by plaintiff from order entered 5 February 2001 by Judge A. Leon Stanback, Jr., in Chatham County Superior Court, and from judgments entered 10 May and 11 May 2001 by Judge Richard L. Doughton in Chatham County Superior Court. Heard in the Court of Appeals 20 August 2002.

## VARES v. VARES

[154 N.C. App. 83 (2002)]

*Katherine E. Jean and Edwards & Atwater, by W. Ben Atwater, Jr., for plaintiff appellant.*

*Ragsdale Liggett PLLC, by George R. Ragsdale and Andrew C. Buckner, for defendant appellee Bert L. Bennett, Jr. Broughton Wilkins Sugg Hall & Thompson, PLLC, by R. Palmer Sugg, for defendant appellee Ann Bennett Phillips.*

TIMMONS-GOODSON, Judge.

Terry Vares (“plaintiff”), mother and guardian ad litem to her minor son, Justice Vares (“Justice”), appeals from judgments by the trial court granting summary judgment in favor of her father, Bert L. Bennett, Jr. (“Bennett”), and her sister, Ann Bennett Phillips (“Phillips”) (collectively, “defendants”). Plaintiff also appeals from an order of the trial court setting aside entry of default against Phillips. For the reasons stated herein, we affirm the order and judgments of the trial court.

The pertinent facts of this appeal are as follows: On 6 April 1999, plaintiff filed a complaint in Chatham County Superior Court on behalf of her son, Justice, seeking recovery for severe and permanent injuries he suffered when a falling tree struck his head. The complaint filed by plaintiff alleged that Bennett was negligent in allowing inherently dangerous activity to occur on his property without taking adequate precautions to ensure Justice’s safety. On 17 October 2000, plaintiff filed an amended complaint, adding Phillips as a defendant to the suit. On 6 December 2000, plaintiff obtained an entry of default against Phillips, but the trial court set the entry of default aside by order entered 5 February 2001. Phillips filed her answer to the complaint the same day. Defendants thereafter filed motions for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, which motions came before the trial court on 30 April 2001.

The evidence before the trial court tended to show the following: On 6 April 1996, six-year-old Justice accompanied his parents to the home of his grandfather, defendant Bennett, for a family gathering that the Bennett family members referred to as “Farm Day.” On each “Farm Day,” Bennett family members typically performed various tasks related to the general maintenance of the fifty-acre property.

On the “Farm Day” at issue (“1996 Farm Day”), Justice’s father, Gregory Vares (“Vares”), assisted two other men in trimming and cut-

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ting down trees on the property with a chain saw. Justice was present and assisted his father by pulling “brush from around the tree.” Before he began cutting a certain tree, Vares instructed his son to stand in a particular area, some distance away from the tree. While cutting the tree, Vares noticed that Justice had moved from his original location to an area closer to the tree being felled. Vares then stopped cutting the tree and ordered Justice to return to his original location. Justice obeyed, and Vares continued cutting the tree. As the tree began to fall, Justice inexplicably darted into its path. The falling tree then struck Justice on the head, severely injuring him.

The evidence further tended to show that Bennett’s daughter, defendant Ann Bennett Phillips, was responsible for planning and assigning to family members the activities for the 1996 Farm Day. Plaintiff alleged that Phillips negligently assigned the task of cutting trees to Vares and the other men without first ascertaining their training or expertise to perform such activities. Moreover, plaintiff alleged that Phillips failed to adequately ensure Justice’s safety.

After considering all of the evidence and arguments by counsel, the trial court concluded that both defendants were entitled to summary judgment as a matter of law and accordingly entered such judgments. Plaintiff appeals.

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The issues on appeal are whether the trial court erred in (1) granting summary judgment to Bennett; (2) setting aside the entry of default against Phillips; (3) granting summary judgment to Phillips; and (4) declining plaintiff’s request to introduce certain depositions in the record on appeal. We address these issues in turn.

*Standard of Review for Summary Judgment*

Summary judgment is properly granted where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001); *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79, *disc. review denied*, 355 N.C. 747, 565 S.E.2d 192 (2002). Where the movant establishes that no claim for relief exists, or that the claimant cannot overcome an affirmative defense or legal bar to the claim, the movant is entitled to summary judgment. *See Wilder v. Hobson*, 101 N.C. App. 199, 201, 398 S.E.2d 625, 627 (1990). In determining the grounds for summary judgment, the trial court must view

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the evidence in the light most favorable to the non-movant. *See Bostic Packaging, Inc.*, 149 N.C. App. at 830, 562 S.E.2d at 79.

In a negligence claim, summary judgment is appropriate where the plaintiff's forecast of evidence is insufficient to support an essential element of negligence. *See Patterson v. Pierce*, 115 N.C. App. 142, 143, 443 S.E.2d 770, 771, *disc. review denied*, 337 N.C. 803, 449 S.E.2d 749 (1994). In order to establish a *prima facie* case for negligence, the plaintiff must show the following essential elements: (1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered damages as a result of the injury. *See id.* at 144, 443 S.E.2d at 772.

*Defendant Bert L. Bennett, Jr.*

Plaintiff argues that there are genuine issues of material fact precluding summary judgment in favor of defendant Bennett, and that the trial court therefore erred in granting such judgment. Plaintiff contends that there was evidence that defendant Phillips acted pursuant to authority granted by Bennett to Phillips as his agent. Plaintiff also asserts that Vares acted as an agent for Phillips, and that any negligence by Vares or Phillips is therefore imputed to Bennett. Plaintiff further asserts that the felling of trees with a chain saw is an inherently dangerous activity, and that Bennett had a non-delegable duty as a landowner to take adequate precautions to protect all lawful visitors to the property. We examine these arguments in turn.

*A. Agency*

**[1]** An agent is "one who acts for or in the place of another by authority from the other." *American Tours, Inc. v. Liberty Mutual Ins. Co.*, 315 N.C. 341, 349, 338 S.E.2d 92, 97 (1986). Although the question of agency is a factual one and therefore generally a matter for the jury, "[i]f only one inference can be drawn from the facts then it is a question of law for the trial court." *Hylton v. Koontz*, 138 N.C. App. 629, 635, 532 S.E.2d 252, 257 (2000), *disc. review denied*, 353 N.C. 373, 546 S.E.2d 603 (2001). Thus, we must examine the evidence to determine whether genuine issues of material fact exist as to whether Phillips acted pursuant to authority granted to her by Bennett.

Although plaintiff cites to disputed testimony regarding Bennett's general *knowledge* of the activities that would take place during the 1996 Farm Day, there is no evidence in the record that Phillips was acting on Bennett's behalf or at his *request*. All of the parties agree

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that Phillips organized the 1996 Farm Day, assigning the chores to be done and generally coordinating the events. Bennett's uncontradicted testimony was that Farm Day occurred each year "by and large for my children who wanted to be a part of keeping the place up," adding that it was "not at my insistence." There was no evidence that Bennett either requested the 1996 Farm Day to be held or asked for Phillips' assistance in arranging such an event.

Moreover, there was no evidence that Phillips' actions in organizing the 1996 Farm Day and assigning tasks were subject to Bennett's control. See *Outer Banks Contractors v. Daniels & Daniels Construction*, 111 N.C. App. 725, 730, 433 S.E.2d 759, 762 (1993) (stating that agency exists where the actions by the agent are subject to the principal's control). Phillips testified that she coordinated all of the activities, including assigning chores to various family members. Although there was some evidence that Phillips consulted her father before deciding what type of general maintenance should be performed that year, there was no evidence that Bennett reviewed the chore list created by Phillips or the particular assignments, or was present when the activities were performed. There was a similar lack of evidence that Vares acted as Bennett's agent. Because there was no evidence that Phillips or Vares acted as Bennett's agents, we reject this ground as a basis for liability on Bennett's part.

*B. Premises Liability*

**[2]** Plaintiff further argues that Bennett is liable as the landowner of the property where Justice was injured. As a landowner, plaintiff asserts that Bennett had a non-delegable duty to take necessary precautions to protect Justice from inherently dangerous activity occurring on the property.

A landowner ordinarily owes a duty "to exercise ordinary care for the protection of one of tender years, after his presence in a dangerous situation is or should have been known." *Freeze v. Congleton*, 276 N.C. 178, 182, 171 S.E.2d 424, 426 (1970). This duty of care does not apply, however, where the minor child is being actively supervised by a parent who has full knowledge of the condition of the premises and appreciation of the danger thereby presented. See *id.*; see also *Watson v. Nichols*, 270 N.C. 733, 736, 155 S.E.2d 154, 157 (1967) (stating that, "when parents are present, in charge of their children of tender years, responsibility for their care and safety falls on the parents"); compare *Mitchell v. K.W.D.S., Inc.*, 26 N.C. App. 409, 413, 216 S.E.2d 408, 412 (holding that, where a minor child is injured



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because of a dangerous condition on the premises, the fact that a parent or guardian is “somewhere on the premises” but not actually present at the time of injury “does not absolve the proprietor of liability for injuries to the child caused by the proprietor’s negligent failure to maintain the premises in a reasonably safe condition”), *cert. denied*, 288 N.C. 242, 217 S.E.2d 665 (1975), and *Foster v. Weitzel*, 17 N.C. App. 90, 92, 193 S.E.2d 329, 330-31 (1972) (holding that the proprietor of a laundromat could be held liable for injuries suffered by the minor plaintiff in the presence of her mother where the mother had no knowledge of the dangerous condition on the premises), *cert. denied*, 282 N.C. 672, 194 S.E.2d 152 (1973). Similarly, in the context of attractive nuisance cases, it is incumbent upon parents to warn and guard their children against “‘common dangers, existing in the order of nature’” and where they fail to do so, “‘they should not expect to hold others responsible for their own want of care.’” *Fitch v. Selwyn Village*, 234 N.C. 632, 635, 68 S.E.2d 255, 257 (1951) (quoting *Peters v. Bowman*, 115 Cal. 345, 356, 47 P. 598, 599 (1897)).

In contrast to *Mitchell* and *Foster*, the evidence in the instant case shows that Vares was actively supervising his son when the injury occurred, and that he was actually performing the task that plaintiff asserts was inherently dangerous. Vares testified that he fully appreciated the potential hazards associated with felling trees, and that he should not have permitted his son to be present while such activity was taking place. Vares stated that he was “against [taking Justice to Farm Day] to begin with,” and that when he was asked to bring a chain saw, he “realized that [he] wouldn’t be able to watch the children as well as run a chain saw safely.” The evidence further shows that there were other adults present on the property who could have supervised Justice.

When Vares initially began cutting the tree, he noticed that Justice had moved from the safe location where Vares had instructed him to remain. Vares ordered Justice to return to the original position, and Justice obeyed. At that point, the evidence shows that, although Vares (1) understood the hazardous nature of the work; (2) knew that his supervision of Justice while performing such work was inadequate; and (3) had actual notice of the potential for Justice to abandon his position of relative safety, Vares nevertheless allowed Justice to remain in the vicinity of the work site and proceeded to fell the tree that injured his son.

Because the evidence establishes that Justice was injured while being actively supervised by his father, who was actually performing

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the activity that plaintiff asserts was inherently dangerous, the duty of care to protect Justice belonged to Vares and not to Bennett. We therefore hold that the trial court properly granted summary judgment to defendant Bennett.

*Defendant Ann Bennett Phillips*

Plaintiff contends that the trial court erred in setting aside the entry of default against Phillips. Plaintiff further asserts that genuine issues of material fact exist which preclude summary judgment in favor of Phillips. Specifically, plaintiff argues that Phillips was negligent in assigning Vares and the other men the task of cutting trees, and in failing to provide supervision for Justice. Plaintiff further argues that Vares and the other men cutting trees acted as agents for Phillips, and that any negligence on their part is imputed to her.

*A. Entry of Default*

**[3]** Plaintiff asserts that the trial court improperly granted Phillips' motion to set aside the entry of default against her. A judge may set aside an entry of default "[f]or good cause shown." N.C. Gen. Stat. § 1A-1, Rule 55(d) (2001). "A trial court's determination of 'good cause' to set aside an entry of default will not be disturbed on appeal absent an abuse of discretion." *Brown v. Lifford*, 136 N.C. App. 379, 382, 524 S.E.2d 587, 589 (2000). Whether or not "good cause" exists depends on the circumstances in a particular case, and, where merited, "an inadvertence which is not strictly excusable may constitute good cause, particularly 'where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant.'" *Peebles v. Moore*, 48 N.C. App. 497, 504, 269 S.E.2d 694, 698 (1980) (quoting *Whaley v. Rhodes*, 10 N.C. App. 109, 112, 177 S.E.2d 735, 737 (1970)), *affirmed as modified*, 302 N.C. 351, 275 S.E.2d 833 (1981). Entry of default is generally disfavored, and thus any doubts concerning such entry "should be resolved in favor of setting aside an entry of default so that the case may be decided on its merits." *Id.* at 504-05, 269 S.E.2d at 698.

In the instant case, the evidence presented to the trial court at the hearing for Phillips' motion to set aside the entry of default tended to show the following: Plaintiff added Phillips as a defendant to the instant lawsuit after Phillips gave a deposition at which she was unrepresented by counsel. Plaintiff served Phillips with a copy of the amended complaint on 28 October 2000. Phillips took the documents to her insurance representative on 30 October 2000, and followed up thereafter with the representative on 22 November 2000. On 6

## VARES v. VARES

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December 2000, entry of default was entered against Phillips. On 18 December 2000, Phillips' insurance company retained counsel for the case, who immediately contacted counsel for plaintiff and requested that the entry of default be voluntarily set aside. Counsel for plaintiff declined to agree to set aside the entry of default, although other defendants to the suit had not yet filed their answers.

Under the circumstances, we conclude that the trial court did not abuse its discretion in setting aside the entry of default. The evidence showed that the delay in answering plaintiff's complaint was primarily due to negligence by Phillips' insurance company rather than negligence by Phillips. *See Whaley*, 10 N.C. App. at 112, 177 S.E.2d at 737 (affirming the trial court's order setting aside entry of default where it was shown that the defendant justifiably relied upon his insurance company to handle the complaint served against him). Moreover, the delay presented by setting aside the entry of default was relatively short and caused no prejudice to plaintiff. We therefore overrule this assignment of error. We now examine whether the trial court properly granted summary judgment in favor of Phillips.

*B. Summary Judgment*

[4] As noted *supra*, in order to prevail on a negligence claim, plaintiff must demonstrate that the defendant owed plaintiff a duty of reasonable care, and that the defendant's breach of that duty proximately resulted in injury to plaintiff. *See Pulley v. Rex Hospital*, 326 N.C. 701, 704-05, 392 S.E.2d 380, 383 (1990). Plaintiff presented no evidence that Phillips owed any particular duty to Justice, or that her actions resulted in the injury to Justice. There was no evidence that Phillips agreed to directly supervise Justice or assumed such duty at any point in time. Although Phillips informed Justice's mother that there would be adults on the premises who would supervise Justice, the evidence also shows that Justice was in fact being supervised by his father at the time of the injury.

[5] Plaintiff has also presented insufficient evidence of any agency relationship between Phillips and Vares and the other men cutting the tree. Although Phillips organized and coordinated the 1996 Farm Day, it is clear from the evidence that Farm Day was a voluntary family event that took place each year for the benefit of the entire extended Bennett family, rather than for the benefit of Phillips herself. As such, there was no evidence that Vares or the other family members acted on Phillips' behalf in performing their work, or that they were obligated to perform the specific tasks assigned to them. We hold there-

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fore that the trial court properly granted summary judgment in favor of Phillips, and we overrule this assignment of error.

*Depositions*

**[6]** Plaintiff further assigns error to the trial court's alleged refusal to admit into evidence certain depositions. The transcript of the summary judgment hearing reveals that, after the judge granted defendants' motions for summary judgment, the following colloquy took place:

[Counsel for Plaintiff]: I want to make sure that all the depositions and interrogatories are in evidence.

The Court: Which ones are you talking about?

. . . .

The Court: I have given her everything that was handed up to me, and that includes the depositions of the parties that were—that were handed up and the notebook that was handed up by [counsel for Bennett] that includes several depositions. But everything I looked at should be made a part of this record.

[Counsel for Plaintiff]: They're not originals, so I don't guess you have a problem with that.

The Court: I don't have any problem with that. If y'all want to put the originals in evidence right now, fine. Or between now and Wednesday. Everything I looked at should be made a part of the evidence. Does everybody agree on that?

[Counsel for Bennett]: I agree.

[Counsel for Phillips]: I do, Your Honor. I believe that the—the deposition of Sean McPartland was never referenced and you did not look at it. I believe that is the only deposition that you did not have access to.

The Court: Well, do you want that put in as part of the record?

[Counsel for Plaintiff]: I would like all of them put in.

. . . .

[Counsel for Bennett]: I never—I did not refer to it, so I would not want it put in.

The Court: Well, just what I looked at.

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[Counsel for Bennett]: I didn't refer to it.

The Court: Whatever is there is what I looked at and what y'all handed up to me.

[Counsel for Plaintiff]: I think you looked at Greg—

[Counsel for Phillips]: Greg, Bert, Terry.

[Counsel for Bennett]: Greg, Bert, and Terry.

No further statements were made regarding the depositions. Plaintiff now contends that the trial court "erred in refusing to admit into evidence the depositions of John Bennett, Sean McPartland and Bryan Wagner." We disagree.

There is no evidence that counsel for plaintiff ever offered the depositions into evidence by physically conveying them to the judge or otherwise submitting them to the court's review. Trial counsel made no arguments at the hearing based on the depositions at issue or otherwise referred to the depositions until after the trial court ruled on the summary judgment motion. Counsel for plaintiff made no objection to the trial court's alleged "refusal" to consider the depositions. As the depositions were never introduced into evidence, and as the trial court therefore did not rely on the depositions in ruling on the motions, the trial court did not err in excluding this evidence from the record on appeal after ruling on the motions for summary judgment.

We moreover note that, according to plaintiff, the depositions at issue concern two eyewitness accounts of the accident, as well as expert testimony concerning the allegedly dangerous nature of cutting trees with a chain saw. Further, the affidavit submitted by plaintiff's expert witness, Bryan Wagner, regarding his opinion as to the inherently dangerous nature of cutting trees with a chain saw was submitted into evidence and before the court. Given our conclusion that neither Bennett nor Phillips owed a legal duty to Justice, the exclusion of evidence regarding the events of the accident or additional evidence concerning the nature of the activity causing the accident could not have prejudiced plaintiff. We overrule this assignment of error.

In conclusion, we hold that the trial court properly granted summary judgment in favor of defendants. We also hold that the trial court did not abuse its discretion in setting aside the entry of default. The order and judgments of the trial court are hereby

**PAGE v. MANDEL**

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

Affirmed.

Judges GREENE and HUNTER concur.

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EDITH H. PAGE, PLAINTIFF-APPELLANT v. DALE M. MANDEL, M.D., DAVIDSON SURGICAL ASSOCIATES, INC., DONALD R. BOSKEN, M.D., CHAIR CITY FAMILY PRACTICE, P.A., CEDRIC R. DEANG, M.D., THOMASVILLE SURGICAL ASSOCIATES, INC., COMMUNITY GENERAL HEALTH PARTNERS, INC. D/B/A COMMUNITY GENERAL HOSPITAL, DEFENDANTS-APPELLEES

No. COA02-11

(Filed 19 November 2002)

**1. Civil Procedure— motion to dismiss—converted to motion for more definite statement**

The trial court did not err by treating a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b) as a motion for a more definite statement under N.C.G.S. § 1A-1, Rule 12(e).

**2. Pleadings— vague allegations—amended complaint required**

The trial court did not abuse its discretion by requiring plaintiff to file a second amended complaint in a medical malpractice action where the court determined that plaintiff's allegations were not specific as to defendant Community Hospital and that a more definite statement would be the way to remedy this deficiency.

**3. Pleadings— order based on prior order—first order valid**

The trial court did not abuse its discretion in a medical malpractice action by dismissing an amended complaint based on plaintiff's violation of an allegedly improper prior order for a more definite statement. The first order did not result from an abuse of discretion.

**4. Pleadings— sanctions—failure to consider lesser remedies**

The trial court abused its discretion in a medical malpractice action by granting defendant-hospital's motion to dismiss an amended complaint as a sanction for failing to comply with a prior order without considering lesser sanctions.

## PAGE v. MANDEL

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

Appeal by plaintiff from order dated 8 December 1999 by Judge Sanford L. Steelman, Jr. and order entered 16 February 2000 by Judge Mark Klass in Superior Court, Davidson County. Heard in the Court of Appeals 18 September 2002.

*The Law Office of Herman L. Stephens, by Herman L. Stephens, for plaintiff-appellant.*

*Wilson & Iseman, L.L.P., by G. Gray Wilson and Linda L. Helms, for defendants-appellees.*

McGEE, Judge.

This is an appeal by Edith H. Page (plaintiff) from an order requiring plaintiff to file a second amended complaint and an order striking and dismissing her first amended complaint for failure to comply with an order of the trial court to file a more definite statement. Plaintiff alleged in her complaint that on 10 March 1996 she was admitted by Donald Bosken, M.D. (Dr. Bosken) to Community General Hospital, owned by Health Partners, Inc. d/b/a Community General Hospital (Community General), allegedly suffering from diverticulitis. Three days later Cedric R. Deang, M.D. (Dr. Deang) conducted a consultation examination of plaintiff and diagnosed plaintiff as having diverticulitis. Dale M. Mandel, M.D. (Dr. Mandel) examined plaintiff on 13 March 1996, recommended immediate surgery, and performed surgery that day. Plaintiff remained a patient at Community General from 10 March 1996 until 26 March 1996.

Dr. Mandel saw plaintiff for follow-up visits in early April 1996. Plaintiff was readmitted to Community General on 9 April 1996 by Dr. Kerry A. Critin (Dr. Critin) of Davidson Surgical Associates, Inc. (Davidson Surgical) for colitis with intractable nausea, vomiting, diarrhea and pain. Plaintiff was discharged from Community General on 13 April 1996. Dr. Mandel saw plaintiff for another follow-up visit on 15 April 1996. Plaintiff alleged that on or about 20 April 1996 she had pain and swelling in her left leg, which she reported to Davidson Surgical on 22 April 1996 and was seen by Dr. Mandel the following day. Dr. Mandel determined plaintiff had acute deep vein thrombosis of the left leg. Plaintiff was again admitted to Community General. Plaintiff alleged that her deep vein thrombosis was "to a large extent a permanent condition."

Plaintiff alleged that defendants were negligent in not promptly performing surgery and in not administering prophylaxis for deep vein thrombosis during the period following her surgery until the

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deep vein thrombosis manifested itself on or about 20 April 1996. Plaintiff further alleged that this delay and failure to provide care proximately caused injury to her.

Plaintiff filed a motion on 9 March 1999 seeking an order extending the statute of limitations in a medical malpractice action. The trial court granted plaintiff's motion, extending the statute of limitations to 8 July 1999. Plaintiff filed her complaint on 8 July 1999, seeking damages for alleged medical malpractice by defendants. A civil summons was also issued on 8 July 1999 and was served on defendant Community General on 14 July 1999. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 15(a), plaintiff filed an amended complaint on 10 September 1999. Defendants answered the amended complaint and moved to dismiss the amended complaint on 3 October 1999. On 6 December 1999 the trial court held a hearing on Community General's motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). In an order dated 8 December 1999, the trial court treated Community General's Rule 12(b)(6) motion to dismiss as a motion for more definite statement under N.C. Gen. Stat. § 1A-1, Rule 12(e), and ordered plaintiff to file a second amended complaint as to Community General within thirty days, alleging "specific acts of negligence of the defendant Community General . . . , whether these acts [were] based upon the conduct of agents of [Community General], and the basis for any [necessary] agency relationship." The trial court noted that the order would not prevent Community General from challenging the second amended complaint by a Rule 12(b)(6) motion.

Community General filed a motion to strike and dismiss plaintiff's amended complaint on 19 January 2000 pursuant to N.C.G.S. § 1A-1, Rules 12(b)(6) and 12(e). However, in its motion Community General only argued for dismissal on the basis of a violation of the trial court's order pursuant to Rule 12(e). Community General based its motion on the fact that thirty days had elapsed since entry of the order directing plaintiff to file a second amended complaint within thirty days as to Community General, and plaintiff had failed to do so. The trial court entered an order on 16 February 2000, granting Community General's motion to strike and dismiss with prejudice plaintiff's amended complaint. Plaintiff appealed from both the 8 December 1999 order and the 16 February 2000 order.

In an order dated 20 December 2001, the trial court settled the record on appeal. The order excluded plaintiff's proposed second amended complaint. In refusing to allow the second amended complaint to be included in the record on appeal, the trial court stated



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that plaintiff proffered to the court her proposed second amendment to complaint for the first time at the hearing on [Community General's] motion to strike and dismiss plaintiff's amended complaint on February 7, 2000, that [Community General] objected to the court's consideration of the proposed second amendment to complaint, and that plaintiff's proposed second amendment to complaint was not accepted or considered by the court due to the fact that it was not timely filed in accordance with the prior order of the court entered December 8, 1999.

## I.

[1] Plaintiff argues in her second assignment of error that the trial court erred in its 8 December 1999 order by treating Community General's motion to dismiss as a motion for more definite statement under N.C.G.S. § 1A-1, Rule 12(e). A trial court may, in the appropriate case, treat a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b) as a motion for a more definite statement under N.C.G.S. § 1A-1, Rule 12(e). *See Manning v. Manning*, 20 N.C. App. 149, 154, 201 S.E.2d 46, 50 (1973). The trial court in this case cited *Manning* in its 8 December 1999 order treating the motion to dismiss as a motion for more definite statement.

This rule is consistent with the ability our courts have traditionally enjoyed of seeking a more definite statement *ex mero motu*. *See, e.g., Bowling v. Bank*, 209 N.C. 463, 184 S.E. 13 (1936); *Hutchins v. Mangum*, 198 N.C. 774, 153 S.E. 409 (1930); *Buie v. Brown*, 104 N.C. 335, 10 S.E. 465 (1889); *see also Umstead v. Durham Hosiery Mills, Inc.*, 578 F. Supp. 342, 344 (M.D.N.C. 1984) (denying the defendant's motion to dismiss but requiring, *sua sponte*, the plaintiff to file a more definite statement pursuant to Rule 12(e)). The rule is also consistent with the practice of federal courts under the analogous federal rule. *See Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 367 (E.D. La. 1997) ("The court may treat a Rule 12(b)(6) dismissal motion as a motion for a more definite statement, even if the motion is not so styled."), *affirmed*, 197 F.3d 161 (5th Cir. 1999); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1541 (N.D. Cal. 1987) ("The Court may treat a Rule 12(b)(6) dismissal motion as a Rule 12(e) motion for a more definite statement."), *reconsideration granted in part on other grounds*, 694 F. Supp. 707 (N.D. Cal. 1988); *In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 350 (E.D. Pa. 1976) ("[T]he Court may consider *sua sponte* plaintiffs' motion to dismiss under Rule 9(b) as a motion for a more definite statement.") (citations omitted); 5A Charles Alan Wright & Arthur R. Miller, *Federal*

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*Practice & Procedure* § 1378 (2d ed. 1990). While we are clearly not bound by decisions from federal courts concerning their rules of procedure when deciding cases concerning application of the North Carolina Rules of Civil Procedure, such decisions are often instructive in reaching our own decisions. *Turner v. Duke University*, 325 N.C. 152, 164, 381 S.E.2d 706, 713 (1989). We hold that the trial court did not err in its 8 December 1999 order by treating Community General's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b) as a motion for more definite statement under N.C.G.S. § 1A-1, Rule 12(e). Plaintiff's second assignment of error is overruled.

## II.

[2] Plaintiff argues in her third assignment of error that the entry of an order requiring plaintiff to file a second amended complaint pursuant to N.C.G.S. § 1A-1, Rule 12(e) was an abuse of the trial court's discretion. As plaintiff admits in her assignment of error, a trial court's grant or denial of a motion for more definite statement is subject to review only for an abuse of discretion. *Ross v. Ross*, 33 N.C. App. 447, 454, 235 S.E.2d 405, 410 (1977). An abuse of discretion occurs only when "a decision is 'manifestly unsupported by reason' or 'so arbitrary that it could not have been the result of a reasoned decision.'" *Frost v. Mazda Motors of Am., Inc.*, 353 N.C. 188, 199, 540 S.E.2d 324, 331 (2000) (quoting *Little v. Penn Ventilator Co.*, 317 N.C. 206, 218, 345 S.E.2d 204, 212 (1986) (citations omitted)). In the present case, the trial court determined that plaintiff's allegations were not specific as to Community General's alleged negligence and agency relationship. Plaintiff failed to allege specific acts of negligence by Community General or its employees in her complaint. Plaintiff referred to Community General only in her general references to the negligence of the collective "defendants." In actuality these references are nothing more than reiterations of the specific acts of negligence plaintiff alleged certain physician defendants committed, with no allegation of how these acts can be attributed to Community General. The trial court determined that a motion for a more definite statement would be the appropriate means for allowing plaintiff to remedy this deficiency in her complaint. We cannot say that this decision was " 'manifestly unsupported by reason.' " *Frost*, 353 N.C. at 199, 540 S.E.2d at 331 (quoting *Little*, 317 N.C. at 218, 345 S.E.2d at 212 (citations omitted)). We hold that the trial court did not abuse its discretion in granting Community General's converted motion for a more definite statement. Plaintiff's third assignment of error is overruled.

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## III.

**[3]** In her fourth assignment of error plaintiff argues that the trial court erred in its 16 February 2000 order in striking and dismissing her amended complaint against Community General based on plaintiff's violation of the 8 December 1999 order granting Community General's converted motion for a more definite statement. Plaintiff correctly asserts that no valid order can be based on violation of another order which is itself invalid. *See Collins v. Collins*, 18 N.C. App. 45, 51, 196 S.E.2d 282, 286 (1973). However, as we have already determined, the 8 December 1999 order granting Community General's converted motion for a more definite statement was valid and not an abuse of the trial court's discretion. Therefore, we overrule plaintiff's fourth assignment of error.

## IV.

**[4]** In her fifth assignment of error, plaintiff argues that the trial court's grant of Community General's 19 January 2000 motion to strike and dismiss plaintiff's amended complaint was an abuse of discretion. Plaintiff contends that the trial court dismissed her amended complaint pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b) for failure to comply with a court order. As plaintiff points out, under N.C.G.S. § 1A-1, Rule 41(b), a "dismissal is the most severe sanction available" and should only be imposed "when lesser sanctions are not appropriate to remedy" the situation. *Wilder v. Wilder*, 146 N.C. App. 574, 575-76, 553 S.E.2d 425, 426-27 (2001). Plaintiff argues that the trial court did not consider lesser sanctions before striking and dismissing her amended complaint, thereby abusing its discretion. *See id.*

Community General counters that the trial court struck and dismissed plaintiff's amended complaint under N.C.G.S. § 1A-1, Rule 12(e), not under N.C.G.S. 1A-1, Rule 41(b). Community General argues that the requirement to consider less severe sanctions does not apply in this case since the trial court entered its order under N.C.G.S. § 1A-1, Rule 12(e), instead of N.C.G.S. § 1A-1, Rule 41(b).

Plaintiff argues that a trial court cannot dismiss a complaint as a sanction for failing to timely file a motion for more definite statement, unless there is a showing that plaintiff acted with "deliberate or contumacious disregard of the court's authority, bad faith, gross indifference, or deliberate callous conduct." *See Sazima v. Chalko*, 712 N.E.2d 729, 734-35 (Ohio 1999); *Clay v. City of Margate*, 546 So.2d 434, 435-36 (Fla. Ct. App. 4th), *review denied*, 553 So.2d 1164 (1989).

However, plaintiff has cited no authority from our State courts stating such a rule. Additionally, the case law from other jurisdictions that plaintiff cites actually stands for the contention that if the factors plaintiff enumerated are not present in a case, a trial court should consider lesser sanctions before dismissing the case. *See Sazima*, 712 N.E.2d at 735. *Sazima* and *Clay* do not stand for the proposition that a trial court can never dismiss a case unless the factors plaintiff enumerated are present. *See Thompson v. Johnson*, 253 F.2d 43, 43 (D.C. Cir. 1958) (per curiam) (finding trial court committed no error in dismissing the appellant's case where after time to comply with order to file a more specific and definite complaint had expired, the appellees filed their timely motion to dismiss the original complaint, and the appellants filed an amended complaint two months later).

In the present case, the trial court struck and dismissed plaintiff's amended complaint as to Community General after plaintiff failed to file a second amended complaint within the thirty-day time period mandated in the trial court's 8 December 1999 order. In the interim, between the expiration of the thirty-day period and the time Community General filed its motion to strike and dismiss, plaintiff offered no explanation for this failure and did not attempt to file the required second amended complaint. Even after Community General filed its motion to strike and dismiss on 19 January 2000 plaintiff did not immediately respond with either an explanation or a second amended complaint. It was only on the day of the hearing on the motion to strike and dismiss, being almost another thirty days after the time had expired to file the second amended complaint, that plaintiff presented the requested second amended complaint. At that time the trial court refused to accept the second amended complaint due to plaintiff's tardiness. The trial court struck and dismissed plaintiff's amended complaint against Community General.

Examining the record, there is no indication that the trial court considered less severe sanctions before striking and dismissing plaintiff's amended complaint for failure to timely file her second amended complaint. We must therefore determine whether a trial court can dismiss a complaint for failure to timely respond to a court's order for more definite statement without considering lesser sanctions.

Dismissals in general are viewed as the harshest of remedies in a civil case and should not be imposed lightly. *See Wilder*, 146 N.C. App. at 576, 553 S.E.2d at 427 ("Dismissal is the most severe sanction available to the court in a civil case.") (citing *Daniels v. Montgomery Mut.*

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*Ins. Co.*, 81 N.C. App. 600, 604, 344 S.E.2d 847, 849 (1986)); *Foy v. Hunter*, 106 N.C. App. 614, 619, 418 S.E.2d 299, 303 (1992) (noting that the “drastic sanction of dismissal” is not always the best sanction” to impose) (citations omitted). In *Goss v. Battle*, our Court noted that even though various statutory provisions that provide dismissal as an appropriate sanction do not expressly require a trial court to consider lesser sanctions before ordering a dismissal, these provisions have been interpreted to include such a requirement. 111 N.C. App. 173, 176, 432 S.E.2d 156, 158-59 (1993) (citing N.C.G.S. § 1A-1, Rule 41(b) and N.C. Gen. Stat. § 1-109). In *Goss*, we extended the requirement to consider lesser sanctions to dismissals pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(d) for failure to respond to discovery. *Goss* at 177, 432 S.E.2d at 159; see also *Atlantic Veneer Corp. v. Robbins*, 133 N.C. App. 594, 599, 516 S.E.2d 169, 173 (1999) (noting that upon dismissal for failure to comply with discovery request under N.C.G.S. § 1A-1, Rule 37, “the trial court indicated in its order, as it must, that it considered less severe sanctions”) (citation omitted); *Triad Mack Sales & Service, Inc. v. Clement Bros. Co.*, 113 N.C. App. 405, 409, 438 S.E.2d 485, 488 (1994) (holding that striking of the defendant’s pleading and entering default against defendant pursuant to N.C.G.S. § 1A-1, Rule 37 was not an abuse of discretion because, *inter alia*, “the order reflects that less severe sanctions were considered by the trial court and rejected as inappropriate”) (citation omitted).

In *Wilder*, our Court discussed whether the requirement to consider lesser sanctions, that had traditionally been applied to involuntary dismissals under Rule 41(b) for failure to comply with an order of the court, should be extended to Rule 41(b) dismissals for failure to prosecute. 146 N.C. App. 574, 553 S.E.2d 425 (2001). In *Wilder*, we stated that

[b]ecause we believe that the cases on Rule 41(b) point most logically in this direction, we hold that the trial court must also consider lesser sanctions when dismissing a case pursuant to Rule 41(b) for failure to prosecute.

We reach this conclusion for two reasons. First, from the cases involving dismissals under Rule 41(b), we can discern no reason to treat a dismissal for failure to prosecute different from dismissals for other reasons permitted by Rule 41(b), when the question is whether lesser sanctions suffice. And second, because the cases concerning dismissal under Rule 41(b), few though they are, appear to compel this conclusion.

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*Id.* at 576, 553 S.E.2d at 426 (emphasis omitted). After noting the level of severity inherent in a trial court's decision to dismiss a party's case whether for failure to comply with a court order or for failure to prosecute a case, our Court saw no reason to treat the two types of cases under Rule 41(b) differently, given the identical result in both situations. *Id.* Likewise, we see no reason to impose the requirement to consider lesser sanctions on some types of involuntary dismissals and not on others.

Given the identical result in cases where the trial court imposes involuntary dismissal as a sanction, irrespective of the authority under which the trial court is acting, we hold that the trial court must at least consider lesser sanctions before imposing dismissal as a sanction in a civil case pursuant to N.C.G.S. § 1A-1, Rule 12(e) or Rule 41(b). In reaching this conclusion, we understand the trial court's frustration and its ultimate decision to strike and dismiss plaintiff's amended complaint with prejudice in the present case. However, since there is no evidence in the record that the trial court considered lesser sanctions in the present case, we must vacate the trial court's order of 16 February 2000 and remand the case for a determination of whether lesser sanctions are appropriate in this case.

We have reviewed plaintiff's remaining assignment of error and find it to be without merit.

We affirm the 8 December 1999 order of the trial court. We vacate the 16 February 2000 order of the trial court and remand for a determination of whether lesser sanctions are appropriate.

Affirmed in part; vacated and remanded in part.

Judges WALKER and HUNTER concur.

**LOCUST v. PITT CTY. MEM'L HOSP.**

[154 N.C. App. 103 (2002)]

HELEN LOCUST, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF LESTER R. TYSON, PLAINTIFF V. PITT COUNTY MEMORIAL HOSPITAL, INC., JAMES M. GALLOWAY, M.D., LINDA G. MONTEITH, M.D., AND PITT FAMILY PHYSICIANS, DEFENDANTS

No. COA01-1467

(Filed 19 November 2002)

**1. Wrongful Death— abandonment by spouse—surviving siblings—no surviving action**

A wrongful death action against a hospital and doctors could not survive with decedent's siblings as the only remaining beneficiaries where decedent's estranged wife had willfully abandoned decedent and was thus barred by N.C.G.S. § 31A-1(a)(5) from sharing in the proceeds of a recovery for the wrongful death of her husband because all of the wrongful death benefits would have been distributed to decedent's wife had she not abandoned him; the wife's abandonment of decedent did not mandate that she be treated as having predeceased her husband; when beneficiaries are precluded from recovery of wrongful death proceeds due to their bad acts, any remaining beneficiaries only receive their original percentage distribution; and there was no percentage share decedent's siblings could claim as remaining beneficiaries to keep the wrongful death action alive.

**2. Wrongful Death— pleadings—survival claim—delineation of theory required**

The trial court did not err by dismissing a portion of a wrongful death complaint which plaintiff contended was a survival claim (which belongs to the decedent as opposed to his heirs) where the damages sought were lumped together because they related to a single wrongful death claim. Plaintiffs should carefully delineate the theory under which they seek recovery.

Judge WYNN concurring in part, dissenting in part.

Appeal by plaintiff from order filed 22 August 2001 by Judge James R. Vosburgh in Pitt County Superior Court. Heard in the Court of Appeals 10 September 2002.

*Burford & Lewis, PLLC, by Robert J. Burford, for plaintiff appellant.*

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*Harris, Creech, Ward and Blackerby, P.A., by R. Brittain Blackerby, for defendant-appellees Pitt County Memorial Hospital, Inc. and Linda G. Monteith, M.D.*

*Herrin & Morano, L.L.P., by Mickey A. Herrin, for defendant-appellees James M. Galloway, M.D., and Pitt Family Physicians.*

GREENE, Judge.

Helen Locust (Plaintiff), individually and as the administratrix of the estate of her deceased brother Lester R. Tyson, appeals an order filed 22 August 2001 granting summary judgment in favor of Pitt County Memorial Hospital, Inc., James M. Galloway, M.D., Linda G. Monteith, M.D., and Pitt Family Physicians (collectively Defendants).

On 2 June 1994, Plaintiff filed a complaint against Defendants to recover damages “for the wrongful death of [Lester] Tyson,” including: (1) damages for his care, treatment, and hospitalization; (2) pain and suffering and loss of enjoyment of life; (3) mental anguish; (4) funeral expenses; (5) present and future monetary value to his wife, brother, and sisters; and (6) punitive damages. Lester Tyson was survived by his estranged spouse, Brenda Tyson, and his brother and sisters. Plaintiff subsequently moved for a voluntary dismissal of her complaint on 16 November 1994.

On 17 July 1995, Plaintiff filed a “Statement of Renunciation and Acts Barring Property Rights” (the Statement) signed by Brenda Tyson. Brenda Tyson had been married to but was separated from Lester Tyson at the time of his death in June 1992. In the Statement, Brenda Tyson, pursuant to Chapter 31A of the North Carolina General Statutes, purported to “renounce . . . any interest in the estate of Lester Tyson or any interest in any wrongful death action brought by reasons of his death.”<sup>1</sup> Brenda Tyson further stated:

When [she] voluntarily left Lester Tyson against his wishes and for no fault on his part in 1989, it was [her] intent that [they] should live and die totally separate and apart, and therefore [she] did not visit, communicate with, or have anything to do with Lester Tyson . . . after [she] voluntarily left him . . . . In 1989, [she]

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1. We note that Brenda Tyson’s renunciation, for the benefit of Lester Tyson’s siblings, of any interest she might have in a wrongful death action arising from her husband’s death did not bar her from being a beneficiary in a subsequent wrongful death action. See *Evans v. Diaz*, 333 N.C. 774, 430 S.E.2d 244 (1993) (renunciation of wrongful death benefits invalid).



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wilfully and without just cause abandoned and refused to live with Lester Tyson and [she] was not living with him at the time of his death.

Plaintiff timely refiled her complaint against Defendants on 9 November 1995. On 24 July 2001, Defendants moved for summary judgment. The trial court entered an order on 22 August 2001 granting Defendants' motion and dismissing the case on the grounds that the North Carolina Supreme Court's decision in *Evans v. Diaz* barred Plaintiff from pursuing this action because Brenda Tyson's acts prevented her from succeeding to any property interest under the Wrongful Death Act.

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The issues are whether: (I) the acts admitted in the Statement barred Plaintiff from pursuing a wrongful death action on behalf of Brenda Tyson and Lester Tyson's siblings; and (II) Plaintiff's complaint included a survival action outside the scope of *Evans*.

## I

**[1]** In a wrongful death action, "the real party in interest is not the estate but the beneficiary of the recovery as defined in the [Wrongful Death] Act." *Evans*, 333 N.C. at 776, 430 S.E.2d at 245 (citing *Davenport v. Patrick*, 227 N.C. 686, 688, 44 S.E.2d 203, 205 (1947)). Pursuant to the Wrongful Death Act, the proceeds of a recovery in an action for wrongful death "shall be distributed to the same persons, and in the same proportionate shares, as the personal property of the decedent . . . would be distributed if the decedent died intestate." *Williford v. Williford*, 288 N.C. 506, 509, 219 S.E.2d 220, 222-23 (1975); N.C.G.S. § 28A-18-2(a) (2001) (distribution according to the Intestate Succession Act). Thus, if the decedent "is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent," the decedent's spouse receives all of the wrongful death proceeds. N.C.G.S. § 29-14(b)(4) (2001).

Because Lester Tyson's parents were dead and he had no children, Brenda Tyson would therefore be entitled to all of the wrongful death benefits as the surviving spouse, leaving no portion of the recovery for distribution to Lester Tyson's siblings. Brenda Tyson, however, admitted that, in 1989, she "wilfully and without just cause abandoned and refused to live with Lester Tyson and . . . was not living with him at the time of his death." This constitutes one of the acts barring a spouse's right of intestate succession. *See* N.C.G.S. § 31A-1(a)(3), (b)(1) (2001) ("[a] spouse who wilfully and without just

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cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death" loses "[a]ll rights of intestate succession in the estate of the other spouse"). Accordingly, Brenda Tyson is barred from sharing in the proceeds of a recovery for the wrongful death of her husband. See *Williford*, 288 N.C. at 510, 219 S.E.2d at 223 (a father, having abandoned the deceased when the latter was a minor child, may not share in the proceeds of the settlement of the claim for wrongful death of his child); see also *Evans*, 333 N.C. at 778, 430 S.E.2d at 246 (mother who killed her son through the negligent operation of an automobile had no interest in any wrongful death recovery).

The issue thus remains whether Plaintiff's wrongful death action could survive with Lester Tyson's siblings as remaining beneficiaries. According to N.C. Gen. Stat. § 29-15 "[t]hose persons surviving the intestate, other than the surviving spouse, shall take that share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse." N.C.G.S. § 29-15 (2001). As *all* of the wrongful death benefits would have been distributable to Brenda Tyson had she not abandoned Lester Tyson, there is no percentage share Lester Tyson's siblings could claim as remaining beneficiaries to keep the wrongful death action alive. Accordingly, Lester Tyson's siblings could only continue the wrongful death action if Brenda Tyson's abandonment mandated that she be treated as having predeceased her husband. This, however, is not the case.

The only statutory provision that specifically treats a person as predeceased is the slayer statute. See N.C.G.S. § 31A-4 (2001). The applicable statute in this case, section 31A-1(a), merely states a person who abandons her spouse "shall lose the rights [of intestate succession]." N.C.G.S. § 31A-1(a) (2001). In the context of wrongful death actions involving beneficiaries who engaged in bad acts, this rule has been interpreted to preclude distribution of their share of the wrongful death recovery. See *Williford*, 288 N.C. at 509, 219 S.E.2d at 222-23; *Cummings v. Locklear*, 12 N.C. App. 572, 574, 183 S.E.2d 832, 834 (1971) (as the husband who would have had a one-third intestacy share in wife's estate, but whose wrongful act caused her death, was barred from sharing in a wrongful death recovery, leaving the wife's children as the remaining beneficiaries, the trial court was instructed to enter judgment for only two-thirds of the amount of the verdict should the jury return a verdict in the plaintiff's favor). Any remaining beneficiaries do not succeed to a full one hundred percent recovery but only receive their original percentage distribution of the

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judgment as dictated by sections 29-14 and -15 of the Intestate Succession Act. Because, as noted above, Lester Tyson's siblings' share of a wrongful death recovery in this case would be zero, the trial court did not err in granting Defendant's motion for summary judgment on the wrongful death claim.<sup>2</sup>

## II

**[2]** Plaintiff next contends that because the complaint also alleged damages pursuant to a survival action, the trial court erred in dismissing that portion of the complaint.

Damages for the pain and suffering of as well as the hospital care for a decedent used to only be recoverable in survival actions. *In re Parrish*, 143 N.C. App. 244, 253, 547 S.E.2d 74, 79, *disc. review denied*, 354 N.C. 69, 553 S.E.2d 201 (2001). These types of actions belong to the decedent as opposed to his heirs and survive to the decedent's personal representative upon his death. *Id.* In 1969, the General Assembly modified the Wrongful Death Act to include recovery for the decedent's pain and suffering and hospital care. *See id.*; N.C.G.S. § 28A-18-2(b)(1)-(2) (2001). Today, the administratrix of an estate thus has the option of claiming damages for the decedent's pain and suffering and hospital care under either a survival or a wrongful death action.

If Plaintiff's complaint in this case does indeed include a survival claim, the trial court erred in dismissing that portion of her complaint relying on the holding in *Evans*. *See Parrish*, 143 N.C. App. at 253, 547 S.E.2d at 79 (survival actions belong to the decedent). Consequently, we must determine whether Plaintiff's complaint alleged damages solely under the Wrongful Death Act or included a survival action as well.

According to the Wrongful Death Act, recoverable damages include:

- (1) Expenses for care, treatment and hospitalization incident to the injury resulting in death;
- (2) Compensation for pain and suffering of the decedent;
- (3) The reasonable funeral expenses of the decedent;

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2. Plaintiff further argues the doctrine of laches barred Defendants from moving to dismiss this case based on *Evans*. Having reviewed the record on appeal, we find no merit in this argument.

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(4) The present monetary value of the decedent to the persons entitled to receive the damages recovered . . . ;

(5) Such punitive damages as the decedent could have recovered pursuant to Chapter 1D of the General Statutes had he survived, and punitive damages for wrongfully causing the death of the decedent through malice or willful or wanton conduct, as defined in G.S. 1D-5;

(6) Nominal damages when the jury so finds.

N.C.G.S. § 28A-18-2(b) (2001).

The allegations in a pleading must be liberally construed so as to do substantial justice. N.C.G.S. § 1A-1, Rule 8(f) (2001); *Smith v. N.C. Farm Bureau Mut. Ins. Co.*, 84 N.C. App. 120, 123, 351 S.E.2d 774, 776, *aff'd*, 321 N.C. 60, 361 S.E.2d 571 (1987). While a request for damages based on a decedent's pain and suffering and hospital care can be construed as invoking an action for survival, in the context of this case, Plaintiff only intended to go forward with a wrongful death claim. In her complaint, Plaintiff states a claim "for the wrongful death of [Lester] Tyson" and then proceeds to plead all the damages listed in section 28A-18-2(b) with the exception of nominal damages. *See Parrish*, 143 N.C. App. at 255-56, 547 S.E.2d at 81 (holding the plaintiff's action was one for wrongful death and not survival where damages listed in complaint were identical to damages listed in the Wrongful Death Act). Also, there is no indication in the complaint that upon recovery the damages for Lester Tyson's pain and suffering and hospital care would be distributed to his estate as opposed to his heirs. Instead, it appears the damages sought were lumped together because they related to a single claim: wrongful death. Accordingly, the trial court did not err in dismissing Plaintiff's complaint.<sup>3</sup>

Affirmed.

Judge BIGGS concurs.

Judge WYNN concurs in part and dissents in part.

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3. As the only difference between a claim for damages for pain and suffering and/or hospital care under a survival action or a wrongful death action relates to the distribution of the proceeds of a recovery, a plaintiff should carefully delineate in her complaint under which theory she seeks to recover. *See Parrish*, 143 N.C. App. at 253, 547 S.E.2d at 79 (the recovery in a survival action goes to the estate whereas in a wrongful death action, it is distributed pursuant to the Intestate Succession Act).

## LOCUST v. PITT CTY. MEM'L HOSP.

[154 N.C. App. 103 (2002)]

WYNN, Judge concurring in part, dissenting in part.

Although I concur in the majority's holding relevant to the survival action, I respectfully dissent from the majority's holding interpreting the Wrongful Death Act to barr the siblings of Lester Tyson from recovering because of the bad acts of Tyson's estranged wife.

The majority correctly notes that N.C. Gen. Stat. § 29-15 provides that: "Those persons surviving the intestate, shall take that share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse." The majority broadly defines "distributable," however, to include situations in which the surviving spouse is statutorily barred from recovery. For instance, although Brenda Tyson "willfully and without just cause abandoned" her husband, and, therefore, was barred by N.C. Gen Stat. § 31A-1(a)(3) from intestate succession, the majority reasons that the decedent-spouses' net estate was still "distributable" to her. Consequently, the majority concludes, the intestates, who only include brothers and sisters of the decedent, Lester Tyson, are barred from recovery because the estate was "distributable" to Brenda Tyson. I dissent because this result is not only unfair and inconsistent, it perverts the relevant statute to judicially decide that a spouse's willful abandonment of her husband bars the husband's brothers and sisters from the benefits of his estate.

In support of this inequitable proposition, the majority states that "Lester Tyson's siblings could only continue the wrongful death action if Brenda Tyson's bad acts mandated that she be treated as having pre-deceased her husband." The majority, however, cites no statutory or case law in direct support of this proposition. Rather, the majority relies on *Cummings v. Locklear*, 12 N.C. 572, 183 S.E.2d 832 (1971) and *Williford v. Williford*, 288 N.C. 506, 219 S.E.2d 220 (1975).

In *Cummings*, our Supreme Court held that a husband could not share in a wrongful death recovery against his insurer, where the husband was legally negligent and responsible for the death of his wife. Accordingly, this Court held that the husband's intestate share, one-third of the recovery, could not be given to his children. Our holding in *Cummings*, however, is inapposite in the case *sub judice* for two reasons.

First, Brenda Tyson was not responsible for the death of Lester Tyson. In fact, the record makes it apparent that the reason Brenda

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Tyson made an affirmative "Statement of Renunciation and Acts Barring Property Rights" to the estate of Lester Tyson was because of a reasonable legal interpretation of the relevant statute, N.C. Gen. Stat. § 29-15, that once she renounced her interest the intestate heirs would take "the entire net estate." The record provides no other motive for Brenda Tyson's renunciation.

Second, in *Cummings* this Court held that the children of the father could not take his intestate share, where the father negligently caused the death of the mother. Here, however, the intestates seeking recovery are not related to Brenda Tyson, the alleged wrongdoer. Rather, the intestates are the brothers and sisters of the decedent Lester Tyson. Why should the decedents of Lester Tyson be punished for the alleged bad acts of Brenda Tyson?

Likewise, the holding in *Williford* is inapposite to the case *sub judice*. In fact, a close reading of *Williford*, is contrary to the holding of the majority. In *Williford*, our Supreme Court held that a father, who abandoned his child, could not share in the wrongful death recovery of that abandoned child.

First, the facts of *Williford* are significantly different because Brenda Tyson is not seeking to share in the wrongful death recovery. Rather, Brenda Tyson was merely renouncing her rights in order to expedite the apparent rights of the intestates. Second, and most importantly, in *Williford* our Supreme Court did not limit the wrongful death recovery by one half, simply because the father was barred from recovery. Instead, the entire recovery was awarded to the mother. Thus, in *Williford*, the father's statutory bar to recovery did not prevent the other intestate, his former wife, from succeeding in his half of the recovery.

In my view, once Brenda Tyson renounced her interest in the estate of Lester Tyson, the assets of the estate were no longer "distributable" to her under N.C. Gen. Stat. § 29-15. Consequently, "[t]hose persons surviving the intestate, [should] take that share of the net estate not distributable to the surviving spouse." Since nothing was "distributable" to Brenda Tyson after the renunciation, the intestates should take everything. Accordingly, I respectfully dissent.

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STATE OF NORTH CAROLINA v. JOHN WESLEY BARNES

No. COA01-824

(Filed 19 November 2002)

**1. Confessions and Incriminating Statements— voluntariness—use of false statements or trickery—intoxication at time of confession**

The totality of circumstances revealed that the trial court did not err in an attempted statutory rape of a person between the ages of thirteen and fifteen case by denying defendant's motion to suppress his statements to an officer concerning the sexual assault of defendant's daughter even though defendant contends the statements were made involuntarily and violated his due process rights allegedly based on the false information given to defendant by an officer about the pregnancy of defendant's daughter and based on defendant's prior consumption of prescription drugs and alcohol, because: (1) the use of false statements and trickery by police officers during interrogations is not illegal as a matter of law; (2) the tactics used did not implant fear of physical violence or hope of better treatment; (3) defendant was not tricked about the nature of the crime involved or possible punishment; (4) the officer did not subject defendant to threats of harm, rewards for confession, or deprivation of freedom of action; (5) the evidence in the record does not show an oppressive environment; (6) a defendant's intoxication at the time of a confession does not preclude a conclusion that a defendant's statements were freely made, and the record does not show that defendant was so heavily under the influence that he could not understand the implications of confessing to sexually assaulting his daughter; (7) defendant's own testimony was the only evidence tending to prove any use of prescription drugs and alcohol; and (8) defendant was able to relate the events of 20 July 1998 to a degree of detail inconsistent with someone who was impaired and unaware of the meaning of his words.

**2. Confessions and Incriminating Statements— custodial interrogation—invocation of right to counsel**

The totality of circumstances revealed that the trial court did not err in an attempted statutory rape of a person between the ages of thirteen and fifteen case by denying defendant's motion to suppress his statements to an officer concerning the sexual

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assault of defendant's daughter even though defendant contends the circumstances surrounding the interview constituted a custodial situation requiring that he be given Miranda warnings, because: (1) defendant went to the sheriff's department voluntarily; (2) an officer told defendant that he was free to leave and that he did not have to answer questions; (3) defendant was not subjected to a degree of restraint associated with a formal arrest when defendant was placed in an unlocked interview room without handcuffs, defendant was free to visit the restroom and smoke a cigarette while in the company of a single officer, and defendant was allowed to leave the sheriff's department after the interview concluded; and (4) defendant did not invoke his right to counsel by merely asking whether he needed an attorney without stating that he actually wanted an attorney.

Appeal by defendant from judgment dated 5 March 2001 by Judge James R. Vosburgh in Superior Court, Beaufort County. Heard in the Court of Appeals 17 April 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Thomas O. Lawton III, for the State.*

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

McGEE, Judge.

John Wesley Barnes (defendant) was indicted on 10 August 1998 for attempted statutory rape, statutory rape, statutory sexual offense of a person under thirteen years old, indecent liberties with a child, and incest of his thirteen-year-old daughter. Defendant filed a motion to suppress on 16 February 1999, seeking to exclude statements made by defendant to law enforcement officers.

A hearing was held on defendant's motion to suppress on 13 September 1999. The State presented the testimony of Laurel Miller (Officer Miller), an investigator with the Beaufort County Sheriff's Department. Officer Miller testified that a complaint was filed with the Sheriff's Department in the summer of 1998 concerning sexual abuse of defendant's daughter, and that after investigation, it was determined that defendant was a suspect. Defendant called the Sheriff's Department on 19 July 1998 to inquire whether any warrants had been issued for his arrest. Defendant was told there were no warrants for his arrest, but that accusations had been made against him.



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Officer Miller testified that defendant voluntarily came to the Sheriff's Department the following day and met with her. They talked in an interview room with the door closed, but unlocked. Officer Miller testified she told defendant he was not under arrest and was free to leave at any time. She testified defendant did not ask for an attorney. During the conversation, defendant did ask to go to the restroom. A male investigator unlocked the men's bathroom door and waited outside for defendant. Defendant later asked to take a cigarette break. Defendant and Officer Miller left the interview room and smoked cigarettes outside the building.

During the interview, Officer Miller told defendant that his daughter was pregnant. Officer Miller testified she had no evidence that this statement was true. However, she used the statement as an "investigative technique" because the victim told Officer Miller that her father's greatest fear was that she might be pregnant, and "that if [defendant] was in fact having sex with [his daughter] that this would cause him to tell the truth about it." Defendant later wrote his own statement admitting he sexually assaulted his daughter. He then left the Sheriff's Department. Defendant was arrested later that week.

Defendant testified at the suppression hearing that when he arrived at the Sheriff's Department and met Officer Miller, he

walked in and sat down [] and [Officer Miller] said, 'I want to ask you a few questions,' and I said 'Do I need a lawyer?' . . . [S]he said, 'No,' we [were] just going to have a little chit-chat between me and her and that was it. And then she started asking me questions and stuff.

Defendant also testified he had been drinking and taking "Valiums and Preludes" the morning that he went to the Sheriff's Department.

The trial court denied defendant's motion to suppress in an order entered 11 May 2001, *nunc pro tunc* October 2000. Defendant pled guilty on 5 March 2001 to attempted statutory rape of a person between the ages of thirteen and fifteen. The State dismissed the remaining charges. The transcript of plea noted the State and defendant agreed defendant retained the right to appeal the denial of his motion to suppress. *See* N.C. Gen. Stat. § 15A-979(b) (2001).

## I.

[1] Defendant first argues the trial court erred in denying his motion to suppress statements he made to Officer Miller concerning the sex-

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ual assault of defendant's daughter. Defendant contends the statements were made involuntarily and therefore his due process rights were violated.

Defendant also argues he did not receive any *Miranda* warnings. Defendant asserts that because of the false "information" given to him by Officer Miller about his daughter's pregnancy, he confessed against his will. He further contends his prior consumption of prescription drugs and alcohol altered his mental state, resulting in his confession of sexually assaulting his daughter. He contends the totality of the circumstances constituted police coercion which extracted an involuntary confession. Therefore, the trial court's denial of his motion to suppress violated his Fourteenth Amendment due process rights.

The false statement made by Officer Miller about defendant's daughter being pregnant is insufficient to render defendant's confession inadmissible. As defendant acknowledges, the use of false statements and trickery by police officers during interrogations is not illegal as a matter of law. Our Supreme Court stated in *State v. Jackson* that:

The general rule in the United States, which this Court adopts, is that while deceptive methods or false statements by police officers are not commendable practices, standing alone they do not render a confession of guilt inadmissible. The admissibility of the confession must be decided by viewing the totality of the circumstances, one of which may be whether the means employed were calculated to procure an untrue confession.

308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983) (citations omitted).

This Court agrees with defendant that deceptive law enforcement tactics and false statements during questioning are not commendable practices. However, only in limited circumstances are deceptive methods and attendant consequences sufficient to render a confession invalid. The admissibility of a confession under the shadow of false inducing statements by law enforcement hinges on the totality of the circumstances surrounding the confession. *Jackson*, 308 N.C. at 574, 304 S.E.2d at 148. To determine whether a confession is voluntary, the question to be answered is whether a defendant's will was overborne when he incriminated himself. If so, the confession was not the result of a rational, willful decision to confess. *Lynumn v. Illinois*, 372 U.S. 528, 534, 9 L. Ed. 2d 922, 926 (1963).

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The purpose behind placing restraints on law enforcement when interviewing suspects is to avoid forcing false confessions or coerced confessions; however, the ability of investigators to procure voluntary confessions should not be undermined. *See generally State v. Buchanan*, 353 N.C. 332, 543 S.E.2d 823 (2001); *State v. Jackson*, 308 N.C. 549, 304 S.E. 2d 134 (1983). For this reason, deceiving suspects, while not commendable, is insufficient to suppress a confession. *Jackson*, 308 N.C. at 574, 304 S.E.2nd at 148.

Findings of fact relating to the voluntariness of a confession are binding on our Court if supported by competent evidence in the record. *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826. We may not set aside or modify findings substantiated by evidence, even if the evidence is conflicting. *Jackson*, 308 N.C. at 569, 304 S.E.2d at 145 (citations omitted).

While the record supports defendant's assertion that his worst fears were realized upon hearing that his daughter was pregnant, the type of fear that justifies suppression of a confession involves threats of violence or harsh treatment by law enforcement, especially if better treatment is offered in exchange for a confession. *See State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975); *State v. Rook*, 304 N.C. 201, 218-19, 283 S.E.2d 732, 742-43 (1981). In the case before us, the tactics used did not implant fear of physical violence or hope of better treatment. *Cf. State v. Simpson*, 299 N.C. 335, 345, 261 S.E.2d 818, 824 (1980).

Deception is only one factor to be considered when looking at the totality of the circumstances surrounding defendant's confession. In the case before us, other circumstances of defendant's confession do not support a conclusion that the confession was involuntary. Defendant was not tricked about the nature of the crime involved or possible punishment. Officer Miller did not subject defendant to threats of harm, rewards for confession, or deprivation of freedom of action. In fact, defendant exercised his freedom of action by leaving the Sheriff's Department at the end of the interview. *See Jackson* at 577, 304 S.E. 2d at 149-50.

The evidence in the record does not show an oppressive environment. As in *Rook*, a single interviewer conducted the interview. Nothing in the record suggests Officer Miller used threats or a show of violence. Further, defendant was not subjected to physical touching or bodily harm. For these reasons, the unsubstantiated statement

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about his daughter's pregnancy was insufficient to render defendant's incriminating statements involuntary.

Defendant also argues his prior consumption of prescription drugs and alcohol makes his incriminating statements involuntary. However, a defendant's intoxication at the time of a confession does not preclude a conclusion that a defendant's statements were freely made. "An inculpatory statement is admissible unless the defendant is so intoxicated that he is unconscious of the meaning of his words." *State v. Oxendine*, 303 N.C. 235, 243, 278 S.E.2d 200, 205 (1981). The record does not show defendant was so heavily under the influence that he could not understand the implications of confessing to sexually assaulting his daughter. There was no evidence defendant was unable to walk or carry on a normal conversation. Defendant's own testimony was the only evidence tending to prove any use of prescription drugs and alcohol, and defendant contends only that he was under the influence of alcohol and perhaps prescription drugs. Lastly, defendant was able to relate the events of 20 July 1998 to a degree of detail inconsistent with someone who was impaired and unaware of the meaning of his words.

The trial court's findings of fact are supported by competent evidence in the record. The totality of the circumstances surrounding the interview show that defendant's confession was voluntary and that Officer Miller did not extract defendant's confession. Therefore, the trial court did not err in admitting defendant's statements.

## II.

**[2]** Defendant next argues the trial court erred in denying his motion to suppress his statements because the circumstances surrounding the interview constituted a custodial situation requiring that he be given *Miranda* warnings. Defendant argues that by asking whether he needed an attorney while in custody, he invoked his right to counsel, rendering inadmissible the confession that followed.

An entitlement to *Miranda* warnings attaches only when a defendant is in custody. *State v. Gregory*, 348 N.C. 203, 207, 499 S.E.2d 753, 757, cert. denied, 525 U.S. 952, 142 L. Ed. 2d 315 (1998). If *Miranda* warnings are not administered in custodial situations, a strong presumption arises against the admissibility of statements made by a defendant. *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826 (citing *Oregon v. Elstad*, 470 U.S. 298, 306-07, 84 L. Ed. 2d 222, 230-31 (1985)).

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To determine whether a defendant is entitled to *Miranda* warnings, the initial inquiry is whether a defendant was “in custody.” *Buchanan*, 353 N.C. at 337, 543 S.E.2d at 826. In this case, the trial court concluded that defendant was not in custody. We must determine if the trial court’s conclusion of law is “legally correct reflecting a correct application of legal principles to the facts found.” *State v. Golphin*, 352 N.C. 364, 409, 533 S.E.2d 168, 201 (2000) (citation and internal quotes omitted). Uncontested evidence supports the trial court’s findings of fact that defendant went to the Sheriff’s Department voluntarily. Officer Miller told defendant he was free to leave, and that he did not have to answer questions.

“[T]he appropriate inquiry in determining whether a defendant is ‘in custody’ for the purposes of *Miranda* is, based on the totality of the circumstances, whether there was a ‘formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.’” *Buchanan* at 339, 543 S.E.2d at 828 (citations omitted). Therefore, even if a defendant is not formally arrested, he may nevertheless be considered in custody if he is subjected to an objective constraint of freedom capable of converting the formerly non-custodial situation into one in which *Miranda* rights apply. See *Buchanan*, 353 N.C. at 338-39, 543 S.E.2d at 827-28. Thus, the key inquiry in the case before us is whether in the totality of the circumstances, there was a restraint on defendant’s freedom of movement of the degree associated with a formal arrest. *Id.* at 339, 543 S.E.2d at 828. Our Supreme Court carved rather narrow circumstances in *Buchanan* which give rise to such restraint. The use of locked doors, applied handcuffs, or posted guards are circumstances which might rise to the level of formal restraint. *Id.*

In the present case, the trial court properly applied this standard to conclude defendant was not subjected to a degree of restraint associated with a formal arrest. Defendant was placed in an unlocked interview room, without handcuffs. He was free to visit the restroom and smoke a cigarette while in the company of a single officer. Defendant was also allowed to leave the Sheriff’s Department after the interview concluded. Since defendant was not in actual or constructive custody, *Miranda* warnings were not required.

Defendant argues that even if his *Miranda* rights had not attached, his question about whether he needed an attorney rendered his statement inadmissible. Defendant relies upon North Carolina case law which holds interrogations must cease after an ambiguous

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invocation of counsel. *State v. Torres*, 330 N.C. 517, 529, 412 S.E.2d 20, 27 (1992). However, subsequent to *Torres*, decisions of the United States Supreme Court have more precisely defined the requirements for invoking one's right to counsel. A suspect must unambiguously request counsel to warrant the cessation of questions and "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459, 129 L. Ed. 2d 362, 371 (1994). Police may continue to question suspects until the individual suspect "actually requests" an attorney. *Id.* at 462, 129 L. Ed. 2d at 373; see *State v. Hyatt*, 355 N.C. 642, 655, 566 S.E.2d 61, 70 (2002).

In this case, defendant merely asked whether he needed an attorney, not that he actually wanted an attorney. Defendant's ambiguous statement fails to meet the bright line test established by *Davis* as a guide for police in investigation and interrogation. Since defendant did not invoke his right to counsel, his answers to Officer Miller's questions were admissible. The trial court concluded defendant was not in custody. Defendant was subjected neither to a formal arrest nor to a restraint on freedom of movement to a degree associated with a formal arrest. Defendant did not unambiguously express his intent to have the aid of counsel. Therefore, he did not invoke his right to counsel, thereby requiring that the questioning cease.

We hold the trial court did not err in denying defendant's motion to suppress his statements and we affirm the decision of the trial court.

Affirmed.

Judges WALKER and CAMPBELL concur.

**STRUCTURAL COMPONENTS INT., INC. v. CITY OF CHARLOTTE**

[154 N.C. App. 119 (2002)]

STRUCTURAL COMPONENTS INT. INC., PLAINTIFF v. THE CITY OF CHARLOTTE AND  
LOCKHEED MARTIN IMS, DEFENDANTS

No. COA02-200

(Filed 19 November 2002)

**1. Appeal and Error— preservation of issues—failure to argue in brief**

Plaintiff has abandoned all theories alleged in its complaint other than its due process claim because its assignments of error and arguments in the brief failed to preserve these issues in accordance with N.C. R. App. P. 28(a).

**2. Civil Rights— failure to state claim—red-light citation—civil rights violation—due process**

The trial court did not err in a negligence and violation of civil rights claim arising out of the issuance of a red-light citation to plaintiff based on the Safelight program by ruling plaintiff's complaint failed to state a claim for civil rights violations including due process, because: (1) one cannot recover monetary damages for a violation of procedural due process rights when one claims that a civil penalty is imposed pursuant to a program that does not provide adequate due process and is unconstitutional; (2) a petition for certiorari to the superior court was the proper avenue to challenge the constitutionality of the pertinent statute and ordinances; and (3) plaintiff may not seek relief through an independent action as the present statutory scheme provides an adequate method for challenging the legality of the Safelight program.

Appeal by plaintiff from judgment entered 21 August 2001 by Judge L. Oliver Noble in Mecklenburg County Superior Court. Heard in the Court of Appeals 17 October 2002.

*Paul R. Schell for plaintiff appellant.*

*Senior Assistant City Attorney Robert E. Hagemann for City of Charlotte defendant appellee.*

*Crews & Klein, P.C., by Andrew W. Lax and Katherine Freeman, for Lockheed Martin IMS defendant appellee.*

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McCULLOUGH, Judge.

On 12 April 2000, Phillip Carriker, President of plaintiff Structural Components Int. Inc., was mailed a red-light citation pursuant to the "Safelight" program initiated and operated by defendants City of Charlotte and Lockheed Martin IMS. The "Safelight" program is authorized in certain designated North Carolina cities and towns pursuant to N.C. Gen. Stat. § 160A-300.1 (2001). The citation demanded payment of a \$50.00 civil penalty, as a vehicle registered to Mr. Carriker was photographed running a red light. According to the "Safelight" program, if the recipient of a citation desires a review hearing, he or she must post a bond equal to the amount of the penalty before a hearing will be scheduled. Thus, after posting his bond, Mr. Carriker was given his hearing on 27 June 2000. As a result of this hearing, the citation was upheld.

On 7 April 2001, plaintiff filed suit against defendants in Mecklenburg County Superior Court. After identifying the parties, the complaint alleged the following:

4. Defendants THE CITY OF CHARLOTTE & LOCKHEED MARTIN IMS operate a program called the "Red Light Camera Program" or "Safelight." Under the program, the defendants have installed automatic cameras at various intersections around the city. The cameras take photographs of automobiles in the intersection when the traffic signal is red.

5. Defendant THE CITY OF CHARLOTTE has contracted with LOCKHEED MARTIN IMS to review the pictures and to decide which vehicles are in violation of traffic laws. Upon information and belief, LOCKHEED's rate of compensation under the [contract] is determined by the number of violators that they identify and process. The City of Charlotte then mails citations to the vehicle owners whom Defendants' agents have decided are in violation. The recipients of the citation must then pay the \$50.00 fine or be subject to an additional monetary penalty. After paying the fine, a recipient of a citation may request a hearing. This hearing is held by an officer who works for the program.

6. On April 12th 2000, the CITY OF CHARLOTTE mailed a citation to Plaintiff. Phillip Carriker, Plaintiff's President and General Manager, paid the citation under protest. In accordance with the program rules, Plaintiff then requested a hearing to review the citation. During the "hearing", the hearing officer was



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completely biased in favor of the program and wholly abandoned the judicial role in concluding that Plaintiff was in violation of the traffic laws.

Plaintiff included two claims for relief, negligence and violation of its civil rights. Under its negligence claim, plaintiff alleged that:

8. Defendants were negligent in failing to establish reasonable guidelines and in failing to govern the Safelight camera program in a reasonable manner and in failing to provide a reasonable appeals process to govern appeals taken under the program.

Accordingly, plaintiff asked for a return of its \$50 bond, and also damages in excess of \$10,000 for the loss of services of its president and general manager during the time he was dealing with this matter. In addition, plaintiff asked for punitive damages to the "extent that the conduct of defendant was wanton and in reckless disregard of and with indifference to plaintiff's rights . . . ."

Under its violation of civil rights claim, plaintiff alleged that:

12. Defendants, in creating and maintaining a sham safety program whose actual motive is not improvement of public safety but generation of revenue, have violated Plaintiff's civil rights as follows:

(a) Its right to due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution,

(b) Its right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution,

(c) Its right to obtain witnesses in its behalf and to have effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution,

(e) Its right not to be deprived of his liberty by the law of the land and its right to equal protection of the laws as guaranteed by Article I Section 19 of the Constitution of North Carolina;

(f) Its right to confront its accusers and witnesses with other testimony as guaranteed by Article I Section 23 of the Constitution of North Carolina,

(h) Its right to a frequent recurrence of fundamental principals . . . absolutely necessary to preserve the blessings of liberty

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as guaranteed by Article I Section 35 of the Constitution of North Carolina,

all to its damage in a sum in excess of \$10,000.

Plaintiff also asked for punitive damages for this claim in the same manner as the previous claim.

Defendants filed respective motions to dismiss which came for hearing on 16 August 2001 before the Honorable L. Oliver Noble. The trial court's order, entered 21 August 2001, found that:

The Court reviewed the Complaint and considered authorities submitted and argument by counsel for Plaintiff and Defendants. Based on this review and consideration, the Court determines that it lacks subject matter jurisdiction to review the subject red light citation issued to Plaintiff or the procedural or substantive aspects of the administrative proceeding below through this action *as such review must be conducted through certiorari*. In addition, the Court determines that Plaintiff has *failed to state a claim upon which relief can be granted for negligence, for a violation of civil rights, and for punitive damages* against the Defendants.

(Emphasis added.) Plaintiff appeals.

Plaintiff makes the following assignments of error: The trial court erred (I) in granting defendants' motions to dismiss and in ruling that its complaint did not constitute a challenge to the "Safelight" camera program but was instead a review of an administrative hearing over which the trial court did not have jurisdiction; and (II) in ruling that the "Safelight" program meets the constitutional requirements of due process.

## I.

**[1]** Initially we note that the parties in this case, both in their respective briefs and at oral argument, have agreed that the only issue before this Court is whether the granting of defendants' Rule 12(b)(6) motions on plaintiff's due process claim were proper.

Plaintiff contended that it was error for the trial court to grant defendants' motions to dismiss on the basis that it did not have subject matter jurisdiction to review plaintiff's citation because such review must be conducted through *certiorari* to the trial court. Defendants now concede that the trial court had subject matter

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jurisdiction over plaintiff's lawsuit because it was not a challenge to its own citation or a request for review of an administrative hearing, but a constitutional challenge to the entire "Safelight" camera program.

Defendants assert that plaintiff has waived all theories of recovery, other than its due process claim, because its assignments of error and arguments in brief to this Court have failed to preserved them according to N.C.R. App. P. 28(a). Plaintiff's complaint alleged two causes of action: Negligence and Violation of Civil Rights. The violation of civil rights cause of action included the theories of due process (perhaps substantive and procedural) under both federal and state constitutions, equal protection under both federal and state constitutions, and frequent recurrence of fundamental principals from the North Carolina Constitution. In addition, plaintiff called for punitive damages under both causes of action. In the record, plaintiff's assignments of error are as follows:

1. Plaintiff/Appellant assigns as error the Trial Court's granting of Appellees' motions to dismiss and the ruling that Appellant's complaint did not constitute a challenge to the "Safelight" camera program but was instead a review of an administrative hearing over which the trial court did not have jurisdiction.

2. Plaintiff/Appellant assigns as error the trial court's ruling that the "Safelight" program meets the constitutional requirements of due process.

Rule 28(a) provides:

- (a) *Function.* The function of all briefs required or permitted by these rules is to define clearly the questions presented to the reviewing court and to present the arguments and authorities upon which the parties rely in support of their respective positions thereon. Review is limited to questions so presented in the several briefs. Questions raised by assignments of error in appeals from trial tribunals but not then presented and discussed in a party's brief, are deemed abandoned. Similarly, questions properly presented for review in the Court of Appeals but not then stated in the notice of appeal or the petition, accepted by the Supreme Court for review, and discussed in the new briefs required by Rules 14(d)(1) and 15(g)(2) to be filed in the Supreme Court for review by that Court are deemed abandoned.

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N.C.R. App. P. 28 (2002). Thus, plaintiff has abandoned all theories alleged in its complaint other than its due process claim. We accordingly only address that issue.

## II.

**[2]** Plaintiff contends that the trial court erred by ruling its complaint failed to state a claim for civil rights violations, specifically due process.

“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.” 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[.]”

*Huntington Properties, LLC v. Currituck County*, 153 N.C. App. 218, 223, 569 S.E.2d 695, 699 (2002) (citations omitted).

A complaint is not sufficient to withstand a motion to dismiss if an insurmountable bar to recovery appears on the face of the complaint. Such an insurmountable bar may consist of an absence of law to support a claim, an absence of facts sufficient to make a good claim, or the disclosure of some fact that necessarily defeats the claim.

*Al-Hourani v. Ashley*, 126 N.C. App. 519, 521, 485 S.E.2d 887, 889 (1997) (citations omitted).

“Procedural due process restricts governmental actions and decisions which ‘deprive individuals of “liberty” or “property” interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.’” *Peace v. Employment Sec. Comm’n*, 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L. Ed. 2d 18, 31 (1976)).

Plaintiff’s complaint indeed fails to state a claim upon which relief can be granted. What remains of the complaint are the three factual allegations (4, 5 & 6) and its claim that its procedural due process rights were violated by defendants “in creating and maintaining a sham safety program whose actual motive is not improvement of public safety but generation of revenue . . . .” Significantly, plaintiff in its prayer for relief requests damages in excess of \$10,000 for this alleged violation. Under current North Carolina law, such a cause of action does not exist. One cannot recover monetary damages for a

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violation of procedural due process rights when one claims that a civil penalty is imposed pursuant to a program that does not provide adequate due process and is unconstitutional.

Plaintiff had other proper avenues of challenging the “Safelight” camera program for violation of its due process rights. N.C. Gen. Stat. § 160A-300.1(c)(4) provides that, “[t]he municipality shall institute a nonjudicial administrative hearing to review objections to citations or penalties issued or assessed under this section.” N.C. Gen. Stat. § 160A-300.1(c)(4) (2001). The Charlotte City Ordinance 966, § 14-226, *et seq.*, establishing the city’s traffic control photographic system establishes such an appeal process. N.C. Gen. Stat. § 14-230 authorizes the City of Charlotte Department of Transportation to set up an administrative process to hear appeals, in which a person receiving a citation must post a bond equal to the amount of the fine (\$50.00) before a hearing can be scheduled. This procedure was followed in the present case. In addition, to this procedure, the city ordinance goes a step further: “The hearing officer’s decision is subject to review in the Superior Court of Mecklenburg County by proceedings in the nature of certiorari.” Plaintiff failed to utilize this procedure and opted to file this independent lawsuit in superior court, as the trial court noted in its order of dismissal. We believe that a petition for certiorari to the superior court was the proper avenue to challenge the constitutionality of the statute and ordinances that plaintiff was allegedly aggrieved by.

Challenges to the constitutionality of the laws one is charged with violating are best brought within the context of one’s own case. Few alternatives to this approach are available. The most prominent alternative is to file an action under the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, *et seq.* (2001). However, our Supreme Court recently stated that:

[D]eclaratory judgment is not generally available to challenge the constitutionality of a criminal statute. *See, e.g., [Edmisten v.] Tucker*, 312 N.C. [326] at 349, 323 S.E.2d [294] at 309 (“It is widely held that a declaratory judgment is not available to restrain enforcement of a criminal prosecution,” especially where a criminal action is already pending.); *Jernigan v. State*, 279 N.C. 556, 560, 184 S.E.2d 259, 263 (1971) (“A declaratory judgment is a civil remedy which may not be resorted to to try ordinary matters of guilt or innocence.”); *Chadwick v. Salter*, 254 N.C. 389, 394, 119 S.E.2d 158, 162 (1961) (“Ordinarily, the constitutionality of a

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statute . . . will not be determined in an action to enjoin its enforcement.”). Nevertheless, a declaratory judgment action to determine the constitutionality of a criminal statute prior to prosecution is not completely barred. For example, in *Calcutt v. McGeachy*, 213 N.C. 1, 195 S.E. 49 (1938), the plaintiff, a manufacturer and distributor of amusement machines, was threatened with prosecution under a statute making possession of slot machines illegal and authorizing their seizure by authorities. *Id.* at 4, 195 S.E. at 49-50. The Court, noting that the plaintiff’s action was proper under the Declaratory Judgment Act, determined that the statute in question was constitutional. *Id.* at 4, 9, 195 S.E. at 49, 54.

This Court has enunciated what a plaintiff must show in order to seek a declaratory judgment that a criminal statute is unconstitutional.

The key to whether or not declaratory relief is available to determine the constitutionality of a criminal statute is whether the *plaintiff* can demonstrate that a criminal prosecution is imminent or threatened, and that he stands to suffer the loss of either fundamental human rights or property interests if the criminal prosecution is begun and the criminal statute is enforced.

*Tucker*, 312 N.C. at 350, 323 S.E.2d at 310.

*Malloy v. Cooper*, 356 N.C. 113, 117, 565 S.E.2d 76, 79 (2002) (holding that Declaratory Judgment Act was available to challenge statute where District Attorney indicated in writing that prosecution was imminent). Plaintiff’s complaint makes no showing that he is likely to be re-cited for future “Safelight” violations. In any event, a direct suit under this state’s constitution for damages is not authorized.

This Court has recognized that:

In *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992), our Supreme Court noted:

This Court has recognized a direct action under the State Constitution against state officials for violation of rights guaranteed by the Declaration of Rights. *Having no other remedy*, our common law guarantees plaintiff a direct action under the State Constitution . . . [Moreover, w]hen called

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upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, however, the judiciary must recognize two critical limitations. *First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power.* Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong.

*Id.* at 783-84, 413 S.E.2d at 290-91 (citations omitted) (emphasis added).

*Hanton v. Gilbert*, 126 N.C. App. 561, 570-71, 486 S.E.2d 432, 438-39, *disc. review denied*, 347 N.C. 266, 493 S.E.2d 454 (1997).

As the present statutory scheme provides an adequate method for challenging the legality of the “Safelight” program, the plaintiff may not seek relief through an independent action. Accordingly, we affirm the trial court’s dismissal of plaintiff’s complaint pursuant to Rule 12(b)(6).

Affirmed.

Judges CAMPBELL and THOMAS concur.

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STATE OF NORTH CAROLINA v. ALVINO RAE WILSON, JR.

No. COA01-1559

(Filed 19 November 2002)

**Sentencing— second-degree kidnapping—firearm enhancement penalty—failure to allege enhancement factors**

The trial court erred in its resentencing of defendant for second-degree kidnapping and the firearm enhancement penalty under N.C.G.S. § 14-2.2(a) by imposing a sentence exceeding the range authorized by N.C.G.S. § 15A-1340.17, because: (1) although defendant pleaded guilty to a firearm enhancement, the statutory factors necessary for the enhancement were not alleged in the indictment; (2) the case was no longer final for purposes of the

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Lucas rule when the trial court voided the original judgments of conviction to enter a new single judgment; and (3) on the specific facts of this case defendant cannot be resentenced using the firearm enhancement penalty due to the State's failure to allege in the original indictment the statutory factors supporting the enhancement despite the fact that the original indictment occurred before the decision of *State v. Lucas*, 353 N.C. 568, which states that its law applies to cases that were not yet final as of 9 August 2001.

Judge HUNTER dissenting in part.

Appeal by defendant from judgment entered 14 September 2001 by Judge Melzer A. Morgan, Jr. in Superior Court, Rockingham County. Heard in the Court of Appeals 18 September 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.*

*Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Barbara S. Blackman, for defendant-appellant.*

McGEE, Judge.

Alvino Rae Wilson, Jr. (defendant) was indicted on 8 April 1996 for first-degree kidnapping. Defendant pleaded guilty on 25 June 1996 to one count of second-degree kidnapping, felony firearm enhancement, felonious larceny, and misdemeanor assault with a deadly weapon. The trial court determined defendant to have a Prior Record Level of II and sentenced him to twenty-nine to forty-four months' active imprisonment for the second-degree kidnapping. The trial court entered a separate judgment imposing a consecutive sentence of sixty to eighty-one months' active imprisonment for the firearm enhancement penalty. The trial court arrested judgment on the misdemeanor assault with a deadly weapon offense and sentenced defendant for felonious larceny to eight to ten months suspended, running consecutively with the sentence from the firearm enhancement penalty.

After notification by the Department of Correction of an irregularity in sentencing in having two separate judgments for the second-degree kidnapping and the firearm enhancement penalty, the trial court ordered on 5 October 2000 that defendant be re-sentenced. Defendant was re-sentenced on 14 September 2001 to eighty-nine to



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one-hundred sixteen months in a single judgment for the second-degree kidnapping offense with a firearm enhancement. Defendant appeals this re-sentencing.

## I.

The State argues defendant's appeal should be dismissed because defendant is not entitled to an appeal as a matter of right. Defendant contends that the sentence imposed in the re-sentencing hearing on 14 September 2001 resulted in a sentence exceeding the range authorized by N.C. Gen. Stat. § 15A-1340.17 due to the enhancement of his second-degree kidnapping sentence. Defendant argues that this falls into one of the categories of appeal authorized as of right under N.C. Gen. Stat. § 15A-1444(a2), and therefore he is entitled to appeal. The sentence imposed by the trial court on re-sentencing exceeds the range authorized by N.C. Gen. Stat. § 15A-1340.17 (2001), and we therefore review the re-sentencing to determine whether it was properly enhanced under N.C. Gen. Stat. §§ 14-2.2 and 15A-1340.16A (2001). *See* N.C. Gen. Stat. § 15A-1444(a2)(2) (2001).

## II.

Defendant assigns as error the trial court's re-sentencing to an enhanced term under N.C.G.S. § 14-2.2(a), arguing that the re-sentencing violates his right to due process under both the United States and North Carolina Constitutions as the trial court lacked jurisdiction to sentence upon a non-indicted count. N.C.G.S. § 14.2.2(a) states that

[i]f a person is convicted of a Class A, B, B1, B2, C, D, or E felony and the person used, displayed, or threatened to use or display a firearm during the commission of the felony, the person shall, in addition to the punishment for the underlying felony, be sentenced to a minimum term of imprisonment for 60 months as provided by G.S. 15A-1340.16A.

Therefore, a trial court applying the firearm enhancement penalty must do so in accordance with N.C.G.S. § 15A-1340.16A. The relevant portion of N.C.G.S. § 15A-1340.16A states that

[i]f a person is convicted of a Class A, B1, B2, C, D, or E felony and the court finds that the person used, displayed, or threatened to use or display a firearm at the time of the felony, the court shall increase the minimum term of imprisonment to which the person is sentenced by 60 months.

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The recent North Carolina Supreme Court case of *State v. Lucas*, 353 N.C. 568, 548 S.E.2d 712 (2001), explicitly adopted the rule announced by the United States Supreme Court in *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). In *Lucas*, our Supreme Court stated that the sentencing of a defendant to an enhanced sentence pursuant to N.C.G.S. § 15A-1340.16A

is forbidden by *Jones* and *Apprendi* unless the use of a firearm under the statute is charged in the indictment, proven beyond a reasonable doubt, and submitted to the jury. Accordingly, we hold that in every instance where the State seeks an enhanced sentence pursuant to N.C.G.S. § 15A-1340.16A, it must allege the statutory factors supporting the enhancement in an indictment, which may be the same indictment that charges the underlying offense, and submit those factors to the jury. If the jury returns a guilty verdict that includes these factors, the trial judge shall make the finding set out in the statute and impose an enhanced sentence.

*Lucas*, 353 N.C. at 597-98, 548 S.E.2d at 731.

However, the decision in *Lucas* only “applies to cases in which the defendants have not been indicted as of the certification date of [that] opinion, [9 August 2001,] and to cases that are now pending on direct review or are not yet final.” *Id.* at 598, 548 S.E.2d at 732. Defendant essentially argues that the re-sentencing in the present case resulted in his case no longer being “final” at the moment of re-sentencing, thus bringing it under the strictures of *Lucas*. A case is “final” when “a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari elapsed or a petition for certiorari finally denied.” *State v. Zuniga*, 336 N.C. 508, 511 n.1, 444 S.E.2d 443, 445 n.1 (1994) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 93 L. Ed. 2d 649, 657 n.6 (1987)).

Although defendant pleaded guilty to a firearm enhancement, the statutory factors necessary for the enhancement were not alleged in the indictment. Therefore, as the State correctly points out, whether defendant was properly sentenced to a firearm enhancement at the re-sentencing on 14 September 2001 depends on whether the case before us was “final” at the time of re-sentencing. If defendant’s case was “final,” then *Lucas* does not apply and the sentencing will stand. See *Lucas*, 353 N.C. at 598, 548 S.E.2d at 732. If defendant’s case was

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not “final,” defendant cannot be sentenced for a plea based upon a firearm enhancement when the necessary statutory factors were not alleged in the indictment. See *State v. Wimbish*, 147 N.C. App. 287, 292, 555 S.E.2d 329, 333 (2001).

The use of two separate judgments by the trial court in the original disposition of the case was in error. The Department of Correction, as it did in *State v. Branch*, 134 N.C. App. 637, 640-41, 518 S.E.2d 213, 215-16 (1999), brought this error to the attention of the trial court by letter. In *Branch*, our Court noted this was an appropriate method for the Department of Correction to bring an irregularity in sentencing to the attention of the trial court. *Id.* In the case before us, the trial court set the matter for re-sentencing and conducted a re-sentencing hearing to correct its erroneous sentence originally imposed.

Defendant argues that because the original judgments and sentencing were in error there was never a judgment of conviction in the case, and therefore the case could not have been final. We disagree. The fact that the original sentencing in this case was in error, does not render the judgment void. *Hamilton v. Freeman*, 147 N.C. App. 195, 204, 554 S.E.2d 856, 861 (2001), *appeal dismissed and disc. review denied*, 355 N.C. 285, 560 S.E.2d 803 (2002) (“Where a court has authority to hear and determine the questions in dispute and has control over the parties to the controversy, a judgment issued by the court is not void, even if contrary to law.”) (citing *Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294, *disc. review denied*, 320 N.C. 166, 358 S.E.2d 47 (1987)). If contrary to law, the judgment is only voidable, and therefore constitutes a binding judgment of conviction that must be honored until vacated or corrected. *Id.* (citing *Allred*, 85 N.C. App. at 142, 354 S.E.2d at 294).

In the case before us, defendant was originally subject to two separate judgments, one for second-degree kidnapping, and a separate one for the firearm enhancement penalty. Upon notice of the error in this method of sentencing, the trial court laudably sought to remedy the error. The State argues that the trial court simply modified the sentence to bring it in line with the appropriate sentencing guidelines. However, in the present case, where there were originally two judgments, one of which was a firearm enhancement, invalid as a separate judgment, the trial court must vacate the firearm enhancement judgment along with the sentence for the second-degree kidnapping judgment, and re-sentence defendant to the appropriate term of imprisonment for second-degree kidnapping with a firearm

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enhancement in a single judgment. *See Branch*, 134 N.C. App. at 640-41, 518 S.E.2d at 215-16 (vacating and imposing a sentence using the appropriate law upon learning through a letter from the Department of Correction that the original sentence was unlawful); *State v. Rollins*, 131 N.C. App. 601, 607, 508 S.E.2d 554, 558 (1998) (vacating previous sentence for the purpose of re-sentencing when the previous sentence was invalid); *State v. Morgan*, 108 N.C. App. 673, 425 S.E.2d 1 (1993) (holding that the trial court had the authority to set aside a sentence and to re-sentence a defendant if such re-sentencing was required), *disc. review improvidently allowed*, 335 N.C. 551, 439 S.E.2d 127 (1994); *State v. Bonds*, 45 N.C. App. 62, 64, 262 S.E.2d 340, 342 (holding that the North Carolina Courts have the authority to vacate an invalid sentence and re-sentence a defendant even after the term has ended), *appeal dismissed and disc. review denied*, 300 N.C. 376, 267 S.E.2d 687, *cert. denied*, 449 U.S. 883, 66 L. Ed. 2d 107 (1980).

In the present case, the trial court did just that, vacating the improper sentences and the improper firearm enhancement judgment, and re-sentencing defendant to the appropriate term of imprisonment. However, when the trial court vacated the firearm enhancement judgment and the second-degree kidnapping sentence, the case was no longer “final” for purposes of the *Lucas* rule, since the trial court had voided the original judgments of conviction to enter a new single judgment. Therefore, on this specific set of facts, defendant cannot be re-sentenced using the firearm enhancement penalty due to the failure of the State to allege in the original indictment the statutory factors supporting the enhancement, despite the fact that the original indictment occurred before *Lucas* was decided. *See Lucas*, 353 N.C. at 597-98, 568 S.E.2d at 731; *see also Griffith*, 479 U.S. at 325-28, 93 L. Ed. 2d at 659-62 (noting that simply because a new constitutional rule is a “clear break” from the law at the time of the original incidents leading to the conviction of a defendant, the new rule should still apply to non-final cases).

Although this case is likely not the type of case the North Carolina Supreme Court had in mind when it stated that *Lucas* would apply to cases that were not yet final as of 9 August 2001, the unique procedural nature of this case brings it under the requirements of *Lucas*. We therefore remand this case for re-sentencing without imposition of an enhanced sentence pursuant to N.C.G.S. § 15A-1340.16A.

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Remanded for re-sentencing.

Judge WALKER concurs.

Judge HUNTER dissents with a separate opinion.

HUNTER, Judge, dissenting in part.

I respectfully dissent from the majority opinion's conclusion that defendant's case was not "final" thereby resulting in the trial court committing error by imposing the firearm enhancement penalty on defendant's re-sentencing for second-degree kidnapping.

As stated in the majority opinion, "[i]f a judgment is invalid as a matter of law, North Carolina Courts have the authority to vacate the invalid sentence and resentence the defendant accordingly . . ." *State v. Branch*, 134 N.C. App. 637, 641, 518 S.E.2d 213, 216 (1999). Here, I agree with the majority's conclusion that defendant's separate sentence for the firearm enhancement was invalid and should be vacated based on the court's misapplication of N.C. Gen. Stat. § 15A-1340.16A. However, our case law indicates that the kidnapping sentence was still valid and only had to be modified due to the court's mistake of law.

At least two North Carolina cases have upheld changes made to a defendant's sentence without invalidating that sentence when a trial court has mistakenly applied the requisite law. In *State v. LeSane*, 137 N.C. App. 234, 528 S.E.2d 37 (2000), a trial court originally sentenced the defendant to life imprisonment based on its mistake as to when an amendment to the relevant statute (requiring life imprisonment without parole) would go into effect. After the defendant was sentenced, the court learned of the mistake and appropriately re-sentenced the defendant. This Court held that the re-sentence was not invalidated by the court's mistake of law because it resulted in no prejudice to the defendant. *Id.* at 245, 528 S.E.2d at 44. Also, in *State v. Brown*, 59 N.C. App. 411, 417, 296 S.E.2d 839, 843 (1982), this Court held that a "trial court acted properly in changing [a] defendant's sentence after discovering it had mistakenly applied the wrong parole law when originally sentencing defendant."

I find these two cases to be analogous to the case *sub judice*. The trial court mistakenly sentenced defendant without properly applying the firearm enhancement statute. This mistake of law resulted in defendant originally receiving two separate sentences;

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one for second-degree kidnapping and another for the firearm enhancement. Although the separate firearm enhancement sentence was invalid, the kidnapping sentence was valid and only required a change or modification to bring it in accordance with N.C. Gen. Stat. § 15A-1340.16A. Defendant was not prejudiced by this change because it did not result in him receiving a greater sentence than was originally given to him.

Accordingly, the trial court did not err in re-sentencing defendant for the second-degree kidnapping offense with a firearm enhancement because defendant's case was final for purposes of the *Lucas* rule.

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H. WADE BAKER AND WIFE, LOLA W. BAKER; JACOB L. BAKER (WIDOWER); AND JACOB L. WHITAKER, EXECUTOR OF THE ESTATE OF GOLDEN McCLELLAN BAKER AND EXECUTOR OF THE ESTATE OF ETHEL PAULINE WHITAKER BAKER, PETITIONERS V. CLYDE GRAY MOOREFIELD AND WIFE, DONNA W. MOOREFIELD, RESPONDENTS

No. COA01-1594

(Filed 19 November 2002)

**1. Deeds— ambiguity in description—sufficiency of evidence**

There was competent evidence to support the trial court's finding of ambiguity in a deed where there was testimony from two professional surveyors that the terms in the original deed were inconsistent when applied to the contested boundary.

**2. Deeds— conflict in description—monument controls**

The trial court correctly used the brick wall of a store building as a monument in an action to establish a common boundary where the course and distance description in the deed was inconsistent with the monument. Where there is a conflict between course and distance and a fixed monument, the call for the monument will control.

Judge GREENE dissenting.

Appeal by petitioners from judgment entered 20 September 2001 by Judge Clarence E. Horton, Jr., in Superior Court, Stokes County. Heard in the Court of Appeals 17 September 2002.

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*Hough & Rabil, PA, by David B. Hough, for petitioners-appellants.*

*Stover and Bennett, by Michael R. Bennett, for respondents-appellees.*

WYNN, Judge.

Wade and Lola Baker appeal the Superior Court's judgment establishing a common boundary line between the Bakers' property and adjacent property owned by Clyde and Donna Moorefield. The Bakers present one issue on appeal: Did the trial court err by finding the recorded deed ambiguous and using a monument, instead of course and distance, to establish the common boundary? After a careful review of the record, we conclude the trial court had competent evidence to find ambiguity in the deed. Moreover, our Supreme Court has consistently held that when "there is a conflict between course and distance and a fixed monument, the call for the monument will control." *Cutts v. Casey*, 271 N.C. 165, 170, 155 S.E.2d 519, 522 (1967). Accordingly, we affirm the judgment of the Superior Court, Stokes County.

The facts of this case tend to show that in 1953, the Moorefields and Bakers entered into a land conveyance contract and used the following legal description to describe the property conveyed:

BEGINNING at an iron stake in the Golden Baker and C.D. Slate line, at a point 54.8 feet, South 79 degrees 51 minutes East of Golden Baker's and C.D. Slate's corner in C.T. McGee's line, and runs thence South 7-1/2 degrees West, said line being parallel to the brick wall of the store building; 100 feet to a corner in line of U.S. Highway 52; thence South 79 degrees 57 minutes East 140 feet to a point in the line U.S. Highway 52, thence parallel with the first line, running North 7-1/2 degrees East 150 feet to an iron stake, Golden Baker's corner and Mrs. C.D. Slate's line; thence with her line North 79 degrees 57 minutes West 140 feet to the BEGINNING.

The present controversy arises from the placement of a common boundary line which the deed describes as running "South 7-1/2 degrees West" and "parallel to the brick wall of the store building." In 1986, the Moorefields tore down the brick wall and store building, and constructed a new structure on the property. In December 1997, the Bakers filed a Petition to Establish Boundaries in Superior Court,

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Stokes County. The Bakers alleged that the Moorefield's new structure encroached on the 7 ½ degree boundary arch. In response, the Moorefields alleged that the new structure was parallel to the brick wall of the old store building.

In August 2001, the case was tried without a jury before Superior Court Judge Clarence W. Horton who made the following contested Findings of Fact:

8. Location of the first line, which proceeds generally South . . . is the primary focus of the dispute between the parties. The description of the first line . . . describes a course South 7 ½ degrees West, running parallel to the brick wall of the Store Building . . . . Although the old Store Building has now been removed . . . its exact location was plotted . . . . [However a] course of 7 ½ degrees West is not parallel with the Store Building, and does not accurately represent the common boundary line . . . as shown by . . . the surveys.

11. [T]he Store Building was a monument, and the description of the line as being parallel to the Store Building would take precedence over the description of the same line as being South 7 ½ degrees.

Based on these findings of fact, the trial court concluded the "true boundary lines of the [Bakers' Property]" did not run 7 ½ degrees South, but rather, were parallel to the old store building and brick wall. Accordingly, the trial court affirmed the status quo, and held that the Moorefields were not encroaching on the Baker's property. The Bakers' appeal this judgment.

In a petition to establish boundaries, "where the location of the boundary line . . . is admitted, or evidence is not conflicting, . . . the location of the line [is] a question of law for the court." *Young v. Young*, 76 N.C. App. 93, 95, 331 S.E.2d 769, 770 (1985). However, "where the language is *ambiguous* so that the effect of the instrument must be determined by resort to extrinsic evidence . . . the question of the parties' intention becomes one of fact." *Runyon v. Paley*, 331 N.C. 293, 305, 416 S.E.2d 177, 186 (1992) (emphasis in original). "Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *Sessler v. Marsh*, 144 N.C. App. 623, 628, 551 S.E.2d 160, 163, *disc. review denied*, 354 N.C. 365, 556 S.E.2d 577 (2001) (citations omitted).



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[1] First, the Bakers contend the trial court erred “in determining the placement of a boundary line” by “inappropriately isolating a single phrase,” and giving the phrase too much weight. Essentially, the Bakers argue the trial court erroneously concluded that the deed was ambiguous. We disagree.

The deed specifically provides that the boundary line running “South 7-1/2 degrees West” is “parallel to the brick wall of the store building.” Craig Sizemore, a surveyor hired by the Moorefields’ in 1986, before the present controversy arose, testified that a line drawn 7 ½ degrees South was not parallel with the location of the brick wall.<sup>1</sup> Marvin Cavanaugh, a surveyor appointed by the Clerk of Court for Superior Court of Stokes County, also testified that a 7 ½ degree line was not “exactly parallel” with the brick wall.<sup>2</sup> Thus, the court heard testimony from two professional surveyors that the terms in

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1. According to the dissent, this testimony should be disregarded because Sizemore did not survey the call in the deed. It is unclear whether the dissent is questioning his credibility or competence. In either case, however, it is not within the province of this Court to re-weigh credibility evidence on appeal or to raise error where no error is assigned. In the first instance, the dissent might be arguing that Sizemore is not “credible” because he did not survey the call. However, our Supreme Court has made it eminently clear that: “Questions of credibility and the weight to be accorded the evidence remain in the province of the finder of facts.” *Scott v. Scott*, 336 N.C. 284, 291, 442 S.E.2d 493, 497 (1994). In the second instance, the dissent might be arguing that Sizemore is not “competent” to testify on the relationship between the call and the brick wall because he did not survey the call. The Baker’s, however, did not raise this objection at trial; The trial court did not have an opportunity to hear or rule on this objection; and the Baker’s did not assign this as error. Accordingly, under our rules of appellate procedure, the competence of Sizemore was not properly preserved and is not before this Court. N.C. R. App. P. 10(a) (2002).

2. In analyzing Cavanaugh’s testimony and reaching a conclusion, the dissent states that “a map pursuant to a survey that closes by following the deed description and accepting the common boundary line as being close to but ‘not exactly parallel’ to the store building is a more accurate reflection of the parties’ intentions . . .” Essentially, the dissent reasons that interpreting the word “parallel” literally is “repugnant” to the rest of the deed. The dissent assumes, in opposition to the trial court, that the word “parallel” as opposed to the “7 ½ degree call” is the repugnant aspect of the deed. In support of this proposition, the dissent notes that “Cavanaugh expressed doubt” as to whether the original surveyors “actually went out and located the two corners of the building and created a parallel line.” This doubt, however, is not a sufficient basis to reverse the factual findings of the trial court for three reasons. First, Cavanaugh was not at the original survey. Therefore, his doubt is mere speculation. Second, whether or not the surveyors did their jobs correctly does not have the slightest of relevance in determining the “original intent” of the parties. In fact, the original parties to the deed certainly had a greater understanding of the term “parallel” than they did of a “7 ½ degree” call. Third, even assuming Cavanaugh’s doubts are correct, i.e. the original surveyors did not measure a parallel line as instructed and, therefore, created an ambiguity in the deed, our law compels the trial court to have monuments control over course and distances.

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the original deed were inconsistent when applied to the contested boundary. Accordingly, the trial court's finding of ambiguity in the deed is binding on appeal, because there was competent evidence to support the trial court's determination that a "course of 7 ½ degrees West is not parallel with the Store Building, and does not accurately represent the common boundary line." Therefore, this assignment of error is without merit.

**[2]** Second, the Bakers contend the trial court erred by using the brick wall of the store building to establish the common boundary instead of using the course and distance description in the deed. We disagree.

In North Carolina, it is well established that: "[w]here there is a conflict between course and distance and a fixed monument, the call for the monument will control." *Cutts v. Casey*, 271 N.C. 165, 170, 155 S.E.2d 519, 522 (1967); *North Carolina State Highway Commission v. Gamble*, 9 N.C. App. 618, 623-24, 177 S.E.2d 434, 438 (1970); see also *Stephens v. Dortch*, 148 N.C. App. 509, 517, 558 S.E.2d 889, 894 (2002) ("[T]he general rule is that calls to natural objects control courses and distances."). Moreover, "a building is frequently regarded as a monument of boundary sufficient . . . to control course and distance." *Millard v. Smathers*, 175 N.C. 61, 65, 94 S.E. 1045, 1047 (1917); see also *Stephens*, 148 N.C. App. at 517, 558 S.E.2d at 894 ("A call to a wall . . . if known or established, is a call to a monument."); *Gamble*, 9 N.C. App. at 623-24, 177 S.E.2d at 438.

Here, as previously noted, the terms in the original deed are inconsistent when applied to the contested boundary. Moreover, the conflict involves a call to course and distance that is inconsistent with a known monument. Accordingly, the trial court correctly applied North Carolina law by resolving the controversy in favor of the monument. Therefore, this assignment of error is without merit.

Affirmed.

Judge BIGGS concurs.

Judge GREENE dissents.

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GREENE, Judge, dissenting.

As I disagree with the majority that, in order to determine the common boundary line between the parties in this case, the call in the deed to a monument prevails over a call to a course, I dissent.

Our Supreme Court has held: “‘In the construction of deeds, words are not the principal thing, . . . and . . . when there are any words in a deed that appear repugnant to the other parts of it, and to the general intention of the parties, they will be rejected.’” *Lumber Co. v. Lumber Co.*, 169 N.C. 80, 93, 85 S.E. 438, 446 (1915) (citation omitted). As a general rule of hierarchy, “‘monuments, natural or artificial, referred to in a deed, control its construction, rather than courses and distances; but this rule is not inflexible. It yields whenever, taking all the particulars of the deed together, it would be absurd to apply it.’” *Lumber Co.*, 169 N.C. at 94, 85 S.E. at 446 (quoting *White v. Luning*, 93 U.S. 514, 524, 23 L. Ed. 938, 939-40 (1876)).

While Craig Sizemore (Sizemore), the Moorefields’ surveyor, testified a line drawn “South 7-1/2 degrees West” as required by the deed “would have gone up either close to or through the old store building, and definitely not parallel with it,” this testimony must be disregarded as Sizemore never surveyed the call in the deed. In fact, Sizemore never considered the deed in surveying the property. Instead, he located iron stakes that were not referenced in the deed but purported by the Moorefields to establish the property boundaries and based his deductions regarding the common boundary line between the Moorefields and the Bakers on the location of these stakes.

Later in the hearing, the parties also stipulated that, contrary to Sizemore’s testimony, the line would not have gone through the store building. This stipulation was based on a projection by Marvin Cavanaugh (Cavanaugh), the court-appointed surveyor, who explained the line would not even get close to the building, although it would be “not exactly parallel.” In addition, Cavanaugh expressed doubt “[w]hether or not the day [the property] was surveyed [for purposes of the deed the original surveyors] actually went out and located the two corners of the building and created a line parallel.”

Cavanaugh had prepared several maps with respect to the property in question: (1) a map following the calls in the deed (the deed map),<sup>3</sup> (2) a map (the stake map) reflecting the iron stakes found on

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3. In surveying the property following the calls in the deed, Cavanaugh did not consider the call in the deed to the “line being parallel to the brick wall of the store building” because the building had been torn down several years before.

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the property,<sup>4</sup> (3) a map setting out the Bakers' contentions regarding the boundaries, and (4) a map outlining the Moorefields' contentions.<sup>5</sup> With respect to the deed map, Cavanaugh testified "the deed closed and . . . had a mathematical closure that was proper and acceptable." Comparing the deed map to the stake map, Cavanaugh concluded that "beyond [the northern boundary line of the property] there] [was] not a whole lot of semblance" between the two maps.

It thus appears that a map based on a survey that closes by following the deed description and accepting the common boundary line as being close to but "not exactly parallel" to the store building is a more accurate reflection of the parties' intentions than a map based on movable iron stakes that hardly has any semblance to the deed description. Upholding the general rule of hierarchy among calls in a deed by taking the word "parallel" literally instead of accepting it as a general reference for the direction of the intended line would make it repugnant to the other parts of the deed and lead to an absurd result. *See Lumber Co.*, 169 N.C. at 93, 85 S.E. at 446. Accordingly, I would agree with the Bakers that the trial court "inappropriately isolat[ed] a single phrase" in the deed and that its judgment must therefore be reversed and remanded for determination of the common boundary line between the parties pursuant to the call in the deed to a course of "South 7-1/2 degrees West."

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LINDA A. TRIVETTE, EMPLOYEE, PLAINTIFF v. MID-SOUTH MANAGEMENT, INC.,  
EMPLOYER, CNA INSURANCE COMPANIES, CARRIER, DEFENDANTS

No. COA01-1217

(Filed 19 November 2002)

**1. Workers' Compensation— remanded hearing—additional issue**

The Industrial Commission did not exceed its authority in a workers' compensation action by resolving on remand plaintiff's entitlement to temporary total disability even though the issue

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4. This survey was introduced into evidence as Exhibit H and was later relied on by the trial court in entering its judgment.

5. In comparing the contentions of the Bakers with those of the Moorefields, Cavanaugh concluded the Bakers' contentions were "more consistent with the recorded document," i.e. the deed.

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was not addressed in the first appeal. Plaintiff had a rating of her permanent impairment and the commission was required to address, if plaintiff desired, whether the scheduled benefit for her rating under N.C.G.S. § 97-31 was a more favorable remedy than temporary total disability under N.C.G.S. § 97-28.

**2. Workers' Compensation— total disability—sufficiency of evidence**

There was sufficient evidence to support the Industrial Commission's findings and conclusions of temporary total disability in a workers' compensation action where there was medical testimony that the combination of plaintiff's existing multiple sclerosis and the injury rendered her incapable of work.

**3. Workers' Compensation— temporary total disability—end point**

Maximum medical improvement is not the point at which temporary total disability must end if the employee has not regained her ability to earn pre-injury wages. Temporary disability ends at the first point at which the employee may decide to exercise her discretion to select the more favorable remedy (disability benefits, partial or total, or the benefits scheduled for the permanent partial disability rating). Here, the commission determined that benefits would stop on the date which plaintiff sought as the beginning date for scheduled benefits and plaintiff did not appeal or cross-assign error.

Appeal by defendants from Opinion and Award entered 28 February 2001 and the Order entered 22 May 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 June 2002.

*Harris, Ragan, Patterson & Rodgers, P.L.L.C., by James W. Ragan, for the plaintiff-appellee.*

*Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Mel J. Garofalo and Shelley W. Coleman, for the defendant-appellants.*

HUDSON, Judge.

Defendants appeal an opinion and award entered 28 February 2001 by the Full Commission ("Commission") of the North Carolina Industrial Commission awarding plaintiff, Linda Trivette, compensation for a work-related injury and an order entered 22 May 2001 by

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the Commission denying defendants' motion to reconsider the opinion and award. We affirm.

This appeal arises from a worker's compensation claim filed by plaintiff alleging injury to her lower back during her employment by defendant, Mid-South Management, Inc. After plaintiff filed her claim, defendant admitted liability for medical expenses but did not admit liability for any disability, and this litigation ensued. The Commission awarded plaintiff benefits for temporary total disability for the period from 22 June 1993 through 9 July 1993 and for medical expenses. Plaintiff appealed and this Court (1) affirmed the Commission's determination that plaintiff was not entitled to an award of benefits for total disability for the worsening of a pre-existing condition, and (2) remanded to the Commission for findings regarding the issue of whether plaintiff has sustained, and is entitled to compensation for, permanent partial impairment. See *Trivette v. Mid-South Mgmt., Inc.*, 141 N.C. App. 151, 541 S.E.2d 523 (2000) (Table).

On 28 February 2001, the Commission found that, in addition to the benefits previously awarded, plaintiff was entitled to compensation for a 5% permanent partial impairment of her lower back and compensation for temporary total disability from 31 May 1994 until 7 January 1997 when plaintiff reached maximum medical improvement. Defendants appeal to this court contending (1) that the Commission exceeded the scope of its authority in awarding compensation for temporary total disability from 31 May 1994 until 7 January 1997, and (2) that even if the Commission acted within its authority, the evidence did not support the Commission's findings of fact and conclusions of law concerning temporary total disability benefits. We affirm the 28 February 2001 award of the Commission.

**[1]** In their first argument, defendants contend that the Commission exceeded its authority in awarding compensation for temporary total disability for the period from 31 May 1994 until 7 January 1997. Defendants argue that the Commission was instructed to address one issue on remand, the issue of permanent partial impairment, and that it was error for the Commission to address any other issue. In *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985), the Supreme Court observed that "[a]lthough the Industrial Commission is not a court with general implied jurisdiction, it is clothed with such implied power as is necessary to perform the duties required of it by the law which it administers." The Industrial Commission, as part of its judicial powers, "has inherent power to set aside one of its former judgments," because the "power to provide relief against the opera-

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tion of a former judgment is an integral part of the judicial power.” *Hogan*, 315 N.C. at 137, 139, 337 S.E.2d at 483, 484; *see also Jenkins v. Piedmont Aviation Servs.*, 147 N.C. App. 419, 424, 557 S.E.2d 104, 107-08 (2001) (holding that in certain circumstances, because of the judicial functions of the Commission, it may set aside a previous decision, even though it was not appealed). The Commission has the authority to set aside its former decisions in their entirety, which certainly includes the authority to set them aside in part in some circumstances, in the interest of justice. Moreover, in *Crump v. Independence Nissan*, 112 N.C. App. 587, 589, 436 S.E.2d 589, 592 (1993), this Court noted that “if necessary, the full commission must resolve matters in controversy even if those matters were not addressed by the deputy commissioner.”

Here, on remand, the Commission, in addition to its original findings, addressed the issue of plaintiff’s permanent partial impairment and her temporary total disability. Because the evidence indicated that plaintiff had a rating of her permanent impairment, the Commission was required to address, if plaintiff desired, whether the scheduled benefit for her rating under N.C. Gen. Stat. § 97-31 was a more favorable remedy than temporary total disability under N.C. Gen. Stat. § 97-29. *Whitley v. Columbia Mfg. Co.*, 318 N.C. 89, 348 S.E.2d 336 (1986). Thus, we do not believe that, under these circumstances, the Commission exceeded its authority in resolving the matter of plaintiff’s entitlement to temporary total disability even though this issue was not addressed by this Court in the first appeal.

**[2]** In their second argument, defendants contend that the “record is devoid of competent evidence to support the findings of fact and conclusions of law of the Full Commission.” On appeal of a workers’ compensation decision, we are “limited to reviewing whether any competent evidence supports the Commission’s findings of fact and whether the findings of fact support the Commission’s conclusions of law.” *Deese v. Champion Int’l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000). An appellate court reviewing a workers’ compensation claim “does not have the right to weigh the evidence and decide the issue on the basis of its weight. The court’s duty goes no further than to determine whether the record contains any evidence tending to support the finding.” *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)), *reh’g denied*, 350 N.C. 108, 532 S.E.2d 522 (1999). In reviewing the evidence, we are required, in accordance with the Supreme Court’s mandate of liberal construction

in favor of awarding benefits, to take the evidence “in the light most favorable to plaintiff.” *Id.*

The Full Commission is the “sole judge of the weight and credibility of the evidence.” *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. Furthermore,

the Commission does not have to explain its findings of fact by attempting to distinguish which evidence or witnesses it finds credible. Requiring the Commission to explain its credibility determinations and allowing the Court of Appeals to review the Commission’s explanation of those credibility determinations would be inconsistent with our legal system’s tradition of not requiring the fact finder to explain why he or she believes one witness over another or believes one piece of evidence is more credible than another.

*Id.* at 116-17, 530 S.E.2d at 553. Additionally, in making its determinations, the Commission “is not required . . . to find facts as to all credible evidence. That requirement would place an unreasonable burden on the Commission. Instead the Commission must find those facts which are necessary to support its conclusions of law.” *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 602, 532 S.E.2d 207, 213 (2000) (internal quotation marks omitted) (alteration in original); see N.C. Gen. Stat. § 97-86 (2001). Moreover, the Commission must “make specific findings with respect to crucial facts upon which the question of plaintiff’s right to compensation depends.” *Gaines v. Swain & Son, Inc.*, 33 N.C. App. 575, 579, 235 S.E.2d 856, 859 (1977).

Here, the defendants have challenged the following provisions in the Opinion and Award:

#### Findings of Fact

11. Dr. Stutesman also diagnosed plaintiff with piriformis syndrome, which involves spasticity of a deep pelvic muscle which binds and irritates the sciatic nerve resulting in lower back pain. Dr. Stutesman directly related plaintiff’s problems with the piriformis muscle to the work-related injury, although in retrospect, Dr. Stutesman stated that the severity of the syndrome was probably due to the fact that plaintiff also had multiple sclerosis.
12. On May 31, 1994, plaintiff underwent piriformis release surgery performed by Dr. Scott McCloskey. The surgery was



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successful and plaintiff's deep buttock and hip pain was somewhat relieved; however, due to plaintiff's multiple sclerosis condition, she continued to experience a degree of spasticity. On January 7, 1997, Dr. Stutesman stated that plaintiff had reached maximum medical improvement as far as her back injury, and she rated plaintiff with a 5% permanent partial disability to her back. The rating was based upon the work injury, the SI joint dysfunction and the piriformis injury which Dr. Stutesman directly related to the work injury.

19. Dr. Yount indicated that plaintiff's June 21, 1993, injury was one which normally would heal in a 6 to 8 week period with conservative treatment.
22. Plaintiff was subsequently disabled as a result of her piriformis release surgery on May 31 1994 and continued to be disabled until 7 January 1997 when she reached maximum medical improvement to her lower back with a 5% permanent partial disability rating.

Conclusions of Law

4. As a result of the injury by accident of June 21, 1993, plaintiff's piriformis condition was significantly aggravated and resulted in piriformis muscle release surgery on 31 May 1994. As a result of the injury, plaintiff sustained a 5% permanent partial disability to her lower back. Accordingly, plaintiff is entitled to compensation in the amount of \$193.64 per week for a period of 15 weeks. N.C. Gen. Stat. § 97-31(23).
5. Plaintiff is entitled to temporary total disability compensation in the amount of \$193.64 per week from the 31 May 1994 date of her piriformis release surgery through 7 January 1997 when she reached maximum medical improvement to her lower back. N.C. Gen. Stat. § 97-29.

Award

2. Defendants shall pay plaintiff temporary total disability compensation in the amount of \$193.64 per week beginning on 31 May 1994 and continuing through 7 January 1997. Defendants shall pay this amount in a lump sum, subject to attorney's fees approved below.
3. Subject to attorney's fees approved below, defendants shall pay plaintiff a lump sum in the amount of \$2,904.60 represent-

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ing a 5% permanent partial disability to her back, pursuant to the June 7, 1997 rating provided by Dr. Stutesman.

4. Plaintiff's counsel is entitled to a reasonable attorney's fee of 25% of plaintiff's recovery in Paragraphs 2 and 3 above. The fee shall be deducted from the lump sum awards and paid directly to plaintiff's counsel.

Defendants argue that Dr. Stutesman's testimony does not support these findings and conclusions of total disability because certain portions of the doctor's testimony "reveal[] that Dr. Stutesman actually felt that plaintiff's disability was a result of the multiple sclerosis." We disagree and conclude that the testimony supports the findings of the Commission.

First, we address whether "any competent evidence supports the Commission's findings of fact" concerning plaintiff's temporary total disability. *Deese*, 352 N.C. at 116, 530 S.E.2d at 553. The employee bears the burden of showing that he has suffered a "disability" (loss of wage-earning capacity) pursuant to N.C. Gen. Stat. § 97-29 (2001) or N.C. Gen. Stat. § 97-30 (2001). *See* N.C. Gen. Stat. § 97-2(9) (2001). According to *Russell v. Lowes Product Distribution*, a plaintiff may satisfy this initial burden by one of several approaches:

(1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, experience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993) (internal citations omitted).

Plaintiff's evidence, including the testimony of Dr. Stutesman, established that the combination of her pre-existing multiple sclerosis and the injury that required piriformis release surgery rendered her physically incapable of work in any employment. Specifically, Dr. Stutesman stated the following at her deposition:

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Q. . . . So are you saying here her inability to work at this point in time is due to a combination of things?

MR. KURANI: Objection.

THE WITNESS: Yes.

Q. (By Ms. Thomas) Okay. And those things are MS, back pain and deformities?

MR. KURANI: Objection.

THE WITNESS: Yes.

Later in her deposition, Dr. Stutesman reiterated that plaintiff's inability to work was due to "a combination of the two" factors—back problems and multiple sclerosis.

Based on this evidence, the Commission found that plaintiff's "disability" or loss of wage-earning capacity during the period ending 7 January 1997 was total, meaning that she was "entitled to receive benefits for as long as the total loss of wage-earning capacity lasts." *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 10, 562 S.E.2d 434, 441 (2002) (citing N.C. Gen. Stat. § 97-29); *Gupton v. Builders Transport*, 320 N.C. 38, 42, 357 S.E.2d 674, 678 (1987) (defining "disability" for purposes of workers' compensation benefits).

**[3]** Dr. Stutesman last saw plaintiff on 23 May 1996. In response to a letter from defendants on 7 January 1997, "Dr. Stutesman stated that plaintiff had reached maximum medical improvement as far as her back injury, and she rated plaintiff with a 5% permanent partial disability to her back. The rating was based upon the work injury, the SI joint dysfunction and the piriformis injury which Dr. Stutesman directly related to the work injury." According to Dr. Stutesman, "maximum medical improvement" signifies "when a person's condition stabilizes for at least 6 months and we do not see any deterioration or improvement." However, maximum medical improvement is not the point at which temporary total disability must end, if the employee has not regained her ability to earn pre-injury wages. *See Knight; Russos v. Wheaton Indus.*, 145 N.C. App. 164, 167-68, 551 S.E.2d 456, 459 (2001) (*disc. rev. denied*, 355 N.C. 214, 560 S.E.2d 135 (2002)). Rather, it is the first point at which the employee may decide to exercise her selection of the more favorable remedy, as between disability benefits, (partial 97-30 or total 97-29), and the benefits provided under the 97-31 schedule for the rating. *See Knight; Whitley v. Columbia Manufacturing*; and *Gupton*. Here, the plaintiff apparently

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sought to select the benefits under the schedule beginning 7 January 1997, and has neither appealed nor cross-assigned as error the Commission's determination that her ongoing benefits should stop on that date. Dr. Stutesman carefully explained the basis for her 5% rating, and defendants have not argued that the rating is unsupported by the evidence. Thus, we conclude that the evidence supports the challenged findings of fact, which in turn support the conclusions of law and award of the Commission.

Defendants also contend that the Commission erred in denying their motion to reconsider. In light of our decision on the merits in this opinion, we need not address this contention. The 28 February 2001 Opinion and Award of the Commission is affirmed.

Affirmed.

Judges WYNN and CAMPBELL concur.

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STATE OF NORTH CAROLINA v. ARTIS TAMAR PERKINS

No. COA02-158

(Filed 19 November 2002)

**1. Appeal and Error— preservation of issues—general objection**

A defendant in a prosecution for a first-degree murder (which began when a baby was called ugly) did not preserve for appellate review the State's cross-examination of defendant about bad acts and crimes he committed as a juvenile. Defendant made only two general objections, gave no basis for the objections, and the transcript does not clearly demonstrate grounds for the objections.

**2. Evidence— bad acts as juvenile—admission not plain error**

The admission of bad acts and crimes committed by a first-degree murder defendant as a juvenile was not plain error where there was compelling evidence of guilt, defendant did not show that the jury probably would have reached a different result otherwise, and defendant did not show that the admission of the evidence resulted in a fundamental miscarriage of justice.

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[154 N.C. App. 148 (2002)]

**3. Evidence— bad acts as juvenile—not statutory plain error**

The General Assembly did not label the admission of juvenile convictions as plain error in N.C.G.S. § 8C-1, Rule 609(d), under which a defendant cannot be impeached by a juvenile adjudication, and there was no evidence that defendant was unfairly prejudiced by questions about his juvenile convictions.

Appeal by defendant from judgment dated 20 April 2001 by Judge David Q. LaBarre in Superior Court, Wake County. Heard in the Court of Appeals 16 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Steven F. Bryant, for the State.*

*Ligon and Hinton, by Lemuel W. Hinton, for defendant-appellant.*

McGEE, Judge.

Artis Tamar Perkins (defendant) was indicted for the murder of Louis Santos on 23 October 2000. The evidence presented at trial tended to show the following. Tiyonia Miller (Miller) was walking to defendant's apartment in Raleigh, North Carolina with her baby in her arms on 16 September 2000. As she walked up the steps of the apartment, Louis Santos (Santos) and Antwoin Watkins (Watkins) complimented Miller on her baby. Lushawna Jeffreys (Lushawna) was standing on the balcony above and said that the baby was ugly. Miller entered defendant's apartment and told those in the apartment, including Shaquanna Henderson (Shaquanna) and Kenyatta Henderson (Kenyatta), what Lushawna had said.

Lushawna left her apartment and Miller went outside to confront her. They were soon joined by Shaquanna, Kenyatta, and others, including Latisha Jeffreys (Latisha), and an argument ensued. Latisha punched Shaquanna in the jaw and a fight started. Santos and Watkins broke up the fight by pushing Lushawna and Latisha back into the apartment. Santos had called for a taxi and it arrived. Santos, Watkins, Lushawna, and Latisha left the apartment. Shaquanna, Kenyatta, and Miller stood outside their apartment and Santos and Watkins stayed between the young women to prevent another fight.

As Santos, Watkins, Lushawna, and Latisha entered the taxi, Kenyatta and Miller threw bottles at the vehicle. The taxi driver refused to drive the four passengers away from the scene and ordered

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them out of the taxi. After leaving the taxi, Lushawna and Latisha went to a neighbor's house to call another taxi while Santos and Watkins waited outside. When Lushawna and Latisha returned, they were confronted by Shaquanna, Kenyatta, and another female, and another fight erupted.

A crowd gathered and some people encouraged the young women to fight. Santos and Watkins attempted to break up the fight by pushing the young women apart. Defendant and his friend, Maurice Davis (Davis), were in the crowd watching the fight. Davis heard defendant say that Santos and Watkins were hitting defendant's sister. A couple of weeks earlier, Davis had given defendant a gun. Davis asked defendant if he had the gun and defendant responded that he did. When Davis asked defendant what he was going to do, defendant stated that he was going to "shoot . . . a m---- f---- that keep messing with my sister."

During the fight, the young women and Santos fell to the ground, with Santos on top of Kenyatta. Santos was hitting Kenyatta's head against the ground. Defendant removed a gun from his back pocket and began to shoot it. Defendant fired the gun, paused, and then fired several more shots. After the shots, Santos ran from the crowd and said, "I'm shot, I'm shot" before falling to the ground. Santos was shot once in his back and twice in his left leg. Bystanders administered CPR until emergency medical personnel and police arrived. Santos died from the gunshot wound in his back.

At trial, the trial court determined that due to defendant's age at the time of the crime, his case would be tried as a noncapital case. The jury found defendant guilty of first degree murder and the trial court sentenced defendant to life imprisonment without parole. Defendant appeals.

**[1]** Defendant's sole argument on appeal is that the trial court erred in allowing the State to question defendant about crimes and bad acts he committed as a juvenile. Defendant argues the State impermissibly attacked his character with evidence of prior unindicted bad acts. The trial transcript shows the following cross-examination of defendant by the State:

Q. Did you used to stand out with Quondell while he was selling drugs?

DEFENSE COUNSEL: Objection, your Honor.

COURT: Overruled.

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Q. Did you used to stand out with Quondell over at Cinnamon Ridge while he was selling drugs?

A. Sometimes.

Q. You sell drugs too?

A. I have.

Q. Did you sell drugs also over by Muffin's house?

A. No, I did not.

Q. Over in southeast Raleigh anywhere?

A. No, I didn't.

Q. Who else would sell drugs out there with you at Cinnamon Ridge, Maurice?

A. No one sold drugs with me. They did it on their own.

Q. So you just sold drugs on your own, you didn't sell for anybody?

A. No, I didn't.

Q. Where did you get them from?

A. Does it really matter?

Q. Where did you get them from?

A. I got it from a guy.

DEFENSE COUNSEL: Objection, your Honor.

COURT: Overruled.

A. I got it from a guy.

Q. Who?

A. I don't know.

"In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Eason*, 328 N.C. 409, 420, 402 S.E.2d 809, 814 (1991); *see* N.C. R. App. P. 10(b)(1). The trial transcript shows that counsel for defendant only made two general objections to questions regarding defendant's drug sales during the challenged

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cross-examination and failed to object to the State's repeated questions concerning defendant's bad acts. Defendant's counsel also failed to state specific grounds for the basis of the objections. "A general objection, when overruled, is ordinarily not adequate unless the evidence, considered as a whole, makes it clear that there is no purpose to be served from admitting the evidence." *State v. Jones*, 342 N.C. 523, 535, 467 S.E.2d 12, 20 (1996). Defendant's counsel gave no basis for the objections and the transcript does not clearly demonstrate grounds for the objections. Accordingly, defendant failed to properly preserve this issue for appeal. *See State v. Gardner*, 315 N.C. 444, 447, 340 S.E.2d 701, 704 (1986).

**[2]** Defendant nonetheless argues the admission of evidence of his prior bad acts constituted plain error and should be reviewed by this Court accordingly. *See* N.C. R. App. P. 10(c)(4). Plain error review is appropriate when a defendant fails to preserve the issue for appeal by properly objecting to the admission of evidence at trial. *State v. Rourke*, 143 N.C. App. 672, 675, 548 S.E.2d 188, 190 (2001).

Plain error is an error which 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. Bagley*, 321 N.C. 201, 213, 362 S.E.2d 244, 251 (1987), *cert. denied*, 485 U.S. 1036, 99 L.Ed.2d 912 (1988). To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result. *See State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

*State v. Jones*, 137 N.C. App. 221, 226, 527 S.E.2d 700, 704 (2000). Our Supreme Court has stated that

"[t]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused,' or the error has 'resulted in a miscarriage of justice or in the denial to appellants of a fair trial.'"

*State v. Steen*, 352 N.C. 227, 255, 536 S.E.2d 1, 18 (2000) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting



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*United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982) (emphasis omitted)).

Defendant argues that admitting evidence of defendant's prior bad acts as a juvenile was overly prejudicial and rose to the level of plain error. Defendant further argues that his defense relied largely upon his credibility, which was effectively destroyed by admission of the prior bad acts. Defendant also argues that he is entitled to a new trial under *State v. Wilson*, 118 N.C. App. 616, 456 S.E.2d 870 (1995). In holding that the defendant in *Wilson* was prejudiced by the admission of improper evidence, this Court stated that "[a] defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error . . . not been committed, a different result would have been reached at the trial out of which the appeal arises." *Id.* at 620, 456 S.E.2d at 873 (quoting N.C. Gen. Stat. § 15A-1443(a) (1988)). While defendant states this standard correctly, we must review defendant's argument for plain error rather than under this standard because defendant failed to properly preserve the issue for appeal.

Defendant also argues that the General Assembly has sought to protect juvenile defendants when they are tried as adults. Defendant cites N.C. Gen. Stat. § 8C-1, Rule 609(d) and argues that public policy requires an extension of the criminal convictions exclusion to include prior bad acts under Rule 608. However, defendant offers no authority that suggests the General Assembly intended such a result and we find no argument that would justify such an extension.

Defendant fails to show that the jury probably would have reached a different result had the evidence of prior bad acts not been admitted. He also fails to demonstrate that the admission of the evidence resulted in a fundamental miscarriage of justice. In light of the compelling evidence of defendant's guilt presented at trial, we hold the trial court did not commit plain error in admitting evidence of defendant's prior bad acts. See *State v. Parks*, 148 N.C. App. 600, 609, 560 S.E.2d 179, 185 (2002).

**[3]** Defendant also contends the State impermissibly attacked his credibility through the use of prior juvenile convictions. The trial transcript shows the following cross-examination of defendant by the State:

Q. Did your mother teach you right from wrong?

A. Yes, she did.

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Q. Did she tell you it was wrong to shoot people?

A. Yes, she did.

Q. Did she tell you it was wrong to steal?

A. Yes.

Q. Did she tell you it was wrong to fight people or hurt them?

A. She told me not to do it unless like I'm protect[ing] myself.

Q. Did she tell you it was wrong to lie?

A. Yes, she did.

Q. But you do all those things, don't you?

A. No, I don't.

Q. You don't steal?

A. I have—I don't do it anymore.

Q. You're on probation for that, aren't you?

A. Not on probation anymore.

Q. Because you got arrested for murder?

A. Yes.

Q. You've gotten in fights before too, haven't you?

A. Yes, I have.

Q. You've been convicted of being in fights too, haven't you?

DEFENSE COUNSEL: Objection, your Honor.

A. No.

COURT: Overruled.

Q. Have you not been convicted of assault?

A. No.

Q. You weren't put on probation for assault?

A. No.

Q. On [10 February] 2000, you weren't placed on probation for assault?

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- A. I was placed on probation for stealing.
- Q. And after you got placed on probation for stealing, you were also convicted of assault, weren't you?
- A. No, I wasn't.
- Q. You didn't get an assault and have them have to extend your probation for stealing because you got in trouble again?
- A. No.

As discussed previously, an objection to evidence must be timely and specific in order to preserve the issue for appeal. *Eason*, 328 N.C. at 420, 402 S.E.2d at 814; see N.C. R. App. P. 10(b)(1). The trial transcript shows that defendant made only one general objection to the State's questions regarding prior juvenile convictions. The objection came after defendant answered the question concerning his conviction for assault and provided no grounds for the ruling sought. Defendant did not object to testimony regarding a prior juvenile conviction for stealing or to the four successive questions concerning defendant's alleged probation for assault after the initial objection. This issue was therefore not properly preserved for appeal.

Defendant argues the admission of prior juvenile convictions was plain error and urges this Court to review the issue accordingly. As we have previously discussed, the burden on defendant to demonstrate plain error is high. "To prevail under a plain error analysis, a defendant must establish not only that the trial court committed error, but that absent the error, the jury probably would have reached a different result." *Jones*, 137 N.C. App. at 226, 527 S.E.2d at 704.

Defendant argues the General Assembly labeled the admission of juvenile convictions as plain error by enacting N.C. Gen. Stat. § 8C-1, Rule 609(d) (2001). Under Rule 609(d), a defendant cannot be impeached by a juvenile adjudication in a criminal case. *Id.* While admission of defendant's juvenile conviction for stealing and questions concerning an assault conviction were inappropriate, the General Assembly's decision to exclude such testimony does not mean its admission is plain error. Defendant has cited no authority that would compel such an interpretation of the North Carolina Rules of Evidence.

While defendant objected once to the admission of his prior juvenile conviction for assault, there is no evidence that he was unfairly prejudiced by the question. Defendant responded "no" to the first

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question before an objection was given and no extrinsic evidence of the juvenile adjudication was admitted into evidence. No evidence therefore was admitted concerning a juvenile conviction for assault that could have prejudiced defendant.

Defendant has failed to show that exclusion of evidence of his prior juvenile convictions probably would have resulted in a different outcome at trial. He has also failed to demonstrate that admission of the evidence resulted in a fundamental miscarriage of justice. The evidence presented at trial was sufficient for the jury to convict defendant absent the admission of the evidence in question. In light of the compelling evidence of defendant's guilt, we hold the admission of prior juvenile convictions did not constitute plain error. We find this assignment of error to be without merit.

We hold that defendant received a fair trial, free of prejudicial error.

No error.

Judges HUDSON and BIGGS concur.

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NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF V.  
JULIE S. F. HOLT, DEFENDANT

No. COA01-1439

(Filed 19 November 2002)

**1. Appeal and Error— lack of jurisdiction—waiver of defense—first raised on appeal**

An argument concerning waiver of the defense of lack of personal jurisdiction was not addressed where it was first raised on appeal.

**2. Jurisdiction— long arm—insurance in North Carolina—vehicle in South Carolina**

Defendant's conduct was covered by North Carolina's long-arm statute in an action arising from an automobile accident in South Carolina involving a vehicle driven by a South Carolina resident, owned by a North Carolina resident, registered in North Carolina, and insured by plaintiff. Defendant ratified the services

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performed in North Carolina when her representative signed a form in North Carolina verifying the insurance coverage and mailed it to the South Carolina Department of Public Safety. Additionally, plaintiff processed and investigated defendant's claim in North Carolina. N.C.G.S. § 1-75.4(5)(b).

**3. Jurisdiction— minimum contacts—South Carolina vehicle— insurance claim on North Carolina policy**

The defendant in a declaratory judgment action had sufficient minimum contacts with North Carolina for the exercise of jurisdiction even though she did not physically enter North Carolina where she was driving a truck in South Carolina which was licensed and registered in North Carolina, she mailed a written claim to plaintiff in North Carolina for UIM benefits under a North Carolina insurance policy, the policy was entered into in North Carolina and issued by a North Carolina insurer to the owner of the vehicle, and the owner was a North Carolina resident.

Appeal by plaintiff from an order entered 17 August 2001 by Judge Ola M. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 September 2002.

*Caudle & Spears, P.A., by Harold C. Spears and C. Grainger Pierce, Jr., for plaintiff-appellant.*

*Kenneth L. Holland, P.A., by Kenneth L. Holland, for defendant-appellee.*

HUNTER, Judge.

North Carolina Farm Bureau Mutual Insurance Company ("plaintiff") appeals from an order dismissing its declaratory judgment action for lack of jurisdiction. For the reasons stated herein, we reverse the trial court.

This action arises from an automobile accident that occurred in Spartanburg, South Carolina on 23 February 1997. A pickup truck, owned by North Carolina resident Lewis Kelly Holt ("Holt") and operated by South Carolina resident Julie S. F. Holt ("defendant"), collided with a vehicle operated by Lois Elaine Berry ("Berry"). At the time of the accident, defendant had Holt's permission to drive his pickup truck, which was insured by plaintiff. The truck driven by defendant was garaged and registered in North Carolina and had a North Carolina license plate. At the time of the accident, Berry was

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insured under an automobile policy issued by Allstate Mutual Insurance Company (“Allstate”) having limits of liability of \$15,000 per person. Defendant suffered injuries in the accident and asserted a claim against Berry and her insurer, Allstate, alleging that Berry was negligent in proximately causing the accident and that defendant was injured as a result thereof. On 11 August 1999, defendant negotiated and accepted the sum of \$15,000 from Berry and Allstate and executed a Covenant Release and Settlement Agreement in favor of Berry.

On 10 August 1999, defendant, by letter from her attorney, notified plaintiff that she was bringing a claim for underinsured motorist (“UIM”) coverage under the policy since Berry’s insurer, Allstate, tendered the full \$15,000 limit of Berry’s liability insurance policy. On 30 December 1999, defendant filed suit against Berry in the Court of Common Pleas in Spartanburg County, South Carolina, for the purpose of pursuing a UIM claim against plaintiff. Defendant’s South Carolina suit for damages was served on plaintiff through the South Carolina Department of Insurance on 10 January 2000. Plaintiff’s counsel in South Carolina answered defendant’s damages suit on 28 March 2000, without mentioning any jurisdictional problems in its answer. Plaintiff’s South Carolina counsel admitted the accident was caused by Berry’s simple negligence. As a defense to defendant’s damages action, plaintiff’s South Carolina counsel raised essentially the same issues as were presented in the North Carolina trial court. Subsequently, plaintiff moved under Rule 40(j) of the South Carolina Rules of Civil Procedure to strike her complaint from the docket. In an order filed 1 May 2001, the South Carolina trial court granted this motion and noted that the parties agreed that if the claim was restored upon motion made within one year of the date of the order, the statute of limitations would be tolled.

On 28 April 2000, plaintiff filed a complaint seeking a declaratory judgment declaring that no UIM coverage is afforded to defendant because defendant breached the terms of the insurance policy and violated plaintiff’s statutory rights under N.C. Gen. Stat. § 20-279.21. Defendant filed her answer on 4 August 2000. Plaintiff filed a motion for summary judgment on 23 March 2001 asserting that there was no genuine issue as to any material fact and the plaintiff was entitled to judgment as a matter of law. On 10 May 2001, defendant filed a motion labeled “Motion for Summary Judgment Dismissing this Action.” Defendant asserted in her motion that the North Carolina court lacked jurisdiction over her. On 13 June 2001, plaintiff filed an

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amendment to the complaint, alleging that the North Carolina court had personal jurisdiction over defendant, and defendant filed her answer to the amended complaint. On 17 August 2001, the trial court filed an order dismissing plaintiff's declaratory judgment action for lack of jurisdiction. Plaintiff appeals.

The sole issue presented on appeal is whether the trial court erred in dismissing plaintiff's declaratory judgment action for lack of jurisdiction. We initially note that defendant's motion was labeled as a summary judgment motion. However, in its order, the trial court treated the motion as a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2). We will also treat defendant's motion as a Rule 12(b)(2) motion since defendant's motion was based on lack of personal jurisdiction and "[a] motion is properly treated according to its substance rather than its label." *Harrell v. Whisenant*, 53 N.C. App. 615, 617, 281 S.E.2d 453, 454 (1981).

[1] Plaintiff claims the trial court erred in dismissing the action because defendant had previously waived the defense of lack of personal jurisdiction by filing an answer denying allegations in plaintiff's complaint. However, the issue of waiver apparently is raised for the first time on appeal. "[I]ssues and theories of a case not raised below will not be considered on appeal." *Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjust.*, 354 N.C. 298, 309, 554 S.E.2d 634, 641 (2001). Accordingly, we will not consider plaintiff's waiver argument because that issue is not properly before this Court.

[2] "The standard of review of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record; if so, this Court must affirm the order of the trial court." *Replacements, Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999). The inquiry for determining whether a nonresident defendant is subject to *in personam* jurisdiction is two-fold—(1) whether the North Carolina long-arm statute allows jurisdiction over the defendant; and (2) whether the exercise of jurisdiction comports with due process requirements of the Fourteenth Amendment. *Fraser v. Littlejohn*, 96 N.C. App. 377, 386 S.E.2d 230 (1989). The plaintiff has the burden of establishing that one of the statutory grounds for jurisdiction is applicable. *Stallings v. Hahn*, 99 N.C. App. 213, 215, 392 S.E.2d 632, 633 (1990). Our long-arm statute "is liberally construed to find personal jurisdiction over nonresident defendants to the full extent allowed by due process." *DeArmon v. B. Mears Corp.*, 67 N.C. App. 640, 643,

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314 S.E.2d 124, 126 (1984), *rev'd on other grounds*, 312 N.C. 749, 325 S.E.2d 223 (1985).

Plaintiff contends and we agree that it has met its burden of establishing that there is statutory authority for a North Carolina court to exercise jurisdiction over defendant. Defendant's conduct falls under our long-arm statute, N.C. Gen. Stat. § 1-75.4, which provides in pertinent part as follows:

A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j), Rule 4(j1), or Rule 4(j3) of the Rules of Civil Procedure under any of the following circumstances:

....

(5) Local Services, Goods or Contracts.—In any action which:

....

b. Arises out of . . . services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant[.]

N.C. Gen. Stat. § 1-75.4 (2001). We note that in its amended complaint, plaintiff failed to specifically cite N.C. Gen. Stat. § 1-75.4(5)b, but instead cited another section and two sections that do not exist. This Court has stated “[t]he failure to plead the particulars of jurisdiction is not fatal to the claim so long as the facts alleged permit the inference of jurisdiction under the statute.” *Williams v. Institute for Computational Studies*, 85 N.C. App. 421, 428, 355 S.E.2d 177, 182 (1987). Therefore, it follows that although in the instant case, N.C. Gen. Stat. § 1-75.4(5)b was not specifically cited in plaintiff's amended complaint, we still may consider whether defendant's conduct falls under this section.

We conclude that defendant's conduct is covered by N.C. Gen. Stat. § 1-75.4(5)b since the action arises out of services performed by plaintiff within North Carolina and such performance was authorized and ratified by defendant. Plaintiff provided automobile liability insurance coverage for the truck operated by defendant at the time of the accident. Further, defendant authorized, ratified, and accepted the benefits of plaintiff's liability coverage since plaintiff's representative, Dennis Parker, signed a notice of requirement form in North



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Carolina and mailed it to the South Carolina Department of Public Safety, which prevented the suspension of defendant's South Carolina driving privileges. In signing the notice of requirement form, Mr. Parker verified that defendant and the truck she was driving at the time of the accident were covered under the insurance policy issued by plaintiff to the owner of the vehicle, Mr. Holt. In addition, after defendant notified plaintiff of her claim for UIM coverage, plaintiff processed and investigated defendant's claim in North Carolina.

[3] After establishing that statutory authority exists for a North Carolina court to exercise jurisdiction over defendant, we now turn to the issue of whether the exercise of jurisdiction over defendant is consistent with due process requirements of the Fourteenth Amendment. In order to satisfy the requirements of due process, minimum contacts must exist between the nonresident defendant and the forum state "such that the maintenance of the suit 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)). "This relationship between the defendant and the forum must be 'such that he should reasonably anticipate being haled into court there.'" *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 786 (1986) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 501 (1980)). Further, for a nonresident defendant to be subject to personal jurisdiction, "defendant must take some purposeful action within the forum state that invokes for defendant the benefits and protections of the forum state's laws." *Fraser*, 96 N.C. App. at 383, 386 S.E.2d at 234 (citing *Hanson v. Denkla*, 357 U.S. 235, 2 L. Ed. 2d 1283 (1958)). The factors to be considered when determining whether defendant has had minimum contacts with the forum state include: "(1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience." *Id.*

Applying the above stated principles of law to the facts in the case *sub judice*, we conclude that defendant had minimum contacts with North Carolina such that the exercise of jurisdiction over defendant does not offend traditional notions of fair play and substantial justice. From the record, it appears that defendant did not physically enter North Carolina. However, "[i]t is well settled that a

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defendant need not physically enter North Carolina in order for personal jurisdiction to arise.” *Better Business Forms, Inc. v. Davis*, 120 N.C. App. 498, 501, 462 S.E.2d 832, 834 (1995).

The United States Supreme Court has acknowledged two types of long-arm jurisdiction—“specific jurisdiction,” when the action arises out of or is related to the defendant’s contacts with the forum state and “general jurisdiction,” when the action does not arise out of or is related to defendant’s contacts with the forum state. *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414, 80 L. Ed. 2d 404, 411 nn. 8-9 (1984). In the instant case, specific jurisdiction is sought because the controversy relates to defendant’s contacts with this state.

When specific jurisdiction is involved, the court must focus on the relationship among the defendant, the forum state, and the litigation. *Buck v. Heavner*, 93 N.C. App. 142, 145, 377 S.E.2d 75, 77 (1989). We initially note that this case relates to a contract that was made and was to be performed within North Carolina. Plaintiff compares this case to cases in which our Courts have held that if a defendant purposefully avails herself of the rights, benefits, and protections of a forum state’s laws, then even a single contract can provide the basis for personal jurisdiction over a nonresident defendant. *See, e.g., Tom Togs, Inc.*, 318 N.C. 361, 348 S.E.2d 782; *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 394 S.E.2d 651 (1990). We acknowledge that this case is different from the contract cases cited by plaintiff since defendant in the present case did not enter into the contract and therefore was not a party to the contract. However, we still conclude that defendant had minimum contacts with North Carolina such that due process requirements have been met.

In the instant case, defendant’s contacts with North Carolina include driving a truck that was licensed and registered in North Carolina. Additionally, defendant mailed a written claim to plaintiff in North Carolina for UIM benefits under the North Carolina insurance policy. The insurance policy was entered into in North Carolina and issued by a North Carolina insurer to the owner of the truck, a North Carolina resident. In borrowing the truck, defendant availed herself of the liability coverage provided by the North Carolina insurance policy. We also note that North Carolina has a substantial interest in having its courts exercise jurisdiction over this case. This Court has stated that “North Carolina . . . has a manifest interest in providing a forum for the settlement of disputes arising under her laws and to

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which her laws must apply.” *Swenson v. Thibaut*, 39 N.C. App. 77, 94, 250 S.E.2d 279, 291 (1978). “With insurance contracts the principle of *lex loci contractus* mandates that the substantive law of the state where the last act to make a binding contract occurred, usually delivery of the policy, controls the interpretation of the contract.” *Fortune Ins. Co. v. Owens*, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000). Therefore, in the case *sub judice*, North Carolina law controls the construction and interpretation of the policy. By filing a claim for UIM coverage under the policy, defendant is seeking to afford herself the protection of North Carolina laws.

For the foregoing reasons, we conclude that the North Carolina long-arm statute permits jurisdiction over defendant and the exercise of jurisdiction is consistent with due process. Therefore, the trial court erred in dismissing plaintiff’s declaratory judgment action. Accordingly, we reverse.

Reversed.

Chief Judge EAGLES and Judge MARTIN concur.

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GEORGE MICHAEL SHROYER AND GAIL LITAKER SHROYER, PLAINTIFFS v. COUNTY OF MECKLENBURG, MECKLENBURG COUNTY HEALTH DEPARTMENT, PHILO WALKER, WILLIAM R. MARLIN, GEORGE HOUSTON, CONNELL MILLS PARTNERSHIP, W.T. NORWOOD, INC., HELMSMAN CONSTRUCTION, INC., AND ROBERT F. HELMS, DEFENDANTS

No. COA02-15

(Filed 19 November 2002)

**1. Construction Claims— third-party beneficiary breach of contract—design and installation of septic system**

A de novo review revealed that the trial court did not err by granting summary judgment in favor of defendant subcontractor on plaintiffs’ third-party beneficiary breach of contract claim against the subcontractor for failing to properly design and install plaintiffs’ residential septic system, because a landowner is not a third-party beneficiary to a subcontract between the builder and one of the builder’s subcontractors.

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**2. Construction Claims— negligence—design and installation of septic system**

A de novo review revealed that the trial court did not err by granting summary judgment in favor of defendant subcontractor on plaintiffs' negligence claim against the subcontractor for failing to properly design and install plaintiffs' residential septic system based on statements in plaintiffs' pretrial memorandum that were never memorialized in a formal pretrial order, because: (1) plaintiffs' arguments are irrelevant when they expressly abandoned their negligence claim and their right to do so did not require the signature of defendant's attorney or the presiding judge to give it effect; (2) as a document properly served and filed in this case, the trial court was entitled to consider the memorandum as a matter outside the pleading when it ruled on defendant's motion for summary judgment; (3) plaintiffs made no attempt to withdraw the memorandum from the court's consideration prior to or during the hearing on the motion; and (4) plaintiffs made no attempt to revive their negligence claim against defendant until after the court dismissed plaintiffs' breach of contract claim against defendant.

**3. Civil Procedure— breach of contract—warranty of suitability of lot to build home—summary judgment—pretrial discovery**

A de novo review revealed that the trial court did not err by granting summary judgment in favor of defendant real estate developer and the developer's manager on plaintiffs' breach of contract claim, regarding the warranties of the suitability of plaintiffs' lot to build a home, prior to the completion of pretrial discovery because: (1) there was no evidence that plaintiffs sought any discovery prior to defendants' motion for summary judgment; (2) there was no record of any objections by plaintiffs to the court proceeding with a hearing on defendants' motion; and (3) plaintiffs did not move for a continuance of the summary judgment hearing to allow additional time for pretrial discovery to take place.

**4. Construction Claims— breach of contract—warranty of suitability of lot to build home—genuine issues of material fact**

A de novo review revealed that the trial court did not err by granting summary judgment in favor of defendant real estate

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developer and the developer's manager on plaintiffs' breach of contract claim regarding the warranties of the suitability of plaintiffs' lot to build a home even though plaintiffs allege there were genuine issues of material fact in dispute because: (1) plaintiffs did not allege that defendants tried to prevent or that they participated in plaintiffs' percolation test of the property; (2) defendants had no duty to disclose the 1991 investigation considering that both the test and investigation were performed by the Mecklenburg County Health Department and neither concluded the property was completely unsuitable for a home; and (3) there was no evidence that a house could not be built on the lot, and at most the evidence indicated that the house plaintiffs built had septic demands greater than those for which their septic system could accommodate.

Appeal by plaintiffs from orders entered 26 May 1999 and 23 May 2000 by Judge Ronald Payne and Judge Timothy L. Patti, respectively, in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 September 2002.

*Cozen O'Connor, by Michael L. Minsker, for plaintiff-appellants.*

*DeVore, Acton & Stafford, P.A., by Fred W. DeVore, III, for defendant-appellee Connell Mills Partnership.*

*Crews & Klein, P.C., by Andrew W. Lax, for defendant-appellee W.T. Norwood, Inc.*

HUNTER, Judge.

George and Gail Shroyer ("plaintiffs") appeal an order granting summary judgment of their claim asserting breach of contract against defendants George Houston ("Houston") and Connell Mills Partnership ("CMP"). Plaintiffs also appeal an order granting summary judgment on their claims asserting a third-party beneficiary breach of contract and negligence against defendant W.T. Norwood, Inc. ("Norwood"). We affirm the trial court's orders.

CMP is a real estate developer managed by Houston. In 1990, CMP began development of a subdivision in which plaintiffs eventually built a home. In 1991, CMP requested that the Mecklenburg County Health Department ("the Department") perform a soil investigation on lots of the subdivision to determine the property's suitability

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ity for installation of a ground absorption sewage disposal system. The results of the investigation revealed that portions of the subdivision property were unsuitable for installation of such a system. Nevertheless, the Department (1) recommended a reduction in the number of lots in the subdivision, resulting in CMP reducing the number of lots from fifty to forty-two, and (2) concluded that the lots would be suitable for homes if an innovative septic tank water treatment system (“septic system”) was designed and installed.

In April of 1996, plaintiffs entered into a contract with CMP to purchase Lot 26 in the subdivision. The contract was “[s]ubject to land passing a percolation test in relation to [plaintiffs’] desired house location on lot” to determine whether it was suitable for operation of a residential septic system. The Department performed the test, and Lot 26 passed. Plaintiffs closed on the property on 9 May 1996.

After plaintiffs purchased Lot 26, the general contractor for the home, Helmsman Construction, Inc., subcontracted with Norwood to design and install their septic system. However, in September of 1996, less than a month after moving into their new home, plaintiffs’ septic system failed. Plaintiffs continued to encounter problems despite having numerous repairs made to the septic system. Ultimately, the Department conducted a new soil test and found that unsuitable soil caused the septic tank’s constant failure. Plaintiffs were issued two wastewater violation notices by the Department (on 20 June 1997 and 3 July 1998) for having an inoperable septic system that was in violation of state law.

Plaintiffs filed a complaint against defendants on 3 September 1998. In their complaint, plaintiffs asserted a negligence claim and a third-party beneficiary breach of contract claim against Norwood for faulty design and installation of the septic system. Plaintiffs also asserted a breach of contract claim against CMP and Houston for breaching express and implied warranties regarding the suitability of Lot 26 for operation of a septic system. Plaintiffs asserted claims against other defendants, but those claims are not at issue in this appeal.

CMP and Houston moved for summary judgment in their answer filed on 17 November 1998. Prior to this motion being heard, the affidavit of plaintiff Gail Shroyer was filed in which she stated that plaintiffs would have never purchased Lot 26 had they been informed prior

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to the purchase about the 1991 soil investigation performed by the Department. On 5 January 1999, the summary judgment motion was heard and granted in favor of CMP and Houston in an order filed 26 May 1999.

With respect to Norwood, it also filed an answer in November of 1998. The case against it and the other defendants proceeded into the discovery phase with the action being calendared for trial during the last week of February 2000. Norwood filed a summary judgment motion on 11 February 2000 requesting the dismissal of all plaintiffs' claims against it. Plaintiffs' counsel prepared and filed a pre-trial memorandum for the court. The memorandum stated that plaintiffs were going forward with their third-party beneficiary breach of contract claim against Norwood, but not proceeding to trial on their negligence claim against it. The court subsequently heard and granted Norwood's motion for summary judgment in an order filed 23 May 2000. Plaintiffs then filed a motion to alter or amend the judgment in favor of Norwood arguing it was overbroad and should not have resulted in the dismissal of their negligence claim. Plaintiffs' motion was denied in an order entered 14 August 2000.

As the case continued towards trial, plaintiffs settled their claims against the other defendants. A voluntary dismissal without prejudice was entered regarding the claims against those defendants on 27 September 2001. Thereafter, plaintiffs timely filed notice of appeal with respect to the court's summary judgment orders in favor of Norwood, CMP, and Houston.

### I. Standard of Review

The assignments of error plaintiffs bring forth against Norwood, CMP, and Houston all involve whether the court erred in granting summary judgment in defendants' favor. On an appeal from a grant of summary judgment, this Court reviews the trial court's decision *de novo*. *Falk Integrated Tech., Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999). Thus, when viewing the evidence in the light most favorable to the non-movant, we must determine whether the trial court properly concluded that the moving party showed, through pleadings and affidavits, that there was no genuine issue of material fact and that the moving party was entitled to judgment as a matter of law. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

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## II. Norwood

**[1]** By their first assignment of error plaintiffs argue, in part, that they should be allowed to bring a third-party beneficiary breach of contract claim against Norwood, a subcontractor, for failing to properly design and install their septic system. We disagree.

North Carolina case law clearly holds that a landowner is not a third-party beneficiary to a subcontract between the builder and one of the builder's subcontractors. *See Vogel v. Supply Co. and Supply Co. v. Developers, Inc.*, 277 N.C. 119, 177 S.E.2d 273 (1970). Specifically, our Supreme Court has held that the landowner is a mere incidental beneficiary of the construction contract between the builder and subcontractor and cannot maintain an action against the subcontractor for its breach. *Id.* at 126, 177 S.E.2d at 277. Here, plaintiffs admit that no contract or direct privity existed between them and Norwood. Plaintiffs only support the validity of their claim by citing to several North Carolina cases where the courts held that privity of contract is not required for a tenant/landowner to maintain a *negligence* claim against a subcontractor. *See Prince v. Wright*, 141 N.C. App. 262, 541 S.E.2d 191 (2000); *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 363 S.E.2d 367 (1988). Since this is not a negligence claim, precedent requires the dismissal of plaintiffs' third party beneficiary claim.

**[2]** Plaintiffs also argue the court erred in dismissing their negligence claim against Norwood based on statements in their pre-trial memorandum that were never memorialized in a formal pre-trial order. They contend the court should not have relied on the statements to dismiss that claim because (1) plaintiffs never filed a motion to voluntarily dismiss their negligence claim, (2) the memorandum was not signed by Norwood's attorney or the presiding judge, and (3) a pre-trial order reciting plaintiffs' statements was never entered as controlling in this case. *See* N.C. Gen. Stat. § 1A-1, Rules 16 and 41 (2001). We conclude plaintiffs' arguments are irrelevant because they expressly abandoned their negligence claim against Norwood.

In their memorandum, plaintiffs stated as follows: "Although Plaintiffs['] Complaint alleges causes of action against [Norwood] sounding in negligence and breach of contract, only the breach of contract claim[ ] will be tried in this case. *Plaintiffs have elected not to pursue the negligence claim[ ] against [Norwood].*" (Emphasis added.) This memorandum was signed by plaintiffs' attorney, served on defendants' attorneys, and filed with the court on 16 February



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2000. By their actions, plaintiffs expressly abandoned their negligence claim and their right to do so did not require the signature of Norwood's attorney or the presiding judge to give it effect. *See generally* 1 C.J.S. *Abandonment* § 2 (2002). Moreover, as a document properly served and filed in this case, the trial court was entitled to consider the memorandum as a "matter outside the pleading" when it ruled on defendant Norwood's motion for summary judgment. *See* N.C. Gen. Stat. § 1A-1, Rules 12(b) and 56 (2001). Plaintiffs made no attempt to withdraw the memorandum from the court's consideration prior to or during the hearing on the motion. Plaintiffs made no attempt to "revive" their negligence claim against Norwood until after the court dismissed their breach of contract claim against him. Thus, the court did not err in granting summary judgment in favor of Norwood.

## III. CMP and Houston

**[3]** By their final assignment of error, plaintiffs argue the trial court erred in granting summary judgment on their breach of contract claim against CMP and Houston (1) prior to the completion of pre-trial discovery and (2) when there were genuine issues of material fact in dispute. We conclude the court did not err in either instance.

With respect to plaintiffs' first argument, it is ordinarily error when a court "hears and rules upon a motion for summary judgment while discovery is pending and the party seeking discovery has not been dilatory [or lazy] in doing so." *Gebb v. Gebb*, 67 N.C. App. 104, 108, 312 S.E.2d 691, 694 (1984). The trial court's action in the present case did not constitute error because there was no evidence that plaintiffs sought any discovery prior to defendants' motion for summary judgment. There was also no record of any objections by plaintiffs to the court proceeding with a hearing on defendants' motion. Finally, plaintiffs did not move for a continuance of the summary judgment hearing to allow additional time for pre-trial discovery to take place. *See* N.C. Gen. Stat. § 1A-1, Rule 56(f). Therefore, the court did not err in proceeding with the summary judgment hearing.

**[4]** With respect to plaintiffs' second argument regarding genuine issues of facts being in dispute, their complaint alleged that defendants are liable for breach of contract:

- a. By failing to provide the Plaintiffs with a Lot which was of merchantable quality and reasonably fit and suitable for the purpose for which it was intended; and

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- b. By failing to provide the Plaintiffs with a Lot which would meet the necessary standards for installation of a septic tank system.

However, the evidence established that following the Department's 1991 investigation of the property, it concluded that Lot 26 was suitable for a residence if an innovative septic system was built. Additionally, prior to plaintiffs' purchase of the property, they entered into a contract with CMP that was contingent upon plaintiffs obtaining an adequate percolation test on Lot 26. Plaintiffs purchased the property after it passed this test. Plaintiffs did not allege that CMP or Houston tried to prevent or participated in their test of the property. Since plaintiffs conducted their own test and were satisfied with the results, defendants had no duty to disclose the 1991 investigation, especially considering (1) both the test and investigation were performed by the Department, and (2) neither concluded the property was completely unsuitable for a home. Thus, there was no evidence that a house could not be built on Lot 26; at most, the evidence indicated that the house plaintiffs built had septic demands greater than those for which their septic system could accommodate. Accordingly, there were no genuine issues of material fact in dispute as to whether defendants CMP and Houston breached warranties regarding the suitability of Lot 26.

For the aforementioned reasons, we affirm the trial court's orders dismissing plaintiffs' claims against Norwood, Houston, and CMP.

Affirmed.

Judges WALKER and McGEE concur.

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BERNICE G. SURLES, PLAINTIFF v. JUNIOUS M. SURLES, JR., DEFENDANT

No. COA01-1583

(Filed 19 November 2002)

**Divorce— equitable distribution—life insurance policy—Rule 60(b) motion**

The trial court did not abuse its discretion in an equitable distribution case by denying defendant's N.C.G.S. § 1A-1, Rule 60(b) motion for relief from the trial court's judgment giving plaintiff

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wife absolute ownership and exclusive possession of defendant husband's life insurance policy, because: (1) there is no merit to defendant's argument that the trial court's denial of his motion was arbitrary or patently unfair when the trial court determined that defendant had separate property worth over \$250,000 and that plaintiff had separate property worth under \$30,000; (2) affirmation of the trial court's order will not amount to a substantial miscarriage of justice; and (3) contrary to defendant's contention, there was no clerical error to correct regarding the intention of the trial court to award the surrender value of the life insurance policy versus the fair market value of the policy when the trial court found as fact that it would have spelled out clearly in the order if it wanted to give the cash value of the life insurance policy, and the trial court also noted that it did not award plaintiff alimony based in large part on giving her the ownership of the life insurance policy.

Judge GREENE concurring.

Appeal by defendant from order entered 17 October 2001 by Judge A. Elizabeth Keever in District Court, Cumberland County. Heard in the Court of Appeals 17 September 2002.

*Hedahl and Radtke, by Debra J. Radtke, for plaintiff-appellee.*

*The Yarborough Law Firm, by Garris Neil Yarborough and Barry K. Simmons, for defendant-appellant.*

WYNN, Judge.

This appeal arises from the distribution of marital property following the divorce of Junious and Bernice Surles. On appeal, Mr. Surles presents one issue: In denying his Rule 60(b) motion, did the trial court err by finding that the distributive judgment awarded Ms. Surles the "surrender value" of Mr. Surles' life insurance policy (\$32,617.92), rather than the estimated fair market value of the policy (\$192,617.92)? We answer, no, and therefore uphold the trial court's denial of the Rule 60(b) motion.

In September 1998, Ms. Surles brought an equitable distribution action that resulted in a 7 December 2000 property distribution judgment in which the trial court made the following relevant findings of fact:

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XVI. [T]he defendant purchased a life insurance policy through Protective Life Insurance. . . . [T]he Court finds that the life insurance had a cash value as of the date of separation of \$32,617.92, and the Court finds that this is marital property.

. . . .

XXI. [T]he Court finds there should be an unequal division [of marital property].

Based on these findings of fact, the trial court awarded Ms. Surles “absolute ownership and exclusive possession of” Mr. Surles’ life insurance policy.

In an attempt to satisfy that part of the judgment, Mr. Surles presented to Ms. Surles a check for \$32,617.92. However, Ms. Surles refused the check, demanding instead, the transfer of the life insurance policy. Mr. Surles canceled the check, and presented to her another check in the same amount. In response, Ms. Surles filed a Contempt Motion against Mr. Surles for his failure to transfer the policy. Shortly thereafter, Mr. Surles filed a Motion for Relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b).

In his Rule 60(b) Motion, Mr. Surles argued that the 7 December 2000 judgment distributing the marital property should be reformed because of a clerical mistake. Specifically, Mr. Surles noted that the trial court consistently referred to the life insurance policy as having a surrender value of \$32,617.92. However, Mr. Surles argued that because of his age, seventy-seven years old, the policy had a fair market value of \$192,617.92. Mr. Surles’ attorney argued that:

This would increase the total value of the marital property by \$160,000, with [Ms. Surles] taking 100% of the increase. Simple arithmetic reveals that [Ms. Surles’] share of the marital property would then increase [from 58%] to a whopping 74%, with [Mr. Surles’] share plummeting [from 42%] to 26%. Given the factors the Court [considered] . . . it is difficult to imagine that the Court intended an outcome so unfavorable to [Mr. Surles].

In the alternative, Mr. Surles argued the judgment should be set aside because of surprise, excusable neglect, and fairness. Mr. Surles argued that “no reasonable person could review the Court’s Findings of Fact . . . and conclude that a \$250,000 award from [Mr. Surles to Ms. Surles] is fair by any stretch of the imagination and the facts . . . as contained in the record.”

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On 17 October 2001, District Court Judge A. Elizabeth Keever, the same judge who issued the challenged judgment, denied Mr. Surles' Rule 60(b) Motion and found that:

8. If the Court had only wanted to give the cash value of [the] life insurance policy to [Ms. Surles] the order would have spelled that out clearly and would have raised the amount of the distribution award.

9. In addition, the Court did not award [Ms. Surles] alimony based in large part on giving her the ownership of the Protective Life Insurance Policy.

From that denial, Mr. Surles appeals to this Court.

We note, at the onset, that Mr. Surles presents arguments arising from the 7 December 2000 equitable distribution judgment that: (1) "the *trial court's judgment property distribution* failed to give Mr. Surles adequate notice of its intended effect"; (2) "the impact of the *trial court's judgment property distribution* is too arbitrary to have been the result of a reasoned decision"; (3) "the *trial court* initially did intend that Ms. Surles get the cash surrender value" of the life insurance policy; and (4) "the *trial court's decision* is unfair." These arguments are not properly before this Court. Mr. Surles lost his right to appeal the 7 December 2000 judgment by failing to timely appeal from it. Rather, Mr. Surles is currently before this Court appealing the trial court's denial of his Rule 60(b) motion. On an appeal from a Rule 60(b) motion, Mr. Surles is limited to arguing that the trial court abused its discretion in denying that motion.<sup>1</sup> Mr. Surles may argue that the judgment underlying the Rule 60(b) motion is erroneous only insofar as the error demonstrates the trial court's abuse of discretion

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1. When reviewing a trial court's equitable discretion under Rule 60(b)(6), "[o]ur Supreme Court has indicated that this Court cannot substitute 'what it consider[s] to be its own better judgment' for a discretionary ruling of a trial court, and that this Court should not disturb a discretionary ruling unless it 'probably amounted to a substantial miscarriage of justice.'" *State ex rel. Environmental Management Comm'n v. House of Raeford Farms, Inc.*, 101 N.C. App. 433, 448, 400 S.E.2d 107, 117 (1991) (quoting *Worthington v. Bynum*, 305 N.C. 478, 486-87, 290 S.E.2d 599, 604-05 (1982)). "The findings of fact by the trial court are binding on appeal if supported by competent evidence." *Royal v. Hartle*, 145 N.C. App. 181, 182, 551 S.E.2d 168, 170 (2001). Furthermore, "[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); see e.g., *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985); *Harris v. Harris*, 307 N.C. 684, 687, 300 S.E.2d 369, 372 (1983). Thus, when considering an appeal of a Rule 60(b) motion order, "[a]ppellate review is limited to a determination of whether the court abused its discretion." *Hartle*, 145 N.C. App. at 182, 551 S.E.2d at 170.

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in denying the Rule 60(b) motion. Because Mr. Surles fails to cast his arguments correctly, we will consider and address his arguments only insofar as the arguments place the trial court's discretion in issue in denying the Rule 60(b) motion.

First, Mr. Surles contends that the trial court's denial of his 60(b) motion was not the product of a reasoned decision. In denying Mr. Surles' motion, the court made the following pertinent Findings of Fact:

5. At the hearing on September 27, 2000, the Court found that the life insurance policy with Protective Life Insurance was marital property.

6. The Court, in its ruling on the issue of Equitable Distribution, was required to place a value on the policy. The life insurance policy was a whole life policy and the Court used the cash value on the date of separation. The Court further realized that the premiums were not fully paying the cost of the policy [and] the cash value would be reducing each month. Such reduction over time could have a significant impact on the face value or cash value of the policy.

7. In reaching the ultimate division of the parties' marital estate, the Court took into consideration [Mr. Surles'] separate property value. There were significant contested issues as to whether the property was marital or separate, the court found a bulk of the estate to be separate property.

8. Based on that significant factor and other factors the Court determined how to equitably divide the rest of the property. If the Court had only wanted to give the cash value of [the] life insurance policy to [Ms. Surles] the order would have spelled that out clearly and would have raised the amount of the distribution award.

These findings of fact are supported by competent evidence. The record indicates that the trial court determined that Mr. Surles had separate property worth over \$250,000 and that Ms. Surles had separate property worth under \$30,000. Moreover, affirmation of the trial court's order will not "probably amount[] to a substantial miscarriage of justice." Therefore, we find no merit to Mr. Surles' argument that the trial court's denial of his Rule 60(b) motion was arbitrary, not reasoned, or patently unfair.

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Second, Mr. Surles argues that the trial court intended to award Ms. Surles \$32,617.92, the surrender value of the life insurance policy, and not \$192,617.92, the fair market value of the policy. Mr. Surles contends that the trial court abused its discretion by failing to correct this clerical error. However, the trial court (the same court that entered the challenged judgment) responded to Mr. Surles' argument by finding as fact that:

If the Court had only wanted to give the cash value of [the] life insurance policy to [Ms. Surles] the order would have spelled that out clearly and would have raised the amount of the distribution award.

The court also noted that it "did not award [Ms. Surles] alimony based in large part on giving her the ownership of the Protective Life Insurance Policy." Based on these findings of fact, we hold that the trial court did not abuse its discretion in failing to correct a non-existent clerical error. Accordingly, we uphold the trial court's denial of Mr. Surles' Rule 60(b) motion.

Affirmed.

Judge BIGGS concurs.

Judge GREENE concurs in separate opinion.

GREENE, Judge, concurring.

I agree with defendant that every life insurance policy has a fair market value that can be determined by a consideration of the amount and terms of the policy, the policy's cash surrender value, the insured's age, and the insured's general health. I further agree that the fair market value of a life insurance policy may exceed its cash surrender value. The law in North Carolina requires a life insurance policy, like any other asset (marital, separate, or divisible), to be valued at its fair market value. *See Patton v. Patton*, 78 N.C. App. 247, 255, 337 S.E.2d 607, 612 (1985), *rev'd in part on other grounds*, 318 N.C. 404, 348 S.E.2d 593 (1986). If either party contends the fair market value of a life insurance policy exceeds its cash surrender value, an expert opinion is required. *Cf. Thorpe v. Wilson*, 58 N.C. App. 292, 298, 293 S.E.2d 675, 679 (1982) (expert testimony required in wrongful death action because of the necessary reliance on probabilities).

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In this case, the record does not show either party presented any expert testimony on the fair market value of the life insurance policy at issue.<sup>2</sup> Indeed, neither party contended at trial that the policy had a fair market value in excess of its cash surrender value. Accordingly, defendant cannot argue in a Rule 60(b) motion, or on appeal from the trial court's order in response thereto, that the trial court erred in distributing to plaintiff the ownership of defendant's life insurance policy with a value reflecting its cash surrender value. Thus, for this reason, the trial court correctly denied defendant's Rule 60(b) motion.

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STATE OF NORTH CAROLINA v. NATHANIEL WILLIAMS

No. COA01-1452

(Filed 19 November 2002)

**1. Child Abuse and Neglect— felonious child abuse—motion to dismiss—sufficiency of evidence—serious physical injury**

The trial court did not err by denying defendant's motion to dismiss at the close of all evidence the charge of felonious child abuse under N.C.G.S. § 14-318.4(a) based on alleged insufficient evidence of a serious physical injury after defendant struck his eight-year-old daughter on the buttocks with a board multiple times while disciplining her for perceived misbehavior, because: (1) there is no requirement that an injury require immediate medical attention in order to be a serious physical injury; (2) conflicts in the evidence as to the minor child's level of activity and the extent, if any, to which she appeared to be in pain after the alleged assault are for resolution by the jury; and (3) the evidence was sufficient for the jury to reasonably infer that the injury inflicted by defendant caused the minor child great pain and suffering.

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2. The sole issue before the trial court with respect to the policy was whether it constituted marital or separate property.



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**2. Assault— felonious assault inflicting serious bodily injury—motion to dismiss—sufficiency of evidence—serious bodily injury**

The trial court did not err by denying defendant's motion to dismiss at the close of all evidence the charge of felonious assault inflicting serious bodily injury under N.C.G.S. § 14-32.4 based on alleged insufficient evidence of serious bodily injury after defendant struck his eight-year-old daughter on the buttocks with a board multiple times while disciplining her for perceived misbehavior, because even assuming arguendo that there was insufficient evidence of serious bodily injury to satisfy the statutory definition, any error in submission to the jury of the greater offense of felonious assault inflicting serious bodily injury was rendered harmless by the jury's verdict convicting defendant of the lesser offense of misdemeanor assault inflicting serious injury.

Appeal by defendant from judgment entered 24 May 2001 by Judge Benjamin G. Alford in Lenoir County Superior Court. Heard in the Court of Appeals 17 September 2002.

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

*Sonya S. Davis for defendant-appellant.*

MARTIN, Judge.

Defendant was originally indicted for felonious child abuse and felonious assault inflicting serious bodily injury. He appeals from a judgment entered upon his conviction of felonious child abuse and misdemeanor assault inflicting serious injury.

Briefly summarized, the evidence tended to show that on or about 6 October 2000, a Friday, defendant struck his 8-year-old daughter, Tanaje, on the buttocks with a board multiple times while disciplining her for perceived misbehavior. Tanaje testified that her buttocks bled after the spanking and hurt badly. Although she was able to play outside over the weekend, employees at her school observed her limping the following week. She was examined by the school nurse and later by social service workers. Tanaje was subsequently seen at the emergency room at Lenoir Memorial Hospital, where she was examined by Dr. Tracy Lee Smith. He described the injury as a "large hematoma" and stated that Tanaje had moderate blood loss and might develop a permanent scar from the injury.

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Defendant testified that he had punished Tanaje by giving her five “licks” with a “batting ball paddle.” He denied that she was injured by the paddling and testified that she went out to eat with him later that evening and played normally during the entire weekend, never complaining that she was in pain. Tracy Watts testified that she was present when defendant spanked Tanaje and that she observed no bruises nor any bleeding as a result of the spanking. Lillie Keyes testified that defendant and Tanaje spent the weekend at her house and that she did not notice anything unusual about Tanaje and that Tanaje did not complain to her about pain.

Additional evidence necessary to an understanding of the issues raised on appeal will be discussed in the opinion.

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Defendant’s sole assignment of error is to the denial of his motion to dismiss made at the close of all the evidence. He asserts that the evidence was insufficient to support a guilty verdict on either charge. We find no error.

In ruling on a motion to dismiss at the close of evidence made pursuant to G.S. § 15A-1227, a trial court must determine whether there is substantial evidence of each essential element of the offenses charged. *State v. Roddey*, 110 N.C. App. 810, 812, 431 S.E.2d 245, 247 (1993). If, viewed in the light most favorable to the State, the evidence is such that a jury could reasonably infer that defendant is guilty, the motion must be denied. The defendant’s evidence is not to be considered unless it is favorable to the State. *Id.* at 812-13, 431 S.E.2d at 247.

**[1]** Defendant first challenges the sufficiency of the evidence to withstand his motion to dismiss the charge of felonious child abuse. To convict a defendant of felonious child abuse in violation of G.S. § 14-318.4(a), the State must prove (1) that defendant is the parent or caretaker of a child under the age of 16, (2) that defendant “intentionally inflict[ed] . . . serious physical injury upon or to the child or . . . intentionally commit[ted] an assault upon the child,” and (3) that the assault or infliction of injury resulted in “serious physical injury.” N.C. Gen. Stat. § 14-318.4(a). The element of intent is satisfied if the defendant intentionally causes injury to the child and that injury turns out to be serious. *State v. Campbell*, 316 N.C. 168, 340 S.E.2d 474 (1986). Defendant’s challenge to the trial court’s denial of his motion is based on his contention that there is not substantial evidence that Tanaje sustained a “serious physical injury.” We disagree.

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Serious physical injury, within the meaning of G.S. § 14-318.4, is injury that causes “great pain and suffering.” *State v. Phillips*, 328 N.C. 1, 20, 399 S.E.2d 293, 303, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991). In the present case, Tanaje testified that her father struck her on her buttocks with a board that was eighteen or twenty inches by four or five inches. She testified that he initially made her bend over a chair and that she was wearing underwear; later, he made her remove her underwear and told her to bend over and hold her feet while he swung the board at her “like a baseball bat.” Tanaje testified that the beating hurt “badly.” Because of the pain, she kept falling over and defendant had his girlfriend hold her hands down. Although she could not remember how many times her father hit her, she stated that the beating went on for “a very long time.” Her buttocks were bleeding after the beatings; she did not take a bath that night because she was afraid it would burn her wounds and she “couldn’t sleep at all” due to the pain. She testified that over the weekend after the beating she was able to play, but could not sit down except on a pillow.

There was also evidence that the following week, employees at Tanaje’s school noticed that she was walking “funny.” Tanaje stated that she walked that way because her backside was “swollen” and she could not feel her legs. She was called to the nurse’s office where the school’s nurse examined her; the nurse testified that Tanaje had a large bruise on her buttocks that was crusted around the outside and had a spot that was “open and oozing” near the middle. The nurse also testified that when she saw the wound she “gasped.”

Tanaje’s mother testified that she was called to the hospital emergency room and that she “just started screaming” when she saw her daughter’s wounds. She stated that Tanaje’s buttocks were “blistered, cracked, scarred” and there were bloodstains on her underwear from where it stuck to the wounds.

Tanaje was released from the emergency room into her mother’s custody. Her mother testified that the wounds took another week to heal and that Tanaje had difficulty walking and sitting during that time because her bottom was swollen and the wounds would re-open if she tried to run and play. She also had difficulty going to the bathroom. Tanaje’s mother testified that at the time of trial Tanaje had scars on her buttocks from the injury that were “real dark spots on both sides.” Tanaje had received a bruise on her arm when she tried to block the board her father was using and was still complaining of pain in her arm at the time of trial.

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The emergency room physician, Dr. Smith, stated that when he examined Tanaje in the emergency room and touched her wound very gently, it “appeared to be very painful” to Tanaje and that she winced and cried during the examination. He stated that Tanaje suffered a hematoma that resulted from a “large amount of trauma that broke blood vessels” and caused the outer skin to die due to lack of blood supply. He testified that she would have experienced “moderate to severe pain at the time [of the beating] and for many days thereafter.” In addition, he noted that it would probably have taken her 14 to 21 days to recover from the injury.

Defendant argues that because Tanaje was able to go to school after the alleged assault, did not require immediate medical attention, was not hospitalized nor given medication, the injury was, as a matter of law, not “serious.” There is no requirement in the statute or in our case law that an injury require immediate medical attention in order to be a “serious physical injury.” Moreover, conflicts in the evidence as to Tanaje’s level of activity and the extent, if any, to which she appeared to be in pain after the alleged assault are for resolution by the jury. *Campbell*, at 172, 340 S.E.2d at 477 (“[c]ontradictions and discrepancies in the evidence are to be resolved by the jury”).

Viewed in the light most favorable to the State, we hold that the evidence was sufficient for a jury to reasonably infer that the injury inflicted by defendant caused Tanaje great pain and suffering, and thus satisfied the statutory element of “serious physical injury.” The trial court did not err in denying the motion to dismiss the charge of felonious child abuse.

**[2]** Defendant next contends the trial court erred in denying his motion to dismiss the charge of felonious assault inflicting serious bodily injury. *See* N.C. Gen. Stat. § 14-32.4 (2002). The elements of that offense include (1) an intentional assault on another person (2) resulting in serious bodily injury. In the statute, “serious bodily injury” is defined as:

bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization.

N.C. Gen. Stat. § 14-32.4 (2002). Defendant argues there was insufficient evidence that Tanaje sustained “serious bodily injury” to survive his motion to dismiss.

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[154 N.C. App. 181 (2002)]

After denying defendant's motion to dismiss the charge of felonious assault, the trial court submitted to the jury the issues of defendant's guilt of felonious assault inflicting serious bodily injury and the lesser included offense of misdemeanor assault inflicting serious injury in violation of G.S. § 14-33(c)(1) (2002). Defendant was convicted of the misdemeanor.

On appeal, defendant does not argue that the trial court erred in failing to dismiss the lesser included offense, which requires proof only of "serious injury" rather than "serious bodily injury" as defined by G.S. § 14-32.4. Our courts have defined "serious injury" as injury which is serious but falls short of causing death and have indicated that "the element of 'serious bodily injury' requires proof of more severe injury than the element of 'serious injury.'" *State v. Hannah*, 149 N.C. App. 713, 718-19, 563 S.E.2d 1, 4-5 (2002) (citations omitted). Even assuming, *arguendo*, there was insufficient evidence of "serious bodily injury" to satisfy the statutory definition, any error in submission to the jury of the greater offense was rendered harmless by the jury's verdict convicting defendant of the lesser offense of assault inflicting serious injury. *State v. Williams*, 100 N.C. App. 567, 397 S.E.2d 364 (1990). This assignment of error is overruled.

No error.

Chief Judge EAGLES and Judge THOMAS concur.

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FREDDIE L. EMORY, PLAINTIFF v. JAMES "JIM" PENDERGRAPH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SHERIFF OF THE OFFICE OF SHERIFF OF MECKLENBURG COUNTY, PEERLESS INSURANCE COMPANY, AS SURETY OF THE SHERIFF'S BOND, SUSAN RAUL, WALTER SIZEMORE, MECKLENBURG COUNTY, AND THEODIS BECK, IN HIS OFFICIAL CAPACITY AS SECRETARY OF NORTH CAROLINA DEPARTMENT OF CORRECTION, DEFENDANTS

No. COA01-1591

(Filed 19 November 2002)

**False Imprisonment— civil contempt incarceration—ambiguous sentence**

The trial court did not err by granting summary judgment for defendants on a false imprisonment claim where plaintiff was arrested on 11 July and ordered released on 17 December on a 30

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day civil contempt sentence. The sentencing court's order and the circumstances of plaintiff's incarceration did not provide a clear mandate to defendants for plaintiff's release date; a claim for false imprisonment cannot be established without defendants' knowledge of the wrongful restraint.

Appeal by plaintiff from judgment entered 17 September 2001 by Judge Forrest Donald Bridges in Mecklenburg County Superior Court. Heard in the Court of Appeals 28 October 2002.

*Ferguson, Stein, Chambers, Wallas, Adkins, Gresham & Sumter, P.A., by Henderson Hill and Corie Pauling, for plaintiff-appellant.*

*Womble Carlyle Sandridge & Rice, by Scott D. MacLatchie, for defendants-appellees.*

TYSON, Judge

I. Facts

On 24 June 1999, Freddie L. Emory, ("plaintiff") failed to appear at his equitable distribution proceeding. Judge Jane Harper held plaintiff in civil contempt for failure to appear and ordered him "committed to the jail of Mecklenburg County for a period of (30) days. . . ."

On 11 July 1999, plaintiff was arrested by Union County deputies and appeared before a magistrate who issued a Release Order, commonly called a "blue sheet." The blue sheet directed plaintiff be released from custody if he made a "payment in cash in the amount shown above [\$16,313] for judgements [sic] as decreed in Civil Contempt Order (see order for dispersement [sic] of funds)."

On 13 July 1999, plaintiff appeared before Judge Harper, and was sentenced to, "30 days work release [for] contempt." No new written order was filed by Judge Harper. Plaintiff informed defendants that his sentence was for a maximum term of thirty days. He presented portions of Judge Harper's original sentencing order to his work-release counselor, Monica Lindsey, to show the length of his sentence. Lindsey gave the papers to her supervisor, Defendant Susan Rall.

Rall made an inquiry to the Records and Classifications Department about plaintiff's sentence and was informed that it was

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indefinite. Rall also discussed plaintiff's protests with her superior, Defendant Walter Sizemore. Rall told plaintiff that he should retain an attorney if he wanted to be released because neither she nor her department could do anything about his incarceration.

In December 1999, Defendant Sizemore directed an employee to obtain plaintiff's district court file. Sizemore perceived that plaintiff's sentence to be thirty days. On 17 December 1999, Judge Harper ordered plaintiff's release.

On 27 September 2000, plaintiff filed an amended complaint alleging false imprisonment, abuse of process, intentional infliction of emotional distress, libel, and violations of the North Carolina State Constitution against defendants.

On 8 November 2000, the trial court granted defendants' motion to dismiss plaintiff's claim for abuse of process. The parties stipulated to the dismissal of Mecklenburg County as a defendant and to the dismissal of the claim of the violation of the state constitution. On 17 September 2001, Judge Forrest Bridges granted defendants' motion for summary judgment on all remaining claims. The trial court ruled that the wording of Judge Harper's order and the circumstances of incarceration evidenced no clear mandate, and held that plaintiff could not show defendants' "deliberate disregard" in the absence of a clear mandate for plaintiff's release. Plaintiff appeals.

## II. Issues

Plaintiff contends that the trial court erred in granting summary judgment for defendant and argues (1) the sentencing order was unclear as to the length of plaintiff's sentence and (2) defendants' conduct constituted deliberate disregard of the order, both issues of material fact for a jury.

## III. Standard of Review

Our standard of review is well-settled. "Where a motion for summary judgment is granted, the critical questions for determination on appeal are whether, on the basis of materials presented to the trial court, there is a genuine issue of material fact and whether the movant is entitled to judgment as a matter of law." *You v. Roe*, 97 N.C. App. 1, 7, 387 S.E.2d 188, 190 (1990) (citation omitted). "[T]he evidence presented by the parties must be viewed in the light most favorable to the non-movant." *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998) (citation omitted).

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IV. Clarity of Sentencing Order

Plaintiff contends that summary judgment was improper because interpretation of the sentencing order presented issues of material fact. Defendants claim the interpretation of two orders, the blue sheet and Judge Harper's sentencing order, raised questions of law and not of fact.

The trial court determined that Judge Harper's order did not present a clear mandate to defendants concerning plaintiff's confinement period.

This Court further concludes that, even had Defendants obtained and reviewed the entirety of Judge Harper's June 24 Order, *the wording of the Order and the circumstances of the Plaintiff's incarceration* are such there was no clear mandate as to the date on which Plaintiff was entitled to be released.

(Emphasis supplied).

Defendants rely upon *Blevins v. Welch*, 137 N.C. App. 98, 527 S.E.2d 667 (2000) for the premise that an interpretation of a prior court order presents a question of law and should be given deference by a reviewing court.

Although no unanimity seems to exist, several courts, in the context of ambiguous judgments, have given deference to the trial court's interpretation of the prior judgment. Exactly how much deference varies. *See, e.g., County of Suffolk v. Stone & Webster Eng'g Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997) (stating a trial court's interpretation is subject to an abuse of discretion standard); *Holmberg v. Holmberg*, 578 N.W.2d 817, 825 (Minn. Ct. App. 1998) (stating the trial judge's interpretation is given "great weight"), *aff'd*, 588 N.W.2d 720 (Minn. 1999); *Schultz v. Schultz*, 535 N.W.2d 116, 120 (Wis. Ct. App. 1995) (stating that some deference is given to the trial court's interpretation). *But see Kerndt v. Ronan*, 458 N.W.2d 466, 470-71 (Neb. 1990) (stating that a trial judge's interpretation is irrelevant). Deference to a trial judge's interpretation is even more appropriate where, as here, that trial judge is the same one who presided over the original judgment now being interpreted. This is so because "the [trial judge's] resolution of the ambiguity is made based upon the judge's experience of trial or prior experience with the record." *Schultz*, 535 N.W.2d at 120. Here, the trial judge interpreted the 1983 judgment



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to include both roads. We will defer to his experience with this case and the parties and therefore affirm his interpretation.

*Id.* at 102, 527 S.E.2d at 671.

*Blevins* is factually distinguishable from the case at bar. The judge interpreting the prior order in *Blevins* was the same judge who issued it. *Id.* at 102, 527 S.E.2d at 671. Judge Harper did not grant summary judgment on a complaint that questioned an order she had previously entered. That factual distinction between the cases is irrelevant because a superior court judge interpreted Judge Harper's order and found an ambiguity.

Whether or not an ambiguity exists in a contract is a question of law, and our review of that determination is *de novo*. *Bicket v. McLean Securities, Inc.*, 124 N.C. App. 548, 553, 478 S.E.2d 518, 521 (1996) (citations omitted). Similarly, the existence of an ambiguity in a court order is also a question of law, but resolution of the ambiguity is a question of fact. *See Potter v. Hilemn Labs, Inc.*, 150 N.C. App. 326, 331, 564 S.E.2d 259, 263 (2002) (Trial court's determination of whether the language in a consent judgment was ambiguous is a question of law). The existence of an ambiguity in the orders is a question of law to be decided by the judge and is not a question of fact for the jury.

A claim of false imprisonment requires a showing of "the illegal restraint of a person against his will." *Marlowe v. Piner*, 119 N.C. App. 125, 129, 458 S.E.2d 220, 223 (1995) (citation omitted). "Illegal" or "unlawful" necessarily implies deliberateness in defendants' actions. Defendants had no duty to go behind the face of either order. *See Thomas v. Sellers*, 142 N.C. App. 310, 313, 542 S.E.2d 283, 286 (2001) (citation omitted).

In *Harwood v. Johnson*, 326 N.C. 231, 388 S.E.2d 439 (1990), plaintiff filed a lawsuit for false imprisonment after plaintiff was granted a writ of *habeas corpus*. The court at the *habeas corpus* proceeding concluded that the parole commission did not follow mandatory provisions of a statute, which rendered the detention and imprisonment of the plaintiff "unlawful." *Id.* at 236, 388 S.E.2d at 442. While the unlawful incarceration was undisputed, our Supreme Court found that plaintiff could only recover if he established on remand "that the members of the Parole Commission falsely imprisoned him *by deliberately disregarding* the mandate of N.C.G.S. § 15A-1371(f). . . ." *Id.* at 242, 388 S.E.2d at 445 (emphasis supplied).

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The trial court found no clear mandate for plaintiff's release because "the wording of [Judge Harper's] . . . order and the circumstances of the plaintiff's incarceration" created an ambiguity. The trial court's determination of law is supported by existing law and substantial evidence. We find no basis to reverse this conclusion. Because plaintiff's release date was ambiguous, defendants did not deliberately disregard a clear mandate and did not intentionally restrain plaintiff. Plaintiff's assignment of error is overruled.

**V. Deliberate Disregard**

Plaintiff's second assignment of error alleges that defendants' deliberate disregard of Judge Harper's original order presents a question of material fact. If the orders had provided a clear mandate to defendants, whether they deliberately disregarded the orders would be a question of fact. The orders did not provide a clear mandate to defendants for plaintiff's release. A claim for false imprisonment against defendants cannot be established without their knowledge of the wrongful restraint.

**VI. Conclusion**

We affirm summary judgment for defendant on the basis that there is no claim for false imprisonment without a clear mandate for release in the orders to show unlawful confinement. As a result of this holding, we do not reach plaintiff's second issue. The judgment of the trial court is affirmed.

Affirmed.

Chief Judge EAGLES and Judge THOMAS concur.

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STATE OF NORTH CAROLINA v. DAVID ERIC MITCHELL

No. COA02-82

(Filed 19 November 2002)

**Motor Vehicles; Search and Seizure— stop and arrest—random driver's license checkpoint**

The trial court erred in an impaired driving case by granting defendant's motion to suppress evidence of his stop and arrest based on defendant's driving through a random driver's license

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[154 N.C. App. 186 (2002)]

checkpoint because even though there was no evidence of a written plan adopted by the pertinent police department relative to license checkpoints and the pertinent officer had standing permission to establish the checkpoint, the State met its burden of showing the random license check was not an unreasonable detention when uncontroverted evidence demonstrated that all westbound traffic on U.S. 29/74 was stopped and checked for licenses and registrations.

Appeal by the State from order dated 17 October 2001 by Judge Marcus L. Johnson in Gaston County Superior Court. Heard in the Court of Appeals 15 October 2002.

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

*Legal Foundation, Inc., by Seth H. Jaffe, for defendant appellee.*

GREENE, Judge.

The State appeals from a 17 October 2001 order granting a motion to suppress the stopping and arrest of David Eric Mitchell (Defendant).

At a 17 October 2001 hearing, the evidence tended to show Officer Boyce Falls (Officer Falls), a traffic officer with the Belmont Police Department, was working during the early morning hours of 6 February 2000. Officer Falls decided to set up a "random license check" on Highway U.S. 29/74 to check oncoming traffic for valid licenses and registrations. He informed his shift sergeant of his decision and asked two other officers to join him. Between 3:30 and 4:00 a.m., the three officers positioned themselves at the location designated by Officer Falls and conducted a license and registration check of every westbound vehicle. At approximately 4:15 a.m., Defendant, headed westbound on U.S. 29/74, approached the checkpoint. Defendant was motioned to stop by Officer Falls but continued to drive through the checkpoint. Officer Falls pursued Defendant for a mile and a half beyond the checkpoint before Defendant stopped. Defendant was subsequently arrested and charged with impaired driving "solely as a result of this road check."

Officer Falls testified he had "standing permission" from his captain to set up "random license checks." He further testified at least

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three officers are required to conduct these license checks, although a total of six officers would be required to conduct a license check on both sides of U.S. 29/74. Officer Falls had checked beforehand with his shift sergeant only “to make sure he had the manpower.” Officer Falls was permitted to determine where and when the checkpoints were placed and how long they lasted. He stated the checkpoints usually lasted less than one hour. The police department had no written guidelines or procedures for checkpoints, but officers in training were instructed to: select a safe location, have activated their patrol cars’ “blue lights,” wear orange reflective vests, and direct traffic using their flashlights. Officer Falls also testified a random license check is different from a driving while impaired checkpoint because a driving while impaired checkpoint requires a plan.

Captain William Jonas, the operations captain for the Belmont Police Department, testified he was responsible for the training and supervision of Officer Falls. He further stated officers are given responsibility to set up license checkpoints when they deem it necessary and that the checkpoints are “random stops to enforce such laws as no operator’s license, child restraint enforcement, seat belt enforcement, numerous charges.” Officers did not have to get any authorization to conduct random license checks. It, however, was necessary for officers “to be aware that every car must be stopped.”

The trial court found as fact Defendant’s “stop and subsequent charges were as a direct result of the roadblock or checking station.” The court also found Officer Falls had (1) standing permission to establish the checkpoint and (2) authority to decide what type of checkpoint would be established, the time it was to begin, how long it would last, where it would be established, which traffic would be stopped, and the procedures for setting up the checkpoint. Based on these findings, the trial court made the following conclusion of law:

2. That the Belmont Police Department delegated all authority to Officer Falls to decide in his own discretion when to set up a check point, where to set up the check point, and what type of check point was to be conducted, and thereby gave Officer Falls unbridled and unrestrained discretion in these matters. This delegation of authority to Officer Falls is clearly unconstitutional and violates the United States and North Carolina Constitutions.

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The issue is whether a law enforcement officer may lawfully establish a license checkpoint (systematic stopping of motor vehicles to determine if the operator has a valid driver license) when the officer does not have prior supervisory approval and/or when there is no written plan in place at the law enforcement agency setting out criteria for the establishment and operation of the checkpoint.

The Fourth Amendment prohibits unreasonable detentions. *See Delaware v. Prouse*, 440 U.S. 648, 663, 59 L. Ed. 2d 660, 673 (1979); *see also* U.S. Const. amend. IV. A random stop of the operator of a motor vehicle without at least “articulable and reasonable suspicion” the operator has committed some violation of law is an unreasonable detention. *Prouse*, 440 U.S. at 663, 59 L. Ed. 2d at 673. The stopping of a motor vehicle at a license checkpoint, however, does not constitute an unreasonable detention of its operator if “all oncoming traffic” is stopped. *Id.* at 663, 59 L. Ed. 2d at 673-74. This is so without regard to whether the officer conducting the checkpoint has received approval from a supervisor or whether the law enforcement agency has a written plan in effect with respect to establishing and conducting these checkpoints.<sup>1</sup> *See State v. VanCamp*, 150 N.C. App. 347, —, 562 S.E.2d 921, 925 (2002); *State v. Briggs*, 140 N.C. App. 484, 486-87, 536 S.E.2d 858, 859-60 (2000); *State v. Pulliam*, 139 N.C. App. 437, 440, 533 S.E.2d 280, 283 (2000); *State v. Grooms*, 126 N.C. App. 88, 90, 483 S.E.2d 445, 446 (1997). When not all the vehicles are stopped, there is nonetheless no constitutional violation if the checkpoint is conducted pursuant to a written plan, duly adopted by the law enforcement agency, setting out the criteria for the establishment and operation of the checkpoint. *See, e.g., Sanders*, 112 N.C. App. at 480, 435 S.E.2d at 844.

In this case, uncontroverted evidence demonstrates all west-bound traffic on U.S. 29/74 was stopped and checked for licenses and registrations. Thus, even though there is no evidence of a written plan adopted by the Belmont Police Department relative to licence checkpoints, the State met its burden of showing the random license check was not an unreasonable detention and therefore was valid under the

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1. This Court has noted that the constitutionality of the stops is not affected even if all vehicles are not stopped, provided the officers conducting the stops were actively engaged in issuing citations for violations. *See State v. Colbert*, 146 N.C. App. 506, 512-14, 553 S.E.2d 221, 225-26 (2001); *State v. Tarlton*, 146 N.C. App. 417, 420-21, 553 S.E.2d 50, 53-54 (2001); *State v. Barnes*, 123 N.C. App. 144, 145-56, 472 S.E.2d 784, 784-85 (1996); *State v. Sanders*, 112 N.C. App. 477, 480, 435 S.E.2d 842, 844 (1993). In those cases, however, the officers were conducting the checkpoint pursuant to a written plan adopted by the appropriate law enforcement agency.

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Fourth Amendment.<sup>2</sup> *See Tarlton*, 146 N.C. App. at 420, 553 S.E.2d at 53 (burden is on the State to show validity of a checkpoint). Accordingly, the trial court erred in suppressing evidence of Defendant's stop and arrest.

Reversed.

Judges MARTIN and BRYANT concur.

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CORPENING INSURANCE CENTER, INC., PLAINTIFF v. LEILA R. HAAFF,  
F/K/A LEILA R. IMBRIANI, DEFENDANT

No. COA01-1514

(Filed 19 November 2002)

**Appeal and Error— mootness—expired non-competition agreement**

An appeal was dismissed as moot where petitioner sought an injunction to enforce a non-competition agreement which expired while the appeal was pending.

Appeal by plaintiff from judgment entered 16 October 2001 by Judge Melzer A. Morgan, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 12 September 2002.

*Keziah, Gates & Samet, L.L.P., by Andrew S. Lasine, for plaintiff-appellant.*

*Robert E. Sheahan & Associates, by Robert E. Sheahan, for defendant-appellee.*

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2. Defendant does not argue the random license check at issue in this case was a pretext for a driving while impaired checkpoint in an attempt to circumvent Section 20-16.3 of the General Statutes. *See* N.C.G.S. § 20-16.3 (2001) (mandatory procedures for the establishment of a driving while impaired checkpoint); *see also State v. Hamilton*, 125 N.C. App. 396, 399-400, 481 S.E.2d 98, 100 (1997) (the police may use a detention for a traffic violation as a pretext for further investigation of criminal activity if there is probable cause a traffic violation occurred). Further, Defendant does not argue this random license check violated the North Carolina Constitution. Accordingly, we do not address these issues.

## CORPENING INS. CTR., INC. v. HAAFF

[154 N.C. App. 190 (2002)]

HUDSON, Judge.

Plaintiff Corpening Insurance Center (“Corpening”) sued its former employee Leila R. Haaff (“Haaff”) in June 2001. In its complaint, Corpening alleged that Haaff had violated the duties of loyalty and non-competition contained in the employment agreement that Haaff had signed prior to beginning work. Corpening also moved for a preliminary injunction, which the trial court denied. Corpening then appealed. For the reasons set forth below, we dismiss this appeal as moot.

Corpening, an insurance agency, hired Haaff in 1987 to work as a producer (sales agent) and a customer service representative. In this capacity, Haaff sold and serviced personal and commercial insurance products, as well as group life and health insurance. She acted both to solicit new business on Corpening’s behalf and to service existing accounts.

As a condition of employment, Haaff signed an employment contract, in which she agreed that she would not:

within the City of High Point and Archdale within 18 months from the termination of employment, canvass or advertise for, or otherwise assist anyone engaged in, nor herself engage directly or indirectly in any line of business carried on or contemplated at the time of the termination of her employment by her Employer, nor furnish information directly or indirectly to anyone engaged or interested in any such line of business.

Haaff received \$500 for signing the contract.

On April 19, 2001, Haaff voluntarily terminated her employment with Corpening. The next day, she formed a corporation known as Liberty Insurance Agency, Inc. (“Liberty”), located in Liberty, North Carolina, which offered property, casualty, life, and health coverage for individuals and groups. Haaff had contracted to buy the assets of the Liberty agency from its previous owners in March 2001.

Before she terminated her employment with Corpening, Haaff informed her clients there that she was leaving the company to open her own agency. Haaff then solicited business from these existing accounts and, in many cases, was able to secure “agent of record” letters, designating her as the exclusive agent for the accounts to the exclusion of Corpening. Some of these accounts were located in High Point or Archdale.

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Moreover, Haaff had an arrangement with Vickie Jones (“Jones”), another former Corpening employer, whereby Jones worked for Haaff part-time as a sales representative. Jones solicited accounts in High Point, accounts that Haaff serviced during her employment at Corpening, for the purpose of securing those accounts.

Corpening filed suit on June 1, 2001, alleging that Haaff had violated her contractual duties of loyalty and noncompetition. Corpening also requested preliminary and permanent injunctions, an accounting, and damages. Haaff answered Corpening’s complaint and filed five counterclaims, including a counterclaim for fraud. Corpening moved to dismiss the fraud counterclaim for failure to state a claim upon which relief could be granted. The superior court granted that motion.

On August 20, 2001, Corpening filed its motion for a preliminary injunction to enjoin Haaff from violating the terms of the employment agreement. The court denied the motion. The court found that the covenant not to compete was “broader than necessary to protect plaintiff’s legitimate business interests.” Specifically, the agreement “purports to prohibit defendant from providing assistance to anyone engaged in any line of business carried on by plaintiff or from assisting anyone engaged in any line of insurance business contemplated by plaintiff at the time of the termination of her employment rather than restricting defendant from competing as an agent in the actual personal sale of insurance products.” The court also found objectionable the fact that the covenant not to compete would “prevent defendant from working as a secretary, receptionist, adjuster, or custodian for or in an insurance agency.” In the court’s view, because the “overly broad restrictions [were] not separable,” plaintiff had failed to demonstrate a reasonable likelihood of success at trial. Corpening then appealed to this Court.

A preliminary injunction is interlocutory. *Rug Doctor, L.P. v. Prate*, 143 N.C. App. 343, 345, 545 S.E.2d 766, 767 (2001). No appeal lies from a trial court’s denial of a preliminary injunction unless the appellant would be deprived of a substantial right that he would lose absent review prior to final determination. *Id.*; see also N.C. Gen. Stat. § 7A-27(d)(1) (2001). However, “[w]hen, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have



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won in the lower court.” *Benvenue Parent-Teacher Ass’n v. Nash County Bd. of Educ.*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969). Accordingly, a “plaintiff can only seek to enforce [a] covenant for the period of time within which the covenant proscribes.” *Rug Doctor*, 143 N.C. App. at 345, 545 S.E.2d at 767.

In *Rug Doctor*, the plaintiff employer sued to enforce a covenant not to compete, but the covenant expired while the case was on appeal. 143 N.C. App. at 346, 545 S.E.2d at 768. This Court declined to address the merits because the “questions raised . . . regarding injunctive relief have been rendered moot by the passage of time.” *Id.*; see also *Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 479, 241 S.E.2d 700, 702 (1978) (same; because the covenant not to compete expired while the case was on appeal, “questions relating to the propriety of the injunctive relief granted below are not before us”). Cf. *Benvenue Parent-Teacher Ass’n*, 275 N.C. at 680, 170 S.E.2d at 477 (where acts against which plaintiffs had sought injunctive relief were discontinued, the “controversies which were the subject matter of this action have ceased to exist and questions raised by the appeal are moot”).

In *A.E.P. Industries, Inc. v. McClure*, however, a divided Supreme Court decided that the trial court had erred in denying the plaintiff’s request for injunctive relief even though the basis for the request—also a covenant not to compete—had expired pending appeal. 308 N.C. 393, 401, 302 S.E.2d 754, 759 (1983). A majority of that Court noted that the appellate process is not the procedural mechanism best suited for resolving the dispute and that the parties would be better advised to seek a final determination on the merits at the earliest possible time. *Id.* Nonetheless, the Court went on to address the merits. *Id.* In the Court’s view, “because this case presents an important question affecting the respective rights of employers and employees who choose to execute agreements involving covenants not to compete, we have determined to address the issues.” *Id.*

In this case, the covenant not to compete that Corpening is seeking to enforce expired eighteen months after the termination of employment. Haaff terminated her employment on April 19, 2001; therefore, the covenant was in effect only through October 19, 2002. That date has passed. Accordingly, we follow *Benvenue Parent-Teacher Ass’n*, *Rug Doctor*, and *Herff Jones* and decline to address the merits because “questions raised by [Corpening] . . . regarding injunctive relief have been rendered moot by the passage of time.” *Rug Doctor*, 143 N.C. App. at 346, 545 S.E.2d at 768. It is not this

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Court's—or any court's—function to “entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.” *Benvenue Parent-Teacher Ass'n*, 275 N.C. at 679, 170 S.E.2d at 476.

For the reasons set forth above, this appeal is dismissed as moot.

Dismissed.

Judges TIMMONS-GOODSON and CAMPBELL concur.



STATE OF NORTH CAROLINA v. SCOTT EDWARD THOMPSON

No. COA01-1553

(Filed 19 November 2002)

**1. Motor Vehicles; Search and Seizure— driving while impaired—reasonable suspicion for investigatory stop**

The trial court did not err in a DWI action by denying defendant's motion to suppress evidence of the stop of his vehicle because there were sufficient articulable acts for a reasonable suspicion that defendant was committing a motor vehicle violation where officers observed defendant weave within his lane and the tires of his car touch the dividing line of the highway, and the officers observed defendant exceeding the speed limit.

**2. Motor Vehicles— Intoxilyzer—informing defendant of rights**

The trial court did not err in a DWI action by denying defendant's motion to suppress the Intoxilyzer test results where the officer put a copy of defendant's rights in front of defendant as the officer read the rights, defendant's signature was obtained, and defendant was provided with a copy of the rights form after the test. Nothing in the statutes or the case law mandated that the officer physically hand defendant a copy of his rights.

Appeal by defendant from judgment entered 10 August 2001 by Judge Sanford L. Steelman, Jr. in Union County Superior Court. Heard in the Court of Appeals 18 September 2002.

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[154 N.C. App. 194 (2002)]

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

*W. David McSheehan and Bobby Khan for defendant-appellant.*

WALKER, Judge.

Defendant was charged with and found guilty of driving while impaired (DWI) in Union County District Court on 13 March 2001. He appealed to Union County Superior Court, where he was convicted by a jury. He received a sixty-day suspended sentence along with twelve months of supervised probation and was assessed \$417.00 in fines and costs.

At trial, the State's evidence tended to show the following: In the early morning hours of 24 February 2001, Officers James Hyatt and Mike Buesing of the Wingate Police Department were driving west on Highway 74 during their routine patrol. They observed defendant's vehicle traveling at what appeared to be a high rate of speed in the eastbound lane. After observing the vehicle for several seconds, Officer Buesing testified that he estimated defendant's speed to be fifty miles per hour in a thirty-five miles per hour zone. Similarly, Officer Hyatt testified that he estimated the defendant's speed to be about fifty-five miles per hour. Officer Buesing was operating the radar unit which verified defendant was driving above the posted speed limit. Because Officer Buesing had not completed the necessary training to receive his radar certification, the officers could not stop defendant based on this radar reading.

However, prompted by their estimations of defendant's speed, the officers turned into the eastbound lane of Highway 74 and followed defendant for five-tenths of a mile to one mile. The officers observed him weave within his lane and touch the left line separating the two eastbound lanes at least twice with both left tires. Based on these observations, Officer Buesing executed a traffic stop of defendant.

While talking to defendant during the traffic stop, Officer Buesing noticed his glassy eyes and a strong odor of alcohol about him. Officer Buesing testified that when he asked defendant to step out of his vehicle, defendant grabbed the door in a manner which indicated he needed help exiting. Officer Buesing further testified that defendant performed poorly on each of the field sobriety tests administered and that he was both talkative and argumentative. As a result of his

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observations, Officer Buesing was of the opinion that defendant had consumed a sufficient amount of alcoholic beverages to “appreciably impair both his mental and physical faculties to operate a motor vehicle.”

Defendant was arrested for DWI and was taken to the intoxilyzer room of the Union County jail. Officer Buesing testified that he “placed a copy of the rights in front of [defendant]” for him to follow as he read defendant his intoxilyzer rights. Defendant then signed a copy of the rights form and requested that a witness be present before the intoxilyzer test was administered. After defendant’s witness arrived, Officer Buesing administered the intoxilyzer test and gave defendant a copy of his intoxilyzer rights. Defendant’s blood alcohol reading was 0.10.

**[1]** Defendant contends the trial court erred in denying his motion to suppress the stop of his vehicle based on the lack of reasonable, articulable suspicion of a motor vehicle violation. We first note that “[o]ur review of a trial court’s denial of a motion to suppress is strictly limited to a determination of whether it’s [sic] findings are supported by competent evidence, and in turn, whether the findings support the trial court’s ultimate conclusion.” *State v. Allison*, 148 N.C. App. 702, 704, 559 S.E.2d 828, 829-30 (2002) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

Our Supreme Court recently reaffirmed the standard governing the requirements for an investigatory stop of a vehicle:

“An investigatory stop must be justified by ‘a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.’ A court must consider ‘the totality of the circumstances—the whole picture’ in determining whether a reasonable suspicion to make an investigatory stop exists. The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training. The only requirement is a minimal level of objective justification, something more than an ‘unparticularized suspicion or hunch.’ ”

*State v. Steen*, 352 N.C. 227, 238-39, 536 S.E.2d 1, 8 (2000) (citations omitted), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

In *State v. Watson*, 122 N.C. App. 596, 472 S.E.2d 28 (1996), a highway patrolman observed a vehicle weaving within its lane and driving

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on the dividing line of a dual-lane highway at 2:30 a.m. The patrolman turned, followed the vehicle, and observed defendant's driving behavior for about 15 seconds, after which he executed a traffic stop of the vehicle. *Id.* at 598, 472 S.E.2d at 29. The patrolman testified that he observed a strong odor of alcohol on defendant whose eyes were red and glassy. *Id.* On the basis of his observations, the patrolman arrested defendant for DWI. *Id.* Although defendant argued that the patrolman lacked a reasonable, articulable suspicion of a traffic violation when he executed the stop, this Court held that the patrolman's observations provided sufficient grounds to form a suspicion of impaired driving under the totality of the circumstances. *Id.* at 599-600, 472 S.E.2d at 29-30.

The facts of this case are very similar to those in *Watson*. Both vehicles were being operated in the early morning hours. The officers in both cases observed the drivers weave within their lane, touching the dividing line of the highways. Moreover, the officers in this case had the additional factor of having observed the defendant exceeding the speed limit. Thus, consistent with the requirements set forth in *Steen* and this Court's ruling in *Watson*, we conclude that sufficient articulable facts existed to allow the officers to form a reasonable suspicion that defendant was committing a motor vehicle violation and that the trial court did not err in denying defendant's motion to suppress this evidence.

**[2]** Defendant next argues that the trial court erred in denying his motion to suppress the intoxilyzer test results due to Officer Buesing's failure to comply with N.C. Gen. Stat. § 20-16.2(a) (2001). N.C. Gen. Stat. § 20-16.2(a) provides that "before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath, who shall inform the person orally and also give the person a notice in writing . . ." of his rights associated with such test. This Court has held that an officer administering an intoxilyzer test fully complies with the statutory requirements of N.C. Gen. Stat. § 20-16.2(a) by placing a written copy of the rights form before the defendant as the officer reads them aloud and then obtaining the defendant's signature on a copy of the rights form prior to administering the intoxilyzer test. *Watson, supra*; see also *State v. Carpenter*, 34 N.C. App. 742, 239 S.E.2d 596 (1977) (holding that a breathalyzer operator fully complied with N.C. Gen. Stat. § 20-16.2(a) when he orally advised the defendant of his rights and placed a form containing those same rights in front of the defendant, even though the offi-

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cer was unsure whether defendant actually read the form), *disc. review denied*, 294 N.C. 183, 241 S.E.2d 518 (1978).

In this case, Officer Buesing testified that he “placed a copy of the rights in front of [defendant]” as he read the intoxilyzer rights to him and then obtained defendant’s signature before administering the test. After completing the intoxilyzer test, Officer Buesing provided defendant with a copy of the rights form. Although defendant argues that Officer Buesing was required to physically hand him a copy of his rights form prior to administering the test, we find nothing in N.C. Gen. Stat. § 20-16.2(a) or our appellate decisions that mandates such a requirement. Therefore, we conclude the trial court did not err in denying defendant’s motion to suppress the intoxilyzer test results.

We have carefully reviewed defendant’s remaining assignments of error and find them to be without merit.

No error.

Judges McGEE and HUNTER concur.

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THOMAS KROH, PLAINTIFF v. TERESA KROH, DEFENDANT

No. COA02-151

(Filed 19 November 2002)

**Enforcement of Judgment—defamation judgment—execution—future interest on pending equitable distribution proceeding—401(k) retirement account**

The trial court did not err by granting plaintiff former husband’s motion under N.C.G.S. § 1-362 to collect a defamation judgment against defendant former wife by executing on defendant’s future interest in the couple’s pending equitable distribution proceeding including but not limited to defendant’s claims to plaintiff’s 401(k) retirement accounts even though defendant contends that the N.C.G.S. § 1C-1601(a)(9) retirement exemption applies, because: (1) defendant’s reliance on N.C.G.S. § 1C-1601(a)(9) is misplaced when defendant equates a claim for equitable distribution with an ownership interest in property; (2)

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defendant does not own a retirement account but has an expectancy in an equitable distribution claim; (3) N.C.G.S. § 50-20 provides that an equitable distribution claim is not a property right in specific marital property; (4) under N.C.G.S. § 1C-1601(a)(9), a debtor may use the retirement account exemption to shield her own retirement account but not to shield her claim to someone else's account; and (5) defendant does not even have a legal claim to the retirement account, but instead has an equitable distribution claim to a marital estate that might include the retirement account.

Appeal by defendant from order entered 8 November 2001 by Judge Melzer A. Morgan, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 16 October 2002.

*Moss, Mason, & Hill, by Matthew L. Mason and William L. Hill for plaintiff-appellee.*

*Smith, James, Rowlett, & Cohen, L.L.P., by Seth R. Cohen for defendant-appellant.*

WYNN, Judge.

This case arises from Thomas Stewart Kroh's motion to collect a defamation judgment against his former wife, Teresa Ledford Kroh, by executing on Ms. Kroh's future interest in the couple's pending equitable distribution proceeding. The trial court granted Mr. Kroh's motion, and held under N.C. Gen. Stat. § 1-362, that he "should be deemed the holder of all right, title and interest in [Ms. Kroh's] equitable distribution claim . . . including but not limited to her claims to [his] 401(k) retirement accounts."

On appeal, Ms. Kroh raises one issue: Did the trial court's order, with respect to the 401(k) retirement account, violate North Carolina's "Individual Retirement Plan" execution exemption codified at N.C. Gen. Stat. § 1C-1601(a)(9)?<sup>1</sup> We answer, no, and therefore uphold the order of the trial court.

The underlying facts to this matter tend to show that on 28 December 2001, an \$80,000 judgment was entered against Ms. Kroh,

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1. Ms. Kroh also argues in her brief the trial court's order violated North Carolina's "\$1,500 motor vehicle" and "\$3,500 personal property" execution exemption. However, she failed to raise these assignments of error in the record on appeal; accordingly, these arguments are not before us. N.C. R. App. P. 10(a) (2002).

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in favor of Mr. Kroh, for slander *per se*.<sup>2</sup> Twice, on 15 February 2001 and 14 June 2001, Mr. Kroh attempted to execute this judgment. However, the executions were returned unsatisfied. Unable to satisfy his judgment, Mr. Kroh filed a Motion in Aid of Execution in Superior Court, Guilford County.

In his motion, Mr. Kroh noted Ms. Kroh's pending equitable distribution claim, filed 26 March 1999, in which Ms. Kroh requested equitable distribution of Mr. Kroh's 401(k) retirement account. Accordingly, Mr. Kroh requested the Superior Court to "declare him the holder of all right, title, and interest" in Ms. Kroh's future "equitable distribution" award "to any portion of his retirement account" not in excess of his unsatisfied judgment."

On 8 November 2001, the Superior Court granted Mr. Kroh's motion under N.C. Gen. Stat. § 1-362 which provides: "The court or judge may order any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor) . . . due to the judgment debtor, to be applied towards the satisfaction of the judgment." Ms. Kroh argues, however, the trial court should have applied N.C. Gen. Stat. § 1C-1601(a)(9), providing that: "Each individual, resident of this State, who is a debtor is entitled to retain free of the enforcement of the claims of creditors . . . Individual retirement plans."

Ms. Kroh contends that since the execution exemption for "retirements accounts" is neither restricted nor eliminated by Section 1-362, the trial court erroneously applied Section 1-362 frustrating the legislative purpose of Section 1C-1601. We disagree.

Our Supreme Court has consistently held that we are required to "give effect to statutes covering the same subject matter where they are not absolutely irreconcilable and when no purpose of repeal is clearly indicated." *Person v. Garrett*, 280 N.C. 163, 165-66, 184 S.E.2d 873, 874 (1971). Here, Section 1-362 was enacted in 1870. *See* N.C. Gen. Stat. § 1-362. In 1981, the legislature repealed sections 1-369 through 1-392, entitled "Property Exempt from Execution," and replaced that section with 1C-1601. *See* N.C. Gen. Stat. §§ 1-369 through 1-392 (repealed by Session Laws 1981, Ch. 490, codified at N.C. Gen. Stat. § 1C-1601 et seq). The legislature, however, did not

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2. In an earlier appeal from the defamation judgment, this Court affirmed the \$80,000 award of compensatory and punitive damages, but reversed the award of \$5000 based upon a violation of the Electronic Surveillance Act. *Kroh v. Kroh*, 152 N.C. App. 347, 567 S.E.2d 760 (2002).



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repeal section 1-362. Chapter 1C contains no suggestion or evidence of a legislative intent to repeal section 1-362.<sup>3</sup>

Ms. Kroh relies on Section 1C-1601 to support the proposition that the trial court erroneously used her exempt property to satisfy a judgment. Ms. Kroh's reliance on this section is misplaced. Her argument incorrectly equates a claim for equitable distribution with an ownership interest in property. Ms. Kroh does not own a retirement account, rather Ms. Kroh has an expectancy in an equitable distribution claim. Under N.C. Gen. Stat. § 50-20, we have consistently held that an equitable distribution claim is not a property right in specific marital property.

Equitable distribution is a statutory right granted to spouses under G.S. 50-20 which vests at the time of separation. This vested right does not create a property right in marital property. *Perlow v. Perlow*, 128 B.R. 412, 415 (E.D.N.C.1991). Nor does the separation create a lien on specific marital property in favor of the spouse. *Id.* It only creates "a right to an equitable distribution of that property, whatever a court should determine that property is." *Id.* (quoting *Wilson v. Wilson*, 73 N.C. App. 96, 99, 325 S.E.2d 668, 670, *cert. denied*, 314 N.C. 121, 332 S.E.2d 490 (1985)).

*Hearndon v. Hearndon*, 132 N.C. App. 98, 101, 510 S.E.2d 183, 185 (1999).

Under section 1C-1601, a debtor may use the retirement account exemption to shield her own retirement account, but not to shield her claim to someone else's account. Here, Ms. Kroh does not even have a legal claim to the retirement account. Rather, Ms. Kroh has an equitable distribution claim to a marital estate that might include the retirement account. Accordingly, Ms. Kroh's assignment of error is without merit.

In sum, because Ms. Kroh does not have a property interest in the 401(k), Ms. Kroh is precluded from arguing, under section 1C-1601, that the trial court erred by using her exempt property to satisfy a claim.

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3. It is implausible to believe section 1-362 incorporates the exemptions of chapter 1C-1601 by reference. Chapter 1C-1601 was not enacted until 1981, a century after section 1-362 was first enacted. Although section 1-362 contains a clause appearing to be a "catch-all exemption" for personal property, this clause actually has a clear and narrow meaning. The homestead and personal property exemptions noted in section 1-362 arise directly from Article X of the North Carolina Constitution. *See* N.C. Const. Art. X, §§ 1-2.

MARCUSON v. CLIFTON

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Affirmed.

Judges TIMMONS-GOODSON and HUNTER concur.

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RANDALL AND LINDA MARCUSON, PLAINTIFFS v. BENJAMIN F. CLIFTON, JR.,  
DEFENDANT

No. COA02-240

(Filed 19 November 2002)

**Escrow— payment of sewer assessment—not within required period**

The trial court properly granted summary judgment for plaintiffs who were alleging breach of contract and of fiduciary duty arising from the payment of a sewer assessment from escrow after a real estate sale. Payment from the escrow agreement was limited to 16 months, the assessment was subject to modification until it was confirmed, and the assessment was not confirmed within 16 months of the closing.

Appeal by defendant from order filed 24 October 2001 by Judge Wade Barber, Jr. in Wake County Superior Court. Heard in the Court of Appeals 15 October 2002.

*Younce Hopper Vtipil & Bradford, PLLC, by Danny Bradford for plaintiff appellee.*

*Pendergrass Law Firm, PLLC, by James K. Pendergrass, Jr., for defendant appellant.*

GREENE, Judge.

Benjamin F. Clifton, Jr. (Defendant) appeals from an order filed 24 October 2001 granting summary judgment for Randall and Linda Marcuson (Plaintiffs).<sup>1</sup>

On 11 July 2000, Plaintiffs filed a complaint alleging breach of contract and breach of fiduciary duty seeking to recover \$12,000.00

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1. Although initially Daniel Gallagher and Judith Gallagher (the Gallaghers) were also defendants in this action, their motion for summary judgment was allowed on 15 June 2001 and filed 18 June 2001, based on Plaintiffs' failure to appear at the hearing. Consequently, the Gallaghers are no longer parties in the case.

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which they alleged had been held in an escrow account by Defendant. Both parties moved for summary judgment.

The evidence presented at the summary judgment hearing on 23 October 2001 tended to show Plaintiffs entered into a contract to sell their house (the property) to the Gallaghers. Defendant was employed as the closing attorney. As part of the sale of the house, Plaintiffs, Defendant, and the Gallaghers entered into an "escrow agreement" (the agreement). The agreement provided Plaintiffs would deposit \$12,000.00 to be held in escrow by Defendant for the payment of a pending sewer assessment. The funds were to be paid to Wake County by Defendant "upon the rendering of billing from Wake County to the record owner [of the property] at that time." If the billing was less than \$12,000.00, the remaining balance would be refunded to Plaintiffs. The agreement also contained the following provision: "If an assessment is made such that there is no cost to either the [Gallaghers] or [Plaintiffs] within 16 months of closing, the escrow will be returned to [Plaintiffs] in full." The agreement was signed by Plaintiffs, the Gallaghers, and Defendant.

The closing took place on 2 July 1997, and Plaintiffs' funds to pay the sewer assessment were deposited with Defendant. On 17 November 1997, a preliminary assessment resolution was passed by the Wake County Board of Commissioners stating the assessment would not exceed \$10,900.00. The assessment roll for the sewer project was confirmed on 3 January 2000, in the amount of \$10,550.00. A Sewer District Assessment Bill (the bill) was subsequently given to Kevin and Kathy Burns (the Burns),<sup>2</sup> the owners of the property at the time, and the bill was due on 3 March 2000.<sup>3</sup> Defendant paid the \$10,550.00 assessment out of the escrowed funds.<sup>4</sup> He then returned the remaining balance of \$1,450.00 to Plaintiffs.

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2. The record shows the Gallaghers sold the property to the Burns at some point before the bill was due. This constitutes an alternative basis for affirming the trial court, as the Burns were not parties to the agreement.

3. The record is not clear when the bill was given to the Burns. On its face, it shows a billing date of 1 December 1999. This date would suggest the bill was presented before the assessment was confirmed and appears inconsistent with section 153A-195.

4. The record does not reveal when the bill was paid. Defendant, however, admits in his brief to this Court that he held "the escrowed funds until such time as Wake County submitted a billing for the sewer assessment."

## MARCUSON v. CLIFTON

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At the conclusion of the hearing, the trial court entered judgment for Plaintiffs in the full amount of \$12,000.00.<sup>5</sup>

The dispositive issue is whether the Wake County sewer assessment was “made” within sixteen months of the closing date.

If a contract is unambiguous, “it must be enforced as it is written.” *Parks v. Oil Co.*, 255 N.C. 498, 501, 121 S.E.2d 850, 853 (1961). A court must interpret an unambiguous contract “as a whole, considering each clause and word with reference to all other provisions and giving effect to each whenever possible.” *Marcoin, Inc. v. McDaniel*, 70 N.C. App. 498, 504, 320 S.E.2d 892, 897 (1984) (citing *State v. Corl*, 58 N.C. App. 107, 293 S.E.2d 264 (1982)). Furthermore, unless circumstances show otherwise, words in an unambiguous contract will be given their “common or normal meaning.” *Marcoin*, 70 N.C. App. at 504, 320 S.E.2d at 897 (citing *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 266 N.C. 430, 146 S.E.2d 410 (1966)). Dictionaries can be used to determine “the common and ordinary meaning of words and phrases.” *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970).

A county board of commissioners may either annul, modify, or confirm a preliminary assessment “in whole or in part, either by confirming the preliminary assessments against any lot, parcel or tract” listed in the preliminary assessment roll, or “by cancelling, increasing, or reducing the assessments” to comply with “the basis of the assessment.” N.C.G.S. § 153A-195 (2001). An assessment becomes a lien on property once the assessment is confirmed. *Id.* Once confirmed, the assessment is sent to the county tax collector for collection. *Id.* The tax collector publishes a notice of confirmation, which notice sets a date for payment of the assessment. N.C.G.S. § 153A-196 (2001).

In this case, the agreement is unambiguous. Defendant was not permitted to pay the sewer assessment until a bill was “rendered,” and if “rendered,” the bill was to be paid only if the assessment was “made” within sixteen months after the closing date. A bill is “rendered” when it is presented. *American Heritage College Dictionary* 1155 (3d ed. 1993) [hereinafter *American Heritage*]. An assessment is “made” when it is carried out. *American Heritage* at 818. The bill at issue in this case was presented to the owners of the property either

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5. Defendant, of course, is not liable to Plaintiffs on the judgment for the amount refunded to Plaintiffs.

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on 1 December 1999 (billing date shown on bill) or sometime between 3 January 2000 (assessment confirmation date) and 3 March 2000 (due date) and thus could not have been paid by Defendant earlier than 1 December 1999. The sewer assessment was carried out when it was confirmed on 3 January 2000.<sup>6</sup> Although the bill was not paid until presented, because the assessment was not confirmed within sixteen months of the closing, Defendant had no authority to pay the bill arising from the assessment. Accordingly, the trial court properly granted summary judgment in favor of Plaintiffs.

Affirmed.

Judges MARTIN and BRYANT concur.

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6. This is so because prior to confirmation, the assessment was subject to modification, including elimination. We thus reject Defendant's argument that the assessment was "made" when the preliminary assessment was established.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 19 NOVEMBER 2002

IN RE ZONING OF BACHELOR PROP. No. 02-173-2	Polk (01CVS70)	Affirmed
STATE v. HUFFMAN No. 01-1585	Catawba (01CRS6128)	No error
STATE v. HUGHES No. 02-118	Randolph (99CRS14677) (99CRS14678) (99CRS14679)	No error
STATE v. ROBINSON No. 01-1354	Swain (00CRS963) (00CRS964)	No error
STATE v. SPIVEY No. 01-1192	Chatham (99CRS6212) (99CRS6213) (99CRS6214) (99CRS50307) (99CRS50352) (99CRS50355) (99CRS50356) (99CRS50357)	No prejudicial error
STATE v. SWAIN No. 02-6	Brunswick (99CRS56827)	No prejudicial error
STATE v. TILLEY No. 01-1530	McDowell (01CRS2135)	No error
ZANDER v. GREATER EMMANUEL PENTACOSTAL TEMPLE OF DURHAM No. 02-174	Wake (00CVS14502)	Reversed

## STATE EMPLOYEES ASS'N OF N.C., INC. v. STATE

[154 N.C. App. 207 (2002)]

STATE EMPLOYEES ASSOCIATION OF NORTH CAROLINA, INC., PLAINTIFF v. STATE OF NORTH CAROLINA; MICHAEL F. EASLEY, GOVERNOR OF NORTH CAROLINA; EDWARD RENFROW, STATE CONTROLLER OF NORTH CAROLINA; AND DAVID T. MCCOY, STATE BUDGET OFFICER OF NORTH CAROLINA, DEFENDANTS

No. COA01-1568

(Filed 3 December 2002)

**1. Injunction— temporary restraining order hearing—jurisdiction to dismiss lawsuit in entirety**

The trial court did not err by denying plaintiff state employees association's motion for a temporary restraining order (TRO) and by dismissing its complaint for declaratory judgment seeking to enjoin the State and certain of its officials from redirecting funds allocated to the State's retirement system to attempt to balance the budget rather than to fund the retirement systems even though plaintiff contends the trial court lacked jurisdiction to dismiss the lawsuit in its entirety at the TRO hearing, because: (1) neither of the grounds given by the trial court, including a Rule 12(b)(6) motion based on lack of jurisdiction or a Rule 12(b)(1) motion for lack of subject matter jurisdiction, is on the merits; and (2) a lack of jurisdiction can be raised at any time including by the trial court *ex mero motu* without any notice being required.

**2. Declaratory Judgments— standing—association**

The trial court did not err by concluding that plaintiff state employees association lacked standing to maintain a declaratory judgment action seeking to enjoin the State and certain of its officials from redirecting funds allocated to the State's retirement system to attempt to balance the budget rather than to fund the retirement systems.

Judge TYSON concurring in part and dissenting in part.

Appeal by plaintiff from order entered 29 May 2001 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 11 September 2002.

*State Employees Association of North Carolina, Inc., by General Counsel Thomas A. Harris, for plaintiff appellant.*

## STATE EMPLOYEES ASS'N OF N.C., INC. v. STATE

[154 N.C. App. 207 (2002)]

*Attorney General Roy Cooper, by Special Deputy Attorneys Norma S. Harrell and Alexander McC. Peters and Assistant Attorney General Robert M. Curran, for defendant appellees.*

*Blanchard, Jenkins, Miller & Lewis, P.A., by E. Hardy Lewis, Amicus Curiae North Carolina Conference of the American Association of University Professors.*

McCULLOUGH, Judge.

Plaintiff State Employees Association of North Carolina, Inc., (SEANC) appeals from an order denying its motion for a temporary restraining order and dismissing its complaint for declaratory judgment against defendants the State of North Carolina, Governor Michael Easley, State Controller Edward Renfrow, and State Budget Officer David McCoy, entered 29 May 2001.

SEANC is a nonprofit corporation that, according to its complaint, has approximately 58,000 active members, of whom approximately 46,000 are current employees of the State of North Carolina and approximately 12,000 are retired State employees. Active members of SEANC are defined as being limited to “current and retired employees of the State of North Carolina and/or persons having membership in or eligibility for membership in the following systems, Teachers’ and State Employees’ Retirement System of North Carolina, Consolidated Judicial Retirement System of North Carolina, and Legislative Retirement System.” Plaintiff alleges that they are bringing this lawsuit on behalf of its vested members. Vested members are those active members who have five (5) years of state service and have a vested right in their retirement account. *See Bailey v. State of North Carolina*, 348 N.C. 130, 500 S.E.2d 54 (1998).

In pursuing this lawsuit, plaintiff SEANC is seeking to enjoin the State and certain of its officials from redirecting funds allocated to the State’s retirement systems. The North Carolina General Assembly has statutorily created retirement systems for respective State employees. Three in particular are involved here.

Created in 1941 and located in N.C. Gen. Stat. §§ 135-1 to -18.8, the “Retirement System for Teachers and State Employees” was established “for the purpose of providing retirement allowances and other benefits under the provisions of this Chapter for teachers and State employees of the State of North Carolina.” N.C. Gen. Stat. § 135-2 (2001).



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Codified in N.C. Gen. Stat. §§ 135-50 to -76 in 1973, the “Consolidated Judicial Retirement Act” was established for the purpose of improving “the administration of justice by attracting and retaining the most highly qualified talent available within the State to the positions of justice and judge, district attorney and solicitor, and clerk of superior court, within the General Court of Justice[.]” N.C. Gen. Stat. § 135-50(b) (2001), by “providing retirement allowances and other benefits under the provisions of this Article for justices and judges, district attorneys, and clerks of superior court of the General Court of Justice of North Carolina, and their survivors.” N.C. Gen. Stat. § 135-54 (2001).

The “Legislative Retirement System” was created in 1983 and is located in N.C. Gen. Stat. §§ 120-4.8 to -4.31 (2001).

These retirement systems are funded by both employee and State, or employer, contributions. *See* N.C. Gen. Stat. §§ 135-8; 135-68, -69; 120-4.19, -20 (2001). As plaintiff alleges, these systems provide “for a systematic method of funding of the respective retirement system with employee contributions computed as a set percentage . . . of the employees’ salaries, and with systematic employer contributions in accordance with formulas mandated by the Retirement Statutes, which include calculations by an actuary based on the actuarial valuation of liabilities of the Retirement Systems.”

It was with respect to these State contributions that the “Appropriation Act of 2000” purported to set aside certain percentages of the covered salaries for the 2000-2001 fiscal year. 2000 N.C. Sess. Laws ch. 67, § 26.19(a).

It is worth noting Article V, Section 6 of the North Carolina Constitution, titled “Inviolability of sinking funds and retirement funds.” Subsection 2 of this provision provides:

*Retirement funds.* Neither the General Assembly nor any public officer, employee, or agency shall use or authorize to be used any part of the funds of the Teachers’ and State Employees’ Retirement System or the Local Governmental Employees’ Retirement System for any purpose other than retirement system benefits and purposes, administrative expenses, and refunds; except that retirement system funds may be invested as authorized by law, subject to the investment limitation that the funds of the Teachers’ and State Employees’ Retirement System and the Local Governmental Employees’ Retirement System shall not be

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applied, diverted, loaned to, or used by the State, any State agency, State officer, public officer, or public employee.

N.C. Const. art V, § 6(2). This version of Section (2) was adopted in 1969, but is similar to the provisions of Article II, Section 31, of the 1868 North Carolina Constitution, as adopted in 1950.

On the other hand, the North Carolina Constitution in Article III, Section 5 details the duties of the Governor. As to the budget of the State, it provides the following:

*Budget.* The Governor shall prepare and recommend to the General Assembly a comprehensive budget of the anticipated revenue and proposed expenditures of the State for the ensuing fiscal period. The budget as enacted by the General Assembly shall be administered by the Governor.

The total expenditures of the State for the fiscal period covered by the budget shall not exceed the total of receipts during that fiscal period and the surplus remaining in the State Treasury at the beginning of the period. *To insure that the State does not incur a deficit for any fiscal period, the Governor shall continually survey the collection of the revenue and shall effect the necessary economies in State expenditures, after first making adequate provision for the prompt payment of the principal of and interest on bonds and notes of the State according to their terms, whenever he determines that receipts during the fiscal period, when added to any surplus remaining in the State Treasury at the beginning of the period, will not be sufficient to meet budgeted expenditures.* This section shall not be construed to impair the power of the State to issue its bonds and notes within the limitations imposed in Article V of this Constitution, nor to impair the obligation of bonds and notes of the State now outstanding or issued hereafter.

N.C. Const. art. III, § 5(3) (emphasis added). Pursuant to this power, defendant Governor Easley issued Executive Order No. 3, entitled "Budget Administration," to insure that the State did not incur a deficit for the 2000-2001 fiscal year. This order detailed the distinct possibility that a deficit was impending in the fiscal year. It also commanded the Office of State Budget, Planning and Management (OSBPM) to take certain actions to insure that the State did not suffer a deficit. One of the commands was as follows:

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Section 8. The Office of the State Controller, as advised by the State Budget Officer, is directed to receive the employer portion of retirement contributions for all State funded retirement systems and to escrow such funds in a special reserve as established by OSBPM. Before taking such action, OSBPM is directed to confirm with the State Treasurer that such action will not impair the actuarial integrity of the state retirement system. Return of all such receipts shall be made to the retirement system, if possible, after determination that such funds are not necessary to address the deficit.

The amount that OSBPM actually put in escrow is estimated to be \$151,000,000.00.

As it became apparent to plaintiff SEANC that defendants were indeed going to use the appropriated employer contributions held in escrow to attempt to balance the budget rather than to fund the retirement systems, plaintiff filed this action on 22 May 2001. In its verified complaint, plaintiff sought a declaratory judgment on four possible grounds: (1) that contracts exist between defendants and the members of the retirement systems to fund those systems in accordance with the systematic funding methods mandated by the retirement systems, and that defendants' actions had breached those contracts; (2) that the Executive Order and other actions of defendants, both taken and threatened, violate Article V, Section 6(2) of the North Carolina Constitution; (3) defendants lack authority under Article III, Section 5(3) of the North Carolina Constitution to withhold the appropriated retirement funds; (4) the contractual rights of the members of the retirement systems to have the systems funded are property rights, and the Executive Order and other actions of defendants constitute a taking of property from those members without due process of law in violation of the Fourteenth Amendment to the U.S. Constitution and other than by the law of the land in violation of Article I, Section 19 of the North Carolina Constitution.

Plaintiff's complaint sought a preliminary injunction to preserve the *status quo* while the action was pending and ultimately a permanent injunction compelling defendants to pay into the retirement systems all employer contributions to the systems withheld by them under the Executive Order or otherwise. In addition to its complaint, plaintiff also filed a motion for a temporary restraining order (TRO) pursuant to Rule 65(b) of the North Carolina Rules of Civil Procedure on the same day. This motion alleged that

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“[t]he threatened actions of Defendants will cause immediate and irreparable injury to Plaintiff’s members and all other current and retired State employees.”

A hearing on plaintiff’s motion for TRO was held on 23 May 2001. As to the TRO, the trial court found as fact that plaintiff had failed to demonstrate that it or its members will suffer any irreparable harm if injunctive relief is not granted, and that they had presented no allegation of actual harm to it or its members. Accordingly, the trial court made conclusions of law to the same effect holding that plaintiff could not prevail on the merits of the action, and thus ordered that the TRO motion be denied.

The trial court also made findings of fact that plaintiff SEANC was the only plaintiff to this action, that SEANC has neither alleged nor shown by any evidence that it is a party to or third-party beneficiary of the alleged contracts, and that all of the parties to the contracts are not before the trial court in the action. The trial court then made conclusions of law that plaintiff lacked standing to bring its declaratory judgment action as the relief sought was not available under the Act, that the suit lacked the necessary parties to issue a declaration of rights, plaintiff had failed to demonstrate that an actual and justiciable controversy existed or is unavoidable, that the trial court lacked subject matter jurisdiction because plaintiff had no standing, and that this suit was subject to dismissal under Rule 12(b)(6). Thus, the trial court ordered that the entire complaint be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted and pursuant to Rule 12(h)(3) for lack of subject matter jurisdiction. These orders were entered on 29 May 2001. Plaintiff appeals.

Plaintiff argues on appeal that (1) the trial court lacked jurisdiction to dismiss the lawsuit at the hearing on plaintiff’s motion for TRO; (2) the trial court’s order of dismissal at the TRO hearing violated plaintiff’s right to proper notice and a fair hearing; (3) the trial court had subject matter jurisdiction of the action below because plaintiff’s allegations demonstrate that its members had suffered actual harm and plaintiff had standing to sue on their behalf; (4) plaintiff’s complaint states proper claims for declaratory judgment or, in the alternative, proper claims under other legal theories which the trial court should have recognized; (5) plaintiff’s verified complaint presents a justiciable controversy; and (6) all necessary parties were present in the action below.

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For the reasons set forth herein we affirm the actions of the trial court and the dismissal of this suit.

## I.

**[1]** Plaintiff's first argument is that the trial court lacked jurisdiction to dismiss the lawsuit in its entirety at the hearing on their motion for TRO. Plaintiff argues that the merits of an action cannot be considered at such a hearing because the trial court has jurisdiction only to consider the TRO. See *Register v. Griffin*, 6 N.C. App. 572, 575, 170 S.E.2d 520, 522-23 (1969). Further, plaintiff cites cases which hold that a dismissal pursuant to Rule 12(b)(6), unless otherwise specified, is a dismissal on the merits.

Defendant argues that the trial court had jurisdiction to rule the way it did, and we agree. "A lack of standing may be challenged by motion to dismiss for failure to state a claim upon which relief may be granted." *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000). While generally a Rule 12(b)(6) motion is on the merits, one based on lack of jurisdiction is not.

Rule 41(b) of the North Carolina Rules of Civil Procedure provides the basis for concluding that dismissal under Rule 12(b)(6) is an adjudication on the merits, and therefore that 12(b)(6) dismissal bars subsequent relitigation of the same claim. Rule 41(b) provides in relevant part that

[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this section and *any dismissal* not provided for in this rule, *other than a dismissal for lack of jurisdiction*, for improper venue, or for failure to join a necessary party *operates as an adjudication upon the merits*.

*Cline v. Teich*, 92 N.C. App. 257, 264, 374 S.E.2d 462, 466 (1988) (citations omitted) (emphasis added).

Also in *Cline*, it is explained that a dismissal pursuant to Rule 12(b)(1) is not on the merits. *Id.* at 263-64, 374 S.E.2d at 466. Neither of the grounds given by the trial court, Rule 12(b)(6) for failure to state a claim because of lack of standing, nor Rule 12(b)(1) for lack of subject matter jurisdiction because of lack of standing, are on the merits. A lack of jurisdiction can be raised at any time including by the trial court *ex mero motu*, notice not being required. N.C. Gen. Stat. § 1A-1, Rule 12(h)(3) (2001). Thus, the trial court did not exceed

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its authority at the TRO hearing. Accordingly, these assignments of error are overruled.

## II.

[2] Resolution of this appeal requires this Court to determine if plaintiff has standing to maintain this action in its present form. As plaintiff is an association seeking to represent its members in this lawsuit, the proper standard for analysis of the standing issue is set forth by our Supreme Court in *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990):

“[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.”

*River Birch*, 326 N.C. at 130, 388 S.E.2d at 555 (quoting *Hunt v. Washington State Apple Adver. Comm’n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 394 (1977)). The Supreme Court in *River Birch* stated that “[t]o have standing the complaining association or one of its members must suffer some immediate or threatened injury.” *Id.* at 129, 388 S.E.2d at 555. Further, “[w]hen an organization seeks declaratory or injunctive relief on behalf of its members, ‘it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.’” *Id.* at 130, 388 S.E.2d at 555 (quoting *Warth v. Selding*, 422 U.S. 490, 515, 45 L. Ed. 2d 343, 364 (1975)).

Since *River Birch* was decided, our Court has had several occasions to consider this issue. In doing so, there appears, as the arguments by the parties point out, to be a disagreement as to the interpretation of the first prong of the *River Birch* test. In particular, the question pertains to whether or not this prong, which requires that “its members would otherwise have standing to sue in their own right,” requires every member of the association to have standing or allows an association to have standing even though not all members are immediately harmed by the activity complained of.

In *Landfall Group v. Landfall Club, Inc.*, 117 N.C. App. 270, 450 S.E.2d 513 (1994), this Court was presented with the issue of whether plaintiff, a non-profit association, made up of members of defendant Club, had standing to bring a declaratory judgment action where one

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member of plaintiff did not belong to defendant Club, and thus did not have standing on his own to sue. *Id.* at 272, 450 S.E.2d at 515. Plaintiff claimed standing as an association, and this Court proceeded to apply the *River Birch* test. There the Court stated that:

Under the first prong of the *Hunt* test, an individual member has standing to sue in his own right if he can demonstrate a “distinct and palpable injury” likely to be redressed by granting the requested relief.

*Landfall Group*, 117 N.C. App. at 272-73, 450 S.E.2d at 515 (quoting *Valley Forge College v. Americans United*, 454 U.S. 464, 488, 70 L. Ed. 2d 700, 719 (1982)). Applying this to the facts, the Court noted that in support of defendant’s motion for summary judgment, which was granted, defendant produced an affidavit that tended to show that one of the members of plaintiff was not a member of defendant Club:

Based on this evidence, [one member] cannot demonstrate that he has a “distinct and palpable injury” likely to be remedied by granting the relief requested by plaintiff; therefore, plaintiff has failed to meet the first prong of the *Hunt* test for representational standing.

*Id.* at 273, 450 S.E.2d at 515. Because plaintiff was unable to rebut this evidence, summary judgment in favor of defendant on the basis of standing was affirmed.

Recently, this Court commented on this situation in *Northeast Concerned Citizens, Inc. v. City of Hickory*, 143 N.C. App. 272, 545 S.E.2d 768, *disc. review denied*, 353 N.C. 526, 549 S.E.2d 220 (2001). *Northeast* dealt with the issue of “whether a corporation which does not have any legal interest in property affected by a zoning ordinance nevertheless has standing to challenge that zoning ordinance when [some] members/shareholders of the corporation have standing as individuals to challenge the zoning ordinance.” *Id.* at 276, 545 S.E.2d at 771. *Northeast* noted that special rules apply to challenging a zoning ordinance. Essentially, zoning ordinances may be challenged by individuals in an action for declaratory judgment or a writ of certiorari under N.C. Gen. Stat. § 160A-388(e) (2001). Individuals have standing under either if they have a specific legal interest that is directly and uniquely affected by the zoning ordinance (an aggrieved party under § 160A-388(e)). Therefore, this Court declared that a corporation has standing in the same manner, if *all* of the mem-

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bers/shareholders of the corporation were so situated. *Id.* at 276-77, 545 S.E.2d at 771-72.

While *Northeast Concerned Citizens* applied specific rules unique to the zoning ordinance area, that Court sowed confusion when it stated that other more general rules did not apply. The majority did this in a footnote, apparently addressing concerns of the concurrence:

The concurrence cites *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990), for the proposition that all individual members of an association do not have to have individual standing for the association to have standing to bring an action on behalf of the members when the association itself does not have standing. *River Birch*, however, is distinguishable from the case *sub judice* because at issue in *River Birch* was an association's standing to bring an action for unfair or deceptive trade practices and not an action to challenge a zoning ordinance. *Id.* at 129-31, 388 S.E.2d at 355-56. As North Carolina has created a specific test for standing that is applicable to actions challenging zoning ordinances, see *Taylor*, 290 N.C. at 620, 227 S.E.2d at 583; N.C.G.S. § 160A-388(e), the more general standing requirement for associations stated in *River Birch* is not applicable to the case *sub judice*.

*Id.* at 277, 545 S.E.2d at 772 (emphasis added).

The concurrence cited *River Birch* for associational standing, with particular emphasis on the quote that, “[t]o have standing the complaining association or one of its members must suffer some immediate or threatened injury.” *Id.* at 278, 545 S.E.2d at 773. It explains:

Thus, even though *River Birch* holds that an association's “members” must have standing in their own right in order for the association to have standing, it explains that not *all* of the members must have individual standing.

*Id.* at 279, 545 S.E.2d at 773 (emphasis added).

While the *Northeast Concerned Citizens* footnote created some confusion, it is not binding as the statement was not the holding of that case. *Landfall* is the only case that the courts of this State have decided on the issue of associational standing subsequent to *River Birch*. The holding from that case is binding on this panel, as one



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panel cannot overrule another. *See In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (stating “[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court”).

Thus even if we were inclined to follow the more liberal rule of other states or the federal courts, which have allowed associational standing when some of its members had standing, we cannot. *See 1000 Friends of Oregon v. Multnomah County, Etc.*, 39 Or. App. 917, 593 P.2d 1171 (1979). Indeed, the United States Supreme Court seems to hold that some lesser number of impacted members is sufficient to allow associational standing:

[T]o justify any relief the association must show that it has suffered harm, or that one or more of its members are injured. *E.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L. Ed. 2d 636 (1972). But, apart from this, whether an association has standing to invoke the court’s remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind. *E.g.*, *National Motor Freight Assn. v. United States*, 372 U.S. 246, 83 S.Ct. 688, 9 L. Ed. 2d 709 (1963).

*Warth v. Seldin*, 422 U.S. at 515, 45 L. Ed. 2d at 364; *see also River Birch*, 326 N.C. at 130, 388 S.E.2d at 555.

Affirmed.

Judge BRYANT concurs.

Judge TYSON concurs in part and dissents in part.

TYSON, Judge concurring in part, dissenting in part.

I concur with Part I of the majority’s opinion holding that the trial court had proper jurisdiction to dismiss the lawsuit in its entirety at the hearing on plaintiff’s motion for a temporary restraining order

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(TRO). I respectfully dissent from Part II of the majority's opinion which affirms that portion of the trial court's order which held that plaintiff State Employees Association of North Carolina (SEANC) did not have standing to bring an action and which dismissed plaintiff's action.

### I. Standing

Plaintiff alleged in its complaint:

SEANC brings this action on behalf of its active members who are vested members of any of the [retirement] systems. . . . SEANC has standing to maintain this lawsuit. As more fully set forth below, the active SEANC members who are vested members of the Retirement Systems are suffering and will continue to suffer irreparable harm to their contractual and constitutional rights in the Retirement Systems as a result of the actions, both past and threatened, of the defendants unless the defendants are restrained. Thus, all such members would have standing to maintain a lawsuit such as this one on their own behalf.

The proper standard to analyze whether an association has standing is set forth by our Supreme Court in *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990):

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

*River Birch*, 326 N.C. at 130, 388 S.E.2d at 555 (quoting *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 394 (1977)). Justice Meyer stated, "[t]o have standing the complaining association or one of its members must suffer some immediate or threatened injury." *Id.* at 129, 388 S.E.2d at 555. (Emphasis supplied). The *River Birch* Court found the association had standing for the declaratory judgment claim but not for the tort claim because individual members of the association may suffer damages in differing amounts.

*River Birch* adopted the standard set forth in the case of *Warth v. Seldin*, 422 U.S. 490, 45 L. Ed. 2d. 343 (1975). The U.S. Supreme Court stated that for an association to have standing, "[t]he associa-

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tion must allege *that its members, or any one of them*, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit.” *Warth*, 422 U.S. at 511, 45 L. Ed. 2d. at 362 (emphasis supplied). The Court further stated:

whether an association has standing to invoke the court’s remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought. If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.

*Warth*, 422 U.S. at 515, 45 L. Ed. 2d at 364.

The clear language of *River Birch* and *Warth* does not require a threat of immediate injury to each and every individual member of the association in order for the association to have standing.

The majority’s opinion, relying upon *Landfall Group v. Landfall Club, Inc.*, 117 N.C. App. 270, 450 S.E.2d 513 (1994), would require each and every member of an association to have individual standing in order for the association to have standing. This requirement would obliterate associational standing and is inconsistent with the plain language of *River Birch*. “[O]ne of its members must suffer some immediate or threatened injury.” *River Birch*, 326 N.C. at 129, 388 S.E.2d at 555 (citing *Hunt*, 432 U.S. at 342, 53 L. Ed. 2d at 393).

*Landfall* relied upon *Valley Forge College v. Americans United*, 454 U.S. 464, 488, 70 L. Ed. 2d. 700, 719 (1982) to hold that each member of the association had to show a “distinct and palpable injury” to have standing to sue. *Landfall*, 117 N.C. App. at 273, 450 S.E.2d at 515.

*Valley Forge* required a distinct and palpable injury to each association member for the association to make an establishment clause challenge and meet the requirements of Art. III of the U.S. Constitution. *Valley Forge*, 454 U.S. at 488-89, 70 L. Ed. 2d at 719-20. The facts of *Valley Forge* were specific, and its holding is narrow. Its rationale for Art. III standing is inapplicable to the facts in *Landfall*.

The majority’s assertion that *Landfall* controls the result here is questionable in light of the more recent cases from this Court of

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*Northeast Concerned Citizens, Inc. v. City of Hickory*, 143 N.C. App. 272, 545 S.E.2d 768 (2001) and *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 552 S.E.2d 220 (2001), *disc. review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002).

The concurring opinion in *Northeast* expressed concern that the majority's opinion overreached by stating "that a corporation has standing to challenge a zoning action only if 'all of the members/shareholders of the corporation' would have individual standing to bring the action." *Northeast*, 143 N.C. App. at 278, 545 S.E.2d at 772. To address the concerns of the concurrence, the majority acknowledged in a footnote the holding of *River Birch* but distinguished its applicability to the facts in *Northeast* which dealt with zoning regulations. *Id.* at 277, 545 S.E.2d at 772. ("As North Carolina has created a specific test for standing that is applicable to actions challenging zoning ordinances, . . . the more general standing requirement for associations stated in *River Burch* is not applicable to the case *sub judice*.")

More recently, this Court in *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 552 S.E.2d 220 (2001), *disc. rev. denied*, 356 N.C. 161, 568 S.E.2d 191 (2002), reversed the trial court's dismissal of a homeowner's association's claim for lack of standing and held "that the association ha[d] standing to pursue claims against [the] defendant on its own behalf." *Creek Pointe*, 146 N.C. App. at 169, 552 S.E.2d at 227-28.

## II. Conclusion

While the majority finds this Court bound by precedent in *Landfall*, I would hold that *River Birch* is controlling precedent at bar. See *Rogerson v. Fitzpatrick*, 121 N.C. App. 728, 732, 468 S.E.2d 447, 450 (1996) (citing *Dunn v. Pate*, 106 N.C. App. 56, 60, 415 S.E.2d 102, 104 (1992), *rev'd on other grounds*, 334 N.C. 115, 431 S.E.2d 178 (1993) ("It is elementary that this Court is bound by holdings of the Supreme Court."); See also *Brundage v. Foye*, 118 N.C. App. 138, 141, 454 S.E.2d 669, 671 (1995) ("[O]ur responsibility is to follow established precedent set forth by our Supreme Court.")

For the foregoing reasons, I respectfully dissent.

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NORMAN S. BECK, PLAINTIFF v. THE CITY OF DURHAM, ORVILLE POWELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF DURHAM, J. W. MCNEIL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE CITY OF DURHAM, AND P. LAMONT EWELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CITY MANAGER OF THE CITY OF DURHAM, DEFENDANTS

No. COA01-1407

(Filed 3 December 2002)

**1. Civil Procedure— Rule 12(b)(6) dismissal—outside matters considered**

There was no error in the dismissal of an employment harassment complaint where the order and judgment referred to Rule 12(b)(6) but an affidavit and a previous federal judgment were considered. Rule 12(b) expressly provides for the disposal of claims under Rule 56 when outside matters are considered and it was not necessary for the court to specifically refer to Rule 56. Furthermore, it is clear that the court used Rule 12(b) and Rule 56 interchangeably.

**2. Pleadings— timeliness—amended complaint—filed during hearing on motion to dismiss**

An amended complaint was timely filed even though plaintiff filed his amended complaint four minutes after the beginning of the hearing on defendant's motion to dismiss where defendants did not present a record of objections or a transcript indicating whether the trial court took issue with the amended complaint. N.C.G.S. § 1A-1, Rule 15(a).

**3. Statutes of Limitation and Repose— defense pled—amended, unverified complaint not sufficient**

An amended, unverified complaint was not sufficient to establish a genuine issue for trial where defendants had properly pled a statute of limitations defense.

**4. Immunity— governmental—affidavit that claims not insured—no forecast of coverage**

The trial court's dismissal of employment harassment claims against the City based on governmental immunity was proper where defendant presented the affidavit of a City employee that the City did not have insurance coverage for any of the matters in the complaint and plaintiff did not come forward with a forecast of evidence that immunity was waived.

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**5. Immunity— governmental—police chief and city manager— official capacity**

The Durham police chief and city manager were public officials immune from suit for tortious acts committed in their official capacity.

**6. Immunity— governmental—intentional torts**

Determination of governmental immunity is unnecessary if an intentional tort is alleged, since neither public officials nor public employees have immunity from suit in their individual capacities.

**7. Employer and Employee— constructive wrongful discharge—not generally recognized**

There was no error in dismissing a constructive wrongful discharge claim where there was no termination payment provision in an employment contract. This tort has not been recognized in North Carolina except in that context.

**8. Emotional Distress— intentional infliction—negative opinion of plaintiff—not outrageous**

The trial court did not err by dismissing plaintiff's claim for intentional infliction of emotional distress against a city manager where the city manager spoke negatively about plaintiff after plaintiff retired as a police officer and became a private investigator. Plaintiff did not demonstrate the necessary level of extreme and outrageous conduct.

**9. Wrongful Interference— contract and prospective advantage—tortious interference—subjective view of plaintiff—not sufficiently malicious**

The trial court did not err by granting summary judgment for defendant city manager on claims for interference with prospective advantage and interference with contract where defendant told plaintiff's client that she "could do better." This simply expressed defendant's subjective view of plaintiff's abilities and did not express the required malicious motive.

**10. Collateral Estoppel and Res Judicata— prior federal claim—different issues**

A 42 U.S.C. 1983 claim for selective waiving of governmental immunity was not barred by res judicata even though a prior federal claim had been dismissed where the claims were based on different factual and legal issues.

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**11. Constitutional Law— due process—equal protection—municipal payment of selective claims**

The trial court did not err by granting summary judgment for the City of Durham on due process and equal protection claims based on the City's practice of paying damages on some tort claims but not others. The allegations were insufficient to establish that the City was arbitrary and capricious.

Appeal by plaintiff from an order and judgment entered 26 June 2001 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 20 August 2002.

*Mitchell Law Offices, P.A., by Donald R. Von Hagen; Foil Law Offices, by Beth Poinsett Von Hagen, for plaintiff-appellant.*

*Newsom, Graham, Hedrick & Kennon, P.A., by Joel M. Craig and Thomas H. Lee, Jr., for defendant-appellees.*

HUNTER, Judge.

Norman S. Beck ("plaintiff") appeals from the Durham County Superior Court's order in favor of the City of Durham ("the City"), Orville Powell ("Powell"), P. Lamont Ewell ("Ewell"), and J. W. McNeil ("McNeil") (collectively "defendants") granting dismissal of plaintiff's claims for (1) constructive wrongful discharge against the City and McNeil; (2) negligent promotion, supervision, and retention against the City and Powell; (3) negligent infliction of emotional distress ("NIED") against all four defendants; (4) intentional infliction of emotional distress ("IIED") against the City, McNeil, and Ewell; (5) tortious interference with contract against the City and Ewell; (6) tortious interference with prospective advantage against the City and Ewell; and (7) violation of due process and equal protection against the City. We affirm.

The relevant allegations of plaintiff's complaint are as follows: Plaintiff served as a police officer for the Durham Police Department ("DPD") from 1979 to 1996. During his employment, the City employed Powell as City Manager. The City also employed McNeil as a supervisor in the DPD and later promoted him to Chief of Police in 1992. Neither of these men are currently employed by the City. Ewell was subsequently employed as City Manager.

In 1989, plaintiff was assigned to serve as a traffic supervisor. His immediate supervisor was McNeil. While under McNeil's supervision,

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plaintiff was ordered to void a speeding ticket for a friend of McNeil's—an action that was in direct violation of DPD policies and state law. When plaintiff refused and attempted to expose McNeil's improper actions, McNeil's treatment of him became hostile and harassing. McNeil retaliated against plaintiff by (1) assigning plaintiff to on-call status twenty-four hours a day, seven days a week for six years with no relief, (2) taking away plaintiff's office, and (3) requiring plaintiff to work longer hours by assigning his unit to walking patrol. Also, plaintiff suffered racial harassment from McNeil, a black man, and other black police officers because plaintiff, a white and Jewish male, was referred to as "Mark Furman" and subjected to jokes about Jewish people. Ultimately, plaintiff requested a transfer to regular patrol duty as a line police sergeant in March of 1995. McNeil granted this request.

Shortly after being transferred, plaintiff sustained a work-related injury that precluded him from returning to regular patrol duty. Plaintiff requested a light-duty assignment. However, McNeil failed to arrange a meeting between plaintiff and the personnel department to discuss plaintiff's medical disability—another action in direct violation of policies and procedures established by the City and DPD regarding an employee's rights to continued employment after a work-related injury. As a result, plaintiff was placed on a permanent midnight shift in the DPD records department, which was not the type of assignment commonly given to police officers recovering from an injury. Defendant subsequently retired on 31 October 1996, terminating his employment with the DPD.

Following his retirement, plaintiff started a private investigative business. However, after Ewell (in his position as City Manager) told one of plaintiff's clients that she "could do better" than plaintiff's services, that client terminated her contract with plaintiff.

On 22 November 1999, plaintiff filed a complaint in Durham County Superior Court alleging two federal claims under Title 42, Section 1981 and Section 1983 of the United States Code, as well as the first six state law claims previously mentioned against the City and against McNeil, Powell, and Ewell individually and in their official capacity. Defendants removed the action to the United States District Court for the Middle District of North Carolina. Thereafter, defendants filed a motion to dismiss plaintiff's action. On 29 November 2000, the middle district court dismissed plaintiff's federal claims, and after declining to exercise supplemental jurisdiction over



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plaintiff's state law claims, dismissed those claims without prejudice. Plaintiff did not appeal the judgment.

Plaintiff reasserted his state law claims on 29 December 2000 in another complaint filed in Durham County Superior Court. In support of these claims, plaintiff's complaint contained all of the allegations previously mentioned, as well as allegations that (1) the work conditions created by McNeil forced him into retirement, (2) the City and Powell negligently promoted, supervised, and retained McNeil as Chief of Police despite having knowledge of his actions, and (3) Ewell induced a client to terminate her contract with plaintiff's private investigative business. The complaint further alleged that the City had waived its governmental immunity by purchasing liability insurance.

On 12 April 2001, defendants filed a motion seeking dismissal of plaintiff's first six claims pursuant to Rule 12(b)(6) or, in the alternative, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. In support of their motion, defendants submitted a certified copy of the order and judgment from the middle district court and the affidavit of Laura W. Henderson ("Henderson"), an employee of the City who was familiar with the City's insurance policies. In her affidavit, Henderson stated that the City had no liability insurance that provided coverage for any of the matters alleged by plaintiff in his complaint.

On 12 April 2001, defendants noticed the hearing on their motion to dismiss for 31 May 2001 at 9:30 a.m. At 9:34 a.m. on 31 May 2001, plaintiff filed an amended complaint and served it during the hearing. The amended complaint contained a new claim alleging the City's violation of plaintiff's rights to due process and equal protection, as well as additional allegations to support plaintiff's other six claims. Nevertheless, defendants' motion to dismiss was granted in an order and judgment filed 26 June 2001. Plaintiff appeals the court's dismissal of all his claims against all defendants, with the exception of his claim for NIED against Ewell (as stated in plaintiff's brief).

## I.

**[1]** The first issue presented to this Court is whether the trial court properly dismissed plaintiff's action pursuant to either Rule 12(b)(6) or Rule 56.

Rule 12(b) provides, *inter alia*, that a trial court's review of a 12(b)(6) motion to dismiss requires a determination of "whether, as a

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matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not.” *Miller v. Nationwide Mutual Ins. Co.*, 112 N.C. App. 295, 300, 435 S.E.2d 537, 541 (1993). Rule 12(b) further provides that if “matters outside the [complaint] 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 . . . .” N.C. Gen. Stat. § 1A-1, Rule 12(b) (2001). Thus, in treating a motion as one for dismissal under Rule 56, the trial court, when viewing the evidence in the light most favorable to the non-movant, must determine whether the moving party has shown, through pleadings and affidavits, that there is no genuine issue of material fact requiring a trial and that he is entitled to judgment as a matter of law. *Bruce-Terminix Co. v. Zurich Ins. Co.*, 130 N.C. App. 729, 733, 504 S.E.2d 574, 577 (1998).

Here, defendants’ motion to dismiss stated that defendants “move, pursuant to Rule 12(b)(6), or in the alternative pursuant to Rule 56, . . . for an order dismissing [plaintiff’s] action in its entirety.” The subsequent court order and judgment granting defendants’ motion to dismiss stated:

Defendants moved to dismiss all of Plaintiff’s claims pursuant to Rule 12(b)(6) . . . on the grounds that Plaintiff has failed to state a claim upon which relief can be granted. In the alternative, Defendants moved to dismiss all of Plaintiff’s claims pursuant to Rule 12(b) and submitted a certified copy of the judgment and order dismissing Plaintiff’s federal claims . . . and the Affidavit of Laura Henderson.

Plaintiff argues the trial court erred in considering the previous federal court judgment and Henderson’s affidavit because the current order and judgment only made reference to Rule 12(b)(6) and Rule 12(b), not to Rule 56. However, since Rule 12(b) expressly provides for the disposal of claims under Rule 56 when outside matters are considered, it was not necessary for the trial court to specifically reference Rule 56 in its order and judgment. Furthermore, it is clear from the text of the order and judgment that the trial court used Rule 12(b) and Rule 56 interchangeably to refer to the alternative grounds for dismissal as stated in defendants’ motion. Therefore, we conclude the order and judgment was a grant of dismissal under Rule 56 where the court considered matters outside the pleadings.

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## II.

The second issue, which arises from defendants' brief, is in regards to the timeliness of (A) plaintiff's amended complaint and (B) several of plaintiff's claims.

## A. Amended Complaint

**[2]** Defendant argues that plaintiff failed to exercise his right to amend his complaint in a timely manner. Based on the circumstances in this case, we disagree.

Rule 15 of the North Carolina Rules of Civil Procedure provides, in pertinent part, that "[a] party may amend his pleading once as a matter of course at *any time* before a responsive pleading is served . . . ." N.C. Gen. Stat. § 1A-1, Rule 15(a) (2001) (emphasis added). For purposes of this rule, our Court has held that "[a] motion to dismiss . . . is not a 'responsive pleading' under Rule 15(a) and so does not itself terminate plaintiff's unconditional right to amend a complaint under Rule 15(a)." *Johnson v. Bollinger*, 86 N.C. App. 1, 7, 356 S.E.2d 378, 382 (1987). The record in the instant case clearly indicates that plaintiff filed his amended complaint approximately four minutes after the hearing on defendants' motion to dismiss began. Prior to the hearing, defendants had only filed a motion to dismiss, which is not a responsive pleading. It is unlikely that the drafters of Rule 15(a) intended "any time" to encompass plaintiff serving his amended complaint during a hearing. Nevertheless, defendants' failure to present a record of objections to this last minute act by plaintiff or provide a verbatim transcript indicating whether the court took issue with the amended complaint compels this Court to conclude that in this case the complaint was timely filed.

## B. Statute of Limitations

**[3]** Additionally, defendants argue that several of the claims raised in plaintiff's amended complaint fail to allege any wrongful conduct by defendants within the applicable statute of limitations period. For the following reasons, we agree.

"The statute of limitations is 'inflexible and unyielding,' and the defendants are vested with the right to rely on it as a defense." *Staley v. Lingerfelt*, 134 N.C. App. 294, 299, 517 S.E.2d 392, 396 (1999) (citation omitted). In North Carolina, claims against defendants alleging personal injury are governed by a three-year statute of limitations. N.C. Gen. Stat. § 1-52(5) (2001). This limitations period also applies to

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emotional distress claims, claims arising from the alleged wrongful conduct of public officials, and claims of alleged negligence. See *Fowler v. Valencourt*, 334 N.C. 345, 435 S.E.2d 530 (1993); *Waddle v. Sparks*, 331 N.C. 73, 85, 414 S.E.2d 22, 28 (1992). "The trial court has no discretion when considering whether a claim is barred by the statute of limitations." *Staley*, 134 N.C. App. at 299, 517 S.E.2d at 396.

All parties in the present case agree on the applicability of a three-year statute of limitations to plaintiff's first six claims; their only dispute is when that three-year period began to run with respect to several of the claims plaintiff raised against the City, McNeil, and Powell.<sup>1</sup> Defendants filed a motion to dismiss these claims alleging that they were entitled to such because "[p]laintiff's claims are clearly barred by . . . applicable statutes of limitations." Our courts have held that "[o]nce a defendant has properly pleaded the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action." *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491, 329 S.E.2d 350, 353 (1985). When forecasting evidence, plaintiff "may not rest upon the mere allegations or denials of his pleading," but must instead "set forth specific facts showing that there is a genuine issue for trial." N.C. Gen. Stat. § 1A-1, Rule 56(e) (2001).

In his complaint, plaintiff alleged that his injuries did not finally accrue or become known to him until 31 October 1996, which presumably gave him until Monday, 1 November 1999, to file his action. See N.C. Gen. Stat. § 1A-1, Rule 6(a) (2001). However, since defendants properly pled a statute of limitations defense in their motion to dismiss, the allegations in plaintiff's complaint alone were insufficient to establish a genuine issue for trial. See *Staley*, 134 N.C. App. at 299, 517 S.E.2d at 396 (recognizing that a statute of limitations defense is properly pled when raised by a defendant in a Motion for Summary Judgment instead of in a responsive pleading). Plaintiff cannot meet his burden of forecasting evidence by simply filing an amended, unverified complaint that contains additional allegations to support his claims. Thus, the court did not err in granting summary judgment on plaintiff's claims against (1) the City and Powell for negligent promotion, supervision, and retention; (2) McNeil and

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1. Plaintiff's three claims against Ewell all clearly fall within the statutory time limit because they all arise out of events that occurred after plaintiff's retirement from the DPD.

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Powell for NIED; and (3) McNeil for IIED. Plaintiff failed to set forth specific facts establishing that these claims were not barred by the statute of limitations.

## III.

[4] Third, this Court must determine whether plaintiff's remaining claims against any or all of the remaining defendants were properly dismissed due to governmental immunity.

"Under the doctrine of governmental immunity, a municipality is not liable for the torts of its officers and employees if the torts are committed while they are performing a governmental function . . . ." *Taylor v. Ashburn*, 112 N.C. App. 604, 607, 436 S.E.2d 276, 278 (1993). However, "[a]ny city may . . . waive its immunity from civil tort liability by purchasing liability insurance." *Id.* "Immunity is waived only to the extent that the city or town is indemnified by the insurance contract from liability for the acts alleged." *Combs v. Town of Belhaven*, 106 N.C. App. 71, 73, 415 S.E.2d 91, 92 (1992).

In the case *sub judice*, plaintiff argues that his remaining claims against the City (with the exception of his due process and equal protection claim) were erroneously dismissed because the City waived its governmental immunity by purchasing liability insurance or participating in a local government risk pool. Yet defendants, in moving for dismissal of the case, presented to the court Henderson's affidavit stating that the City did not waive its immunity. Once defendants, as the moving party, made and supported their motion for summary judgment, the burden once again shifted to plaintiff, as the non-moving party, to introduce evidence in opposition to the motion that set forth "specific facts showing that there is a genuine issue for trial." See N.C. Gen. Stat. § 1A-1, Rule 56(e). Plaintiff failed to come forward with a forecast of his own evidence of specific facts demonstrating that this immunity was waived. See *Amoco Oil Co. v. Griffin*, 78 N.C. App. 716, 718, 338 S.E.2d 601, 602 (1986). Thus, the court's dismissal of the remaining claims against the City was proper because defendants met their burden of showing that there was no genuine issue of a material fact regarding immunity. See *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 393-94, 499 S.E.2d 772, 775 (1998).

[5] Furthermore, as stated previously, the doctrine of governmental immunity also bars actions against "public officials sued in their official capacity." *Messick v. Catawba County*, 110 N.C. App. 707, 714,

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431 S.E.2d 489, 493 (1993) (citations omitted). The chief of police and the city manager are both considered public officials. *See generally Thompson Cadillac-Oldsmobile, Inc. v. Silk Hope Automobile, Inc.*, 87 N.C. App. 467, 471-72, 361 S.E.2d 418, 421 (1987). Thus, McNeil, Powell, and Ewell are also immune from suit for tortious acts allegedly committed in their official capacity.

## IV.

[6] Having determined that defendants Ewell and McNeil are entitled to governmental immunity for acts performed in their official capacity, we next examine whether either or both of these defendants are potentially liable to plaintiff individually on the remaining claims against them.

Despite public officials being shielded from liability in their official capacities, “they remain *personally* liable for any actions which may have been corrupt, malicious or perpetrated outside and beyond the scope of official duties.” *Locus v. Fayetteville State University*, 102 N.C. App. 522, 526, 402 S.E.2d 862, 865 (1991). Thus, in order to sustain a personal or individual capacity suit, “the plaintiff must initially make a *prima facie* showing that the defendant-official’s tortious conduct falls within one of the immunity exceptions, *i.e.*, that the official’s conduct is malicious, corrupt, or outside the scope of official authority.” *Trantham v. Lane*, 127 N.C. App. 304, 307, 488 S.E.2d 625, 627 (1997). However, “if the plaintiff alleges an intentional tort claim, a determination [of governmental immunity] is unnecessary since, in such cases, neither a public official nor a public employee is immunized from suit in his individual capacity.” *Wells v. North Carolina Dept. of Correction*, 152 N.C. App. 307, 320, 567 S.E.2d 803, 813 (2002).

The remaining claim against McNeil asserts constructive willful discharge. The remaining claims against Ewell assert IIED, tortious interference with contract, and tortious interference with prospective advantage. Since these are all intentional tort claims, McNeil and Ewell are potentially liable to plaintiff individually. Accordingly, we must now determine whether the trial court erred in granting summary judgment on plaintiff’s claims alleging individual liability against (A) McNeil for constructive discharge, (B) Ewell for IIED, and (C) Ewell for tortious interference with contract and with prospective advantage.

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## A. Constructive Wrongful Discharge

[7] Plaintiff argues the court erred in dismissing his claim against McNeil for constructive wrongful discharge in his individual capacity. However, North Carolina courts have yet to adopt this tort. *Graham v. Hardee's Food Systems*, 121 N.C. App. 382, 385, 465 S.E.2d 558, 560 (1996). Our courts have only recognized the validity of a claim for constructive discharge “in the context of interpreting whether constructive termination by [a plaintiff’s] employer triggered the termination payment provision of [an] employment contract.” *Doyle v. Asheville Orthopaedic Assocs., P.A.*, 148 N.C. App. 173, 177, 557 S.E.2d 577, 579 (2001), *disc. review denied*, 355 N.C. 348, 562 S.E.2d 278 (2002). Since this is not the factual scenario currently on appeal, we hold the court did not err in dismissing plaintiff’s constructive wrongful discharge claim.

## B. IIED

[8] Next, plaintiff argues the court erred in dismissing his claim against Ewell for IIED in his individual capacity.

In an action for IIED, a plaintiff must prove “(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another.” *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981). This Court has defined the element of “extreme and outrageous conduct” as “ ‘conduct [which] exceeds all bounds usually tolerated by decent society.’ ” *Fieldcrest Cannon, Inc. v. Fireman’s Fund Insurance Co.*, 124 N.C. App. 232, 252, 477 S.E.2d 59, 72 (1996) (citations omitted). “It is a question of law for the court to determine, from the materials before it, whether the conduct complained of may reasonably be found to be sufficiently outrageous as to permit recovery.” *Hogan v. Forsyth County Club Co.*, 79 N.C. App. 483, 490, 340 S.E.2d 116, 121 (1986).

Based on our reading of the complaint, plaintiff’s allegations that Ewell spoke negatively about him to one of plaintiff’s clients do not demonstrate the level of “extreme and outrageous conduct” necessary to support an action for IIED. Thus, the trial court did not err.

C. Tortious Interference with Contract  
and with Prospective Advantage

[9] Plaintiff also argues his claims for tortious interference with contract and with prospective advantage against Ewell in his individual capacity were improperly dismissed by the trial court.

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The elements of tortious interference with contract are as follows:

(1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to plaintiff.

*United Laboratories, Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988). “In order to maintain an action for tortious interference with prospective advantage, Plaintiff must show that Defendants induced a third party to refrain from entering into a contract with Plaintiff without justification. Additionally, Plaintiff must show that the contract would have ensued but for Defendants’ interference.” *DaimlerChrysler Corp. v. Kirkhart*, 148 N.C. App. 572, 585, 561 S.E.2d 276, 286, (citing *Cameron v. New Hanover Memorial Hospital*, 58 N.C. App. 414, 440, 293 S.E.2d 901, 917 (1982)), *temporary stay allowed*, 355 N.C. 284, 560 S.E.2d 798 (2002).

Both of these claims require Ewell’s interference to be “without justification.” This Court has held that in order to establish this element, plaintiff’s “complaint must admit of no motive for interference other than malice.” *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 674, 541 S.E.2d 733, 738 (2001). With respect to both claims in plaintiff’s complaint, he alleged that Ewell’s comment to one of plaintiff’s clients that she “could do better” than hiring plaintiff induced that client to terminate her contract with plaintiff. However, this allegation simply expresses Ewell’s subjective view regarding plaintiff’s abilities and does not express the malicious motive required by these torts. Therefore, the court did not err in granting summary judgment on these claims against Ewell.

## IV.

**[10]** The final issue presented to this Court is whether the trial court erred in granting summary judgment because there were no genuine issues of material fact by which to allow plaintiff’s claim against the City for violation of his rights to due process and equal protection as enforced by Title 42, Section 1983 of the United States Code (“Section 1983”)<sup>2</sup> and Article I, Section 19 of the North Carolina Constitution to

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2. Section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes



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go forward. Specifically, plaintiff contends he has been denied due process and equal protection of the law because the City asserted governmental immunity in his case in an effort not to pay damages for his claims, while customarily waiving it for similarly situated individuals. The City contends that this claim is barred by *res judicata* because the middle district court previously dismissed plaintiff's federal claim based on Section 1983.

The doctrine of *res judicata* was developed by the Courts "for the dual purposes of protecting litigants from the burden of relitigating previously decided matters and promoting judicial economy by preventing needless litigation." *Bockweg v. Anderson*, 333 N.C. 486, 491, 428 S.E.2d 157, 161 (1993). "*Res judicata* precludes a second suit involving the same claim between the same parties or those in privity with them when there has been a final judgment on the merits in a prior action in a court of competent jurisdiction." *Little v. Hamel*, 134 N.C. App. 485, 487, 517 S.E.2d 901, 902 (1999). "The defense of *res judicata* may not be avoided by shifting legal theories or asserting a new or different ground for relief." *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 30, 331 S.E.2d 726, 735 (1985).

Although plaintiff's prior and current due process and equal protection claims were brought under Section 1983 and against the same party, these claims were based on different factual and legal issues. The prior claim related to plaintiff's continued employment and job reassignment with the DPD, which required the court to consider the facts and circumstances prior to plaintiff's retirement. The current claim related to the City's actions with respect to plaintiff's tort claims filed after his retirement and whether those claims were treated any differently by the City from claims raised by similarly situated individuals. Thus, plaintiff's current claim under Section 1983 is not barred by *res judicata*.

**[11]** Nevertheless, we conclude the trial court did not err in granting summary judgment on plaintiff's claim for violation of his rights to due process and equal protection. Plaintiff made the following allegations with respect to this claim against the City:

86. The City's custom and practice of paying damages in some tort claims asserted against it, while refusing to pay damages

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to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

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to Plaintiff Beck, is unconstitutional, as it denies Plaintiff Beck's right to due process and equal protection under Article I, Section 19 of the North Carolina Constitution.

87. Plaintiff Beck has been damaged by the denial of his constitutional rights by the City, and he is entitled to compensation for said damages pursuant to Article I, Section 19 of the North Carolina Constitution and 42 U.S.C.A. Section 1983.

These allegations, even when viewed in the light most favorable to plaintiff, are insufficient to establish that the City's actions were so arbitrary and capricious as to violate plaintiff's rights to due process and equal protection. *See generally Dobrowolska v. Wall*, 138 N.C. App. 1, 530 S.E.2d 590, *disc. review allowed*, 352 N.C. 588, 544 S.E.2d 778 (2000), *disc. review improvidently allowed in part; appeal dismissed ex mero motu in part*, 355 N.C. 205, 558 S.E.2d 174 (2002). Plaintiff's assignment of error is therefore overruled because his complaint fails to indicate genuine issues of material fact regarding the City's refusal to pay damages for his claims.

For the aforementioned reasons, we conclude that the trial court did not err in granting defendants' motion to dismiss all of plaintiff's claims.

Affirmed.

Judges GREENE and TIMMONS-GOODSON concur.



STATE OF NORTH CAROLINA v. VERNELLE LAFARRIS BULLOCK, SR., DEFENDANT

No. COA01-476

(Filed 3 December 2002)

**1. Evidence— cross-examination—alibi witness—bias or prejudice**

The trial court did not abuse its discretion in an attempted first-degree murder and possession of a firearm by a felon while being an habitual felon case by denying defendant's objection on relevancy grounds to cross-examination questions by the State of a defense witness, defendant's girlfriend, that implied the witness had a previous altercation with the victim, defendant's former

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wife, because the State was allowed to question defendant's alibi witness about events which may have revealed bias or prejudice against the victim of the crime.

**2. Criminal Law— defendant's argument—someone else shot victim**

The trial court did not abuse its discretion in an attempted first-degree murder and possession of a firearm by a felon while being an habitual felon case by failing to allow defendant to argue during closing arguments that the victim's present husband shot the victim, because there was no evidence presented that pointed directly or indirectly to the guilt of anyone other than defendant.

**3. Criminal Law— trial court asking witness questions—no expression of opinion**

A defendant is not entitled to a new trial in an attempted first-degree murder and possession of a firearm by a felon while being an habitual felon case even though the trial court asked a doctor witness questions about the seriousness and the permanency of the victim's injuries, because: (1) the trial court did not express an opinion concerning defendant's guilt or make any statement tending to discredit or prejudice defendant; and (2) the trial court did not violate the restrictions imposed by N.C.G.S. § 15A-1222 nor was defendant prejudiced by the questions.

**4. Homicide— attempted first-degree murder—sufficiency of short-form indictment**

A defendant's attempted first-degree murder conviction is vacated and the case is remanded for sentencing and entry of judgment on attempted voluntary manslaughter based on insufficiency of the short-form indictment, because: (1) the indictment failed to allege the essential element of malice aforethought as required by N.C.G.S. § 15-144; and (2) the jury's verdict of attempted first-degree murder necessarily means that it found all of the elements of the lesser-included offense of attempted voluntary manslaughter.

Appeal by defendant from judgments entered 2 October 2000 by Judge Howard R. Greeson, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 25 March 2002.

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*Attorney General Roy Cooper, by Assistant Attorney General Donald R. Teeter, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel R. Pollitt, and Mark E. Hayes, for the defendant-appellant.*

HUDSON, Judge.

Vernelle L. Bullock, Sr. (“defendant”) was convicted by the jury of attempted first degree murder and possession of a firearm by a felon while being an habitual felon. The defendant pled guilty to the status of being an habitual felon. The court sentenced him to a total imprisonment of 423 months to 526 months. Defendant appeals his convictions and sentences.

We begin with a summary of pertinent facts. For seven years, defendant was married to the victim, Yvonne Smith; they had two children, Vernelle, Jr., born in 1990, and Dayquinton, born in 1992. Shortly after the birth of Dayquinton, defendant moved away. Ms. Smith obtained a divorce from defendant in 1995 and married Curtis Vincent Smith in 1997. Defendant reappeared in August of 1999 and contacted Ms. Smith. He expressed an interest in reuniting with her and their sons, and she informed him that he could visit with the boys, but that she had remarried and was not interested in resuming a romantic relationship. Defendant began to visit the boys, especially his older son, Vernelle, Jr., about every other weekend. Around the time defendant returned to Greensboro and became involved in the lives of his ex-wife and sons, Ms. Smith’s husband moved out of their home. Ms. Smith explained that Mr. Smith was not comfortable with her resuming any friendship with defendant.

Defendant did not pay any child support during the time he was gone, and Ms. Smith agreed for defendant to begin paying support six months after he returned to Greensboro. She testified that from time to time she lent defendant money to help him “get on his feet,” and that he always paid her back. Ms. Smith repeatedly rebuffed defendant’s advances and his statements of intent to re-establish a romantic relationship with her. After one such advance, Ms. Smith testified that on or about 29 December 1999, defendant came to her house, told Vernelle, Jr. not to call him anymore, and threatened to kill everyone in the house.

Ms. Smith testified that in March of 2000, she and the boys went with defendant to visit his grandmother in Maxton, N.C. During that

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trip, defendant became agitated, and told Ms. Smith that he was in love with her and wanted their family to be together. Again, Ms. Smith explained that she had a husband and it would not be right. She said she was okay that time, but described an incident earlier that night, during which defendant asked her to pull over the car and, “he got out of the car, slammed the door, and then he walked over to this field. . . . And he—then he just started jumping up and down and banging his head and, you know, hitting the ground and hollering, and all kind of crap.” Defendant’s two sons, who were in the car, began to shake and cry. Ms. Smith got out of the car at defendant’s request. Again, he professed his love for her. Ms. Smith testified that,

[t]hen he just grabbed me to the point he almost picked me up off the ground, and it scared me. And I was like, Vernelle, let me go, because you’re getting mad. . . . He just kept grabbing and grabbing. Then he let me go. He said, I’m not going to hurt you. I’m not going to hurt you ever again in life. I’m not going to hurt you. I promise you I’m not going to hurt you. You know I love you. You know I love you.

After a while, she calmed him down and they returned to the car.

Ms. Smith testified that on the evening of 28 April 2000, she and her sons were at her sister’s house, when defendant repeatedly paged her to talk about repaying a debt, and then he showed up at her sister’s door. She spoke with him briefly outside, and Ms. Smith assured defendant that he could pay her back the next week. Defendant asked for a hug or kiss goodbye, and Ms. Smith lightly hugged him. Defendant left, and Ms. Smith and the boys stayed at her sister’s house until around midnight, when they went to the house where Mr. Smith was staying. Ms. Smith hoped to stay with her husband for the evening. However, Mr. Smith was on the phone and Ms. Smith only stayed thirty minutes before leaving for her home with the boys at 12:30 or 12:45 in the morning. She put the boys to bed, went to her bedroom to read the Bible and watch television, and fell asleep.

At about 12:50 a.m., Ms. Smith was awakened by knocking on the door. She looked out of her window and saw defendant’s truck backed into her driveway. Ms. Smith walked into the living room, turned on a light, and saw defendant standing on her porch. She let him into the house and asked him what was wrong. Defendant did not speak, but walked around her while she was closing and re-locking the door. Ms. Smith testified, “[a]nd I turned around to say, Now, Vernelle, what’s—and when I turned around, then that’s when I fell. I

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said boom—you know, I could feel him shoot me. I didn't know where he had shot me at that point. I just knew I was shot." Ms. Smith later found out that the first shot had been in her left eye. When she fell to the floor, she saw the defendant standing over her and sparks from the gun. She testified that while he was standing over her, she "could see sparks from his continuing to shoot me."

Ms. Smith testified that after defendant shot her several times, she heard him moving around her house and firing the gun repeatedly. She did not know how long he stayed, but he finally left, hitting her in the head with the door as he opened it, and slamming it behind him. Ms. Smith dragged herself across the floor, knocking down a lamp, and tried to rise. She called out for her sons. When the younger boy, Dayquinton, came to her, she asked him to get the older one, Vernelle, Jr. She told the boys that defendant shot her, and asked the older boy to call 911. The boys did as she asked, then put a pillow under her head, wiped up some of the blood with paper towels, and covered her with a blanket.

The police and EMS arrived and took Ms. Smith to the hospital. She learned that she had been shot four times: in the left eye, the back of her head/upper neck, the left leg, and the right arm. Ms. Smith testified that as a result of the shooting, she lost the use of her left eye, had a stroke on the left side of her brain, had difficulty regaining the use of her body for everyday functions, and still suffered a lack of sensation that made it difficult for her to use her leg and arm. At the time of defendant's trial, she expected to undergo at least two more surgeries to reconstruct the left side of her face where the bullet had destroyed her eye and eye socket. After the shooting, Mr. Smith moved back in and took care of his wife.

Ms. Smith's two sons also testified. Vernelle, Jr. testified that his father showed him a gun that he kept in a case in the basement of the house he lived in at the time. On cross-examination, he said that his dad "just said it was for—it was his girlfriend's for if my mom had came over there that she would shoot her." He also testified that he remembered his father coming to his aunt's house on the evening his mother was shot, and that his father sent him to get his mother. He remembered returning to their house, going to sleep, and being awakened by his younger brother, "to call the police. . . . So I went to her room, and she wasn't in there. And I went up to the front and asked her what was wrong, and she told me that he [defendant] had shot her." Dayquinton gave a similar description of events that evening.

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Dr. James Wyatt, a general and trauma surgeon who was the medical director of the trauma service at Moses Cone Hospital in Greensboro, testified that Ms. Smith was still conscious and speaking when she first arrived at the hospital. She told him that her ex-husband had shot her and Dr. Wyatt tried to calm her down so that he could treat her wounds. He testified that Ms. Smith's wounds could have been fatal to her, and Dr. Ernesto Votero, a neurosurgeon, agreed. Dr. Votero testified to the surgical procedures he performed to treat the wounds, and indicated that she would need future surgeries. He believed that the effects of the injuries would include permanent problems with speech, memory, and possibly movement.

Greensboro police officer M.J. Hanna testified that he arrived at the Smiths' home in the early morning hours of 29 April 2000, and waited for back-up, secured the property, and then entered the house. After securing the house, Officer Hanna asked the children, "Who did this? The victim stated to me, 'My ex-husband, Vernelle Lafarris Bullock, shot me in the face.'" Greensboro police officer J.C. Cho, arrived at the scene shortly after Officer Hanna, and entered the house with Hanna. After calling for EMS, Officer Cho attempted to talk to Ms. Smith. He testified that:

she (Ms. Smith) had great difficulty talking. She made mention of she was having problems breathing and the blood was running down her neck or what. So I asked her what happened. And I understood her to say that it was her husband knocking on the door and she went to answer it, see what he wanted. And when she opened the door, he stepped in and started shooting. And so I asked her what is his name. And she said Vernelle Bullock. And so I turned to one of her sons to clarify the spelling of Vernelle. And he did that.

The defendant presented the testimony of two witnesses who saw him on the night of the shooting. First, Juditha Walker, defendant's girlfriend at the time, testified that defendant came over to her house in his truck on 28 April 2000 sometime between 11:00 and 11:30 p.m., wearing his work uniform. They talked for a while and then drove over to defendant's father's house in Ms. Walker's car. Ms. Walker said that they drove to a gas station on Lee Street at about 1:00 a.m., and the defendant went into the store to buy gasoline. Then, she said they returned to Ms. Walker's house and went to sleep. After defendant was arrested the next morning, Ms. Walker found defendant's work uniform in her clothes dryer.

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Second, Kerianne Elseworth, the cashier at the Great Stops gas station on West Lee Street testified that at approximately 1:05 a.m. on 29 April 2000, she saw defendant and Ms. Walker at the station. Ms. Walker came into the store, where she picked up a 22-ounce Icehouse beer and a pack of Newport cigarettes. A few minutes later, the defendant came into the store, paid for the gasoline and other items, and then sat in the store with Ms. Walker smoking a cigarette. They left at 1:30 or 1:35 in the morning. The defendant did not testify.

The court instructed the jury on attempted first degree murder, possession of a handgun by a felon, and not guilty. The jury found defendant guilty of both charges. The defendant then pled guilty to having attained the status of habitual felon. The trial court found one factor in aggravation, number 19 on "Felony Judgment, Findings of Aggravating and Mitigating Factors" form, that "[t]he victim of this offense suffered serious injury that is permanent and debilitating," and found no factors in mitigation. The court sentenced defendant to consecutive prison terms of 313 months minimum and 385 months maximum for the attempted first degree murder, and to a prison term of 110 months minimum and 141 months maximum for possession of a firearm by a felon.

Defendant brings forward six assignments of error in his appeal. However, we address his third assignment of error last, as it is dispositive on the attempted murder conviction only. Our discussion of the other three issues applies to all convictions. We need not reach the fifth and sixth assignments of error, which apply only to the sentencing in the attempted first degree murder case.

**[1]** In his first argument, defendant contends that the trial court committed prejudicial error by denying "the defendant's objection on relevancy grounds to cross-examination questions by the State of a defense witness that implied that she had a previous altercation with the victim." Juditha Walker, defendant's girlfriend at the time of the shooting, testified that she was with defendant late on the evening of 18 April 2000 and through the morning of 19 April 2000. On cross-examination, the State questioned Ms. Walker about an altercation that she may have had with Ms. Smith prior to the shooting. Defendant objected to the questioning on the grounds that it was irrelevant; the trial court overruled the objection because the testimony bore upon the witness' possible bias.

The trial court "has broad discretion over the scope of cross-examination." *State v. Call*, 349 N.C. 382, 411, 508 S.E.2d 496, 514



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(1998). The court's ruling on the scope of cross-examination will not be disturbed absent a showing of abuse of discretion. See *State v. Maynard*, 311 N.C. 1, 10, 316 S.E.2d 197, 202-03, cert. denied, 469 U.S. 963, 83 L. Ed. 2d 299 (1984). "Cross-examination of an opposing witness for the purpose of showing his bias or interest is a substantial legal right. Jurors are to consider evidence of any prejudice in determining the witness' credibility." *State v. Grant*, 57 N.C. App. 589, 591, 291 S.E.2d 913, 915 (1982) (citing *State v. Hart*, 239 N.C. 709, 80 S.E.2d 901 (1954)). Here, we find that the trial court did not abuse its discretion in allowing the State to question defendant's alibi witness about events which may have revealed bias or prejudice against the victim of the crime. Defendant's first assignment of error is overruled.

**[2]** In his second assignment of error, defendant contends that the trial court erred in not allowing him to argue during closing arguments that someone other than defendant shot Ms. Smith. Before defendant's defense counsel began closing arguments, he informed the trial court that he intended to suggest in his argument that Mr. Smith shot Ms. Smith. The trial court instructed him not to make any such argument, because there was no direct evidence presented at trial regarding Mr. Smith as the perpetrator of the crime. Defendant duly objected to this ruling.

The scope of closing argument is governed by N.C. Gen. Stat. § 15A-1230(a) (2001) which provides that an "attorney may . . . on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue." "Counsel is afforded wide latitude in his arguments to the jury." *State v. Whiteside*, 325 N.C. 389, 398, 383 S.E.2d 911, 916 (1989). However, "[t]he trial judge may limit the argument of counsel within his discretion." *Id.* In accordance with this standard, we review whether the trial court abused its discretion in not allowing defendant to argue that Mr. Smith shot Ms. Smith.

"The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy" pursuant to Rule 401 of the North Carolina Rules of Evidence (2001). *State v. Cotton*, 318 N.C. 663, 667, 351 S.E.2d 277, 280 (1987), *aff'd*, 329 N.C. 764, 407 S.E.2d 514 (1991). "Evidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard. It must point directly to the guilt of the other party." *Id.* at 667, 351 S.E.2d at 279-80. Here, there was no evidence presented that pointed directly or indirectly to the guilt of Mr.

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Smith. Because there was no such evidence presented at trial, the trial court did not abuse its discretion in denying defendant's request to argue that Mr. Smith shot Ms. Smith, as it was not a "matter in issue" at the trial, within the meaning of N.C.G.S. § 15A-1230(a). Defendant's second assignment of error is overruled.

**[3]** In his fourth argument, defendant contends that he is entitled to a new trial on both convictions because the trial court improperly questioned a witness "about irrelevant matters and erroneously expressed an opinion against defendant." N.C. Gen. Stat. § 15A-1222 (2001) prohibits a judge from expressing "during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." "Because the trial judge occupies an exalted position, he must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury." *State v. Turner*, 66 N.C. App. 203, 207, 311 S.E.2d 331, 334 (1984) (internal citations and quotations omitted). The burden lies with the defendant to show that under the totality of the circumstances, he was prejudiced by the trial judge's comments. *See State v. Fleming*, 350 N.C. 109, 126, 512 S.E.2d 720, 732, *cert. denied*, 528 U.S. 941, 145 L. Ed. 2d 274 (1999).

Here, defendant objects to the following colloquy:

THE COURT: What are—is there any permanent effect of these injuries?

THE WITNESS: With this injury, she's going to have problem with speech. She's going to have some difficulty with the right side because as far as I know—by the time she came to the emergency room, although I didn't see her, I was told by the nurse, that she wasn't able to move the right side. She's going—might have some broken memory. And probably down the line she might require some special plate in the left side to cover up part of the brain.

THE COURT: Now, you said she may have some permanent problems with her speech?

THE WITNESS: That's correct. Yes, sir.

THE COURT: What type of problems?

THE WITNESS: Probably expression.

THE COURT: How about her movement? Being able to walk?

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THE WITNESS: Well, she—as far as I know, she may be—she’s still weak in the right side. The last time I saw her back in—on August 10, 2000. It’s difficult to say how well she’s going to be, but from this, it will take a little work to get better.

THE COURT: Do you feel like these injuries are debilitating, the ones that she received?

THE WITNESS: That’s correct. Yes, sir.

This discussion occurred after the State examined Dr. Votero as to his treatment of Ms. Smith and her resulting injuries. Following this discussion, defendant cross-examined Dr. Votero as to the extent of Ms. Smith’s injuries. Defendant attempted to elicit a medical opinion that anesthesia might have affected Ms. Smith’s memory, but Dr. Votero rejected this suggestion.

A trial judge is not prohibited from asking a testifying witness questions during trial. “It is well recognized that a trial judge has a duty to question a witness in order to clarify his testimony or to elicit overlooked pertinent facts.” *State v. Rogers*, 316 N.C. 203, 220, 341 S.E.2d 713, 723 (1986), *overruled on other grounds by State v. Gaines*, 345 N.C. 647, 483 S.E.2d 396, *cert. denied*, 522 U.S. 900, 139 L. Ed. 2d 177 (1997), *and by State v. Vandiver*, 321 N.C. 570, 364 S.E.2d 373 (1988). Here, the trial judge asked questions concerning the seriousness and permanency of Ms. Smith’s injuries. He did not express an opinion concerning the defendant’s guilt, nor did he make any statement tending to discredit or prejudice the defendant. We do not believe that the trial judge violated the restrictions imposed by N.C.G.S. § 15A-1222, nor that he prejudiced the defendant by his questions to the doctor. Defendant’s fourth assignment of error is overruled.

**[4]** Finally, defendant contends that his attempted first degree murder conviction must be vacated because the underlying indictment did not sufficiently allege the essential elements of the offense or comply with the requirements for a short-form murder indictment pursuant to N.C. Gen. Stat. § 15-144 (2001). N.C.G.S. § 15-144 “Essentials of bill for homicide” states that in the body of the indictment, “it is sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder (naming the person killed), and concluding as is now required by law.” Here, the indictment omitted the phrase “and of his malice aforethought.” The indictment for attempted first degree mur-

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der stated: “[t]he jurors for the State upon their oath present that on or about the date of the offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did attempt to kill and murder Yvonne Bullock.” Defendant contends that because the indictment lacked the phrase “malice aforethought,” it failed to properly allege the crime charged. We agree that the indictment fails to allege attempted first degree murder.

The purpose of an indictment is to inform the defendant of the charge against him with sufficient certainty to enable him to prepare a defense. *See State v. Gregory*, 223 N.C. 415, 27 S.E.2d 140 (1943). An indictment is insufficient if it fails to allege the essential elements of the crime charged as required by Article I, Section 22 of the North Carolina Constitution and our legislature in N.C.G.S. § 15-144. When an indictment has failed to allege the essential elements of the crime charged, it has failed to give the trial court subject matter jurisdiction over the matter, and the reviewing court must arrest judgment. *See State v. Sturdivant*, 304 N.C. 293, 307-08, 283 S.E.2d 719, 729 (1981) (citing N.C. Const. Art. I, § 22; *State v. Simpson*, 302 N.C. 613, 276 S.E.2d 361 (1981); *State v. Crabtree*, 286 N.C. 541, 212 S.E.2d 103 (1975)). We note that “the failure of a criminal pleading to charge the essential elements of the stated offense is an error of law which may be corrected upon appellate review even though no corresponding objection, exception or motion was made in the trial division.” *Sturdivant*, 304 N.C. at 308, 283 S.E.2d at 729 (citing N.C. Gen. Stat. §§ 15A-1441, -1442(2)(b), -1446(d)(1) and (4)); *see also State v. Wilson*, 128 N.C. App. 688, 497 S.E.2d 416 (1998) (noting that a challenge to the sufficiency of an indictment may be made for the first time on appeal).

Here, the indictment on its face failed to include the essential element of “malice aforethought” as required by N.C.G.S. § 15-144 and *State v. Arnold*, 107 N.C. 861, 11 S.E. 990 (1890). *See also State v. Moore*, 284 N.C. 485, 202 S.E.2d 169 (1974) (noting that the element of malice is necessary to elevate the charge of manslaughter to murder, and that murder cannot be sufficiently alleged without malice). Although the Supreme Court has approved the use of the “short form” indictment authorized by N.C.G.S. § 15-144, the approved form contains allegations of malice. *See State v. Holder*, 138 N.C. App. 89, 93, 530 S.E.2d 562, 565, *review denied*, 352 N.C. 359, 544 S.E.2d 551 (2000) (holding that the United States Supreme Court’s opinion in *Jones v. United States*, 526 U.S. 227, 243, 143 L. Ed. 2d 311, 319 (1999), does not invalidate North Carolina’s short form indictment for

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murder). For the failure to include an allegation of malice, this Court on its own motion arrests the judgment in the attempted first degree murder conviction. *See State v. Hadlock*, 34 N.C. App. 226, 228, 237 S.E.2d 748, 749 (1977); *see also Wilson*, 128 N.C. App. at 691, 497 S.E.2d 419. Often, “[t]he legal effect of arresting the judgment is to vacate the verdict and sentence of imprisonment below, and the State, if it is so advised, may proceed against the defendant upon a sufficient bill of indictment.” *State v. Fowler*, 266 N.C. 528, 531, 146 S.E.2d 418, 420 (1966); *see also State v. Covington*, 267 N.C. 292, 148 S.E.2d 138 (1966).

However, where the indictment does sufficiently allege a lesser-included offense, we may remand for sentencing and entry of judgment thereupon. Voluntary manslaughter consists of an unlawful killing without malice, premeditation or deliberation. *See State v. Robbins*, 309 N.C. 771, 777, 309 S.E.2d 188, 191 (1983). Because the jury’s verdict of attempted first degree murder necessarily means that they found all of the elements of the lesser-included offense of attempted voluntary manslaughter, we remand this case to the trial court for sentencing and entry of judgment for attempted voluntary manslaughter. *See Wilson*, 128 N.C. App. at 696, 497 S.E.2d 422 (remanding defendant’s case to the trial court for imposition of judgment on false imprisonment as a lesser-included offense of kidnapping, because all of the elements of false imprisonment were alleged in the indictment).

We recognize that our Supreme Court in *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000), has held that attempted second degree murder is not cognizable in North Carolina and likewise signaled, without specifically deciding, that it would likely hold the same way as to attempted voluntary manslaughter. 351 N.C. at 450-53, 527 S.E.2d at 47-49. However, more recently this Court has carefully analyzed the issue and specifically held “that attempted voluntary manslaughter is (1) a crime in North Carolina, and, (2) a lesser-included offense of attempted first-degree murder.” *State v. Rainey*, 154 N.C. App. —, —, — S.E.2d —, — (2002). Thus, when the evidence supports it, an instruction may be given and, if the jury convicts, a judgment of attempted voluntary manslaughter entered. Here, where the jury found defendant to have been guilty of all elements of attempted first degree murder, including specific intent, but where the indictment does not support that offense, we conclude that the trial court may enter judgment on the lesser-included offense of attempted voluntary manslaughter.

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No error in case number 00 CRS 23567 (habitual felon status) and number 00 CRS 23566 (possession of a firearm by a felon).

Judgment arrested on attempted first degree murder; remanded for sentencing and entry of judgment on attempted voluntary manslaughter.

Chief Judge EAGLES and Judge BRYANT concur.

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IN THE MATTER OF: JOSEPH D. LINEBERRY

No. COA02-113

(Filed 3 December 2002)

**1. Appeal and Error— preservation of issues—juvenile delinquency—sufficiency of evidence—no motion to dismiss**

A juvenile waived his right to challenge on appeal the sufficiency of the evidence against him by failing to move to dismiss the petition at the close of evidence during the adjudicatory hearing.

**2. Juveniles— hearing—interruption of counsel—no bias**

A trial judge did not exhibit improper bias in a juvenile delinquency hearing by interrupting counsel where the interruptions were inconsequential and revealed no predisposition toward either party.

**3. Constitutional Law— right to be present at trial—juvenile disposition—chambers conference call**

Although it was error to exclude a juvenile from a chambers conference call with a doctor who prepared an evaluation of the juvenile, the error was harmless beyond a reasonable doubt because the call occurred in the presence of the juvenile's counsel, who cross-examined the witness; the substance of the call was placed on the record by the judge; the doctor's opinion was reduced to writing and was available to all parties; and the juvenile made no objections to his absence from the conference.

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**4. Constitutional Law— self-incrimination—juvenile’s refusal to admit guilt—custody pending appeal**

A juvenile’s constitutional right against self-incrimination was violated where the court found that the juvenile’s consistent refusal to admit to the offenses diminished his amenability to treatment and ordered that he remain in custody pending appeal.

**5. Juveniles— transcript of juvenile hearing—imperfect**

The transcript of a juvenile proceeding, while imperfect, was not so inaccurate as to prevent meaningful review.

Appeal by juvenile from orders entered 12 January 2001 and 29 June 2001 by Judge Charlie E. Brown in Rowan County District Court. Heard in the Court of Appeals 10 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Kathleen U. Baldwin, for the State.*

*Richard E. Jester for juvenile appellant.*

TIMMONS-GOODSON, Judge.

Joseph D. Lineberry (“juvenile”) appeals from orders of the trial court adjudicating juvenile to be delinquent and placing the custody of juvenile with the Youth Development Center. For the reasons stated herein, we affirm the order of the trial court adjudicating juvenile delinquent, but we vacate the order continuing custody of juvenile pending appeal, and we remand for proceedings consistent with this opinion.

The pertinent facts of this appeal are as follows: On 6 June 2000, the State filed two petitions seeking delinquency status for juvenile with the Rowan County District Court. The petitions accused juvenile of committing a sexual offense in the second degree and of taking indecent liberties with a fellow minor.

The matter came before the trial court on 23 June 2000, at which time the State presented evidence tending to show the following: On 5 February 2000, juvenile’s ten-year-old cousin, “B,” spent the night at juvenile’s residence. Juvenile was fourteen years old at the time. “B” testified that, after he had gone to sleep in juvenile’s bedroom, juvenile removed “B’s” clothing, placed duct tape over his mouth, held him down on the bed, and “put his privates . . . in [B’s] butt.” “B” affirmed that juvenile’s actions were painful, but that he was unable

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to scream due to the duct tape over his mouth. "B" stated that he was approximately four feet, five inches tall at the time and weighed eighty-five pounds. Juvenile testified that he was six feet, two inches tall and weighed approximately one hundred and ninety pounds. According to "B," juvenile warned him that "if [he] told anybody he'd hurt me." Despite the warning, "B" attempted to inform his aunt, juvenile's mother, of the assault immediately following his encounter with juvenile. "B" stated that he approached his aunt in the living room, where she was watching television, but that before he could tell her what had happened, she ordered him to "get back in the room." "B" returned to juvenile's room and went to sleep.

When "B" returned home the following day, he spoke of juvenile's actions with his brother, who immediately informed "B's" mother. "B" described his encounter with juvenile to his mother, who then took him to the hospital. "B's" mother testified that the examining physician found redness around "B's" anus, but no other physical manifestations of the assault.

Juvenile testified at the hearing and denied touching "B" in any type of sexual or otherwise improper manner. Juvenile's mother, Debbie Lineberry, also testified that she heard no unusual noises on the evening in question, and noted that there was no duct tape in the house.

At the conclusion of the evidence, the trial court found that juvenile had committed a second-degree sexual offense and had taken indecent liberties with a child. The trial court delayed disposition of the matter pending completion of a sex offender evaluation. On 8 December 2000, the trial court held a hearing concerning the evaluation of juvenile and entered an order adjudicating juvenile delinquent on 12 January 2001. The disposition order required juvenile to cooperate with an intensive nonresidential treatment program for sex offenders.

On 25 May 2001, the trial court held a hearing upon a motion for review based on evidence that juvenile was not attending the required outpatient therapy. On 31 May 2001, the trial court entered a disposition and commitment order, committing juvenile to the custody of the Youth Development Center in order to complete a sex offender treatment program. On 7 June 2001, the trial court convened to address the presumption that a juvenile be released from secure custody pending appeal. After hearing the evidence presented, the court concluded that it was in the best interests of juvenile and the



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State that juvenile remain in custody pending appeal. Juvenile appeals from these orders.

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Juvenile presents five issues on appeal, arguing that the trial court erred by (1) finding juvenile to be delinquent; (2) displaying improper bias towards juvenile; (3) receiving testimony of a witness *ex parte*; and (4) committing juvenile to the Youth Development Center pending appeal. Juvenile also contends that (5) the procedures for the recordation of trial testimony and proceedings in the juvenile court were inadequate to protect juvenile's constitutional and statutory rights.

**[1]** By his first assignment of error, juvenile contends that the State failed to present sufficient evidence of juvenile's delinquency, and that the trial court erred in finding otherwise. Juvenile made no motion, however, to dismiss the petition at the close of the evidence during the adjudicatory hearing. As such, he has waived his right on appeal to challenge the sufficiency of the evidence against him. *See* N.C.R. App. P. 10(b)(3) (2002); *In re Clapp*, 137 N.C. App. 14, 19, 526 S.E.2d 689, 693 (2000) (holding that, as the juvenile charged with delinquency on the grounds of committing a second-degree sexual offense failed to move for dismissal at the close of the evidence against him, he was precluded from challenging the sufficiency of the evidence on appeal). We therefore dismiss this assignment of error.

**[2]** By his second assignment of error, juvenile submits that the trial judge demonstrated improper bias towards juvenile during the adjudicatory hearing. Specifically, juvenile contends that the trial judge displayed bias by interrupting juvenile's counsel six times during his closing argument. Juvenile asserts that the comments made by the trial judge during these interruptions revealed the judge's lack of impartiality. We disagree.

We note first that juvenile made no motion for the trial judge's recusal based on allegations of bias. Further, where a party moves for recusal, the burden is on the movant to "demonstrate objectively that grounds for disqualification actually exist. Such a showing must consist 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." *State v. Fie*, 320 N.C. 626, 627, 359 S.E.2d 774, 775 (1987) (quoting *State v. Fie*, 80 N.C. App. 577, 584, 343 S.E.2d 248, 254 (1986) (Martin, J., concurring)).

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We discern no improper bias by the trial judge in the instant case. The interruptions of the closing argument by the trial judge were inconsequential and reveal no predisposition by the judge towards either party. For example, when counsel for juvenile stated that he “hope[d] I don’t irritate the Court or bore you with bringing out these things” the judge assured counsel that “You’re not boring me[.]” In another example, counsel for juvenile stated that, “More than two weeks before Ms. Rushner asked to talk to him, passed[.]” at which point the judge correctly noted that the time period had in fact been ten days. Further, when counsel for juvenile stated that he “underst[ood] that the Court wishes to give credence to a victim that comes in and says this happened[.]” the judge assured counsel that, “I’m not here to give credence to anybody in particular. I’m here to weigh the credibility of the witnesses and the evidence.” We fail to perceive how the trial court’s direct affirmation that it was impartial could form the basis of a claim of partiality.

In another incident, counsel for juvenile argued that “B’s” account of events was not credible, in that he did not immediately inform Mrs. Lineberry of juvenile’s assault. Specifically, counsel called “B’s” testimony into doubt by stating, “something like this has just occurred to him, that he did not go to the woman he had no reason to think would do anything but be his friend [.]” at which point the trial judge interrupted with the observation that Mrs. Lineberry was “[t]he perpetrator’s mother.”

In the context of the transcript, it is clear that the trial court characterized Mrs. Lineberry as “the perpetrator’s mother” in order to direct counsel’s attention to valid reasons for “B’s” reluctance to confide in Mrs. Lineberry. Rather than exposing bias towards juvenile, the trial court’s statement allowed counsel to refine his closing argument to the trial court by focusing more narrowly on “B’s” credibility. The trial court’s description of Mrs. Lineberry as “the perpetrator’s mother” for identification purposes does not indicate that the trial court believed that juvenile committed the offense any more than defense counsel’s identification of “B” as “the victim” indicates defense counsel’s belief that “B” was in fact assaulted. Further interruptions by the trial court were similarly minor in nature and of no import. We therefore overrule juvenile’s second assignment of error.

**[3]** In his third assignment of error, juvenile asserts that the trial court violated his rights by receiving witness testimony outside of

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juvenile's presence. Under Article 1, section 23 of the North Carolina Constitution, a criminal defendant has the right to be present at every stage of his trial. *See State v. Thomas*, 134 N.C. App. 560, 570, 518 S.E.2d 222, 229, *appeal dismissed and disc. review denied*, 351 N.C. 119, 541 S.E.2d 468 (1999). "Juveniles in delinquency proceedings are entitled to constitutional safeguards similar to those afforded adult criminal defendants." *See In re Arthur*, 27 N.C. App. 227, 229, 218 S.E.2d 869, 871 (1975), *reversed on other grounds*, 291 N.C. 640, 231 S.E.2d 614 (1977). Constitutional error will not form the basis of reversal on appeal, however, where it is shown that such error was harmless beyond a reasonable doubt. *See* N.C. Gen. Stat. § 15A-1443(b) (2001); *State v. Brogden*, 329 N.C. 534, 541, 407 S.E.2d 158, 163 (1991).

During the 8 December 2000 hearing in the instant case, the trial court ordered the record to reflect

that there was a chambers conference that involved a conference call with Dr. Cappaletti . . . who prepared the court-ordered evaluation; that [counsel for juvenile] and the [district attorney], as well as the court counselors, had an opportunity to question Dr. Cappaletti about her evaluation about the alternatives to therapy available in lieu of training school for [juvenile]. And, in fact, we further briefed Dr. Cappaletti about the competing privately-obtained evaluation, and [counsel for juvenile] fleshed that out with Dr. Cappaletti to a degree.

Counsel for juvenile confirmed that the conference call was made in his presence and with juvenile's knowledge and consent, stating that

for the record, [juvenile] knew when I started the chambers discussion and we started to handle the method in the discussion rather the confrontational manner that that was something we wanted to do as a way of facilitating the open discussion rather than the formal, confrontational type things that could otherwise be required. And we do appreciate the opportunity to handle the matter in that way. Thank you.

Dr. Cappaletti also submitted a written evaluation of juvenile to the court, which was available for all parties and is included in the record on appeal.

Although juvenile was not present during Dr. Cappaletti's testimony, we hold that the error in excluding juvenile was harmless

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beyond a reasonable doubt. *See Thomas*, 134 N.C. App. at 571, 518 S.E.2d at 230. The conference call occurred in the presence of juvenile's counsel, who cross-examined the witness regarding her testimony. The substance of the conference call was placed on the record by the trial judge. Dr. Cappaletti's opinion regarding the matter was reduced to writing and available to all parties. Moreover, juvenile made no objections to his absence from the conference; on the contrary, counsel for juvenile thanked the trial judge for allowing the admission of evidence in an informal setting. In light of these circumstances, we cannot conclude that juvenile's exclusion from the proceedings had any impact on the outcome of the disposition. *See State v. Huff*, 325 N.C. 1, 35, 381 S.E.2d 635, 654 (1989), *vacated and remanded on other grounds*, 497 U.S. 1021, 111 L. Ed. 2d 777 (1990); *Thomas*, 134 N.C. App. at 571, 518 S.E.2d at 230. We therefore overrule this assignment of error.

**[4]** Juvenile next contends that the trial court erred in ordering juvenile to remain in custody during the pendency of his appeal. Under section 7B-2605 of the North Carolina General Statutes,

[p]ending disposition of an appeal, the [release of the juvenile, with or without conditions, should issue in every case unless the court orders otherwise. For compelling reasons which must be stated in writing, the court may enter a temporary order affecting the custody or placement of the juvenile as the court finds to be in the best interests of the juvenile or the State.

N.C. Gen. Stat. § 7B-2605 (2001). In the instant case, the trial court held a hearing on the issue of juvenile's release from custody pending appeal and found the following pertinent facts:

3. The date of adjudication of felonious Second Degree Sex Offense and misdemeanor Indecent Liberties Between Minors was June 23, 2000;
4. Upon request of the juvenile's first trial counsel, Ron Bowers; continuance was granted thereby delaying entry of a dispositional order;
5. Three sex offender evaluations, attached and incorporated herein by reference, were received and considered;
6. The juvenile has consistently expressed entrenched denial which diminishes his amenability to treatment;

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7. To date the juvenile has not participated in any sex offender therapy;

....

9. The felonious Second Degree Sex Offense and misdemeanor Indecent Liberties Between Minors was committed in an aggressive, premeditated manner;

10. The juvenile is frequently in the presence of other juveniles that have not been made aware of his adjudication for a sex offense;

11. The juvenile has not been consistently closely supervised by his parents or other adults that have been made aware of the risks for re-offending; and,

12. The juvenile is currently receiving sex offender specific treatment at the Swannanoa Valley Youth Development Center Juvenile Evaluation Center.

Based on these facts, the trial court concluded that “[c]ompelling reasons exist and it is in the best interest of the juvenile and the State that the juvenile remain in the custody of the Youth Development Center pending appeal.”

Juvenile objects to Finding Number Six by the trial court, in which the court found that juvenile “consistently expressed entrenched denial which diminishes his amenability to treatment[.]” Juvenile contends that this finding indicates that the trial court denied juvenile’s release because of his refusal to admit that he committed the offenses for which he was adjudicated delinquent. We agree with juvenile that this finding was improper.

Under the Fifth Amendment to the United States Constitution, no person “shall be compelled in any criminal case to be a witness against himself[.]” U.S. Const. amend. V. Similarly, Article I, section 23, of the North Carolina Constitution protects “every person charged with crime” from being “compelled to give self-incriminating evidence[.]” N.C. Const. art. I, § 23. The privilege against self-incrimination extends to juveniles charged with delinquency. *See* N.C. Gen. Stat. § 7B-2405(4) (2001); *Arthur*, 27 N.C. App. at 229, 218 S.E.2d at 871. The constitutional guarantees against self-incrimination should be liberally construed, *see State v. Smith*, 13 N.C. App. 46, 51, 184 S.E.2d 906, 909 (1971), and apply alike to civil and criminal proceedings, “ wherever the answer might tend to subject to criminal respon-

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sibility him who gives it.' " *Trust Co. v. Grainger*, 42 N.C. App. 337, 339, 256 S.E.2d 500, 502 (quoting *McCarthy v. Arndstein*, 266 U.S. 34, 40, 69 L. Ed. 158, 161 (1924)), *disc. review denied*, 298 N.C. 304, 259 S.E.2d 300 (1979).

A "classic penalty situation" regarding the privilege against self-incrimination arises where the State, either expressly or by implication, asserts that invocation of the privilege will lead to revocation of probation. See *Minnesota v. Murphy*, 465 U.S. 420, 435, 79 L. Ed. 2d 409, 424 (1984). Various courts have applied the United States Supreme Court's holding in *Murphy* in the context of treatment programs for offenders. Such court-ordered treatment programs may implicate the "classic penalty situation," in that the therapeutic programs often require a convicted offender to admit to the offense for which he was found guilty. See, e.g., *Mace v. Amestoy*, 765 F. Supp. 847, 851 (D.Vt. 1991) (holding that the defendant's Fifth Amendment rights were violated where his probation was revoked based on his failure to complete a sexual treatment program that required incriminating admissions); *State v. Fuller*, 276 Mont. 155, 166-67, 915 P.2d 809, 816 (holding that the defendant was placed in the classic penalty situation when he was ordered, as a condition of his probation, to participate in a sexual offenders treatment program that required participants to disclose their offense history), *cert. denied*, 519 U.S. 930, 136 L. Ed. 2d 219 (1996); *State v. Evans*, 144 Ohio App. 3d 539, 550, 760 N.E.2d 909, 918 (holding that the classic penalty situation existed where the delinquent juvenile made incriminating statements during court-ordered therapy at a residential treatment center for drug offenders), *appeal dismissed*, 93 Ohio St.3d 1473, 757 N.E.2d 771 (2001). Courts have recognized that

[t]he dramatic expansion of therapeutic sentencing alternatives has disturbing implications for the Fifth Amendment rights of convicted offenders, because cooperation of the patient is a prerequisite to successful therapy. Sex offenders . . . often deny both the commission of an offense and the inappropriateness of their actions. The first step toward rehabilitation, however, is to admit that there is a problem. In criminal law, this translates into an admission of guilt, raising the question of whether the requirement of most therapy programs that a defendant accept responsibility for his actions violates the Fifth Amendment protection against self-incrimination.

Jessica Wilen Berg, Note, *Give Me Liberty or Give Me Silence: Taking a Stand on Fifth Amendment Implications for Court-*

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*Ordered Therapy Programs*, 79 Cornell L. Rev. 700, 702 (1994) (footnotes omitted).

In the instant case, the court ordered that juvenile undergo a sex offender evaluation, three of which were performed and submitted to the court. The court also ordered juvenile to be placed in the custody of the Youth Development Center and specifically ordered “that he attend and complete the Sex Offender Sex Treatment Program.” At the hearing to determine whether juvenile should remain in custody pending his appeal, the juvenile court counselor assigned to juvenile’s case testified that, if juvenile continued to deny the offense while undergoing treatment, “that will slow his progression through the treatment program.” The counselor further verified that juvenile’s “commitment time is connected directly to his—whether or not he will admit to the crime.” After reviewing the evidence, the court found that juvenile’s consistent refusal to admit to the offenses “diminishes his amenability to treatment” and ordered that juvenile remain in custody pending appeal. This finding was error.

In finding that juvenile’s refusal to admit to the offenses was a factor justifying his continued custody pending appeal, the trial court exposed juvenile to the classic penalty situation of choosing between the privilege against self-incrimination and prolonged confinement. *See Murphy*, 465 U.S. at 435, 79 L. Ed. 2d at 424. Juvenile has consistently maintained his innocence as to the offenses for which he was adjudicated delinquent, and which he is currently appealing. Thus, the trial court’s conclusion that juvenile should remain in custody pending appeal based on juvenile’s refusal to admit to the offense for which he was adjudicated delinquent violated juvenile’s constitutional right against self-incrimination.

We note that the fact that juvenile denied the offenses for which he was adjudicated delinquent was but one of several reasons for the trial court’s decision. The trial court made other findings of fact to support its conclusion that continued custody was in the best interests of the juvenile and of the State. Specifically, the trial court found that juvenile posed a risk to others, in that he had been adjudicated delinquent for offenses that often present a high rate for re-offense, and for which juvenile had received no therapy. *See, e.g., McKune v. Lile*, 536 U.S. 24, 33-34, 153 L. Ed. 2d 47, 56-57 (2002) (noting that therapy for sexual offenders is particularly important, as sexual offenders are “much more likely than any other type of offender” to commit a further sexual offense upon release from custody).

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Moreover, the offenses were committed “in an aggressive, premeditated manner.” Despite the fact that juvenile was often “in the presence of other juveniles” who were unaware of juvenile’s adjudication, juvenile was not closely supervised by his parents. Because of the potential threat that juvenile posed to others, the trial court concluded that custody was in the best interests of the State.

Although the trial court made appropriate findings to support its decision, we are unable to determine from the record before us the weight given by the trial court to the erroneous finding concerning juvenile’s refusal to admit to his guilt. *Compare State v. Canaday*, 330 N.C. 398, 399, 410 S.E.2d 875, 876 (1991); *State v. Clifton*, 125 N.C. App. 471, 483, 481 S.E.2d 393, 401 (1997) (both adhering to the general rule that, under the Fair Sentencing Act, a defendant is entitled to a new sentencing hearing where the trial court errs in finding an aggravating factor). We therefore vacate the order continuing juvenile’s custody pending appeal and remand the case to the trial court for proceedings not inconsistent with this opinion. *See In re Bullabough*, 89 N.C. App. 171, 184, 365 S.E.2d 642, 649 (1988) (holding that the trial court erred in ordering juvenile to remain in custody pending appeal without making appropriate findings). In doing so, we are aware of the likelihood that the passage of time may have rendered the issue of juvenile’s custody pending appeal moot. We further note that, as the erroneous order continuing custody of juvenile pending appeal occurred after final adjudication and disposition of juvenile’s case, the error by the trial court had no effect on the adjudication or disposition. *See Bullabough*, 89 N.C. App. at 184, 365 S.E.2d at 649; *In re Bass*, 77 N.C. App. 110, 117, 334 S.E.2d 779, 783 (1985) (both holding that post-trial proceedings had no effect on the adjudication and disposition of the juveniles).

**[5]** By his final assignment of error, juvenile contends that the recodation procedures for transcribing juvenile court proceedings are inadequate to protect juvenile’s rights. Juvenile contends that, as there was no official court reporter, and as there were certain portions of the taped testimony that were inaudible and thus not transcribed, the transcript in the instant case is incomplete and inadequate to preserve juvenile’s rights on appeal. We disagree.

Under the Juvenile Code,

[a]ll adjudicatory and dispositional hearings and hearings on probable cause and transfer to superior court shall be recorded by stenographic notes or by electronic or mechanical means.



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Records shall be reduced to a written transcript only when timely notice of appeal has been given. The court may order that other hearings be recorded.

N.C. Gen. Stat. § 7B-2410 (2001) (emphasis added). Thus, the statute specifically provides for recordation of juvenile proceedings. Where a trial transcript is “entirely inaccurate and inadequate,” precluding formulation of an adequate record and thus preventing appropriate appellate review, a new trial may be granted. *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984) (per curiam). Such, however, is not the case here. Instead, as was the case in *State v. Hammonds*, 141 N.C. App. 152, 541 S.E.2d 166 (2000), *affirmed per curiam*, 354 N.C. 353, 554 S.E.2d 645 (2001), our review of the record reveals that “the transcript, despite its imperfections, is not so inaccurate as to prevent meaningful review by this Court.” *Id.* at 168, 541 S.E.2d at 178. *See also State v. McLaughlin*, 323 N.C. 68, 108, 372 S.E.2d 49, 75 (1988) (noting that, “[a]lthough the transcript in the case *sub judice* cannot be described as a model of reporting service, it is not so inaccurate as to prevent this Court from reviewing it for errors in defendant’s trial”), *judgment vacated and remanded on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990). We therefore overrule juvenile’s final assignment of error.

In conclusion, we hold that the trial court did not err in adjudicating juvenile to be delinquent. We therefore affirm this order. We further hold that the trial court erred in finding that juvenile’s refusal during court-ordered therapeutic treatment to admit to the offenses for which he was adjudicated delinquent was a factor justifying his continued custody pending appeal. We therefore vacate this order and remand juvenile’s case to the trial court for proceedings not inconsistent with this opinion.

The 12 January 2001 order of the trial court adjudicating juvenile delinquent is hereby

Affirmed.

The 29 June 2001 order of the trial court continuing custody of juvenile pending appeal is hereby

Vacated.

Judges HUDSON and CAMPBELL concur.

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF—  
NORTH CAROLINA UTILITIES COMMISSION AND CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC. APPELLEES v. NUI CORPORATION D/B/A NUI NORTH CAROLINA GAS, APPELLANT

No. COA01-1051

(Filed 3 December 2002)

**1. Utilities— denial of application for natural gas expansion fund—consistency with public interest**

The Utilities Commission did not err by denying petitioner natural gas supplier's application for the establishment of a natural gas expansion fund under N.C.G.S. § 62-158 for service to unserved areas based on it being inconsistent with the public interest, because: (1) the Commission properly exercised its limited discretion in determining that under the facts of this case the creation of an expansion fund was not in the best interests of the public; and (2) petitioner has failed to carry its burden of demonstrating that the Commission's judgment was unreasonable or affected by errors of law.

**2. Utilities— denial of application for natural gas expansion fund—public interest factors**

The Utilities Commission's announcement and application of allegedly previously unarticulated public interest factors to petitioner natural gas supplier's case seeking an application for the establishment of a natural gas expansion fund for service to unserved areas did not amount to an unfair burden and surprise, because: (1) the factors relied upon by the Commission do not represent an unstated and additional evidentiary burden, but instead are a sensible and pertinent articulation of the existing public interest standard; and (2) the Commission's action was neither arbitrary nor capricious.

**3. Utilities— denial of application for natural gas expansion fund—alleged different treatment of natural gas suppliers**

The Utilities Commission did not treat petitioner natural gas supplier in a distinctly different and prejudicial manner compared to other cases before the Commission even though petitioner contends that another natural gas supplier was permitted to establish a natural gas expansion fund under substantively identical circumstances as those conditions in petitioner's case, because the circumstances in the two cases were not identical.

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**4. Utilities— denial of application for natural gas expansion fund—findings—pipeline transverses county**

The Utilities Commission did not err by finding that a major interstate natural gas pipeline serving North Carolina transverses the middle of the pertinent county to support the Commission's conclusion that establishment of an expansion fund was not in the best interests of the public, because it was relevant and a proper factor in the decision to deny the establishment of an expansion fund.

**5. Utilities— denial of application for natural gas expansion fund—comparison to other counties**

The Utilities Commission did not err by comparing the pertinent county to other counties with inferior natural gas infrastructure in its determination of whether to deny or grant petitioner's application for the establishment of a natural gas expansion fund, because: (1) even if the Commission's comparison was irrelevant, there was nevertheless competent and material evidence before the Commission tending to show the pertinent county enjoys significant gas infrastructure; and (2) the evidence supported the Commission's conclusion that significant natural gas infrastructure was available in petitioner's territory to promote economic development.

**6. Utilities— denial of application for natural gas expansion fund—reducing gas costs more consistent with public interest**

The Utilities Commission did not err by concluding that, under the facts of the present case, reducing customer gas costs is more consistent with the public interest than applying supplier refunds toward further natural gas infrastructure in the pertinent county, because: (1) the Court of Appeals may not set aside the Commission's decision merely based on the fact that different conclusions could have been reached from the evidence; and (2) the Commission's decision was properly supported by competent evidence in the record which in turn supported its conclusions.

Appeal by petitioner from order entered 12 April 2001 by the North Carolina Utilities Commission. Heard in the Court of Appeals 16 May 2002.

*Nelson Mullins Riley & Scarborough L.L.P., by James H. Jeffries, IV, for petitioner appellant.*

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*Robert P. Gruber, Executive Director, Public Staff, by Chief Counsel Antoinette R. Wike, for intervenor appellee Public Staff.*

*West Law Offices, P.C., by James P. West, for intervenor appellee Carolina Utility Customers Association, Inc.*

TIMMONS-GOODSON, Judge.

NUI North Carolina Gas (“petitioner”) appeals from a final order of the North Carolina Utilities Commission (“the Commission”) denying petitioner’s request for the establishment of a natural gas expansion fund pursuant to section 62-158 of the North Carolina General Statutes. For the reasons set forth herein, we affirm the order of the Commission.

Petitioner is an operating division of NUI Corporation, a corporation based in New Jersey. Petitioner is a North Carolina public utility, authorized to transport, distribute and furnish natural gas service to customers throughout its franchised territory of Rockingham County and portions of Stokes County, North Carolina. On 14 June 2000, petitioner filed a petition with the Commission, seeking approval for the establishment of a natural gas expansion fund and for the deposit into such fund of certain supplier refunds being held by petitioner.

The public staff at the Utilities Commission, in their role as representatives of the consuming public at large, opposed petitioner’s request, asserting that the establishment of an expansion fund would not be in the best interests of the public. Carolina Utility Customers Association, Inc. was permitted to intervene and subsequently filed a petition opposing establishment of the expansion fund on similar grounds.

On 21 November 2000, the matter came on for hearing before a panel of the Commission, at which the following evidence was presented: Petitioner supplies natural gas service to major population centers within its franchised areas, including the towns of Reidsville, Eden, Madison and Mayodan. The areas between these major population centers are generally undeveloped and sparsely populated, with the exception of the town of Stoneville, which has an approximate population of 1,100 persons. The town of Stoneville receives no natural gas service. There are moreover two industrial development zones within petitioner’s franchised territory that have no access to natural gas service. Petitioner asserted at the hearing that extension of natural gas service into these areas would reduce the cost of

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energy to the public and provide opportunities for economic growth. According to economic studies performed by petitioner, expansion of natural gas service into the town of Stoneville and the industrial development zones would result in substantial economic loss to petitioner and was therefore infeasible, unless the costs of construction were mitigated in some manner. Petitioner therefore requested that a natural gas expansion fund be established in order to construct facilities in the unserved areas, and that petitioner be allowed to deposit nearly two million dollars in supplier refunds into the fund.

Public staff presented evidence tending to show that there was significant natural gas infrastructure within petitioner's territory. Public staff noted that the town of Stoneville was the only incorporated municipality within Rockingham County that did not have natural gas service, and that the price for natural gas was high. According to the public staff, reducing natural gas costs by returning monies to ratepayers within petitioner's territory represented a more constructive use of the supplier refunds held by petitioner. Public staff therefore recommended denial of the petition for an expansion fund.

On 28 February 2001, the Commission issued a recommended order denying petitioner's application for the expansion fund and requiring petitioner to refund to its customers the supplier refunds held by petitioner in escrow. Petitioner filed exceptions to the recommended order, and the Commission heard oral arguments on the matter. On 12 April 2001, the Commission overruled petitioner's exceptions and issued its final order affirming the recommended order. From this order, petitioner appeals.

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The primary issue on appeal is whether the Commission erred in denying petitioner's application for establishment of an expansion fund. For the reasons stated herein, we affirm the order of the Commission.

Section 62-94 of the North Carolina General Statutes sets forth the applicable standard of review by appellate courts of decisions by the Utilities Commission. Under section 62-94, the reviewing court may

reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:

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- (1) In violation of constitutional provisions, or
- (2) In excess of statutory authority or jurisdiction of the Commission, or
- (3) Made upon unlawful proceedings, or
- (4) Affected by other errors of law, or
- (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
- (6) Arbitrary or capricious.

N.C. Gen. Stat. § 62-94(b) (2001). Because a determination of the Commission is *prima facie* reasonable, see *Utilities Comm. v. Coach Co. and Utilities Comm. v. Greyhound Corp.*, 260 N.C. 43, 50, 132 S.E.2d 249, 255 (1963), “judicial reversal of an order of the Utilities Commission is a serious matter for the reviewing court which can be properly addressed only by strict application of the six criteria [of this section] which circumscribe judicial review.” *Utilities Comm. v. Oil Co.*, 302 N.C. 14, 20, 273 S.E.2d 232, 235 (1981) (footnote omitted). The appellate court must review the whole record to determine whether there is support for the Commission’s decision, but “where there are two reasonably conflicting views of the evidence, the appellate court may not substitute its judgment for that of the Commission.” *State ex rel. Util. Comm’n v. Carolina Indus. Group*, 130 N.C. App. 636, 639, 503 S.E.2d 697, 699-700, *disc. review denied*, 349 N.C. 377, 525 S.E.2d 465 (1998). Having established the proper standard of review, we turn to petitioner’s arguments on appeal.

[1] Petitioner first argues that the Commission erred in concluding that the establishment of an expansion fund in the instant case was inconsistent with the public interest. Petitioner asserts that this conclusion contravenes the stated public policy of North Carolina and was thus contrary to law, arbitrary and capricious, and unsupported by the evidence.

Section 62-2 of the North Carolina General Statutes declares that it is the policy of this State

To facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare throughout the State and to that end to authorize the creation of expansion funds for natural gas local distribution

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companies or gas districts to be administered under the supervision of the North Carolina Utilities Commission.

N.C. Gen. Stat. § 62-2(a)(9) (2001). “[T]he establishment of an expansion fund is in the public interest.” *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 336 N.C. 657, 671, 446 S.E.2d 332, 340 (1994). To implement this public policy, section 62-158 provides that

In order to facilitate the construction of facilities in and the extension of natural gas service to unserved areas, the Commission may, after a hearing, order a natural gas local distribution company to create a special natural gas expansion fund to be used by that company to construct natural gas facilities in areas within the company’s franchised territory that otherwise would not be feasible for the company to construct. The fund shall be supervised and administered by the Commission. Any applicable taxes shall be paid out of the fund.

N.C. Gen. Stat. § 62-158(a) (2001). The statute also authorizes the Commission to adopt rules for the establishment of expansion funds. *See* N.C. Gen. Stat. § 62-158(d) (2001). Rule R6-82 of the Rules and Regulations of the North Carolina Utilities Commission, concerning the establishment of expansion funds, dictates that

In determining the establishment of a fund and the sources and magnitude of the initial funding, the Commission will consider the [natural gas local distribution company’s] showing that expanding to serve unserved areas is economically infeasible and such other factors as the Commission deems reasonable and consistent with the intent of G.S. 62-158 and G.S. 62-2(9). Before ordering the establishment of a fund, the Commission must find that it is in the public interest to do so. Upon the establishment of a fund, the Commission shall provide for appropriate notice of its decision.

N.C. Utilities Commission, *North Carolina Public Utilities Laws and Regulations*, Rule R6-82(d) (Lexis 1999 ed.) (hereinafter “Commission Rule”).

In *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, Carolina Utility Customers Association, Inc. (“CUCA”), who is an intervenor in the instant case, sought reversal of a decision by the Commission authorizing establishment of an expansion fund. The decision by the Commission stated that, where a natural gas utility

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establishes that unserved areas exist within its territory that are otherwise infeasible to serve, the Commission has "limited discretion" to determine whether or not an expansion fund should be created for that particular gas utility. *See id.* at 664, 446 S.E.2d at 337. CUCA argued that, in approving the establishment of the expansion fund, the Commission "misapprehended the scope of its discretion under N.C.G.S. § 62-158." *Id.* According to CUCA, which had advocated the return of supplier refunds to customers as opposed to deposit of such funds into the expansion fund, the Commission had wide, rather than limited, discretion to approve or deny petitions.

Noting that the General Assembly had recognized the establishment of expansion funds to be in the public interest, our Supreme Court held that the Commission "did not act under a misapprehension of applicable law and that it granted the petition and established the expansion fund pursuant to a proper interpretation of its authority and discretion to do so." *Id.* at 666, 446 S.E.2d at 338. Examining Commission Rule R6-82(d), the Court stated that

The plain language of this rule indicates that the Commission had a proper view of its discretion in making a determination of whether to authorize the creation of an expansion fund: It was to evaluate pertinent factors in a manner consistent with the legislative intent; if, after doing so, the Commission concluded that the creation of an expansion fund would not be in the public interest, it would presumably decline to order the creation of such a fund. Because the General Assembly has clearly stated that it is the policy of the state "[t]o facilitate the construction of facilities in and the extension of natural gas service to unserved areas in order to promote the public welfare," N.C.G.S. § 62-2(9), the Commission is not free to exercise its discretion with regard to whether, in a general sense, this policy is wise or unwise.

*Id.* (alteration in original). The Commission could, however, exercise limited discretion in determining whether or not the establishment of a particular expansion fund was in the public interest.

In the instant case, the Commission expressly recognized in its order that, pursuant to *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, it had limited discretion to "evaluate pertinent factors in a manner consistent with the legislative intent" in determining whether the establishment of an expansion fund would be in the public interest. The Commission articulated these pertinent factors as including



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the size of the geographic area without service, the size of the area relative to the amount of natural gas infrastructure already existing within the county involved, the location of population centers within the county and their proximity to natural gas infrastructure, the presence or lack of economic development in the county, practical engineering and right-of-way aspects of installing natural gas facilities in some cases, and whether traditional economic tests and policies and other sources of funding should take precedence over use of expansion funds.

Applying these factors to the evidence before it, the Commission concluded that establishment of an expansion fund was not in the public interest. Specifically, the Commission found that the areas to be served by the potential expansion were relatively small and were located within a county that had "significant natural gas infrastructure available to promote economic development." Further, economic development within petitioner's territory was rated three on a scale of five by the North Carolina Department of Commerce. The Commission also noted that alternate avenues existed to mitigate the costs of extending service to unserved areas. The Commission moreover found that, because natural gas prices were high, "[a] refund of the \$2 million held in escrow by [petitioner] will help to mitigate high customer bills during the current winter, and the return of supplier refunds in the future will help to make natural gas more attractive as a fuel of choice."

Petitioner argues that, under the plain language of the statutes, Commission Rules, and case law, the establishment of a natural gas expansion fund for service to unserved areas is necessarily of greater public interest than a refund to existing customers, and that the Commission erred in concluding otherwise. We disagree.

By asserting that the Commission erred in concluding that the establishment of this particular expansion fund was not in the best interests of the public despite case law and statutory authority declaring the establishment of such funds to be in the general public interest, petitioner essentially argues that the Commission was without discretion to deny its petition once it had established that there existed within its territory unserved areas that were otherwise infeasible to serve.<sup>1</sup> While it is clear that the Commission has no authority

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1. Whether or not the two industrial development zones within petitioner's franchised territory qualify as "unserved areas" within the meaning of section 62-158 of the General Statutes is debatable. *See* Commission Rule R6-81(b)(5) (defining "unserved areas" as "[c]ounties, cities or towns of which a high percentage is unserved"). As the

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“with regard to whether, in a *general sense*, [the] policy [advocating expansion funds] is wise or unwise,” *State ex rel. Utilities Comm.*, 336 N.C. at 666, 446 S.E.2d at 338 (emphasis added), it also clearly has the authority to exercise limited discretion in determining whether the establishment of a particular expansion fund is in the best interests of the public. See N.C. Gen. Stat. § 62-158(a) (stating that “the Commission *may*, after a hearing, order a natural gas local distribution company to create a special natural gas expansion fund”) (emphasis added); *State ex rel. Utilities Comm.*, 336 N.C. at 666, 446 S.E.2d at 338 (stating that the proper role of the Commission in evaluating petitions for an expansion fund is to “evaluate pertinent factors in a manner consistent with the legislative intent” and to decline the creation of such funds if it concludes “that the creation of an expansion fund would not be in the public interest”); Commission Rule R6-82(d) (directing the Commission to evaluate a petition using such “factors as the Commission deems reasonable and consistent with the intent of G.S. 62-158 and G.S. 62-2(9),” in order to determine whether the establishment of a fund “is in the public interest”).

A determination by the Commission is *prima facie* just and reasonable. See *Utilities Commission v. Ray*, 236 N.C. 692, 697, 73 S.E.2d 870, 874 (1953). The burden is on the appellant to demonstrate an error of law in the proceedings. See *Utilities Commission v. Champion Papers, Inc.*, 259 N.C. 449, 456, 130 S.E.2d 890, 895 (1963). “To be arbitrary and capricious, the Commission’s order would have to show a lack of fair and careful consideration of the evidence or fail to display a reasoned judgment.” *State ex rel. Utilities Comm. v. Piedmont Nat. Gas Co.*, 346 N.C. 558, 573, 488 S.E.2d 591, 601 (1997). Here, the Commission carefully articulated pertinent factors and appropriately applied them to the evidence before it. We conclude that the Commission properly exercised its limited discretion in determining that, under the facts of this case, the creation of an expansion fund was not in the best interests of the public. As petitioner has failed to carry its burden of demonstrating that the Commission’s judgment was unreasonable or affected by errors of law, we overrule petitioner’s first argument.

**[2]** By its second argument, petitioner contends that the Commission’s announcement and application of previously unarticulated “public interest factors” to petitioner’s case amounted to an unfair burden and surprise. As recited *supra*, the Commission articu-

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town of Stoneville clearly qualified as an unserved area, however, we do not address this issue.

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lated numerous factors in determining whether to deny or approve the establishment of the expansion fund, including (1) the size of the geographic area without service; (2) the size of the area relative to the amount of natural gas infrastructure already existing within the county involved; (3) the location of population centers within the county and their proximity to natural gas infrastructure; (4) the presence or lack of economic development in the county; (5) practical engineering and right-of-way aspects of installing natural gas facilities; and (6) whether traditional economic tests and policies and other sources of funding should take precedence over use of expansion funds.

Petitioner does not deny that these factors are pertinent to the Commission's decision, but contends that their application created a new and heightened standard for the establishment of an expansion fund for which petitioner was unprepared. Petitioner asserts that the Commission thereby acted in an arbitrary and capricious manner. We do not agree.

Before the Commission may order the establishment of an expansion fund, it must find that it is in the public interest to do so, applying "pertinent factors in a manner consistent with the legislative intent." *State ex rel. Utilities Comm.*, 336 N.C. at 666, 446 S.E.2d at 338. The factors relied upon by the Commission in the instant case do not represent "an unstated and additional evidentiary burden" as asserted by petitioner, but instead are a sensible and pertinent articulation of the existing public interest standard, consistent with the legislative intent of establishing expansion funds when it is in the best interests of the public. We conclude that the Commission's action was neither arbitrary nor capricious, and we overrule this assignment of error.

**[3]** Petitioner further contends that it was treated "in a distinctly different and prejudicial manner" compared to other cases before the Commission. Specifically, petitioner argues that another natural gas supplier, Piedmont Natural Gas Company, Inc. ("Piedmont"), was permitted to establish a natural gas expansion fund under "substantively identical circumstances" as those conditions in petitioner's case. In the Piedmont decision, the Commission allowed Piedmont to establish an expansion fund on a contingent basis, despite the fact that some level of service already existed in Piedmont's franchised territory. Petitioner offers this comparison as the basis for its contention that the Commission's decision was arbitrary and capricious. Again, we must disagree with petitioner.

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Despite petitioner's assertions to the contrary, our review of the Piedmont decision reveals that the circumstances were not identical to the facts of the present case. Most notably, the Commission found that "new franchise territory may be certified to Piedmont . . . in the near future." Further, Piedmont was allowed to establish an expansion fund on a contingent basis only, in order to allow further review of individual projects. In its decision concerning present petitioner, the Commission specifically noted that the Commission had "in fact only used Piedmont's expansion fund to help build facilities in counties that were franchised to Piedmont after April 1996 and had no natural gas service at all." There was no evidence presented in the instant case that petitioner would be acquiring new territory at any point in the future. Because the two cases were not identical, petitioner has failed to show that the Commission's treatment of its case was arbitrary or capricious. We therefore overrule this assignment of error.

**[4]** Petitioner next argues that several of the Commission's findings and conclusions were either irrelevant or unsupported by substantial evidence. First, petitioner objects to the Commission's finding that "Transco, the major interstate natural gas pipeline serving North Carolina, transverses the middle of Rockingham County." Petitioner contends that this finding was irrelevant to the Commission's conclusion that establishment of an expansion fund was not in the best interests of the public. We disagree. At the hearing before the Commission, James G. Hoard, a member of the public staff, testified that Rockingham County enjoyed substantial gas infrastructure, of which the Transco pipeline is a part. The fact that substantial gas infrastructure exists within Rockingham County was a relevant and proper factor in the decision to deny the establishment of an expansion fund.

**[5]** Petitioner also asserts that the Commission's comparison of Rockingham County to other counties with inferior natural gas infrastructure was irrelevant to a determination of whether to deny or grant the petition by petitioner. In its order, the Commission concluded that, "Compared to other [natural gas local distribution companies] and other counties, there is significant natural gas infrastructure available [in Rockingham County] to promote economic development." Petitioner asserts that, as the establishment of an expansion fund by petitioner would have no impact on expansion of natural gas facilities outside petitioner's franchised territory, the Commission's comparison was irrelevant. Even if the

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Commission's comparison of Rockingham County's infrastructure to that of other counties was irrelevant, there was nevertheless competent and material evidence before the Commission tending to show that Rockingham County enjoys significant gas infrastructure. For example, the evidence showed that Stoneville is the only incorporated municipality within petitioner's territory that does not have natural gas service. Further, Mr. Hoard testified that there was "plenty of gas infrastructure" in Rockingham County. We have already concluded above that the existence of a natural gas infrastructure within Rockingham County was a relevant and proper factor in the decision to deny the establishment of an expansion fund. Because the evidence supported the Commission's conclusion that significant natural gas infrastructure was available in petitioner's territory to promote economic development, the Commission did not err in its conclusion.

**[6]** By its final assignment of error, petitioner maintains that the Commission erred in concluding, under the facts of the present case, that "reducing customers' gas costs is more consistent with the public interest than applying supplier refunds toward further natural gas infrastructure in Rockingham County." Petitioner argues that the opportunity to fund natural gas expansion outweighs a one-time benefit to customers, and that the Commission erred in concluding otherwise. It is well established, however, that this Court may not properly set aside the Commission's decision merely because different conclusions could have been reached from the evidence. See *Utilities Comm. v. Telephone Co.*, 281 N.C. 318, 354, 189 S.E.2d 705, 728 (1972). The Commission's decision was properly supported by competent evidence of record, which in turn supported its conclusions. We therefore overrule petitioner's final assignment of error.

The decision of the Utilities Commission is hereby

Affirmed.

Judges CAMPBELL and LEWIS concur.

**SKINNER v. N.C. DEP'T OF CORR.**

[154 N.C. App. 270 (2002)]

WILLIAM T. SKINNER, PETITIONER v. NORTH CAROLINA DEPARTMENT  
OF CORRECTION, RESPONDENT

No. COA01-1121

(Filed 3 December 2002)

**1. Administrative Law— sufficiency of evidence—whole record test**

The superior court was required to perform a whole record test to determine whether there was substantial evidence to support demotion of a prison food service supervisor for not maintaining a sanitary and orderly kitchen.

**2. Public Officers and Employees— food service supervisor demoted—dirty kitchen—inconsistent serving lines**

There was substantial evidence in the whole record to support the demotion and transfer of a prison food service supervisor for unsatisfactory job performance where the evidence included testimony about unsanitary conditions, deviation from posted menus, and inconsistent serving lines, which can cause problems with inmates.

**3. Public Officers and Employees— demoted food service supervisor—inconsistent explanations of conduct—immaterial**

Isolated erroneous findings regarding inconsistent explanations from a demoted prison food service supervisor were not material to the issue of unsatisfactory job performance.

**4. Public Officers and Employees— demotion—racial discrimination—prima facie case**

The State Personnel Commission did not err by finding that there was no credible evidence of intentional racial discrimination in the demotion of a prison food supervisor where petitioner did not make out a prima facie case of discrimination. He was not replaced by a person who is not a member of a minority group, there was no evidence that non-minority supervisors were retained under similar circumstances, a Caucasian food service supervisor was also recommended for demotion and transfer on the same grounds, and the administrator who made the recommendations is African-American.

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**5. Public Officers and Employees— due process—employment discipline**

A demoted prison food service supervisor was given the due process to which he was entitled where he received two detailed written warning letters; received a notice outlining the specific grounds for the proposed disciplinary action; attended a pre-demotion conference and was given the opportunity to respond to the charges of unsatisfactory job performance; and set forth no evidence that he would not have been demoted had he been given an action plan following the written warnings.

**6. Public Officers and Employees— unsatisfactory job performance—prison food service**

The Department of Correction had just cause to demote a food service supervisor for unsatisfactory job performance where there was substantial evidence that petitioner did not satisfactorily meet his job requirements, which included supervising inmate workers and ensuring that the kitchen was kept in a clean and orderly fashion; petitioner received two written warnings about his poor job performance; and his ability to perform satisfactorily was particularly critical because seemingly innocuous incidents could cause security risks in the prison dining hall.

Appeal by petitioner from order entered 4 June 2001 by Judge David Q. Labarre in Wake County Superior Court. Heard in the Court of Appeals 6 June 2002.

*Browne, Flebotte, Wilson & Horn, P.L.L.C., by Joy Rhyne Webb, for petitioner appellant.*

*Attorney General Roy Cooper, by Assistant Attorney General Neil Dalton, for the State.*

TIMMONS-GOODSON, Judge.

William T. Skinner (“petitioner”) appeals from an order of the trial court affirming a decision and order of the North Carolina State Personnel Commission (“the Commission”). In its decision, the Commission affirmed the disciplinary action taken by petitioner’s employer, the North Carolina Department of Correction (“respondent”), in demoting petitioner. After a careful review of the record, we affirm the order of the trial court.

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The facts pertinent to this appeal are as follows: Petitioner was employed with respondent in the position of "Correction Food Service Supervisor I" at Pasquotank Correctional Institute ("Pasquotank"). As a food service supervisor, petitioner oversaw the preparation and distribution of food to the inmate population during his shift, and was responsible for maintaining the kitchen in a sanitary and orderly fashion. Petitioner's duties included supervising food service assistants, who in turn supervised the inmates assigned to work in the food service department.

On 31 December 1996, petitioner received a written warning for poor job performance. The warning reprimanded petitioner for allowing an unauthorized deviation from the approved menu at Pasquotank on 11 December 1996. On 1 May 1997, respondent issued a second warning to petitioner for unsatisfactory job performance, due to petitioner's alleged "failure to maintain proper sanitary conditions in the kitchen." On 29 September 1997, petitioner received notice of a "pre-demotion conference" to be held on the following day. The notice advised petitioner of a proposed recommendation to demote him and listed seven specific incidents involving unacceptable job performance by petitioner. The notice invited petitioner to attend the conference in order to respond to the issues supporting the proposed demotion and transfer. Petitioner attended the conference, submitting both an oral and written statement.

On 5 November 1997, respondent transferred petitioner to the Currituck Correctional Center. On 29 December 1997, respondent notified petitioner of his demotion to the position of correctional officer. The notice set forth several grounds for the disciplinary action, including (1) petitioner's failure to maintain a properly balanced serving line; (2) tardy delivery of food; (3) unsanitary conditions in the kitchen; (4) substitution of menu items without approval; and (5) failure to ensure that dishware was properly cleaned before distribution to the inmates.

After unsuccessfully pursuing an internal agency appeal of his demotion, petitioner filed two petitions for a contested case hearing with the Office of Administrative Hearings, alleging racial discrimination and improper procedural errors by respondent. These petitions were consolidated for review and came before an administrative law judge on 15 and 16 March 1999. In a recommended decision filed 7 May 1999, the administrative law judge concluded that, although respondent did not discriminate against petitioner on the basis of his race, respondent lacked just cause in demoting and transferring peti-



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tioner. The administrative law judge therefore recommended that petitioner be reinstated to his former position.

The matter came before the State Personnel Commission on 19 August 1999. In its final decision and order dated 22 September 1999, the Commission agreed with the administrative law judge's conclusion that respondent did not discriminate against petitioner on the basis of his race. The Commission determined, however, that respondent's decision to demote petitioner was supported by just cause due to his unsatisfactory job performance and therefore affirmed the disciplinary action.

Petitioner filed a petition for judicial review in Wake County Superior Court on 21 October 1999. Upon review of the whole record, the trial court entered an order affirming the decision and order by the Commission. From this order, petitioner appeals.

On appeal, petitioner contends that the trial court erred in concluding that the Commission's final decision was supported by substantial evidence of record. Petitioner also asserts that several of the Commission's conclusions of law are erroneous, and that the trial court therefore erred in affirming the Commission's decision. After careful review of the record, we affirm the order of the trial court.

**[1]** Upon appeal from an order of the superior court entered after a review of an agency decision, the appellate court must examine the trial court's order to determine first, whether the trial court exercised the appropriate standard of review, and secondly, whether the trial court properly applied that standard to the record before it. *See ACT-UP Triangle v. Commission for Health Services*, 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). The standard of review to be utilized by the superior court depends upon the issues raised in the petition for judicial review. *See id.* "When the petitioner contends the agency decision was affected by error of law . . . *de novo* review is the proper standard; if it is contended the agency decision was not supported by the evidence . . . or was arbitrary and capricious . . . the whole record test is the proper standard." *R.J. Reynolds Tobacco Co. v. N.C. Dep't of Env't & Natural Res.*, 148 N.C. App. 610, 614, 560 S.E.2d 163, 166, *disc. review denied*, 355 N.C. 493, 564 S.E.2d 44 (2002). "The reviewing court may be required to utilize both standards of review if warranted by the nature of the issues raised." *Id.*

In the instant case, petitioner alleged that the Commission's decision was not supported by the evidence. Thus, the superior court

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was required to perform a whole record test to determine whether the administrative agency's decision was supported by substantial evidence.

"The 'whole record' test requires the reviewing court to examine all competent evidence (the 'whole record') in order to determine whether the agency decision is supported by 'substantial evidence.'" *Amanini v. N.C. Dept. of Human Resources*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994). Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion. See *Dorsey v. UNC-Wilmington*, 122 N.C. App. 58, 62, 468 S.E.2d 557, 560, cert. denied, 344 N.C. 629, 477 S.E.2d 37 (1996). Under the whole record test, the reviewing court must take into account both the evidence that justifies the agency's decision and the contradictory evidence from which a different result could be reached. See *R.J. Reynolds Tobacco Co.*, 148 N.C. App. at 617, 560 S.E.2d at 168. Under this standard, "the reviewing court is not allowed to replace the agency's judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different conclusion had the matter been before it *de novo*." *Id.* at 618, 560 S.E.2d at 168.

In the case *sub judice*, the trial court indicated that it had employed the "whole record" test, which was the proper standard of review. Inasmuch as the record on appeal indicates that the trial court applied the "whole record" test, our only question is whether the court did so properly. See *N.C. Dept. of Correction v. Myers*, 120 N.C. App. 437, 441, 462 S.E.2d 824, 827 (1995), affirmed *per curiam*, 344 N.C. 626, 476 S.E.2d 364 (1996).

**[2]** Petitioner argues that the Commission's findings are not supported by substantial evidence in the record, which in turn do not support the Commission's conclusion that petitioner was demoted and transferred for just cause. We therefore examine the record to determine whether substantial evidence exists to support the Commission's findings.

Petitioner first objects to the Commission's finding that

[o]n the morning of July 31, 1997, Assistant Superintendent Barnes entered the food service area and observed that the two lines serving food were in disarray. One was staffed with three inmate servers, and one was staffed with five. This was causing confusion and disorder among the inmates because one line was moving faster than the other.

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Petitioner asserts that this finding is unsupported by the evidence of record. We disagree.

Van Barnes ("Barnes"), the assistant superintendent for custody and operation at Pasquotank, testified at the hearing that he arrived at the food service area where petitioner worked in the late morning hours of 31 July 1997. Barnes explained that when he entered,

[t]he kitchen was in the process of preparing some trays. I noticed that there was some confusion. The trays for Unit 5 had not left the institutional kitchen, therefore I knew that the food that was going down to Unit 5 would not be on time if it was already 10:45 and the policy says or the instructions given to the kitchen that the food that is to go down to Unit 5 has to leave at 10:40. We were already behind time. Our line is a consistent line which is—with a serving line to the right and a serving line to the left, same amount of compartments on both sides to hold the food. On one side of the line there [were] five inmates, on the other side of the line there [were] three. This was causing the trays going down to Unit 5 not to be prepared as quickly as we needed them to be prepared. I believe that I spoke to [petitioner] . . . and instructed him that we needed to speed this process up and balance the line out and in fact he moved one and balanced it out to four and five instead of five and three.

This testimony by Barnes provides competent and substantial evidence in support of the Commission's finding. We therefore overrule petitioner's exception to this finding.

Petitioner next argues that the Commission erred in finding that petitioner "did not follow clean as you go procedures" in Finding of Fact Number Four. Petitioner contends that this finding is unsupported by the evidence. We first note that the Commission never actually found that petitioner "did not follow clean as you go procedures." Instead, Finding of Fact Number Four recites the following facts:

4. Petitioner acknowledged during his pre-disciplinary conference that the "clean as you go procedures[]" mean that "once you make a mess, you clean it up." Petitioner acknowledged at the hearing that he did not think he could ever clean the kitchen to the satisfaction of Mr. Creecy. Petitioner had received a written warning on May 1, 1997, for among other things, unsanitary conditions in the kitchen. The written warning stated "As the Food supervisor I, it is your responsibility to ensure that a sufficient

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number of staff or inmates are not only performing their assigned duties, but are present to perform those duties as well.["] At his pre-disciplinary conference, the Petitioner stated that the reason the kitchen was such a mess was that he did not have enough janitors on the day in question to clean it up. He did not allege prior to the hearing, during the investigation of these matters nor [at] his pre-disciplinary conference that the clean as you go procedures were in fact being followed. In his written statement he specifically stated that the clean as you go procedures were "suspended" due to the shortage of inmate janitors.

As there is substantial evidence of record to support each of the above-stated facts, the Commission did not err in Finding of Fact Number Four. We overrule this assignment of error.

Petitioner further objects to the Commission's finding regarding an unauthorized substitution of food items and unclean dishware. As to the unauthorized deviation from the approved menu, petitioner testified that he was the food service supervisor assigned to the first shift on 28 August 1997. The first shift supervisor oversees the preparation and serving of the breakfast menu and preparation of the lunch menu. Captain Curtis Brown, a correctional officer at Pasquotank, testified that numerous inmates approached him with complaints about the lunch service on 28 August 1997. Captain Brown stated that the inmates were "frustrated and angry" about a deviation from the posted menu. Captain Brown approached petitioner concerning the problem because petitioner was the only food supervisor in the kitchen at the time the substitution was made. Petitioner argues that, because it was the responsibility of the second shift supervisor to oversee the serving of the lunch that day, he was not responsible for the unauthorized food substitution. The evidence demonstrated, however, that there were no other food supervisors present when the unauthorized substitution occurred.

As to the unclean dishware, the Commission found that

Petitioner addressed the situation regarding cheese being left in the coffee cups on August 29, 1997 as soon as the matter was brought to his attention. These cups had been run through the dishwasher but apparently some residue was left in the bottom of the cups. Petitioner's failure to ensure that the cups were clean was just another example of his inability to produce a clean and sanitary well functioning kitchen.

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Petitioner argues that there is no substantial evidence to support this finding. Although petitioner agrees that the coffee cups were not clean, he maintains that it was the responsibility of his assistants to ensure that the cups were clean. As supervisor, however, it was ultimately petitioner's duty to thoroughly inspect and maintain sanitary conditions in the kitchen. The finding by the Commission was therefore supported by substantial evidence.

Petitioner further objects to Finding of Fact Number Nine, in which the Commission found that

Sanitation of the kitchen during the a.m. shift was an on-going problem while Petitioner was the Food Service Supervisor I. On January 7, 1997 the "cleanliness of the kitchen on the a.m. shift" was a topic of a meeting discussion and a subject of a memorandum received by Petitioner. . . . Petitioner was issued a written warning for the lack of cleanliness in the kitchen on May 1, 1997. The written warning cited among other things; "the dirty condition of the grill" and "water standing on the floors." The warning letter further stated; "As the Food Service Supervisor I, it is your duty and responsibility to ensure that [the staff] and the inmates are performing their duties and maintaining the proper level of cleanliness in the kitchen."

There was clearly substantial evidence to support this finding. Several witnesses testified to numerous incidents involving unsanitary conditions in the kitchen, and petitioner received a written warning on 1 May 1997 expressly admonishing him for his failure to maintain clean and sanitary conditions. This assignment of error is overruled.

**[3]** Petitioner objects to the Commission's finding that "[a]t the hearing, the petitioner gave entirely different excuses for all of the deficiencies noted in his letter of demotion." Petitioner asserts that his answers at the pre-demotion conference did not differ materially from those he gave at the hearing, and that there is no evidence to support the Commission's contrary finding. Petitioner further asserts that there was no evidence to support the Commission's finding that "[n]o evidence was presented relative to the petitioner's 'appraisal'".

We agree with petitioner that the responses he submitted at the hearing did not differ materially from those he gave at the pre-demotion conference. For example, at the pre-demotion conference, petitioner explained that the imbalance in the serving lines had been

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caused by a staff shortage. At the hearing, petitioner elaborated on this answer, asserting that a "late count" among the inmates had caused his inmate servers to arrive late, thus resulting in the staff shortage. Petitioner gave similar testimony regarding his other responses, none of which differed materially from those he gave at the pre-demotion hearing. Thus, the Commission's finding that petitioner "gave entirely different excuses for all of the deficiencies" is unsupported by substantial evidence. The Commission further erred in finding that there was "no evidence" concerning petitioner's appraisals. Petitioner presented evidence at the hearing tending to show that he did not receive a performance appraisal in 1996.

Although we determine that the Commission erred in finding that petitioner's explanations at the conference were "entirely different" from those given at the hearing, and that "no evidence" was presented regarding an appraisal of petitioner, we conclude that these isolated findings were not material to the issue of petitioner's unsatisfactory job performance or his subsequent demotion. We therefore overrule this assignment of error.

[4] By his next assignment of error, petitioner contends that the Commission erred in finding that "[t]here was no credible evidence of intentional discrimination against the petitioner on account of his race." Petitioner asserts that he presented evidence for a *prima facie* case of racial discrimination, and that the Commission erred in determining otherwise. We disagree.

In order to make out a *prima facie* case for discrimination, the plaintiff may show that he is "(1) . . . a member of a minority group, (2) he was qualified for the position, (3) he was discharged, and (4) the employer replaced him with a person who was not a member of a minority group." *Dept. of Correction v. Gibson*, 308 N.C. 131, 137, 301 S.E.2d 78, 82-83 (1983). The plaintiff may also demonstrate discrimination by "showing the discharge of a black employee and the retention of a white employee under apparently similar circumstances." *Id.* at 137, 301 S.E.2d at 83.

Plaintiff asserts in the present case that he established a *prima facie* case by demonstrating that he is an African-American man and was qualified for his position as a food service supervisor. Petitioner presented no evidence, however, that he was replaced by a person who is not a member of a minority group. There was also no evidence that other, non-minority food service supervisors were retained under similar circumstances. In fact, the evidence tended to show that

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Peggy Caroon, a Caucasian woman and petitioner's fellow food service supervisor, was also recommended for demotion and transfer on poor performance grounds. Incidentally, the recommendation to demote both petitioner and Ms. Caroon was made by the administrator of Pasquotank, Charles M. Creecy, Jr., who is an African-American man. As petitioner failed to make out a *prima facie* case for discrimination, the Commission did not err in its finding. We overrule this assignment of error.

[5] By his next assignment of error, petitioner argues that the Commission's conclusion that "petitioner received all of the due process to which he was entitled" is unsupported by the evidence and erroneous as a matter of law. Petitioner thus contends that the trial court erred in affirming the Commission. We do not agree.

We note again that questions of law are to be reviewed *de novo*. See *Amanini*, 114 N.C. App. at 674, 443 S.E.2d at 118. "'*De novo*' review requires a court to consider a question anew, as if not considered or decided by the agency." *Id.* "[W]here the initial reviewing court should have conducted *de novo* review, this Court will directly review the State Personnel Commission's decision under a *de novo* review standard." *Id.* at 677, 443 S.E.2d at 119. Although it is unclear whether or not the trial court in the instant case reviewed *de novo* those errors asserted by petitioner to be errors of law, we employ the appropriate standard of review regardless of that utilized by the reviewing trial court. See *Souther v. New River Area Mental Health*, 142 N.C. App. 1, 4, 541 S.E.2d 750, 753, *affirmed per curiam*, 354 N.C. 209, 552 S.E.2d 162 (2001).

Section 126-35 of the North Carolina General Statutes provides in pertinent part that

No career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. The employee shall be permitted 15 days from the date the statement is delivered to appeal to the head of the department.

N.C. Gen. Stat. § 126-35(a) (2001). A state employee who has a right to continued employment is entitled to a predetermination opportu-

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nity to respond to the allegations against him. See *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 349, 342 S.E.2d 914, 921-22, cert. denied, 318 N.C. 507, 349 S.E.2d 862 (1986).

In the instant case, petitioner does not dispute that he received two detailed written warning letters, as well as a notice of the pre-demotion conference outlining the specific grounds for the proposed disciplinary action. Petitioner attended the conference and was given the opportunity to respond to the charges of unsatisfactory job performance. Petitioner nevertheless argues that his due process rights were denied because he “was never given an action plan following any of his written warnings, as required by the Department of Correction disciplinary process and procedures.” In order to claim relief based on a violation of the internal review process, however, petitioner must demonstrate “that there was a substantial chance there would have been a different result in his case if the established internal procedures had been followed.” *Leiphart*, 80 N.C. App. at 353, 342 S.E.2d at 924. Petitioner sets forth no evidence tending to show that, had he been given an “action plan” following the written warnings, he would not have been demoted. Because there is no evidence that petitioner’s due process rights were denied, the trial court properly affirmed the Commission’s conclusion that petitioner received the due process to which he was entitled. We therefore overrule this assignment of error.

**[6]** By his final assignment of error, petitioner argues that the trial court erred in affirming the Commission’s conclusion that “[p]etitioner’s demotion was with just cause as he performed unsatisfactorily in his job duties.” Petitioner asserts that this conclusion is not based on substantial evidence and is contrary to law. We disagree.

Pursuant to section 126-35(a) “[n]o career State employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause.” N.C. Gen. Stat. § 126-35(a). “‘Just cause’ is a legal basis, set forth by statute, for the termination [or demotion] of a State employee, and requires the application of legal principles. Thus, its determination is a question of law.” *Gainey v. N.C. Dept. of Justice*, 121 N.C. App. 253, 259 n.2, 465 S.E.2d 36, 41 n.2 (1996). “Just cause” may consist of either “unsatisfactory job performance” or “unacceptable personal conduct.” N.C. Admin. Code tit. 25, r. 1J.0604(b) (June 2002). “Unsatisfactory job performance” is defined as “work-related performance that fails to satisfactorily meet job requirements as specified in the relevant job



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description, work plan, or as directed by the management of the work unit or agency.” N.C. Admin. Code tit. 25, r. 1J.0614(j) (June 2002). Careless errors, poor quality of work, or failure to follow instructions or procedures may constitute unsatisfactory job performance. See *Amanini*, 114 N.C. App. at 679, 443 S.E.2d at 121. In the instant case, there was substantial evidence that petitioner did not satisfactorily meet his job requirements, which included supervising inmate workers and ensuring that the kitchen was kept in a clean and orderly fashion. Petitioner received two written warnings concerning his poor job performance, detailing petitioner’s failure to follow proper procedure and failure to maintain sanitary conditions in the kitchen. Petitioner’s ability to perform satisfactorily was particularly critical at Pasquotank, as noted by the Commission as follows:

Pasquotank Correctional Institution is a high security prison housing many of North Carolina’s most dangerous felons. At any given time, up to 250 inmates can be in the dining hall at once. It is therefore essential that all kitchen functions perform in an orderly fashion. Even seemingly innocuous incidents such as switching items on the menu and having an imbalanced serving line can cause a security risk.

After conducting our *de novo* review, we conclude that respondent had just cause to demote petitioner for unsatisfactory job performance.

In conclusion, we hold that the trial court did not err in affirming the decision and order of the State Personnel Commission. The order of the trial court is hereby

Affirmed.

Judges MARTIN and CAMPBELL concur.

**STATE v. RAINEY**

[154 N.C. App. 282 (2002)]

STATE OF NORTH CAROLINA v. MIKEL OLANDA RAINEY

No. COA02-129

(Filed 3 December 2002)

**1. Homicide— attempted first-degree murder—assault with a deadly weapon inflicting serious injury not a lesser-included offense**

The trial court did not err in an attempted first-degree murder case by failing to instruct on assault with a deadly weapon inflicting serious injury as a lesser-included offense because it is not a lesser-included offense of attempted first-degree murder when assault with a deadly weapon inflicting serious injury requires the State to prove the existence of a deadly weapon and attempted murder does not require a deadly weapon.

**2. Homicide— attempted voluntary manslaughter—recognized in North Carolina**

Attempted voluntary manslaughter is a recognized crime in North Carolina, because: (1) heat of passion voluntary manslaughter is essentially a first-degree murder where a defendant's reason is temporarily suspended by legally adequate provocation; and (2) the specific intent to kill does exist in the mind of such a defendant although the defendant is only legally culpable for the general intent since the specific intent is not based on cool reflection but rather on an adequate provocation that would cause an individual with an ordinary firmness of mind to become provoked.

**3. Homicide— attempted first-degree murder—instruction on attempted voluntary manslaughter not required**

The trial court did not err in an attempted first-degree murder case by failing to instruct on the lesser-included offense of attempted voluntary manslaughter even though defendant shot at the victim for sleeping with defendant's thirteen-year-old sister, because: (1) the evidence revealed that defendant sought out the victim after learning of the alleged relationship through a conversation and did not discover his thirteen-year-old sister and the victim in an illicit act; and (2) defendant did not act immediately under a heat of passion but rather under an indulgence of revenge or malice.

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[154 N.C. App. 282 (2002)]

Appeal by defendant from judgment entered 19 July 2001 by Judge Dwight L. Cranford in Superior Court, Halifax County. Heard in the Court of Appeals 16 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Amy L. Yonowitz, for the State.*

*Mary March Exum, for the defendant-appellant.*

WYNN, Judge.

Following his conviction on the charge of attempted first-degree murder, defendant Mikel Rainey argues on appeal that the trial court erred by failing to instruct on the lesser-included offenses of (1) assault with a deadly weapon inflicting serious injury, and (2) attempted voluntary manslaughter. We find no error in the failure to instruct on the offense of assault with a deadly weapon inflicting serious injury because that offense is not a lesser-included offense of attempted first-degree murder. Moreover, although we hold that attempted voluntary manslaughter is (1) a crime in North Carolina, and, (2) a lesser-included offense of attempted first-degree murder, we hold that defendant was not entitled to an instruction on the lesser-included offense of attempted voluntary manslaughter. Therefore, we affirm the judgment of the Superior Court, Halifax County.

The underlying facts of this case tend to show that on 20 July 1999, defendant shot Roy Richardson, his stepbrother, three times with a shotgun in the buttocks, ankle, and thigh. On 21 July 1999, defendant turned himself into the Halifax County Sheriff's Department and made a written confession stating:

Last night my girlfriend, Stephanie Yarborough, and I had just laid down to go to bed at her house. . . . We were talking about different things that had went on during the day. I asked Stephanie what she and my [thirteen-year-old] sister . . . were talking about, when I saw both of them walking earlier in the evening. [Stephanie] said [my sister] was talking about boys she had been with intimately lately. I asked her who they were, and she said my half brother Roy Richardson . . . .

I was so mad I couldn't say anything to her. I got up and dressed and drove . . . to my Mama's house. I walked inside and went to [my sister] who was laying on my Mama's bed. I asked [her], who

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she had been with, meaning having sex. She just laid there and smiled at me. I went outside and . . . [got] a shotgun. . . .

I left my Mama's house and drove to Roy Richardson's house on Lynch Road. I drove up and beeped my horn when I got to the house. I got out of the car with the shotgun to confront Roy who was stepping off the porch. I asked him, "Did you fuck my little sister?" Roy said, "It's not any of your fucking business." I pointed the gun at Roy and shot a couple of times. He fell to the ground when I hit him. He got up from the ground and turned to run away so I shot him again. I put the shotgun in the car and drove away to Stephanie's house.

While I was driving . . . something ran out and I swerved to miss it flipping Stephanie's car. It threw me out on the paved roadway. It shook me so bad I didn't know where I was. I started walking through the woods. I stayed in the woods until morning and then walked to my Mama's house. . . . This is the truth of what happened last night.

At trial, the evidence tended to conform to this confession. Defendant admitted shooting Richardson; however, he testified that he did not intend to kill Richardson. Rather, Defendant stated: "I could have [killed] him if I wanted to, but like I [said], I [wasn't] trying to kill him. I just wanted to hurt him . . . . [F]or messing with my little sister."

At the charge conference, defendant requested an instruction on attempted voluntary manslaughter and assault with a deadly weapon inflicting serious injury. The trial court denied both motions and submitted a verdict sheet giving the jurors the option of finding defendant guilty of attempted first-degree murder or not guilty.

After deliberating for an hour and twenty minutes, the jurors submitted a list of questions to the judge. Of interest, the jurors asked the judge: "Does the State come back with another charge if [defendant] is found not guilty?" The trial judge informed the jury that such an inquiry "should not bear upon . . . [the] decision in this case."

On 19 July 2001, a unanimous jury returned a guilty verdict against defendant for attempted first-degree murder. From that conviction and sentence of a minimum of 269 months and a maximum of 332 months in the North Carolina Department of Corrections, defendant appeals.

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[1] Before this Court, defendant first argues that the trial court erred by denying his request for an instruction on assault with a deadly weapon inflicting serious injury.<sup>1</sup> For an offense to be a “lesser-included” offense, “all of the essential elements of the lesser crime must also be essential elements included in the greater crime.” *State v. Westbrook*, 345 N.C. 43, 55, 478 S.E.2d 483, 490 (1996). Assault with a deadly weapon requires the State to prove the existence of a deadly weapon; however, attempted murder does not require a deadly weapon. Accordingly, assault with a deadly weapon inflicting serious injury is not a lesser-included offense of attempted first-degree murder. *Cf. State v. Coble*, 351 N.C. 448, 453, 527 S.E.2d 45, 49 (2000). Therefore, this assignment of error is without merit.

[2] By his second assignment of error, defendant contends the trial court erred in denying his request for an instruction on attempted voluntary manslaughter. He contends that attempted voluntary manslaughter is a lesser-included offense of attempted first-degree murder. *See generally, State v. Lea*, 126 N.C. App. 440, 485 S.E.2d 874 (1997); *State v. Chamberlain*, 307 N.C. 130, 151, 297 S.E.2d 540, 552-53 (1982).

However, the State argues that this Court should not reach the question of whether defendant was entitled to the lesser-included offense instruction because attempted voluntary manslaughter is not recognized as an offense under North Carolina law. In support of this proposition, the State cites *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000) in which our Supreme Court held that attempted second-degree murder is not an offense and does not exist under North Carolina law:

‘In connection with [second-degree murder and voluntary manslaughter], the phrase ‘intentional killing’ refers not to the presence of a specific intent to kill, but rather to the fact that the act which resulted in death is intentionally committed. . . .’ Moreover, we have explained that specific intent to kill is ‘a necessary constituent of the elements of premeditation and delibera-

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1. In North Carolina, a “defendant is entitled to have a lesser included offense submitted to the jury . . . .” *State v. Smith*, 351 N.C. 251, 267, 524 S.E.2d 28, 40 (2000) (quoting *State v. Brown*, 300 N.C. 731, 735-36, 268 S.E.2d 201, 204 (1980)). However, a “trial judge is not required to instruct the jury on lesser-included offenses” unless there is “evidence to sustain a verdict of defendant’s guilt of such lesser degrees.” *State v. Lea*, 126 N.C. App. 440, 447, 485 S.E.2d 874, 878 (1997) (quoting *State v. Lyons*, 340 N.C. 646, 663, 459 S.E.2d 770, 779 (1995); *State v. Shaw*, 305 N.C. 327, 342, 289 S.E.2d 325, 333 (1982)).

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tion in first degree murder [ ]and] is not an element of second degree murder or manslaughter. . . .’ Therefore, it logically follows that the crime of attempted murder, as recognized in this state, can be committed only when a person acts with the specific intent to commit first-degree murder.

*Coble*, 351 N.C. at 450, 527 S.E.2d at 47 (citations omitted).

Thus, the State argues that under *Coble*, our Supreme Court in holding that attempted second-degree murder is not a crime in North Carolina likewise signaled that attempted voluntary manslaughter is not an offense under North Carolina law. Nonetheless, in *Coble*, the issue decided by our Supreme Court was whether attempted second-degree murder exists as a crime under North Carolina law. Indeed, while the Court commented on both voluntary manslaughter and second-degree murder, the Court did not in fact consider the issue of whether attempted voluntary manslaughter exists as a crime in North Carolina. See *Trustees of Rowan Tech. College v. Hammond Assocs.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (“Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.”). Accordingly, we will consider this issue for the first time.

Other states are split on whether attempted voluntary manslaughter is a cognizable offense. Generally, states requiring “intent” as an essential element of voluntary manslaughter have recognized the offense of attempted voluntary manslaughter. See *e.g.*, *State v. Robinson*, 643 A.2d 591, 596 (N.J. 1994) (“[A] finding of guilt of . . . manslaughter does not suggest that a defendant did not intend to kill . . . [but] indicates that the defendant, while acting with the intent to kill, did not act with the level of culpability necessary for a murder conviction . . .”); *Cox v. State*, 534 A.2d 1333, 1337 (Md. 1987) (A defendant who “suddenly attempts to perpetrate a homicide caused by heat of passion in response to legally adequate provocation” is subject to an “attempted voluntary manslaughter” conviction); *People v. Tucciarone*, 137 Cal. App. 3d 701 (1982) (“Voluntary manslaughter requires a showing of intent to kill but not malice aforethought.”); *Ex parte Buggs*, 644 S.W.2d 748, 750 (Tex. Crim. App. 1983) (“The intent to commit the substantive offense of murder remains an element of attempted voluntary manslaughter, but the attempt to cause death is generated by immediate influence of sudden passion caused by provocation from the intended victim.”).

On the other hand, states not requiring intent as an essential element of voluntary manslaughter have generally not recognized the

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offense of attempted voluntary manslaughter. *See e.g., Curry v. State*, 792 P.2d 396, 397 (Nev. 1990) (holding that general intent crimes, like voluntary manslaughter, are inconsistent with the specific intent required for a criminal attempt).

In North Carolina, intent is an essential element of voluntary manslaughter. *See e.g., State v. Wallace*, 309 N.C. 141, 149, 305 S.E.2d 548, 553 (1983) (holding that “voluntary manslaughter is an intentional killing without premeditation, deliberation or malice but done in the heat of passion suddenly aroused by adequate provocation”). Nevertheless, the State, relying on *Coble*, argues that voluntary manslaughter only requires a general intent, rather than the specific intent necessary for a criminal attempt. Accordingly, the State contends voluntary manslaughter does not have as an essential element the intention to kill and is, therefore, a general intent crime.

To illustrate the State’s argument, the “elements of the crime of ‘attempt’ consist of the following: (1) an intent by an individual to commit a crime; (2) an overt act committed by the individual calculated to bring about the crime; and (3) which falls short of the completed offense.” *State v. Gunnings*, 122 N.C. App. 294, 296, 468 S.E.2d 613, 614 (1996). The State contends that the element of “intentional killing” in voluntary manslaughter represents a general intent to commit the underlying act rather than a specific intent to commit the substantive offense. In voluntary manslaughter, specifically, the State argues, heat of passion negates the ability of the assailant to form a specific intent. *See Coble*, 351 N.C. at 451, 527 S.E.2d at 48 (“It is logically impossible, therefore, for a person to specifically intend to commit a form of murder which does not have, as an element, specific intent to kill.”)

However, an examination of the typical voluntary manslaughter situation reveals that heat of passion does not prevent the formation of a specific intent to kill *per se*; rather, such specific intent is either excused, justified, or negated by heat of passion arising under sudden and adequate provocation. Our Supreme Court has consistently held that a homicide committed in the moments after discovering a spouse in the act of infidelity merits a voluntary manslaughter instruction. *See e.g., State v. Ward*, 286 N.C. 304, 312-13, 210 S.E.2d 407, 413-14 (1974).

For instance, in the classic case, a wife comes home from work to find her husband in an adulterous relationship with another woman. The wife grabs a gun, and shoots in the direction of the mar-

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ital bed killing her husband. The State would contend, as they did at oral argument, that the wife only “intended” to commit the underlying act of firing the gun; and thus, the wife did not specifically intend to kill her husband. We find this logic unpersuasive and inconsistent with North Carolina’s definition of voluntary manslaughter. Indeed, the wife did “specifically intend” to kill, but that “specific intent” is legally negated by the heat of passion arising from sudden and adequate provocation. *See e.g., State v. Smith*, 26 N.C. App. 283, 285, 215 S.E. 2d 830, 832 (1975) (“When one spouse kills the other in a heat of passion engendered by the discovery of the deceased and a paramour in the very act of intercourse . . . the killing . . . is manslaughter.”).

We further note this interpretation comports with the “reasoning” behind why our statutory and case laws recognize a devolution from murder to manslaughter under certain circumstances. “The common law of passionate manslaughter originated in England, where the impassioned killer was treated more leniently than the calm killer because of the harshness of the then-mandatory death penalty for all cases of homicide.” *State v. Robinson*, 643 A.2d 591, 594 (N.J. 1994) (citations omitted). The reduction of murder to manslaughter was a recognition that one who kills in the “heat of passion” arising from reasonable provocation is less culpable than one who kills with the cold blood of premeditation and deliberation. As one court has noted, “a finding of guilt of passion/provocation manslaughter does not suggest that a defendant did not intend to kill. Rather, [it] indicates that the defendant, while acting with an intent to kill, did not act with the level of culpability necessary for a murder conviction, due to circumstances present at the time of the killing.” *Id.* at 596.

In accord, our Supreme Court has held that: “The doctrine of heat of passion is ‘meant to reduce murder to manslaughter when defendant kills without premeditation and without malice, but rather under the influence of the heat of passion suddenly aroused which renders the mind temporarily incapable of cool reflection.’” *State v. Camacho*, 337 N.C. 224, 233, 446 S.E.2d 8, 13 (1994) (quoting *State v. Forrest*, 321 N.C. 186, 193, 362 S.E.2d 252, 256 (1987) (citing *State v. Jones*, 299 N.C. 103, 261 S.E.2d 1 (1980))). Thus, our case law reveals that murder is reduced to manslaughter upon a showing that heat of passion, arising from sudden provocation, negated the element of malice and made the mind incapable of “cool” premeditation and deliberation. *State v. Forrest*, 321 N.C. 186, 192, 362 S.E.2d 252, 256 (1987) (“Our Court has held on numerous occasions” that a defendant who kills “in the ‘heat of passion,’ produced by adequate



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provocation sufficient to negate malice, is guilty of manslaughter rather than murder.” Moreover, “killing in the ‘heat of passion’ ” with “adequate provocation means a killing without premeditation [because passion] renders the mind incapable of cool reflection.’ ”) (citations omitted); *State v. Robbins*, 309 N.C. 771, 777, 309 S.E.2d 188, 191 (1983) (“One who kills a human being under the influence of sudden passion, produced by adequate provocation, sufficient to negate malice, is guilty of manslaughter.”). By definition, the *negation* of an element requires (1) the existence of that element, and (2) evidence to negate that element. Consequently, the elements of malice and premeditation play a vital role in any heat of passion manslaughter prosecution; however, the role is limited to negation rather than affirmation.

Accordingly, in North Carolina, heat of passion voluntary manslaughter is essentially a first-degree murder, where the defendant’s reason is temporarily suspended by legally adequate provocation. The specific intent to kill does exist in the mind of such a defendant; however, the defendant is only legally culpable for the general intent because the “specific intent” is not based on “cool reflection.” The specific intent is based on an “adequate provocation” that would cause an individual with an ordinary firmness of mind to become provoked, and which did, in fact, provoke the defendant to commit an act spawned by provocation rather than malice.

Therefore, because intent is an essential element of heat of passion voluntary manslaughter, there is no reasonable basis to conclude that the offense of attempted voluntary manslaughter does not exist under North Carolina law. This conclusion is in accordance with the position of many other states. More importantly, this position is in accordance with the equitable principles inherent in having degrees of murder, and recognizes that a defendant’s culpability for attempted murder, like a defendant’s culpability for murder, is relative to the circumstances surrounding the crime.<sup>2</sup>

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2. The equitable foundations of the degrees of culpability in murder further supports our position that the crime of attempted voluntary murder exists in North Carolina. For example, in *State v. Ward*, 286 N.C. 304, 312-13, 210 S.E.2d 407, 413-14 (1974), our Supreme Court pointed out that,

When one spouse kills the other in the heat of passion engendered by the discovery of the deceased and a paramour in the very act of intercourse, or under circumstances clearing indicating that the act had just been completed, or was “severely proximate,” and the killing follows immediately, it is manslaughter.

From this example in *Ward*, the defendant spouse would be convicted of voluntary manslaughter because her spouse died from the shooting. However, if her spouse did

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[3] Having concluded that North Carolina recognizes the crime of attempted voluntary manslaughter, we now examine the facts of this case to determine if the trial court erred by failing to instruct on that offense. As previously noted, in North Carolina, a “defendant is entitled to have a lesser included offense submitted to the jury only when there is evidence to support that lesser included offense.” *State v. Smith*, 351 N.C. 251, 267, 524 S.E.2d 28, 40 (2000). “The doctrine of heat of passion is ‘meant to reduce murder to manslaughter when defendant kills without premeditation and without malice, but rather under the influence of the heat of passion suddenly aroused which renders the mind temporarily incapable of cool reflection.’” *State v. Camacho*, 337 N.C. 224, 233, 446 S.E.2d 8, 13 (1994). Therefore, to support an instruction on attempted voluntary manslaughter, a defendant must produce “heat of passion” or “provocation” evidence negating the elements of malice, premeditation, or deliberation.

Our Supreme Court has developed a significant jurisprudence pertaining to sudden provocation and the discovery of illicit sexual relationships. This jurisprudence makes it eminently clear that the law will recognize factors of mitigation when a spouse discovers an adulterous relationship and proceeds to “slay the wrongdoer in the very act . . . . [However,] redress for past offences must be sought through the process of the Courts.” *State v. Harman*, 78 N.C. 515 (1878). In *State v. Ward*, our Supreme Court expounded on this jurisprudence by explaining that when one spouse kills the other in a heat of passion upon discovering the deceased in an adulterous act of intercourse, it is manslaughter.

However, . . . knowledge of past adultery between the two will not change the character of the homicide from murder to manslaughter. The law extends its indulgence to a transport of passion justly excited and to acts done before reason has time to subdue it; the law does not indulge revenge or malice, no matter how great the injury or grave the insult which first gave it origin.

*State v. Ward*, 286 N.C. 304, 312-13, 210 S.E.2d 407, 413-14 (1974) (citing *State v. John*, 30 N.C. 330 (1848); *State v. Samuel*, 48 N.C. 74 (1855); *State v. Avery*, 64 N.C. 608 (1870); *State v. Harman*, 78 N.C. 515 (1878)).

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not die from the shooting, then the result of the State's position that the crime of attempted voluntary manslaughter does not exist in North Carolina would mean that defendant spouse could only be convicted of the greater crime of attempted first-degree murder. Illogically, this would mean that the defendant spouse in *Ward* would face a lesser charge if she kills rather than wounds her spouse.

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In the case *sub judice*, the evidence did not support an instruction on the lesser-included offense of attempted voluntary manslaughter. The evidence, conforming substantially to defendant's confession, shows that defendant was lying in bed one night when told his step-brother, Roy Richardson, had been sleeping with his thirteen-year-old sister. Defendant got out of bed, dressed, and drove to his mother's house. Defendant entered the bedroom of his little sister and asked with whom she was intimate. Defendant's sister smiled, and did not answer the question. Thereafter, defendant retrieved a shotgun from his mother's property and drove to Richardson's house. Defendant arrived at Richardson's house, honked his horn repeatedly, and, while Richardson was standing on the porch, asked, "Did you f—k my little sister?" Richardson responded, "It's not any of your f—king business." Defendant then pointed the shotgun at Richardson and shot him in the buttocks. As Richardson attempted to pull himself up, defendant shot him a second time in the ankle. Richardson fell to the ground, and, when he got up and began to run away, defendant shot him a third time in the left thigh.

This evidence shows that defendant sought out Richardson. If defendant had discovered his thirteen-year-old sister and Richardson in an illicit act, then defendant might indeed be entitled to an attempted voluntary manslaughter instruction. Here, however, defendant learned of the alleged relationship through a conversation, left his house, confronted his sister, retrieved a shotgun, drove to his step-brother's house, confronted him, and then shot him three separate times. In essence, defendant did not act immediately under a heat of passion, but rather under an indulgence of revenge or malice. As stated in *Ward*, the law does not allow him to do so, "no matter how great the injury or grave the insult which first gave it origin". Under the facts of this case, defendant was not entitled to the benefit of an instruction on attempted voluntary manslaughter; accordingly, this assignment of error is without merit.

In sum, although we hold that the crime of attempted voluntary manslaughter does exist in North Carolina, we hold that defendant was not entitled to the instruction. Accordingly, we affirm the judgment of the Superior Court, Halifax County.

No Error.

Judges TIMMONS-GOODSON and THOMAS concur.

**PORTER v. AMERICAN CREDIT COUNSELORS CORP.**

[154 N.C. App. 292 (2002)]

KEVIN P. PORTER AND MACNIFISENSE, INC., PLAINTIFFS v. AMERICAN CREDIT COUNSELORS CORPORATION; JOHN A. WASKIN; CHERYL WASKIN; AND CREDIT MANAGEMENT SYSTEMS, INC., DEFENDANTS/CROSSCLAIM-PLAINTIFFS v. ALLIANCE CREDIT COUNSELING, INC., CROSSCLAIM-DEFENDANT

No. COA01-1358

(Filed 3 December 2002)

**1. Appeal and Error— appealability—partial summary judgment**

A partial summary judgment in a case that arose from the dissolution of a business was appealable where the order was final as to a breach of contract claim and the trial court certified the case for immediate appeal.

**2. Witnesses— dissolution of business—agreement for referee—expert appointed instead**

There was no error in a breach of contract action that arose from the dissolution of a business where the parties had entered into a settlement agreement which provided for the appointment of a referee or special master and the court appointed an expert under Rule 706. The parties consented to the court's order appointing its own expert and are bound by that agreement. The expert could be called to testify or have his deposition taken by any party.

**3. Contracts— dissolution of business—transfer of assets—compliance with agreement—factual issues**

There were material issues of fact in an action that arose from the dissolution of a business where the expert appointed by the court concluded that the information transfer provisions of the dissolution had been complied with, but there were conflicting affidavits. Since the parties and the trial court are not bound by the expert's conclusions, there were viable issues of fact.

Judge TYSON dissenting.

Appeal by defendants from judgment entered 15 February 2001 by Judge James E. Lanning in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 August 2002.

**PORTER v. AMERICAN CREDIT COUNSELORS CORP.**

[154 N.C. App. 292 (2002)]

*Carley & Rabon, PLLC, by Stephen R. Carley and Charles H. Rabon, Jr., for plaintiffs-appellees.*

*Wishart, Norris, Henninger & Pittman, P.A., by Robert J. Wishart, David C. Boggs, June K. Allison, and Pamela S. Duffy, for defendants-appellants.*

THOMAS, Judge.

Plaintiff Kevin P. Porter and defendants entered into a settlement agreement as part of the dissolution of their business relationship. The agreement included a stipulation whereby they bound themselves to the determination of a “referee or special master” if a dispute developed regarding the fulfillment of its terms.

A dispute eventually arose. Defendants, claiming Porter did not fully transfer certain data, refused to make a payment to Porter which would otherwise be due. Porter and his company, plaintiff Macnifisense, Inc., filed suit, and moved for the appointment of a referee. The trial court then entered an order for “Appointment of Expert,” with the parties subsequently agreeing for David Asbury to be the expert. After his evaluation and analysis, Asbury submitted a report to the court stating the data had been fully and properly transferred to defendants.

Based on “the pleadings, matters of record in the file and applicable law,” plaintiffs moved for summary judgment.

On 15 February 2001, the trial court granted partial summary judgment in favor of plaintiffs on the issue of whether they had breached the agreement. Defendants American Credit Counselors Corporation (ACCC), John A. Waskin (Waskin), Cheryl Waskin, and Credit Management Systems, Inc. (CMS), appeal. Crossclaim-defendant Alliance Credit Counseling, Inc., allegedly a company developed by Porter that competes with ACCC and CMS, is not a party to this appeal.

The primary basis of defendants’ appeal is that there are genuine issues of material fact. Further, they contend, the trial court erred by accepting the report of Asbury, which was not verified, without defendants having the opportunity to depose or cross-examine him. Plaintiffs counter that the settlement agreement provided for Asbury’s report to be conclusive.

Based on the reasons herein, we reverse and remand.

**PORTER v. AMERICAN CREDIT COUNSELORS CORP.**

[154 N.C. App. 292 (2002)]

Porter and Waskin were co-owners and business partners of CMS. ACCC is a nonprofit corporation that provides credit counseling, debt management plans, and related services. The services of ACCC are highly automated and dependent on electronic document and data management. Through a written service agreement, CMS supplied ACCC with necessary data management. Porter was the computer, software, and database expert of CMS. His copyrighted software, known as "Star Wars," powered the computer-related part of ACCC's business. Waskin's expertise was in the area of credit counseling and management.

The business relationship between Porter and Waskin deteriorated, however, with the parties entering into a settlement agreement dated 6 April 2000. The agreement provided that ACCC would pay Porter \$300,000 for his stock in CMS with Porter retaining ownership in Star Wars. Defendants were prohibited from using Star Wars after the period during which data would be transferred.

The \$300,000 payment was to be made in two equal installments contingent on the transfer of data to defendants. The contingencies are set forth in paragraphs 1(a) and (b) of the settlement agreement. The first condition required Porter to deliver the data in a certain format:

(a) [Porter shall deliver] to ACCC . . . an alpha numeric text file of all client-related data, field delineated, using the same field and record delineation as was used by Amerix when Amerix transferred similar data to CMS. Additionally, the data provided will not be encrypted nor randomized. The data will be provided without skipping fields or tables. Upon a determination by Mr. Waskin that condition 1(a) has been fulfilled Waskin will authorize the release of \$150,000.00 to Porter[.]

Porter transferred the files on 7 April 2000 and was paid the first installment of \$150,000. The second installment would be paid when:

(b) ACCC has verified that the data has been provided in the form promised by Porter and that the file is complete using spot checks of records and total record count. Upon determination that condition (b) above has been fulfilled, [defendants' lawyers] will be instructed to pay the balance of the settlement proceeds to Porter.

Defendants refused to pay Porter the remaining \$150,000. In his affidavit, Waskin contends that the first \$150,000 was paid to insure

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Porter's continued cooperation, but that the requirements of the settlement agreement had not been met.

The settlement agreement further provided that, in the event of a dispute, a court-appointed "referee or special master" would determine whether the conditions had been met:

2. Porter will arrive at the ACCC office on Friday, April 7th, 2000 between 8:00 and 9:00am EDT and will work with the technical people designated by ACCC until the data is satisfactorily loaded into ACCC's computer system. Waskin will make a determination about the fulfillment of condition (b) by Wednesday April 12th, 2000 at noon. *In the event Waskin determines that the conditions have not been met and Porter disagrees any party may apply to a Superior Court Judge in Mecklenburg County North Carolina for the appointment of a referee or special master whose decision will be final.* In the event a referee or special master is appointed the losing party will pay the winners reasonable attorney's fees in an amount to be determined by a Judge.

(Emphasis added).

After he did not receive the second payment of \$150,000, Porter filed a complaint containing motions for the appointment of a referee to determine whether the data files had been properly transferred and for a preliminary injunction. In opposition to the motions, defendants filed the affidavit of Robert Ducker, an expert in software operations and conversion hired by Waskin to complete the data conversion from Porter's operating system to a Windows-based operating system. Ducker claimed the "data provided by Mr. Porter was not in the format he promised." Additionally, Waskin filed his own affidavit disputing Porter's assertion that he had performed his obligations under the settlement agreement.

On 21 June 2000, the trial court issued an "Order for Appointment of Expert and for Preliminary Injunction." The order reads in pertinent part:

After considering the briefs and affidavits submitted by both parties, the pleadings and other matters of record, the arguments and representations of counsel and with the agreement of the parties the Court rules as follows:

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IT IS ORDERED that:

1. The Court shall appoint its own expert pursuant to North Carolina Rule of Evidence 709 [sic] rather than a Rule 53 referee, to determine and advise the Court whether the Data Files at issue in this case were properly transferred by plaintiffs to ACCC, as required by the Settlement Agreement executed by the parties on April 6, 2000.

We initially note that it is clear from the context of the order that the trial court intended to reference Rule 706, and not Rule 709, which does not exist.

The order further provided that the parties were to agree on the appointed expert or submit separate recommendations. It also allowed the parties to retract their consent: "Any party, for any reason, may withdraw his consent and seek a ruling by placing the matter on for hearing before the undersigned and providing proper notice of the same."

The parties consented to Asbury as the court-appointed expert. The trial court entered an additional order appointing Asbury, requiring him to make a determination and advise the court in a written report whether Porter had complied with the settlement agreement.

In his written report to the court filed 20 July 2000 Asbury stated:

As a result of my work, I conclude that Mr. Porter transferred to ACCC an alpha numeric text file of all client-related data field delineated, without skipping fields or tables, that the transfer was complete and the data was not encrypted or randomized.

Defendants, however, then filed an amended answer, counterclaim, and third-party complaint. On 20 November 2000, plaintiffs filed a motion for summary judgment. In opposition to the motion, defendants/crossclaim plaintiffs, filed the affidavit of Ronald McFarland, Ph.D. Porter filed a second affidavit in which he asserted that since the Star Wars System was provided to CMS in a configuration that permitted data to be deleted or modified, "it is highly unlikely that any third-party review of the data conducted subsequently to that of David Asbury can be considered reliable." He further stated that due to the system's unique and complex structure, Asbury's review was by necessity conducted with the assistance of Porter, Waskin, and designated representatives. Without their assistance, a third-party could



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not competently review the system. On 29 December 2000, seven days before the hearing on summary judgment, defendants filed a Notice of Deposition of Asbury. The trial court did not continue the matter for defendants to depose Asbury and granted partial summary judgment to plaintiffs. Defendants appeal.

**[1]** At the outset, we note that because a grant of partial summary judgment does not entirely dispose of the case, it is an interlocutory order which is ordinarily not appealable. *Liggett Group v. Sunas*, 113 N.C. App. 19, 23, 437 S.E.2d 674, 677 (1993). The order here granted partial summary judgment in favor of plaintiffs.

There is, however, an exception applicable here that permits appellate review of an interlocutory order. If the order or judgment is final as to some but not all of the claims or parties, and the trial court certifies the case for immediate appeal pursuant to N.C. Gen. Stat. § 1A-1, Rule 54(b) (2001), an immediate appeal may lie. *Van Engen v. Que Scientific Inc.*, 151 N.C. App. 683, 686, 567 S.E.2d 179, 182 (2002). The order here was final as to the breach of contract claim and included the trial court's certification pursuant to Rule 54(b). Therefore, it is appealable and properly before us.

**[2]** By their first and second assignments of error, defendants contend the trial court erred in granting summary judgment because: (1) defendants had not been afforded an opportunity to depose or examine Asbury; and (2) genuine issues of material fact were presented. They argue that the trial court did not appoint a "referee or special referee" as contemplated by the parties in the settlement agreement but rather an expert under Rule 706 of the North Carolina Rules of Evidence. We agree.

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.R. Civ. P. 56(c). The party moving for summary judgment has the burden of establishing that an essential element of the claim does not exist, or that the non-moving party cannot produce evidence to support an essential element of the claim. *Evans v. Appert*, 91 N.C. App. 362, 365, 372 S.E.2d 94, 96, *disc. review denied*, 323 N.C. 623, 374 S.E.2d 584 (1988). "The record is reviewed in the light most favorable to the non-movant, and all inferences will be drawn against the movant." *Allstate Ins. Co. v. Oxendine*, 149 N.C. App. 466, 468, 560 S.E.2d 858, 860 (2002).

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Asbury was appointed as a court expert pursuant to Rule 706, which provides in pertinent part:

A witness so appointed shall advise the parties of his findings, if any; his deposition may be taken by any party; and he may be called to testify by the court or any party. He shall be subject to cross-examination by each party, including a party calling him as a witness.

N.C.R. Evid. 706(a).

Absent indication from the parties to the contrary, we give the words of their agreement their ordinary and common meaning. *Briggs v. Mills, Inc.*, 251 N.C. 642, 644, 111 S.E.2d 841, 843 (1960). The original agreement here provided for a court-appointed “referee” or “special master.” Subsequently, however, the parties consented to the court’s order appointing “its own expert.” The parties are bound by this substitute agreement. Had the court order contemplated appointing a referee or special master it would have said so; it would not have used the words “its own expert” and “pursuant to North Carolina Rule of Evidence 709 [sic].”

Both parties are bound by their agreement to have a Rule 706 expert appointed and, in doing so, both risked the possibility of further litigation initiated by the party opposing Asbury’s decision. Since Asbury was not a referee or special master as contemplated by the original settlement agreement, his report was not conclusive. As with any other witness, he could be “called to testify by the court or any party,” or have “his deposition . . . taken by any party.” N.C.R. Evid. 706(a).

**[3]** Moreover, the affidavits submitted by defendants set forth factual issues of whether Porter complied with the settlement agreement. Ducker’s affidavit reads:

The data supplied by Mr. Porter was not complete when supplied and did not contain the requirement of all client related data.

. . .

The data was not fully field delineated. In fact, a substantial delay in my conversion included located a non-field delineated receipts file.

. . .

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The data provided by Mr. Porter was not in the format promised. It was encrypted and randomized such that data conversion was difficult and even, at times, impossible.

McFarland's affidavit states:

As a result of my examination of the data files, I have discovered that not all files were fully field delineated. This lack of adherence to conversion specifications would cause errors in converting data from the CMS system to the CreditMaster system if this data error were not accommodated for in the data conversion programs.

Asbury, meanwhile, sent a report to the trial court but was not deposed and did not testify. Porter submitted two of his own affidavits and a verified complaint. Since the parties and the trial court are not bound by Asbury's conclusions, there are viable issues of fact. Accordingly, we find merit to defendants' assignment of error and reverse the trial court's order.

In their second assignment of error, defendants contend the trial court erred by not granting their motion to continue the summary judgment hearing. Because of our holding as to the first assignment of error, we do not address defendants' argument.

REVERSED AND REMANDED.

Judge MARTIN concurs.

Judge TYSON dissents.

TYSON, Judge dissenting.

I respectfully dissent from the majority's opinion which reverses the trial court's grant of partial summary judgment in favor of plaintiffs.

I. Finality of the Decision

Plaintiffs and defendants resolved their dispute through a settlement and release agreement ("settlement agreement") that specified:

In the event Waskin determines that the conditions have not been met and Porter disagrees any party may apply to a Superior Court Judge in Mecklenburg County North Carolina for the appointment of a referee or special master whose decision will be final.

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Porter petitioned the court to appoint a referee pursuant to the settlement agreement to determine whether the Data Files had been properly transferred. As provided in the settlement agreement, the referee's decision would be final and binding on the parties. On 21 June 2000, the parties consented to an order which stated: "The Court shall appoint its own expert pursuant to North Carolina Rule of Evidence 709 [sic] rather than a Rule 53 referee, *to determine* and advise the Court whether the Data Files at issue in this case were properly transferred by plaintiffs to ACCC, as required by the Settlement Agreement executed by the parties on April 6, 2000." (emphasis added). The majority's opinion concludes that by consenting to this order, the parties waived the contractual right to have the appointed official's determination be final. I do not read the settlement agreement and the order in this manner.

The order clearly states that an expert will be appointed by the trial court, presumably pursuant to Rule 706 of the North Carolina Rules of Evidence and sets forth the issues and duties of the expert:

[The expert's] duties shall include providing a written notification to the Court indicating (1) whether or not plaintiff Kevin P. Porter ("Mr. Porter") complied with the provisions of a settlement agreement between the parties . . . , by transferring an alpha numeric text file of all client-related data, without skipping fields or tables, to American Credit Counselors Corporation ("ACCC"); (2) whether the transfer was complete by spot checking specific records and comparing total record count of the data transferred with the original file; and (3) whether the data was encrypted or randomized.

The language of the settlement agreement is unambiguous that the determination of the "referee or special master" be final. The parties consented to amending the settlement agreement by substituting an "expert" with specific questions the expert was required to "determine" for a "referee" with no specific duties. The settlement agreement's provision for finality of the expert's decision was not altered by the consent orders.

Defendants do not contend that the expert exceeded his duties or failed to perform his duties required by the trial court's appointing order. Defendants question the determinations the expert reached. As the parties had previously agreed that the decision would be final, the trial court did not err in granting partial summary judgment to plaintiffs. I would overrule this assignment of error.

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**II. Continuance of Summary Judgment Hearing**

As I would affirm the trial court's implicit ruling that the determination of the expert was final, I address defendants' other assignment of error: the trial court's failure to continue the hearing on the motion for summary judgment.

Presuming the substitution of the expert for the referee was not final, defendants waived the right to contest the determinations of the expert by failing to timely object to or contest his decision. The consent orders providing for and appointing an expert stated: "Any party, for any reason, may withdraw his consent and seek a ruling by placing the matter on for hearing before the undersigned and providing proper notice of the same[.]" and "[a]ny party that wishes to expand, narrow or clarify the authority of the court-appointed expert shall apply to the undersigned for such relief by filing a written motion and providing notice as required by the North Carolina Rules of Civil Procedure." Defendants did neither of these. The expert answered definitively each question contained in the trial court's appointing consent order and filed his report on 13 July 2000. Defendants never objected to the report and delayed for nearly six months from the filing of the report before giving notice of his deposition.

On 20 November 2000, plaintiffs moved for summary judgment and filed a notice of hearing for 5 January 2001, more than six weeks prior notice. On Friday, 29 December 2000, defendants gave notice to depose the expert on 25 January 2001. The hearing on the motion for partial summary judgment was held on 5 January 2001 as previously scheduled. Defendants delayed for over five weeks from plaintiffs' notice of hearing on summary judgment and delayed until less than one week prior to the hearing itself to give notice of the deposition. Defendant filed no motion to continue the summary judgment hearing until after the deposition. Defendants waived the right to depose or to contest the determination of the expert.

While Rule 706 of the Rules of Evidence allows for an expert to be deposed, defendants delayed for six months after the expert report was filed, over five weeks after the notice of the summary judgment hearing, and less than one week before the scheduled hearing to notice the expert's deposition. Defendants waived their right to depose the expert they consented to and failed to move for a continuance.

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**III. Conclusion**

The defendants correctly note that the decision to continue a hearing on a motion for summary judgment lies within the sound discretion of the trial court. *Berkeley Federal Savings and Loan Assn v. Terra Del Sol*, 111 N.C. App. 692, 710, 433 S.E.2d 449, 458 (1993), *disc. rev. denied*, 335 N.C. 552, 441 S.E.2d 110 (1994). The record does not reflect that defendants moved for a continuance of the summary judgment hearing. Defendant has made no showing that the trial court abused its discretion in denying a continuance.

I would hold that the trial court did not abuse its discretion in failing to continue the summary judgment hearing. I would overrule defendants' assignments of error and affirm the judgment of the trial court. I respectfully dissent.



STATE OF NORTH CAROLINA v. ALAN BOYD, JR., DEFENDANT

No. COA01-1155

(Filed 3 December 2002)

**1. Drugs— cocaine—constructive possession in car**

There was sufficient evidence of constructive possession of cocaine where the cocaine was found under the driver's seat of a car; defendant was riding in the front passenger seat; the only other person in the car testified that defendant was the only person who could have put the drugs where they were found; defendant behaved suspiciously when stopped by the police, reaching under the seat, moving about, and making it difficult for the police to search him; and, at one point, defendant stood alone by the passenger door.

**2. Drugs— constructive possession—no acting in concert instruction**

The State could rely on constructive possession in a prosecution for trafficking in cocaine by possession where the cocaine was discovered under the driver's seat of a car in which defendant was a passenger and the court did not instruct on acting in concert.

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**3. Firearms— constructive possession by felon—evidence sufficient**

The evidence was sufficient to show that defendant, a felon, constructively possessed a firearm where the gun was found under the front passenger seat of a car, where defendant was sitting; the only other person in the car was the driver; the driver and defendant did not have equal access to the gun; officers saw defendant reaching under the seat; the driver did not own the gun; and the gun had been seen at defendant's mother's house.

**4. Constitutional Law— double jeopardy—possession of cocaine with intent to sell—trafficking by possession**

Convictions for possession of cocaine with intent to sell and distribute and trafficking in the same cocaine by possession did not violate double jeopardy.

Appeal by defendant from judgments entered 23 May 2001 by Judge Claude S. Sitton in Gaston County Superior Court. Heard in the Court of Appeals 12 June 2002.

*Attorney General Roy Cooper, by Special Deputy Attorney General John R. Corne, and Assistant Attorney General M. Janette Soles, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Jarvis John Edgerton, IV, for defendant-appellant.*

HUDSON, Judge.

Defendant appeals his convictions for trafficking in cocaine by transport, possession of a firearm by a felon, possession with intent to sell and deliver cocaine, and trafficking in cocaine by possession. We find no error.

The evidence presented at trial tended to show the following: On 25 April 1998, Ledell Cole ("Mr. Cole"), a relative of the defendant, picked the defendant up and drove him to Sharon, South Carolina, in Mr. Cole's 1973 Chevy Impala. The two men went to church, then to defendant's mother's home, and then returned to Gastonia, North Carolina. On the morning of 28 April 1998, Mr. Cole drove the defendant to Charlotte, and dropped him (defendant) at the motel where defendant lived and worked. Mr. Cole returned to pick up defendant that evening. While he was waiting for defendant to finish his work,

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Mr. Cole left the car and walked up the hill some distance to speak with another man. When Mr. Cole returned to the car, defendant was standing at the car with the door open. The two men got into the car and Mr. Cole drove to Gastonia with the defendant in the front passenger seat.

At approximately 9:41 that evening, Gastonia Police Officer Mike McKenzie observed Mr. Cole's Impala heading west on Long Avenue in that city and followed it. Officer McKenzie saw the car switch from the left lane to the center lane, cutting off and almost hitting a car in the center lane. Officer McKenzie then activated his blue lights and stopped the car.

Officer McKenzie testified:

As I was asking Mr. Cole for his license and registration, I noticed Mr. Boyd, the passenger, was nervous, acting unusually nervous. He had his hands under his legs and was reaching toward the end of the seat area in front of him. I asked him several times to put his hands where I could see them. One time he did raise them up where I could see them and then shortly thereafter he put them back in the same view as if he was trying to reach for something under the seat.

After the second time, Officer McKenzie went over to the defendant's side of the car. "I ordered Mr. Boyd to step out of the car. As he was stepping out of the car he was reaching with his left hand up underneath the passenger area of the seat. At that time I pulled my weapon out and ordered him out of the car." Officer McKenzie then radioed for backup.

Officer McKenzie searched the defendant for weapons and found a switchblade knife concealed in the defendant's right front pocket. The patrol car's videotape of the stop shows Mr. Cole, while still in the car, dropping out of the view of the camera and then rising back up into view. After backup officers arrived, they again noticed Mr. Cole dropping out of view and ordered him out of the car. Upon searching the car, the officers found a plastic bag containing cocaine under the driver's seat and a loaded .45 caliber handgun under the passenger's seat. They placed both men under arrest.

Mr. Cole pled guilty to attempted trafficking in cocaine, possession with intent to sell and deliver cocaine, maintaining a place for the purpose of keeping, selling or manufacturing cocaine, and carrying a concealed weapon. In return for his guilty pleas and his agree-



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ing to testify against the defendant, Mr. Cole received a suspended sentence.

On 2 November 1998, the grand jury returned indictments charging the defendant with carrying a concealed weapon, trafficking in cocaine by transport, possession of a firearm by a felon, possession with intent to sell and deliver cocaine, and trafficking in cocaine by possession. The defendant pled not guilty, but on 23 May 2001 a jury convicted defendant on all charges. The court imposed a consolidated sentence of imprisonment for a minimum of 96 months and a maximum of 116 months. Defendant appeals.

The defendant raised eight assignments of error in the Record on Appeal, but in his brief he brings forward only numbers one and two. In his argument, defendant first contends that the trial court erred in not dismissing all charges, on the grounds that the evidence was insufficient as a matter of law to support a conviction on any of the offenses charged. However, defendant offers no argument concerning the conviction for carrying a concealed weapon—the switchblade knife found in his pocket. Thus, he has abandoned all of his issues as to that conviction. *See* N.C. R. App. Proc. 28(b)(5) (2001) (“Assignments of error not set out in the appellant’s brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned.”).

[1] “In ruling on a motion to dismiss, the issue before the trial court is whether substantial evidence of each element of the offense charged has been presented, and that defendant was the perpetrator of the offense. If the trial court so finds, the motion is properly denied.” *State v. Carr*, 122 N.C. App. 369, 371-72, 470 S.E.2d 70, 72 (1996) (citations omitted). “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585 (1994) (citations and quotation marks omitted). “[I]f the trial court determines that a reasonable inference of the defendant’s guilt may be drawn from the evidence, it must deny the defendant’s motion and send the case to the jury even though the evidence may also support reasonable inferences of the defendant’s innocence.” *State v. Matias*, 354 N.C. 549, 551, 556 S.E.2d 269, 270 (2001) (citation and quotation marks omitted). Therefore, we analyze the evidence to determine if, in the light most favorable to the State, the evidence was substantial enough on all necessary elements for the court to submit the charges to the jury.

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Defendant contends that the evidence presented by the State was insufficient as a matter of law to prove that he possessed cocaine, a necessary element of the drug charges against him. *See* N.C. Gen. Stat. 90-95(a)(1) (2001) (possession with intent to sell or deliver cocaine); N.C. Gen. Stat. 90-95(h)(3) (2001) (trafficking in cocaine by transportation or possession). "Possession of controlled substances may be either actual or constructive." *Carr*, 122 N.C. App. at 372, 470 S.E.2d at 73. Here, the State relied upon the doctrine of constructive possession because there was no evidence presented that the defendant actually possessed the drugs in question.

"Evidence of constructive possession is sufficient to support a conviction if it would allow a reasonable mind to conclude that defendant had the intent and capability to exercise control and dominion over the controlled substance." *State v. Matias*, 143 N.C. App. 445, 448, 550 S.E.2d 1, 3 (1988), *aff'd*, 354 N.C. 549, 556 S.E.2d 269 (2001). "Where contraband is found on premises under the control of the defendant, that in itself is sufficient to go to the jury on the question of constructive possession." *State v. Peek*, 89 N.C. App. 123, 126, 365 S.E.2d 320, 322 (1988). "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." *State v. Davis*, 325 N.C. 693, 697, 386 S.E.2d 187, 190 (1989).

This Court has noted that "the mere presence of the defendant in an automobile in which illicit drugs are found does not, without more, constitute sufficient proof of his possession of such drugs." *State v. Weems*, 31 N.C. App. 569, 571, 230 S.E.2d 193, 194 (1976) (citation and quotation marks omitted). In *Weems*, the defendant was in the passenger seat of a car stopped by the police. Packets of heroin were found hidden in the car in three locations, two of which were in close proximity to the defendant. This Court found "no evidence of any circumstance connecting the defendant to the drugs in any manner whatsoever other than the showing of his mere presence for a brief period in the car as a passenger." *Id.* at 571, 230 S.E.2d at 195.

In *Matias*, a package containing marijuana and cocaine was found in the rear seat of a vehicle with several passengers. *See Matias*, 354 N.C. at 551, 556 S.E.2d at 270. The arresting officer testified that in his opinion, the defendant was the only person in the vehicle who could have placed the drugs in the location where they were discovered. *See id.* at 552, 556 S.E.2d at 271. The evidence further

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showed that the defendant was in the vehicle for approximately twenty minutes and that there was a noticeable odor of marijuana in the vehicle. *See id.* Viewed in the light most favorable to the State, the Court held that there were sufficient incriminating circumstances to support an inference of defendant's constructive possession of the drugs. *See id.* at 553, 556 S.E.2d at 271.

Here, the State presented evidence through the testimony of Ledell Cole that the defendant was the only person who could have placed the drugs where they were found. In *Matias*, there were four people in the car where the drugs were found, but here only Mr. Cole and the defendant were present. The evidence also showed that when Mr. Cole walked back to the car, defendant was standing alone by the open passenger door. The defendant also behaved suspiciously upon being stopped by the police, reaching under the seat of the car, moving about, and making it difficult for the police to search him. Viewing the evidence in the light most favorable to the State, we hold that the evidence was sufficient to support an inference that defendant constructively possessed the cocaine.

**[2]** The defendant argues further that in the absence of an instruction on acting in concert on the charge of trafficking in cocaine by transportation, the State was required to prove actual possession. We disagree. Although the trial court did not specifically explain the application of the law to the evidence presented in this case, the court was not required to do so. *See* N.C. Gen. Stat. 15A-1232 (2001). Defendant correctly states that "in the absence of an acting in concert instruction, the State must prove that the defendant committed each element of the offense." *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996). The element at issue, however, is transportation. "[O]nly a person in the actual or constructive possession of [contraband], absent conspiracy or aiding and abetting, could be guilty of the unlawful transportation thereof." *State v. Wells*, 259 N.C. 173, 177, 130 S.E.2d 299, 303 (1963) (emphasis added). We find no merit to the argument that in the absence of an instruction on acting in concert, the State could not rely upon constructive possession to prove the element of transportation.

**[3]** Similarly, defendant argues that the evidence was insufficient to show that he constructively possessed a firearm, a necessary element of the charge of possession of a firearm by a felon. *See* N.C. Gen. Stat. 14-415.1 (2001). Possession of a firearm may also be actual or constructive. *See State v. Alston*, 131 N.C. App. 514, 519, 508 S.E.2d 315, 318 (1998). "A person has constructive possession of an item when

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the item is not in his physical custody, but he nonetheless has the power and intent to control its disposition.” *Id.*

Upon direct examination, Mr. Cole testified:

Q. Mr. Cole, I am showing you State’s Exhibit 7 which is a gun here. Have you ever seen this gun before?

A. Yes.

Q. Where have you seen this gun before?

A. I saw it down there at his mama’s house.

Q. You saw this at whose mother’s house?

A. Alan Boyd. I saw it down there at his mama’s house.

Q. You have seen that gun at the Defendant’s mother’s house?

A. That’s right.

Q. Was that before the two of you were arrested?

A. Yes, sir.

Q. How long before you two were arrested did you see that gun down at the Defendant’s house, at his mother’s house?

A. I saw it down there Sunday. He might have put it in my car then. I didn’t know.

...

Q. Did you put the gun in your car?

A. No, sir.

Q. Could anybody else have put the gun in your car?

A. No, sir. Nobody else hadn’t been in that car.

Q. Just you and the Defendant?

A. Me and the Defendant.

Officer Mike McKenzie testified, “I ordered [the defendant] to step out of the car. As he was stepping out of the car he was reaching with his left hand up underneath the passenger area of the seat.” Officer McKenzie then radioed for backup. Officer Shane Caughey was one of the responding officers who subsequently searched the vehicle. He testified on direct examination:

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Q. I show you what has been marked for identification purposes as State's Exhibit Number 7. Do you recognize that?

A. Yes, sir.

Q. And where do you recognize that from?

A. It was the .45 caliber handgun that I took out from under the passenger side of the seat of Mr. Cole's car.

...

Q. Now you say that you located that gun underneath the passenger seat. Where under the passenger seat? How far back was it and how far left to right was it?

A. It was midway up under the seat midway in the center of the seat. I've got note[s] about it being midway and completely out of view.

Q. So it would have been directly under the center of the passenger seat?

A. Directly under the center of the seat midway back between the front floorboard and the rear floorboard.

In *Alston*, this Court found insufficient evidence to support an inference of constructive possession of a firearm when the evidence showed that the gun was found lying on the console between the driver and the defendant, the driver and the defendant had equal access to the gun, and the gun was purchased and owned by the driver. See *Alston*, 131 N.C. App. at 519, 508 S.E.2d at 319. Here, the evidence tended to show that the driver and the defendant did not have equal access to the gun, which was under defendant's seat, and officers saw defendant reaching under that seat. The evidence also showed that the driver did not own the gun, and that the gun was seen earlier at the defendant's mother's house. We conclude that this evidence was sufficient to support an inference that defendant constructively possessed the firearm, and that the court did not err by refusing to dismiss the charge of possession of a firearm by a felon.

[4] Defendant next contends that the trial court's entry of judgment on the separate convictions of trafficking in cocaine by possession and possession of cocaine with intent to sell and deliver violate his constitutional rights against double jeopardy. See U.S. Const. Amend. V, U.S. Const. Amend. XIV, § 1. In support of his position, defendant

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cites this Court's decision in *State v. Sanderson*, 60 N.C. App. 604, 300 S.E.2d 9 (1983), *disc. review denied*, 308 N.C. 679, 304 S.E.2d 759 (1983). In *Sanderson*, this court found that the constitutional guarantee against double jeopardy protects a defendant from multiple punishments for the same offense. *See id.* at 610, 300 S.E.2d at 14. To determine if a single act constitutes one or two offenses, "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Id.* (citing *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 309 (1932)).

Building upon the *Sanderson* decision and on subsequent decisions, this Court decided in *State v. Mebane* that the principle of double jeopardy barred convictions for possession with intent to sell and deliver cocaine under N.C. Gen. Stat. 90-95(a)(1) and trafficking in the same cocaine by possession under N.C. Gen. Stat. 90-95(h)(3)—the same convictions here. *See State v. Mebane*, 101 N.C. App. 119, 124, 398 S.E.2d 672, 675 (1990); *see also State v. McGill*, 296 N.C. 564, 568, 251 S.E.2d 616, 619 (1979).

After *Sanderson*, the North Carolina Supreme Court held that the *Blockburger* test is "neither binding on state courts nor conclusive." *State v. Gardner*, 315 N.C. 444, 455, 340 S.E.2d 701, 709 (1986). Further, "when a legislature clearly expresses its intent to proscribe and punish exactly the same conduct under two separate statutes, a trial court in a single trial may impose cumulative punishments under the statutes." *Id.* at 453, 340 S.E.2d at 708 (quoting *Missouri v. Hunter*, 459 U.S. 359, 74 L. Ed. 2d. 535 (1983)). The *Mebane* Court was therefore obliged to determine what the legislature intended when it passed separate statutes against possession with intent to sell and deliver and trafficking by possession. The Court noted that both statutes were designed to deter distribution of cocaine, with the only difference being the amount distributed. *See Mebane*, 101 N.C. App. at 124, 398 S.E.2d at 678. Therefore, the Court determined that "the legislature did not intend that a defendant be punished for both of the statutory crimes in issue." *Id.*

However, our Supreme Court directly overruled *Mebane* in *State v. Pipkins*, 337 N.C. 431, 435, 446 S.E.2d 360, 363 (1994). The majority of a divided Court found that "[a]n examination of the subject, language and history of the statutes indicates that the legislature intended that these offenses be punished separately, even where the

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offenses are based upon the same conduct.” *Id.* at 434, 446 S.E.2d at 362. Thus, in light of *Pipkins*, we are bound to uphold the defendant’s convictions for possession with intent to sell and distribute cocaine and trafficking in the same cocaine by possession.

No error.

Judges WYNN and CAMPBELL concur.

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RICKY B. HANDY, EMPLOYEE, PLAINTIFF v. PPG INDUSTRIES, EMPLOYER, SELF-INSURED  
AND KEY RISK MANAGEMENT SERVICES, SERVICING AGENT, DEFENDANTS

No. COA01-1447

(Filed 3 December 2002)

**1. Workers’ Compensation— basis for recovery—injury by accident—occupational disease—election of theory not required**

The Industrial Commission did not err in a workers’ compensation case by determining a deputy commissioner did not violate defendants’ due process or equal protection rights by allegedly becoming an advocate for plaintiff and abandoning her role as an impartial factfinder and decisionmaker when she changed plaintiff employee’s theory of recovery ex mero motu from injury by accident to occupational disease, because: (1) there is nothing in the record on appeal to indicate plaintiff elected at any time to proceed solely on the theory of injury by accident to the exclusion of an occupational disease theory; (2) defendants failed to identify any statute or Industrial Commission rule requiring a workers’ compensation claimant to choose between injury by accident and occupational disease as a basis for recovery; and (3) plaintiff was not required to make an election of theories.

**2. Workers’ Compensation— deputy commissioner ordering deposition of witness—due process**

The Industrial Commission did not err in a workers’ compensation case by determining the deputy commissioner did not violate defendants’ due process or equal protection rights by ordering ex mero motu that plaintiff’s physician who was not

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present at the hearing be asked questions, because: (1) the deputy commissioner originally intended for written questions to be submitted to the doctor and it was defendants who then requested a deposition; and (2) the subsequent ordering of the doctor's deposition did not indicate a disqualifying personal bias on her part or deprive defendants of an impartial decisionmaker in violation of due process.

**3. Workers' Compensation— deputy commissioner's formulation of questions and hypothetical—due process**

The Industrial Commission did not err in a workers' compensation case by determining the deputy commissioner did not violate defendants' due process rights by formulating questions and an essential factual hypothetical to be submitted to plaintiff's physician at a deposition, because: (1) the deputy commissioner, who was not present at the deposition, did not comment on the strength of the evidence or the credibility of the witness; (2) the fact that the physician's answers were dispositive of an essential issue does not constitute error; and (3) the questions presented by the deputy commissioner were neutral which could benefit either plaintiff or defendants depending upon the answer.

**4. Workers' Compensation— deputy commissioner's formulation of questions and hypothetical—equal protection**

The Industrial Commission did not err in a workers' compensation case by determining the deputy commissioner did not violate defendants' equal protection rights by allegedly assisting plaintiff employee with his claim in a compensation hearing in violation of N.C.G.S. § 97-79(f) based on the deputy commissioner's action in preparing and submitting questions to plaintiff's physician, because: (1) the questions did not convey or express an opinion with respect to an essential element of plaintiff's claim or the credibility of plaintiff's doctor as a witness; and (2) the questions did not indicate a disqualifying personal bias or predisposition on the part of the deputy commissioner when the questions were neutral and could have benefitted either party.

Appeal by defendants from opinion and award entered 26 June 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 17 September 2002.



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*No brief for pro se plaintiff-appellee.*

*Womble Carlyle Sandridge & Rice, PLLC, by Phillip Mohr, for defendant-appellants.*

THOMAS, Judge.

Defendants, PPG Industries and Key Risk Management Services, appeal from an opinion and award of the North Carolina Industrial Commission in favor of plaintiff, Ricky B. Handy.

They contend the Commission erred in determining the Deputy Commissioner did not violate their due process or equal protection rights by (1) changing plaintiff's theory of recovery *ex mero motu* from injury by accident to occupational disease; (2) ordering *ex mero motu* that a physician not present at the hearing be asked questions; (3) formulating questions and an essential factual hypothetical to be submitted to the physician; and (4) in sum, assisting plaintiff with his claim.

The Commission, based in part on the deposition testimony of the physician ordered to testify by the Deputy Commissioner, allowed plaintiff's claim and ordered defendants to pay all resulting medical expenses. Based on the reasons herein, we affirm the opinion and award of the Commission.

At the outset, we note plaintiff appeared *pro se* before the Deputy Commissioner and the Full Commission, and did not file a brief on appeal.

The facts are as follows: Plaintiff began working for defendant-employer PPG in April 1994. During most of his employment, plaintiff was a twist machine operator (TMO) in the manufacturing of yarn.

His job consisted of three primary tasks. First, he was required to doff his machine, which involved removing up to eighty bobbins weighing between two and thirty-five pounds from the frame of the machine and placing them on a pin truck. Doffing was not required on most days, however.

Plaintiff's second task was cleaning the machine. Approximately twelve times per shift, he used long brushes to clean the inside of the frame of the machine, and used steel wool and chemical towels to clean the other parts.

Plaintiff's third and perhaps most important task was called the wrap-in procedure. His twist machine contained large spools of fiber-

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glass thread, referred to as packages, which were located at two different levels, six-and-a-half and seven feet off the ground. There were forty spools on each level. A certain length of thread was required to hang from a package to allow plaintiff to thread the machine and attach the thread to a bobbin. The machine was supposed to automatically release the appropriate amount of thread, but, in July 1997, it began to malfunction. As a result, plaintiff often had to reach up and turn each package six or seven times, overcoming the resistance in the packages in order to release the thread. Plaintiff is five feet six-and-a-half inches in height, which meant he often had to stand on his toes and reach over his head to turn the packages.

Once the machine was fully threaded, plaintiff would then monitor it to make sure the spindles were running. He would also sweep the area around the machine.

Additionally, the evidence indicates plaintiff was a regular weightlifter from 1991 until early 1998, but, thereafter, he lifted weights at a reduced level and stopped doing certain exercises.

In November 1997, plaintiff began experiencing pain in his left shoulder when he reached to turn the packages. He also experienced the pain at night while not at work. Occasionally he awakened with numbness in his left arm. He finally saw a physician's assistant about his shoulder pain in late January 1998. The physician's assistant noted that plaintiff complained of increased pain when lifting weights and experienced improvement when he avoided lifting them. Plaintiff was advised to take anti-inflammatory medication and stop weightlifting.

On 10 February 1998, plaintiff saw Dr. Richard Worf, his family doctor, and reported continuing shoulder pain.

On 25 February 1998, as he was turning one of the packages at work, plaintiff experienced a sharp pain in his left shoulder. He was treated by the company nurse with heat and ice. On 5 March 1998, plaintiff saw Dr. Chris Christakos and reported shoulder problems associated with overhead activity at work as well as weightlifting. Christakos diagnosed plaintiff as suffering from left shoulder impingement syndrome and prescribed medication and rest. Nevertheless, plaintiff's symptoms persisted with only slight improvement.

On 24 March 1998, Christakos gave plaintiff a steroid injection in his left shoulder and referred him to physical therapy. Plaintiff con-

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tinued to see Christakos over the next six months. Despite shoulder pain, plaintiff remained at PPG in a light duty position.

Christakos eventually referred plaintiff to Dr. Gregory Holthusen, an orthopaedic surgeon, who examined him on 28 October 1998. Holthusen was advised that plaintiff had suffered shoulder pain for over a year. Plaintiff also reported his shoulder had been treated with a cortisone injection and physical therapy but the pain persisted. He described his overhead lifting at work and weightlifting. Holthusen diagnosed plaintiff as suffering from "rotator cuff tendinitis secondary to subacromial impingement." Plaintiff was treated with an injection to the subacromial space and his work restrictions were continued for two weeks.

On 3 February 1999, plaintiff again saw Holthusen and reported increased symptoms associated with repeated overhead reaching. Plaintiff was advised not to perform activities above shoulder level.

Despite plaintiff's shoulder problems, he neither missed time at work nor sustained a reduction in wages.

On 11 August 1998, plaintiff filed a Form 33 request for hearing in which he contended he suffered a left shoulder injury on 25 February 1998. Defendants responded by denying plaintiff suffered an injury by accident or an occupational disease.

Plaintiff's claim was heard by Deputy Commissioner Morgan Chapman on 10 February 1999. Plaintiff appeared *pro se* and testified on his own behalf. He failed to present any additional witnesses and failed to present any medical testimony on the issue of causation. Diane Swicegood, plant nurse at PPG, testified for defendants, who were represented by counsel. Plaintiff's answers to interrogatories, his employee health record, and an employee incident report were admitted into evidence.

Following the hearing, the Deputy Commissioner held the record open on her own motion for the receipt of medical records. She explained she would treat the claim as one for an occupational disease and would permit the parties to submit written questions to be mailed to Dr. Holthusen. The parties' written questions would be added to questions she herself intended to prepare.

Defendants requested that Holthusen's testimony be taken by deposition. The Deputy Commissioner granted defendants' request. She ordered her factual hypothetical and follow-up questions be sub-

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mitted first and only then would defendants be allowed to cross-examine Holthusen.

In compliance with the Deputy Commissioner's order, Holthusen's deposition was taken on 1 December 1999. Although he received notice, plaintiff did not appear at the deposition or submit questions. Defense counsel began the deposition by reading the Deputy Commissioner's factual hypothetical and asking the Deputy Commissioner's prepared questions. Defense counsel entered an objection on the record. In response to the Deputy Commissioner's hypothetical and follow-up questions, Holthusen testified that plaintiff's job duties (1) placed him at risk of developing shoulder tendinitis and (2) contributed to his development of tendinitis. Defense counsel then proceeded with a lengthy cross-examination of Holthusen covering approximately thirty-one pages of transcript.

On 11 June 2000, the Deputy Commissioner entered an opinion and award. She found plaintiff had not suffered an injury by accident and concluded his shoulder tendinitis was an occupational disease. She ordered defendants to pay all resulting medical expenses, past and future. Defendants appealed to the Full Commission. The Full Commission affirmed and defendants now appeal to this Court.

The basis of defendants' appeal is their contention that the Full Commission erred in determining the Deputy Commissioner had not become an advocate for plaintiff, thus abandoning her role as an impartial fact finder and decision maker.

The courts of this State have long held that the rules of procedure and evidence applicable in our general courts do not govern the Industrial Commission's administrative fact-finding function. See *Maley v. Furniture Co.*, 214 N.C. 589, 200 S.E. 438 (1939); *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 535 S.E.2d 602 (2000); *Allen v. K-Mart*, 137 N.C. App. 298, 528 S.E.2d 60 (2000); *Haponski v. Constructor's Inc.*, 87 N.C. App. 95, 360 S.E.2d 109 (1987). In fact, the Workers' Compensation Act (Act) mandates that the processes, procedures, and discovery under the Act "shall be as summary and simple as reasonably may be." N.C. Gen. Stat. § 97-80(a) (2001). The Commission is empowered to make rules for carrying out the provisions of the Act consistent with this stated purpose. *Id.* Members of the Commission, as well as deputy commissioners, are empowered to take evidence and enter orders, opinions, and awards. N.C. Gen. Stat. § 97-79(b) (2001).

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In interpreting an earlier version of the Act in *Maley*, our Supreme Court stated:

The Industrial Commission is an administrative board, with *quasi*-judicial functions. The manner in which it transacts its business is a proper subject of statutory regulation and need not necessarily conform to court procedure except where the statute so requires, or where, in harmony with the statute, or where it fails to speak, the Court of last resort, in order to preserve the essentials of justice and the principles of due process of law, shall consider rules similar to those observed in strictly judicial investigations in courts of law to be indispensable or proper.

*Maley*, 214 N.C. at 594, 200 S.E. at 441 (emphasis in original). In accord with the Supreme Court's view in *Maley*, this Court has consistently held that the Commission must conform to court procedure and evidentiary rules where required to preserve justice and due process. *See Goff*, 140 N.C. App. at 134-35, 535 S.E.2d at 605-06 (holding the Commission erred by allowing the plaintiff to admit a new doctor's report without allowing the opposing parties an opportunity to cross-examine the doctor); *Allen*, 137 N.C. App. at 304, 528 S.E.2d at 64-65 (holding the Commission erred by allowing significant new evidence from physicians to be admitted while denying the defendants the opportunity to depose or cross-examine the physicians or requiring the plaintiff to be examined by experts chosen by the defendants); *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 21, 510 S.E.2d 388, 395 (1999) (holding the Commission erred by not allowing the defendant to present evidence in a hearing in which the defendant had the burden of proof).

"Whenever a governmental tribunal . . . considers a case in which it may deprive a person of life, liberty or property, it is fundamental to the concept of due process that the deliberative body give that person's case fair and open-minded consideration." *Crumpp v. Bd. of Education*, 326 N.C. 603, 613, 392 S.E.2d 579, 584 (1990). Essential to due process is a fair trial in a fair tribunal with an unbiased, impartial decision maker. *Id.* at 613-15, 392 S.E.2d at 584-85. To make out a due process claim based on this theory, the complaining party must show the decision maker possesses a disqualifying personal bias. *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 354, 342 S.E.2d 914, 924 (1986). "Bias has been defined as 'a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction[.]'" *Crumpp*, 326 N.C. at 615, 392 S.E.2d at 585 (quoting Black's Law Dictionary 147 (5th ed. 1979)).

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**[1]** Defendants first contend the Deputy Commissioner violated their due process rights by changing plaintiff's theory of recovery. However, there is nothing in the record on appeal to indicate plaintiff elected at any time to proceed solely on the theory of injury by accident to the exclusion of an occupational disease theory. Further, defendants have failed to identify any statute or Industrial Commission rule requiring a workers' compensation claimant to choose between injury by accident and occupational disease as a basis for recovery. N.C. Gen. Stat. § 97-52 (2001) states that an injury resulting from an occupational disease "shall be treated as the happening of an injury by accident within the meaning of the North Carolina Workers' Compensation Act." We conclude plaintiff was not required to make an election and thus the Deputy Commissioner's decision to treat his claim as one based on an occupational disease did not violate defendants' due process rights.

**[2]** We likewise disagree with defendants' next contention that their due process rights were violated by the Deputy Commissioner's decision to order the testimony of Holthusen. The Commission, as well as deputy commissioners, are statutorily empowered to order testimony be taken by deposition. N.C.G.S. § 97-80(d); N.C.G.S. § 97-79(b) (granting deputy commissioners the same powers as members of the Commission under N.C.G.S. § 97-80). Further, Industrial Commission Rule 612 allows a commissioner or deputy commissioner to order the deposition of a witness following a hearing when additional testimony from the witness is necessary to the disposition of the case. 4 NCAC 10A.0612(a) (2001). The courts of this State are also permitted to call witnesses to testify, with or without a request from a party. N.C.R. Evid. 614(a) (2001). Here, the Deputy Commissioner originally intended for written questions to be submitted to Holthusen. It was defendants who then requested a deposition. The subsequent ordering of Holthusen's deposition did not indicate a disqualifying personal bias on her part or deprive defendants of an impartial decision maker in violation of due process.

**[3]** Defendants argue the Deputy Commissioner continued her role as advocate for plaintiff in violation of their due process rights by preparing the factual hypothetical and follow-up questions for Holthusen. They claim those questions went beyond clarifying Holthusen's testimony and instead sought to elicit new testimony necessary to satisfy plaintiff's burden of proof.

N.C.R. Evid. 614(b) (2001) specifically allows the trial court to "interrogate witnesses, whether called by itself or by a party." Such

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interrogation, in the exercise of the trial court's duty to supervise and control the course of a trial, has consistently been allowed for the purpose of clarifying contradictory or confusing testimony. *See State v. Ramey*, 318 N.C. 457, 464, 349 S.E.2d 566, 571 (1986); *State v. Whittington*, 318 N.C. 114, 125, 347 S.E.2d 403, 409 (1986); *State v. Hill*, 105 N.C. App. 489, 494, 414 S.E.2d 73, 77 (1992); *State v. Chandler*, 100 N.C. App. 706, 710, 398 S.E.2d 337, 339 (1990). In interrogating a witness, the court may not intimate an opinion as to the witness's credibility, *State v. Long*, 113 N.C. App. 765, 771, 440 S.E.2d 576, 579 (1994), or express an opinion as to whether any essential fact has been proved. *State v. Lowe*, 60 N.C. App. 549, 552, 299 S.E.2d 466, 468 (1983). However, a trial court may ask questions that elicit testimony which proves an element of the case so long as the court does not comment on the strength of the evidence or the credibility of the witness. *State v. Smarr*, 146 N.C. App. 44, 52-53, 551 S.E.2d 881, 886 (2001), *disc. review denied*, 355 N.C. 291, 561 S.E.2d 500 (2002); *Lowe*, 60 N.C. App. at 552, 299 S.E.2d at 468. The submission of the questions "must be conducted with care and in a manner which avoids prejudice to either party." *Chandler*, 100 N.C. App. at 710, 398 S.E.2d at 339 (citing *State v. Colson*, 274 N.C. 295, 163 S.E.2d 376 (1968)).

Here, plaintiff appeared *pro se* before the Deputy Commissioner, while defendants were represented by counsel. At the conclusion of the hearing, the Deputy Commissioner developed a factual hypothetical and four questions to be read to plaintiff's physician. Defendants were again represented by counsel at the deposition. Defense counsel read the prepared hypothetical and four questions to plaintiff's physician.

Following the physician's answers, defendants proceeded with their cross-examination. The Deputy Commissioner, who was not present at the deposition, did not comment on the strength of the evidence or the credibility of the witness. The fact that Holthusen's answers were dispositive of an essential issue does not constitute error. *See Smarr*, 146 N.C. App. at 52-53, 551 S.E.2d at 886. The questions presented by the Deputy Commissioner were neutral, which, depending upon the answer, could benefit either plaintiff or defendants. *See Lowe*, 60 N.C. App. at 552, 299 S.E.2d at 468 (finding no error in trial court's questions to a witness; the witness's responses were the only evidence as to the value of a television set in a felony larceny case).

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“This Court will not interfere with the trial court’s exercise of its duty to control the conduct and course of the trial absent a showing of manifest abuse.” *Long*, 113 N.C. App. at 771, 440 S.E.2d at 580. Defendants advance no plausible argument why the Commission, and in turn deputy commissioners, should not hold the same power to interrogate witnesses when performing their administrative fact-finding function. The Deputy Commissioner’s questions to Holthusen do not indicate a disqualifying personal bias on her part. Thus, there was no violation of defendants’ due process right to a fair trial and impartial decision maker. The Deputy Commissioner did not abuse her discretion in submitting the hypothetical and follow-up questions to Holthusen.

**[4]** Defendants next contend “the Deputy Commissioner’s actions violated the statutory prohibition against the Industrial Commissioner representing a claimant in a compensation hearing.” Again, we disagree.

N.C. Gen. Stat. § 97-79(f) (2001) states:

The Commission shall create an ombudsman program to assist unrepresented claimants, employers, and other parties, to enable them to protect their rights under this Article. In addition to other duties assigned by the Commission, the ombudsman shall meet with, or otherwise provide information to, injured employees, investigate complaints, and communicate with employers’ insurance carriers and physicians at the request of the claimant. Assistance provided under this subsection shall not include representing the claimant in a compensation hearing.

Here, the record does not indicate that a N.C.G.S. § 97-79(f) ombudsman was involved in assisting plaintiff. Since the Deputy Commissioner acted within her discretion in preparing and submitting the questions to plaintiff’s physician, these actions do not amount to “representing the claimant in a compensation hearing.” *Id.*

Defendants’ final contention is that the Deputy Commissioner’s actions violated their equal protection rights under the North Carolina Constitution and the United States Constitution. They claim she violated the statutory prohibition against the Commission representing a claimant and that no rational basis exists for her actions. We disagree.

The questions submitted by the Deputy Commissioner did not convey or express an opinion with respect to an essential element of



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plaintiff's claim or the credibility of Holthusen as a witness. The questions did not indicate a disqualifying personal bias or predisposition on the part of the Deputy Commissioner. As noted, the questions were neutral and could have benefitted either party. Accordingly, the actions of the Deputy Commissioner did not violate N.C.G.S. § 97-79(f) and did not constitute representing plaintiff at the hearing. She acted within her discretion in preparing and submitting the questions to Holthusen. Defendants' equal protection rights were thus not violated.

We find no constitutional or statutory infirmity in the actions taken by the Deputy Commissioner in the instant case. However, it is important to stress that the Commission or a deputy commissioner, as well as a trial court, should be resolutely careful in calling and interrogating witnesses. Not only should there be no prejudice to a party, but there also should be no reasonable perception of prejudice. Neutrality and the appearance of neutrality are equally critical in maintaining the integrity of our judicial and quasi-judicial processes.

For the reasons stated herein, we affirm the opinion and award of the Industrial Commission.

Affirmed.

Chief Judge EAGLES and Judge MARTIN concur.

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SOUTHEASTERN SHELTER CORPORATION AND JERRY CHESSON, PLAINTIFFS V.  
BTU, INC., PAUL SILCOX AND MARC GILFILLAN, DEFENDANTS

No. COA01-1257

(Filed 3 December 2002)

**1. Joint Venture— no joint sharing of profits—no fiduciary relationship**

The parties' business relationship was not a joint venture, because: (1) plaintiffs failed to allege in their complaint that they were entitled to share in defendants' profits under the terms of the agreement; (2) the end result of the parties' agreement that defendants essentially would be taking over plaintiffs' fireproofing business does not establish that the agreement was a joint venture; (3) the evidence showed that defendants agreed to pur-

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chase the assets of plaintiffs' business but only after a five-month period during which plaintiff individual would work for defendants in a capacity that would enable defendants to learn the fireproofing business; and (4) the agreement did not indicate that it established a principal-to-agent relationship which is a necessary fiduciary relationship between the parties.

**2. Fiduciary Relationship—breach of fiduciary duty—failure to show joint venture—summary judgment**

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claim for breach of fiduciary duties arising out of the parties' business relationship, because: (1) the complaint revealed that this claim was dependent on the existence of a joint venture; and (2) plaintiffs failed to show the elements of a joint venture.

**3. Fraud—constructive—relationship of trust and confidence—failure to show joint venture—summary judgment**

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claim for constructive fraud arising out of the parties' business relationship, because: (1) plaintiffs' claim was based on a relationship of trust and confidence that allegedly arose from the parties' joint venture; and (2) plaintiffs failed to show a joint venture.

**4. Unfair Trade Practices—failure to show joint venture—failure to show aggravating circumstances—summary judgment**

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claim for unfair and deceptive trade practices arising out of the parties' business relationship, because: (1) the language in the complaint revealed that plaintiffs have tied this claim to the existence of a joint venture; (2) plaintiffs failed to show a joint venture; and (3) while plaintiffs have provided sufficient evidence of a contractual relationship between the parties, they have failed to show sufficient aggravating circumstances.

**5. Unjust Enrichment—failure to show joint venture—contract between parties governs—summary judgment**

The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claim for unjust enrichment arising out of the parties' business relationship, because:

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(1) the evidence showed the parties entered into a contract but plaintiffs failed to assert a claim for breach of contract; and (2) the law will not imply a contract since a contract existed between the parties.

**6. Conversion— business relationship—summary judgment**

The trial court erred by granting summary judgment in favor of defendants on plaintiffs' claim for conversion arising out of the parties' business relationship, because: (1) defendants converted plaintiffs' proprietary information, including customer lists, contact lists, records, and historical data; (2) defendants removed certain tangible personal property belonging to plaintiffs including a photocopier, gas paint sprayer, air compressor, and computer software; (3) according to the terms of the parties' agreement, defendants were not entitled to any of plaintiffs' assets until the end of the business relationship when the parties had agreed on asset valuations and plaintiffs had received the balance due under the agreement; and (4) the fact the parties had a contract does not prevent this claim.

Appeal by plaintiffs from order entered 28 June 2001 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 12 June 2002.

*Randolph M. James, P.C., by Randolph M. James, for plaintiff-appellants.*

*Newsom, Graham, Hedrick & Kennon, P.A, by William P. Daniell and Kenneth R. Murphy, III, for defendant-appellees.*

CAMPBELL, Judge.

Plaintiffs, Southeastern Shelter Corporation ("SES") and Jerry Chesson ("Chesson"), appeal the trial court's order granting summary judgment in favor of defendants, BTU, Inc. ("BTU"), Paul Silcox ("Silcox") and Marc Gilfillan ("Gilfillan"), and dismissing with prejudice plaintiffs' claims for breach of fiduciary duties, constructive fraud, conversion, unfair and deceptive trade practices and restitution based on unjust enrichment. For the reasons discussed herein, we affirm in part and reverse in part.

Chesson is president and majority shareholder of SES. SES's principal business activity is the application of fireproofing materials to construction projects. Silcox is president of BTU. Gilfillan is the reg-

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istered agent, an incorporator and a shareholder of BTU. Defendants had no experience in the fireproofing business prior to their relationship with plaintiffs.

Plaintiffs seek to recover damages arising out of a dispute over a business relationship between the parties, the terms of which were never reduced to a signed writing. Plaintiffs contend the business relationship was a joint venture. Defendants deny the existence of a joint venture and contend the business relationship was an asset purchase agreement.

Plaintiffs allege in their complaint that the parties entered into a \$250,000.00 joint venture agreement in February 1999. The agreement provided that defendants would pay plaintiffs a \$50,000.00 advance good faith payment, with the remaining \$200,000.00 to be paid by a promissory note. In exchange, plaintiffs would assist defendants with entry into the fireproofing business by: (a) providing use of SES's offices, facilities and equipment through 1 August 1999; (b) encouraging SES's employees to accept employment with defendants; (c) assuring Chesson would provide services as a consultant in order to train and advise defendants through 1 August 1999; (d) assuring Chesson would assist defendants in procuring \$1,000,000.00 in contracts for the application of fireproofing materials through 1 August 1999; (e) assuring Chesson would provide services as a consultant on a contract basis after 1 August 1999; (f) providing SES's telephone number for BTU's use; and (g) transferring certain assets to defendants no later than 1 August 1999. In essence, plaintiffs would provide their knowledge, experience, goodwill, proprietary information and assets, to enable defendants to learn and enter the fireproofing business.

On the other hand, defendants contend the arrangement was an asset purchase agreement whereby plaintiffs would assist defendants with entry into the fireproofing business by making available its office space, equipment and personnel, for five months, at the end of which time defendants would purchase some or all of SES's assets. During the five-month period, defendants would pay Chesson to serve as a consultant and teach them the business while they determined which assets they ultimately wished to purchase from SES. On or before 1 August 1999, defendants were to provide Chesson with a list of the assets they wished to purchase, and tender payment in the amount of the value of the assets, at which time each party would have fulfilled its obligations under the agreement.

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On or about 1 March 1999, defendants paid Chesson \$25,000.00 in partial payment of the \$50,000.00 good faith advance. Defendants occupied plaintiffs' facilities and began using plaintiffs' equipment and employees, while Chesson began working with defendants to teach them the fireproofing business.

From 1 March 1999 through 21 June 1999, BTU bid on, obtained and performed fireproofing contracts, used plaintiffs' office, equipment and employees to conduct its day-to-day operations, and benefitted from Chesson's knowledge and expertise by receiving numerous contracts with third parties for the application of fireproofing materials.

The parties operated under this arrangement until on or about 21 June 1999, when Chesson asked Silcox how much, when, and in what form Chesson would be paid the remainder of the money he was owed under the agreement. Chesson needed \$75,000.00 for an unrelated purpose. Defendants told Chesson he could not be paid on that date, nor could they provide him an exact date on which he would be paid, because defendants were waiting for approval on a business loan. The parties then had a major disagreement concerning when defendants would tender the balance due Chesson, and Chesson reacted by changing the locks on SES's facilities and preventing access by defendants. Since 21 June 1999, the parties have operated separate fireproofing businesses in direct competition with one another.

Plaintiffs instituted this action on 16 July 1999, asserting claims for breach of fiduciary duties, constructive fraud, conversion, unfair and deceptive trade practices and restitution based upon unjust enrichment. Defendants answered and denied the essential allegations of plaintiffs' complaint. Defendant BTU counterclaimed against plaintiffs for breach of contract, conversion, restitution, and unfair and deceptive trade practices

Defendants filed a motion for summary judgment as to plaintiffs' claims only. Defendants argued they were entitled to summary judgment because the evidence, as a matter of law, failed to show the existence of a joint venture. Defendants were granted summary judgment by order entered 28 June 2001 and plaintiffs' claims were dismissed with prejudice. The trial court's order expressly states that BTU's counterclaims are still pending. The trial court certified the summary judgment order for immediate appellate review pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure.

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Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.R. Civ. P. 56(c) (2001). The moving party bears the burden of showing that no triable issue of fact exists. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 62-63, 414 S.E.2d 339, 341-42 (1992). This burden can be met by proving: (1) that an essential element of the non-moving party’s claim is nonexistent; (2) that discovery indicates the non-moving party cannot produce evidence to support an essential element of his claim; or (3) that the non-moving party cannot surmount an affirmative defense which would bar the claim. *Id.* Once the moving party has met its burden, the non-moving party must forecast evidence that demonstrates the existence of a *prima facie* case. *Id.* In reviewing the evidence at summary judgment, “[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.” *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988).

Defendants maintain the parties’ business relationship was not a joint venture. Defendants further contend that, since plaintiffs based all of their claims on the premise that the parties’ relationship was a joint venture, each of plaintiffs’ claims was properly dismissed. Finally, defendants argue that the actions of Chesson prior to 1 August 1999 prevented defendants from fully performing their obligations under the agreement and that plaintiffs should not be allowed to take advantage of Chesson’s actions by claiming defendants did not perform.

Plaintiffs argue defendants have failed to show the lack of any triable issue and that the evidence, when viewed in the light most favorable to plaintiffs, establishes each essential element of plaintiffs’ claims.

**[1]** We first address whether the parties’ agreement created a joint venture.

To establish a joint venture, “ ‘[t]here must be (1) an agreement, express or implied, to carry out a single business venture *with joint sharing of the profits*, and (2) *an equal right of control* of the means employed to carry out the venture.’ ” *Rhoney v. Fele*, 134 N.C. App. 614, 620, 518 S.E.2d 536, 541 (1999) (quoting *Edwards v. Bank*, 39 N.C. App. 261, 275, 250 S.E.2d 651, 661 (1970) (emphasis in original)).

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In *Pike v. Trust Co.*, 274 N.C. 1, 161 S.E.2d 453, (1968), the Supreme Court quoted with approval from *In re Simpson*, 222 F. Supp. 904, 909 (M.D.N.C. 1963), as follows:

“ ‘A joint venture is an association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business adventure for joint profit, for which purpose they combine their efforts, property, money, skill, and knowledge, but without creating a partnership in the legal or technical sense of the term.

...

“ ‘Facts showing the joining of funds, property, or labor, in a common purpose to attain a result for the benefit of the parties in which each has a right in some measure to direct the conduct of the other through a necessary fiduciary relation, will justify a finding that a joint adventure exists.’

“ ‘To constitute a joint adventure, the parties must combine their property, money, efforts, skill, or knowledge in some common undertaking. The contributions of the respective parties need not be equal or of the same character, but there must be some contribution by each coadventurer of something promotive of the enterprise.’ ”

*Pike v. Trust Co.*, 274 N.C. at 8-9, 161 S.E.2d at 460. Thus, the essential elements of a joint venture are (1) an agreement to engage in a single business venture with the joint sharing of profits, *Edwards v. Bank*, 39 N.C. App. 261, 275, 250 S.E.2d 651, 661 (1979), (2) with each party to the joint venture having a right in some measure to direct the conduct of the other “*through a necessary fiduciary relationship.*” *Cheape v. Town of Chapel Hill*, 320 N.C. 549, 562, 359 S.E.2d 792, 799 (1987) (emphasis in original). The second element requires that the parties to the agreement stand in the relation of principal, as well as agent, as to one another. *Id.* at 562, 359 S.E.2d 799-800.

Viewed in the light most favorable to plaintiffs, we find the evidence insufficient to establish that the parties’ business relationship was a joint venture.

First, plaintiffs failed to allege in their complaint that they were entitled to share in defendants’ profits under the terms of the agreement. Rather, plaintiffs alleged that defendants were obligated to pay a sum certain of \$250,000.00, with \$50,000.00 to be paid at the outset

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of the relationship as an advance good faith payment, and \$200,000.00 to be paid at the end of the parties' relationship in exchange for an undetermined number of plaintiffs' business assets.

Chesson confirmed this aspect of the parties' agreement in his deposition. Chesson repeatedly testified that defendants would have satisfied their obligations under the agreement by paying him or SES a sum certain, or a sum certain and some combination of properly secured notes. Chesson further stated defendants were obligated to pay \$250,000.00 even if defendants never made a profit. Chesson also stated that, even if defendants had generated millions of dollars in profits, they still would have owed only \$250,000.00 under the terms of the agreement. That the end result of the parties' agreement would be defendants essentially taking over plaintiffs' fireproofing business does not establish that the agreement was a joint venture. Rather, when viewed in the light most favorable to plaintiffs, the evidence shows defendants agreed to purchase the assets of plaintiffs' business, but only after a five-month period during which Chesson would work for defendants in a capacity that would enable defendants to learn the fireproofing business.

In addition, we find little in the alleged agreement to indicate that it established a principal-to-agent relationship between the parties. The Supreme Court has defined an agent as " 'one who acts for or in the place of another by authority from him.' " *Id.* at 562, 359 S.E.2d at 800 (quoting *Julian v. Lawton*, 240 N.C. 436, 440, 82 S.E.2d 210, 213 (1954)). Under the parties' agreement, Chesson was responsible for teaching all aspects of the fireproofing business to defendants. Chesson shared his knowledge and experience with defendants and assisted them in making bids on fireproofing projects. With twenty years of experience in the fireproofing business, Chesson's input on bids and other operational decisions carried great weight in the final decision. However, Chesson testified that he could only recommend a bid to defendants. The ultimate decision whether to accept a job, and at what price, was left to defendants. Accordingly, there is nothing in the agreement that establishes Chesson and SES as agents of the individual defendants and BTU. Likewise, there is nothing that establishes defendants as agents of plaintiffs. Thus, the agreement fails to place the parties in the relation of principal, as well as agent, as to each other. Having failed to establish a joint sharing of profits, or the necessary fiduciary relationship between the parties, plaintiffs have failed to establish a joint venture.



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We must now address whether plaintiffs' claims are dependent on the existence of a joint venture. If so, the trial court did not err in dismissing them at the summary judgment stage. If not, the trial court's decision must be reversed and the cause remanded for trial on those claims.

Breach of Fiduciary Duties

[2] In their first claim for relief, plaintiffs allege the parties entered into a joint venture, plaintiffs placed special trust and confidence in defendants, and defendants owed plaintiffs "the highest fiduciary duties." Plaintiffs further allege defendants breached their fiduciary duties arising from the parties' joint venture. It is clear from the complaint that plaintiffs' breach of fiduciary duties claim is dependent on the existence of the joint venture. Having failed to show the elements of a joint venture, plaintiffs have necessarily failed to show the existence of a fiduciary duty to support a claim for breach of fiduciary duties. Accordingly, the trial court did not err in entering summary judgment against plaintiffs on their first claim.

Constructive Fraud

[3] Plaintiffs' next claim is one for constructive fraud. In order to prove constructive fraud, plaintiffs must show a relationship of trust and confidence that led up to the consummation of a transaction in which defendants took advantage of this trust and confidence to the detriment of plaintiffs. *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666, 488 S.E.2d 215, 224 (1997) (citing *Rhodes v. Jones*, 232 N.C. 547, 549, 61 S.E.2d 725, 726 (1950)). Here, plaintiffs allege that defendants' scheme to induce plaintiffs to perform the joint venture and then disavow their own duties to perform constitutes a breach of the fiduciary duties of good faith, fair dealing, honesty, and loyalty. Plaintiffs further contend that defendants' misconduct "constitutes bad faith, reckless indifference . . . and self-dealing by fiduciaries, and constitutes constructive fraud." Plaintiffs' constructive fraud claim is based on a relationship of trust and confidence that allegedly arose from the parties' joint venture. Having failed to show a joint venture, plaintiffs cannot maintain their constructive fraud claim.

Unfair and Deceptive Trade Practices

[4] Plaintiffs allege that the parties' joint venture in the fireproofing contracting business was "in or affecting commerce," and that defendants' conduct in connection with the joint venture was unfair and deceptive.

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A trade practice is unfair and deceptive when it offends established public policy as well as when the practice is immoral, unethical, oppressive, or unscrupulous. *Eastover Ridge, L.L.C. v. Metric Constructors, Inc.*, 139 N.C. App. 360, 367, 533 S.E.2d 827, 832, *disc. review denied*, 353 N.C. 262, 546 S.E.2d 93 (2000). In essence, an unfair act or practice is one in which a party engages in conduct which amounts to an inequitable assertion of its power or position. *Id.*

However, “[i]t is well recognized . . . that actions for unfair and deceptive trade practices are distinct from actions for breach of contract . . . and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1.” *Branch Banking & Trust Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992) (citations omitted). To recover for unfair and deceptive trade practices, a party must show substantial aggravating circumstances attending the breach of contract. *Id.* It is “‘unlikely that an independent tort could arise in the course of contractual performance, since those sorts of claims are most appropriately addressed by asking simply whether a party adequately fulfilled its contractual obligations.’” *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 347 (4th Cir. 1998) (quoting *Strum v. Exxon Co., U.S.A., a Div. of Exxon Corp.*, 15 F.3d 327, 333 (4th Cir. 1994)).

Here, by the language in the complaint, plaintiffs have tied their unfair and deceptive trade practices claim to the existence of a joint venture. Having failed to show a joint venture, plaintiffs cannot proceed on their unfair and deceptive trade practices claim. We further note that while plaintiffs have presented sufficient evidence of a contractual relationship between the parties, they have failed to show sufficient aggravating circumstances to maintain an action for unfair and deceptive trade practices.

#### Unjust Enrichment

**[5]** In order to recover on a claim of unjust enrichment, a party must prove that it conferred a benefit on another party, that the other party consciously accepted the benefit, and that the benefit was not conferred gratuitously or by an interference in the affairs of the other party. *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988). An unjust enrichment claim is neither in tort nor contract “but is described as a claim in quasi contract or a contract implied in law.” *Booe*, 322 N.C. at 570, 369 S.E.2d at 556. “The claim is not based on a

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promise but is imposed by law to prevent an unjust enrichment.” *Id.* If there is a contract between the parties, the contract governs the claim and the law will not imply a contract. *See Concrete Co. v. Lumber Co.*, 256 N.C. 709, 124 S.E.2d 905 (1962).

Viewed in the light most favorable to plaintiffs, the evidence shows that the parties entered into a contract. However, plaintiffs failed to assert a claim for breach of contract. Since a contract exists between the parties, the law will not imply a contract. Therefore, plaintiffs may not maintain a claim for unjust enrichment.

Conversion

[6] “Conversion is the unauthorized assumption and exercise of right of ownership over goods or personal property belonging to another to the alteration of their condition or the exclusion of the owner’s rights.” *Marina Food Assoc., Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 93, 394 S.E.2d 824, 831 (1990).

Viewed in the light most favorable to plaintiffs, the evidence shows defendants converted plaintiffs’ proprietary information, including customer lists, contact lists, records and historical data. The evidence also shows defendants removed certain tangible personal property belonging to plaintiffs, including a photocopier, gas paint sprayer, air compressor, and computer software. According to the terms of the parties’ agreement, defendants were not entitled to any of plaintiffs’ assets until the end of the business relationship when the parties had agreed on asset valuations and plaintiffs had received the \$200,000.00 balance due under the agreement. Thus, the fact the parties had a contract does not prevent plaintiffs’ claim for conversion.

In conclusion, we hold that the trial court did not err in its determination that, as a matter of law, the parties’ agreement was not a joint venture. Accordingly, we affirm the trial court’s grant of summary judgment to defendants on plaintiffs’ claims for breach of fiduciary duties, constructive fraud and unfair and deceptive trade practices. We likewise affirm the trial court’s entry of summary judgment on plaintiffs’ unjust enrichment claim. However, we reverse summary judgment on plaintiffs’ conversion claim and remand for a trial on the merits as to that claim.

Affirmed in part, reversed in part, and remanded.

Judges WYNN and HUDSON concur.

**STATE v. MOSES**

[154 N.C. App. 332 (2002)]

STATE OF NORTH CAROLINA v. MARIO MOSES

No. COA02-26

(Filed 3 December 2002)

**1. Assault; Indictment and Information— multiple count indictment—necessary element—no incorporation by reference**

A motion to arrest judgment on a conviction for assault with a deadly weapon inflicting serious injury was allowed where the applicable count of the indictment, Count III, did not mention the bottle which was the weapon and did not incorporate by reference the mention of the bottle in Count II, which charged armed robbery. However, the indictment sufficiently alleged assault inflicting serious injury, the jury was instructed on this offense, and the case was remanded for entry of judgment on that offense.

**2. Indictment and Information— amendment of indictment—elevation of offense to felony**

A conviction for felonious operation of a motor vehicle to elude arrest was remanded because the indictment had been amended to add one of two necessary aggravating factors. N.C.G.S. § 15A-923(e) has been interpreted to mean that an indictment may not be amended to substantially alter the charge set forth in the indictment; a change which results in a misdemeanor being elevated to a felony substantially alters the original charge. The case was remanded for entry of judgment on the misdemeanor.

**3. Robbery— dangerous weapon—glass bottle across victim's head**

The trial court did not err by denying a motion to dismiss a prosecution for an armed robbery in which a bottle was used as the weapon where the evidence was sufficient to support a jury finding that the victim's life was endangered or threatened by use of the bottle. Although the evidence showed that an accomplice hit the victim with the bottle, the trial court properly instructed on acting in concert.

**4. Sentencing— aggravating factors—joining with more than one other person—evidence insufficient**

Aggravated sentences for armed robbery, assault, and operation of a vehicle to elude arrest were remanded where the court

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found as an aggravating factor for each judgment that defendant joined with more than one person in committing the offense, but there was no evidence that more than one other person was involved.

Appeal by defendant from judgments entered 11 July 2001 by Judge Clarence W. Carter in Forsyth County Superior Court. Heard in the Court of Appeals 28 October 2002.

*Attorney General Roy Cooper, by Special Deputy Attorney General W. Richard Moore, for the State.*

*Russell J. Hollers, III, for defendant-appellant.*

THOMAS, Judge.

Defendant, Mario Moses, appeals from judgments entered on his convictions of felonious operation of a motor vehicle to elude arrest, robbery with a dangerous weapon, and assault with a deadly weapon inflicting serious injury.

He contends the trial court erred by (1) entering judgment on assault with a deadly weapon inflicting serious injury, (2) allowing the State to amend Count I of the indictment and subsequently entering judgment on felonious operation of a motor vehicle to elude arrest, (3) denying his motion to dismiss the charge of robbery with a dangerous weapon, and (4) sentencing him in the aggravated range on all three convictions.

The State's evidence tends to show the following: On 17 February 2001, Mateo Jimenez was sitting in his Ford Tempo automobile outside a store in Winston-Salem. He was waiting for family members to finish shopping. Defendant and Shea Rousseau approached and attempted to speak with him but Jimenez did not understand English. Defendant and Rousseau left but shortly thereafter returned. Defendant opened the driver's side door of the Tempo and pulled Jimenez from his seat while Rousseau hit Jimenez in the back of the head with a glass bottle. Jimenez fell to the ground and defendant proceeded to kick him in the face several times. Jimenez suffered serious injuries to his teeth and mouth which required sutures. Defendant and Rousseau then stole Jimenez's car, with defendant driving.

Winston-Salem Police Department officers Mike Carico, who is fluent in Spanish, and Brad Underwood were dispatched to the scene.

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Jimenez gave a statement consistent with the facts set forth above. The officers, however, did not find a glass bottle.

Officer Michael McDonald of the Winston-Salem Police Department received a dispatch regarding the robbery. He spotted the vehicle, got behind it and activated his lights and siren. Defendant failed to stop however, until crashing on an exit ramp. Upon his being arrested, defendant told the officer that a Mexican had jumped Rousseau.

Defendant's evidence, meanwhile, tends to show that Jimenez had allowed defendant and Rousseau to borrow his car in exchange for crack cocaine. Defendant testified he was waiting in Jimenez's car when Jimenez struck Rousseau and accused him of providing poor quality cocaine. Rousseau fought back and gained control. Defendant and Rousseau then quickly drove away.

The jury returned verdicts of guilty on each charge. Following a sentencing hearing, the trial court found two statutory aggravating factors and three statutory mitigating factors. The trial court then determined the aggravating factors outweighed the mitigating ones. Defendant was sentenced in the aggravated range to three consecutive terms of imprisonment totaling a minimum of 114 months and a maximum of 156 months.

**[1]** Defendant first contends the trial court erred in entering judgment on Count III of the indictment, assault with a deadly weapon inflicting serious injury, because the indictment fails to name the deadly weapon. He moves for arrest of judgment and asks for a remand for re-sentencing on the lesser-included offense of assault inflicting serious injury. We agree.

A valid bill of indictment is essential to the jurisdiction of the Superior Court to try an accused for a felony and have the jury determine his guilt or innocence, "and to give authority to the court to render a valid judgment." *State v. Ray*, 274 N.C. 556, 562, 164 S.E.2d 457, 461 (1968); see also *State v. Midyette*, 45 N.C. App. 87, 262 S.E.2d 353 (1980); *State v. Johnson*, 77 N.C. App. 583, 335 S.E.2d 770 (1985). A defendant may not be lawfully convicted of an offense which is not charged in an indictment; if a defendant is found guilty of an offense for which he has not been charged, judgment thereon is properly arrested. See *State v. Rush*, 19 N.C. App. 109, 110, 197 S.E.2d 891, 891-92 (1973).

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N.C. Gen. Stat. § 15A-924(a)(5) (2001) states:

(a) A criminal pleading must contain:

...

(5) A plain and concise factual statement in *each* count which, without allegations of an evidentiary nature, asserts facts supporting every element of a criminal offense and the defendant's commission thereof with sufficient precision clearly to apprise the defendant or defendants of the conduct which is the subject of the accusation. (emphasis added)

"An indictment is sufficient in form for all intents and purposes if it expresses the charge in a plain, intelligible and explicit manner." *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984) (citing N.C. Gen. Stat. § 15-153 (2001)). An indictment is constitutionally sufficient if it identifies the offense with enough certainty 1) to enable the accused to prepare his defense, 2) to protect him from being twice put in jeopardy for the same offense, and 3) to enable the court to know what judgment to announce in the event of conviction. *Id.* at 434-35, 323 S.E.2d at 346; *see also State v. Baynard*, 79 N.C. App. 559, 562, 339 S.E.2d 810, 812 (1986).

The requirements for an indictment charging a crime in which one of the elements is the use of a deadly weapon are (1) to "name the weapon and (2) either to state expressly that the weapon used was a 'deadly weapon' or to allege such facts as would *necessarily* demonstrate the deadly character of the weapon." *State v. Brinson*, 337 N.C. 764, 768, 448 S.E.2d 822, 824 (1994) (quoting *State v. Palmer*, 293 N.C. 633, 639-40, 239 S.E.2d 406, 411 (1977) (emphasis in original)); *accord State v. Hinson*, 85 N.C. App. 558, 563, 355 S.E.2d 232, 235 (1987).

The indictment here sets forth three crimes that defendant allegedly committed. Count III of the indictment, assault with a deadly weapon inflicting serious injury, charges as follows:

The jurors for the State upon their oath present that on or about the date of offense shown and in Forsyth County the defendant named above unlawfully, willfully and feloniously did assault Mateo Mendez Jimenez with a deadly weapon. The assault resulted in the infliction of a serious injury, knocking out his teeth.

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This count clearly does not name the deadly weapon allegedly used by defendant in his assault on Jimenez and therefore violates the requirements set forth in *Brinson*, *Palmer* and *Hinson*.

Nonetheless, the State argues defendant received sufficient notice of the identity of the alleged deadly weapon, a bottle, from Count II of the indictment, which charged defendant with robbery with a dangerous weapon. Count II reads, in pertinent part:

The defendant committed [the robbery] by means of an assault with a dangerous weapon, a bottle, whereby the life of Mateo Mendez Jimenez, was threatened and endangered.

Defendant contends the reference to a bottle in Count II of the indictment is not sufficient to sustain the assault with a deadly weapon inflicting serious injury charge in Count III. We agree.

“[I]t is settled law that each count of an indictment containing several counts should be complete in itself.” *State v. Hackney*, 12 N.C. App. 558, 559, 183 S.E.2d 785, 786 (1971); accord *State v. Jones*, 275 N.C. 432, 168 S.E.2d 380 (1969); *State v. McKoy*, 265 N.C. 380, 144 S.E.2d 46 (1965); *State v. Sutton*, 14 N.C. App. 422, 424, 188 S.E.2d 596, 597 (1972). It is also settled that allegations in one count may be incorporated by reference in another count. N.C. Gen. Stat. § 15A-924(a)(2) (2001); see also *State v. Russell*, 282 N.C. 240, 192 S.E.2d 294 (1972) (in a two-count indictment for forgery of a check and uttering a forged check, the first count charging forgery and setting forth the contents of the check with exactitude, reference to the check in the uttering count as “same as above” is sufficient to identify the offense charged).

This Court applied these principles in *Hackney* and *Sutton*, both forgery and uttering cases. In *Hackney*, the defendant was charged in separate counts with (1) forgery and (2) uttering a forged check drawn on Central Carolina Bank & Trust Company in the amount of \$37.00. The full text of the check allegedly forged and uttered was set forth in the uttering count of the indictment. However, in the forgery count, a copy of the check was not set forth and facts pertaining to it were not alleged. Additionally, the forgery count failed to incorporate by reference the uttering count or the check set forth therein. The Court vacated the judgment, which was entered on the defendant's guilty plea to both counts, and remanded for re-sentencing only on the uttering charge. *Hackney*, 12 N.C. App. at 559-60, 183 S.E.2d at 786.



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In *Sutton*, the defendant was charged in separate bills of indictment with two offenses of (1) forging the endorsement of a money order and (2) uttering the forged money order. In each case the first count in the bill of indictment (forgery) particularly described the money order involved in that case. In the second count of each indictment (uttering a forged money order), the money order was only referred to as “a certain false, forged and counterfeited money order.” No further description of the particular counterfeited money order which the defendant was charged with having uttered was contained in the second count of either bill. There was no incorporation by reference between the two counts in each indictment. The Court held that the uttering count of each indictment was insufficient to charge the offense and arrested judgment on those verdicts. *Sutton*, 14 N.C. App. at 424-26, 188 S.E.2d at 597-98.

Here, Count II of the indictment identifies the bottle. However, Count III, the operative count, simply charges defendant with assaulting Jimenez with a deadly weapon. There is no mention of the bottle in Count III and no incorporation by reference to Count II. Following the precedent set forth in *Hackney* and *Sutton*, we hold Count III of the indictment to be insufficient to charge assault with a deadly weapon inflicting serious injury. It does not adequately enable defendant to prepare for trial and avoid the possibility of double jeopardy, or allow the court to enter judgment on the offense. Accordingly, defendant’s motion in arrest of judgment is allowed.

Because Count III of the indictment sufficiently alleges each of the essential elements of the lesser-included offense of assault inflicting serious injury, the jury was instructed on this lesser offense. The evidence does support each of the elements so we therefore remand for entry of judgment on assault inflicting serious injury.

**[2]** Defendant next contends the trial court erred in allowing the State to amend Count I of the indictment, operation of a motor vehicle to elude arrest, to modify the alleged offense from misdemeanor to felony status. He further claims it was error to enter judgment against him for felonious operation of a motor vehicle to elude arrest pursuant to the improperly amended indictment. We agree.

N.C. Gen. Stat. § 20-141.5 sets forth the crimes of misdemeanor and felony operation of a motor vehicle to elude arrest. The statute reads, in part:

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(a) It shall be unlawful for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties. Except as provided in subsection (b) of this section, violation of this section shall be a Class 1 misdemeanor.

N.C. Gen. Stat. § 20-141.5(a) (2001). In order to properly charge the Class H felony of operation of a motor vehicle to elude arrest, the indictment must also allege two or more of the aggravating factors set forth in subsection (b) of the statute. *Id.* Here, the indictment only included the single aggravating factor of speeding more than fifteen miles per hour over the legal speed limit. N.C. G.S. § 20-141.5(b)(1). At the close of the State's evidence, the trial court granted the State's motion to amend the indictment. The aggravating factor of "[r]eckless driving as proscribed by G.S. § 20-140," N.C.G.S. § 20-145.5(b)(3), was added, thereby elevating the charge to felony status.

However, N.C. Gen. Stat. § 15A-923(e) (2001) provides that "[a] bill of indictment may not be amended." This statute has been interpreted "to mean only that an indictment may not be amended in a way which 'would substantially alter the charge set forth in the indictment.'" *Brinson*, 337 N.C. at 767, 448 S.E.2d at 824 (quoting *State v. Carrington*, 35 N.C. App. 53, 58, 240 S.E.2d 475, 478 (1978)); accord *State v. Brady*, 147 N.C. App. 755, 758, 557 S.E.2d 148, 151 (2001). Clearly, adding an aggravating factor in this case, which resulted in a misdemeanor charge being elevated to a felony, substantially altered the charge in the original indictment. The State commendably concedes this point in its brief.

As a result of the trial court's erroneous amendment to Count I of the indictment, we arrest judgment on defendant's conviction of felonious operation of a motor vehicle to elude arrest. Because the indictment sufficiently charges him with misdemeanor operation to elude arrest, and the evidence supports such a charge, we remand for entry of judgment on misdemeanor operation of a motor vehicle to elude arrest.

**[3]** Defendant next contends the trial court erred in denying his motion to dismiss the charge of robbery with a dangerous weapon. He argues there was insufficient evidence the bottle used in the robbery was a dangerous weapon. 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)

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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 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).

In determining whether evidence of the use of a particular instrument lies within the prohibition of N.C. Gen. Stat. § 14-87(a), the determinative question is whether the evidence is sufficient to support a jury finding that a person’s life was in fact endangered or threatened by the use of that instrument. *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 195-96 (1985); *State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982). “Whether an instrument can be considered a dangerous weapon depends upon the nature of the instrument, the manner in which defendant used it or threatened to use it, and in some cases the victim’s perception of the instrument and its use.” *Peacock*, 313 N.C. at 563, 330 S.E.2d at 196.

The evidence here, when viewed in the light most favorable to the State, shows that Jimenez was struck in the back of the head with a glass bottle. The blow caused Jimenez to fall to the ground, whereupon he was repeatedly kicked in the face. This evidence is sufficient to support a jury finding that Jimenez’s life was endangered or threatened by use of the glass bottle. While Jimenez did not actually suffer life-threatening injuries as a result of the blow from the bottle, the jury could still reasonably find the bottle to be a dangerous weapon. Also, while the evidence shows Rousseau, and not defendant, was the one who hit Jimenez with the bottle, the trial court properly instructed the jury on acting in concert. Defendant, therefore, could legally be found responsible for Rousseau’s use of the glass bottle. His argument on this issue is rejected.

Defendant’s final contention is that the trial court erred by sentencing him in the aggravated range. We agree.

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**[4]** The trial court found as an aggravating factor in each of the three judgments that (1) defendant “occupied a position of leadership or dominance of other participants” in the commission of the offense, N.C. Gen. Stat. § 15A-1340.16(d)(1) (2001), and (2) “defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy.” N.C.G.S. § 15A-1340.16(d)(2). The trial court then determined the aggravating factors outweighed the mitigating factors and sentenced defendant in the aggravated range.

However, no evidence was presented at trial of anyone involved in the crimes other than defendant and Rousseau. “When the trial judge errs in finding an aggravating factor and imposes a sentence in excess of the presumptive term, the case must be remanded for a new sentencing hearing.” *State v. Wilson*, 338 N.C. 244, 259, 449 S.E.2d 391, 400 (1994); *accord State v. Baldwin*, 139 N.C. App. 65, 75, 532 S.E.2d 808, 815 (2000). Defendant’s argument on this issue has merit.

Accordingly, we arrest judgment on assault with a deadly weapon inflicting serious injury and felonious operation of a motor vehicle to elude arrest. We remand for entry of judgment on assault inflicting serious injury and misdemeanor operation of a motor vehicle to elude arrest. We hold there was no error in defendant’s conviction for robbery with a dangerous weapon. We remand for a new sentencing hearing on that charge.

COUNT III; JUDGMENT ARRESTED; REMANDED FOR ENTRY OF JUDGMENT ON ASSAULT INFLECTING SERIOUS INJURY AND SENTENCING THEREON.

COUNT I; JUDGMENT ARRESTED; REMANDED FOR ENTRY OF JUDGMENT ON MISDEMEANOR OPERATION OF MOTOR VEHICLE TO ELUDE ARREST AND SENTENCING THEREON.

COUNT II; NO ERROR AT TRIAL; REMANDED FOR RE-SENTENCING.

Chief Judge EAGLES and Judge TYSON concur.

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[154 N.C. App. 341 (2002)]

STATE OF NORTH CAROLINA v. PAUL WILLIAM MARK, SR., DEFENDANT

No. COA01-1512

(Filed 3 December 2002)

**1. Confessions and Incriminating Statements— motion to suppress—traffic stop—not in custody**

The trial court did not err in a driving while impaired and habitual impaired driving case by denying defendant's motion to suppress his statement made during a traffic stop that he had a few alcoholic drinks over at a friend's house, because during a traffic stop a driver is not considered in custody when he is asked a moderate number of questions and when he is not informed that his detention will be other than temporary, and Miranda warnings were not required.

**2. Motor Vehicles— habitual impaired driving—indictment—reference to previous convictions**

The trial court did not err in a driving while impaired and habitual impaired driving case by denying defendant's motion to quash the indictment where count three of the indictment referenced defendant's previous convictions, because it complies with the requirements of N.C.G.S. § 15A-928 that the principal indictment be accompanied by a special indictment or information filed with the principal pleading charging that defendant was previously convicted of a specific offense.

**3. Motor Vehicles— driving while impaired—motion to dismiss—sufficiency of evidence**

The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired (DWI) based on the State's alleged failure to present sufficient evidence that defendant was driving on a public street within North Carolina or that he was impaired, because: (1) a reasonable inference can be drawn that the pertinent street is a public street in North Carolina including the testimony of an officer that he observed defendant driving on the pertinent street and the street was twice the normal width of a normal street out in the county; and (2) the State presented sufficient evidence that defendant was impaired including an officer testifying that he formed an opinion that defendant was appreciably impaired after conducting a field sobriety test.

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**4. Sentencing— aggravating factor—defendant on pretrial release when committed offenses**

The trial court did not err in a driving while impaired and habitual impaired driving case by finding as an aggravating factor that defendant was on pretrial release when he committed the charged offenses even though defendant contends the pending charge had been dismissed with leave based on defendant's failure to appear in court, because: (1) N.C.G.S. § 15A-932 provides that dismissal with leave results in removal of the case from the docket but all other process outstanding retains its validity; (2) the statute does not contain any time limitation and contemplates that a case remains active after a failure to appear and dismissal with leave; and (3) allowing defendant to benefit from his failure to appear in court is an unnecessary result and inconsistent with the relevant statute.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 12 July 2002 by Judge Melzer A. Morgan, Jr. in Superior Court, Guilford County. Heard in the Court of Appeals 17 September 2002.

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

*Hall & Hall, by Douglas L. Hall, for the defendant-appellant.*

WYNN, Judge.

On appeal from convictions of driving while impaired ("DWI") and habitual impaired driving, defendant Paul Mark contends that the trial court erred by (1) denying his motion to suppress his statement made during a traffic stop; (2) denying his motion to quash the indictment where count three of the indictment referenced his previous convictions; (3) denying his motion to dismiss because the State failed to present a *prima facie* case of DWI; and (4) by finding as an aggravating factor that he was on pretrial release when he committed the charged offenses. After carefully reviewing the record, we find no error.

On 22 June 2000, Officer Lowdermilk, of the Greensboro Police Department, observed defendant's vehicle repeatedly cross over the center line of Florida Street; stopped the vehicle; noticed a strong

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smell of alcohol; and asked defendant to produce his license and registration. Defendant informed the officer that his license was revoked. Officer Lowdermilk then asked him whether he had anything to drink, and defendant responded: "I had a few over at a friend's house." After conducting a field sobriety test, Officer Lowdermilk formed the opinion that defendant was appreciably impaired by alcohol and, therefore, placed him under arrest. At the police station, defendant was read his *Miranda* and Intoxilyzer rights; however, he refused to take the Intoxilyzer test.

On 10 June 2000, defendant pled guilty to driving while his license was revoked. After a jury trial in Superior Court, Guilford County, defendant was also found guilty of DWI and habitual impaired driving. From this judgment, defendant appeals.

**[1]** First, defendant assigns error to the trial court's denial of his motion to suppress. Specifically, he argues that his statement, "I had a few [alcoholic drinks] over at a friend's house," should have been suppressed because he made the statement while in "custody" for the purposes of *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). We disagree.

"It is well established that the standard of review in evaluating a trial court's ruling on a motion to suppress is that the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.'" *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165 (2001) (citations omitted)). "The determination of whether a defendant was in custody, based on those findings of fact, however, is a question of law and is fully reviewable by this Court." *State v. Briggs*, 137 N.C. App. 125, 128, 526 S.E.2d 678, 680 (2000) (citations omitted).

"*Miranda* warnings are required only when a defendant is subjected to custodial interrogation." *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253 (2001) (citations omitted). The *Miranda* Court defined "custodial interrogation" as "questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444. "[T]he appropriate inquiry in determining whether a defendant is in 'custody' for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a 'formal arrest or

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restraint on freedom of movement of the degree associated with a formal arrest.’ ” *State v. Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828 (citations omitted).

In *State v. Beasley*, this Court addressed the precise question posed by defendant and held that:

During a traffic stop, a driver is not considered in custody when he is asked a moderate number of questions and when he is not informed that his detention will be other than temporary. . . . The statement made by defendant was made before he was told that he was being charged, and it was not reasonable for him to believe that he was deprived of his freedom of movement in any significant way at that time. . . . Defendant was not in custody for purposes of *Miranda* until he was informed he was under arrest. Trooper Johnson was not required to inform him of his rights under *Miranda* until that time. Therefore, the statements made by defendant prior to his arrest were admissible.

*State v. Beasley*, 104 N.C. App. 529, 532, 410 S.E.2d 236, 238-39 (1991) (citations omitted). Accordingly, we find no merit to defendant’s first assignment of error.

**[2]** Second, defendant assigns error to the trial court’s denial of his motion to quash the indictment. Specifically, defendant argues that count three of the indictment was entitled and referenced “Habitual Impaired Driving” in violation of N.C. Gen. Stat. 15A-928 which provides:

(a) If a reference to a previous conviction is contained in the statutory name or title of the offense, the name or title may not be used in the indictment or information, but an improvised name or title must be used which labels and distinguishes the offense without reference to a previous conviction.

(b) An indictment or information for the offense must be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense. At the prosecutor’s option, the special indictment or information may be incorporated in the principal indictment as a separate count. . . . [T]he State may not refer to the special indictment or information during the trial nor adduce any evidence concerning the previous conviction alleged therein.



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In *State v. Lobohe*, this Court addressed the precise question posed by defendant and held that:

In this case, Count I of the indictment contains all of the elements of DWI and, in compliance with section 15A-928(a), Count I does not allege Defendant's three previous impaired driving convictions. Count II of the indictment, which is contained as a separate count in the principal indictment as permitted by section 15A-928(b), contains an allegation that Defendant was convicted of impaired driving on three previous occasions and contains the dates of those alleged convictions. Count II, therefore, complies with the requirement of section 15A-928(b) that the principal indictment "be accompanied by a special indictment or information, filed with the principal pleading, charging that the defendant was previously convicted of a specified offense." Thus, the indictment follows precisely the required format set forth in section 15A-928.

*State v. Lobohe*, 143 N.C. App. 555, 558, 547 S.E.2d 107, 109 (2001) (citations omitted). Accordingly, we find no merit to defendant's second assignment of error.

**[3]** Third, defendant assigns error to the trial court's denial of his motion to dismiss contending that the State failed to present a *prima facie* case of DWI. The essential elements of DWI are: (1) Defendant was driving a vehicle; (2) upon any highway, any street, or any public vehicular area within this State; (3) while under the influence of an impairing substance. N.C. Gen. Stat. § 20-138.1. Defendant argues that the State failed to produce evidence that he was driving on a public street within North Carolina or that he was impaired. We disagree.

"In ruling on a motion to dismiss for insufficient evidence, the trial court must consider the evidence in the light most favorable to the State, which is entitled to every reasonable inference which can be drawn from that evidence." *State v. Dick*, 126 N.C. App. 312, 317, 485 S.E.2d 88, 91 (1997).

Here, the State presented evidence through the testimony of Officer Lowdermilk that he observed defendant driving on "Florida Street" near "Highway 29." Moreover, Officer Lowdermilk testified that Florida Street was twice the normal width of a normal street "out in the county." From this evidence, viewed in the light most favorable

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to the State, a reasonable inference can draw that Florida Street is a public street in North Carolina.<sup>1</sup>

Furthermore, the State presented sufficient evidence that defendant was impaired. The opinion of a law enforcement officer, for instance, has consistently been held sufficient evidence of impairment, provided that it is not solely based on the odor of alcohol. *State v. Rich*, 351 N.C. 386, 397-98, 527 S.E.2d 299, 305 (2000); *Atkins v. Moye*, 277 N.C. 179, 185, 176 S.E.2d 789, 793 (1970); *State v. Willard*, 241 N.C. 259, 264, 84 S.E.2d 899, 902 (1954). Here, Officer Lowdermilk testified that he formed an opinion that defendant was appreciably impaired after conducting a field sobriety test. Accordingly, we find no merit to defendant's third assignment of error.

**[4]** Finally, the dissent and defendant argue the trial court impermissibly found as an aggravating factor that defendant was on pretrial release when arrested. Accordingly, the dissent would remand for a new sentencing hearing. We disagree.

In 1990, defendant was charged for driving with a revoked license. However, the charge was dismissed with leave, pursuant to N.C. Gen. Stat. § 15A-932, because defendant failed to appear in court. When defendant was sentenced in the case *sub judice*, the trial court sentenced defendant in the aggravated range because the factors in aggravation outweighed the mitigating factors. As the sole aggravating factor, the trial court checked the box indicating that "defendant committed the offense while on pretrial release on another charge." The dissent and defendant contend this was error, because, rather than being on pretrial release, the pending charge had been dismissed with leave because of defendant's failure to appear in court.

However, section 15A-932 contemplates this precise situation and provides that "dismissal with leave . . . results in removal of the case

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1. The dissent disagrees with this proposition. The dissent argues that a "reasonable inference" cannot be drawn that Florida Street is a public street in North Carolina because "[a] landowner . . . is not prohibited from naming" a private road on his or her personal property. In addition, the dissent notes that N.C. Gen. Stat. § 153A-239.1(a) permits local governments to name all roads in North Carolina, public or private, for the purpose of facilitating 911 emergency services. From these facts, the dissent contends the jury could only have harbored a "mere suspicion" that Florida Street is a public street in North Carolina. The dissent essentially argues that it is not "reasonable" to reach a conclusion if any exceptions or contrary evidence exist. Rather, such a conclusion is simply a "mere suspicion." We cannot agree, and other states having occasion to address this issue have all held that a reasonable inference pertaining to a street's public nature can be drawn from similar evidence. See *e.g.*, *State v. Johnson*, 2001 WL 1562089, \*3 (Ohio App. 2001); *Com. v. Hopkins*, 747 A.2d 910, 918 (Pa. Super. 2000); *State v. Diesing*, 435 N.W.2d 190, 192 (Neb. 1989).

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from the docket . . . but all other process outstanding retains its validity.” The statute does not contain any time limitation, and contemplates that a case remains “active” after a failure to appear and dismissal with leave. The dissent would have the defendant benefit from his failure to appear in court. We find this result unnecessary and inconsistent with the relevant statute. Accordingly, the trial court did not err, and this assignment of error is without merit.

We have examined defendant’s remaining assignments of error and find them to be without merit.

No Error.

Judge BIGGS concurs.

Judge Greene dissents.

GREENE, Judge, dissenting.

I disagree with the majority’s conclusion that “a reasonable inference can [be] drawn from the evidence that Florida Street is a public street in North Carolina.” Accordingly, I dissent.

In considering a motion to dismiss, a trial court must determine whether there is substantial evidence of each essential element of the offense charged. *State v. Butler*, 356 N.C. 141, 145, 567 S.E.2d 137, 139 (2002). “Substantial evidence is that relevant evidence which a reasonable mind would find adequate to support a conclusion.” *State v. Carr*, 122 N.C. App. 369, 372, 470 S.E.2d 70, 72 (1996). Evidence creating a “mere suspicion” is not substantial evidence. *Butler*, 356 N.C. at 141, 567 S.E.2d at 139-40. The State, however, is entitled to all reasonable inferences drawn from the evidence. *Id.* at 145, 567 S.E.2d at 140. Thus, evidence is substantial if it leads to a reasonable inference of the existence of an element of the crime charged.

An inference is “[a] logical and reasonable conclusion of a fact not presented by direct evidence but which, by process of logic and reason, a trier of fact may conclude exists from the established facts.” *Black’s Law Dictionary* 778 (6th ed. 1990) [hereinafter *Black’s*]. A suspicion is “[t]he apprehension of something without proof or upon slight evidence. Suspicion implies a belief or opinion based upon facts or circumstances which do not amount to proof.” *Black’s* at 1447.

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To withstand a motion to dismiss in this case the State was required to present substantial evidence defendant was driving a vehicle on a street while under the influence of an impairing substance. *See* N.C.G.S. § 20-138.1 (2001). A street is defined as a “highway.” N.C.G.S. § 20-4.01(46) (2001). A highway is “[t]he entire width between property or right-of-way lines of every way or place of whatever nature, when any part thereof is open to the use of the public as a matter of right for the purposes of vehicular traffic.” N.C.G.S. § 20-4.01(13) (2001).

Evidence defendant was driving on “Florida Street,” which is “near” Highway 29 and is twice the width of a “normal street out in the county” does not logically or reasonably lead to the conclusion “Florida Street” is “open to the use of the public as a matter of right.” To hold otherwise would mean that all named streets are “open to the use of the public as a matter of right,” and this simply is not true.<sup>2</sup> Evidence of a name, general location, and size of a road only amounts to facts and circumstances raising a mere suspicion that “Florida Street” might be a “public street.”

Thus, the State failed to produce substantial evidence of an essential element of the crime charged. Accordingly, defendant’s motion to dismiss should have been allowed. In any event, assuming the majority has correctly decided this issue, defendant is entitled to a new sentencing hearing. The trial court found, as an aggravating factor, defendant had committed this driving while impaired offense while on release pending trial of another offense (driving while license revoked). This was error. *See State v. Parks*, 324 N.C. 94, 98, 376 S.E.2d 4, 7 (1989) (aggravating factor exists if the defendant has shown “disdain for the law by committing an offense while on release pending trial of an earlier charge”). The other offense had been dismissed and was not pending at the time defendant was charged with driving while impaired.

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2. A landowner having a private road on his property, where the public can be excluded, is not prohibited from naming the road. Indeed, some counties name each road within the county, whether private or public, to make it easier to locate people in the event of emergencies. *See* N.C.G.S. § 62A-3(3) (2001) (local government can name streets within its jurisdiction for purposes of 911 emergency response); *see also* N.C.G.S. § 153A-239.1(a) (2001) (county can name “any road”).

**TAYLOR v. INTERIM HEALTHCARE OF RALEIGH-DURHAM, INC.**

[154 N.C. App. 349 (2002)]

LARRY TAYLOR, ADMINISTRATOR OF THE ESTATE OF WILLIAM TAYLOR, JR., PLAINTIFF V.  
INTERIM HEALTHCARE OF RALEIGH-DURHAM, INC., DEFENDANT

No. COA02-91

(Filed 3 December 2002)

**1. Wrongful Death— proximate cause—sufficiency of evidence—directed verdict**

The trial court erred in a wrongful death action by directing verdict in favor of defendant healthcare corporation at the close of plaintiff administrator of estate's evidence on grounds plaintiff failed to produce sufficient evidence of proximate cause between defendant's alleged breach of duty in its home nursing care of decedent after his leg surgeries and decedent's subsequent death, because the evidence sufficiently established that: (1) in the exercise of reasonable care, the nurse taking care of decedent could have foreseen her failure to inform decedent's doctors of the state of the wound on decedent's leg could result in consequences of an injurious nature; (2) the fact decedent's doctors were unaware of the open state of the wound was likely to produce the result which occurred; (3) there was a direct cause and effect relationship between the nurse's failure to act and the result; (4) the nurse's failure to act was a substantial factor in the result; and (5) there existed a continuous sequence between cause and result.

**2. Venue— motion for change denied—no abuse of discretion**

The trial court did not abuse its discretion in a wrongful death action by denying plaintiff administrator of estate's motion to change the venue to the county where plaintiff was pursuing a related medical malpractice action against decedent's doctors, because there were several valid grounds upon which the trial court could base this denial including plaintiff's failure to move for a change in venue until almost two years after the commencement of the action and after the case had already been calendared twice in the present county.

Appeal by plaintiff from order entered 24 July 2001 and order and judgment entered 17 September 2001 by Judge Narley L. Cashwell in Durham County Superior Court. Heard in the Court of Appeals 12 November 2002.

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*Jones Martin Parris & Tessener Law Offices, PLLC, by Thomas E. Barwick, for plaintiff-appellant.*

*Yates, McLamb & Weyher, L.L.P., by Barbara B. Weyher and Michael C. Hurley, for defendant-appellee.*

MARTIN, Judge.

Plaintiff Larry Taylor, as administrator of the estate of William Taylor, Jr., (“decedent”) appeals the entry of an order and final judgment granting the motion of defendant Interim Healthcare of Raleigh-Durham, Inc., for a directed verdict at the close of plaintiff’s evidence on grounds plaintiff had failed to produce sufficient evidence of proximate cause between defendant’s alleged breach of duty and decedent’s subsequent death. We reverse the entry of directed verdict and remand for a new trial.

The facts pertinent to the appeal are as follows: Decedent suffered from peripheral vascular disease. At all relevant times, decedent was being treated for complications from the disease by surgeons Joseph Mulcahy and Cynthia Robinson. Throughout the mid to late 1990’s, Drs. Mulcahy and Robinson performed various surgeries on the vascular structures in decedent’s left leg, including a 1995 surgery to graft the femoral artery of the right leg to the femoral artery of the left leg to improve circulation in the left leg. On 11 July 1997, Drs. Mulcahy and Robinson operated on decedent’s left leg to de-clot a saphenous vein graft and remove dead tissue from around the graft. The incision was closed with blue sutures, and decedent’s thigh muscle was mobilized in order to cover the graft. The surgery left decedent with two large wounds on his left thigh.

Decedent was discharged from the hospital on 17 July 1997. Defendant was engaged to provide decedent with home nursing care beginning 17 July, including twice-daily dressing changes to the two wounds on decedent’s left thigh. On the afternoon of 19 July, Corrine Taylor-Allen, a nurse employed by defendant, observed during a routine visit to decedent’s home that decedent had an area of swelling below the knee on his left leg. Taylor-Allen contacted Dr. Mulcahy, who advised that decedent be brought to the emergency room immediately. Decedent presented to the emergency room where Dr. Mulcahy performed a final surgery on his left leg where-in the bridge of skin between the existing wounds was cut, leaving only one wound. Dr. Mulcahy discharged decedent from the hospital that evening.

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On the morning of 20 July, Taylor-Allen again visited decedent's home. She noted the two prior wounds were now one larger wound, and that there appeared to be a large amount of drainage in the wound. Taylor-Allen also noted that she saw what she believed to be a tendon visible in the wound bed. Taylor-Allen did not contact Drs. Mulcahy or Robinson to report the drainage or visible tendon. Taylor-Allen returned to decedent's home late in the afternoon of 20 July. She recorded that what she had believed to be a tendon that morning was actually the femoral artery, and that the blue sutures used to close decedent's saphenous vein graft following surgery were now visible. Taylor-Allen did not contact her supervisors or decedent's doctors about the visible femoral artery and sutures, nor did she alert decedent that he should go to the hospital or contact his doctors.

In the early morning of 21 July 1997, decedent awoke his sons to alert them that he needed to be transported to the emergency room. Decedent's sons observed "squirts of blood" coming from decedent's left leg, decedent's bed sheets were completely soaked with blood, and there was a pool of blood one inch deep beside decedent's bed. Decedent's son Ricky testified that when he came to his father's aid, decedent stated twice that "[t]he nurse said it might burst." Decedent arrived via ambulance at the hospital shortly after 2:00 a.m. and died minutes thereafter. The cause of death was determined to be a hemorrhage due to a breakdown of the wound from the vascular surgery. Dr. Mulcahy examined decedent's leg wound postmortem and observed that parts of the saphenous vein graft were visible and exposed in the wound bed.

On 3 May 1999, plaintiff initiated this action for wrongful death, alleging defendant was negligent in failing to render care to decedent consistent with the applicable standard of practice and that such negligence resulted in the rupture of decedent's femoral bypass, causing him to bleed to death. On 19 March 2001, plaintiff moved to change the venue to Vance County, where plaintiff had initiated a related medical malpractice action against decedent's doctors; plaintiff's motion was denied.

At trial, plaintiff presented the testimony of Dr. Bruce Morgan, an expert in general and vascular surgery. Dr. Morgan testified that had Taylor-Allen alerted decedent's treating physician to the fact his femoral artery was visible in the wound bed, any reasonable physician would have immediately admitted decedent to the hospital and performed a ligation, wherein the graft would be tied off. Dr. Morgan testified that had a ligation been performed on decedent's graft, dece-

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dent would not have experienced a hemorrhage since the graft was the only source of blood to decedent's left leg. Dr. Mulcahy testified that if he had known the femoral artery was visible in the wound bed, he would have admitted decedent to the hospital and ligated the graft due to the "great risk" of the wound opening up and bleeding. Dr. Robinson testified that had she been alerted to the fact a nurse believed decedent's femoral artery was visible in the wound bed, she would have requested decedent be brought to the hospital immediately for evaluation.

Dr. Mulcahy testified that, in his opinion, decedent most likely died of a hemorrhage to the saphenous vein graft. He further testified that during his postmortem examination of decedent's wound, he observed what he thought was a possible tear in decedent's graft. However, Dr. Mulcahy was not certain that the hemorrhage occurred where he believed he saw a tear, or whether it occurred at a location on the saphenous vein graft that was visible in the wound bed, or elsewhere on the graft.

Additionally, plaintiff presented evidence from an expert in the field of nursing, who testified a visible or exposed artery in a wound bed constitutes a "medical emergency," and Taylor-Allen's failure to alert decedent's doctors to the state of the femoral artery and sutures on 20 July, among other of her actions, fell below the reasonable standard of care for the profession. Taylor-Allen testified she knew decedent's wound was a "high risk" wound due to the lack of structures surrounding the femoral artery, and that, depending on decedent's activity level, the artery could possibly rupture.

At the close of plaintiff's evidence, defendant moved for a directed verdict. During arguments on the motion, the trial court stated that for purposes of the motion, it would assume Taylor-Allen had violated every conceivable standard of care in failing to alert decedent's doctors to the state of the wound, but that because plaintiff had not presented evidence that decedent's hemorrhage occurred on a portion of the saphenous vein graft actually visible to Taylor-Allen, plaintiff had failed to show the necessary connection between Taylor-Allen's breach of duty and decedent's subsequent hemorrhage. Accordingly, the trial court granted defendant's motion on grounds that "Plaintiff's evidence as to proximate cause of death is insufficient as a matter of law and that Defendant is entitled to judgment on the merits of this action." Plaintiff appeals.

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Plaintiff brings forward three arguments on appeal: (1) the trial court erred in granting defendant's motion for directed verdict because plaintiff presented sufficient evidence of proximate cause; (2) the trial court abused its discretion in denying plaintiff's motion to change venue; and (3) the trial court erred in excluding testimony from plaintiff's expert in nursing that Taylor-Allen's recopying of decedent's medical chart following his death was a violation of the applicable standard of care.

**[1]** We first address the trial court's grant of directed verdict on the issue of proximate cause.

The law with regard to directed verdicts is clear. In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor. . . . [W]here the question of granting a directed verdict is a close one, we have said that the better practice is for the trial court to reserve its decision on the motion and allow the case to be submitted to the jury.

*Turner v. Duke University*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989). "To prevail on a claim of negligence, the plaintiff must establish that the defendant owed him a duty of reasonable care, 'that [the defendant] was negligent in his care of [the plaintiff,] and that such negligence was the proximate cause of [the plaintiff's] injuries and damage.'" *Williamson v. Liptzin*, 141 N.C. App. 1, 10, 539 S.E.2d 313, 319 (2000) (citation omitted), *review dismissed and disc. review denied*, 353 N.C. 456, 548 S.E.2d 734 (2001). Moreover, because causation is an inference of fact to be drawn from the circumstances, "proximate cause is normally a question best answered by the jury." *Leatherwood v. Ehlinger*, 151 N.C. App. 15, 24, 564 S.E.2d 883, 889 (2002).

We first disagree with defendant's contention that plaintiff was unable to sufficiently establish decedent's cause of death. Contrary to defendant's assertion that Dr. Mulcahy was unable to conclude anything other than decedent bled to death from an unknown location, Dr. Mulcahy opined decedent most likely died as a result of a hemorrhage to the saphenous vein graft. He testified that although he could not be certain the exact location of the hemorrhage on the saphenous

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vein graft, it was indeed his opinion, based on his training as a vascular surgeon and familiarity with decedent's condition and leg, the most likely cause of death was a hemorrhage of that graft. This testimony sufficiently established decedent's cause of death for purposes of withstanding a motion for directed verdict. *See Felts v. Liberty Emergency Service, P.A.*, 97 N.C. App. 381, 389, 388 S.E.2d 619, 623 (1990) (physician's statement that it was "possible" a heart attack could have been prevented had plaintiff been admitted to hospital, combined with testimony as to what could have been done at hospital to prevent severity of attack sufficient evidence of proximate cause to withstand motion for directed verdict); *Largent v. Acuff*, 69 N.C. App. 439, 443, 317 S.E.2d 111, 113 (holding testimony from doctor that lack of early surgery "quite likely" contributed to patient's paralysis sufficiently concrete to survive motion to dismiss, and noting term "quite likely" denotes much higher probability than "may"), *disc. review denied*, 312 N.C. 83, 321 S.E.2d 896 (1984).

We also disagree with defendant's assertion that plaintiff failed to provide the necessary causative link between any breach of duty by Taylor-Allen in her care of decedent and decedent's death from a hemorrhage to the saphenous vein graft. Defendant argues, and the trial court determined, that in order for plaintiff to establish proximate cause between Taylor-Allen's failure to report the state of the wound and the hemorrhage, plaintiff would be required to present evidence showing the hemorrhage occurred on the exact portion of the graft visible to Taylor-Allen. Such an interpretation of proximate cause is too narrow.

North Carolina appellate courts define proximate cause as a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

*Williamson*, 141 N.C. App. at 10, 539 S.E.2d at 319. Foreseeability is a necessary element of proximate cause. *Id.* "To prove that an action is foreseeable, a plaintiff is required to prove that 'in "the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.'" " *Id.* (citations omitted). The plaintiff need not prove the defendant foresaw the exact injury which occurred. *Id.* In addition to foreseeability, other

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factors to consider in assessing proximate cause are whether the cause was likely to produce the result, whether the relationship of cause and effect is too attenuated, the existence of intervening causes, whether the cause was a substantial factor in the result, and whether there existed a continuous sequence between cause and result. *Id.* at 11, 539 S.E.2d at 319-20.

In the present case, defendant argues plaintiff's lack of evidence that the hemorrhage occurred at a place visible to Taylor-Allen renders any link between her alleged breach of duty and the subsequent hemorrhage one of coincidence and sequence as opposed to consequence; in other words, defendant maintains Taylor-Allen's failure to alert decedent's doctors to the state of the wound cannot have been the cause of the subsequent hemorrhage if Taylor-Allen could not see the exact location where the hemorrhage occurred, and the fact decedent subsequently suffered a hemorrhage possibly at some other location in the leg was simply coincidental and temporal.

Defendant's argument does not stand in the face of the medical testimony tending to show that the state of the wound and the visible nature of the femoral artery was, in and of itself, an indication of the breakdown in the structures of decedent's femoral bypass specifically placing decedent at risk of hemorrhage in those structures. Plaintiff's nursing expert testified that a visible or exposed artery in a wound bed constitutes a "medical emergency." Dr. Mulcahy testified that a visible femoral artery in the wound bed would signify the muscle had uncovered the graft and the graft would not be working as it should, thereby placing the patient "at a great risk" of the graft opening up and bleeding. Indeed, the fact that the state of the wound itself was indicative of the risk of hemorrhage was demonstrated by the testimony of the physicians that if they had known the femoral artery was visible in the wound bed, they would have requested decedent come to the hospital immediately for evaluation, and that based simply on the knowledge the femoral artery was visible, a litigation would be necessary in order to prevent hemorrhaging.

Moreover, the evidence established, by more than a mere scintilla, that it was specifically foreseeable to Taylor-Allen that the state of decedent's wound and the lack of other structures surrounding and protecting the femoral artery placed decedent at a risk of hemorrhage. Decedent expressed to his son that the nurse specifically informed him the wound "might burst," and Taylor-Allen testified herself that the state of the wound was "high risk" and could be susceptible to rupture. Thus, regardless of where the hemorrhage in dece-

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dent's graft actually occurred and whether it occurred at a location visible to Taylor-Allen, the testimony provides more than a scintilla of evidence establishing that it was, or at least should have been, foreseeable to Taylor-Allen based on her observation of the open state of the wound and femoral artery, that decedent was at risk of experiencing a breakdown of his femoral bypass, and consequently, his doctors should have been informed of the state of the wound. As our Supreme Court has observed, evidence of such a failure to act in the face of such foreseeability is "the essence of proximate cause." *Turner*, 325 N.C. at 160, 381 S.E.2d at 711.

Additionally, the evidence also sufficiently established that had Taylor-Allen informed decedent's doctors of her observations, the hemorrhage which killed decedent would not have occurred. Dr. Morgan's expert testimony established that had Taylor-Allen properly informed decedent's doctors of the state of the wound, any reasonable doctor would have immediately performed a ligation to tie off the graft to prevent hemorrhaging. He further testified that had that been done in this case, decedent would not have suffered the hemorrhage which killed him. The testimony of Drs. Mulcahy and Robinson, that had they known of the state of the wound they would have requested that decedent come to the hospital and that Dr. Mulcahy would have performed a ligation, supported Dr. Morgan's testimony. Such testimony constitutes more than a mere scintilla of evidence that had Taylor-Allen alerted decedent's doctors to the fact the femoral artery was visible in the wound bed, as the standard of care required, decedent would have been admitted to the hospital and a ligation performed that would have prevented the hemorrhage that caused his death.

In summary, plaintiff's evidence, taken in the light most favorable to plaintiff, giving him the benefit of all reasonable inferences, sufficiently established that in the exercise of reasonable care, Taylor-Allen could have foreseen her failure to inform decedent's doctors of the state of the wound could result in consequences of an injurious nature; that the fact decedent's doctors were unaware of the open state of the wound was likely to produce the result which occurred; that there was a direct cause and effect relationship between Taylor-Allen's failure to act and the result; that Taylor-Allen's failure to act was a substantial factor in the result; and that there existed a continuous sequence between cause and result. Such evidence is all plaintiff was required to forecast on the issue of proximate cause in order to overcome the motion for directed verdict. *See Williamson*, 141

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N.C. App. at 11, 539 S.E.2d at 319-20. The trial court erred in granting a directed verdict in favor of defendant on this issue. Accordingly, plaintiff is entitled to a new trial.

**[2]** In his second argument, plaintiff maintains the trial court abused its discretion in denying his motion to change the venue to Vance County where he was pursuing a related medical malpractice action against decedent's doctors. A trial court's ruling on a motion to change venue will not be disturbed on appeal absent a manifest abuse of discretion. *Smith v. Mariner*, 77 N.C. App. 589, 335 S.E.2d 530 (1985), *disc. review denied*, 315 N.C. 590, 341 S.E.2d 29 (1986). We discern from the record no abuse of discretion in the trial court's denial of plaintiff's motion, as there appear in the record several valid bases upon which the trial court could base that denial, including, among other things, plaintiff's failure to move for a change in venue until almost two years after the commencement of the action and after the case had already been calendared twice in Durham County. This assignment of error is overruled.

In light of our holding, we need not address plaintiff's final assignment of error directed to the exclusion of certain testimony offered through his expert witness in the field of nursing. The entry of a directed verdict in favor of defendant is reversed, and this case is remanded for a new trial.

Reversed and remanded.

Chief Judge EAGLES and Judge GREENE concur.

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SHARON LUCAS, PLAINTIFF V. SWAIN COUNTY BOARD OF EDUCATION, AND  
FARLEY CONSTRUCTION CO., INC. DEFENDANTS

No. COA02-253

(Filed 3 December 2002)

### **1. Immunity— governmental—waiver—School Boards Trust**

Defendant board of education's motion for summary judgment should have been granted based on governmental immunity in an action that arose from plaintiff's fall down concrete steps at a high school football stadium. There was no issue of material fact as to defendant's waiver of immunity up to \$100,000 despite

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defendant's participation in the North Carolina School Boards Trust; the Department of Insurance's failure to take action against the Trust for the unauthorized provision of insurance does not make the Trust a qualified insurer under N.C.G.S. § 115C-42.

**2. Immunity—governmental—waiver—School Boards Trust—excess insurance purchased**

A school board waived its immunity for claims between \$100,000 and \$1,000,000 where the school participated in the North Carolina School Boards Trust and the Trust purchased excess coverage for claims in this range from a commercial insurance company. N.C.G.S. § 115C-42 does not exempt from waiver a school board which contracts with an intermediary to procure insurance through the commercial market.

Appeal by defendant Swain County Board of Education from order entered 15 November 2001 by Judge J. Marlene Hyatt in Swain County Superior Court. Heard in the Court of Appeals 15 October 2002.

*Bridgers & Ridenour, PLLC, by Ben Oshel Bridgers and Eric Ridenour, for plaintiff-appellee.*

*Roberts & Stevens, P.A., by Sarah Patterson Brison Meldrum, for defendant-appellant Swain County Board of Education.*

*Yates, McLamb & Weyher, L.L.P., by Barbara B. Weyher; and Allison Schafer, for the North Carolina School Boards Association, amicus curiae.*

*Ferguson Stein Chambers Wallas Adkins Gresham & Sumter, P.A., by S. Luke Largess, for the North Carolina Academy of Trial Lawyers, amicus curiae.*

MARTIN, Judge.

Swain County Board of Education ("defendant") appeals an order granting partial summary judgment in favor of Sharon Lucas ("plaintiff") on the issue of defendant's governmental immunity. For reasons stated herein, we affirm in part, reverse in part, and remand.

The facts pertinent to this appeal are as follows: plaintiff was injured on 18 September 1999 when she allegedly fell down concrete steps at the Swain County High School Football Stadium, located on land owned by defendant. On 12 June 2000, plaintiff filed a complaint

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against defendant and the construction company which had constructed the steps, alleging their negligence caused her injuries. The construction company's motion to dismiss plaintiff's complaint was granted on 18 April 2001. On 20 September 2001, plaintiff moved for partial summary judgment against defendant, asserting defendant had waived its governmental immunity pursuant to G.S. § 115C-42 through the purchase of insurance from the North Carolina School Boards Trust ("the Trust"). The statute provides, in relevant part:

Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

*Any contract of insurance purchased pursuant to this section shall be issued by a company or corporation duly licensed and authorized to execute insurance contracts in this State or by a qualified insurer as determined by the Department of Insurance . . . .*

N.C. Gen. Stat. § 115C-42 (2001) (emphasis added). The evidence showed that at the time of plaintiff's accident, defendant had entered into a General Liability Trust Fund Agreement ("Agreement") with the Trust wherein the Trust agreed to pay damages resulting from claims against defendant for bodily injury up to \$100,000. The Agreement also provided for excess insurance coverage for claims between \$100,000 and \$1,000,000.

In support of her motion, plaintiff filed an affidavit in an unrelated case from Peter Kolbe of the Department of Insurance, which had been given prior to plaintiff's injury. In the affidavit, Mr. Kolbe stated that he considers the Trust to be engaged in the business of insurance. In addition, plaintiff offered the deposition testimony of Edwin Dunlap, Jr., Executive Director of the North Carolina School Boards Association, and Treasurer of the Trust. Dunlap's deposition established that under the agreement with the Trust, defendant's excess coverage for claims between \$100,000 and \$1,000,000 was provided by a commercial insurer, not the Trust itself.

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In response to plaintiff's motion, defendant filed the affidavit of William Hale, Deputy Insurance Commissioner, stating that Mr. Kolbe's opinion that the Trust is an insurer does not represent the official position of the Department of Insurance, and that the Trust is neither licensed and authorized to execute insurance contracts in this State, nor a qualified insurer as determined by the Department of Insurance. In addition, defendant moved to strike Mr. Kolbe's affidavit as not having been given for the case at issue.

On 21 September 2001, defendant moved for summary judgment on the ground that it is immune from suit under the doctrine of governmental immunity. Defendant offered two affidavits in support of its motion, one from Patsy Earley, defendant's finance officer, and the other from Edwin Dunlap. Both affidavits established the Trust is not authorized and licensed to execute insurance contracts in this State and that it is not considered a qualified insurer as determined by the Department of Insurance. In addition, the trust fund coverage agreement was in evidence and provided:

[t]he NCSBT Coverage Agreement is not a contract of insurance by a company or corporation duly licensed and authorized to execute insurance contracts in this State or by a qualified insurer as determined by the Department of Insurance. Therefore, the NCSBT Coverage Agreement expressly is not considered a waiver of governmental immunity as provided in G.S. 115C-42.

On 15 November 2001, the trial court entered an order denying defendant's motion and granting plaintiff's motion for partial summary judgment, holding that defendant had waived its governmental immunity to the full extent of the coverage, \$1,000,000, provided by this Agreement. Defendant appeals.

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**[1]** Although defendant's appeal is interlocutory in nature, it is well-established that the denial of a motion for summary judgment grounded on governmental immunity affects a substantial right and is immediately appealable; thus, defendant's appeal is properly before us. *See Craig v. Asheville City Bd. of Educ.*, 142 N.C. App. 518, 543 S.E.2d 186 (2001). By two of its three assignments of error, defendant argues the trial court erred in denying its motion for summary judgment and in granting plaintiff's motion for partial summary judgment where plaintiff's claims are barred by governmental immunity as a matter of law. The standard for ruling upon a motion for summary judgment is well-settled: summary judgment should only be granted



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where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2002). We first address whether a genuine issue of fact exists as to whether defendant waived its immunity by entering into the Agreement for coverage provided directly by the Trust for claims of up to \$100,000.

“As a general rule, the doctrine of governmental, or sovereign immunity bars actions against, *inter alia*, the state, its counties, and its public officials sued in their official capacity.” *Herring ex rel. Marshall v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 683, 529 S.E.2d 458, 461 (citation omitted), *disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000). “A county or city board of education is a governmental agency, and therefore is not liable in a tort or negligence action except to the extent that it has waived its governmental immunity pursuant to statutory authority.” *Seipp v. Wake County Bd. of Educ.*, 132 N.C. App. 119, 121, 510 S.E.2d 193, 194 (1999) (citation omitted). That statutory authority is established by G.S. § 115C-42, set forth above.

Under the plain language of G.S. § 115C-42, a school board such as defendant can only waive its governmental immunity where it procures insurance through (1) a company or corporation licensed and authorized to issue insurance in this State; or (2) a qualified insurer as determined by the Department of Insurance. This requirement was reiterated by this Court in *Hallman v. Charlotte-Mecklenburg Bd. of Educ.*, 124 N.C. App. 435, 477 S.E.2d 179 (1996). In that case, the plaintiff sued the defendant board of education for an injury she sustained while on the property of a county school. The evidence showed the board had liability coverage for claims of up to \$1,000,000 through its participation in the City of Charlotte’s Division of Insurance and Risk Management (“DIRM”) program. *Id.* at 436, 477 S.E.2d at 180. The board moved for summary judgment, asserting it had not purchased insurance, and was therefore protected from liability by governmental immunity. *Id.* In support of its motion, the board filed an affidavit from DIRM’s manager to the effect that DIRM was not licensed and authorized to execute insurance contracts in this State and was not regulated or supervised in any respect by the Department of Insurance. *Id.* at 438-39, 477 S.E.2d at 181. The plaintiff did not offer evidence in opposition to the board’s motion.

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We rejected the plaintiff's argument that the board's participation in DIRM constituted a waiver of immunity under G.S. § 115C-42. Noting that our courts have strictly construed G.S. § 115C-42 against waiver, we emphasized that the board's supporting affidavit established that DIRM did not meet either of the two criterion under G.S. § 115C-42, and that the plaintiff had failed to contradict this evidence. *Id.* Thus, we held summary judgment should have been granted for the board, as its "participation in the City of Charlotte's risk management agreement [was] not tantamount to the purchase of liability insurance as authorized by G.S. § 115C-42 and does not constitute a waiver of its governmental immunity pursuant to the statute for claims not covered by insurance." *Id.* at 439, 477 S.E.2d at 181.

Plaintiff argues *Hallman* is not controlling, and that we should follow this Court's opinion in *Vester v. Nash/Rocky Mount Bd. of Educ.*, 124 N.C. App. 400, 477 S.E.2d 246 (1996), filed the same date as *Hallman*. The plaintiff in *Vester* was injured while being transported on a county school bus. *Id.* at 401, 477 S.E.2d at 247. The trial court dismissed the plaintiff's claim against the defendant board on grounds that the board was immune from suit and jurisdiction was lacking. *Id.* at 402, 477 S.E.2d at 248. The plaintiff appealed, arguing the board had waived its governmental immunity through the purchase of insurance from the North Carolina School Boards Insurance Trust ("NCSBIT"). *Id.* The board's coverage agreement with NCSBIT provided an exemption for claims arising out of the operation of an automobile. *Id.* at 403, 477 S.E.2d at 248. The court stated that the issue on appeal was whether the plaintiff's injury arose out of the operation of the school bus, and the legal discussion in the opinion was centered on that issue only. *Id.* Having determined the plaintiff's injury fell within the coverage exemption, we concluded the trial court had properly dismissed the plaintiff's claim. *Id.* at 405, 477 S.E.2d at 249. The Court did not discuss plaintiff's contention that the defendant board had waived its immunity through its participation in NCSBIT.

Although *Hallman* and *Vester* were filed on the same date, *Hallman* dealt directly with the application of G.S. § 115C-42 to a claim that a school board had waived its governmental immunity, whereas *Vester* makes no mention of G.S. § 115C-42 or the requirements necessary for a board to waive its immunity. We believe *Hallman* is the most analogous case to the issues pertinent here, and we follow that decision. *Hallman* reaffirms the plain language of the relevant statute: the only way a plaintiff can establish that a board

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has waived its immunity is by showing the contract of insurance was issued by (1) an entity licensed and authorized to execute insurance contracts in this State; or (2) a qualified insurer as determined by the Department of Insurance. Nothing in our *Vester* decision negates the plain requirement of G.S. § 115C-42 as applied in *Hallman*.

Applying that statutory requirement here, it is clear plaintiff did not forecast evidence to establish that the Trust meets either of these two criterion. Plaintiff made no showing in support of her motion for summary judgment that the Trust is a licensed and authorized insurer, nor does plaintiff attempt such an argument on appeal. Plaintiff's only argument as to why the Trust is a "qualified insurer as determined by the Department of Insurance" is that the Trust must be qualified in the Department's view, because the Department is aware of the Trust's activities and the Department has failed to take action against the Trust for providing insurance without authorization. However, it is an equally, if not more, plausible explanation that the Department has not chosen to take action against the Trust because it does not consider the Trust a provider of insurance. Moreover, defendant established through three affidavits from Hale, Earley and Dunlap that the Trust is neither a licensed and authorized insurer, nor a qualified insurer as determined by the Department. These affidavits were sufficient to rebut plaintiff's motion, to support defendant's motion, and to then shift the burden to plaintiff, to forecast evidence that the Trust fits one of the two statutory criterion. Plaintiff simply failed to do so. "Once the moving party has made and supported its motion for summary judgment, section (e) of Rule 56 provides that the burden is then shifted to the non-moving party to introduce evidence in opposition to the motion, setting forth 'specific facts showing that there is a genuine issue for trial.' At this time, the non-movant must come forward with a forecast of his own evidence." *Crowder Const. Co. v. Kiser*, 134 N.C. App. 190, 196, 517 S.E.2d 178, 183 (citation omitted), *disc. review denied*, 351 N.C. 101, 541 S.E.2d 142 (1999). Accordingly, as in *Hallman*, plaintiff failed to show the existence of a genuine issue of material fact as to whether defendant waived its immunity to the extent of the Trust's coverage of up to \$100,000. The entry of summary judgment in favor of plaintiff on this issue was therefore error, and defendant's motion for summary judgment should have been granted as to this issue.

**[2]** However, we agree with the trial court that defendant was covered for claims between \$100,000 and \$1,000,000 by an insurer meeting at least one of the requirements of G.S. § 115C-42. The Dunlap

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deposition attached to plaintiff's motion established that defendant's excess coverage for claims beyond \$100,000 was provided by a commercial insurance company. Defendant did not present evidence in response tending to show the excess coverage was not provided by an insurer meeting the statutory criteria, nor does defendant make this argument on appeal. Instead, defendant argues that despite the excess coverage being provided by a commercial insurer, defendant has not waived its immunity because it was the Trust, not defendant itself, that actually dealt with the excess coverage provider.

We are not persuaded by this argument. Under G.S. § 115C-42, a school board waives its immunity when it "secur[es]" or "obtain[s]" insurance from entities such as a commercial insurer. The evidence shows defendant knew its excess coverage was being provided by a commercial insurance company. We do not interpret the statute so narrowly as to exempt a school board from waiver where the board contracts with an intermediary to then procure the board's insurance through the commercial insurance market, nor do we believe such an interpretation consistent with the policy and purpose of G.S. § 115C-42.

This Court has previously addressed a similar issue in the context of a county's statutory waiver of its governmental immunity through the purchase of insurance. *See Wood v. Guilford County*, 143 N.C. App. 507, 546 S.E.2d 641 (2001), *affirmed in part and reversed in part on other grounds*, 355 N.C. 161, 558 S.E.2d 490 (2002). In that case, we held the trial court correctly denied the defendant county's motion to dismiss the complaint based on governmental immunity where the complaint alleged the county entered into a contract with an entity requiring that the entity obtain a liability policy from an insurance company and name the county as an additional insured. We held it was not necessary for the county to have directly purchased the insurance from the insurance company for it to have waived its immunity under the relevant statute, providing that the "[p]urchase of insurance" pursuant to that subsection waives the county's governmental immunity to the extent of coverage:

Although Defendant did not 'purchase' a liability insurance policy from an insurance company, we do not read section 153A-435(a) as requiring the purchase of insurance from an insurance company in order to waive governmental immunity. By requiring Burns to obtain an insurance policy and name Defendant as an additional insured, Defendant contracted, within the meaning of

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section 153A-435(a), to have itself insured and, thus, waived its governmental immunity.

*Id.* at 513, 546 S.E.2d at 645-46.

As in *Woods*, we hold defendant's action in contracting with the Trust, which then contracted with a commercial insurer to provide excess coverage to defendant, constitutes a waiver of defendant's immunity under G.S. § 115C-42 to the extent of that coverage. The evidence establishes defendant waived its immunity for claims between \$100,000 and \$1,000,000 by securing coverage from a commercial insurer for that amount. Therefore, partial summary judgment in favor of plaintiff was proper as to this issue.

In its remaining assignment of error, defendant argues the trial court erred in considering the Kolbe affidavit where that affidavit was not given in connection with the present case and Kolbe had no personal knowledge of the facts of this case when giving the affidavit. Although Kolbe opined in the affidavit that he believed the Trust was engaged in the business of insurance, he made no representations as to whether the Trust met either of the two criterion under G.S. § 115C-42, and thus, his affidavit and the trial court's consideration thereof have no import in light of our decision. Accordingly, we need not address whether the trial court erred in considering the affidavit.

The order granting partial summary judgment in favor of plaintiff is reversed to the extent it determined defendant waived its governmental immunity for claims up to \$100,000; the judgment is affirmed to the extent it determined defendant waived immunity for claims between \$100,000 and \$1,000,000. *See Jones v. Kearns*, 120 N.C. App. 301, 303, 462 S.E.2d 245, 246 (holding defendant city entitled to partial summary judgment to the extent it had not waived its immunity through the purchase of insurance for claims under \$250,000, but not as to claims exceeding that amount for which the city had excess coverage), *disc. review denied*, 342 N.C. 414, 465 S.E.2d 541 (1995). This matter is remanded to the trial court for entry of partial summary judgment in favor of defendant on the issue of governmental immunity for claims of up to \$100,000 and in excess of \$1,000,000, and for such further proceedings as may be required.

Affirmed in part, reversed in part, and remanded.

Judges GREENE and BRYANT concur.

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[154 N.C. App. 366 (2002)]

STATE OF NORTH CAROLINA v. RONALD KENT TAYLOR

No. COA02-176

(Filed 3 December 2002)

**1. Assault— contributory negligence instruction—refused**

The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by refusing defendant's requested instruction that the State must prove that the negligent acts of the victim were not the intervening cause of her injuries. Contributory negligence by a victim does not preclude consideration of defendant's culpable conduct.

**2. Criminal Law— defense of accident—submitted to jury**

The trial court submitted the defense of accident in an assault prosecution where the court told the jury that defendant had no burden to prove that there was an accident and that the State had the burden of proving that the injury was not accidental.

**3. Evidence— prior crimes or bad acts—used to rebut defense—temporally proximate—limiting instruction**

There was no error in an assault prosecution in the testimony of defendant's former spouse about his prior bad acts, including chasing her through the house and placing a gun to her head, where the testimony rebutted defendant's defense of accident in the shooting of his current companion, defendant's actions in 1993 were sufficiently similar to be temporally proximate, and the court gave a limiting instruction.

**4. Evidence— prior crimes or bad acts—unfair prejudice—outweighed by probative value**

In a assault prosecution for shooting his current companion, evidence from defendant's former spouse of prior bad acts, including threatening to kill their children if she did not sign a visitation agreement, was not overly prejudicial in violation of N.C.G.S. § 8C-1, Rule 403.

**5. Evidence— prior crimes or bad acts—breaking mirror on truck—character for truthfulness**

The trial judge in an assault prosecution did not abuse his discretion by admitting on cross-examination evidence that defendant had previously become angry and broken the mirror

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on his truck. Defendant had given an equivocal answer when asked whether he was at a certain restaurant on a particular night and the mirror question was designed to demonstrate that he was present. Moreover, defendant did not show a reasonable possibility of a different outcome had the evidence of prior acts of violence been excluded.

**6. Appeal and Error— preservation of issues—improper use of evidence—no assignment of error**

An issue concerning the improper use of evidence of prior acts of violence was not preserved for appeal where defendant did not make the argument the subject of an assignment of error.

**7. Evidence— other crimes or bad acts—marijuana sale—not relevant to veracity—not prejudicial**

There was no prejudicial error in an assault prosecution where the court erroneously allowed the State to cross-examine defendant about selling marijuana to his neighbor, which had no relevance to defendant's veracity as a witness, but defendant did not show a reasonable possibility of a different outcome had the question been excluded.

Appeal by defendant from judgment dated 11 October 2001 by Judge James U. Downs in Superior Court, Henderson County. Heard in the Court of Appeals 16 October 2002.

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

*Roy D. Neill for defendant-appellant.*

McGEE, Judge.

Ronald Kent Taylor (defendant) was indicted on 22 January 2001 for assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence presented at trial tended to show that defendant and Julie Roy (Ms. Roy) attended a Christmas party together on 9 December 2000. After consuming alcohol at the party, defendant and Ms. Roy had a disagreement because she thought defendant was flirting with another woman. Defendant and Ms. Roy left the party at midnight with defendant driving the vehicle. On the way home, Ms. Roy grabbed the steering wheel and forced the vehicle off the road and into a ditch. Ms. Roy climbed out of the wrecked vehicle, flagged down a passing car driven by Theresa

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Kimmey (Ms. Kimmey) who drove Ms. Roy back to the party. Ms. Roy was unable to obtain help at the party and Ms. Kimmey drove her back to the wrecked vehicle. Officer Jason Garren of the Henderson County Sheriff's Department (Officer Garren) testified that he arrived at the wrecked vehicle in the early hours of 10 December 2000. Officer Garren stated that Ms. Roy was crying and upset and he detected a strong odor of alcohol on her breath. Officer Garren drove Ms. Roy to defendant's house, which was locked with no lights on. Ms. Roy asked Officer Garren to spend the night because she said defendant was crazy. She also asked Officer Garren to break into the house to see if defendant was okay. Officer Garren refused her requests, but he rang the doorbell, banged on the door, and telephoned defendant from his patrol vehicle. Officer Garren offered to take Ms. Roy to another location for the evening; however, she refused and Officer Garren left.

Defendant testified that he caught a ride home with a passerby and went to bed. He said he was awakened by a loud banging on his back door at approximately 3:00 o'clock a.m. Defendant got his pistol and went downstairs. He opened the door when he saw it was Ms. Roy. Ms. Roy yelled about her vehicle, asked defendant why he did not just shoot her, and then attempted to take the pistol from defendant. After failing to wrestle the pistol from defendant, Ms. Roy said she would get her own gun, and began walking upstairs. Defendant told Ms. Roy that if she continued walking upstairs he would call 911, which he did. As defendant called 911, Ms. Roy stopped walking and said she would behave, and defendant hung up the telephone. The 911 operator called back and defendant began screaming at the operator. When defendant heard the click of a shotgun being loaded upstairs, he hung up the telephone and ran outside the house.

Officer Garren returned to the house with Lieutenant Michael Peppers (Lt. Peppers) a few minutes later and found defendant standing at the road wearing a coat and pajamas. Officer Garren talked to defendant, who stated that Ms. Roy had guns and that defendant was afraid she would use them. Lt. Peppers stated that Ms. Roy smelled of alcohol and was very belligerent with Officer Garren. Defendant and Ms. Roy agreed to sleep in separate bedrooms and the officers told defendant to unload the guns and hide them separately from the ammunition. The couple refused additional assistance and the officers left.

A few minutes later, Officer Garren and Lt. Peppers received a report of a gunshot wound at defendant's house and returned to the



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house. Defendant was still on the telephone with the 911 operator and the officers asked him to hang up and come outside, which he did. Defendant stated that he was going to take the officers' guns and shoot himself. Lt. Peppers took defendant into custody and defendant stated that he had shot Ms. Roy. Ms. Roy was found lying on her side in a pool of blood in the bathroom of the master bedroom that was located downstairs. A six-round pistol with one spent round was found on the edge of the bed and a loaded shotgun was on the dresser.

Defendant testified that when the officers had left defendant's house earlier, Ms. Roy went upstairs to a bedroom, and that he took the loaded shotgun and pistol into a downstairs bedroom to unload them. Defendant testified that as he was unloading the pistol, Ms. Roy attempted to grab it. According to defendant, he pushed her away, she lunged again, and the pistol went off. Defendant said that after the pistol went off he saw blood and Ms. Roy fell to the floor. Defendant called 911 a second time, screamed and cried, and stated that Ms. Roy had jumped on him and the pistol had gone off. Defendant testified that he tried to keep the pistol pointed at the ceiling during the struggle and that he did not know who caused it to go off.

Testimony by Detective Vickie Bane of the Henderson County Sheriff's Department demonstrated that the bullet hit the wall 62.5 inches from the floor and bounced to the floor after exiting Ms. Roy's body. Dr. Steven Miller (Dr. Miller), who initially treated Ms. Roy, testified that the bullet severed Ms. Roy's right carotid artery and that she suffered severe brain damage as a result of lost blood circulation. Dr. Miller also stated that no powder burns were found on Ms. Roy's body, which would be expected had the barrel of the pistol been less than one foot away from the wound.

Defendant was tried for assault with a deadly weapon with intent to kill inflicting serious injury. The jury convicted defendant of the lesser included offense of assault with a deadly weapon inflicting serious injury. The trial court sentenced defendant to a minimum of twenty-four months and a maximum of thirty-eight months in prison. Defendant appeals.

**[1]** Defendant first argues the trial court erred by not instructing the jury to consider any culpable negligence by Ms. Roy as an intervening cause of the gunshot injury. Defendant requested that the trial court instruct the jury that "[t]he State must convince you beyond a reasonable doubt that the negligent acts of Ms. Roy, if any, were not the

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intervening cause of her injuries. If the state fails . . . then you would not consider whether the defendant was culpably negligent.”

A requested jury instruction must be given, at least in substance, if it is legally correct and supported by the evidence. *State v. Lundy*, 135 N.C. App. 13, 23, 519 S.E.2d 73, 81 (1999). “On appeal, defendant must show that substantial evidence supported the omitted instruction and that the instruction was correct as a matter of law.” *State v. Farmer*, 138 N.C. App. 127, 133, 530 S.E.2d 584, 588, *disc. review denied*, 352 N.C. 358, 544 S.E.2d 550 (2000).

“The defense of accident is triggered in factual situations where a defendant, without premeditation, intent, or culpable negligence, commits acts which bring about the death of another. It is not an affirmative defense, but acts to negate the *mens rea* element of homicide.” *State v. Lytton*, 319 N.C. 422, 425-26, 355 S.E.2d 485, 487 (1987) (citations omitted). Contributory negligence is no defense in criminal law and the appropriate inquiry is whether a defendant’s culpable conduct is a proximate cause of a victim’s injury. *State v. Harrington*, 260 N.C. 663, 666, 133 S.E.2d 452, 455 (1963).

Contributory negligence on the part of a victim does not preclude the jury’s consideration of a defendant’s culpable conduct. The jury is responsible for determining if a defendant’s culpable conduct is a proximate cause of the victim’s injury and must decide guilt or innocence on that basis. *Id.* Consideration of this proximate causation is not contingent upon a showing that the victim was not contributorily negligent. Defendant’s requested jury instruction was erroneous as a matter of law and defendant was therefore not entitled to have the instruction given to the jury.

**[2]** Defendant also contends that if his culpable negligence was not the proximate cause of Ms. Roy’s injuries, the defense of accident should have been considered by the jury. The trial transcript indicates that the trial court did instruct the jury on the defense of accident. The trial court stated that “defendant [had] no burden to prove that there was an accident.” The trial court also stated that the State possessed the burden of proving beyond a reasonable doubt that Ms. Roy’s injury was not accidental before the jury could return a guilty verdict. The jury was properly instructed on the defense of accident and this defense was not precluded from consideration by the jury. This assignment of error is without merit.

**[3]** Defendant next argues the trial court erred by admitting evidence of prior bad acts in violation of North Carolina Rule of

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Evidence 404(b). Defendant contends that evidence of his past acts were too remote in time and substantially insufficient to be admitted into evidence.

Rule 404(b) operates as a general rule of inclusion for relevant evidence but excludes evidence if its only probative value is to demonstrate the defendant's propensity to commit the crime. N.C. Gen. Stat. § 8C-1, Rule 404(b) (2001); *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990); *see also State v. McAllister*, 138 N.C. App. 252, 257, 530 S.E.2d 859, 863, *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000). Evidence of other crimes, wrongs, or acts may be admitted under Rule 404(b) to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." N.C.G.S. § 8C-1, Rule 404(b); *see also State v. Barnett*, 141 N.C. App. 378, 389, 540 S.E.2d 423, 431 (2000), *aff'd*, 354 N.C. 350, 554 S.E.2d 644 (2001); *State v. Boczkowski*, 130 N.C. App. 702, 504 S.E.2d 796 (1998).

Defendant's former spouse, Lynn Lucker (Ms. Lucker), testified to bad acts that defendant committed in 1993. Ms. Lucker testified that defendant chased her through their house, placed a gun to her forehead, and talked about the different angles in which he would need to hold the gun in order to make a shooting look like an accident. She also testified that defendant had stated that he would kill their children and make it look like an accident if she did not sign a custody visitation agreement with him following their divorce.

Ms. Lucker's testimony concerning defendant's prior bad acts possessed probative value other than to demonstrate defendant had the propensity to commit the crime. At trial, defendant argued that the shooting of Ms. Roy was an accident caused by his and Ms. Roy's struggle for the pistol. Ms. Lucker's testimony was designed to rebut the defense of accident, one of the bases for admission of evidence under Rule 404(b), and was probative of whether or not the shooting of Ms. Roy was accidental. While the acts Ms. Lucker testified about occurred in 1993, they were sufficiently similar to be temporally proximate to the facts in the present case and were admissible. *See State v. Hall*, 85 N.C. App. 447, 451, 355 S.E.2d 250, 253 (stating that remoteness generally goes to the weight of the evidence, not its admissibility), *disc. review denied*, 320 N.C. 515, 358 S.E.2d 525 (1987). Additionally, the trial court correctly instructed the jury to consider the evidence for the limited purpose of demonstrating the lack of accident or mistake on the part of defendant. This assignment of error is without merit.

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[4] Defendant next argues the admission of Ms. Lucker's testimony was overly prejudicial and in violation of North Carolina Rule of Evidence 403. Otherwise relevant evidence must be excluded under Rule 403 "if its probative value is substantially outweighed by the danger of unfair prejudice." N.C. Gen. Stat. § 8C-1, Rule 403 (2001). "[T]o be excluded under Rule 403, the probative value of the evidence must not only be outweighed by the danger of unfair prejudice, it must be *substantially* outweighed." *State v. Lyons*, 340 N.C. 646, 669, 459 S.E.2d 770, 783 (1995). "Whether to exclude relevant but prejudicial evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Handy*, 331 N.C. 515, 532, 419 S.E.2d 545, 554 (1992). This Court will not overturn the decision of a trial court unless it "is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

The burden is on the party who asserts that evidence was improperly admitted to show both error and that he was prejudiced by its admission. The admission of evidence which is technically inadmissible will be treated as harmless unless prejudice is shown such that a different result likely would have ensued had the evidence been excluded.

*State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987) (citations omitted); *see also* N.C. Gen. Stat. § 15A-1443(a) (2002).

As previously discussed, defendant testified that the pistol was unintentionally discharged during a struggle with Ms. Roy. However, Ms. Lucker's testimony was probative of whether or not the shooting was accidental and was not outweighed by the danger of unfair prejudice to defendant. The value of the evidence in demonstrating the lack of accident was greater than any potentially unfair prejudice. The trial transcript shows that the trial court conducted a *voir dire* hearing of Ms. Lucker's testimony and considered the admission of the evidence before allowing the jury to hear the testimony. The trial court issued a limiting instruction to the jury to consider the evidence only for the purpose of evaluating defendant's defense of accident. *See State v. Penland*, 343 N.C. 634, 654, 472 S.E.2d 734, 745 (1996) (finding no prejudicial error in the admission of bad acts when the court gave a limiting instruction), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997). Furthermore, defendant has failed to demonstrate that the danger of prejudice substantially outweighed the probative value of the evidence and that he was actually prejudiced by its

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admission. *Gappins*, 320 N.C. at 68, 357 S.E.2d at 657. This assignment of error is without merit.

**[5]** Defendant next argues that the trial court erred in admitting evidence that he had previously become angry and had broken the mirror on his truck. N.C. Gen. Stat. § 8C, Rule 608 states that specific instances of a witness's conduct may be inquired into on cross-examination if probative of the witness's "character for truthfulness or untruthfulness." N.C. Gen. Stat. § 8C-1, Rule 608(b) (2001).

Rule 608(b) of the North Carolina Rules of Evidence governs the admissibility of specific acts of misconduct where (i) the purpose of the inquiry is to show conduct indicative of the actor's character for truthfulness or untruthfulness; (ii) the conduct in question is in fact probative of truthfulness or untruthfulness; (iii) the conduct in question is not too remote in time; (iv) the conduct did not result in a conviction; and (v) the inquiry takes place during cross-examination.

*State v. Bell*, 338 N.C. 363, 382, 450 S.E.2d 710, 720 (1994), *cert. denied*, 515 U.S. 1163, 132 L. Ed. 2d 861 (1995). Admission of this evidence on cross-examination is in the discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Kimble*, 140 N.C. App. 153, 168, 535 S.E.2d 882, 892 (2000).

In the case before us, defendant was questioned about a statement he made to friends at Flannagan's Restaurant one evening. In laying the foundation for the question, the State asked defendant if he was at Flannagan's on the night in question and defendant responded, "[p]ossibly, yes." The evidence elicited by the State was designed to demonstrate that defendant was at Flannagan's on the night in question and to rebut any assertion that defendant was elsewhere. The evidence was used to test the truthfulness of defendant's answer and to determine his presence with friends at the restaurant. We do not find that the trial court abused its discretion in admission of the evidence.

Additionally, even assuming *arguendo* that the evidence was erroneously admitted, defendant has failed to demonstrate that he was prejudiced by the admission of the testimony. *Gappins*, 320 N.C. at 68, 357 S.E.2d at 657. Defendant has not proven that there is a reasonable possibility the outcome of the trial would have been different had the evidence of defendant's acts of violence been excluded. N.C.G.S. § 15A-1443(a). This assignment of error is without merit.

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[6] Defendant also argues that evidence of this act of violence was admitted solely to show it was likely he would lose his temper and assault Ms. Roy. Defendant asserts that the State used this evidence in its closing statement, thereby demonstrating the improper purpose for which it was admitted. However, defendant failed to make this argument the subject of an assignment of error and did not preserve this issue for appeal. Accordingly, we decline to address this argument. N.C. R. App. P. 10(c)(1).

[7] Lastly defendant argues the trial court erred in allowing the State to cross-examine defendant concerning his alleged sale of marijuana to his neighbor. Defendant contends admission of this evidence was in violation of N.C.G.S. § 8C-1, Rule 608. As previously stated, specific instances of a witness's conduct may be inquired into on cross-examination if probative of the witness's "character for truthfulness or untruthfulness," and admission of the evidence is subject to the discretion of the trial court. N.C.G.S. § 8C-1, Rule 608(b); *Kimble*, 140 N.C. App. at 168, 535 S.E.2d at 892.

Defendant cites *Bell* in support of his argument that evidence of the sale of drugs is not probative of truthfulness. In *Bell*, our Supreme Court held that the trial court properly restricted inquiry into a witness's possession of marijuana with intent to sell because it was not relevant to the witness's general veracity. *Bell*, 338 N.C. at 382-83, 450 S.E.2d at 720-21. The Court reasoned that the evidence needed to be probative of the defendant's character for truthfulness.

In the case before us, the record fails to show the relevance of defendant's sale of marijuana to his veracity as a witness and should have been excluded. Whether or not defendant sold marijuana to his neighbor is not probative of defendant's truthfulness in this case. Defendant argues that this question was prejudicial in light of other questions concerning defendant's cocaine use and threatening conversations with bill collectors. However, defendant has not assigned error to these questions and they are not before us for review. While the question involving the sale of marijuana was inappropriate, defendant has failed to demonstrate how he was prejudiced by admission of the evidence. Defendant has not proven that there is a reasonable possibility the outcome of the trial would have been different had this question been excluded and he has therefore failed to show he was prejudiced. *See Gappins*, 320 N.C. at 68, 357 S.E.2d at 657. We overrule this assignment of error.

The defendant received a fair trial, free of prejudicial error.

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No error.

Judges HUDSON and BIGGS concur.

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STATE OF NORTH CAROLINA v. ROY LEE CHILDERS, DEFENDANT-APPELLANT

No. COA01-1350

(Filed 3 December 2002)

**1. Gambling; Taxation— ad valorem taxes—discovered property provision—illegal gaming machines**

The trial court did not err by presenting the charge of possession of illegal gaming machines to the jury even though defendant contends the law under N.C.G.S. § 105-312(e) does not require that the machines actually be listed for ad valorem property tax purposes prior to 31 January 2000, because: (1) the machines seized were not installed, in operation, and available for play until 1 October 2000, almost three months after the 30 June 2000 deadline provided under N.C.G.S. § 14-306.1(a)(1); (2) county tax records showed that the machines were not listed for tax purposes until 28 September 2000 which was not by 31 January 2000; and (3) defendant's use of the discovered property provision under N.C.G.S. § 105-312(e) to legitimate activity prohibited by N.C.G.S. § 14-306.1(a)(1) is contrary to its plain meaning and the legislature's intent.

**2. Arrest— warrantless—probable cause—illegal gaming machines**

The trial court did not err in an illegal possession of video gaming machines and assault with a firearm on a law enforcement officer case by admitting the State's exhibits even though defendant contends they were tainted by defendant's warrantless arrest for which the arresting officers allegedly lacked probable cause, because given the information obtained from a restaurant's lessee about the pertinent machines in the restaurant, observation of the machines' presence in the restaurant on the day of defendant's arrest, and a detective's knowledge that defendant failed to register the machines with the sheriff's department, the officers had ample evidence to reasonably assume that a crime was being committed.

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**3. Firearms and Other Weapons— assault with firearm on law enforcement officer—jury instructions—defendant’s right to defend himself—pointing of firearm**

The trial court did not err by failing to give jury instructions that defendant had a right to defend himself with regard to an unlawful arrest and that the firearm he possessed at the time of his arrest was required to be pointed at or toward the alleged victims to find defendant guilty of assault with a firearm on a law enforcement officer, because: (1) the evidence did not support defendant’s contention that he was subjected to an unlawful arrest; and (2) the State did not need to prove that he pointed a firearm at a law enforcement officer but instead needed to prove that defendant put on a show of force or violence sufficient to put a person of reasonable firmness in fear of immediate physical threat.

**4. Evidence— exclusion—defendant’s forgetfulness, hearing problem, and diminished capacity—invited error**

The trial court did not err in an illegal possession of video gaming machines and assault with a firearm on a law enforcement officer case by excluding evidence regarding defendant’s forgetfulness, hearing problem, and diminished capacity, because: (1) assault with a firearm on a law enforcement officer is a general intent crime for which diminished capacity is not a defense; and (2) any error by the trial court in giving the jury an instruction characterizing an assault as a willful, overt act, for which the excluded evidence could have served as a defense, was invited by defendant when he did not object to the use of the word willful in the jury instruction and in fact encouraged its inclusion.

**5. Gambling; Firearms and Other Weapons— possession of illegal gaming machines—assault with a firearm on a law enforcement officer—motion to dismiss—sufficiency of evidence**

The trial court did not err by denying defendant’s motion to dismiss the charges of possession of illegal gaming machines and assault with a firearm on a law enforcement officer, because there was substantial evidence to support each charge.

**6. Criminal Law— no formal arraignment on record—purpose achieved**

The trial court did not err in an illegal possession of video gaming machines and assault with a firearm on a law enforce-



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ment officer case by failing to grant defendant a new trial based upon the alleged material prejudice he suffered in not having a formal arraignment on the record, because: (1) the purpose of the arraignment had been achieved when defendant was fully aware of the charge against him; and (2) the record showed that although defendant was not formally arraigned, the charges against him were joined together, defendant pled not guilty to those charges, and defendant proceeded to trial as if he had been arraigned.

Appeal by defendant from judgments entered 16 May 2001 by Judge Dennis J. Winner in Rutherford County Superior Court. Heard in the Court of Appeals 14 August 2002.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General Richard G. Sowerby, for the State.*

*Deaton & Biggers, PLLC, by W. Robinson Deaton, Jr. and Brian D. Gulden, for defendant-appellant.*

BRYANT, Judge.

Defendant appeals his conviction for illegal possession of video gaming machines and assault with a firearm on a law enforcement officer. On 3 October 2000, law enforcement officers located and seized three video gaming machines at the Childers' Family Restaurant [the restaurant] in Rutherford County, North Carolina. Following a confrontation with officers, defendant was arrested in conjunction with the seizure of the gaming machines. The State indicted defendant on three counts of allowing, placing, or keeping a video gaming machine in operation and eight counts of assault with a firearm on a law enforcement officer.

Following a trial by jury, defendant was convicted on all counts. The assault convictions were subsequently consolidated for sentencing. The trial court sentenced defendant to three consecutive, six-to-eight-month suspended terms of imprisonment for the illegal gaming conviction and a suspended twenty-four-to-thirty-eight-month term for the assault convictions. The court placed defendant on probation, under the condition that he serve a six-month active prison term. Defendant now appeals.

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Defendant presents the following assignments of error: (I) the trial court erred in presenting the charge of possession of illegal gam-

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ing machines to the jury because the law does not require that the machines actually be listed for *ad valorem* property tax purposes prior to 31 January 2000; (II) the trial court erred in allowing the State's exhibits in that they were tainted by defendant's unlawful arrest; (III) the trial court erred in its instructions to the jury; (IV) the trial court erred in excluding evidence of defendant's forgetfulness, hearing problem and diminished capacity; (V) the trial court erred in denying defendant's motion to dismiss; and (VI) the defendant is entitled to a new trial because he was materially prejudiced by not having a formal arraignment.

## I.

**[1]** Defendant first argues that the trial court erred in presenting the possession of illegal video gaming machines charge to the jury, based upon his interpretation of the discovered-property provision of the North Carolina taxation statutes, N.C.G.S. § 105-312(e) (2001).

Section 14-306.1(a)(1), the statute under which defendant was convicted, prohibits the operation and possession of video gaming machines, unless those machines were “[l]awfully in operation, and available for play, within this State on or before June 30, 2000; and . . . [l]isted in this State by January 31, 2000 for ad valorem taxation for the 2000-2001 tax year. . . .” N.C.G.S. § 14-306.1(a)(1) (2001) (effective 1 October 2000).

The “discovered-property” provision, relied upon by defendant, states the following:

When property is discovered, the taxpayer's original abstract (if one was submitted) may be corrected or a new abstract may be prepared to reflect the discovery. If a new abstract is prepared, it may be filed with the abstracts that were submitted during the regular listing period, or it may be filed separately with abstracts designated “Late Listings.” Regardless of how filed, the listing shall have the same force and effect as if it had been submitted during the regular listing period.

N.C.G.S. § 105-312(e). The “listing period” is defined as the month of January. N.C.G.S. § 105-307(a) (2001). According to defendant's application of the discovered-property provision, a taxpayer may list gaming machines after 31 January 2000, the end of the 2000-2001 listing period, and have the listing deemed filed by 31 January 2000, avoiding criminal liability under N.C.G.S. § 14-306.1(a)(1). Thus, defendant argues, for a video gaming machine to be legal, it did

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not actually have to be listed for *ad valorem* tax purposes by 31 January 2000. We disagree.

“Where, as here, one statute deals with a particular situation in detail, while another statute deals with it in general and comprehensive terms, the particular statute will be construed as controlling absent a clear legislative intent to the contrary.” *Merritt v. Edwards Ridge*, 323 N.C. 330, 337, 372 S.E.2d 559, 563 (1988) (citation omitted). Furthermore, when statutory language is “clear and unambiguous,” it must be given “its plain and definite meaning[.]” *Carrington v. Brown*, 136 N.C. App. 554, 558, 525 S.E.2d 230, 234 (quoting 27 Strong’s North Carolina Index 4th, *Statutes* § 28 (1994)), *review denied*, 352 N.C. 147, 543 S.E.2d 892 (2000).

Section 14-306.1(a)(1) is a particularized, unambiguous statute, criminalizing a particular act—operation of video gaming machines, unless they were in operation “on or before” 30 June 2000 and listed for *ad valorem* tax purposes “by” 31 January 2000. Criminal statute § 14-306.1(a)(1) became effective on 1 October 2000, long after the enactment of subsection 105-312(e). It in no way references subsection 105-312(e), its “*as if* it had been submitted” language or any other similarly permissive language.

In contrast, by its plain language and context, subsection 105-312(e) is clearly a portion of a general taxation statute concerning only a tax assessor’s duty to list, assess and tax discovered property. *See* N.C.G.S. § 105-312(b), (d), and (e). “Discovered property” is “all property not properly listed during the regular listing period. . . .” N.C.G.S. § 105-312(b). To value discovered property, the assessor must treat the property as if it was listed before the end of the listing period with the taxpayer’s remaining property. *See* N.C.G.S. § 105-312(b), (d). Therefore, “[s]ubsection (e) is a tool for the tax collector, not a tool for the property owner, and cannot be imported into unambiguous legislation to defeat the purpose of such legislation by legitimizing machines which were not listed by January 31, 2000.” *Henderson Amusement, Inc. v. Good*, 172 F. Supp. 2d 751, 764 (W.D.N.C. 2001) (examining the same issue and following the same line of reasoning in a 42 U.S.C. § 1983 case), *abrogation recognized on other grounds, Gantt v. Whitaker*, 203 F. Supp. 2d 503 (M.D.N.C. 2002).<sup>1</sup>

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1. In *Henderson*, a North Carolina federal district court held in a § 1983 action that a sheriff who seized video gaming machines via the authority granted by § 14-306.1(a)(1) was immune from suit in his official capacity based on the Eleventh amendment and due to his status as a state official. 172 F. Supp. 2d at 763. In an

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Evidence presented at trial shows that defendant's actions clearly ran afoul of the unambiguous language and purpose of N.C.G.S. § 14-306.1(a)(1): Trial testimony revealed that the machines seized from the restaurant were not installed, in operation and available for play until 1 October 2000—almost three months after the 30 June 2000 deadline, and county tax records showed that the machines were not listed for tax purposes until 28 September 2000—certainly not “by” 31 January 2000. Defendant's use of the discovered property provision to legitimize activity prohibited by § 14-306.1(a)(1) is contrary to its plain meaning and the legislature's intent. We therefore conclude that the trial court did not err in submitting the illegal gaming machine charge to the jury. Accordingly, this assignment of error is overruled.

## II.

**[2]** Defendant next argues that it was error for the trial court to admit the State's exhibits because they were tainted by defendant's warrantless arrest, for which the arresting officers did not have probable cause. We disagree.

In North Carolina, “[a]n officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence.” N.C.G.S. § 15A-401(b)(1) (2001). In making an arrest without a warrant, it is not essential that the officer show an offense has actually been committed, it is only necessary that the officer show he has reasonable grounds to believe an offense has been committed. *State v. Crawford*, 125 N.C. App. 279, 282, 480 S.E.2d 422, 424 (1997).

Based upon prior knowledge of the machines' presence at the restaurant, Sheriff Department Detective David Petty and several other officers visited the location on 3 October 2000. The officers learned from the restaurant's lessee, Gladly Whiteside, that the machines located therein were not hers, that she had informed defendant that she did not want them in the restaurant and that tickets from the machines could be redeemed at defendant's store,

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alternative holding, the court addressed arguments by the plaintiff concerning the discovered property provision very similar to the contentions of defendant in the case *sub judice*. *Id.* at 763-64. We find that the federal court's reasoning and interpretation of the North Carolina statutes, while certainly not controlling authority, is sound and instructive to the issues presented by the present case. *Henderson* was later abrogated by another federal court's ruling in *Gantt*, finding that a sheriff is a local, not state, official. *Gantt*, 203 F. Supp. 2d at 509.

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Childers' Truck Stop [the store], located beside the restaurant. Detective Petty and other officers proceeded to the store where they met defendant.

Given the information obtained from Whiteside, observation of the machines' presence in the restaurant on the day of defendant's arrest and Detective Petty's knowledge that defendant failed to register the machines with the Sheriff's Department, the officers had ample evidence to reasonably assume that a crime was being committed. Because the officers possessed such probable cause, defendant's warrantless arrest was proper. This assignment of error is therefore overruled.

## III.

[3] Defendant next assigns error to the instructions given to the jury. In particular, defendant contends that the jury should have been instructed (1) that defendant had a right to defend himself with regards to an unlawful arrest; (2) that the firearm he possessed at the time of his arrest was required to be pointed at or toward the alleged victims to find him guilty of assault with a firearm on a law enforcement officer.

"[I]f a request is made for a jury instruction which is correct in itself and supported by evidence, the trial court must give the instruction at least in substance." *State v. Duncan*, 136 N.C. App. 515, 517, 524 S.E.2d 808, 810 (2000) (citations and internal quotation marks omitted). First, we find no error in the court's decision not to instruct the jury that defendant could defend himself from an unlawful arrest. As noted in our discussion of the previous assignment of error, the evidence did not support defendant's contention that he was subjected to an unlawful arrest, and therefore the court was not obligated to give the instruction.

Second, we also conclude that defendant was not entitled to the above listed instruction as to the assault charge. The evidence at trial established that: After their conversation with Whiteside, Detective Petty and the other officers proceeded to the store where they encountered defendant. Upon inquiry by the officers, defendant denied ownership of the gaming machines in question. Detective Perry informed defendant that the machines were to be seized and someone, either Whiteside or defendant, would be arrested. Defendant told the officers to arrest him, and later reached under the store's counter, "slammed down" a revolver and challenged the officers to "[c]ome behind the counter and get [him]." While the officers

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yelled for defendant to put the gun down and come out from behind the counter, defendant cursed the officers and the Sheriff's Department and "was very belligerent, [] was waving the gun around the entire time [the officers] were dealing with him." Eventually, the officers gained control and subsequently arrested defendant.

To establish that a defendant assaulted a law enforcement officer with a firearm, the State must prove: (1) an assault; (2) with a firearm; (3) on a law enforcement officer; (4) while the officer is engaged in the performance of his or her duties. N.C.G.S. § 14-34.5(a) (2001). An assault is "an overt act or attempt, with force and violence, to do some immediate physical injury to the person of another, which *show of force or violence* must be sufficient to put a person of reasonable firmness in fear of immediate physical injury." *State v. Haynesworth*, 146 N.C. App. 523, 529, 553 S.E.2d 103, 108 (2001) (emphasis added).

The State need not prove, as defendant contends, that he pointed a firearm at a law enforcement officer; rather, the State need only prove that defendant put on a show of force or violence sufficient to put a person of reasonable firmness in fear of immediate physical injury. This, the correct statement of the law corresponds to the trial court's instructions and the evidence presented at trial. Because the assault instruction requested by defendant misapprehends the law, the trial court did not err in its failure to give the instruction. Accordingly, this assignment of error is overruled.

**IV.**

**[4]** Defendant next argues that the trial court erred in excluding evidence regarding defendant's forgetfulness, hearing problem and diminished capacity. Defendant contends that by instructing the jury that the defendant is guilty of an assault if he commits a willful, overt act, the trial court transformed the offense from a general intent to a specific intent crime for which the excluded evidence of his ailments could have served as a defense. We disagree.

Assault with a firearm upon a law enforcement officer is a general intent crime, for which diminished capacity is not a defense. *State v. Page*, 346 N.C. 689, 700, 488 S.E.2d 225, 232 (1997) (citations omitted). Therefore, the trial court's exclusion of evidence serving as a defense to the assault was not error.

Furthermore, assuming *arguendo* that the trial court's characterization of an assault as a willful, overt act was error, it was invited by

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defendant. Defendant did not object to the use of the word “willful” in the jury instruction. In fact, defendant encouraged its inclusion, stating to the trial court, “I think you should use the word willful.” When the trial court responded that it would use “willful and overt act,” defendant replied, “That’s fine.” Because defendant invited what he now argues was error, he cannot contend that the alleged error entitles him to relief. *See State v. Cagle*, 346 N.C. 497, 509, 488 S.E.2d 535, 544 (1997) (noting that invited errors are not subject to review). Accordingly, this assignment of error is overruled.

## V.

[5] Defendant next argues that the trial court erred in denying his motion to dismiss as there was insufficient evidence to support both his convictions for possession of the gaming machines and assault with a firearm on a law enforcement officer. Our review of the facts presented at trial, the pertinent portions of which are set out in the above assignments of error, reveals that there was substantial evidence supporting both of defendant’s convictions. *See State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (holding that convictions must be supported by substantial evidence to withstand motion to dismiss). Consequently, this assignment of error is overruled.

## VI.

[6] Defendant’s final argument is that the trial court erred in failing to grant him a new trial based upon the material prejudice he suffered in not having a formal arraignment on the record. We disagree.

“[F]ailure of the record to show a formal arraignment does not entitle defendant to a new trial where the record indicates that defendant was tried as if he had been arraigned and had entered a plea of not guilty, as is the situation here.” *State v. Benfield*, 55 N.C. App. 380, 382, 285 S.E.2d 299, 301 (1982). Given the facts of the present case, there is no doubt that the purpose of an arraignment has been achieved—“defendant was fully aware of the charge against him [and] that he was in nowise prejudiced by the omission of a formal arraignment—if indeed it was omitted.” *Id.* (citation and internal quotation marks omitted).

Here, the record shows that defendant was not formally arraigned, but the charges against him were joined together, that he did indeed plead not guilty to those charges and that he then proceeded to trial as if he had been arraigned. Given the events surrounding defendant’s plea, he is not entitled to a new trial based upon

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the absence of a formal arraignment on the record. This assignment of error is overruled.

For the reasons stated above, we find defendant received a fair trial, free from error.

NO ERROR.

Judges McGEE and McCULLOUGH concur.

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STATE OF NORTH CAROLINA v. RICHARD WAYNE VASSEY

No. COA02-229

(Filed 3 December 2002)

**1. Homicide— second-degree murder—impaired driving—sufficiency of evidence**

The trial court did not err by failing to dismiss the charge of second-degree murder because there was substantial evidence that defendant's impaired driving caused the accident in which his girlfriend was killed including that: (1) defendant consumed at least ten to twelve beers over a course of six hours; (2) defendant stated he had been drinking beer heavily and possibly champagne as well; (3) defendant's employer who was in defendant's presence for at least twenty minutes the morning of the accident testified that defendant was still heavily drunk some six hours after defendant last reported consuming alcohol; (4) defendant's employer testified that defendant not only reeked of alcohol but that his eyes were glassy and his speech was slightly slurred; (5) the physical evidence from the crash site showed that, although road conditions were clear, defendant lost all control of the vehicle he was driving; and (6) defendant made a deliberate decision to drive despite the fact that he had no license and was impaired at the time, and defendant had been convicted of driving while impaired and with a revoked license on numerous occasions.

**2. Evidence— prior crimes or bad acts—impaired driving—malice—remoteness-harmless error**

The trial court did not err in a second-degree murder, driving while impaired and with a revoked license, and felonious hit and



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run/failure to stop for personal injury case by admitting defendant's conviction in 1978 for impaired driving for the purpose of proving malice, because: (1) even if the conviction was erroneously admitted, such admission did not prejudice defendant when the State presented evidence of three later convictions for driving while impaired; (2) the State also demonstrated that defendant had been convicted four times of driving while license revoked; and (3) given the overwhelming evidence of defendant's faulty driving record, the exclusion of one additional conviction out of the seven that were before the jury could not have resulted in a different verdict.

Appeal by defendant from judgments entered 24 September 2001 by Judge Gentry Caudell in Gaston County Superior Court. Heard in the Court of Appeals 30 October 2002.

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

*J. Clark Fischer for defendant appellant.*

TIMMONS-GOODSON, Judge.

Richard Wayne Vassey ("defendant") appeals from judgments of the trial court entered upon jury verdicts finding defendant guilty of second-degree murder, driving while impaired and with a revoked license, and felonious hit and run/failure to stop for personal injury. For the reasons stated herein, we uphold defendant's convictions.

At trial, the State presented evidence tending to show the following: In the early morning hours of 3 January 2001, passing motorists on Route 274 in Gaston County, North Carolina, discovered a vehicle in the ditch beside the road. As the motorists approached the vehicle, they noticed feet protruding from the driver's side window. Inside the vehicle was the body of Kathy Elaine Long ("Long"). Responding emergency assistance crews pronounced Long dead at the scene. A pathologist for the State testified that Long suffered lethal injuries to her skull and heart caused by blunt force trauma. The pathologist also noted that Long was legally intoxicated at the time of her death.

State Trooper Brian Owenby ("Trooper Owenby") testified for the State and described the scene of the accident. When Trooper Owenby arrived at the scene, he observed damage to the front left and the

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back right quarter panels of the vehicle. Black tire impressions on the roadway revealed that the vehicle skidded sideways, crossing over the center divider line into the opposite lane and onto the shoulder of the road, where it collided with a mailbox and crashed into the ditch. Trooper Owenby confirmed that the road conditions were dry, with no snow or rain.

Mr. Trenton Wright (“Wright”), a former volunteer fireman, testified on behalf of the State. Wright stated that he and his family lived near Route 274, less than two miles away from the scene of the accident. In the early morning of 3 January 2001, Wright responded to someone at his front door. Looking outside, Wright observed defendant standing on the front porch. Defendant explained that his car had broken down at a restaurant located approximately four miles away, and that he was “freezing to death.” Although the temperature was only twelve degrees Fahrenheit outside, defendant wore no shoes. Wright further described defendant’s general physical appearance as “pretty rough,” with “reddish” eyes, “messed-up” hair, and what appeared to be blood smeared across his forehead. Because he felt “uneasy” about defendant, Wright did not open the door and asked defendant to step away from the house. Wright did, however, offer to make a telephone call on defendant’s behalf. Defendant instructed Wright to call Wendell Bunch (“Bunch”), the owner of a restaurant where defendant worked. After Wright reached Bunch at his home, he left the telephone on the porch for defendant’s use. Defendant spoke on the telephone briefly, thanked Wright, and walked away.

Wendell Bunch testified that he had been acquainted with defendant, his employee, for approximately four years. Bunch stated that Long was defendant’s girlfriend, that they lived together, and that she “always chauffeured [defendant] around” because defendant had no driver’s license. Bunch reported that, when he spoke with defendant on Wright’s telephone the morning of 3 January 2001, defendant told him that he was “all to hell in a bucket” and asked Bunch to pick him up. When Bunch asked defendant where Long was, defendant responded, “Just come and get me.” According to Bunch, the “first thing [he] noticed” upon picking defendant up “was a strong presence of alcohol” emanating from defendant’s person. Defendant’s speech was slightly slurred, his eyes were glassy, and his hair was “messed up.” Bunch noticed that defendant’s blue jeans were ripped and there was blood on his right hand. In Bunch’s opinion, defendant “wasn’t knee-walking drunk, but he was definitely drunk.” Shortly after Bunch picked defendant up, “he broke down and whimpered a little

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bit and he said, 'I think something might have happened to [Long], I think she might be dead.' Defendant denied knowing Long's location, however, explaining that he was worried because she had left home that morning at four a.m. and had not returned. Bunch drove defendant to his residence and left him there.

A few hours later, Bunch telephoned defendant, who informed him that Long had not yet returned home. Bunch was then contacted by State Trooper Charles Thomas ("Trooper Thomas"), who asked Bunch for defendant's telephone number. Bunch gave the officer defendant's number, but told Trooper Thomas nothing about his previous interaction with defendant that morning. Approximately fifteen minutes later, defendant called Bunch. Defendant told Bunch that he was very upset, because the police had informed him that Long had been killed in a wreck, and he was "worried that they were going to blame him for the accident." When defendant learned that Bunch had been contacted by Trooper Thomas, Bunch testified that defendant "came out and told me that he was involved in the wreck and to keep quiet about it and not say anything about me picking him up or anything." Bunch then "hit the ceiling," rebuking defendant for "dr[agging] [him] into something that [he] didn't want to be in the middle of." Before he hung up the telephone, Bunch told defendant to "either tell Trooper Thomas the truth or I will." After he and defendant spoke, Bunch telephoned Trooper Thomas and "basically told him the whole story."

Linda Anderson ("Anderson"), one of defendant's former co-workers at the restaurant, also testified for the State. Anderson spoke about the accident with defendant, who insisted that Long had been driving the car when the accident occurred. When Anderson told defendant that his story made no sense and demanded "to know the truth," defendant "started crying, he had been driving." According to Anderson, defendant said, "I was driving instead of [Long] and I had been drinking and I wrecked; and I pulled [Long] out from the passenger side to the driver's side out the driver's door." When Anderson asked defendant whether he attempted to obtain assistance for Long, defendant replied, "No, I panicked and I ran until my shoes fell off of my feet." Defendant told Anderson that he moved Long's body to the driver's side of the vehicle in order "to make it look like she was driving."

Another of defendant's co-workers, William Hovis ("Hovis"), testified similarly. Hovis spoke with defendant the morning of the accident. Although defendant initially told Hovis that Long had been

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driving the vehicle, he later stated that “he was driving and the car went off the road and that—and that he got panicky and ran.”

Trooper Thomas gave further evidence for the State. Although defendant initially denied having any knowledge of the accident, he eventually gave the following statement to Trooper Thomas:

We were drinking beer heavy [sic] last night. We ran out of champagne and we were going to the store. We rode up toward Rick's store, went to the stop sign at Cherryville. She turned right, went down that road for a little ways, and I told her she was going the wrong way. She turned around and went back toward Cherryville. The next thing I know, we was [sic] riding on grass and were in a ditch. I don't know. I hollered and said, “Be careful, we're going to hit that ditch.” I looked over and she wasn't moving. I pulled her out of the car and tried to revive her by giving her mouth-to-mouth. I got scared and left. I panicked and flipped out. I'm being honest. I kept walking and walking. I went to a house and called my bossman [sic] and he came and got me in about 20 to 30 minutes.

After signing his statement, defendant told Trooper Thomas that “he was scared [Long's son] would kill him for what happened.”

Unconvinced by defendant's statement, Trooper Thomas contacted Detective Jeff Costner (“Detective Costner”) of the Gaston County Police Department. Detective Costner testified that he visited defendant at his residence on 8 January 2001, and that defendant agreed to accompany Detective Costner to the Cleveland County Sheriff's Department in order to answer questions. After being advised of his constitutional rights, defendant made the following statement:

Last week, Wednesday morning, 1-3-01, me and [Long] had been drinking. We were drinking beer and we ran out. We were at home, it was probably about 1:00 or 1:30 a.m. We were drinking Busch Lite and Bud Dry. We both decided to go out and get some more. I just put on my flip-flops, or they are actually sandals. We got in the car and [Long] drove. I don't know why she didn't even take her pocketbook or her glasses. We drove to several grocery stores that were closed . . . . We drove on Highway 216 and stopped at Rick's Country Store. [Long] couldn't see, so I got behind the wheel and drove . . . . I realized I was going the wrong way, so I turned around. I drove off the side of the road to the

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right first. I don't know why I ran off the road, I guess it was the alcohol. I drank, probably, 10 to 12 beers before this. When I ran off the road, it caused me to hit the bank on the other side of the road. I had been drinking since 7:00 p.m. and I stopped when me and [Long] ran out around . . . 1:00 or 1:30 a.m. I just remember looking over and seeing [Long's] head jerk forward and backwards. I heard her grunt. I'm not sure whether we had our seatbelts on, but we had the automatic seatbelts in the car. I left after I tried to revive her. I pulled [Long] from the passenger seat over to the driver's seat and tried to do CPR on her, but she was gone. I panicked and I ran. I seen [sic] the ambulances go by and I went to a couple of houses, but no one would let me . . . use the phone. I finally got this one guy to call my boss, Wendell Bunch. I feel so much better after I've told someone about this. I've been saved and quit drinking since this happened. I am sure [sic] sorry for what happened. I wish I could change it.

Finally, the State offered evidence tending to show that defendant's driver's license was permanently revoked and that defendant had been convicted of driving while impaired and driving with a revoked license on numerous previous occasions. Defendant offered no evidence. Upon conclusion of the evidence and after being instructed by the court, the jury found defendant guilty of second-degree murder, driving while impaired and with a revoked license, and felonious hit and run/failure to stop for personal injury. Defendant appeals.

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Defendant contends that the trial court erred in denying his motion to dismiss the charge of second-degree murder, and in allowing evidence of defendant's prior conviction for driving while impaired. We address these issues in turn.

[1] By his first argument, defendant contends that the trial court erred in failing to dismiss the charge of second-degree murder. "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). Substantial evidence is such relevant evidence as

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a reasonable mind might accept as adequate to support a conclusion. *See id.* 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).

Second-degree murder is the (1) unlawful killing (2) of a human being (3) with malice, but without premeditation and deliberation. *See State v. McDonald*, 151 N.C. App. 236, 565 S.E.2d 273, 277, *disc. review denied*, 356 N.C. 310, — S.E.2d — (2002). Thus, intent to kill is not a necessary element of second-degree murder, but “ ‘there must be an intentional act sufficient to show malice.’ ” *State v. Rich*, 351 N.C. 386, 395, 527 S.E.2d 299, 304 (2000) (quoting *State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991)). Where the State seeks to prove malice connected with the act of driving a vehicle, “[t]he State need only show ‘that defendant had the intent to perform the act of driving in such a reckless manner as reflects knowledge that injury or death would likely result, thus evidencing depravity of mind.’ ” *State v. Miller*, 142 N.C. App. 435, 441, 543 S.E.2d 201, 205 (2001) (quoting *Rich*, 351 N.C. at 395, 527 S.E.2d at 304).

In the instant case, defendant argues that the State presented insufficient evidence that defendant was appreciably impaired at the time of the accident, and that such impairment caused the accident leading to Long’s death. Defendant correctly notes that, “[u]nder our statutes, the consumption of alcohol, standing alone, does not render a person impaired. An effect, however slight, on the defendant’s faculties, is not enough to render him or her impaired. Nor does the fact that defendant smells of alcohol by itself control.” *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985) (citations omitted). The *Harrington* Court went on to state, however, that “[o]n the other hand, the State need not show that the defendant is ‘drunk,’ i.e., that his or her faculties are *materially* impaired. The effect must be appreciable, that is, sufficient to be recognized and estimated, for a proper finding that defendant was impaired.” *Id.* (citations omitted).

Viewed in the light most favorable to the State, there was substantial evidence that defendant’s impaired driving caused the accident in which Long was killed. First, as to defendant’s impairment, the State presented evidence tending to show that defendant consumed at least ten to twelve beers over the course of six hours. Defendant stated that he had been “drinking beer heavy [sic],” and

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possibly champagne as well. Bunch testified that defendant was still “definitely drunk” at approximately seven o’clock on the morning of 3 January 2001, some six hours after defendant last reported consuming alcohol. It is well established that an opinion of a lay witness that the defendant was impaired is sufficient evidence of impairment, provided that the opinion is based on more than just the odor of alcohol. *See Rich*, 351 N.C. at 398-99, 527 S.E.2d at 305-06; *State v. Adkerson*, 90 N.C. App. 333, 338, 368 S.E.2d 434, 437 (1988). Bunch, who had known defendant for four years and was in defendant’s presence for at least twenty minutes the morning of the accident, testified that defendant not only “reeked of alcohol,” but that his eyes were glassy and his speech was slightly slurred. We conclude that the above-stated evidence sufficiently supported the jury’s conclusion that defendant was impaired at the time of the accident in which Long was killed.

Secondly, the State provided substantial evidence that defendant’s impaired driving caused the accident that killed Long. “The fact that a motorist has been drinking, when considered in connection with faulty driving such as following an irregular course on the highway or other conduct indicating an impairment of physical or mental faculties, is sufficient *prima facie* to show a violation of [the impaired driving statute].” *State v. Hewitt*, 263 N.C. 759, 764, 140 S.E.2d 241, 244 (1965). Defendant told several people, including Anderson, that “he had been drinking and . . . wrecked [the vehicle].” In his statement to Detective Costner, defendant asserted, “I don’t know why I ran off the road, I guess it was the alcohol.” Evidence from the accident site revealed that, although road conditions were clear, defendant lost all control of the vehicle he was driving. The vehicle skidded into the oncoming lane of traffic and onto the shoulder of the road, where it collided with a mailbox and crashed into the ditch. The evidence of defendant’s impairment, together with the physical evidence from the crash site, provided ample evidence that defendant’s impaired driving was the cause of the accident that killed Long.

Because there was substantial evidence that defendant was impaired at the time of the accident, and that his impaired driving caused the accident that resulted in Long’s death, the trial court did not err in denying defendant’s motion to dismiss the charge of second-degree murder. The evidence showed that defendant made a deliberate decision to drive, despite the fact that he had no license and was impaired at the time. The evidence further showed that

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defendant had been convicted of driving while impaired and with a revoked license on numerous occasions. “[A]ny reasonable person should know that an automobile operated by a legally intoxicated driver is reasonably likely to cause death to any and all persons who may find themselves in the automobile’s path.” *State v. Fuller*, 138 N.C. App. 481, 488, 531 S.E.2d 861, 867 (quoting *State v. McBride*, 118 N.C. App. 316, 319-20, 454 S.E.2d 840, 842 (1995)), *disc. review denied*, 353 N.C. 271, 546 S.E.2d 120 (2000); *see also State v. McAllister*, 138 N.C. App. 252, 260, 530 S.E.2d 859, 864-65 (holding that, where the defendant drove while impaired and with a revoked license, and where the defendant had been convicted of driving while impaired in the past, such evidence properly supported a finding of malice), *appeal dismissed*, 352 N.C. 681, 545 S.E.2d 724 (2000). Defendant’s actions in the instant case clearly demonstrated the malice necessary for conviction of second-degree murder, and we therefore overrule defendant’s first exception to the record.

**[2]** Defendant next argues that the trial court committed prejudicial error by admitting his 1978 conviction for driving while impaired into evidence for the purpose of proving malice. Defendant contends that this conviction was too remote in time to be relevant and irreparably prejudiced his case before the jury. We conclude that, even if the 1978 conviction was erroneously admitted, such admission did not prejudice defendant. In addition to the 1978 conviction, the State presented evidence of three later convictions for driving while impaired. The State also demonstrated that defendant had been convicted four times for driving with a revoked license. Given the overwhelming evidence of defendant’s faulty driving record, we hold that the exclusion of one additional conviction out of the seven that were before the jury could not have resulted in a different verdict. We therefore overrule this assignment of error.

In conclusion, we hold that the trial court did not err in failing to dismiss the charge of second-degree murder. We further hold that the admission of defendant’s conviction in 1978 of impaired driving did not prejudice defendant.

No error.

Judges WYNN and HUNTER concur.



**HEMRIC v. GROCE**

[154 N.C. App. 393 (2002)]

GILBERT HEMRIC AND VANN HEMRIC, PLAINTIFFS v. DONALD GROCE  
AND BETTY GROCE, DEFENDANTS

No. COA02-217

(Filed 3 December 2002)

**1. Judgments— memorandum language omitted from consent judgment—judgment controls**

A consent judgment properly entered supercedes a memorandum of judgment, and contempt language in a memorandum of judgment which was not included in the subsequent consent judgment had no bearing on the case.

**2. Judgments— consent—not domestic—not enforceable by contempt**

A district court lacked the authority to enforce a non-domestic consent judgment through contempt. A consent judgment is a contract enforceable by breach of contract, specific performance, or a declaratory judgment and not by contempt; plaintiffs here did not pursue those avenues.

**3. Contempt— non-domestic consent judgment—not enforceable by contempt**

A district court lacked authority to find a party in contempt for noncompliance with a non-domestic consent judgment, its orders were void, and the superior court erred by denying defendants' Rule 60 motion for relief from judgment.

**4. Appeal and Error— mootness—contempt order—period of incarceration expired—subsequent damages action**

An appeal from a contempt order was not moot even though the period of incarceration had passed because the findings and conclusions made in the contempt order could be used in a damages action which plaintiffs subsequently filed.

**5. Administrative Law— exhaustion doctrine—parallel action with distinct claim**

The exhaustion doctrine was not applicable where plaintiffs unsuccessfully petitioned the County Farm Service Agency (CFSA) for defendants' tobacco marketing cards under the Agricultural Code, did not appeal that decision, and brought a separate action for breach of a consent judgment. That action sought a contract remedy which was not available under the Agricultural Code.

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**6. Collateral Estoppel and Res Judicata— tobacco allotment—CFSA ruling—breach of contract action**

A damages claim for not delivering tobacco marketing cards was not barred by res judicata based on a ruling by the County Farm Service Agency (CFSA) because the hearing before the CFSA involved an analysis of the Agriculture Code and the damages action turned on an interpretation of a consent judgment.

**7. Agriculture— tobacco allotments—marketing cards—damages**

A claim for monetary damages for failure to deliver tobacco marketing cards was not barred by the fact that the tobacco allotments, which run with the land, were leased to a new tenant for the next year. Defendants, as the farm operators, had title to the cards under federal regulations; moreover, plaintiffs were not seeking (in this action) the delivery of the cards.

**8. Agriculture— tobacco allotments—lease—overproduction**

There were genuine issues of material fact in an action arising from tobacco allotments and the possession of marketing cards where defendant contended that the lease between the parties did not permit overproduction, but the lease contained language with respect to the applicability of the CFSA rules and regulations and it was not clear whether the lease sought to limit use of the marketing cards or whether it sought to hold plaintiffs liable for statutory penalties if plaintiffs overproduced.

Appeal by defendants from order filed 13 November 2001 by Judge Ronald E. Spivey in Yadkin County Superior Court. Heard in the Court of Appeals 29 October 2002.

*Finger, Parker, Avram & Roemer, L.L.P., by M. Neil Finger and Raymond A. Parker, for plaintiff appellees.*

*Hendrick & Bryant, L.L.P., by Matthew H. Bryant, for defendant appellants.*

GREENE, Judge.

Donald and Betty Groce (Defendants) appeal an order filed 13 November 2001 denying (1) their Rule 60(b) motion for relief from orders entered 29 September and 17 October 2000 (the contempt orders) and (2) their motion for summary judgment with

**HEMRIC v. GROCE**

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respect to a separate damages action brought by Gilbert and Vann Hemric (Plaintiffs).<sup>1</sup>

In 1997, Defendants leased their Yadkin County farm property and the corresponding tobacco allotments to Plaintiffs. Under the terms of the lease, Plaintiffs agreed “to abide by all rules and regulations set forth by the CFSA office [(the County Farm Services Agency)].” According to an affidavit by the CFSA Agricultural Program Specialist for Tobacco, the rules and regulations provide that “[e]ach producer who has an interest in the crop produced in the current year is entitled to use the marketing card issued for the farm to market the producer’s proportionate share of the crop, not to exceed 103% of the farm’s effective marketing quota.” The lease was to expire on 15 November 1997; however, the parties extended their agreement for an additional year. Subsequently, a dispute arose between the parties as to whether proper notice had been given to terminate the lease for the 1999 crop year, and Plaintiffs initiated an action (99 CVD 111) against Defendants in the Yadkin County District Court (the consent judgment action). This case was settled, resulting in a memorandum of judgment and a subsequent consent judgment signed by the parties and the trial court.

The consent judgment allowed Plaintiffs’ year-to-year lease to continue for the 1999 crop year, ending no later than 15 November 1999. The parties agreed that, on or before 15 November 1999, Plaintiffs were to pay Defendants 52.5 cents per pound for all the tobacco raised on Defendants’ property and sold in 1999. In the event some of the tobacco grown in 1999 was not sold before 15 November 1999, Plaintiffs were to pay this sum to Defendants when they did sell the crop.<sup>2</sup>

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1. On 24 September 2002, this Court elected to hear this appeal pursuant to Rule 21 of the Rules of Appellate Procedure by allowing Defendants’ referred motion for a writ of *certiorari*. See N.C.R. App. P. 21(a)(1) (grant of *certiorari*).

2. [1] The memorandum of judgment, which appears on a preprinted form, included as one of the parties’ stipulations that the judgment would be “enforceable by the contempt powers of the court should any party not comply with its terms.” This language was not included in the subsequent consent judgment. Because a consent judgment properly entered supercedes a memorandum of judgment, the contempt language in the memorandum of judgment in this case has no bearing on our analysis. The only time a consent judgment does not supercede a previous memorandum of judgment, thus giving the provisions contained in the memorandum of judgment effect, is where the consent judgment has some flaw. See *Buckingham v. Buckingham*, 134 N.C. App. 82, 516 S.E.2d 869 (1999) (memorandum of judgment is a final and valid judgment where party did not consent to consent judgment); see also *Miller v. Miller*, 153 N.C. App. 40, 45, 568 S.E.2d 914, 917-18 (2002) (giving effect to provisions in memorandum

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In 1999, Plaintiffs produced tobacco on the leased property in excess of 16,800 pounds above the amount permitted to be sold in 1999. Plaintiffs sought to sell their 1999 overproduction in 2000 and requested Defendants' 2000 tobacco marketing cards for this purpose. Defendants refused to allow Plaintiffs the use of their marketing cards because (1) the 1999 lease had ended on 15 November 1999, at which time Defendants leased their property to a new tenant, and (2) Defendants had already granted Plaintiffs use of the marketing cards to sell 103% of the property's tobacco allotment in 1999.

On or about 17 August 2000, Plaintiffs initiated an administrative hearing before the CFSA to obtain Defendants' marketing cards for the 2000 crop year. The hearing was held on 8 September 2000. The CFSA's decision, announced by letter to the parties, denied Plaintiffs' request because the agency's regulations required issuance of marketing cards to the "farm operator," in this case Defendants, and stated Plaintiffs had fifteen days to appeal the decision.

Plaintiffs did not appeal the agency's decision. On 14 September 2000, Plaintiffs instead filed a motion to show cause why Defendants should not be held in contempt in the consent judgment action. In its motion, Plaintiffs alleged Defendants had failed to comply with the terms of the consent judgment by refusing to give Plaintiffs the necessary 2000 marketing cards to sell their 1999 overproduction. In an order entered 29 September 2000, the district court concluded "a reasonable interpretation of [the consent judgment was] that both parties contemplated there would be tobacco sold after November 15, 1999." Because, as the district court further concluded, the tobacco grown by Plaintiffs could not be sold without Defendants' 2000 marketing cards and any refusal by Defendants to allow Plaintiffs to use the cards would be in violation of the consent judgment, the district court ordered Defendants to turn over their marketing cards to Plaintiffs. In the event Defendants refused to comply with the order, they were directed to re-appear before the district court. Defendant Betty Groce partially complied with the district court's order. When defendant Donald Groce, however, refused to give Plaintiffs his marketing card, the district court, in an order entered 17 October 2000, held Donald Groce in civil contempt, resulting in a thirteen-day incarceration, at the end of which the 2000 tobacco market closed and the district court ordered his release.

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of judgment and knocking out inconsistent provisions in consent judgment where the defendant failed to sign formal consent judgment).

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Having been unable to sell their overproduction in 2000, Plaintiffs, on 10 January 2001, filed a damages action (01 CVS 22) against Defendants in superior court (the damages action). In their complaint, Plaintiffs alleged Defendants had been previously held in civil contempt for their failure to comply with the consent judgment. Defendants filed an answer on 22 March 2001. On 3 August 2001, Defendants also filed a motion for relief from judgment under Rule 60(b)(4) regarding the contempt orders in the consent judgment action and a motion for summary judgment with respect to the damages action. As grounds for their 60(b)(4) motion, Defendants alleged in pertinent part that the district court was without authority to enter the contempt orders and thus enforce the consent judgment through contempt. In an order entered 13 November 2001, the superior court denied both Defendants' 60(b)(4) motion and their motion for summary judgment.

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The issues are whether: (I) the district court had the authority to enforce the consent judgment through contempt; (II) the contempt orders are void; and (III) the superior court erred in denying Defendants' motion for summary judgment.

*Consent Judgment Action*

## I

*Contempt Orders*

**[2]** Defendants contend the district court lacked the authority to enforce the parties' consent judgment through contempt. We agree.

A consent judgment is a contract between the parties entered upon the record with the sanction of the trial court and is enforceable by means of an action for breach of contract and not contempt.<sup>3</sup> *Crane v. Green*, 114 N.C. App. 105, 106, 441 S.E.2d 144, 144-45 (1994); see *Walton v. City of Raleigh*, 342 N.C. 879, 881, 467 S.E.2d 410, 411 (1996) (“[a] consent judgment is a court-approved contract”); *In re Will of Smith*, 249 N.C. 563, 568-69, 107 S.E.2d 89, 93-94 (1959) (a consent judgment is nothing more than a contract between the parties, and a breach of contract is not punishable for contempt). Plaintiffs'

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3. We note that an exception to this rule has been carved out in the field of domestic relations law. See *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983) (all separation agreements approved by the trial court in the form of consent judgments are not to be treated as contracts between the parties but as court-ordered judgments enforceable by contempt).

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attempt to have Defendants held in contempt for alleged noncompliance with the consent judgment was thus prohibited by our case law, and the trial court erred in entering the contempt orders. Although we recognize that there is authority to suggest a party may file a motion in the cause to seek specific performance of a non-domestic consent judgment, *see Few v. Hammack Enter., Inc.*, 132 N.C. App. 291, 299, 511 S.E.2d 665, 671 (1999) (the trial court may order specific performance of the terms of a mediated settlement agreement); *State ex rel. Howes v. Ormond Oil & Gas Co.*, 128 N.C. App. 130, 136, 493 S.E.2d 793, 797 (1997) (a settlement agreement may be enforced by petition or motion in the original action); *see also In re Will of Smith*, 249 N.C. at 568, 107 S.E.2d at 93 (a consent judgment will “support an order for specific performance in an action brought for that purpose”), or file an independent action for a declaratory judgment regarding the parties’ contract embodied in the consent judgment, *see Home Health and Hospice Care, Inc. v. Meyer*, 88 N.C. App. 257, 262, 362 S.E.2d 870, 873 (1987) (while a party may, in a separate and independent action, seek a declaratory judgment with respect to a consent judgment, a declaratory judgment cannot be commenced by a motion in the cause), Plaintiffs did not pursue these avenues but restricted themselves to a motion to show cause why Defendants were not in contempt.<sup>4</sup>

## II

*Void Orders under Rule 60(b)(4)*

[3] Plaintiffs argue in their brief to this Court that even if the district court lacked authority to hear Plaintiffs’ motion to show cause, Defendants were prohibited from collaterally attacking the contempt orders because these orders were not void but merely voidable.<sup>5</sup> *See Worthington v. Wooten*, 242 N.C. 88, 92, 86 S.E.2d 767, 770 (1955) (only void judgments may be collaterally attacked).

In determining whether an order is void or voidable, our courts have held:

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4. Although the 29 September 2000 order, the first of the district court’s contempt orders, appears to be more in the nature of an order for specific performance or declaratory judgment, it does not change the overall nature of the proceedings initiated by Plaintiffs, which were those of contempt. *See Blevins v. Welch*, 137 N.C. App. 98, 100-01, 527 S.E.2d 667, 670 (2000) (the trial court, by interpreting a prior court order, did not transform the contempt action that was before it into a declaratory judgment action).

5. Defendants’ attack of the contempt orders may be classified as collateral because their 60(b)(4) motion was only filed in reply to Plaintiffs’ damages action and not in the consent judgment action itself.

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“If a judgment is void, it must be from one or more of the following causes: 1. Want of jurisdiction over the subject matter; 2. Want of jurisdiction over the parties to the action, or some of them; or 3. Want of power to grant the relief contained in the judgment. In pronouncing judgments of the first and second classes, the court acts without jurisdiction, while in those of the third class, it acts in excess of jurisdiction.”

*Allred v. Tucci*, 85 N.C. App. 138, 142, 354 S.E.2d 291, 294 (1987) (quoting *Ellis v. Ellis*, 190 N.C. 418, 421, 130 S.E. 7, 9 (1925)). In this case, the district court’s contempt orders were void because a trial court clearly lacks the authority to find a party in contempt for non-compliance with a non-domestic consent judgment. See *Crane*, 114 N.C. App. at 106, 441 S.E.2d at 144-45. The superior court therefore erred in denying Defendants’ motion for relief from judgment, and the contempt orders must be vacated.<sup>6</sup>

*Damages Action*

## III

*Summary Judgment*

Defendants also appeal the superior court’s denial of their motion for summary judgment with respect to Plaintiffs’ damages claim.

## A

[5] Defendants first argue the superior court lacked subject matter jurisdiction to hear Plaintiffs’ damages action because Plaintiffs failed to exhaust their administrative remedies before the CFSA by not appealing the agency’s decision. This Court has held that an action is properly dismissed for lack of subject matter jurisdiction where the plaintiff has failed to exhaust administrative remedies. *Shell Island Homeowners Ass’n v. Tomlinson*, 134 N.C. App. 217, 220, 517 S.E.2d 406, 410 (1999); see *Swain v. Elfland*, 145 N.C. App. 383, 388-89, 550 S.E.2d 530, 535 (dismissing the plaintiff’s whistleblower claim in superior court where plaintiff had previously elected to try this claim in the Office of Administrative Hearings), *cert. denied*, 354 N.C. 228, 554 S.E.2d 832 (2001). This doctrine, however, does not apply where the judicial remedy sought is not available under the ad-

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6. [4] Although Donald Groce is no longer incarcerated, we do not consider Defendants’ appeal from the district court’s denial of their 60(b)(4) motion as moot because of the potential use in the damages action of the findings and conclusions made in the contempt orders. This is evidenced by Plaintiffs’ complaint in the damages action, which places great emphasis on the contempt orders.

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ministrative process. *See Guthrie v. Conroy*, 152 N.C. App. 15, 20, 567 S.E.2d 403, 407-08 (2002) (as the plaintiff's common law tort claims for personal injury caused by intentional and negligent infliction of emotional distress did not amount to a statutory "sexual harassment case," the plaintiff was not required to exhaust administrative remedies before bringing her action in the trial court); *Brooks v. Southern Nat'l Corp.*, 131 N.C. App. 80, 86, 505 S.E.2d 306, 310 (1998) (a plaintiff is not required to exhaust administrative remedies where his common law claims were not subject to administrative review).

In this case, Plaintiffs petitioned the CFSA for issuance of Defendants' marketing cards pursuant to 7 C.F.R. § 723.305(a)(2) of the Agricultural Code. This section allows a producer on a farm to submit a request to the CFSA for direct issuance to him of the farm operator's marketing cards. *See* 7 C.F.R. § 723.305(a)(2) (2002). Evaluation of the producer's request is based solely on whether the producer is "a producer in the current crop year," 7 C.F.R. § 723.305(a)(3) (2002), and whether he "has been or likely will be deprived [by the operator] of the right to use the marketing card issued for the farm," 7 C.F.R. § 723.305(a)(1)(iii)-(2) (2002). When Plaintiffs brought their separate action for money damages based on a breach of the parties' consent judgment, they were seeking a remedy under contract law not available under the Agricultural Code. Accordingly, the exhaustion doctrine is inapplicable to this case, and the superior court did not err in denying Defendants' motion for summary judgment on this basis.<sup>7</sup>

**B**

[6] Defendants next argue the superior court should have granted their motion for summary judgment because Plaintiffs' damages claim was barred by the doctrine of res judicata based on the CFSA's ruling regarding the issuance of the marketing cards. We disagree.

The hearing before the CFSA simply involved an analysis of sections 723.305(a)(2)-(3). The damages action, on the other hand, turns on an interpretation of the parties' consent judgment, an issue not before the CFSA. Accordingly, res judicata does not bar Plaintiffs' damages action. *See Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 428, 349 S.E.2d 552, 556 (1986) (under the doctrine of res

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7. Defendants also raised the exhaustion doctrine with respect to their 60(b)(4) motion for relief from the contempt orders. For the reasons just stated, we reject this argument as well.



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judicata “a final judgment on the merits in a prior action will prevent a second suit based on the same cause of action between the same parties or those in privity with them”).

## C

**[7]** Defendants further assert because tobacco allotments run with the land and the property had been leased to a new tenant for the 2000 crop year, “[Defendants’] allotment and marketing cards for 2000 did not belong to [Defendants]” and therefore Plaintiffs could not seek any damages under the 1999 lease and the parties’ consent judgment. This argument has no merit because Defendants, as the farm operators, had title to the 2000 marketing cards. *See* 7 C.F.R. § 723.305(a)(1) (2002). Furthermore, even if the new tenant could assert title to the cards, this would have no effect on Plaintiffs’ breach of contract action against Defendants because Plaintiffs are no longer seeking specific performance by having the marketing cards issued to them, as attempted in the CFSA hearing, but have restricted their claim to monetary damages.

## D

**[8]** Finally, Defendants argue the 1997 written lease agreement between the parties did not permit overproduction and thus their obligations to Plaintiffs ended on 15 November 1999 when the lease terminated.

Contrary to Defendants’ contention, the 1997 lease only contains language with respect to the applicability of CFSA rules and regulations. While these rules permit Plaintiffs to sell 103% of the tobacco allotment assigned to the leased property, they do not specifically prohibit overproduction but merely contain provisions to penalize such overproduction. *See* 7 U.S.C.A. § 1314e(i)(1) (1999). It is thus not clear whether the 1997 lease sought to limit Plaintiffs’ use of Defendants’ marketing cards to 103% of the allotment or whether it sought to hold Plaintiffs liable for the statutory penalties in the event Plaintiffs overproduced. Accordingly, there are genuine issues of material fact that must be determined by a fact-finder. *See* N.C.G.S. § 1A-1, Rule 56(c) (2001).

In conclusion, we affirm the superior court’s denial of Defendants’ motion for summary judgment in the damages action but reverse its denial of Defendants’ 60(b)(4) motion and remand this case with directions to vacate the contempt orders.

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Affirmed in part and reversed and remanded in part.

Judges MARTIN and BRYANT concur.

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TONY SMITH, PLAINTIFF V. STACI DAY BARBOUR, DEFENDANT

TONY SMITH, PLAINTIFF V. STACI D. BARBOUR, DEFENDANT

No. COA01-1519

No. COA02-285

(Filed 3 December 2002)

**1. Venue— convenience of witnesses—discretion of court**

There was no abuse of discretion in the denial of a change of venue for the convenience of witnesses in a custody and legitimation case where the defendant moved to change venue from Wake County to Johnson County, where she and the child lived.

**2. Paternity— separate legitimation action—subject matter jurisdiction**

The filing of a legitimation action in superior court divested a district court of subject matter jurisdiction to decide paternity. Legitimation vests greater rights in the parent and child than a paternity order and should be given preference when separate actions are filed.

**3. Child Support, Custody, and Visitation— temporary custody—third party—relationship sufficient**

A district court had the authority to enter a temporary custody order while a legitimation action was pending in superior court even though plaintiff was a third party while the claim was pending because the child shared plaintiff's last name and plaintiff had visited the child since her birth. The relationship between them was sufficient under *Ellison v. Ramos*, 130 N.C. App. 389 (1998) to give plaintiff standing as an "other person" under N.C.G.S. § 50-13.1(a) to seek custody.

**4. Child Custody, Support, and Visitation— visitation action by putative father—husband a necessary party**

The trial court erred by entering a temporary visitation order involving a child's mother and a man claiming paternity where the

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presumed father (who was married to the mother when the child was born) was not notified. The husband is a necessary party in an action brought by a putative father or non-parent unless he has already been determined not to be the father.

Appeals by defendant from order filed 8 August 2001 by Judge Monica M. Bousman and from orders filed 26 October 2001 by Judge Alice C. Stubbs in Wake County District Court. Heard in the Court of Appeals 8 October 2002.

As the issues presented by defendant's appeals to this Court arise out of the same action and involve common questions of law, we have consolidated the appeals pursuant to Rule 40 of the North Carolina Rules of Appellate Procedure.

*Hatch, Little & Bunn, L.L.P., by Helen M. Oliver, for plaintiff appellee.*

*Staci D. Barbour pro se defendant appellant.*

GREENE, Judge.

Staci Day Barbour (Defendant) appeals an order for temporary custody filed 8 August 2001 and orders for contempt and modification of temporary custody filed 26 October 2001.<sup>1</sup>

On 23 February 2001, Tony Smith (Plaintiff) filed a complaint against Defendant in the Wake County District Court. The complaint alleged "Plaintiff and Defendant [were] the biological parents of one minor child, . . . Kayla Olivia Smith, born November 6, 1999" and stated "[t]he parties ha[d] never been married." Plaintiff sought both temporary and permanent custody of the child. On the same day, Plaintiff initiated a legitimation action in the Wake County Superior Court.

Defendant responded on 26 April 2001 by filing a motion for change of venue to Johnston County, where she and the child resided, based on the convenience of the witnesses. On 21 May 2001, Plaintiff filed a motion for a mental examination of Defendant alleging Defendant had "exhibited numerous mental conditions in the past, including . . . agoraphobia and extreme anxiety." On 20 July 2001,

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1. These orders are clearly interlocutory. Assuming without deciding that they do not implicate a substantial right, we exercise our discretion and grant *certiorari* to hear this appeal. See N.C.R. App. P. 21(a)(1).

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Defendant filed an amended motion to dismiss the complaint.<sup>2</sup> In her motion, Defendant noted: the minor child's father was Bilal Kanawati; Plaintiff had not previously been adjudicated the child's father; Plaintiff did not have legal standing to bring a custody action; and Plaintiff had filed a separate action for legitimation in the Wake County Superior Court.

The hearing on Plaintiff's request for temporary custody and his motion for a mental evaluation revealed Plaintiff believed himself to be the biological father of Defendant's daughter. Plaintiff was paying child support and had visited with the child until May 2001 "when [D]efendant stopped all visitation." Plaintiff requested the district court allow him visitation pending the outcome of the legitimation proceeding in the superior court.

In an order entered 8 August 2001, the district court treated Plaintiff's complaint as initiating an action for paternity in addition to custody and found in pertinent part that:

4. Defendant is the biological mother of the minor child of this action . . . . Defendant was married to Bilal Kanawati at the time of the child's birth.

5. Plaintiff believes himself to be the father of the minor child of this action. Plaintiff had visitation with the minor child from [her] birth . . . until May 2001, the minor child shares Plaintiff's last name, and . . . Defendant never indicated to Plaintiff that he may not be the biological father of the minor child until after the institution of this action.

. . . .

15. At the time of this hearing, Defendant had not filed an [a]nswer to the [c]omplaint. In order for the [district] [c]ourt to permit a hearing on [the] [m]otion to [c]hange [v]enue for convenience of witnesses and promoting the ends of justice, an [a]nswer must have been filed prior to the filing of the [m]otion to [c]hange [v]enue.

. . . .

22. There are two pending actions filed in Wake County, this action and the action to legitimate the minor child.

. . . .

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2. The record does not include the initial motion to dismiss.

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24. Wake County is a proper and convenient forum to hear this matter.
25. Plaintiff has standing to pursue this action at the present time.
26. Defendant has suffered from anxiety disorders and . . . it is in the best interest of the minor child of this action and there is good cause to [o]rder a [m]ental [e]valuation of . . . [D]efendant.
27. It appears to the [district] court, on its own motion[,] that a paternity test would resolve the issue of whether Plaintiff is the biological father of the minor child . . . .
28. It is in the best interest of the minor child that Plaintiff be permitted visitation . . . .

The district court concluded “[t]he best interest of the minor child will be served by the provisions contained in the [o]rder . . . , and the parties are fit and proper persons to have the[ir] [assigned] roles.” The district court then denied both Defendant’s motion for a change of venue and her motion to dismiss and granted Plaintiff temporary visitation. The district court also ordered the parties to submit to a paternity test. In the event the paternity test resulted in a finding that Plaintiff was the child’s biological father, the district court further ordered Defendant to undergo a mental evaluation. Defendant appealed from this order on 14 August 2001. She filed her answer to Plaintiff’s complaint on 28 August 2001.

On 1 October 2001, Plaintiff filed a motion for an order to show cause because, although the results of the court-ordered paternity test indicated Plaintiff was the child’s biological father, Defendant had not undergone a mental evaluation. The district court granted Plaintiff’s motion and entered an order to show cause why Defendant was not in contempt of the 8 August 2001 order. Also, on 1 October 2001, Plaintiff filed a motion for modification of the 8 August 2001 temporary custody order based on the paternity test results.

Defendant responded on 12 October 2001 by filing an “Objection and Motion to Dismiss Contempt of Court Action” and a “Motion to Dismiss Motion for Modification of Temporary Custody Order.” Defendant argued in both motions that due to the pendency of her appeal from the 8 August 2001 order, the district court did not have continuing jurisdiction to rule on Plaintiff’s motions.

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In an order entered 26 October 2001, the district court found that:

4. Plaintiff and Defendant are the biological parents of the minor child . . . .

. . . .

7. Plaintiff desires additional time with his minor child.

. . . .

10. This matter will not be set for a permanent custody hearing for some time, as Defendant was ordered to undergo a mental evaluation which has not commenced as of the date of this hearing.

. . . .

12. Plaintiff and Defendant are fit and proper persons to share joint legal custody of their minor child, . . . with Defendant having primary physical custody and Plaintiff having secondary physical custody.

The district court then denied Defendant's motion to dismiss and increased Plaintiff's visitation rights. In a concurrent order, the district court found Defendant in civil contempt of the 8 August 2001 order for failing to submit to a mental evaluation following the paternity test results. The district court sentenced Defendant to thirty days custody with the opportunity to purge herself of contempt by obtaining a mental evaluation within thirty days of the entry of the contempt order.

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The issues are whether: (I) the district court erred in denying Defendant's motion for a change of venue; (II) Plaintiff's filing of a legitimation action in the superior court divested the district court of subject matter jurisdiction to adjudicate the issue of paternity; and (III) the district court erred in granting Plaintiff temporary visitation.

## I

**[1]** Defendant first argues the district court erred in denying her motion for a change of venue because Defendant and her daughter live in Johnston as opposed to Wake County.

Pursuant to N.C. Gen. Stat. § 1-83(2) “[t]he court may change the place of trial . . . [w]hen the convenience of witnesses and the ends of justice would be promoted by the change.” N.C.G.S. § 1-83(2) (2001).

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“Whether to transfer venue for this reason, however, is a matter firmly within the discretion of the trial court and will not be overturned unless the court manifestly abused that discretion.” *Centura Bank v. Miller*, 138 N.C. App. 679, 683, 532 S.E.2d 246, 249 (2000). Moreover, “motions for change of venue based on the convenience of witnesses, pursuant to section 1-83(2), must be filed after the answer is filed.” *McCullough v. Branch Banking & Tr. Co.*, 136 N.C. App. 340, 350, 524 S.E.2d 569, 575-76 (2000). In this case, Defendant, prior to filing her answer, requested a change of venue based on the convenience of the witnesses. Because we see no abuse of discretion, the district court properly denied her request.

## II

[2] Defendant next asserts Plaintiff’s filing of a legitimation action in the superior court divested the district court of subject matter jurisdiction to adjudicate the issue of paternity. We agree.

In a legitimation action, upon the putative father’s verified, written petition to the clerk of the superior court and the clerk’s determination that petitioner is the father of the child, “the [clerk] may . . . declare and pronounce the child legitimated.”<sup>3</sup> N.C.G.S. § 49-10 (2001). The legitimation serves to confer onto

the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue, and to the same extent as if said child had been born in wedlock, and to entitle such child by succession, inheritance or distribution, to take real and personal property by, through, and from his or her father and mother as if such child had been born in lawful wedlock.

N.C.G.S. § 49-11 (2001); *see also* N.C.G.S. § 49-13 (2001) (right to have child’s surname changed to father’s). An adjudication of paternity, on the other hand, only serves to equalize between the child’s father and mother “the rights, duties, and obligations . . . with regard to support and custody of the child.” N.C.G.S. § 49-15 (2001). As legitimation thus vests greater rights in the parent and the child than an order

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3. When paternity is disputed in a legitimation action, the clerk is required to “transfer the proceeding to the appropriate court.” N.C.G.S. § 1-301.2(b) (2001). With respect to the issue of paternity, the appropriate court is the district court. *See* N.C.G.S. § 49-14 (2001); *e.g.*, *Davis v. N.C. Dept. of Human Resources*, 126 N.C. App. 383, 485 S.E.2d 342 (1997) (paternity action brought in district court), *aff’d and rev’d in part*, 349 N.C. 208, 505 S.E.2d 77 (1998); *see also* N.C.G.S. § 7A-244 (district court proper division for domestic relations cases).

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adjudicating the child's paternity,<sup>4</sup> *see* N.C.G.S. §§ 49-11, 49-13, 49-15, the legitimation proceeding should be given preference when separate actions for both legitimation and paternity are filed.<sup>5</sup> *See Lewis v. Stitt*, 86 N.C. App. 103, 105, 356 S.E.2d 398, 399 (1987) (holding that once a child has been legitimated, an action for paternity can no longer be maintained).

In this case, Plaintiff filed both the custody action in the district court, which the district court treated as including an action for paternity, and the legitimation action in the superior court. Because the issue of paternity is central to both actions and the legitimation action takes priority over a paternity action, the district court was divested of subject matter jurisdiction to decide the issue of paternity. Consequently, it was error for the district court to order a paternity test in this case.

## III

**[3]** While the district court erred in considering the issue of paternity during the pendency of the legitimation action, we also need to determine whether the district court nevertheless had the authority to enter a temporary custody order. Defendant argues the district court lacked jurisdiction to do so because Plaintiff, in the absence of an adjudication of paternity, was a third party without standing. We disagree.

Both parents and third parties have a right to sue for custody. *See* N.C.G.S. § 50-13.1(a) (2001) (“[a]ny parent, relative, or other person . . . claiming the right to custody of a minor child may institute an action or proceeding for the custody of such child”). In a custody dispute between a parent and a non-parent, the non-parent must first establish that he has standing, based on a relationship with the child, to bring the action. *See Ellison v. Ramos*, 130 N.C. App. 389, 394, 502 S.E.2d 891, 394 (1998). Thus, “where a third party and a child have an

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4. Although greater in number, because the rights granted upon legitimation of a child vary only slightly from the rights conveyed upon an action of paternity, it would not only be good public policy but also further judicial efficiency if the legislature amended section 49-14 so that an adjudication of paternity would constitute a *per se* legitimation of the child. *See* Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 4.3, at 174 (2d ed. 1988) (proposing that in states where this is not yet the case “the statute should be phrased to include the paternity suit as a source of legitimation for all purposes”).

5. Without such a preference, we would simply be promoting a race to the courthouse based on assumptions as to which judge will best decide the issue of paternity.



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established relationship in the nature of a parent-child relationship, the third party does have standing as an ‘other person’ under N.C. Gen. Stat. § 50-13.1(a) to seek custody.” *Id.* at 395, 502 S.E.2d at 895. The father of a child born out of wedlock will be treated as a third party unless he has either legitimated the child pursuant to sections 49-10, 49-12, or 49-12.1 or had his paternity adjudicated under section 49-14. *See Rosero v. Blake*, 150 N.C. App. 250, 255-56, 563 S.E.2d 248, 252-53 (2002).

While Plaintiff’s legitimation action was still pending at the time the district court entered its temporary custody order in this case, Plaintiff’s status for purposes of temporary custody remained that of a third party under *Ellison*. Yet even as a third party, Plaintiff had standing to bring this action because the district court’s findings that the child shared Plaintiff’s last name and Plaintiff had visited the child since her birth two years prior to this action indicated the existence of a sufficient relationship.<sup>6</sup> As such, the trial court had the authority to enter a temporary custody order.

**[4]** It was, however, error for the trial court to order temporary visitation to Plaintiff in the absence of any notice to the child’s presumed father, Bilal Kanawati, who was a necessary party to the action. “The term ‘necessary party’ embraces all persons who have a claim or material interest in the subject matter of the controversy, which interest will be directly affected by the outcome of the litigation.” *Lombroia v. Peek*, 107 N.C. App. 745, 750, 421 S.E.2d 784, 787 (1992); N.C.G.S. § 1A-1, Rule 19(b) (2001). In an action brought by a putative father or a non-parent claiming custody of a child born during the mother’s marriage to her husband, the husband is thus a necessary party to the proceeding, unless he has previously been determined not to be the child’s father. *See Lombroia*, 107 N.C. App. at 750, 421 S.E.2d at 787. Because Bilal Kanawati, Defendant’s former husband, was a necessary party in this case but did not receive notice of the temporary custody proceeding, the trial court erred in entering its 8 August 2001 order in its entirety.<sup>7</sup>

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6. As Defendant did not assign error to these findings, they are deemed to be supported by competent evidence. *See Anderson Chevrolet/Olds v. Higgins*, 57 N.C. App. 650, 653, 292 S.E.2d 159, 161 (1982).

7. We note the trial court has the authority under the appropriate circumstances to enter *ex parte* temporary custody orders. *See* N.C.G.S. § 50-13.5(d)(2)-(3) (2001). The record in this case, however, reflects no circumstances warranting suspension of the notice requirement.

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As the trial court lacked subject matter jurisdiction to hear either the paternity or the custody action, this case must be reversed as to the paternity portion and reversed and remanded as to the custody portion<sup>8</sup> of the district court's 8 August 2001 order. Furthermore, all orders in this case entered after 8 August 2001 based on the results of the paternity test ordered by the district court are void. This includes the district court's order holding Defendant in civil contempt.<sup>9</sup>

Reversed and remanded in part.

Judges WYNN and McGEE concur.



STATE OF NORTH CAROLINA v. CHICARION O-RONTE LEE

No. COA02-354

(Filed 3 December 2002)

**1. Identification of Defendants— showup procedure—motion to suppress—suggestiveness**

The trial court did not err in a robbery with a dangerous weapon case by failing to suppress eyewitness identifications of defendant based on a showup procedure used at the restaurant where the crime occurred, because defendant failed to demonstrate that the showup was impermissibly suggestive and created a substantial likelihood of irreparable misidentification when: (1) the eyewitnesses had sufficient opportunity to observe defendant earlier in the evening before the showup and one of the witnesses was familiar with defendant; (2) the time period was sufficiently proximate to support the reliability of the identification; (3) the potential suggestiveness of the showup was mitigated by the fact

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8. The district court's temporary custody order in this case cannot survive absent notice to all necessary parties. Although N.C. Gen. Stat. § 50-13.5(e)(3) provides that "[i]n the discretion of the court, failure of . . . service of notice shall not affect the validity of any order or judgment entered," N.C.G.S. § 50-13.5(e)(3) (2001), this section applies only to orders entered with respect to support actions, *see* N.C.G.S. § 50-13.5(e) (2001); *see also Broaddus v. Broaddus*, 45 N.C. App. 666, 263 S.E.2d 842 (1980) (applying former version of section 50-13.5(e)(3) to custody action where section specifically referred to custody as opposed to child support proceedings).

9. The order for contempt necessarily fails because the district court's order of a mental evaluation of Defendant was premised on its order of a paternity test.

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that the eyewitnesses were shown a different individual shortly before defendant was brought to the restaurant and none of the eyewitnesses identified the first suspect even though he wore a shirt with the same logo as the shirt worn by one of the robbers; (4) although defendant was handcuffed when he first arrived at the showup, this alone is insufficient to make the showup impermissibly suggestive; and (5) the trial court considered that the eyewitnesses' in-court identifications were based on their recollection of the crime and not the subsequent showup.

**2. Evidence— exclusion of expert testimony—eyewitness confidence, eyewitness memory, and showups**

The trial court did not err in a robbery with a dangerous weapon case by excluding expert testimony about eyewitness confidence, eyewitness memory, and showups, because: (1) the overwhelming evidence of defendant's guilt was sufficient to permit a jury to draw inferences without the aid of expert testimony; and (2) the probative value of the expert's testimony was outweighed by its likely danger to mislead the jury and confuse the issues.

**3. Appeal and Error— preservation of issues—failure to assign error**

The trial court did not abuse its discretion in a robbery with a dangerous weapon case by denying defendant's oral motion in limine regarding eyewitness confidence, because while defendant offered an objection to this evidence at trial, he failed to assign error to the evidentiary rulings by the trial court on this issue as required by N.C. R. App. P. 10(a).

**4. Appeal and Error— preservation of issues—questions regarding eyewitness memory—failure to develop argument**

Although defendant contends the trial court abused its discretion in a robbery with a dangerous weapon case by sustaining the State's objections to defendant's two questions regarding eyewitness memory during jury voir dire, this assignment of error is overruled because: (1) defendant failed to develop this argument; and (2) defendant failed to demonstrate that the trial court's decision was arbitrary or that he was prejudiced by exclusion of the questions.

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**5. Appeal and Error— preservation of issues—questions regarding publication—failure to develop argument**

Although defendant contends the trial court abused its discretion in a robbery with a dangerous weapon case by prohibiting defendant from cross-examining a detective about procedures in a publication from the U.S. Justice Department, this assignment of error is overruled because: (1) defendant failed to develop this argument; and (2) defendant failed to demonstrate that the trial court's decision was arbitrary or that he was prejudiced by exclusion of the questions.

Appeal by defendant from judgment dated 8 November 2001 by Judge Knox V. Jenkins, Jr. in Superior Court, Johnston County. Heard in the Court of Appeals 30 October 2002.

*Attorney General Roy Cooper, by Special Deputy Attorney General Thomas J. Ziko, for the State.*

*William B. Gibson, for defendant-appellant.*

McGEE, Judge.

Chicarion O-Ronte Lee (defendant) was indicted on 24 July 2000 for robbery with a dangerous weapon. The evidence presented at trial tended to show that Wayne Edward Hinerman (Hinerman) and his sister Heather Metz (Metz) stopped "just after dark" on 9 June 2000 at a McDonald's restaurant in Smithfield, North Carolina to use a pay telephone. While at the pay telephone, defendant and DaQuon Oliver (Oliver) walked through the well-lit parking lot and approached Metz's vehicle. Defendant stopped at the rear of the vehicle while Oliver approached the open passenger window and asked where he could get some weed. Hinerman replied that he did not know. Oliver pointed a gun toward Hinerman's ribs and demanded Hinerman's money. Hinerman refused and Oliver repeated his demand, but Hinerman continued to refuse. Defendant encouraged Oliver to be more aggressive and to demand things. Metz pulled money from her purse and threw it at Hinerman, who gave it to Oliver. Defendant told Oliver to take Hinerman's cell phone. Oliver took the cell phone and he and defendant left on foot. Hinerman immediately entered the McDonald's restaurant and called 911.

Deputy Jason Crocker (Deputy Crocker) of the Johnston County Sheriff's Department received a call from his dispatcher and responded to the call with his K-9 dog. The dog picked up the most

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recent scent and tracked it for a couple of blocks to the door of a trailer occupied by Alice Lee (Lee), defendant's mother. The dog circled the trailer but did not pick up any more of the scent. Detective Steve Knox (Detective Knox) of the Smithfield Police Department joined Deputy Crocker at the trailer. Lee allowed them both to enter her home. Lee told the officers that her son had recently come home, changed shirts, and exited through the back door. The officers searched defendant's bedroom and asked Lee to have defendant call them when he returned home. The officers then left the trailer.

Shortly after leaving Lee's trailer, Detective Knox and Lieutenant Bob Jones (Lieutenant Jones) arrested a suspect wearing a shirt that matched the description of the shirt worn by the gunman. Lieutenant Jones took the suspect to the McDonald's restaurant for a showup with eyewitnesses. Hinerman sat inside the police car while the suspect stood in front of the police car's headlights. Hinerman said the suspect was wearing the same type of shirt as the gunman, but said the suspect was not one of the robbers. Two other eyewitnesses, Barry Braglin (Braglin) and Tabatha McDonald (McDonald), also said the suspect was not one of the robbers.

Defendant returned to Lee's trailer and Lee contacted Detective Knox. Detective Knox returned to Lee's trailer and questioned defendant about the robbery. Defendant denied involvement with the robbery and reluctantly agreed to go with Detective Knox to the McDonald's restaurant for a showup. Detective Knox took defendant to the McDonald's restaurant, removed his handcuffs, and led him into the restaurant for a showup with the eyewitnesses. Hinerman, Braglin, and McDonald indicated that defendant was one of the robbers.

Defendant testified that he returned home after playing basketball with friends. Defendant said that he went home and changed shirts, washed up, and went to a friend's house to watch a basketball game. A short while later, defendant's aunt went over to the friend's house to tell defendant that his mother wanted to speak to him about a robbery, and defendant returned home. Defendant continued to deny any involvement with the robbery.

A jury convicted defendant of robbery with a firearm on 8 November 2001. The trial court sentenced defendant to a minimum of fifty-one months and a maximum of seventy-one months in prison. Defendant appeals.

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[1] Defendant first argues the trial court erred by failing to suppress eyewitness identifications of defendant and that such error denied defendant his due process rights under the Fifth and Fourteenth Amendments of the United States Constitution. Defendant contends the in-court identifications were impermissibly tainted by the showup procedure used at the McDonald's restaurant. Defendant has failed to preserve the issue of Hinerman's in-court identification for appeal. "In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(b)(1). While defendant objected to Hinerman's out-of-court identification, the transcript shows that defendant failed to object to Hinerman's in-court identification. Accordingly, Hinerman's in-court identification is not before this Court for review. *See State v. Gaither*, 148 N.C. App. 534, 539, 559 S.E.2d 212, 215-16 (2002) (stating that a defendant must object to identification testimony when offered at trial in order to preserve the matter for appellate review). However, the in-court identifications of McDonald and Braglin were properly objected to and are before this Court for review.

"Identification evidence must be excluded as violating a defendant's right to due process where the facts reveal a pretrial identification procedure so impermissibly suggestive that there is a very substantial likelihood of irreparable misidentification." *State v. Harris*, 308 N.C. 159, 162, 301 S.E.2d 91, 94 (1983). While showups are strongly disfavored methods of identification, *see State v. Matthews*, 295 N.C. 265, 285, 245 S.E.2d 727, 739 (1978), this Court has approved the use of showups on numerous occasions. *In re Stallings*, 318 N.C. 565, 569, 350 S.E.2d 327, 329 (1986). Showups are an unrestrictive means of determining if a suspect committed the crime in question and they ensure an innocent party's minimum involvement with the criminal justice system. *Id.* at 570, 350 S.E.2d at 329. The trial court must employ the totality of the circumstances test to evaluate the reliability of a showup identification and "determine whether the procedures created a substantial likelihood of irreparable misidentification." *State v. Fowler*, 353 N.C. 599, 617, 548 S.E.2d 684, 697-98 (2001); *see Stallings*, 318 N.C. at 571, 350 S.E.2d at 330.

Some of the factors that may be examined in determining the reliability of a showup identification are (1) the witness' opportunity to observe the accused, (2) the witness' degree of attention, (3) the accuracy of the witness' description, (4) the witness' level of

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certainty, and (5) the time elapsed between the crime and the confrontation.

*Id.*; see *Neil v. Biggers*, 409 U.S. 188, 199, 34 L. Ed. 2d 401, 411 (1972); *State v. Wilson*, 313 N.C. 516, 529, 330 S.E.2d 450, 460 (1985). A trial court's findings of fact regarding the circumstances surrounding an identification are binding on appeal if they are supported by competent evidence. *State v. Hannah*, 312 N.C. 286, 291, 322 S.E.2d 148, 151-52 (1984).

In the present case, defendant has failed to demonstrate that the showup was impermissibly suggestive and created a substantial likelihood of irreparable misidentification. The evidence in the record demonstrates that the eyewitnesses had sufficient opportunity to observe defendant earlier in the evening before the showup. McDonald testified that she and Oliver had worked together at the McDonald's restaurant for two months and that Oliver was at work with her earlier in the day. Additionally, McDonald said that Oliver had returned to the restaurant with defendant twice after Oliver had left work. McDonald stated that she had no trouble seeing the faces of defendant and Oliver that evening.

Testimony by McDonald indicates that she was familiar with defendant and Oliver before the robbery and was able to observe both individuals during the course of the robbery. The trial transcript also indicates that McDonald was certain about her identification and was attentive to the events comprising the robbery. Additionally, McDonald's identification of defendant in the showup occurred a couple of hours after the robbery. This time period was sufficiently proximate to support the reliability of the identification.

Braglin testified that he and his wife were driving through the parking lot of the McDonald's restaurant and observed two black males interacting with individuals inside a car at the time of the robbery. Braglin testified that he circled the McDonald's restaurant several times and was able to observe the individuals from a range of five to six feet in a well-lit area. Braglin testified that he was able to see their faces and observe their physical build and clothing. Braglin's identification demonstrated a high level of certainty and attentiveness and was based on specific characteristics from his observation. Additionally, the showup was conducted only a couple of hours after Braglin's observations, making the identification sufficiently proximate in time.

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The potential suggestiveness of the showup is further mitigated by the fact that the eyewitnesses were shown a different individual shortly before defendant was brought into the McDonald's restaurant. None of the eyewitnesses who testified identified the first suspect, even though he wore a shirt with a logo that was the same logo as on a shirt worn by one of the robbers. The eyewitnesses had a sufficient basis for their identification to distinguish between defendant and other suspects. The presentation of another suspect provided an alternative to the eyewitnesses, which reduced the risk that the subsequent showup was impermissibly suggestive.

While defendant was handcuffed when he first arrived at the showup, this alone is insufficient to make the showup impermissibly suggestive. Defendant has failed to demonstrate how this occurrence requires exclusion of the showup. The evidence in the record demonstrates that the eyewitnesses had a sufficient basis for their in-court identification beyond the showup. The trial court made the appropriate findings of fact regarding the eyewitness identification and those findings were supported by competent evidence in the record. The trial court considered that the eyewitnesses' in-court identifications were based on their recollection of the crime and not the subsequent showup. Considering the totality of the circumstances, we do not believe the in-court identifications by McDonald and Braglin were tainted by an impermissibly suggestive showup that deprived defendant of his due process rights. This assignment of error is without merit.

**[2]** Defendant next argues the trial court erred in excluding testimony by Dr. Reed Hunt (Dr. Hunt) about eyewitness confidence, eyewitness memory, and showups. Defendant contends this exclusion deprived him of his Fifth and Fourteenth Amendment due process rights under the United States Constitution.

“It is undisputed that expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified.” *State v. Locklear*, 349 N.C. 118, 147, 505 S.E.2d 277, 294 (1998) (quoting *State v. Bullard*, 312 N.C. 129, 139, 322 S.E.2d 370, 376 (1984)), *cert. denied*, 526 U.S. 1075, 143 L. Ed. 2d 559 (1999). The trial court must balance “the probative value of the testimony against its potential for prejudice, confusion, or undue delay.” *State v. Knox*, 78 N.C. App. 493, 495, 337 S.E.2d 154, 156 (1985); *see* N.C. Gen. Stat. 8C-1, Rule 403 (2001).



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This Court has previously addressed the issue of the admissibility of expert testimony on eyewitness identifications and has held that “the admission of expert testimony regarding memory factors is within the trial court’s discretion, and the appellate court will not intervene where the trial court properly appraises probative and prejudicial value of the evidence under Rule 403 and the Rules of Evidence.”

*State v. Cole*, 147 N.C. App. 637, 642, 556 S.E.2d 666, 670 (2001) (quoting *State v. Cotton*, 99 N.C. App. 615, 621, 394 S.E.2d 456, 459 (1990)); see *Bullard*, 312 N.C. at 140, 322 S.E.2d at 376.

In the present case, the trial court conducted a *voir dire* hearing and made findings of fact regarding the expert witness’s proposed testimony. “The trial court’s findings of fact following a *voir dire* hearing are binding on this court when supported by competent evidence.” *State v. Lane*, 334 N.C. 148, 154, 431 S.E.2d 7, 10 (1993). However, conclusions of law drawn from these findings of fact are reviewable on appeal. *Id.* The trial court found as fact that Dr. Hunt, the proposed witness, had not interviewed the victims, did not visit the crime scene, and did not observe any of the eyewitnesses’ testimony at trial. The sole basis for Dr. Hunt’s testimony was his review of the eyewitnesses’ testimony at a suppression hearing and research studies conducted by other experts independent of these facts. The trial court determined that the evidence was not case specific and lacked probative value. The trial court excluded the evidence because the probative value was outweighed by the danger that it would confuse the jury and that it would be unduly prejudicial in defendant’s favor.

While expert testimony concerning eyewitness identification may be appropriate in some cases, we do not believe its admission was warranted in the present case. The eyewitnesses had sufficient opportunity to observe defendant and they were attentive. The identification of defendant by the three eyewitnesses was detailed and possessed a high level of certainty. The identifications were corroborated between the three eyewitnesses, significantly reducing the risk of misidentification about which Dr. Hunt intended to testify. The overwhelming evidence of defendant’s guilt was sufficient to permit a jury to draw inferences without the aid of expert testimony. The probative value of Dr. Hunt’s testimony was outweighed by its likely danger to mislead the jury and confuse the issues. This assignment of error is without merit.

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**[3]** Defendant argues the trial court abused its discretion in denying defendant's oral motion *in limine* regarding eyewitness confidence. "On appeal the issue is not whether the granting or denying of the motion *in limine* was error, as that issue is not appealable, but instead whether the evidentiary rulings of the trial court, made during the trial, are error." *T&T Development Co. v. Southern Nat. Bank of S.C.*, 125 N.C. App. 600, 602-03, 481 S.E.2d 347, 349 (1997). No prejudice results from a denial of a motion *in limine* because the defendant remains free to object to admission of the evidence during trial. See *Hall v. Hotel L'Europe, Inc.*, 69 N.C. App. 664, 665, 318 S.E.2d 99, 101 (1984). While defendant offered an objection to this evidence at trial, he failed to assign error to the evidentiary rulings by the trial court on this issue. Accordingly, this issue is not before us for review. See N.C. R. App. P. 10(a). This assignment of error is overruled.

**[4]** Defendant argues the trial court abused its discretion in sustaining the State's objections to defendant's two questions regarding eyewitness memory during jury *voir dire*. "The trial court has the duty to control and supervise the examination of prospective jurors.' Regulation of the extent and manner of inquiries during *voir dire* rests largely in the trial court's discretion." *State v. Simpson*, 341 N.C. 316, 336, 462 S.E.2d 191, 202 (1995) (quoting *State v. Green*, 336 N.C. 142, 164, 443 S.E.2d 14, 27, cert. denied, 513 U.S. 1046, 130 L. Ed. 2d 546 (1994)), cert. denied, 516 U.S. 1161, 134 L. Ed. 2d 194 (1996). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Defendant does not develop this argument and fails to demonstrate that the trial court's decision was arbitrary or that he was prejudiced by exclusion of the questions. This assignment of error is overruled.

**[5]** Finally, defendant argues the trial court abused its discretion by prohibiting defendant from cross-examining Detective Knox about procedures in a publication from the U.S. Justice Department entitled, *Eyewitness, Evidence, A Guide for Law Enforcement*. "The scope of cross-examination rests in the discretion of the trial judge, and his rulings thereon will not be disturbed absent a showing of abuse of discretion." *State v. Royal*, 300 N.C. 515, 528, 268 S.E.2d 517, 526 (1980). Defendant does not develop this argument, fails to demonstrate that the trial court's decision was arbitrary, and fails to show that he was prejudiced by exclusion of the questions. This assignment of error is overruled.

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No error.

Judges HUDSON and THOMAS concur.

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STATE OF NORTH CAROLINA v. TIMOTHY RYAN POOLE

No. COA01-1482

(Filed 3 December 2002)

**1. Robbery— variance with proof not fatal—attempted armed robbery—type of property**

There was not a fatal variance between the indictment and the proof in an attempted armed robbery prosecution where the indictment alleged that defendant attempted to take currency from the victim, but the evidence was that defendant pointed a gun at the victim and said “give it up” without being specific. The gravamen of the offense is an attempted taking by force or by fear.

**2. Appeal and Error— preservation of issues—right to argue plain error—failure to object when given opportunity**

A defendant in an armed robbery prosecution waived his right to argue plain error in the jury’s use of a dictionary in its deliberations where defendant declined to object when given the opportunity by the trial judge.

**3. Robbery— armed—dangerous weapon—handgun presumed dangerous**

The State’s failure to produce the weapon used in an attempted armed robbery or to specify the model type of handgun used to threaten the victim did not require an instruction on common law robbery. The law presumes that a firearm used in a robbery threatens the life of the victim, and there was no evidence in this case to contradict that presumption.

**4. Robbery— armed—felonious intent—ambiguous statement**

There was sufficient evidence of felonious intent to support an attempted armed robbery charge where defendant contended that his statement that the victim should “give it up” indicated merely that he wanted the return of a necklace stolen from him,

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but the victim understood the statement to mean that defendant intended to rob him, and even defendant testified that the phrase was subject to misinterpretation.

**5. Robbery—felonious intent—instruction**

The instruction on felonious intent in an armed robbery prosecution was adequate.

Appeal by defendant from judgment entered 12 July 2001 by Judge L. Oliver Noble in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 September 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Fred Lamar, for the State.*

*Maitri “Mike” Klinkosum for defendant appellant.*

TIMMONS-GOODSON, Judge.

Timothy Ryan Poole (“defendant”) appeals from the judgment of the trial court entered upon a jury verdict finding him guilty of attempted robbery with a firearm. For the reasons stated herein, we find no error by the trial court.

At trial, the State presented evidence tending to show the following: In the early evening hours of 14 May 2000, Shareef Rasool Ivey (“Shareef”) and his sister, Nena Malukah Ivey (“Nena”), were driving in Hornet’s Nest Park (“the park”) in Charlotte, North Carolina. Nena drove the vehicle and Shareef sat in the front passenger-side seat. A female friend of Nena sat in the back seat. Shareef testified that they were “cruising,” by slowly circling the parking lot of the park.

After they had been at the park for approximately twenty minutes, Shareef observed defendant driving a gold-colored Cadillac Sedan Deville. Shareef was acquainted with defendant, and the two men nodded their heads at one another as they passed. Shortly afterward, Shareef noticed that the Cadillac appeared to be following their automobile. Shareef instructed his sister to stop, and Nena parked the car in a parking space. Defendant parked near them, and defendant and two other men exited the vehicle.

Defendant approached the passenger-side window and spoke briefly with Shareef. Defendant gave Shareef his telephone number, and Shareef entered this number into the data bank of his cellular telephone. As Shareef was programming his telephone, defendant

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“reached into his pants to grab [a] pistol.” Defendant pointed the gun at Shareef and told him “to give it up.” Shareef testified that he understood defendant’s statement to mean that defendant intended to rob him. Nena and her friend began screaming, and Shareef “grabbed the gun” by its barrel. Nena then began backing the car out of the parking space, causing Shareef to loosen his grip on the weapon, which defendant still held by its handle. Shareef released the pistol, and Nena drove them away from the parking lot and toward the park exit, where they were stopped by Charlotte-Mecklenburg police officers. Shareef and Nena reported defendant’s actions to the officers, who then located defendant and took him into custody. Shareef and Nena identified defendant as the man who had attempted to rob them.

Officer M. L. Temple of the Charlotte-Mecklenburg Police Department testified for the State. Officer Temple stated that, after Shareef and Nena identified defendant, he arrested defendant and searched his vehicle. Upon searching the vehicle, Officer Temple found a holster to a handgun, ten live rounds of ammunition, and a magazine for a weapon.

Defendant testified that Shareef was one of three men who had robbed him at a McDonald’s restaurant several months prior to the incident at the park. Defendant never reported this crime to law enforcement, however. Defendant stated that when he approached Shareef at the park, he intended to question him regarding the robbery at McDonald’s. When defendant spoke with Shareef, he noticed that Shareef was wearing a necklace that defendant asserted belonged to him and had been stolen during the earlier robbery. Defendant stated that when he observed the necklace, “my first reaction was to try to get it back. So I pulled my gun out and pointed it at [Shareef], and I told him something like, ‘You know what time it is,’ or something like that.” Defendant testified that he did not intend to harm Shareef or anyone else, but that he “just wanted to get [his] stuff back, that’s it.”

At the close of the evidence, the jury found defendant guilty of attempted robbery with a firearm. The trial court sentenced defendant to a minimum term of imprisonment of fifty-one months and a maximum term of seventy-one months. From this judgment, defendant appeals.

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Defendant presents five assignments of error on appeal, arguing that the trial court erred in (1) that there was a fatal variance between the indictment and the evidence presented at trial; (2) allowing the

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jury to use a dictionary during deliberations; (3) failing to instruct the jury on common law robbery; (4) denying defendant's motion to dismiss; and (5) failing to instruct the jury on felonious intent. We address these issues in turn.

**[1]** By his first assignment of error, defendant asserts that there was a fatal variance between the indictment and the evidence presented at trial. Specifically, defendant argues that there was no evidence that defendant attempted to take United States currency from the victim, as alleged in the indictment. Defendant contends that, because the State failed to identify at trial the type of property defendant intended to take from the victim, the indictment contained a fatal variance, requiring dismissal of the charge against defendant. We disagree.

In order to properly obtain jurisdiction over a criminal defendant charged with a felony, a valid bill of indictment is necessary. *See State v. Snyder*, 343 N.C. 61, 65, 468 S.E.2d 221, 224 (1996). In charging a criminal offense, an indictment must state the elements of the offense with sufficient detail to put the defendant on notice as to the nature of the crime charged and to bar subsequent prosecution for the same offense in violation of the prohibitions against double jeopardy. *See State v. Burroughs*, 147 N.C. App. 693, 695-96, 556 S.E.2d 339, 342 (2001). The gravamen of the offense of armed robbery is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons in the perpetration of or even in the attempt to perpetrate the crime of robbery. *See* N.C. Gen. Stat. § 14-87(a) (2001); *State v. Beaty*, 306 N.C. 491, 499, 293 S.E.2d 760, 764 (1982), *overruled on other grounds*, 322 N.C. 518, 369 S.E.2d 819 (1988). "In an indictment for robbery with firearms or other dangerous weapons . . . the gist of the offense is not the taking of personal property, but a taking or attempted taking by force or putting in fear by the use of firearms or other dangerous weapon." *State v. Mahaley*, 122 N.C. App. 490, 492, 470 S.E.2d 549, 551 (1996) (quoting *State v. Harris*, 8 N.C. App. 653, 656, 175 S.E.2d 334, 336 (1970)).

In the instant case, the indictment alleged that

on or about the 14th day of May, 2000, in Mecklenburg County, Timothy Ryan Poole did unlawfully, wilfully and feloniously attempt to steal, take, and carry away another's personal property, United States currency, of value, from the person and presence of Shareef Rasool Ivey. The defendant committed this act by means of an assault consisting of having in his possession and threatening the use of a firearm, a gun, a dangerous weapon,

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whereby the life of Shareef Rasool Ivey was threatened and endangered.

At trial, the State presented evidence tending to show that on 14 May 2000, defendant approached Shareef Ivey, pointed a gun at his person, and demanded that he “give it up.” Although the State presented no specific evidence to identify what type of property defendant meant by the word “it,” thereby presenting some variance between the indictment and the evidence, not every variance is sufficient to require the allowance of a motion to dismiss. *See State v. Rawls*, 70 N.C. App. 230, 232, 319 S.E.2d 622, 624 (1984), *cert. denied*, 317 N.C. 713, 347 S.E.2d 451 (1986); *State v. Tyndall*, 55 N.C. App. 57, 61, 284 S.E.2d 575, 577 (1981). It is only “where the evidence tends to show the commission of an offense not charged in the indictment [that] there is a fatal variance between the allegations and the proof requiring dismissal.” *State v. Williams*, 303 N.C. 507, 510, 279 S.E.2d 592, 594 (1981). There was substantial evidence in the instant case that defendant used a firearm against Shareef Ivey in an attempt to take his property. “As previously discussed, the gravamen of the offense charged here is the taking by force or putting in fear, while the specific owner or the exact property taken or attempted to be taken is mere surplusage.” *Burroughs*, 147 N.C. App. at 697, 556 S.E.2d at 342. Because there was no fatal variance between the indictment and the evidence presented at trial, we overrule this assignment of error.

[2] Defendant next argues that the trial court erred in allowing the jury to use a dictionary in order to assist it in the deliberations. During its deliberations, the jury requested that the court define the word “calculation.” The trial court instructed the jury that the word “calculation” had no precise legal definition, and read to the jury from a dictionary the various meanings of the term “calculate.” The jury then requested use of the dictionary, which the court granted. When the trial judge asked the counsel for defendant whether there were any objections to the jury’s use of the dictionary, defense counsel stated no objections. Defendant now contends that the trial court committed plain error in allowing the jury to use the dictionary during its deliberations. As defendant assented to allowing the jury to use the dictionary during its deliberations, however, defendant has waived his right to make such an argument on appeal. *See State v. Jones*, 339 N.C. 114, 163, 451 S.E.2d 826, 853 (1994), *cert. denied*, 515 U.S. 1169, 132 L. Ed. 2d 873 (1995). We therefore overrule this assignment of error.

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**[3]** By his third assignment of error, defendant argues that the trial court committed plain error by failing to instruct the jury on the lesser included offense of common law robbery. Defendant contends that, because the State neither identified with specificity the model type of the handgun used to threaten the victim in the instant case, nor produced the weapon itself, there was insufficient evidence that the firearm was one of a dangerous nature. We disagree.

“When a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, *the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed.” *State v. Joyner*, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985). When any evidence is presented showing the weapon is not operational and does not pose a danger, however, the mandatory presumption disappears and the jury is permitted, but is not required, to infer that the life of the victim was endangered or threatened by the apparent weapon. *See State v. Duncan*, 136 N.C. App. 515, 519, 524 S.E.2d 808, 811 (2000). In the instant case, Shareef testified at trial that defendant pulled out a “black handgun,” which, according to Shareef, “might have been a Glock, because it was small.” There was absolutely no evidence presented to contradict the legal presumption that the handgun defendant used was a dangerous weapon. As there was no evidence to support an instruction for common law robbery, the trial court committed no error in failing to give such an instruction. We overrule this assignment of error.

**[4]** Defendant next argues that the trial court erred in denying his motion to dismiss the charge against him. “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). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *See id.* 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



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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).

Defendant contends that there was insufficient evidence of felonious intent to support the armed robbery charge. Defendant asserts that the evidence tended to show that he did not intend to rob the victim, but rather that he sought to reclaim his property, namely, the necklace taken from him during the McDonald's robbery. Defendant contends that his statement to Shareef that "you know what time it is" or that he should "give it up" indicated that he merely wanted the necklace and no other property. We disagree.

The State presented sufficient evidence at trial to support a reasonable inference that defendant intended to rob the victim. *See State v. Larrimore*, 340 N.C. 119, 156, 456 S.E.2d 789, 809 (1995). Shareef testified that when defendant pointed the gun at him and told him to "give it up," he understood defendant's statement to mean that defendant intended to rob him. Defendant asserted at trial that he subjectively intended the phrase to mean that Shareef should return the necklace he allegedly stole. Defendant admitted, however, that the phrase was capable of misinterpretation, stating, "I'm not saying that's what [the phrase "you know what time it is"] means. That's how I meant it when I said it." Because there was substantial evidence to support each essential element of the crime charged, the trial court did not err in denying defendant's motion to dismiss the charge. We therefore overrule this assignment of error.

**[5]** By his final assignment of error, defendant contends that the trial court erred in failing to instruct the jury on the element of felonious intent. "A defendant is not guilty of robbery if he forcibly takes personal property from the actual possession of another under a bona fide claim of right or title to the property, or for the personal protection and safety of defendant and others, or as a frolic, prank or practical joke, or under color of official authority." *State v. Spratt*, 265 N.C. 524, 526-27, 144 S.E.2d 569, 571 (1965). Defendant asserts that he presented evidence tending to show that, in pointing the handgun at the victim, he was acting under a bona fide claim of right to the necklace worn by Shareef. Defendant therefore argues that the trial court was required to give a special instruction on the element of felonious intent.

A taking with "felonious intent" is an essential element of the offense of armed robbery, of attempt to commit armed robbery, and of common law robbery, and it is prejudicial error for the court to

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charge that defendant may be convicted of such offenses where the taking was without felonious intent. *See State v. Chase*, 231 N.C. 589, 590-91, 58 S.E.2d 364, 365 (1950). “The comprehensiveness and [specificity] of the definition and explanation of ‘felonious intent’ required in a charge depends on the facts in the particular case.” *Spratt*, 265 N.C. at 526, 144 S.E.2d at 571. Some explanation must be given in every case. *See State v. Lawrence*, 262 N.C. 162, 168, 136 S.E.2d 595, 600 (1964).

In the instant case, the trial court stated that the first element of attempted robbery required that the defendant “intended to rob a person; that is, to forcibly take and carry away personal property from that person, or in his presence, without his consent, knowing that he, the defendant, was not entitled to take it, intending to deprive the person of its use, permanently.” The court further instructed the jury that “[a] person is not guilty of attempted armed robbery if he forcibly takes personal property at gunpoint from the actual possession of another under a bona fide claim of right or title to the property.” We conclude that the trial court adequately instructed the jury on the meaning of “felonious intent.” *See Spratt*, 265 N.C. at 527, 144 S.E.2d at 572. We therefore overrule defendant’s final assignment of error.

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

No error. Judges HUDSON and CAMPBELL concur.

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JAMES E. PEVERALL, JR., AND OTHERS SIMILARLY SITUATED, AND FRANCES KATHERINE PEVERALL, A MINOR BY AND THROUGH HER GUARDIAN AD LITEM, DAVID V. LINER, AND OTHERS SIMILARLY SITUATED, PLAINTIFFS v. THE COUNTY OF ALAMANCE, DEFENDANT

No. COA01-700

(Filed 3 December 2002)

**1. Appeal and Error— appealability—interlocutory order— sovereign immunity affects substantial right**

Although the appeal from the denial of a motion to dismiss is not a final judgment and is generally not appealable, defendant county’s appeal is properly before the Court of Appeals because

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it is based upon the defense of sovereign immunity which affects a substantial right warranting immediate appellate review.

**2. Immunity—sovereign—county employees—health and life insurance benefits—motion to dismiss—due process—claims under contract law—§ 1983 claim**

The trial court did not err by denying defendant county's motion to dismiss on the ground of sovereign immunity plaintiff's due process, breach of contract, impairment of contractual obligations, and 42 U.S.C. § 1983 claims based on the county's retroactive change in policy requiring county employees declared disabled to have completed twenty years of continuous service to receive health and life insurance benefits rather than the five years required when plaintiff became employed by the county and when he began disability retirement because: (1) defendant is not immune against the due process claim since it was brought pursuant to Article I, Section 19 of the North Carolina Constitution; (2) while sovereign immunity remains a valid defense in tort actions, it is not a proper defense in suits arising from contract law; and (3) defendant is not immune from plaintiff's § 1983 claim since the alleged federal violation occurred as a result of defendant's official action.

Appeal by defendant from order entered 29 March 2001 by Judge Steve A. Balog in Alamance County Superior Court. Heard in the Court of Appeals 13 March 2002.

*Randolph M. James for plaintiff appellee.*

*Alamance County Attorney David I. Smith, and Hedrick, Eatman, Gardner & Kincheloe, L.L.P., by Edward L. Eatman, Jr., and John D. Kocher, for defendant appellant.*

TIMMONS-GOODSON, Judge.

The County of Alamance ("defendant") appeals from an order of the trial court denying its motion to dismiss. For the reasons stated herein, we affirm the order of the trial court.

The relevant facts of this appeal are as follows: James E. Peverall, Jr. ("plaintiff"), began his employment as an emergency medical technician with the Alamance County Emergency Medical Service ("EMS") on 13 June 1992. During the course of his employment, plaintiff was involved in two separate motor vehicle collisions, the first

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occurring on 19 March 1997, and the second on 11 November 1998. As a result of the collisions, plaintiff was diagnosed with post-traumatic stress disorder. Due to the symptoms plaintiff experienced from post-traumatic stress disorder, plaintiff was unable to reliably perform his EMS duties. Plaintiff therefore submitted an application to the Department of State Treasurer Retirement Systems Division for retirement based on disability. The Medical Board of the Retirement Systems Division subsequently approved plaintiff's application for disability retirement, with an effective date of 1 August 1999.

On 16 August 1999, the Board of Commissioners for Alamance County adopted a new policy regarding health and life insurance benefits for county employees declared disabled by the State Retirement Commission. The new policy, effective retroactively to the fiscal year beginning 1 July 1999, required county employees to have completed twenty years of continuous employment in order to receive health and life insurance benefits. Under the previous policy, which was in effect at the time plaintiff began his employment with EMS, the time period for the vesting of health and life insurance benefits was only five years. Although plaintiff had continuously worked for Alamance County for more than five years before he retired, he did not have the requisite twenty years of service to qualify for insurance benefits under the new policy.

Plaintiff thereafter filed a cause of action against defendant seeking class action status on behalf of himself, his daughter, and others similarly situated. In his complaint, plaintiff alleged that defendant, acting by and through the Board of Commissioners, had harmed plaintiff by denying him insurance benefits to which he was entitled. The complaint averred that the new policy, adopted by defendant and retroactively applied to plaintiff, denied insurance benefits to plaintiff and others whose rights to the benefits vested before the change in policy. Plaintiff alleged that adoption of the new policy constituted (1) arbitrary and capricious action in violation of constitutional and statutory law; (2) breach of contract and breach of third-party beneficiary contract; (3) negligent and (4) intentional infliction of emotional distress; and (5) breach of good faith and fair dealing; (6) an unconstitutional impairment of contractual obligations, and (7) a violation of his due process rights under Title 42, section 1983 of the United States Code. Defendant subsequently filed a motion to dismiss the complaint pursuant to 12(b)(6) of the North Carolina Rules of Civil Procedure, alleging that plaintiff had failed to state a claim upon which relief could be granted.

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Defendant's motion to dismiss came before the trial court on 7 March 2001. Upon review of the complaint, the trial court dismissed plaintiff's third, fourth and fifth causes of action, as well as that portion of plaintiff's second cause of action relating to a breach of a third-party beneficiary contract. The trial court denied defendant's motion to dismiss as to the remaining causes of action and entered an order accordingly. From this order, defendant appeals.

[1] Defendant argues that the trial court erred in denying its motion to dismiss plaintiff's complaint in its entirety. At the outset, we note that the denial of a motion to dismiss is not a final judgment and thus generally not appealable. See *Faulkenbury v. Teachers' & State Employees' Retirement System*, 108 N.C. App. 357, 365, 424 S.E.2d 420, 423, *affirmed per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993). Where the appeal from an interlocutory order raises issues of sovereign immunity, however, such appeals affect a substantial right sufficient to warrant immediate appellate review. See *Hedrick v. Rains*, 121 N.C. App. 466, 468, 466 S.E.2d 281, 283, *affirmed per curiam*, 344 N.C. 729, 477 S.E.2d 171 (1996). A substantial right is moreover affected where the motion to dismiss is based upon an immunity defense to a section 1983 claim. See *Corum v. University of North Carolina*, 97 N.C. App. 527, 532, 389 S.E.2d 596, 599 (1990), *affirmed in part, reversed in part on other grounds*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 506 U.S. 985, 121 L. Ed. 2d 431 (1992). Defendant argues that, as a county, it is shielded from plaintiff's suit by virtue of its sovereign immunity. Defendant's appeal is therefore properly before us to the extent that it is based upon the defense of sovereign immunity.

[2] Defendant contends that the trial court erred by denying its motion to dismiss plaintiff's surviving claims on the grounds of sovereign immunity. Sovereign immunity generally operates to provide "unqualified and absolute immunity" to the state and its counties from suits brought against them in their official capacity. *Archer v. Rockingham Cty.*, 144 N.C. App. 550, 552-53, 548 S.E.2d 788, 790 (2001), *disc. review denied*, 255 N.C. 210, 559 S.E.2d 796 (2002). The general rule of immunity is subject to exceptions, however, in cases where the State is deemed to have "consented to be sued." See *Slade v. Vernon*, 110 N.C. App. 422, 426, 429 S.E.2d 744, 746 (1993).

In the instant case, plaintiff's remaining claims seek redress for (1) violation of due process; (2) breach of contract; (3) impairment of contractual obligations; and (4) violation of Title 42, section 1983 of

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the United States Code. We must therefore examine each of these four claims in order to determine in each instance whether sovereign immunity shields defendant from suit.

*I. Due Process Claim*

In his complaint, plaintiff alleged that defendant's actions were arbitrary and capricious and in violation of both the United States Constitution and Article I, Section 19 of the North Carolina Constitution. It is well established that sovereign immunity does not protect the state or its counties against claims brought against them directly under the North Carolina Constitution. *See Corum*, 330 N.C. at 785-86, 413 S.E.2d at 291. Because plaintiff brought his due process claim pursuant to Article I, Section 19 of the North Carolina Constitution, defendant is not entitled to the defense of sovereign immunity against this claim. We therefore reject this basis as a defense to plaintiff's first claim.

*II. Breach of Contract Claim*

Plaintiff argues that, while sovereign immunity remains a valid defense in tort actions, it is not a proper defense in suits arising from contract law. We agree. Referring to *State v. Smith*, 289 N.C. 303, 222 S.E.2d 412 (1976), this Court has noted that, "[o]ur Supreme Court abolished sovereign immunity in contract actions in 1976." *Herring v. Winston-Salem/Forsyth County Bd. of Educ.*, 137 N.C. App. 680, 681 n.1, 529 S.E.2d 458, 460 n.1, *disc. review denied*, 352 N.C. 673, 545 S.E.2d 423 (2000). "[W]henever the State of North Carolina, through its authorized officers and agencies, enters into a valid contract, the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith*, 289 N.C. at 320, 222 S.E.2d at 423-24; *see also Hubbard v. Cty. of Cumberland*, 143 N.C. App. 149, 153-54, 544 S.E.2d 587, 590 (holding that sovereign immunity did not shield the defendant county from a suit brought by law enforcement officers who alleged that the county had negligently administered a longevity pay plan, where the pay plan constituted part of the consideration in the officers' public employment contracts), *disc. review denied*, 354 N.C. 69, 553 S.E.2d 40 (2001).

In the instant case, plaintiff alleged that defendant breached its employment contract by denying plaintiff the disability retirement benefits it agreed to provide in exchange for five years of continuous service when plaintiff originally contracted for employment with defendant. Plaintiff further alleged that he suffered damages due to

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this breach. Because defendant does not enjoy immunity from suits arising from damages incurred due to breach of contract, we reject defendant's argument that the trial court should have dismissed this claim based on sovereign immunity. We therefore overrule this assignment of error.

### III. *Impairment of Contractual Obligations Claim*

Defendant further contends that it is protected by sovereign immunity from plaintiff's claim of impairment of contractual obligations. We disagree.

Article I, Section 10, Clause 1 of the United States Constitution provides that "[n]o state shall . . . pass any . . . law impairing the obligation of contracts . . ." U.S. Const. art. I, § 10, cl. 1. In *Simpson v. N.C. Local Gov't Employees' Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987), affirmed per curiam, 323 N.C. 362, 372 S.E.2d 559 (1988), and again in *Bailey v. State of North Carolina*, 348 N.C. 130, 500 S.E.2d 54 (1998), the appellate courts reaffirmed the principle that "the relationship between [government employees] and the Retirement System is one of contract." *Simpson*, 88 N.C. App. at 223, 363 S.E.2d at 93; *Bailey*, 348 N.C. at 142, 500 S.E.2d at 60-61.

In *Simpson*, the plaintiffs were vested members of the North Carolina Local Governmental Employees' Retirement System. The plaintiffs brought a class action suit against the State of North Carolina, arguing that the State unconstitutionally impaired their contractual rights in a pension plan when the legislature, by amendment, changed the method of calculating disability benefits, resulting in a reduction of the plaintiffs' benefits under the plan. In concluding that the employees "had a contractual right to rely on the terms of the retirement plan," this Court noted that:

"A pension paid a governmental employee . . . is a deferred portion of the compensation earned for services rendered." If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then an employee has contractual rights to it. The agreement to defer the compensation is the contract. Fundamental fairness also dictates this result. A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Plaintiffs, as members of the North Carolina Local Governmental Employees'

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Retirement System, had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested.

*Id.* at 223-24, 363 S.E.2d at 94 (quoting *Insurance Co. v. Johnson, Comr. of Revenue*, 257 N.C. 367, 370, 126 S.E.2d 92, 94 (1962)).

Although neither *Simpson* nor *Bailey* directly addressed the question of sovereign immunity, the doctrine clearly did not shield the State from suit in those cases. Further, we have already concluded that the State does not enjoy sovereign immunity from suits based on a breach of contractual obligations. We therefore hold that defendant is not shielded from liability for plaintiff's claim of impairment of contractual obligations, and we overrule this assignment of error.

## IV. 42 U.S.C § 1983 Claim

Finally, defendant argues that plaintiff's claim of a due process violation pursuant to section 1983 claim should have been dismissed on the basis of sovereign immunity. We disagree.

Title 42, section 1983 of the United States Code in pertinent part provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000). Section 1983 "works to create a species of tort liability, in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution." *Crump v. Bd. of Education*, 326 N.C. 603, 614, 392 S.E.2d 579, 584-85 (1990). A county may not claim sovereign immunity as a defense to a section 1983 claim if the violation of federal rights is caused by the county's official policy, such as the implementation of an ordinance or a decision officially adopted by the board of county commissioners. *See, e.g., Corum*, 330 N.C. at 772, 413 S.E.2d at 283; *see generally*, Anita R. Brown-Graham, *Civil Liability of the County and County Officials, in County Government in North Carolina*, 73, 90-92 (A. Fleming Bell, II & Warren Jake Wicker eds., 4th ed. 1998). In such cases, the county is not entitled to sovereign immunity for its actions. *See id.*



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In the case *sub judice*, plaintiff alleged that defendant's action in officially adopting the new policy deprived plaintiff of his vested benefits and therefore constituted an unlawful taking and due process violation under the United States Constitution. Because the alleged federal violation occurred as a result of defendant's official action, defendant is not immune from plaintiff's claim pursuant to Title 42, section 1983, on the basis of sovereign immunity. We note that plaintiff may not be entitled to monetary relief pursuant to section 1983 against defendant on grounds other than sovereign immunity. See *Messick v. Catawba County*, 110 N.C. App. 707, 713-14, 431 S.E.2d 489, 493 (holding that, because a county is not a "person" for purposes of a section 1983 claim, it cannot be sued where the remedy sought is monetary damages), *disc. review denied*, 334 N.C. 621, 435 S.E.2d 336 (1993). As this appeal is limited to issues of sovereign immunity, however, we do not address the merits of such an argument. We therefore overrule this assignment of error.

In conclusion, we hold that sovereign immunity does not shield defendant from plaintiff's surviving claims. We decline to address additional arguments by defendant, as they are interlocutory and do not affect defendant's substantial rights. See *Clayton v. Branson*, 153 N.C. App. 488, 493-94, 570 S.E.2d 253, 257 (2002); *Hubbard*, 143 N.C. App. at 155, 544 S.E.2d at 591. The order of the trial court is hereby

Affirmed.

Judges WYNN and TYSON concur.

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BRENDA D. HOBBS, EMPLOYEE/PLAINTIFF v. CLEAN CONTROL CORPORATION,  
EMPLOYER, AND ZURICH-AMERICAN INSURANCE, CO., CARRIER/DEFENDANTS

No. COA01-1451

(Filed 3 December 2002)

**1. Workers' Compensation— occupational disease—carpal tunnel syndrome**

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee did not suffer a compensable occupational disease based on the fact that her work did not place her at an increased risk of contracting carpal

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tunnel syndrome, because: (1) the testimony of plaintiff's expert regarding whether plaintiff's job placed her at an increased risk of developing carpal tunnel syndrome was linked to the specific job description provided by plaintiff, and the issue of whether that job description was more credible than the one given by various other witnesses was to be resolved by the Commission; and (2) the Commission's finding is supported by competent evidence in the record.

**2. Workers' Compensation— occupational disease—carpal tunnel syndrome—aggravation of pre-existing tendency**

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee did not suffer a compensable occupational disease even though plaintiff contends her employment may have aggravated a pre-existing tendency arising out of her earlier employment or medical problems if this employment did not cause her carpal tunnel syndrome, because plaintiff did not prove that her employment placed her at a greater risk than the general public of contracting carpal tunnel syndrome and thus did not establish that it was an occupational disease.

Appeal by plaintiff from opinion and award entered 6 August 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 10 September 2002.

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

*Lewis & Roberts, P.L.L.C., by Timothy S. Riordan and Jeffrey A. Misenheimer, for defendant-appellees.*

BIGGS, Judge.

Plaintiff (Brenda Hobbs) appeals from an Opinion and Award of the North Carolina Industrial Commission denying her claim for workers' compensation. For the reasons discussed below, we affirm.

Plaintiff was employed by defendant Clean Control in January, 1997, to conduct sales demonstrations for customers at a Sam's Warehouse Club store. The demonstrations generally required her to apply substances such as motor oil or vinegar to various items, and then to demonstrate how defendants' cleaning products would remove the applied substance.

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Shortly after she began work for defendants, plaintiff consulted Dr. Kolkin for arm and elbow pain. In August, 1997, Dr. Kolkin performed surgery to remove a tumor in a nerve of her right elbow. Although she was not diagnosed as suffering from carpal tunnel syndrome at that time, four or five months later plaintiff again experienced pain in her hands, which Dr. Kolkin did diagnose as carpal tunnel syndrome. In September, 1998, plaintiff had carpal tunnel syndrome release surgery; however, she continued to experience pain after the surgery. Plaintiff's last day of work for defendants was 16 August 1998.

On 27 August 1998, plaintiff filed an Industrial Commission Form 18, seeking workers' compensation benefits for carpal tunnel syndrome. Defendants denied her claim, at which time she sought a hearing before the Industrial Commission. Following a hearing before a deputy commissioner on 30 July 1999, an Opinion and Award was issued on 16 June 2000, denying plaintiff's claim. Plaintiff then appealed to the Full Commission. On 6 August 2001, the Commission issued its Opinion and Award, affirming the deputy commissioner's denial of plaintiff's claim. Plaintiff appeals from the Opinion and Award of the Full Commission.

Standard of Review

Appellate review of decisions of the Industrial Commission is "limited to a determination of (1) whether the Commission's findings of fact are supported by any competent evidence in the record; and (2) whether the Commission's findings justify its conclusions of law." *Bailey v. Western Staff Services*, 151 N.C. App. 356, 359, 566 S.E.2d 509, 511 (2002) (quoting *Goff v. Foster Forbes Glass Div.*, 140 N.C. App. 130, 132-33, 535 S.E.2d 602, 604 (2000)). The Commission's findings of fact are conclusive on appeal if supported by competent evidence, notwithstanding evidence that might support a contrary finding. *Hedrick v. PPG Industries*, 126 N.C. App. 354, 484 S.E.2d 853, *disc. review denied*, 346 N.C. 546, 488 S.E.2d 801 (1997). Further, the Commission is the sole judge regarding the credibility of witnesses and the strength of evidence. *Effingham v. Kroger Co.*, 149 N.C. App. 105, 561 S.E.2d 287 (2002). The Commission's conclusions of law are subject to *de novo* review. *Grantham v. R.G. Barry Corp.*, 127 N.C. App. 529, 491 S.E.2d 678 (1997), *disc. review denied*, 347 N.C. 671, 500 S.E.2d 86 (1998).

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## I.

[1] Plaintiff argues first that the Commission erred by concluding that plaintiff did not suffer a compensable occupational disease because her work did not place her at an increased risk of contracting carpal tunnel syndrome. Plaintiff contends that the Commission reached its conclusion by “improperly substitut[ing] its opinion for that of the medical experts and ignor[ing] the unanimous [opinion] of [plaintiff’s] doctors.” We disagree.

N.C.G.S. § 97-53(13) (2001) provides that an occupational disease may include:

Any disease, other than hearing loss covered in another subdivision of this section, which is proven to be due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation or employment, but excluding all ordinary diseases of life to which the general public is equally exposed outside of the employment.

To establish the existence of a compensable occupational disease, plaintiff “must show: (1) the disease is characteristic of individuals engaged in the particular trade or occupation in which the claimant is engaged; (2) the disease is not an ordinary disease of life to which the public generally is equally exposed with those engaged in that particular trade or occupation; and (3) there is a causal relationship between the disease and the claimant’s employment.” *Hardin v. Motor Panels, Inc.*, 136 N.C. App. 351, 354, 524 S.E.2d 368, 371, *disc. review denied*, 351 N.C. 473, 543 S.E.2d 488 (2000). Plaintiff has the burden of proving all three elements by a preponderance of the competent evidence. *Gibbs v. Leggett and Platt, Inc.*, 112 N.C. App. 103, 434 S.E.2d 653 (1993). “[T]he first two elements are satisfied if . . . the employment exposed the worker to a greater risk of contracting the disease than the public generally.” *Rutledge v. Tultex Corp.*, 308 N.C. 85, 93-94, 301 S.E.2d 359, 365 (1983). Evidence that the plaintiff’s employment exposed her to a greater risk than that of the general public is the *sine qua non* of a workers’ compensation claim for an occupational disease:

[if the] Commission’s finding that plaintiff was not at a greater risk of contracting the disease than the general public is supported by competent evidence, . . . [t]his finding alone supports the conclusion that plaintiff did not prove the presence of a compensable occupational disease.

## HOBBS v. CLEAN CONTROL CORP.

[154 N.C. App. 433 (2002)]

*Futrell v. Resinall Corp.*, 151 N.C. App. 456, 459, 566 S.E.2d 181, 183, *disc. review allowed*, 356 N.C. 300, 570 S.E.2d 505 (2002) (evidence failed to show employment exposed plaintiff to greater risk than general public of contracting carpal tunnel syndrome). *See also Fuller v. Motel 6*, 136 N.C. App. 727, 735, 526 S.E.2d 480, 485 (2000) (where evidence conflicted as to whether claimant's carpal tunnel syndrome was "due to causes and conditions which were characteristic of and peculiar to her employment" the Commission is permitted to "resolve[] this conflict").

In the instant case, plaintiff contends that the Commission "ignored competent medical evidence" elicited from Dr. Kolkin, and alleges that his testimony was "completely uncontradicted" regarding whether plaintiff's employment placed her at a greater risk than the general public of developing carpal tunnel syndrome. Plaintiff fails to acknowledge that Dr. Kolkin's opinion regarding this issue was expressly made contingent upon the accuracy of plaintiff's own description of her job duties. Plaintiff reported to Dr. Kolkin that she used the spray bottles "constantly" and "continuously," and the testimony plaintiff elicited from Dr. Kolkin was based on the assumption that the job was one requiring her to "constantly" spray bottles of cleaning fluid:

DR. KOLKIN: Again, reading from my notes, "She comes in with a new problem involving the right upper extremity. For 1 ½ years, she has done a new job as a demonstrator of various cleaning products. *She constantly uses a spray bottle in the right hand. . . .*

DR. KOLKIN: I can say that the symptoms she was having in her right hand, *from the information I received*, were probably strongly impacted by the type of work *that she described as doing.*

. . . .

PLAINTIFF'S COUNSEL: Let me ask you to *assume . . . that her work involved . . . repetitive use of the hands and wrists . . .* do you have an opinion . . . whether more likely than not her job with [defendant] was a substantial contributing factor in her development of these symptoms[?]

DR. KOLKIN: From the information provided, *one needs to be clear as to frequency of one's performing the job.* So, again, *from the*

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*information provided at this point*, I would think there is a greater probability than not that the work was a significant contributing factor to development of right carpal tunnel syndrome. (emphasis added)

However, other evidence was presented at the hearing that the spraying and wiping generally took about a minute, followed by five to ten minutes of a sales pitch extolling the product. Defendant's sales trainer, as well as her supervisor, each testified that plaintiff's job required her to grip and spray from a spray bottle approximately ten to sixteen times per hour, depending on which product plaintiff was demonstrating, for a total of one or two minutes of gripping and spraying hand activity per hour. When defendant asked Dr. Kolkin to assume that plaintiff was only required to spray the cleaning products 10 or 15 times an hour, his opinion changed:

DEFENDANT'S COUNSEL: And the words [using spray bottles] "constantly and [on a] continuous basis" came from [plaintiff]?

DR. KOLKIN: Yes.

....

DEFENDANT'S COUNSEL: Okay. And your opinion that her job at Clean Control contributed to her right carpal tunnel syndrome is based on the information that you have concerning her job description to you at this point, is that correct?

DR. KOLKIN: That's correct. . . .

DEFENDANT'S COUNSEL: Okay, I'm going to ask you to *assume that [plaintiff] . . . [would] spray the 'Odoban' cleaner . . . a maximum of about twelve, maybe sixteen sprays per hour . . . [and that] the Odoban was about seventy percent of her work. . . . To demonstrate [other products] she used her hands roughly thirty seconds or less . . . [a]nd again, the rest of the five to eight minutes was spent selling or talking . . . and the [other cleaner] that she demonstrated . . . had an average demonstration of about eight to ten minutes. And again, she used her hands about one and a half to two minutes of that ten minutes. . . . Based on those assumed facts, doctor, do you have an opinion as to whether that job, as I've described it to you . . . significantly contributed to or caused her right carpal tunnel syndrome [?]*

....

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DR. KOLKIN: *That would be unlikely.*

....

DEFENDANT'S COUNSEL: Doctor, would you consider using a spray bottle a maximum of twelve to sixteen times per hour, . . . continuous or constant?

DR. KOLKIN: No.

....

DEFENDANT'S COUNSEL: Doctor, *based on the lengthy hypothetical question that I gave you before, . . . is it fair for me to summarize your opinion that you do not think that her job as described in that hypothetical question placed her at an increased risk over the general public of developing carpal tunnel syndrome?*

DR. KOLKIN: *That's correct.* (emphasis added)

Thus, Dr. Kolkin's expert medical opinion regarding whether or not plaintiff's job placed her at an increased risk of developing carpal tunnel syndrome was inextricably linked to the specific job description provided. When he was asked to consider plaintiff's job description as "constant" or "continuous" spraying and other repetitive hand motions, he believed her employment exposed her to an unusual risk of carpal tunnel syndrome. However, when Dr. Kolkin was asked to consider the testimony of others that plaintiff only sprayed 12 to 16 times per hour, his opinion changed completely. Thus, the issue to be resolved by the Industrial Commission was which job description was more credible. It is well established that "[t]he Commission is the sole judge of the weight and credibility [to be given] testimony, and its findings may be set aside on appeal only if there is a complete lack of evidence to support them." *Thompson v. Tyson Foods, Inc.*, 119 N.C. App. 411, 414, 458 S.E.2d 746, 748 (1995). We are bound by the Industrial Commission's conclusion, that plaintiff's job did not place her at an increased risk for carpal tunnel syndrome, since this finding is supported by competent evidence in the record. Accordingly, this assignment of error is overruled.

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## II.

[2] Plaintiff alleges that, even if her employment for defendant did not cause her carpal tunnel syndrome, that it may have aggravated a pre-existing tendency arising out of her earlier employment or medical problems, and thus was a compensable occupational disease.<sup>1</sup> We disagree.

An illness is not an occupational disease unless the aggravation of an underlying or pre-existing condition occurs in the context of an employment that places her at an increased risk of contracting the disease. *Pitillo v. N.C. Dept. of Environmental Health and Natural Resources*, 151 N.C. App. 641, 566 S.E.2d 807 (2002) (claimant's psychological illness not a compensable occupational disease, despite being caused in part by workplace job performance review, where evidence failed to establish that conditions of employment placed her at any increased risk for emotional problems); *Norris v. Drexel Heritage Furnishings, Inc.*, 139 N.C. App. 620, 534 S.E.2d 259 (2000) (although plaintiff's fibromyalgia was caused or aggravated by her employment with defendant, it was not an occupational disease because evidence did not show that plaintiff's employment with defendant placed her at an increased risk of contracting or developing fibromyalgia as compared to the general public not so employed). Because plaintiff did not prove that her employment placed her at a greater risk than the general public of contracting carpal tunnel syndrome, she has not established that it was an occupational disease. This assignment of error is overruled.

We conclude that the Industrial Commission's findings are supported by competent evidence, and that the findings justify its conclusions. Accordingly, the Industrial Commission is

Affirmed.

Judges GREENE and WYNN concur.

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1. Plaintiff's prior employment history included factory sewing, housekeeping, nurses' aide, and warehouse employment. She had previous medical treatment for bursitis of her shoulder, high blood pressure, fibromyalgia, injuries suffered in several motor vehicle accidents, numbness in her hands, chronic pain syndrome, and hysterical personality.



**STATE v. CHAPMAN**

[154 N.C. App. 441 (2002)]

STATE OF NORTH CAROLINA v. DONNIE E. CHAPMAN

No. COA02-302

(Filed 3 December 2002)

**1. Child Abuse and Neglect— defendant as perpetrator—sufficiency of evidence**

The State presented evidence in a felonious child abuse inflicting serious bodily injury prosecution sufficient for the jury to infer that defendant was the individual who intentionally abused the child where the evidence tended to show that defendant provided exclusive care to the child while the child's mother was at work; the child was injured during the time he was in defendant's care; and the injuries resulted in the removal of part of the child's pancreas, a perforation in his small intestine, blood clots, severe shock, injury to his bladder and kidneys, and a contusion to his liver.

**2. Child Abuse and Neglect— mere presence—instruction not given**

There was no prejudicial error in the trial court's failure to instruct on mere presence in a prosecution for felonious child abuse where the court instructed on the State's burden of proving defendant's identity as the perpetrator of the crime, circumstantial evidence, accident, and misdemeanor child abuse.

**3. Evidence— another's guilt—emotion not shown at hospital—exclusion not prejudicial**

There was no prejudicial error in a felonious child abuse prosecution where defendant was denied an answer to a question as to whether the child's mother had shown emotion at the hospital. Defendant was allowed to solicit other evidence that the mother was the perpetrator and there was no reasonable possibility that the outcome would have been different if the question had been answered.

Appeal by defendant from judgment entered 19 September 2001 by Judge Russell J. Lanier, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 14 November 2002.

**STATE v. CHAPMAN**

[154 N.C. App. 441 (2002)]

*Attorney General Roy Cooper, by Assistant Attorney General Brenda Eaddy, for the State.*

*Hosford & Hosford, P.L.L.C., by Sofie W. Hosford, for defendant.*

TYSON, Judge.

On 19 September 2001, a jury convicted Donnie E. Chapman (“defendant”) of felony child abuse resulting in serious bodily injury. He was sentenced to a term of 27 months to 42 months. Defendant appeals. We find no prejudicial error.

### I. Background

On Saturday, 11 December 1999, defendant was living with Victoria Dekan (“Ms. Dekan”), her son, Tyrone Mason (“Tyrone”), who was almost two years old, and their daughter, Alexis, who was approximately one year old, in Jacksonville, North Carolina. At 3:00 a.m., Ms. Dekan left home to go to work. The children remained in the care of defendant. Defendant noticed that Tyrone was not feeling well during breakfast later that morning on 11 December. Around noon, defendant called Ms. Dekan, told her that Tyrone was ill and asked her to return home. When she arrived, defendant and Ms. Dekan took a shower together. Defendant went to the store to buy juice for the children while Ms. Dekan continued to dress. Defendant and Ms. Dekan took Tyrone to the emergency room at the Naval Hospital at Camp Lejeune at approximately 3:00 p.m.

Samuel Tuluri, M.D., a staff pediatrician at the Naval Hospital, testified that he examined Tyrone. He described Tyrone as “a sick-looking two year old child, very ill, very shocky.” He also noticed that Tyrone’s abdomen was “distended” or protruding. Dr. Tuluri testified that he diagnosed that Tyrone was suffering from “a blunt abdominal trauma” and that the medical history was inconsistent with the symptoms of shock he observed. The hospital staff experienced difficulties in placing an I.V. into Tyrone, so Dr. Tuluri inserted a needle into Tyrone’s bone to administer fluids. Dr. Tuluri determined that Tyrone needed “a higher level of care, pediatric intensive care” than the Naval Hospital could provide. Tyrone was transferred to Pitt County Memorial Hospital.

Earlier in the week, Tyrone had been kept at home from daycare because he was sick and needed to receive vaccination shots. Defendant cared for Tyrone during this time. Tyrone returned to daycare on Thursday and Friday. His teachers testified that Tyrone

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appeared normal and was feeling well on Friday, December 10th, when he was picked up from daycare by defendant.

Tracey Brown, an investigative social worker with Onslow County Department of Social Services (“DSS”), was called to Pitt County Memorial Hospital on 13 December to investigate an allegation of child abuse of Tyrone. Ms. Brown interviewed defendant, who admitted being a caretaker for Tyrone. On the evening of 10 December, defendant and Ms. Dekan had a guest visit in the house. Defendant informed Ms. Brown that from 3:00 a.m., when Ms. Dekan left for work, until she returned home sometime after noon on 11 December, defendant was the only adult with Tyrone. Defendant and Ms. Dekan were both charged with felonious child abuse inflicting serious bodily injury and tried separately.

Dorothy Mattocks, a social worker with DSS, testified that she worked in the foster care unit and attempted to place Tyrone in the best care available for him. She testified that she observed Tyrone during a visitation with his family. Tyrone interacted with his mother, his mother’s siblings and a grandmother, but cried and would not interact with defendant. She testified that Tyrone was “very bonded” and “clingy towards his mom” but that he “didn’t acknowledge the defendant no more than crying when the mom tried to coax him toward the defendant.” After being released from the hospital, Tyrone was placed in the custody of his biological father.

Rebecca Coker, M.D., an expert in pediatrics, works at the Teddy Bear Center, a program for “the evaluation of children in whom there’s a suspicion of non-accidental trauma or other types of abuse and neglect.” Dr. Coker testified that Tyrone was a patient in the pediatric intensive care unit because of severe shock. The shock was life threatening and resulted from a perforation in the intestine which caused free air to be released into the abdomen. Tyrone also suffered a fracture of the pancreas that resulted in the removal of part of the pancreas, blood clots, contusions on the liver, and bladder or kidney injury noted by blood in the urine. Dr. Coker testified that in her medical opinion, the injuries to Tyrone were caused by trauma. She also testified, “[t]he only other injury like this that I’ve seen have been [sic] with severe motor vehicle accidents and none that involve this many organs in the abdomen. The pediatric surgeon also had never seen this number of injuries even from a single motor vehicle accident to the abdomen to this number of organs. And, and in intentional child abuse. Those are the only other types I’ve seen.”

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The defendant did not offer any evidence. The jury found defendant guilty of felonious child abuse while inflicting serious bodily injury.

## II. Issues

Defendant contends the trial court erred by (1) denying defendant's motion to dismiss for insufficiency of evidence, (2) denying defendant's request for instruction on "mere presence", and (3) preventing defendant from eliciting testimony on cross-examination regarding a witness' observation of the victim's mother.

## III. Motion to dismiss

**[1]** A motion to dismiss is properly denied when there is substantial evidence of (1) each element of the offense charged and (2) that the defendant is the perpetrator of the crime. *State v. Davis*, 130 N.C. App. 675, 678, 505 S.E.2d 138, 141 (1998). "Substantial evidence is evidence from which a rational finder of fact could find the fact to be proved beyond a reasonable doubt." *Id.* (citing *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991)). "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." *Id.* at 679, 505 S.E.2d at 141 (citing *State v. Mitchell*, 109 N.C. App. 222, 224, 426 S.E.2d 443, 444 (1993)).

To survive a motion to dismiss for felonious child abuse inflicting serious bodily injury, the State must present substantial evidence that the defendant is a "parent or any other person providing care to or supervision of a child less than 16 years of age" and that the defendant "intentionally inflict[ed] any serious bodily injury to the child or who intentionally commit[ed] an assault upon the child which result[ed] in any serious bodily injury to the child, or which result[ed] in permanent or protracted loss or impairment of any mental or emotional function of the child." N.C. Gen. Stat. § 14-318.4(a3) (2001); *State v. Krider*, 145 N.C. App. 711, 713, 550 S.E.2d 861, 862 (2001), *appeal dismissed*, 355 N.C. 219, 560 S.E.2d 150 (2002). " 'Serious bodily injury' is defined as bodily injury that creates a substantial risk of death, or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-318.4(a3). "In felonious

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child abuse cases, the State is not required to prove that the defendant “specifically intend[ed] that the injury be serious.” Moreover, felonious child abuse ‘does not require the State to prove any specific intent on the part of the accused.’” *Krider*, 145 N.C. App. at 713, 550 S.E.2d at 862 (quoting *State v. Pierce*, 346 N.C. 471, 494, 488 S.E.2d 576, 589 (1997) (quoting *State v. Campbell*, 316 N.C. 168, 172, 340 S.E.2d 474, 476 (1986))).

Defendant contends the State presented insufficient evidence that defendant assaulted Tyrone or that he intended to inflict injury to Tyrone. “In determining the presence or absence of intent, the jury may consider the acts and conduct of the defendant and the general circumstances existing at the time of the alleged commission of the offense charged.” *State v. Riggsbee*, 72 N.C. App. 167, 171, 323 S.E.2d 502, 505 (1984).

The State presented substantial evidence that defendant provided exclusive adult care to Tyrone, age two years, during the time Tyrone’s mother was at work. Defendant admitted to Ms. Ramos of DSS that he and Ms. Dekan were together with the children for a while that night. Defendant was alone with Tyrone that night when Ms. Dekan took her bath. Ms. Dekan left for work at 3:00 a.m. on 11 December and the children remained alone with defendant until Ms. Dekan’s return after noon that day. Defendant and Ms. Dekan had a guest at their house on the evening of 10 December. Defendant stated that neither their guest nor Ms. Dekan had injured Tyrone.

The State also presented evidence that Tyrone was injured during the time period of 12 to 24 hours prior to his surgery on 11 December at approximately 11:00 p.m. This evidence tended to show that Tyrone was injured between 11:00 p.m. on 10 December and 11:00 a.m. on 11 December. Workers at Tyrone’s daycare testified that Tyrone seemed fine during the day of 10 December until he was picked up by defendant. Tyrone’s injuries resulted in the removal of part of his pancreas, a perforation in his small intestine, blood clots, severe shock, injury to his bladder or kidneys, and contusion to his liver.

Defendant informed Ms. Dekan around noon on 11 December that Tyrone was sick and requested her to come home from work. When Ms. Dekan returned home, defendant and Ms. Dekan took a shower together. While Ms. Dekan dressed, defendant went shopping for juice for the children. Around 3:00 p.m., defendant and Ms. Dekan took Tyrone to the emergency room. Dr. Coker testified that the injuries to Tyrone were of such a nature that they could

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not have been self-inflicted. Dr. Coker had only previously seen injuries of that nature in car wreck victims and victims of intentional child abuse.

The State presented substantial evidence for the jury to infer that defendant was the individual who intentionally abused Tyrone. This assignment of error is overruled.

IV. "Mere Presence" Instruction

**[2]** Defendant contends that the failure to give an instruction on "mere presence" is grounds for a new trial. We disagree.

Defendant requested the following instruction:

A person is not guilty of a crime merely because he is present at the scene; to be guilty he must aid or actively encourage the person committing the crime or in some way communicate to this person his intention to assist in its commission.

The State objected on the grounds that the proposed instruction was only proper where there was evidence of defendant aiding and abetting or acting in concert. No evidence of aiding and abetting or acting in concert was offered and, the trial court denied defendant's request for the proposed instruction.

Defendant's proposed instruction is based upon language from *State v. Lemmons*, 348 N.C. 335, 354, 501 S.E.2d 309, 321 (1998) and *State v. Goode*, 350 N.C. 247, 260, 512 S.E.2d 414, 422 (1999). Both *Goode* and *Lemmon* dealt with instructions regarding aiding and abetting. *Lemmons*, 348 N.C. at 354, 501 S.E.2d at 321; *Goode*, 350 N.C. at 260, 512 S.E.2d at 422. The trial court correctly found that there was no evidence of aiding and abetting or acting in concert in the present case. "A charge is to be construed contextually as a whole. Isolated errors will not be held prejudicial when the charge as a whole is correct." *State v. Chambers*, 52 N.C. App. 713, 721, 280 S.E.2d 175, 180 (1981) (citing *State v. Bailey*, 280 N.C. 264, 185 S.E.2d 683, cert. denied, 409 U.S. 948, 34 L. Ed. 2d 218 (1972)).

The trial court did instruct on the State's burden of proving defendant's identity as the perpetrator of the crime, circumstantial evidence, accident, and the lesser included offense of misdemeanor child abuse. We find that the trial court's instructions, taken as a whole, were correct. There was no prejudicial error in denying the instruction on mere presence. This assignment of error is overruled.

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V. Cross-examination Testimony

[3] Defendant contends the trial court erred in preventing him from cross-examining Ms. Brown regarding her observations of the demeanor of Ms. Dekan at the hospital. Defendant asked Ms. Brown: “[W]hen you went to speak to Ms. Dekan, did you—isn’t it true that you believed she did not show signs of emotion?” The State made a general objection and the trial court sustained the objection without stating its reasoning.

Although defendant was denied the opportunity to obtain an answer to his question, he did solicit other evidence to suggest that Ms. Dekan was the perpetrator of the intentional abuse of Tyrone and that Ms. Brown was concerned for the safety of Tyrone while he was in the presence of Ms. Dekan for the jury to consider. A defendant is not entitled to a new trial unless there is a reasonable possibility that a different result would have been reached absent the challenged testimony. N.C. Gen. Stat. § 15A-1443(a).

We find no reasonable possibility that the outcome would have been different if the trial court had allowed Ms. Brown to answer the question in light of similar evidence introduced for the jury to consider. The trial court did not commit prejudicial error in sustaining the State’s objection. This assignment of error is overruled.

VI. Conclusion

The trial court did not err in denying defendant’s motions to dismiss for insufficient evidence. There was no prejudicial error in denying defendant’s request for jury instructions on mere presence or in sustaining the State’s objection to defendant’s question to Ms. Brown during cross-examination.

No prejudicial error.

Judges WALKER and McCULLOUGH concur.

**SUMMEY v. BARKER**

[154 N.C. App. 448 (2002)]

JOSEPH PATRICK SUMMEY, PLAINTIFF v. RONALD BARKER, FORSYTH COUNTY SHERIFF; AND HARTFORD INSURANCE COMPANY, SURETY; MICHAEL SCHWEITZER, CHIEF JAILER OF FORSYTH COUNTY, IN THEIR OFFICIAL CAPACITIES; LINDA SIDES; JOE MADDUX, CORRECTIONAL MEDICAL SERVICES, INC., D/B/A CORRECTIONAL MEDICAL SYSTEMS A/K/A CORRECTIONAL MEDICAL SERVICES, DEFENDANTS

No. COA02-13

(Filed 3 December 2002)

**1. Discovery— scheduling order—failure to designate expert—sanction**

The trial court did not abuse its discretion in an action for not promptly treating a hemophilic inmate's nose bleed by denying plaintiff's motion for an extension of time to designate an expert witness where plaintiff did not comply with a consent discovery scheduling order. The fact that the defendants may have had notice of the expert witnesses from earlier depositions did not relieve defendant of the obligation to comply with the order.

**2. Prisons and Prisoners— hemophilic inmate's bleeding nose—promptness of treatment—summary judgment for defendants**

The trial court did not err by granting summary judgment for defendants in an action for not promptly treating a hemophilic inmate's nose bleed where defendant's forecast of evidence indicates that plaintiff was checked by a nurse upon his return from the courthouse and was not bleeding and that he was taken to the hospital immediately when he began bleeding; plaintiff did not timely designate his expert witnesses; and plaintiff did not bring forth countervailing evidence or make any arguments in opposition to defendant's motion for summary judgment.

Judge GREENE dissenting.

Appeal by plaintiff from order entered 24 September 2001 by Judge Clarence W. Carter, Superior Court, Forsyth County. Heard in the Court of Appeals 8 October 2002.

*Parrish Smith & Ramsey, L.L.P., by Steven D. Smith, for plaintiff-appellant.*

*Smith Helms Mulliss & Moore, L.L.P., by Lisa Frye Garrison and Alan W. Duncan, for Linda Sides and Correctional Medical Services, defendant-appellees.*



**SUMMEY v. BARKER**

[154 N.C. App. 448 (2002)]

*Womble, Carlyle Sandridge & Rice, by Allan R. Gitter and Oliver M. Read, IV, for Ronald Barker, Hartford Insurance Company and Michael Schweitzer defendant-appellees.*

WYNN, Judge.

Following the trial court's grant of summary judgment dismissing plaintiff Joseph Patrick Summey's medical malpractice and negligence actions, plaintiff presents two issues on appeal to this Court: (1) Did the trial court erroneously exclude his expert witness' testimony as a discovery sanction for plaintiff's failure to designate his expert in a timely fashion; and (2) Did the trial court err in granting summary judgment in favor of the defendants? We answer both questions, no; and therefore, we uphold the trial court's grant of summary judgment in favor of defendants.

The underlying facts to this appeal tend to show that on 22 October 1996, the Forsyth County Detention Center held plaintiff, a hemophiliac, on charges of illegally removing a child across state lines. The next day, plaintiff's hemophilia condition was evaluated by North Carolina Baptist Hospital and he was released back to the detention center. The following day, after his first appearance in criminal court, plaintiff contends that his nose started to bleed at the courthouse. Apparently, he was taken back to the detention center where a nurse employed by defendant, Correctional Medical Services, attended to him but did not observe any bleeding. Several hours later, at around 11:00 p.m., plaintiff's nose began to bleed rapidly and he was transported to Baptist Hospital for treatment.

From that set of facts, plaintiff brought actions against Forsyth County Sheriff, Ronald Baker, Hartford Insurance Company (Surety for the Sheriff's bond), and Chief Jailer Michael Schweitzer alleging various collective acts of negligence apparently arising from their alleged failure to ensure that he was provided timely medical treatment for his nose bleed. Plaintiff also brought actions against certain medical providers including Correctional Medical Systems and its employees Linda Sides and Joe Maddux alleging collective acts of negligence which appear to amount to claims of medical negligence.

Plaintiff voluntarily dismissed his initial action in June 1999 and re-filed it in October 1999; after which, the trial court entered a Consent Discovery Scheduling Order requiring plaintiff to designate his expert witnesses within 30 days of the conclusion of the appeal

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on 9 March 2000.<sup>1</sup> Plaintiff should have designated his experts by 3 May 2001, but did not do so until 4 September 2001. Defendants moved for summary judgment alleging there were no genuine issues of material fact and citing plaintiff's failure to designate his experts in accordance with the Consent Discovery Scheduling Order. Plaintiff moved for an extension of time to designate his experts on 4 September 2001. The trial court denied plaintiff's motion and granted defendant's motion for summary judgment.

## Discovery Sanctions

**[1]** "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." N.C. Gen. Stat. 1A-1, Rule 26(f1) (2001). The choice of sanctions lies within the court's discretion and will not be overturned on appeal absent a showing of abuse of discretion. *See Routh v. Weaver*, 67 N.C. App. 426, 429, 313 S.E.2d 793, 795 (1984).

In this case, plaintiff failed to designate his experts by 3 May 2001 as he should have according to the 9 March 2000 Consent Discovery Scheduling Order. In fact, plaintiff did not designate his experts until 4 September 2001, almost four months after the ordered date, and more than one month after defendants notified plaintiff of his non-compliance. Apparently, the trial judge chose to exclude any testimony from plaintiff's experts as a sanction for plaintiff's non-compliance with the discovery order.<sup>2</sup> Surely, evidence in the record showing that plaintiff failed to comply with the discovery order for several months, supports the conclusion that the trial court did not abuse its discretion by excluding the proffered testimony. Moreover, the fact that the defendants may have had notice of the expert witness from earlier depositions, did not relieve the plaintiff of the obligation to comply with the subsequent consent order. Accordingly, we hold that the plaintiff has not shown that the trial court abused its

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1. Defendants Barker, Schweitzer and Hartford Insurance Company appealed a 14 December 1999 order denying their N.C.R. Civ. P. 12(b)(6) motion to dismiss. In the motion, defendants claimed public official's immunity barred plaintiff's negligence claims. This Court affirmed the trial court's denial in an opinion filed 3 April 2001. *See Summey v. Barker*, 142 N.C. App. 688, 544 S.E.2d 262 (2001).

2. Plaintiff, in his 4 September 2001 motion for an extension of time, included the names of his experts and transcripts of their depositions taken in June 1999, prior to the voluntary dismissal of plaintiff's first complaint against these defendants.

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discretion in denying his motion for an extension of time to designate expert witnesses.

## Review of Summary Judgment

**[2]** Under N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001), summary judgment “shall be rendered forthwith 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.” The moving party bears the burden of showing that there are no genuine issues of material fact. See *Moore v. Coachmen Industries, Inc.*, 129 N.C. App. 389, 394, 499 S.E.2d 772, 775 (1998). “The evidence is to be viewed in the light most favorable to the nonmoving party.” *Id.*

Plaintiff brought three claims against defendants: (I) negligence for not calling plaintiff’s doctor when the nose bled at the courthouse; and, for not having done something sooner before plaintiff’s nose began bleeding rapidly that night; (II) cruel and unusual punishment; and (III) breach of fiduciary and statutory duties. Plaintiff further alleged general acts which appear to constitute medical negligence on the part of the medical providers. On review of the evidence in the light most favorable to the plaintiff, we uphold the trial court’s grant of summary judgment in favor of defendants.

First, defendants’ forecast of evidence indicates plaintiff was checked by the infirmary nurse upon his return from the courthouse and his nose was not bleeding at that time nor did his clothes or person have any blood on them; and, that night when his nose began bleeding rapidly, plaintiff was taken to the hospital immediately. Second, in medical malpractice actions, the “plaintiff must demonstrate by the testimony of a qualified expert that the treatment administered by the defendant was in negligent violation of the accepted standard of medical care in the community and that defendant’s treatment proximately caused the injury.” *Huffman v. Inglefield*, 148 N.C. App. 178, 182, 557 S.E.2d 169, 172 (2001) (citations omitted). Since plaintiff did not timely designate his expert witnesses, plaintiff is unable to prove the defendants’ behavior was a negligent violation of the accepted standard of medical care. Further, plaintiff did not bring forth any countervailing evidence or make any arguments in opposition to defendants’ motion for summary judgment.

In sum, we uphold the trial court’s exclusion of plaintiff’s expert witness testimony as a sanction for failing to timely comply with the

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consent discovery order. We further affirm the trial court's grant of summary judgment in favor of defendants.

Affirmed.

Judge MCGEE concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting in part.

As (I) the trial court erred in failing to consider lesser sanctions for plaintiff's discovery misconduct and (II) I disagree with the majority that this action was solely a medical malpractice action, I dissent in part.

## I

In this case, the trial court's exclusion of plaintiff's experts had the same effect as a dismissal of plaintiff's medical malpractice action. While the imposition of sanctions for discovery misconduct is within the discretion of the trial court, this Court has held that before the trial court selects as severe a sanction as dismissal, it must first determine the appropriateness of lesser sanctions. *Wilder v. Wilder*, 146 N.C. App. 574, 577, 553 S.E.2d 425, 427 (2001). In other words, the trial court must make findings and conclusions indicating it has considered less drastic sanctions. *Id.* Less drastic sanctions in this case could have included staying further proceedings until plaintiff complied with the trial court's order, finding plaintiff in contempt of court, or requiring plaintiff to pay the reasonable expenses, including attorney's fees, caused by his failure to comply. *See* N.C.G.S. § 1A-1, Rule 37(b)(2) (2001) (available sanctions for failure to obey Rule 26(f) discovery conference order).

In this case, the trial court made no findings with respect to the appropriateness of lesser sanctions. As such, the trial court's exclusion of plaintiff's experts and its resulting grant of summary judgment with respect to plaintiff's medical malpractice action must be reversed and remanded for consideration of lesser sanctions.

## II

Even if the trial court's exclusion of plaintiff's experts was justified, this Court still would need to consider whether summary judgment with respect to defendants Sheriff Ronald Barker, Chief Jailer

**SUMMEY v. BARKER**

[154 N.C. App. 448 (2002)]

Michael Schweitzer, and the Hartford Insurance Company was appropriate as plaintiff's suit against these defendants was not a medical malpractice action.

A medical malpractice action is defined as "a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider." N.C.G.S. § 90-21.11 (2001). None of the aforementioned defendants can be considered a health care provider. *See id.* (defining a health care provider). Furthermore, plaintiff does not allege the jail personnel, as opposed to the medical personnel available at the correctional facility, failed to furnish professional medical services which they were capable of rendering. Instead, plaintiff argues the jail personnel failed to fulfil their fiduciary and statutory duties under N.C. Gen. Stat. § 160A-59 et seq. and the North Carolina Constitution by not timely bringing his medical needs to the attention of a designated health care provider.

As plaintiff's action against the jail itself does not constitute a medical malpractice action, it is of no consequence that, as stated by the majority, upon exclusion of plaintiff's experts by the trial court, plaintiff was not able to meet the evidentiary burden required in a medical malpractice action. *See Huffman v. Inglefield*, 148 N.C. App. 178, 182, 557 S.E.2d 169, 172 (2001) (in medical malpractice actions, the plaintiff must "demonstrate by the testimony of a qualified expert that the treatment administered by the defendant was in negligent violation of the accepted standard of medical care in the community and that [the] defendant's treatment proximately caused the injury"). Accordingly, summary judgment in favor of the sheriff, the chief jailer, and the jail's insurer on this basis alone would be error.

Where the trial court, however, grants a motion for summary judgment without delineating its reasons for doing so, as the trial court did in this case, this Court must determine whether there is any basis for upholding the trial court's order. Because I agree with the majority that there are no genuine issues of material fact with respect to plaintiff's negligence claim against the sheriff, the chief jailer, and the jail's insurer, I would therefore affirm summary judgment with respect to these defendants.

**DEPARTMENT OF TRANSP. v. BYERLY**

[154 N.C. App. 454 (2002)]

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. JOE S. BYERLY AND WIFE,  
BETSY BYERLY, DEFENDANTS

No. COA01-1531

(Filed 3 December 2002)

**1. Appeal and Error— appealability—interlocutory order—  
condemnation hearing—business damages**

Although defendants contend the State was required to compensate them for damages to their business based on a condemnation proceeding, this claim is an appeal from an interlocutory order because: (1) N.C.G.S. § 136-108 hearings do not finally resolve all issues when the issue of damages is to be determined later in a jury trial; and (2) defendants are not faced with the possibility of inconsistent verdicts when one jury will hear evidence to determine just compensation in accordance with the law as it now stands, and if defendants are successful in their appeal, another jury will hear completely different evidence regarding business damages and will determine just compensation based upon that evidence only.

**2. Adverse Possession— condemnation proceeding—findings  
of fact**

The trial court erred in a condemnation case by concluding that defendants failed to establish a claim of adverse possession to a tract adjoining their condemned property and this case is remanded for additional and adequate findings of fact, because: (1) the trial court issued one mixed finding of fact and conclusion of law regarding defendant's adverse possession claim; and (2) N.C.G.S. § 1A-1, Rule 52(a)(1) requires the court to find the facts specially and state separately its conclusions of law thereon.

Judge GREENE dissenting.

Appeal by defendants from order entered 17 May 2001 by Judge Catherine C. Eagles, Superior Court, Guilford County. Heard in the Court of Appeals 8 October 2002.

**DEPARTMENT OF TRANSP. v. BYERLY**

[154 N.C. App. 454 (2002)]

*Brooks, Pierce, McLendon, Humphrey and Leonard, L.L.P., by George W. House and Brian J. McMillan for defendants-appellants.*

*Attorney General Roy Cooper, by Assistant Attorney General David R. Minges and Hilda Burnett-Baker for plaintiff-appellee.*

WYNN, Judge.

In this appeal from a condemnation order, defendants present two issues: (I) Did the trial court err by concluding that defendants failed to establish a claim of adverse possession to a tract adjoining their condemned property?; and (II) Did the trial court err by failing to classify the going concern value and/or goodwill of defendants' business as property taken or damaged by the Department of Transportation? We hold that the trial court's mixed findings of fact and conclusion of law fail to provide an adequate basis for the review of whether there was sufficient evidence to establish a claim of adverse possession. Accordingly, we remand this case for adequate findings of fact and conclusions of law in which to assess defendants' adverse possession claim; and, we dismiss defendants' second issue as interlocutory.

The underlying facts of this matter tend to show that in 1998, the North Carolina Department of Transportation (DOT) commenced condemnation proceedings against defendants' property and building for construction of the Greensboro Urban Loop. DOT estimated just compensation as \$1,817,850, whereas defendants estimated the amount to be more than \$5,000,000. Defendants contend the property was uniquely well-suited for their family antique business and that there were not any other suitable locations for relocation. Therefore, defendants argued lost profits and the damage to the going concern value and/or goodwill of the business should be included in the just compensation figure. The trial court rejected their argument.

Defendants also claimed ownership of an adjoining tract of land condemned by DOT. In 1958, defendants' predecessors in interest relocated their antique business to land near I-85. In 1975, defendants began using an adjacent 0.4 acre tract for additional parking and continued this use until the property was condemned in 1999. In addition to defendants' gravel parking lot, a billboard was located on the land which was used by another entity for the entire period the defendants used the land for a parking lot. During the condemnation proceed-

## DEPARTMENT OF TRANSP. v. BYERLY

[154 N.C. App. 454 (2002)]

ings, defendants claimed they owned the adjacent tract by adverse possession. However, the trial court found that defendants use of the 0.4 acre tract had been neither exclusive nor hostile and, therefore, rejected defendants' claim of title by adverse possession. Defendants appeal.

[1] Initially, we address, *sua sponte*, the interlocutory nature of defendants' North Carolina constitutional argument that the state is required to compensate them for damage to their business. Pursuant to N.C. Gen. Stat. § 136-108, upon motion, the trial court in a condemnation proceeding is to "hear and determine any and all issues raised by the pleadings other than the issue of damages . . .," with the damages issue to be determined later in a jury trial. Because G.S. 136-108 hearings do not finally resolve all issues, an appeal from a trial court's order rendered in such hearings is interlocutory.

N.C. Gen. Stat. § 136-119 provides that "either party shall have a right to appeal to the Supreme Court for errors of law committed in any proceedings provided for in this Article in the same manner as in any other civil actions." Defendants contend this Court should grant an interlocutory appeal because they have a substantial right in avoiding the possibility of two trials on the issue of just compensation, which would be the result if the Court dismisses this appeal and they are forced to appeal the business damages issue after final resolution of just compensation in the trial court. We disagree.

"Ordinarily the possibility of undergoing a second trial affects a substantial right only when the same issues are present in both trials, creating the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue." *Turner v. Norfolk Southern Corp.*, 137 N.C. App. 138, 142, 526 S.E.2d 666 (2000). Defendants are not faced with this situation.

In this case, the trial court found defendants were not entitled to recover for business damages under the law as interpreted by the Supreme Court of North Carolina. Defendants' argument on appeal is aimed at persuading this Court to change the law such that business damages would be recoverable. Only if defendants are successful in their appeal would they be able to recover business damages.

Defendants are not faced with the possibility of inconsistent verdicts. In this case, one jury will hear evidence to determine just compensation in accordance with the law as it now stands. After final



## DEPARTMENT OF TRANSP. v. BYERLY

[154 N.C. App. 454 (2002)]

judgment is rendered, if defendants are successful in their appeal, a jury will hear completely different evidence regarding business damages and will determine just compensation based upon that evidence only. Accordingly, we find defendants' arguments regarding the inclusion of business damages in a just compensation award is interlocutory.

**[2]** Next, we address defendants' concerns regarding the trial court's finding that they do not own an adjoining tract of land via adverse possession. Initially we note defendants' claim of ownership of the 0.4 acre triangular tract via adverse possession may be addressed in a N.C. Gen. Stat. § 136-108 condemnation hearing.<sup>1</sup> See *Department of Transportation v. Wolfe*, 116 N.C. App. 655, 449 S.E.2d 11, 12 (1994). In hearings pursuant to N.C. Gen. Stat. § 136-108, the trial court, after resolving any motions and preliminary matters, conducts a bench trial on the disputed issues except for damages. See *Taylor v. North Carolina Department of Transportation*, 86 N.C. App. 299, 302, 357 S.E.2d 439, 440 (1987) (parties conceded the trial court properly conducted a non-jury 136-108 hearing); *Ramsey v. Department of Transportation and Highway Safety*, 67 N.C. App. 716, 313 S.E.2d 909 (1984) (discussing why the trial judge, sitting as a jury, properly denied defendant's motion to dismiss at the close of all evidence). Accordingly, the trial judge must make adequate findings of fact which support the conclusions of law. See N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2001).

In this case, the trial court's order contained only one mixed finding of fact and conclusion of law regarding defendants' adverse possession claim:

That Joe Byerly's parents began using part of the .401 acre triangular tract between Wiley Davis Road, the right-of-way line of Interstate 85, and the Byerly property in 1975 for additional parking for their business, Byerly Antiques. Around 1980 Joe Byerly began landscaping efforts in part of the tract and placed gravel in the parking area. For almost all of the time since at least 1980, there has been a large billboard on the property facing I-85. The billboard is not owned by the Byerlys and has been maintained

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1. N.C. Gen. Stat. § 136-108 states "[a]fter the filing of the plat, the judge, upon motion and 10 days notice by either the Department of Transportation or the owner, shall, either in or out of term, hear and determine any and all issues raised by the pleadings other than the issue of damages, including, but not limited to, if controverted, questions of necessary and proper parties, title to the land, interest taken, and area taken."

## DEPARTMENT OF TRANSP. v. BYERLY

[154 N.C. App. 454 (2002)]

and used by others without permission from the Byerlys. The Defendants have failed to establish adverse possession to the disputed .401 acreage area shown on the Court plat. The Byerlys have not shown exclusive and hostile possession of a tract with known and visible boundaries for the necessary time period and do not own the .401 acre tract by adverse possession.

N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2001) provides “in all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.” On appeal, this Court’s task in reviewing the decision in a non-jury trial is to determine “whether there was competent evidence to support the trial court’s findings of fact and whether its conclusions of law were proper in light of such facts.” *Pineda-Lopez v. North Carolina Growers Association, Inc.*, 151 N.C. App. 587, 589, 566 S.E.2d 162, 164 (2002).

In this case, the trial court issued one mixed finding of fact and conclusion of law regarding defendant’s adverse possession claim, which not only fails to comply with Rule 52(a)(1), but also forms an inadequate basis for this Court to conduct a review and assess appellant’s contentions.<sup>2</sup> Accordingly, we remand this case to the trial court for additional and adequate findings of fact and conclusions of law, compliant with Rule 52(a)(1).

Remanded in part; dismissed in part.

Judge McGEE concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting in part.

While I concur in the majority opinion as to the issue of defendants’ business damages, I disagree that the trial court’s “mixed finding of fact and conclusion of law . . . forms an inadequate basis for this Court to conduct a review and assess appellants’ contentions.”

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2. The dissent acknowledges the trial court’s findings and conclusion are commingled; but yet, finds they are clear enough for meaningful judicial review. The dissent, however, fails to address the mandate of N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) requiring the court to “find the facts specially and state separately its conclusions of law thereon . . .”

## DEPARTMENT OF TRANSP. v. BYERLY

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A trial court's duty pursuant to N.C. Gen. Stat. § 1A-1, Rule 52 to find facts and state its conclusions separately "merely [serves] to provide a basis for appellate review." *Winston-Salem Wrecker Ass'n v. Barker*, 148 N.C. App. 114, 119, 557 S.E.2d 614, 618 (2001) (citing *Mashburn v. First Investors Corp.*, 111 N.C. App. 398, 432 S.E.2d 869 (1993)). The appellate review this Court must be able to conduct consists of a determination of whether (1) the trial court's findings of fact are supported by competent evidence and (2) the trial court's conclusions of law are supported by its findings of fact. *Creech v. Ranmar Props.*, 146 N.C. App. 97, 100, 551 S.E.2d 224, 227 (2001), *cert. denied*, 356 N.C. 160, 568 S.E.2d 191 (2002).

In this case, the trial court found defendants had used part of the 0.4 acre tract they claimed by adverse possession as a parking lot. The trial court further found that "since at least 1980, there ha[d] been a large billboard on the property facing I-85. The billboard [was] not owned by [defendants] and ha[d] been maintained and used by others without permission from [defendants]." Based on these findings, the trial court concluded defendants had failed to show exclusive and hostile possession of the disputed property and therefore could not establish adverse possession to any portion of the 0.4 acre tract.

Because the trial court's findings and conclusion, although commingled, are clear, they do not foreclose meaningful judicial review and should therefore be considered by this Court. *See Barker*, 148 N.C. App. at 119, 557 S.E.2d at 618. Because, however, the trial court's conclusion is not supported by its findings, I would reverse and remand the issue of adverse possession. The billboard, the existence of which was determinative to the trial court in reaching its conclusion, occupied only a portion of the tract claimed by defendants, leaving the trial court to consider whether defendants could assert a right by adverse possession to the remaining portion of the tract. As the trial court failed to do so, this case must be remanded for a determination of whether defendants have a right by adverse possession to the remaining portion of the tract.

**FURMICK v. MINER**

[154 N.C. App. 460 (2002)]

JOSEPH ALAN FURMICK, PLAINTIFF v. GREGORY R. MINER, DEFENDANT

No. COA01-1346

(Filed 3 December 2002)

**1. Costs— attorney fees—findings—sufficiency**

The trial court's findings in a personal injury action were sufficient to support an award of attorney fees under N.C.G.S. § 6-21.1 where the findings sufficiently referred to certain factors without being specific.

**2. Costs— attorney fees—offers higher than verdict**

The trial court did not abuse its discretion by awarding attorney fees to plaintiff where defendant's prejudgment offers were higher than the jury verdict, but the court considered both the amount of the verdict and the timing of the settlement offers.

**3. Costs— attorney fees—prejudgment interest**

There is no provision in N.C.G.S. § 6-21.1 for the assessment of prejudgment interest and the trial court erred in a personal injury action by including prejudgment interest in an award of attorney fees.

**4. Costs— attorney fees—appellate services**

The trial court has discretion under N.C.G.S. § 6-21.1 to award attorney fees for services performed on appeal, and the case was remanded for findings and an award.

Appeal by defendant from judgment entered 17 May 2001 by Judge A. Leon Stanback, Jr. in Wake County Superior Court. Heard in the Court of Appeals 22 August 2002.

*Blanchard, Jenkins, Miller & Lewis, PA, by Philip R. Miller, III, for plaintiff-appellee.*

*Cranfill, Sumner & Hartzog, L.L.P., by Jesse M. Tillman, III, for defendant-appellant.*

THOMAS, Judge.

The issue for consideration in this appeal is whether the trial court erred in awarding attorney's fees, costs and prejudgment interest under N.C. Gen. Stat. § 6-21.1.

**FURMICK v. MINER**

[154 N.C. App. 460 (2002)]

The jury returned an \$812.11 verdict for plaintiff, Joseph Alan Furmick, upon his claim for personal injuries. Defendant, Gregory R. Miner, had earlier filed a \$3,671.00 Offer of Judgment. The trial court nevertheless awarded plaintiff \$6,500.00 in attorney's fees, \$1,866.90 in costs and \$81.20 in prejudgment interest.

Defendant appeals, arguing the trial court: (1) erred by failing to make adequate findings of fact; (2) abused its discretion in awarding fees in light of the amount of defendant's settlement offers as compared to the jury verdict; and (3) erred in awarding prejudgment interest.

We agree with defendant as to the inclusion of prejudgment interest, but otherwise affirm the trial court. We remand the case for the limited purpose of allowing the trial court to make a determination regarding attorney's fees for services performed on appeal.

On 10 April 1997, plaintiff was driving home from work when his vehicle was struck from behind by a vehicle operated by defendant. Plaintiff suffered lower back pain and as a result incurred medical bills totaling \$600.56.

Approximately two weeks after the accident, J.J. Hoyer, a representative of defendant's liability insurance carrier, went to plaintiff's home and made a settlement offer. According to Hoyer, he offered to pay the total of plaintiff's medical expenses up to that date plus \$1,000.00. Plaintiff does not deny an offer was made but does not remember the amount. In any event, plaintiff, who was still receiving medical treatment, refused the offer.

On 11 October 2000, after plaintiff instituted suit and mediation was unsuccessful, defendant filed an Offer of Judgment in the amount of \$3,671.00. Plaintiff again declined to settle.

The case was tried before a jury on 4 and 5 December 2000.

**[1]** By his first assignment of error, defendant contends the trial court erred in awarding fees and costs because it failed to make specific findings of fact. While the trial court made findings of fact concerning the reasonableness of the fees and costs, defendant argues it did not make required findings regarding whether an award was appropriate. We disagree.

Generally, the prevailing party is not entitled to recover attorney's fees as a part of court costs. *Washington v. Horton*, 132 N.C. App. 347, 349, 513 S.E.2d 331, 333 (1999). However, our legislature has pro-

**FURMICK v. MINER**

[154 N.C. App. 460 (2002)]

vided for the recovery of attorney's fees in certain cases where the damage award is less than \$10,000.00:

In any personal injury or property damage suit, or suit against an insurance company under a policy issued by the defendant insurance company and in which the insured or beneficiary is the plaintiff, upon a finding by the court that there was an unwarranted refusal by the defendant insurance company to pay the claim which constitutes the basis of such suit, instituted in a court of record, where the judgment for recovery of damages is ten thousand dollars (\$10,000) or less, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the litigant obtaining a judgment for damages in said suit, said attorney's fee to be taxed as a part of the court costs.

N.C. Gen. Stat. § 6-21.1 (2001). "The allowance of attorney fees is in the discretion of the presiding judge, and may be reversed only for abuse of discretion." *Washington*, 132 N.C. App. at 351, 513 S.E.2d at 334. Accordingly, to overturn the trial court's decision, it must be shown that it is "so arbitrary that it could not have been the result of a reasoned decision," or is "manifestly unsupported by reason." *Davis v. Kelly*, 147 N.C. App. 102, 106, 554 S.E.2d 402, 405 (quoting *Blackmon v. Bumgardner*, 135 N.C. App. 125, 130, 519 S.E.2d 335, 338 (1999)).

This discretion, however, is not unbridled. *Washington*, 132 N.C. App. at 351, 513 S.E.2d at 334. The trial court must consider the entire record, including: (1) settlement offers made before suit was filed; (2) offers of judgment made pursuant to Rule 68 of the North Carolina Rules of Civil Procedure, and whether the judgment finally obtained was more favorable than such offers; (3) whether the defendant unjustly exercised superior bargaining power; (4) in the case of an unwarranted refusal by an insurance company, the context in which the dispute arose; (5) the timing of the settlement offers; (6) the amounts of settlement offers as compared to the jury verdict; and (7) the whole record. *Id.* at 351, 513 S.E.2d at 334-35 (citations omitted). If the trial court determines that an award of attorney's fees is proper, it must also make factual findings concerning time and labor expended, the skill required, the customary fee for similar work, and the experience or ability of the attorney based on competent evidence. *Porterfield v. Goldkuhle*, 137 N.C. App. 376, 378, 528 S.E.2d 71, 73 (2000) (citations omitted). However, the trial court is not required

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[154 N.C. App. 460 (2002)]

to make detailed findings of fact for each factor. *Tew v. West*, 143 N.C. App. 534, 537, 546 S.E.2d 183, 185 (2001).

Here, the trial court's order states "[a]t the hearing for costs and attorney fees, the Court considered the following materials:"

1. Motion for Costs with exhibits submitted by Plaintiff;
2. Bill of Costs and Attorney's Fees submitted by Plaintiff;
3. Affidavit of Philip R. Miller, III, attorney for Plaintiff;
4. Testimony of Mr. J.J. Hoyer, insurance adjuster for Liberty Mutual Insurance, the liability insurance carrier in this case, who appeared and testified at the hearing pursuant to a subpoena issued by counsel for Plaintiff;
5. Exhibits tendered during the hearing;
6. Legal arguments and authorities submitted by Mr. Miller; and
7. Legal arguments and authorities submitted by Mr. Tillman.

The Court has reviewed all of the above-referenced materials as well as the relevant case law setting forth the elements that must be satisfied before ordering a defendant to pay costs and attorney's fees pursuant to North Carolina General Statute § 6-21.1. In particular, pursuant to *Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999), the Court has considered the following factors:

1. Settlement offers made prior to the institution of the action;
2. The offer of judgment in the amount of \$3,671.00 made by the Defendant pursuant to Rule 68 on the 11th day of October, 2000 and whether the Judgment finally obtained was more favorable than such offer;
3. Whether the Defendant exercised superior bargaining power;
4. The timing of settlement offers as reflected and summarized in Exhibit 4 of Plaintiff's motion for costs and attorney fees and as occurred prior to the start of the jury trial when the undersigned Judge told both attorneys to confer with their respective clients in an effort to settle the case;

## FURMICK v. MINER

[154 N.C. App. 460 (2002)]

5. The amounts of the settlement offers as compared to the jury verdict; and

6. The whole record.

In a footnote following (6) above, the order provided:

In light of the fact that this was a case against an individual defendant and not an insurance company, the Court did not consider and therefore does not make any findings on the issue of whether there was an unwarranted refusal by the Defendant insurance company to pay the claim which constitutes the basis of such suit.

The trial court then made ten additional findings pertaining to the reasonableness of the award, the time and labor expended, the skill required, the customary fee for like work, and the experience or ability of plaintiff's counsel.

Defendant correctly asserts that the trial court's mere recitation that it has considered all of the *Washington* factors, without additional fact finding, is inadequate and does not allow for meaningful appellate review. *Thorpe v. Perry-Riddick*, 144 N.C. App. 567, 572-73, 551 S.E.2d 852, 857 (2001). Here, however, the trial court incorporated by reference the parties' briefs and other evidence it had reviewed including exhibits, testimony, and an affidavit. It then specifically noted defendant's pre-judgment offer of \$3671.00, the timing of the settlement offers "as reflected and summarized in Exhibit 4," and the fact that the *Washington* factor regarding an insurance company's unwarranted refusal to pay a claim did not apply here.

The trial court did not specifically note each offer and the amount. However, the trial court did make reference to "offers" in its findings. Since there were essentially only two amounts offered, the one by Hoyer and the Offer of Judgment, which was one dollar more than the mediation offer, we hold the findings are adequate as to that factor.

The trial court also did not expressly find that the judgment finally obtained—damages plus costs plus attorney's fees—exceeded the Offer of Judgment. It did, however, state the factor was considered. The judgment finally obtained here totaled \$9,179.01, which does not include prejudgment interest. Clearly, that exceeded defendant's top offer of \$3,671.00.



## FURMICK v. MINER

[154 N.C. App. 460 (2002)]

Finally, the trial court did not make a finding about whether the defendant unjustly exercised superior bargaining power. The lack of such a finding was in no way prejudicial to defendant. Accordingly, we reject this assignment of error.

**[2]** By his second assignment of error, defendant contends the trial court abused its discretion in awarding attorney's fees where the jury verdict was \$812.11. He argues that his initial offer eighteen days after the accident was nearly twice the jury verdict, and his mediation offer and offer immediately following mediation were approximately four and a half times the verdict. Defendant further emphasizes that plaintiff's settlement demands never fell below \$4,000.

While defendant's prejudgment offers were higher than the ultimate jury verdict, we can not say these facts render the trial court's award "completely arbitrary" or "manifestly unsupported by reason." *Davis*, 147 N.C. App. at 106, 554 S.E.2d at 405. The trial court considered both the amount of the verdict and "[t]he timing of settlement offers as reflected and summarized in Exhibit 4 of Plaintiff's motion for costs and attorney fees and as occurred prior to the start of the jury trial when the undersigned Judge told both attorneys to confer with their respective clients in an effort to settle the case." Accordingly, the trial court acted within its authority under section 6-21.1 and we reject defendant's argument.

**[3]** By his third assignment of error, defendant contends the trial court erred in awarding prejudgment interest in the amount of \$81.20. We agree. This Court held in *Washington* that because there is no provision in section 6-21.1 for the assessment of interest, the trial court erred by including interest in its award of attorney's fees. *Washington*, 132 N.C. App. at 352, 513 S.E.2d at 335. Accordingly, we vacate that portion of the award charging interest.

**[4]** Plaintiff has also moved, in this Court, for attorney's fees incurred during the appellate process. The trial court does have discretion under section 6-21.1 to award such fees. *Davis v. Kelly*, 147 N.C. App. 102, 109, 554 S.E.2d 402, 406-07 (2001). We therefore remand this case to allow the trial court, upon plaintiff's motion and in its discretion, to make findings of fact relevant to a determination of reasonable attorney's fees for services performed on appeal and to enter an award consistent with those findings.

Accordingly, we vacate that part of the trial court's order awarding prejudgment interest but otherwise affirm. We remand for consideration of attorney's fees incurred for the appeal.

**STATE v. WILLIAMS**

[154 N.C. App. 466 (2002)]

VACATED IN PART; AFFIRMED IN PART; REMANDED IN PART.

Judges MARTIN and TYSON concur.

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STATE OF NORTH CAROLINA v. ALBERT RAY WILLIAMS

No. COA01-1374

(Filed 3 December 2002)

**1. Appeal and Error— preservation of issues—plea agreement—failure to object to proceeding with trial**

Although defendant contends the trial court erred in a felonious assault with a deadly weapon inflicting serious injury case by refusing to allow defendant to enter a plea to a lesser offense of misdemeanor assault and by declining defense counsel's request to approach the bench after the jury was empaneled, this assignment of error is dismissed because: (1) there is no evidence in the record to support defendant's contention that a plea agreement was in fact reached between defense counsel and the State, or that the trial court was aware of any such agreement; and (2) even if defendant's contention that a plea agreement was in fact reached is accepted, defendant made no objection to proceeding with the trial of his case as required by N.C. R. App. P. 10(b)(1) in order to preserve this issue for appeal.

**2. Appeal and Error— preservation of issues—denial of evidence—failure to make offer of proof**

Although defendant contends the trial court erred in a felonious assault with a deadly weapon inflicting serious injury case by refusing to allow defendant to testify regarding past confrontations between defendant and the victim, this assignment of error is dismissed because defendant failed to make an offer of proof regarding what the excluded testimony would have revealed, and such content was not obvious from the record.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 29 May 2001 by Judge Frank Brown in Hertford County Superior Court. Heard in the Court of Appeals 20 August 2002.

## STATE v. WILLIAMS

[154 N.C. App. 466 (2002)]

*Attorney General Roy Cooper, by Assistant Attorney General Douglas W. Corkhill, for the State.*

*Gerald W. Spruill for defendant appellant.*

TIMMONS-GOODSON, Judge.

Albert Ray Williams (“defendant”) appeals from judgment of the trial court sentencing defendant for his conviction of felonious assault with a deadly weapon inflicting serious injury. For the reasons stated herein, we find no error by the trial court.

On 22 May 2000, a grand jury indicted defendant for felonious assault with a deadly weapon inflicting serious injury. Defendant’s case came on for hearing before the trial court on 21 May 2001. After the jury was selected, but before the jurors were empaneled, defendant asserts that the trial court inquired of defense counsel and the prosecutor about the possibility of resolving the case by plea. Defendant further asserts that defense counsel and the prosecutor then conferred and agreed that defendant would plead guilty to a charge of misdemeanor assault. The jury was then empaneled. According to defendant, when defense counsel subsequently requested to approach the bench in order to advise the trial judge that a plea agreement had in fact been reached, the trial judge refused defense counsel’s request, stating, “No, I don’t think so. We’re going to try a case.”

At trial, the State presented evidence tending to show that defendant struck his co-worker, William Warren (“Warren”), with a large brick mason’s level during a heated argument on 8 March 2000. Warren sustained serious injury to his arm as a result of the assault. The jury thereafter found defendant guilty of felonious assault with a deadly weapon inflicting serious injury, whereupon the trial court sentenced defendant to a minimum term of thirty-seven (37) months imprisonment, and a maximum term of fifty-four (54) months imprisonment. Defendant appeals.

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**[1]** By his first assignment of error, defendant contends that the trial court erred in refusing to allow defendant to enter a plea to a lesser offense of misdemeanor assault. Defendant argues that the trial judge was aware that a plea agreement had been reached between defendant and the State, and that the trial court therefore erred in refusing to allow defense counsel to approach the bench and submit defendant’s plea. We disagree.

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[154 N.C. App. 466 (2002)]

Under section 15A-1021 of the North Carolina General Statutes,

[i]f the parties have reached a proposed plea arrangement in which the prosecutor has agreed to recommend a particular sentence, they may, with the permission of the trial judge, advise the judge of the terms of the arrangement and the reasons therefor in advance of the time for tender of the plea. . . . The judge may indicate to the parties whether he will concur in the proposed disposition. The judge may withdraw his concurrence if he learns of information not consistent with the representations made to him.

N.C. Gen. Stat. § 15A-1021(c) (2001). A defendant has no constitutional right to have a guilty plea accepted. *See State v. Collins*, 300 N.C. 142, 148, 265 S.E.2d 172, 176 (1980). Moreover, “G.S. 15A-1021(c) allows the parties to a plea arrangement to advise the trial judge of the terms of the proposed agreement, *provided an agreement has been reached.*” *State v. Slade*, 291 N.C. 275, 278, 229 S.E.2d 921, 924 (1976) (emphasis added).

In the instant case, there is no evidence in the record to support defendant’s contention that a plea agreement was in fact reached between defense counsel and the State, or that the trial court was aware of any such agreement. The record reveals no evidence of a guilty plea entered by defendant, nor of any agreement signed by the parties. The transcript of the trial contains no objection by defendant to either the trial court’s purported refusal to accept his plea or to the subsequent trial of defendant’s case.

The only evidence submitted by defendant in support of his argument is an affidavit by defense counsel, in which defense counsel opines that the trial judge “knew that the prosecutor and I had agreed on a guilty plea to a misdemeanor when he denied my request to approach the bench and advised me that we were proceeding to trial.” Defense counsel also states that “[t]he time period from the conference at the bench between myself, the prosecutor and the Judge and the Judge’s denial of my request to re-approach the bench to advise the Court that we had agreed on a plea of guilty to a misdemeanor was approximately two minutes.”

Defendant has simply failed to demonstrate on appeal that a plea agreement between defense counsel and the State ever existed, or that the trial court was aware of any such plea agreement. *See Slade*, 291 N.C. at 278, 229 S.E.2d at 924. Even if we were to accept defend-

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ant's contention that a plea agreement was in fact reached, defendant made no objection to proceeding with the trial of his case. As such, defendant has failed to properly preserve this argument on appeal. See N.C.R. App. P. 10(b)(1) (2002); *Jansen v. Collins*, 92 N.C. App. 516, 517-18, 374 S.E.2d 641, 642-43 (1988) (holding that, where the record failed to disclose any motion by the defendant at the close of the evidence, the defendant waived his right to assign error on appeal to the trial court's purported ruling on his motion). As defendant made no objections, the trial court made no findings or ruling regarding a plea agreement. We do not consider arguments based on issues that were not presented or adjudicated by the trial tribunal. See *State v. Smith*, 50 N.C. App. 188, 190, 272 S.E.2d 621, 623 (1980). We therefore dismiss this assignment of error.

**[2]** By his second assignment of error, defendant contends that the trial court erred by refusing to allow defendant to testify regarding "past confrontations" between defendant and the victim, Warren. At trial, the following exchange took place:

Defense counsel: Did you tell Mr. Wilson you were upset and sorry that this had happened?

Defendant: Yes, sir, because I, you know, I, first of all, I didn't really realize what had happened. That's why I had said to Daryl, I said, "Man, I don't even understand what just happened, or why this happened." I was sorry that it had happened, you know, because, I knew he was hurt and, you know, before that, you know, we [were], you know, kind of friendly sometime [sic]. But he had tried to bully me around a few times anyway. So, but I always tried to, you know, keep peace with him.

Prosecutor: Objection.

Court: Sustained.

After the trial court sustained the State's objection, defendant made no offer of proof regarding what the excluded testimony would have revealed. "[I]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record." *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985). When evidence is excluded, " 'the essential content or substance of the witness's testimony is required' " before there can be a determination of whether the exclusion of evidence was prejudicial. *State v.*

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*Satterfield*, 300 N.C. 621, 628, 268 S.E.2d 510, 515 (1980) (quoting *Currence v. Hardin*, 296 N.C. 95, 100, 249 S.E.2d 387, 390 (1978)).

In the instant case, defendant made no offer of proof concerning the content of what the excluded testimony would have revealed, nor is such content obvious from the record. Accordingly, defendant has failed to preserve this issue for appellate review, and we dismiss this assignment of error.

In conclusion, we hold that defendant failed to properly preserve his arguments for appellate review. Moreover, defendant has presented insufficient evidence that a plea agreement existed between defense counsel and the State. The trial court therefore did not err in declining defense counsel's request to approach the bench after the jury was empaneled.

No error.

Judge HUNTER concurs.

Judge GREENE dissents.

GREENE, Judge, dissenting.

I disagree with the majority's statement that "there is no evidence in the record to support defendant's contention that a plea agreement was in fact reached between defense counsel and the State, or that the trial court was aware of any such agreement." To the contrary, after jury selection, the record shows defense counsel and the assistant district attorney were invited to the bench by the trial court and asked if "the case could be disposed of without a jury trial." Defense counsel advised the trial court defendant would "enter a plea of guilty to a misdemeanor assault" and the assistant district attorney informed the trial court "she would inquire if that would be acceptable to the victim." Counsel left the bench and while the jury was being impaneled, the assistant district attorney informed defense counsel "that a guilty plea to a misdemeanor would be acceptable to the State." There is nothing in the record to show the parties had any agreement with respect to defendant's sentence. Some two minutes after leaving the initial bench conference, defense counsel requested permission for him and the assistant district attorney to "re-approach the bench." This request was denied by the trial court.

If a "plea arrangement" is made between defense counsel and the prosecutor in a criminal case "in which the prosecutor has not agreed

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to make any recommendation concerning sentence,” the trial court “must accept the plea if [it] determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea.” N.C.G.S. § 15A-1023(c) (2001).

In this case, after being encouraged to do so by the trial court, the parties reached an agreement that defendant would plead guilty to misdemeanor assault and the State would accept that plea. There was no agreement on the sentence to be imposed by the trial court. While there is no direct evidence the trial court knew the parties had reached a plea agreement, the only reasonable inference from this record is the trial court denied the parties an opportunity to communicate the plea agreement to the court. This was a violation of section 15A-1023(c) and constitutes error entitling defendant to a new trial. Accordingly, I dissent.

I also disagree with the majority’s statement that defendant has failed to preserve this issue for appeal. Defendant was not required to enter a formal objection to the trial court’s refusal to allow the defense attorney’s request to approach the bench. *See State v. Smith*, 311 N.C. 287, 290, 316 S.E.2d 73, 75 (1984) (formal objection not required after the defendant’s request for an instruction denied); *see also* N.C.R. App. P. 10(b)(1) (to preserve a question for appellate review, a party must make a timely request, objection, or motion).

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SHERRY LEE, PLAINTIFF V. EARL RICE AND MARTHA RICE, CYNTHIA MEADOWS AND  
MICHAEL LANDIS A/K/A BOBBY LANDIS, DEFENDANTS

No. COA01-1506

(Filed 3 December 2002)

**Animals— domestic—pit bull dog—wrongful keeping of animal with knowledge of viciousness**

The trial court erred in a wrongful keeping of animal with knowledge of viciousness case by denying defendants’ motion for directed verdict at the close of plaintiff’s evidence and in denying defendants’ motion for judgment notwithstanding the verdict after a trial finding defendants liable for injuries inflicted upon plaintiff by a pit bull dog, because: (1) plaintiffs presented insufficient evidence that defendants owned or were the keepers of the pit bull that injured plaintiff and her dog; (2) at best, plaintiff’s

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evidence tended to show that defendants allowed their son to keep the dog on property owned by them despite the fact that they were aware of previous incidents involving the dog; and (3) defendants, as landlords, were not required to remove the animals from their property.

Appeal by defendants from judgment entered 25 April 2001 and order entered 19 July 2001 by Judge Zoro J. Guice, Jr., in Buncombe County Superior Court. Heard in the Court of Appeals 12 September 2002.

*Cogburn, Goosmann, Brazil & Rose, P.A., by Patricia L. Arcuri, for plaintiff appellee.*

*Frank J. Contrivo, P.A., by Andrew J. Santaniello, for defendant appellants.*

TIMMONS-GOODSON, Judge.

Earl Rice (“Rice”) and his wife, Martha Rice (collectively, “defendants”), appeal from judgment entered upon a jury verdict finding them liable for injuries inflicted upon Sherry Lee (“plaintiff”) by a pit bull dog. Defendants also appeal an order of the trial court denying their motions for a new trial and for judgment notwithstanding the verdict. For the reasons set forth herein, we vacate the judgment of the trial court.

On 28 January 2000, plaintiff filed a complaint in Buncombe County Superior Court, alleging that a pit bull dog known as “Blockhead” had attacked plaintiff and her dog on plaintiff’s property. The complaint averred that defendants were the owners or keepers of the pit bull, and that the dog exhibited vicious propensities which were known to defendants. The complaint further alleged that Blockhead was a dangerous dog as defined by the North Carolina General Statutes, and that defendants failed to take adequate steps to ensure plaintiff’s safety. On 6 June 2000, plaintiff amended her complaint to include as defendants Rice’s adult son, Michael Landis (“Landis”) and his girlfriend, Cynthia Meadows (“Meadows”). According to the amended complaint, the pit bull belonged to Meadows and Landis, who lived in a house owned by defendants. As neither Landis nor Meadows ever responded to the complaint in any manner, default judgment was entered against them.

Plaintiff’s case came before a jury on 17 and 18 April 2001, at which time the following evidence was presented: Rice testified that



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he and his wife Martha lived at 16 Mildred Avenue in Asheville, North Carolina. They also owned the adjacent house and property located at 20 Mildred Avenue, where Landis lived with his girlfriend, Meadows. A single fence enclosed both properties. Landis and Meadows owned three dogs, including Blockhead. The dogs were normally kept inside a smaller kennel located on the side of the property occupied by Landis and Meadows, but they occasionally ran freely within the larger fenced area. Rice testified that he was aware that Blockhead had escaped from the property on several occasions, and that the dog had been involved in several altercations with other dogs in the neighborhood. Although Rice told his son that "he needed to get rid of the dogs," Landis disregarded this advice. Defendant Martha Rice gave similar testimony.

Plaintiff testified that she lived at 31 Mildred Avenue in Asheville, and that she owned a mixed breed dog named "Shorty." On 10 October 1999, plaintiff was in her backyard when she "heard what sounded like a car wreck" in her front yard. Plaintiff ran to the front of her yard, where she "saw this man on top of this huge dog, and [the dog] had Shorty by the throat." Plaintiff identified Blockhead as the attacking dog. Plaintiff then "grabbed a stick and . . . just started hitting the dog." As plaintiff attempted to rescue her dog, Blockhead bit her ankle and hand, resulting in the eventual amputation of the tip of her finger. Responding officers from the police and fire departments managed to release Shorty from Blockhead's grip. As a result of the attack, Shorty sustained serious injuries requiring intensive veterinary treatment, including surgery. Plaintiff testified that, because of this incident, she was now "deathly afraid of dogs[.]" Upon the close of plaintiff's evidence, defendants moved for a directed verdict, which the trial court denied.

Upon considering the evidence, the jury found that plaintiff had been injured by a vicious animal wrongfully kept by defendants, and that plaintiff was entitled to recovery for personal injuries in the amount of five thousand dollars. The trial court entered judgment against defendants accordingly on 25 April 2001. Defendants thereafter filed motions for a new trial and, alternatively, for judgment notwithstanding the verdict. By order entered 19 July 2001, the trial court denied defendants' motions. Defendants now appeal from the judgment and order of the trial court.

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The dispositive issue on appeal is whether plaintiff's evidence was insufficient as a matter of law to support the jury's verdict. Under

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Rule 50 of the North Carolina Rules of Civil Procedure, a party may move for a directed verdict and for judgment notwithstanding the verdict in a jury trial. *See* N.C. Gen. Stat. § 1A-1, Rule 50 (2001). A motion for a directed verdict tests the legal sufficiency of the evidence. *See Holcomb v. Colonial Associates*, 153 N.C. App. 413, 416, 570 S.E.2d 248, 250 (2002). In considering a motion for directed verdict, the trial court must view the evidence in the light most favorable to the non-movant. *See Williams v. Tysinger*, 328 N.C. 55, 58, 399 S.E.2d 108, 110 (1991). A motion for directed verdict is properly granted where, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. *See Sibbett v. Livestock, Inc.*, 37 N.C. App. 704, 706, 247 S.E.2d 2, 4, *disc. review denied*, 295 N.C. 735, 248 S.E.2d 864 (1978).

A plaintiff seeking to recover for injuries inflicted by a domestic animal must show “(1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal’s vicious propensity, character, and habits.” *Sellers v. Morris*, 233 N.C. 560, 561, 64 S.E.2d 662, 663 (1951). In such cases, “ [t]he gravamen of the cause of action . . . is not negligence, but rather the wrongful keeping of the animal with knowledge of its viciousness[.] ” *Swain v. Tillett*, 269 N.C. 46, 51, 152 S.E.2d 297, 301 (1967) (quoting *Barber v. Hochstrasser*, 136 N.J.L. 76, 79, 54 A.2d 458, 460 (1947)). Thus, liability for injuries inflicted by animals does not depend upon the ownership of the animal, “ ‘but the keeping and harboring of an animal, knowing it to be vicious.’ ” *Id.* at 52, 152 S.E.2d at 302 (quoting *Hunt v. Hazen*, 197 Ore. 637, 639, 254 P.2d 210, 211 (1953)).

The owner of an animal is the person to whom it belongs. *See id.* at 51, 152 S.E.2d at 302. A keeper is “one who, either with or without the owner’s permission, undertakes to manage, control, or care for the animal as owners in general are accustomed to do.” *Id.*

“The word ‘keep’ as applied to animals, has a peculiar significance. It means ‘to tend; to feed; to pasture; to board; to maintain; to supply with necessaries of life.’ ” *To keep* implies “the exercise of a substantial number of the incidents of ownership by one who, though not the owner, assumes to act in his stead.”

*Id.* at 51, 152 S.E.2d at 302 (citations omitted) (quoting *Allen v. Ham*, 63 Me. 532, 536 (1874) and *Raymond v. Bujold*, 89 N.H. 380, 382, 199

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A. 91, 92 (1938), respectively). Nothing else appearing, the keeper of a vicious animal is liable for injuries inflicted by it upon another. *See id.* at 52, 152 S.E.2d at 302.

Section 67-4.4 of our General Statutes moreover provides that “[t]he owner of a dangerous dog shall be strictly liable in civil damages for any injuries or property damage the dog inflicts upon a person, his property, or another animal.” N.C. Gen. Stat. § 67-4.4 (2001). Under section 67-4.1, an owner is defined as “any person or legal entity that has a possessory property right in a dog.” N.C. Gen. Stat. § 67-4.1(a)(3) (2001).

We have recently addressed the liability of landowners for injuries inflicted by dogs owned by tenants. In *Joslyn v. Blanchard*, 149 N.C. App. 625, 561 S.E.2d 534 (2002), and again in *Holcomb v. Colonial Associates*, 153 N.C. App. 413, 417, 570 S.E.2d 248, 251 (2002), this Court reaffirmed the general principle that, in order to recover for injuries inflicted by a domestic animal under the vicious propensity rule, a plaintiff must demonstrate that the defendant was either the owner or the keeper of the vicious animal. *See Joslyn*, 149 N.C. App. at 630, 561 S.E.2d at 537 (affirming summary judgment for the defendant property owner where the plaintiff presented no evidence that the defendant was a keeper of the dog that injured plaintiff); *Holcomb*, 153 N.C. App. at 418, 570 S.E.2d at 251 (reversing the jury verdict against the defendant property owners because there was no evidence to suggest that the defendants “kept” the Rottweiler dogs that attacked the plaintiff).

In the instant case, plaintiff presented insufficient evidence that defendants owned or were the keepers of the pit bull that injured plaintiff and her dog. The uncontroverted evidence in this case was that defendants Landis and Meadows owned Blockhead and generally kept him in a fenced kennel located on one side of their house. Landis and Meadows erected the fenced kennel in order to keep their dogs out of defendants’ yard. Rice testified that neither he nor his wife had ever fed, watered, walked, or cared for Blockhead in any manner. Plaintiff presented no evidence tending to show that defendants contributed, either personally or financially, to the dog’s care. There was also no evidence to suggest that defendants held any type of “possessory property right” in the dog as provided under section 67-4.1(a)(3). At best, plaintiff’s evidence tended to show that defendants allowed their son to keep the dog on property owned by them, despite the fact that they were aware of previous incidents involving the dog. Given

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the lack of evidence that defendants “under[took] to manage, control, or care for the animal as owners in general are accustomed to do,” plaintiff failed to establish the essential element of her *prima facie* case that defendants were the owners or keepers of the dog. *Swain*, 269 N.C. at 51, 152 S.E.2d at 302; *see also Holcomb*, 153 N.C. App. at 417, 570 S.E.2d at 251; *Joslyn*, 149 N.C. App. at 630, 561 S.E.2d at 537.

Plaintiff argues that, as owners of the property, defendants had the ability to “evict” Blockhead, thereby establishing “control” over him. We are unpersuaded by this argument. In both *Joslyn* and *Holcomb*, the defendants were landlords who had prior knowledge of the potential viciousness of their tenants’ dogs. As landlords, the defendants in those cases could have required removal of the animals from their property. Nevertheless, this Court held in both cases that the property owners could not be held liable as “keepers” of the dogs without further evidence of appropriate incidents of ownership. Indeed, the Court in *Holcomb* specifically rejected this ground as a basis for liability. We note that, if plaintiff’s position were adopted, every landlord in North Carolina could be deemed the “keeper” of their tenants’ pets and accordingly held liable for any injuries caused by such animals.

As plaintiff failed to present sufficient evidence to support the jury verdict against defendants, the trial court erred in denying defendants’ motion for directed verdict at the close of plaintiff’s evidence and in denying defendants’ motion for judgment notwithstanding the verdict after the trial. We therefore vacate the judgment against defendants and remand this case to the trial court for entry of an order consistent with this opinion.

Vacated and remanded.

Judges HUDSON and CAMPBELL concur.

## IN RE RHYNE

[154 N.C. App. 477 (2002)]

IN THE MATTER OF: STEPHEN W. RHYNE

No. COA02-89

(Filed 3 December 2002)

**1. Evidence— telephone conversation—self-identification of caller—insufficient**

The trial court erred by admitting evidence of a telephone call in a juvenile delinquency hearing where the identity of the caller was based on the caller's self-identification. Such self-identification is not alone sufficient for admission of testimony regarding the contents of the conversation.

**2. Juveniles— delinquency—evidence linking juvenile to crime—insufficient evidence**

The trial court erred by denying a juvenile's motion to dismiss a delinquency petition that arose from the burning of athletic mats at a middle school where the only evidence linking the juvenile to the fire was testimony that the juvenile was one of the people seen on the mats about five to ten minutes before the fire started.

Appeal by juvenile from orders filed 29 October 2001 by Judge Resa L. Harris in Mecklenburg County District Court. Heard in the Court of Appeals 29 October 2002.

*Attorney General Roy Cooper, by Special Deputy Attorney General Gayl M. Manthei, for the State.*

*Appellate Defender Staples Hughes, by Assistant Appellate Defender Anne M. Gomez, for juvenile appellant.*

GREENE, Judge.

Stephen W. Rhyne (Stephen) appeals juvenile delinquency adjudication and dispositional orders filed 29 October 2001.

Following a juvenile delinquency petition alleging that, on 21 April 2000, Stephen had wantonly, wilfully, and feloniously set fire to and caused to be burned several athletic mats belonging to the North East Middle School, a hearing was held before the trial court on 7 and 13 December 2000. The evidence at this hearing revealed fifteen-year-old Jeff Romanelli (Jeff) witnessed "two or three kids

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down . . . by the mat[s]” on the football field when his father dropped him off at the North East Middle School for baseball practice during mid-afternoon on 21 April 2000. Ten minutes later, Jeff saw a fire where the kids previously stood. When asked if he knew any of the kids he had seen on the mats, Jeff replied: “I guess it was Stephen and I don’t know anybody else.” Because, however, he had observed the kids on the mats from a distance of a “[c]ouple hundred feet,” Jeff indicated his vision had been impaired by the fact “that they [were] too far away.” Jeff identified Stephen both through the aid of a yearbook during the investigation of the fire and also in court, but testified “it[] [was] quite possible that it could not be him . . . [because] of the distance [Jeff] was away” from the mats.

Christopher Koster (Chris), who had arrived at the school with Jeff, testified they were driving alongside the football field when he saw people near the area where the fire started five minutes later. Chris did not know any of them and had not looked at them closely. When asked about the person Chris had subsequently picked out of a school yearbook as one of the people he had seen, Chris identified Stephen.

Michael Fox (Fox), a deputy fire marshal who had investigated the scene of the fire, testified the fire was not accidental but instead “started by a[n] open flame device such as a cigarette lighter or matches igniting the mat material.” During his search of the surrounding area, Fox had found a pack of cigarettes and a cigarette lighter.

The State also called Curtis Cole (Curtis), who went to the same school as Stephen, as a witness. When asked whether Curtis had given a statement to the police about a telephone call he had received from Stephen on 21 April 2000, Curtis testified he did not remember any telephone call, although it could be possible Stephen had called him. The State then asked if during this telephone conversation Stephen had admitted to setting the fire at the school. Defense counsel objected, at which time the trial court intervened to instruct Curtis as to the consequence of perjury. Thereafter, the State asked Curtis whether he had put Stephen on speaker phone when he received the telephone call. Curtis replied: “I might have. I don’t even remember him calling me. I don’t even know if he has my phone number.” When, over defense counsel’s objection, the State again questioned Curtis whether the caller had admitted setting the fire at the school, Curtis said he did not remember.

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At the conclusion of Curtis' testimony, the trial court instructed Curtis and his mother to remain in the courthouse and that if they attempted to leave, they would be placed under arrest. The State then called Dustin Mullis (Dustin) to the stand. Dustin, who was twelve years old and a friend of Curtis, testified he was playing at Curtis' home on 21 April 2000 when Curtis received a telephone call. Curtis placed the call on speaker phone. Dustin did not recognize the caller's voice but claimed Curtis told him it was Stephen. Dustin further testified the caller admitted having set the fire at the school. Defense counsel objected to this testimony on the basis that the caller's voice had not been sufficiently identified to admit the contents of the telephone call.

At the end of the State's evidence, the State, over defense counsel's objection, requested permission to recall Curtis to the witness stand "to see if his memory ha[d] improved." The trial court allowed the State's request. The State, however, then rested its case without recalling Curtis, and defense counsel put forward witnesses to attest to Stephen's alibi defense.

At the end of Stephen's case, again over defense counsel's objection, the State requested Curtis re-take the witness stand. The trial court granted the State's request, noting "maybe we ought to give [Curtis] another opportunity." Curtis subsequently testified he remembered the telephone call but the caller's voice did not sound like Stephen's voice. When asked what the caller had told him, Curtis testified the caller introduced himself as "Stephen" and claimed to have set the fire at the school. Curtis did not remember whether he put the call on speaker phone but was certain he did not tell Dustin about the telephone conversation. Defense counsel objected and moved to strike this testimony because of Curtis' inability to identify the caller's voice but was again overruled by the trial court.

At the end of the State's evidence and at the end of all the evidence, defense counsel moved to dismiss the charge of burning personal property. The trial court denied the motions and adjudicated Stephen delinquent.

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The issues are whether the trial court erred in: (I) admitting into evidence the contents of the telephone call and (II) denying Stephen's motion to dismiss due to insufficiency of the evidence.

## IN RE RHYNE

[154 N.C. App. 477 (2002)]

## I

[1] Our Supreme Court has held:

Before a witness may relate what he heard during a telephone conversation with another person, the identity of the person with whom the witness was speaking must be established. If the call was from the person whose identity is in question, the mere fact that he represented himself to be a certain person is not enough to identify him as that person. Identity of the caller may be established by testimony that the witness recognized the caller's voice, or by circumstantial evidence.

*State v. Richards*, 294 N.C. 474, 480, 242 S.E.2d 844, 849 (1978) (internal quotations and citations omitted); *State v. Williams*, 288 N.C. 680, 698, 220 S.E.2d 558, 571 (1975).

In this case, Curtis testified to receiving a telephone call from a person who identified himself as "Stephen" but whose voice did not sound like Stephen. Dustin, who overheard the telephone conversation, also did not recognize the caller's voice. Dustin testified instead that Curtis told him Stephen had called.<sup>1</sup> Because Curtis did not recognize the caller's voice, any statement he made to Dustin regarding the identity of the caller was thus based on the caller's self-identification. Such self-identification, however, standing alone, is insufficient under *Richards* and *Williams* for admission of testimony regarding the contents of a telephone conversation. See *State v. Jones*, 137 N.C. App. 221, 229, 527 S.E.2d 700, 705 (2000) (identification deemed insufficient where witnesses who testified about the telephone calls did not recognize the caller's voice and simply accepted the caller's self-identification). As there was no proper identification of Stephen's voice or any circumstantial evidence that would lead to his identification, the trial court erred in admitting testimony regarding the caller's self-identification and the cause of the fire. See, e.g., *State v. Rinck*, 303 N.C. 551, 568, 280 S.E.2d 912, 924-25 (1981) (sufficient circumstantial evidence to identify caller where caller stated his name, address, and telephone number and two witnesses identified his voice from the tape recording of the telephone conversation); *Williams*, 288 N.C. at 697-98, 220 S.E.2d at 570-71 (suf-

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1. Although this testimony presents a hearsay problem, see N.C.G.S. § 8C-1, Rules 803-805 (2001), we do not address this issue because defense counsel did not object to the admission of Dustin's testimony on this basis, see *State v. Burgess*, 55 N.C. App. 443, 447, 285 S.E.2d 868, 871 (1982) (failure to object to inadmissible evidence constitutes a waiver).



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ficient circumstantial evidence where testimony established someone who identified himself as “George” had placed the telephone call and requested to speak to the victim and the victim, surprised and shot by the defendant in her living room only a short time thereafter, exclaimed “George”).

## II

**[2]** We next address whether the remaining evidence was sufficient to warrant the trial court’s denial of Stephen’s motion to dismiss.

In considering a juvenile’s motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the charged offense and whether the juvenile was the perpetrator of the offense. *See State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992); *In re Bass*, 77 N.C. App. 110, 115, 334 S.E.2d 779, 782 (1985) (the same standard as used in criminal cases applies to motion to dismiss in a juvenile action). “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). “The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference of fact which may be drawn from the evidence.” *Bass*, 77 N.C. App. at 115, 334 S.E.2d at 782. In this case, Stephen was charged with burning personal property. Thus, the State needed to prove Stephen “wantonly and willfully set fire to or burn[ed], or cause[d] to be burned, or aid[ed], counsel[ed] or procure[d] the burning of, any . . . personal property . . . with intent to injure or prejudice . . . the person owning the property.” N.C.G.S. § 14-66 (2001).

Without the testimony regarding the telephone call, the only evidence linking Stephen to the scene of the fire rests on the testimony of Jeff and Chris who identified Stephen as one of the people they had seen on the mats on the football field approximately five to ten minutes before the fire started. Without any additional circumstantial evidence, this testimony is insufficient to support the conclusion that Stephen was the perpetrator of the charged offense. *See State v. Clark*, 90 N.C. App. 489, 498, 369 S.E.2d 607, 612 (1988) (“[t]he ‘mere presence’ of [the defendant] at the scene of the fire, taken alone, is insufficient to incriminate her as an aider and abettor in a crime”). Accordingly, the trial court erred in denying Stephen’s motion to dismiss. As the trial court’s adjudication and dispositional orders must therefore be reversed, we do not address Stephen’s third assignment

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[154 N.C. App. 482 (2002)]

of error as to whether the trial court's perjury warnings to Curtis constituted error.

Reversed.

Judges MARTIN and BRYANT concur.

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SHEILA M. ARNOLD, EMPLOYEE, PLAINTIFF V. WAL-MART STORES, INC., EMPLOYER, AND  
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, CARRIER,  
DEFENDANTS

No. COA02-296

(Filed 3 December 2002)

**1. Workers' Compensation— permanent disability—date healing period ended—maximum medical improvement**

The Industrial Commission erred in a workers' compensation case by awarding permanent disability to plaintiff employee and the case is remanded for further findings as to disability because: (1) the Commission failed to find the date the healing period ended or the date plaintiff reached maximum medical improvement; and (2) the Commission could not award benefits under N.C.G.S. § 97-31 without such a finding.

**2. Workers' Compensation— future medical compensation—competent evidence**

The Industrial Commission did not abuse its discretion in a workers' compensation case by awarding future medical compensation under N.C.G.S. § 97-25 to plaintiff employee, because there is competent evidence in the record to show that plaintiff may incur ongoing medical expenses related to the compensable injury.

Appeal by defendants from the Opinion and Award of the North Carolina Industrial Commission filed 5 December 2001. Heard in the Court of Appeals 14 November 2002.

*Kathleen G. Sumner, for plaintiff-appellee.*

*Young Moore and Henderson P.A., by J.D. Prather and Zachary C. Bolen, for defendants-appellants.*

## ARNOLD v. WAL-MART STORES, INC.

[154 N.C. App. 482 (2002)]

TYSON, Judge.

Wal-Mart Stores, Inc. (“employer”) and Insurance Company of the State of Pennsylvania (“carrier”) appeal the award of temporary and permanent partial disability to Sheila M. Arnold (“employee”) by the North Carolina Industrial Commission (“Commission”). We vacate the Commission’s award and remand the case to the Commission for further findings.

### I. Facts

Employee had worked for employer for approximately two and a half years. On 4 May 1998, employee was attempting to lift a broken dock plate on a door when she felt pain in her back, hip and leg. Prior to the incident, employee had not complained of any pain in those areas. After the injury, she continued to experience pain. Martin Chipman, M.D., a neurologist, treated employee for her pains through physical therapy, aqua therapy, and ordered restrictions on employee’s carrying heavy loads, sleeping on a hard bed, and sitting in a high back chair.

On 13 July 1998, employee was released to return to light duty with restrictions but employer did not allow her to return. Dr. Chipman gave employee a 10 percent permanent partial disability rating to her back as a result of the incident. On 13 May 1999, employee began work with Dollar General stores at the same or greater wages than she was receiving at the time of the incident.

The Commission concluded in part the following:

1. [Employee] sustained an injury by accident on May 4, 1998 while in the course and scope of employment with Wal-Mart. [Employee] is entitled to receive workers’ compensation benefits as a result of the injuries.
2. [Employee] is entitled to receive disability benefits for the periods she was unable to earn wages as a result of the injuries she sustained.
3. [Employee] is entitled to receive medical benefits for so long as they continue to effect a cure, give relief and/or lessen [employee’s] period of disability.
4. [Employee] sustained a 10 percent permanent partial disability to the back and is entitled to be compensated for the same after her temporary total income ended.

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[154 N.C. App. 482 (2002)]

The Commission awarded employee temporary total disability from 6 May 1998 through 13 May 1999. It further awarded permanent partial disability for 30 weeks following 13 May 1999 for the 10 percent permanent partial disability rating to her back. It also awarded all medical expenses “incurred or to be incurred by [employee] as a result of her compensable injury.”

## II. Issues

Defendants contend that the Commission erred in (1) awarding compensation for permanent disability, (2) awarding compensation after 21 August 1998, and (3) awarding future medical compensation.

## III. Standard of Review

Upon appeal of an award from the Commission, this Court’s review is limited to whether there is any competent evidence to support the Commission’s findings of fact and whether those findings support the Commission’s conclusions of law. *Effingham v. Kroger Co.*, 149 N.C. App. 105, 109, 561 S.E.2d 287, 291 (2002). The findings of fact are conclusive on appeal if there is competent evidence to support them, even if evidence is presented to the contrary. *Id.* The Commission’s conclusions of law are reviewable *de novo*. *Id.*

## IV. Permanent Disability

**[1]** An injured employee seeking compensation generally has two options under the Workers’ Compensation Act (“Act”). First, an employee may seek benefits “by showing that the employee has suffered a loss of wage-earning capacity pursuant to N.C. Gen. Stat. § 97-29 or N.C. Gen. Stat. § 97-30.” *Knight v. Wal-Mart Stores, Inc.*, 149 N.C. App. 1, 10, 562 S.E.2d 434, 441 (2002). If the loss of wage-earning capacity is total, an employee may seek recovery under N.C. Gen. Stat. § 97-29. If the loss of wage-earning capacity is partial, an employee may seek recovery under N.C. Gen. Stat. § 97-30. Second, an employee may seek benefits by showing “the employee has a specific physical impairment that falls under the schedule set forth in N.C. Gen. Stat. § 97-31, regardless of whether the employee has, in fact, suffered a loss of wage-earning capacity.” *Id.* at 11, 562 S.E.2d at 442.

If an employee has a scheduled injury under N.C. Gen. Stat. § 97-31 and a loss of wage-earning capacity, the employee may elect to seek benefits under whichever section will provide the more favorable remedy. *Id.* This election does not allow for an employee to recover from both methods simultaneously. *Farley v. N.C. Dept of*

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*Labor*, 146 N.C. App. 584, 587, 553 S.E.2d 231, 233 (2001); N.C. Gen. Stat. § 97-31. However, an employee who has suffered an injury listed in N.C. Gen. Stat. § 97-31 and suffers a partial or total loss of wage-earning capacity during the “healing period” may seek (1) compensation for loss of wage-earning capacity under N.C. Gen. Stat. § 97-29 or N.C. Gen. Stat. § 97-30 during the “healing period” and (2) compensation for the specific listed injury for the statutorily prescribed period of time under N.C. Gen. Stat. § 97-31 once the “healing period” has ended. *Knight*, 149 N.C. App. at 12, 562 S.E.2d at 442.

The end of the healing period determines the beginning of statutory compensation under N.C. Gen. Stat. § 97-31. The ending of the healing period under N.C. Gen. Stat. § 97-31 is “when the injury has stabilized, referred to as the point of ‘maximum medical improvement’ (or ‘maximum improvement’ or ‘maximum recovery’)” (“MMI”). *Id.* The Commission must find the date on which the employee reached MMI with regard to the specific scheduled injury before awarding compensation from that date based on the statutory number of weeks set forth in N.C. Gen. Stat. § 97-31.

Here, the Commission did not specify under which section of the Act it awarded compensation. We infer that the Commission awarded compensation based on N.C. Gen. Stat. § 97-31, because it found that employee had returned to work at the same or higher wages and that employee did not lose wage-earning capacity. The Commission found that employee had a 10 percent permanent impairment rating and awarded benefits for the scheduled statutory injury starting on 13 May 1999, the date employee returned to employment. However, under N.C. Gen. Stat. § 97-31, the date of returning to employment and the employee’s wage-earning capacity are irrelevant. What is relevant is the end of employee’s “healing period” or the date employee reached MMI. The Commission failed to find the date the “healing period” ended or the date employee reached MMI. Without such a finding, the Commission could not award benefits under N.C. Gen. Stat. § 97-31. We vacate the award of the Commission and remand further findings of fact regarding the date employee reached MMI.

#### IV. Future Medical Compensation

[2] Employer contends the Industrial Commission erred in granting future medical compensation to employee because “she has not proven that any ongoing complaints are causally related to the her [sic] incident at work on May 4, 1998.” We disagree.

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[154 N.C. App. 486 (2002)]

N.C. Gen. Stat. § 97-25 states that “medical compensation shall be provided by the employer.” If the Commission determines that continuing medical treatment is necessary, it may, in its discretion, order such treatment and require the employer to pay for it. N.C. Gen. Stat. § 97-25 (1991).

Here, the Commission found that employee sustained a compensable injury on 4 May 1998. It ordered employer to “pay for all medical expenses incurred or to be incurred by [employee] as a result of her compensable injury when bills for same have been submitted, for so long as such evaluations, treatments and examinations may reasonably be required to effect a cure, give relief and/or lessen [employee’s] period of disability.” There is competent evidence in the record to show that plaintiff may incur ongoing medical expenses related to the compensable injury.

We find the Commission did not abuse its discretion by ordering employer to pay future medical expenses incurred “as a result of [employee’s] compensable injury.”

V. Conclusion

The award of the Commission is vacated and remanded for further findings as to disability. The Commission did not abuse its discretion in awarding future medical expenses which employee may incur as a result of her compensable injury.

Affirmed in part, vacated and remanded in part.

Judges WALKER and McCULLOUGH concur.

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CAROLYN ALFORD, PLAINTIFF V. WANDA EVETTE LOWERY, DEFENDANT

No. COA02-185

(Filed 3 December 2002)

**1. Pleadings— amendment to conform to evidence—contributory negligence—sufficiency of evidence**

The trial court did not abuse its discretion in an automobile accident case by allowing defendant’s answer to be amended to include contributory negligence where plaintiff testified that she

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observed defendant's vehicle traveling toward her in her lane for at least one and possibly two blocks, plaintiff took no evasive action until just before impact, and plaintiff did not blow her horn prior to the accident. Moreover, plaintiff was not prejudiced by the amendment because her attorney stated that he had been on notice of defendant's intent to amend her answer for some time. N.C.G.S. § 1A-1, Rule 15(b).

**2. Appeal and Error— preservation of issues—failure to object to instruction**

Plaintiff did not preserve for appeal the issue of whether the trial court erred by instructing the jury on contributory negligence where there was no evidence of plaintiff objecting to the instruction.

**3. Appeal and Error— preservation of issues—failure to request instructions—failure to object to omission**

A plaintiff in an automobile accident case waived any error in the court not instructing on last clear chance or gross negligence where there was no evidence that plaintiff requested those instructions or objected to their omission.

**4. Motor Vehicles— contributory negligence—automobile accident—sufficiency of evidence for verdict**

There was sufficient evidence to support a verdict of contributory negligence where plaintiff saw defendant's vehicle traveling toward her in her lane for one or two blocks, did not take evasive action until just prior to impact, the impact occurred while plaintiff's vehicle was completely in its own lane, and plaintiff made no attempt prior to the collision to catch defendant's attention.

**5. Attorneys— ineffective assistance of counsel—civil action**

Ineffective assistance of counsel does not provide a basis for setting aside a jury verdict in a civil case.

Appeal by plaintiff from judgment entered 28 August 2001 by Judge Nancy Black Norelli in Mecklenburg County District Court. Heard in the Court of Appeals 16 October 2002.

*Carolyn Alford, plaintiff-appellant, pro se.*

*Morris York Williams Surles & Barringer, LLP, by Christa C. Pratt and Marc S. Gentile, for defendant-appellee.*

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[154 N.C. App. 486 (2002)]

HUNTER, Judge.

A jury found that Carolyn Alford (“plaintiff”) was injured by the negligence of Wanda Evette Lowery (“defendant”). However, plaintiff was barred from recovery because the jury additionally found that plaintiff had been contributorily negligent. Plaintiff appeals from the judgment entered upon the verdict. We affirm for the reasons set forth herein.

This case arises from an automobile accident that occurred on the morning of 2 September 1996 at approximately 6:40 a.m. The accident took place in Mecklenburg County on Hawthorne Lane, which is a two lane road divided by a double yellow line. The evidence tended to show that as plaintiff was driving south on Hawthorne Lane, plaintiff noticed a car ahead of her, driven by defendant, cross the double yellow line and travel towards her in plaintiff’s lane of travel. The two vehicles collided head-on. Plaintiff observed that defendant’s car was in her lane of travel at least one, and maybe two, blocks away from the location of impact. According to plaintiff, the impact occurred completely in her lane of travel. Plaintiff nor defendant blew their horns prior to impact. Plaintiff testified that she did not take any evasive action until just prior to the collision.

Police Officer Kevin L. Weaver testified that when he arrived at the scene of the accident, both vehicles were straddling the yellow line. Officer Weaver further testified that there were thirty feet of skid marks from plaintiff’s vehicle.

Plaintiff filed a complaint on 23 February 1999 alleging that defendant’s negligence was a proximate cause of plaintiff’s personal injuries and damages. Defendant filed an answer raising the defense of a sudden emergency. Defendant alleged in her answer that as she was proceeding northbound on Hawthorne Lane, an object appeared in the path of her vehicle and caused defendant to swerve to the left in order to avoid colliding with the object. A jury concluded that plaintiff was injured by the negligence of defendant but that plaintiff contributed to her injuries by her own negligence. Judgment was entered upon the verdict and plaintiff recovered nothing since the jury found she had been contributorily negligent.

At the outset, defendant points out that plaintiff’s brief does not comply with Rule 28(b)(4) of the North Carolina Rules of Appellate Procedure because plaintiff failed to file a statement of the jurisdictional grounds for the appeal. Defendant requests that we dismiss



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plaintiff's appeal for plaintiff's noncompliance. However, we elect to exercise our discretion pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure and review the merits of this appeal.

## I.

[1] Plaintiff initially contends the trial court erred in granting defendant's motion to amend her answer to include the affirmative defense of contributory negligence. Plaintiff specifically asserts that defendant failed to present sufficient evidence to support such an amendment of the pleading.

Rule 15(b) of the North Carolina Rules of Civil Procedure provides the following in pertinent part:

When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, either before or after judgment . . . . If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when . . . the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

N.C. Gen. Stat. § 1A-1, Rule 15(b) (2001). This Court has stated that “[l]iberal amendment of pleadings is encouraged by the Rules of Civil Procedure in order that decisions be had on the merits and not avoided on the basis of mere technicalities.” *Phillips v. Phillips*, 46 N.C. App. 558, 560-61, 265 S.E.2d 441, 443 (1980). Further, the trial court is allowed broad discretion in ruling on motions to amend pleadings. *North River Ins. Co. v. Young*, 117 N.C. App. 663, 453 S.E.2d 205 (1995).

In the instant case, plaintiff has failed to show that the trial court abused its discretion in allowing defendant's motion to amend her answer. The evidence raises an issue of contributory negligence. Plaintiff testified that she observed defendant's vehicle for at least one, and possibly two, blocks with no visual obstructions traveling towards her in her lane; plaintiff took no evasive action until just prior to impact; the point of impact was entirely within plaintiff's lane; and plaintiff failed to blow her horn in an effort to catch the

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attention of defendant prior to the accident. In addition, plaintiff was not prejudiced by the grant of this motion since plaintiff's attorney stated that he had been on notice that defendant intended to amend her answer to include the defense of contributory negligence for some time. Therefore, this assignment of error is overruled.

## II.

**[2]** Plaintiff next argues the trial court erred in instructing the jury on the issue of contributory negligence. However, there is no evidence in the record indicating that plaintiff objected to the contributory negligence instruction being submitted to the jury. Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure provides, "[a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto . . ." N.C.R. App. P. 10(b)(2). Therefore, plaintiff has not properly preserved this issue for appeal.

## III.

**[3]** Plaintiff also assigns error to the trial court's failure to instruct the jury on gross negligence and last clear chance. However, we note there is no evidence that plaintiff requested an instruction on gross negligence or last clear chance nor is there evidence that plaintiff objected to the omission of such instructions. Accordingly, we conclude this argument was waived by plaintiff because the issue was not properly preserved for appellate review. *See* N.C.R. App. P. 10(b)(2).

## IV.

**[4]** Plaintiff additionally asserts that the jury's finding that she was contributorily negligent was improper since there was no evidence of contributory negligence. We conclude this contention lacks merit.

"Contributory negligence . . . is negligence on the part of the plaintiff which joins, simultaneously or successively, with the negligence of the defendant . . . to produce the injury of which the plaintiff complains." *Jackson v. McBride*, 270 N.C. 367, 372, 154 S.E.2d 468, 471 (1967). The burden is on the defendant to prove contributory negligence. *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 365 S.E.2d 198 (1988). We conclude there was adequate evidence for a jury to find that plaintiff's negligence contributed to her injuries. The evidence showed that plaintiff observed the vehicle driven by defendant for a minimum of one, and a maximum of two, city blocks prior to impact, that plaintiff

## ALFORD v. LOWERY

[154 N.C. App. 486 (2002)]

did not take any evasive action until just prior to impact, that the impact occurred while plaintiff's vehicle was completely within its own lane, and that plaintiff made no attempts prior to the collision to catch defendant's attention. Therefore, the jury's verdict was supported by the evidence and we accordingly conclude plaintiff's argument lacks merit.

The case *sub judice* is representative of the result that often arises from the common law doctrine of contributory negligence. As this Court has previously noted:

The common law doctrine of contributory negligence has been the law in this State since *Morrison v. Cornelius*, 63 N.C. 346 (1869) . . . . Although forty-six states have abandoned the doctrine of contributory negligence in favor of comparative negligence, contributory negligence continues to be the law of this State until our Supreme Court overrules it or the General Assembly adopts comparative negligence.

*Jones v. Rochelle*, 125 N.C. App. 82, 89, 479 S.E.2d 231, 235 (1997).

V.

[5] Plaintiff finally contends that her legal counsel was not looking out for her best interests, failed to inform plaintiff of her rights, and failed to administer adequate representation. Plaintiff's contention may be characterized as an ineffective assistance of counsel claim. Plaintiff cites no authority and we have found no precedent for setting aside a jury verdict in a civil case based on ineffective assistance of counsel. Therefore, plaintiff's assignment of error is overruled.

For the foregoing reasons, we affirm the judgment of the trial court.

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

**RAY v. YOUNG**

[154 N.C. App. 492 (2002)]

SONYA RAY, PLAINTIFF V. CECELIA WHITLEY YOUNG AND RANDALL YOUNG,  
DEFENDANTS

No. COA01-1505

(Filed 3 December 2002)

**Animals— domestic—cat—wrongful keeping of animal with  
knowledge of viciousness**

The trial court did not err in a wrongful keeping of animal with knowledge of its viciousness case by granting summary judgment in favor of defendants in an action by plaintiff to recover injuries inflicted by defendants' cat, because: (1) plaintiff failed to establish that the cat exhibited vicious propensities in the past or that defendants had any reason to suspect that their cat might attack plaintiff; and (2) plaintiff failed to present any evidence linking the cat's cessation of antidepressant medication or the cat's compulsive disorder with the attack when all of the evidence tended to show that the cat's behavioral disorder caused him to ingest foreign objects and that the medication was aimed at preventing this behavior.

Appeal by plaintiff from order entered 31 August 2001 by Judge Knox V. Jenkins, Jr., in Johnston County Superior Court. Heard in the Court of Appeals 12 September 2002.

*Anderson Korzen & Associates, P.C., by John J. Korzen, and Hardison & Leone, L.L.P., by Elizabeth A. Leone, for plaintiff appellant.*

*Bailey & Dixon, L.L.P., by Patricia P. Kerner, for defendant appellees.*

TIMMONS-GOODSON, Judge.

Sonya Ray ("plaintiff") appeals from an order of the trial court granting summary judgment in favor of plaintiff's sister, Cecelia Whitley Young, and her husband, Randall Young ("defendants"). For the reasons stated herein, we affirm the order of the trial court.

On 15 September 2000, plaintiff filed a complaint in Johnston County Superior Court seeking compensation for injuries inflicted by defendants' cat, "Charlie." The complaint alleged that Charlie exhibited vicious propensities, and that defendants were aware of such propensities. Plaintiff charged defendants with negligence in failing

## RAY v. YOUNG

[154 N.C. App. 492 (2002)]

to take adequate precautions to ensure plaintiff's safety while she was a lawful visitor at defendants' residence. Defendants thereafter filed a motion for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, which motion came before the trial court on 13 August 2001.

At the summary judgment hearing, the evidence before the trial court tended to show the following: In early December 1998, plaintiff cared for defendants' dog at her home while defendants were out of town. Defendants did not ask plaintiff to take care of Charlie. On the evening of 6 December 1998, plaintiff returned the dog to defendants' residence. After entering the residence, plaintiff noticed Charlie behind her, "hissing with his back hunched up." Charlie then growled and bit plaintiff on the back of her left ankle. When plaintiff reached down to assess the damage to her ankle, the cat bit her left hand. Because the cat would not release plaintiff's hand, plaintiff "knocked [Charlie] up against the wall with [her] hand in his mouth," whereupon Charlie initially released his grip, but immediately bit plaintiff in the hand once more. Plaintiff knocked the cat against the wall twice more, and Charlie ended his attack. As a result of this attack, plaintiff suffered considerable injury to her left hand.

Plaintiff presented further evidence tending to show that Charlie had bitten both defendants on past occasions, as well as a third individual, Mr. J. D. Denson. Plaintiff also testified that Charlie acted aggressively towards defendants' dog and other large dogs. Finally, plaintiff asserted that Charlie suffered from a "compulsive behavioral disorder" for which he had previously been medicated.

Defendants denied plaintiff's characterization of Charlie as a vicious cat, asserting that his attack upon plaintiff was completely unprecedented and therefore unforeseeable. Defendants presented evidence tending to show that, although Charlie occasionally bit or scratched them while playing, he had never exhibited aggressive behavior of the magnitude experienced by plaintiff. Mr. Denson, the individual identified by plaintiff as having been scratched by Charlie on one occasion, submitted an affidavit asserting that the scratch was superficial and occurred in the course of playing with Charlie.

Defendants also submitted testimony by Charlie's treating veterinarian, Dr. Betsy Sigmon. Dr. Sigmon testified that Charlie's medical records revealed no history of aggression. Dr. Sigmon further described Charlie's history of compulsive behavioral disorder, which had caused him to ingest foreign objects on several occasions, requir-

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[154 N.C. App. 492 (2002)]

ing surgery. Dr. Sigmon noted that cats with compulsive disorders “just have to have a lot of attention, a lot of activity. Without that, without [having] constantly something to do, very commonly they’re seen for obstructions of their intestines from eating stuff they shouldn’t.” Dr. Sigmon initially prescribed an antidepressant for Charlie’s behavior, but later approved of his removal from the medication because a high-fiber diet appeared to effectively control Charlie’s symptoms.

After considering all of the evidence and arguments by counsel, the trial court granted summary judgment in favor of defendants and dismissed plaintiff’s action with prejudice. From this order, plaintiff appeals.

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The sole issue on appeal is whether the trial court erred in granting summary judgment to defendants. Summary judgment is proper where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2001); *Joslyn v. Blanchard*, 149 N.C. App. 625, 628, 561 S.E.2d 534, 536 (2002). Summary judgment is properly granted where the pleadings and proof disclose that no cause of action exists. *See Joslyn*, 149 N.C. App. at 628, 561 S.E.2d at 536.

In order to recover at common law for injuries inflicted by a domestic animal, a plaintiff must show “(1) that the animal was dangerous, vicious, mischievous, or ferocious, or one termed in law as possessing a vicious propensity; and (2) that the owner or keeper knew or should have known of the animal’s vicious propensity, character, and habits.” *Sellers v. Morris*, 233 N.C. 560, 561, 64 S.E.2d 662, 663 (1951). “The gravamen of the cause of action in this event is not negligence, but rather the wrongful keeping of the animal with knowledge of its viciousness[.]” *Swain v. Tillet*, 269 N.C. 46, 51, 152 S.E.2d 297, 301 (1967) (quoting *Barber v. Hochstrasser*, 136 N.J.L. 76, 79, 54 A.2d 458, 460 (1947)).

If the plaintiff establishes that an animal is in fact vicious, the plaintiff must then demonstrate that the owner knew or should have known of the animal’s dangerous propensities. *See Sink v. Moore and Hall v. Moore*, 267 N.C. 344, 350, 148 S.E.2d 265, 270 (1966).

The test of the liability of the owner of the [animal] is . . . not the motive of the [animal] but whether the owner should know from

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the [animal's] past conduct that he is likely, if not restrained, to do an act from which a reasonable person, in the position of the owner, could foresee that an injury to the person or property of another would be likely to result.

*Id.* In order to determine whether the owner of the animal is negligent, the size, nature, and habits of the animal are taken into account. *See id.*

In the instant case, plaintiff failed to establish that Charlie exhibited vicious propensities in the past, or that defendants had any reason to suspect that their cat might attack plaintiff. Although plaintiff presented some evidence tending to show that Charlie had bitten or scratched people in play, plaintiff offered no evidence of any previous behavior by Charlie that would indicate his propensity to attack plaintiff. Regarding a cat's tendency to scratch or bite while playing, Dr. Sigmon verified the common knowledge that, "Cats have claws. Cats have teeth. [The fact that a cat may scratch or bite during play] is one of the possibilities whenever you have a mammal in your possession."

Moreover, although plaintiff argues that defendants had a duty to inform her that Charlie was no longer taking his antidepressant medication at the time he attacked plaintiff, she failed to present any evidence linking the cessation of the medication, or Charlie's compulsive disorder, with the attack. All of the evidence tended to show that the cat's behavioral disorder caused him to ingest foreign objects, and that the medication was aimed at preventing this behavior. There was no credible evidence to suggest that Charlie's disorder made him aggressive, or that ending the medication would cause Charlie to attack someone. Dr. Sigmon furthermore testified that Charlie's condition was being effectively treated through a high-fiber diet.

Because there were no genuine issues of material fact concerning the cat's vicious propensity and defendants' knowledge thereof, the trial court properly granted summary judgment in favor of defendants. The order of the trial court is hereby

Affirmed.

Judges HUDSON and CAMPBELL concur.

## STATE v. WILLIAMS

[154 N.C. App. 496 (2002)]

STATE OF NORTH CAROLINA v. JEFFERY TREMAINE WILLIAMS

No. COA02-135

(Filed 3 December 2002)

**Homicide— voluntary manslaughter—failure to include possible verdict of not guilty by reason of self-defense**

The trial court erred in a voluntary manslaughter case by failing to include not guilty by reason of self-defense as a possible verdict in its final mandate to the jury and defendant is entitled to a new trial.

Appeal by defendant from judgment entered 12 July 2001 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 16 October 2002.

*Attorney General Roy A. Cooper, III, by Assistant Attorney General David N. Kirkman, for the State.*

*Narron, O'Hale and Whittington, P.A., by John P. O'Hale, for defendant-appellant.*

HUNTER, Judge.

Jeffery Tremaine Williams (“defendant”) appeals from a conviction of voluntary manslaughter. We conclude defendant is entitled to a new trial because the trial court failed to include not guilty by reason of self-defense as a possible verdict in its final mandate to the jury.

The evidence presented at trial is briefly summarized as follows: On 2 May 1999, the body of Halton Taylor (“Taylor”) was discovered at approximately 4:20 a.m. on Montgomery Heights Road in Johnston County. When Cathy Cockrell, a paramedic, arrived at the crime scene, she observed Taylor lying face down in the road with his arms extended above his head. Taylor had no pulse, was not breathing, and was cold to the touch. A crack pipe was found in Taylor’s pocket.

Edward Peele, crime scene technician for the Johnston County Sheriff’s office, testified that there was an approximately 500 foot drag trail from the location where Taylor’s body was found to a circular shaped area covered in what appeared to be blood, that was referred to as the “possible confrontation area.” The “possible con-



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frontation area” was located in defendant’s yard. On 5 May 1999, Dale Wheeler, Lieutenant over the Major Crimes Division of the Johnston County Sheriff’s Office (“Lieutenant Wheeler”), found an orange razor knife with a retractable blade directly across the road from defendant’s residence.

Dr. Robert Thompson, a forensic pathologist with the Office of the Chief Medical Examiner in Chapel Hill, performed an autopsy on Taylor’s body which revealed that Taylor had ethanol in his system and the alcohol level was ninety milligrams per deciliter (equivalent to .09% on the breathalyzer scale). Cocaine was also found in Taylor’s system. Dr. Thompson opined that the cause of Taylor’s death was head, chest, and abdominal injuries, which were consistent with injuries sustained by someone who had been kicked.

On 5 May 1999, defendant was interviewed at the Johnston County Sheriff’s Office by Greg Tart, a special agent for the State Bureau of Investigation, and Lieutenant Wheeler. Defendant’s statement was read into evidence. Defendant revealed that he and his friend Shaun White (“White”) had been in an altercation with Taylor in defendant’s yard on the morning of 2 May 1999. According to defendant, as he and his friend White were walking home at about 3:00 a.m., they saw Taylor riding his bicycle on Thorne Road. Taylor asked defendant and White for a \$20 rock. Defendant and White responded that they did not mess with that “shit.” According to defendant, Taylor left his bicycle in the middle of Thorne Road and defendant and White walked away from Taylor while Taylor followed them and continued to ask them for drugs. Defendant heard Taylor clicking a box cutter knife in his pocket. Thereafter, White turned and walked towards his house which was close by, while defendant, followed by Taylor, continued walking toward defendant’s home. When defendant and Taylor reached defendant’s yard, Taylor got in defendant’s face and asked him again for drugs. Taylor pulled the knife from his pocket and an altercation between Taylor and defendant ensued. White came to defendant’s aid. Defendant stated that while Taylor was on the ground, he and White each kicked Taylor in the face and ribs about fifteen times. According to defendant, he and White kicked Taylor about ten more times in the head after Taylor dropped the knife. Defendant spotted Taylor’s knife on the ground, picked it up, and tossed it across the road. Defendant and White then dragged Taylor, face down on the ground, to Montgomery Heights Road, where they left Taylor, who at the time was still breathing and gasping.

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Defendant testified on his own behalf. Defendant stated that he was afraid of Taylor because he knew of specific acts of violence committed by Taylor prior to 2 May 1999, including the following: Taylor shot out the windows of an automobile; Taylor assaulted Carl Sutton, who lived on Montgomery Heights Road; Taylor threw a cement block into Elmo Sheppard's home; Taylor assaulted Kelly Sanders by striking Ms. Sanders in the face with a cooking pot; Taylor broke into Cheryl Raynor's home and attempted to rape Ms. Raynor; Taylor broke into Michael Raynor's house; Taylor cut Donte Markey Atkinson with a razor blade all over his chest and stomach; and Taylor attempted to burn down Benjamin Ethridge's home. In addition, during the trial, several individuals testified that Taylor had a reputation for being a violent person.

Defendant further testified that at the time he was attacked by Taylor, Taylor was acting "[v]ery wild, crazy, [and] violent" and defendant detected an odor of alcohol about Taylor's person. Dr. Nicole Wolfe, a forensic psychiatrist, had reviewed Taylor's autopsy report, the toxicology report prepared in conjunction with the autopsy, and the toxicology report prepared by Professor Brian McMillen of the Department of Pharmacology of East Carolina University School of Medicine before testifying. Dr. Wolfe explained that when alcohol and cocaine are used in combination, they are more potent which makes the effects of both substances last longer. When the euphoria wears off and an individual is coming down from a cocaine high, that individual wants more cocaine. Dr. Wolfe testified that cocaine dependence could make a person "very, very crazy." In Dr. Wolfe's opinion, at the time of his death, Taylor was under the influence of cocaine and alcohol.

Defendant was charged in a true bill of indictment with second degree murder. Defendant was convicted of voluntary manslaughter and was sentenced to thirty-eight to fifty-five months' imprisonment. Defendant appeals from the judgment entered upon the verdict.

Defendant contends the trial court erred in failing to include in its final mandate to the jury a possible verdict of not guilty by reason of self-defense. We agree.

We note that in the case *sub judice*, the trial court discussed the law of perfect self-defense in the body of the charge. However, in its final mandate, the trial court failed to instruct the jury that if they found that defendant acted in self-defense, then the killing would be excusable homicide and it would be their duty to return a verdict of

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not guilty. Our Courts have previously held that a trial court's failure to include the possible verdict of not guilty by reason of self-defense in its final mandate to the jury is prejudicial error, entitling the defendant to a new trial. *State v. Dooley*, 285 N.C. 158, 203 S.E.2d 815 (1974); *State v. Kelly*, 56 N.C. App. 442, 289 S.E.2d 120 (1982). In addition, our Supreme Court has stated that "[t]he failure of the trial judge to include not guilty by reason of self-defense as a possible verdict in his final mandate to the jury [is] not cured by the discussion of the law of self-defense in the body of the charge." *Dooley*, 285 N.C. at 165-66, 203 S.E.2d at 820.

The trial judge's final mandate in the case at bar included the following in pertinent part:

So I charge that if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally and with malice but not in self-defense, killed the victim with a deadly weapon thereby proximately causing the victim's death, it would be your duty to return a verdict of guilty of second-degree murder. However, if you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty [of] second-degree murder. If you do not find the defendant guilty of second-degree murder, you must consider whether he's guilty of voluntary manslaughter.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally killed the victim with a deadly weapon and the defendant was the aggressor in bringing on the fight or used excessive force, it would be your duty to find the defendant guilty of voluntary manslaughter even if the State has failed to prove that the defendant did not act in self-defense, or if you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally and not in self-defense killed the victim with a deadly weapon but the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of voluntary manslaughter. However, if you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of voluntary manslaughter.

A possible verdict of not guilty by reason of self-defense was not included in the final mandate to the jury. Therefore, we conclude defendant is entitled to a new trial.

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[154 N.C. App. 500 (2002)]

The questions raised by defendant's additional assignments of error may not recur during a new trial and hence, will not be considered on this appeal.

New trial.

Judges WYNN and TIMMONS-GOODSON concur.

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STATE OF NORTH CAROLINA v. MAURICE JOHNSTON, DEFENDANT

No. COA01-1379

(Filed 3 December 2002)

**1. Confessions and Incriminating Statements— “secure custody”—custodial interrogation—absence of Miranda warnings—harmless error**

A defendant was in custody for Miranda purposes when he was ordered out of his vehicle at gunpoint, handcuffed, placed in the back of a patrol car, and questioned by detectives. Despite being told that he was in “secure custody” rather than under arrest, defendant's freedom of movement was restrained to the degree associated with a formal arrest. Therefore, the trial court erred by admitting a statement made by defendant in response to interrogation without Miranda warnings, “So what if I threw the shotgun out,” but this error was harmless in light of the other overwhelming evidence of defendant's guilt.

**2. Appeal and Error— preservation of issues—failure to object at trial**

An assault defendant's contention that the trial judge abused his discretion by denying his motion to sequester witnesses was not heard on appeal where defendant did not request to be heard or object to the trial court's ruling.

Appeal by defendant from judgment entered 19 January 2001 by Judge Clifton W. Everett, Jr., in Superior Court, Pitt County. Heard in the Court of Appeals 21 August 2002.

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[154 N.C. App. 500 (2002)]

*Attorney General Roy Cooper, by Assistant Attorney General Mark J. Pletzke, for the State.*

*Angela H. Brown, for the defendant-appellant.*

WYNN, Judge.

This case presents one fundamental issue: Does handcuffing a criminal suspect in the back of a police car constitute “custody” and trigger the protections of *Miranda v. Arizona*, 384 U.S. 436 (1966)? In *State v. Buchanan*, the Supreme Court of North Carolina held that “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.’” 353 N.C. 332, 339, 543 S.E.2d 823, 828 (2001) (citations omitted). Based on the totality of the circumstances in this case, we conclude that handcuffing defendant in the back of a police car did trigger *Miranda* protections, because it was a “restraint on freedom of movement . . . associated with a formal arrest.” Nonetheless, in light of the overwhelming evidence of defendant’s guilt in this case, we hold this error to be harmless. Therefore, we uphold defendant’s convictions of discharging a firearm into occupied property and assault with a deadly weapon.

In the early morning of 11 April 1998, the Pitt County Sheriff’s Department responded to a complaint that a male, driving a gray car, fired shots into an occupied vehicle with a sawed-off shotgun. A few hours later, at the scene of the incident, police officers observed a gray Nissan Maxima driving along the side of the road. With their guns drawn, the officers stopped the vehicle, asked defendant to step out of the vehicle, handcuffed defendant, and placed defendant in the back of a patrol car. Although defendant was handcuffed, the police officers informed defendant that he was not under arrest, but only in “secure custody” for defendant’s safety and the safety of the officers.

When asked why he was at the scene, defendant told the officers that he was looking for a pocketbook. An officer advised defendant that he “knew” defendant “was actually looking for the shotgun.” According to the officer, the defendant “became verbal” upon hearing this accusation and retorted: “So what if I threw the shotgun out.”

Over defendant’s objection, and after the trial court denied defendant’s motion to suppress, this statement was admitted into evi-

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dence. The trial court denied the motion to suppress the statement on the basis that defendant was not “in custody” when the statement was made, and on the basis that the statement was “voluntary” rather than the product of interrogation. On 19 January 2001, defendant was convicted of discharging a firearm into occupied property and assault with a deadly weapon.

**[1]** On appeal, defendant argues that the statement was obtained in violation of *Miranda*; the statement was incurably prejudicial; and the trial court’s denial of defendant’s motion to suppress was an abuse of discretion demanding a new trial.

“It is well established that the standard of review in evaluating a trial court’s ruling on a motion to suppress is that the trial court’s findings of fact ‘are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.’ ” *State v. Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826 (quoting *State v. Brewington*, 352 N.C. 489, 498, 532 S.E.2d 496, 501 (2000), *cert. denied*, 531 U.S. 1165 (2001)). “The determination of whether a defendant was in custody, based on those findings of fact, however, is a question of law and is fully reviewable by this Court.” *State v. Briggs*, 137 N.C. App. 125, 128, 526 S.E.2d 678, 680 (2000) (citations omitted).

“*Miranda* warnings are required only when a defendant is subjected to custodial interrogation.” *State v. Patterson*, 146 N.C. App. 113, 121, 552 S.E.2d 246, 253 (2001) (citations omitted). The *Miranda* Court defined “custodial interrogation” as “questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way.” *Miranda*, 384 U.S. at 444. “[T]he appropriate inquiry in determining whether a defendant is in ‘custody’ for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a ‘formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.’ ” *Buchanan*, 353 N.C. at 339, 543 S.E.2d at 828 (citations omitted).

The United States Supreme Court has consistently held that “the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned.” *Id.* at 341, 543 S.E.2d at 829 (quoting *Stansbury v. California*, 511 U.S. 318, 323 (1994)). “A policeman’s unarticulated plan has no bearing on the question of whether a suspect was ‘in custody’ at a particular time; the only relevant inquiry is how a reasonable man in the sus-

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pect's position would have understood his situation." *Buchanan*, 353 N.C. at 341-42, 543 S.E.2d at 829 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)).

After a careful review of the record, we conclude, as a matter of law, that defendant was in "custody." The record reveals that defendant was ordered out of his vehicle at gun point, handcuffed, placed in the back of a patrol car, and questioned by detectives. Although the officers informed defendant that he was in "secure custody" rather than under arrest, we conclude that defendant's freedom of movement was restrained to the degree associated with a formal arrest. A reasonable person under these circumstances would believe that he was under arrest.

However, the record further shows that defendant's conviction was supported by overwhelming evidence, therefore the trial court's error was harmless. Evidence admitted in violation of *Miranda* is subject to harmless error analysis. *State v. Hicks*, 333 N.C. 467, 479, 428 S.E.2d 167, 174 (1993), *abrogated on other grounds by Buchanan*, 353 N.C. at 340, 543 S.E.2d at 828. However, "before a federal constitutional error can be held harmless, the court must . . . declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also* N.C. Gen. Stat. § 15A-1443 (2001). The burden is on the State to demonstrate that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443(b) (2001).

In this case, the State presented overwhelming evidence of defendant's guilt. Defendant's car and a person matching defendant's description were described by the 911-caller; defendant and his car were found at the crime scene; and defendant and defendant's car were positively identified at trial by various witnesses. We conclude, therefore, that the erroneous admission of defendant's statement was harmless error beyond a reasonable doubt.

**[2]** As a second assignment of error, defendant contends that it was an abuse of discretion for the trial court to deny defendant's motion to sequester the State's witnesses. "A ruling on matters involving the sequestration of witnesses is within the sound discretion of the trial judge, and is not reviewable absent a showing of abuse of discretion." *State v. Williamson*, 122 N.C. App. 229, 233, 468 S.E.2d 840, 844 (1996) (citations omitted). "A discretionary ruling is reversible only where it is shown that it could not have been the result of a reasoned

## FIRST FIN. INS. CO. v. COMMERCIAL COVERAGE, INC.

[154 N.C. App. 504 (2002)]

decision.” *Id.* (citations omitted). Defendant argues that the trial court should have weighed evidence or heard oral arguments before ruling on the motion. Defendant did not object to the court’s ruling or request to be heard. Instead, “[d]efendant . . . stood silently by and did not object . . . . In these circumstances, defendant has waived whatever objection he may have had, and his belated complaint may not be ‘heard’ on appeal.” *State v. Smith*, 305 N.C. 691, 699, 292 S.E.2d 264, 270 (1982). Even assuming defendant has the right to be “heard” on appeal, we find no merit to defendant’s argument and overrule the assignment of error.

We have examined defendant’s remaining assignments of error and find them to be without merit.

Affirmed.

Judges HUDSON and CAMPBELL concur.

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FIRST FINANCIAL INSURANCE COMPANY, BURLINGTON INSURANCE COMPANY,  
AND ALAMANCE SERVICES, INC., PLAINTIFFS V. COMMERCIAL COVERAGE, INC.,  
MICHAEL D. ADKINS, JANET A. ADKINS, ARNOLD J. CHELDIN, AND SUZANNE  
C. CHELDIN, DEFENDANTS

No. COA02-207

(Filed 3 December 2002)

**Courts— overruling a prior judge—change in circumstances—  
not shown**

A second judge was without authority to rescind a prior judge’s order where the first judge remanded a referee’s report, the parties were not able to agree on the factual matters to be submitted, and the second judge rescinded the first judge’s order. Although one judge may overrule another where there has been a substantial change of circumstances since entry of the prior order, there was nothing in the record to show the state of agreement or disagreement at the time of the original order and plaintiffs have not met their burden of showing the existence of new facts arising since the original order. Moreover, the original order gave the referee “sole discretion” to determine the information in question.



**FIRST FIN. INS. CO. v. COMMERCIAL COVERAGE, INC.**

[154 N.C. App. 504 (2002)]

Appeal by plaintiffs First Financial Insurance Company and Burlington Insurance Company from order and judgment filed 23 October 2001 and appeal by defendants from orders filed 23 August 2001, 16 October 2001, and 18 October 2001 and from order and judgment filed 23 October 2001 by Judge Evelyn W. Hill in Alamance County Superior Court. Heard in the Court of Appeals 15 October 2002.

*Wishart, Norris, Henninger & Pittman, P.A., by Pamela S. Duffy, for plaintiff-appellants First Financial Insurance Company and Burlington Insurance Company.*

*Vernon, Vernon, Wooten, Brown, Andrews & Garrett, P.A., by Wiley P. Wooten and Benjamin D. Overby, for defendant-appellants Arnold and Suzanne Cheldin.*

GREENE, Judge.

First Financial Insurance Company (FFIC) and Burlington Insurance Company (BIC) appeal from a 23 October 2001 order granting summary judgment in part to FFIC, BIC, and Alamance Services, Inc., (collectively, Plaintiffs) and in part to Commercial Coverage, Inc. (CCI), Michael D. Adkins and Janet A. Adkins, (the Adkins), and Arnold J. Cheldin and Suzanne C. Cheldin (Defendants).<sup>1</sup> In addition, Defendants appeal from a 24 August 2001 order rescinding and setting aside remand, a 16 October 2001 order adopting a referee's report and amended report, and a 18 October 2001 order denying a new trial.

On 13 April 1998, Plaintiffs filed a complaint in superior court alleging breach of contract, breach of fiduciary duty, conversion and unfair and deceptive trade practices seeking monetary and injunctive relief as well as punitive damages. The allegations arose out of an agency agreement entered into in February 1994 between Plaintiffs and CCI, with the Adkins and Defendants acting as guarantors for CCI.<sup>2</sup> The agency agreement provided for CCI to sell and issue insurance policies on behalf of FFIC and BIC. CCI was to collect the premiums from the policies sold and remit them to Plaintiffs. In return, CCI was to receive a monthly commission and an annual bonus based on the net profits resulting from the sale of insurance policies. Plaintiffs terminated the agency agreement with CCI between 24

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1. On 12 April 2002, this Court dismissed the appeal of CCI and the Adkins.

2. Alamance Services, Inc. provided software licensed to CCI for the purpose of servicing FFIC and BIC accounts.

**FIRST FIN. INS. CO. v. COMMERCIAL COVERAGE, INC.**

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March 1998 and 3 April 1998 and alleged CCI was past due in remitting premiums to Plaintiffs in the amount of at least \$135,649.60 to FFIC and at least \$600.63 to BIC.

Defendants, CCI, and the Adkins filed an answer and counterclaim on 5 August 1998 alleging Plaintiffs owed CCI commissions and a bonus under the agency agreement. In November 1998, a consent order was filed whereby the parties agreed to send the matter to a referee for a determination of any amount owed by CCI to Plaintiffs.<sup>3</sup> Subsequently, the referee submitted to the trial court a "Referee's Report" on 5 July 2000.

This report stated the referee had used a "statistically valid sampling basis" to determine the amounts owed by CCI to Plaintiffs on the numerous policy files. The referee determined CCI owed FFIC \$187,972.05 and BIC \$663.34. After reviewing additional sources submitted to him by Defendants, the referee filed an amended report on 28 December 2000 that included transactions subsequent to his initial report. The amended report, however, did not materially change the referee's initial conclusions and was based on the same "statistically valid sampling basis." The referee further noted he had not included any bonus owed to CCI by Plaintiffs in his calculations. On 26 January 2001, Defendants filed exceptions to the referee's report objecting to, among other things, the referee's use of a statistical sampling method and failure to include any bonus owed to CCI in his calculations.

On 15 February 2001, the matter came before Judge Ronald L. Stephens on Plaintiffs' motion to adopt the referee's amended report. In his order (Judge Stephens' Order), the judge found it appropriate to remand the matter to the referee to "assemble a list of all policies effective from and after April 1, 1996 through the last policy issued by [CCI] for [FFIC] and [BIC]" using whatever sources the referee, "in his sole discretion," deemed appropriate. Further, the referee was ordered to conduct an examination of each policy file on the assembled list to determine the amount owed on each policy. The referee was also required to determine any bonus owed to CCI by Plaintiffs. Judge Stephens' Order then noted: "The [trial] [c]ourt retains jurisdiction of this matter for further hearing upon receipt of . . . [the] Referee's report and may render its decision out of term, out of session, and out of county."

The parties were unable to agree on the factual matters to be submitted and considered by the referee, and consequently, the referee

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3. The record does not indicate the day this consent order was filed.

## FIRST FIN. INS. CO. v. COMMERCIAL COVERAGE, INC.

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performed no additional review. Without motion of either party, the case came before Judge Evelyn W. Hill on 13 August 2001. Judge Hill filed an order (Judge Hill's Order) on 24 August 2001 rescinding Judge Stephens' Order based on the disagreement between the parties and because nothing had been done by the referee, "through no fault of his own," to comply with Judge Stephens' Order.

Subsequently, Judge Hill adopted the referee's amended report filed on 28 December 2000 and granted summary judgment (1) for Plaintiffs on their breach of contract, breach of fiduciary duty, and conversion claims, as well as their claims for injunctive relief and (2) against Plaintiffs on their claims for unfair and deceptive trade practices and for punitive damages.

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The dispositive issue is whether Plaintiffs met their burden of showing a substantial change in the circumstances existing at the time of Judge Stephens' Order and the circumstances existing at the time of Judge Hill's Order.

One superior court judge may only modify, overrule, or change the order of another superior court judge where the original order was (1) interlocutory, (2) discretionary, and (3) there has been a substantial change of circumstances since the entry of the prior order. *Stone v. Martin*, 69 N.C. App. 650, 652, 318 S.E.2d 108, 110 (1984). A substantial change in circumstances exists if since the entry of the prior order, there has been an "intervention of new facts which bear upon the propriety" of the previous order. *See Calloway v. Motor Co.*, 281 N.C. 496, 505, 189 S.E.2d 484, 490 (1972). The burden of showing the change in circumstances is on the party seeking a modification or reversal of an order previously entered by another judge. *Cf. Johnson v. Adolf*, 149 N.C. App. 876, 878, 561 S.E.2d 588, 589 (2002) (in child custody modification action, original custody order may not be modified unless party seeking modification shows there has been a substantial change in circumstances affecting the welfare of the child).

In this case, FFIC and BIC contend, at the time of Judge Hill's Order, the parties were in disagreement over the factual materials to be submitted to the referee and this disagreement constitutes a substantial change in circumstances.<sup>4</sup> Defendant does not dispute that, at the time of Judge Hill's Order, the parties could not agree on the materials to be considered by the referee. There is, however, nothing in

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4. There is no dispute that Judge Stephens' Order was interlocutory and discretionary.

**ARTIS & ASSOCS. v. AUDITORE**

[154 N.C. App. 508 (2002)]

this record to show the state of agreement or disagreement on this issue at the time of Judge Stephens' Order. Thus, Plaintiffs have not met their burden of showing the existence of new facts arising since the entry of Judge Stephens' Order. In any event, any disagreement between the parties with respect to the materials to be considered by the referee, even if arising sometime after the entry of Judge Stephens' Order, is immaterial. The referee had, pursuant to Judge Stephens' Order, the "sole discretion" to determine what sources to use in compiling the list of policies "effective from and after April 1, 1996." See *Davis v. Davis*, 58 N.C. App. 25, 34, 293 S.E.2d 268, 274 (1982) (generally powers of referee governed by order of reference).

Accordingly, Judge Hill was without authority to rescind Judge Stephens' Order and, therefore, her summary judgment order must be vacated and this matter remanded to the referee for compliance with Judge Stephens' Order.<sup>5</sup>

Vacated and remanded.

Judges WALKER and BRYANT concur.

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ARTIS & ASSOCIATES, PLAINTIFF V. MARIE ANN AUDITORE, DEFENDANT

No. COA01-1188

(Filed 3 December 2002)

**Appeal and Error— mootness—covenant not to compete—  
expiration while appeal pending**

An appeal from a preliminary injunction against breach of a non-compete agreement which expired while the appeal was pending was moot.

Appeal by defendant from order entered 29 May 2001 by Judge Jesse B. Caldwell, III, in Mecklenburg County Superior Court. Heard in the Court of Appeals 6 June 2002.

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5. Because we vacate the summary judgment order, we do not address FFIC's and BIC's assignments of error.

**ARTIS & ASSOCS. v. AUDITORE**

[154 N.C. App. 508 (2002)]

*Parker, Poe, Adams & Bernstein L.L.P., by Jack L. Cozort, for plaintiff appellee.*

*Robinson, Bradshaw & Hinson, P.A., by David C. Wright, III, and Joshua F. P. Long, for defendant appellant.*

TIMMONS-GOODSON, Judge.

Marie Ann Auditore (“defendant”) appeals from an order of the trial court granting a preliminary injunction in favor of defendant’s former employer, Artis and Associates (“plaintiff”). For the reasons stated herein, we dismiss defendant’s appeal.

The pertinent facts of the appeal are as follows: On 26 March 2001, plaintiff filed a complaint and motion for a preliminary injunction against defendant in Mecklenburg County Superior Court. The complaint alleged that defendant, a former employee of plaintiff, had breached her employment contract with plaintiff. In the employment contract at issue, defendant agreed to “not perform or engage in any ‘Competing Activity’” with plaintiff’s business for a period of one year following termination of the agreement. The complaint alleged that defendant breached this agreement by accepting employment with one of plaintiff’s competitors within the one-year period following defendant’s resignation from her position with plaintiff on 15 December 2000. The complaint set forth claims for breach of contract, tortious interference with contract, misappropriation of trade secrets, unfair competition and injunctive relief.

On 5 April 2001, plaintiff’s motion for preliminary injunction came before the trial court. Upon review of the pleadings, affidavits, legal memoranda, and arguments by counsel, the trial court granted plaintiff’s motion for a preliminary injunction in part and enjoined defendant from competing with plaintiff’s business or disclosing trade secrets as specified in the employment agreement. Defendant promptly filed a notice of appeal of the trial court’s order with this Court on 13 June 2001. Defendant also filed a motion to stay the trial court’s order pending the appeal, which motion the trial court denied. Defendant then filed a petition for writ of supersedeas and motion for a temporary stay of the injunction with this Court. In her petition for writ of supersedeas, defendant noted that, unless a stay of the trial court’s injunction was granted, the expiration on 15 December 2001 of the non-compete clause contained in the employment contract at issue would render the present appeal moot. This Court nevertheless denied such petition and motion.

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## ARTIS &amp; ASSOCS. v. AUDITORE

[154 N.C. App. 508 (2002)]

The dispositive issue before this Court is whether defendant's appeal presents a live controversy or other compelling grounds for review by this Court. Because we conclude that the issues raised in defendant's appeal are moot, we dismiss the appeal.

It is well established that

[w]hen, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.

*Parent-Teacher Assoc. v. Bd. of Education*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969). Thus, where the restrictions imposed by a preliminary injunction expire within the pendency of an appeal, issues concerning the propriety of the injunctive relief granted are rendered moot by the passage of time. See *Rug Doctor, L.P. v. Prate*, 143 N.C. App. 343, 345, 545 S.E.2d 766, 768 (2001); *Herff Jones Co. v. Allegood*, 35 N.C. App. 475, 479, 241 S.E.2d 700, 702 (1978). Where a preliminary injunction is denied or granted based upon a covenant not to compete, our Supreme Court has warned that "where 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).

In *Rug Doctor*, the plaintiff-employer filed a complaint against one of its former employees, alleging violation of the terms of a non-compete agreement. The plaintiff also sought a preliminary injunction to enjoin the defendant-employee from further violating the agreement, the terms of which prohibited the defendant-employee from competing with the plaintiff-employer's business for a period of one year following termination of the employer-employee relationship. See *Rug Doctor*, 143 N.C. App. at 344, 545 S.E.2d at 767. The plaintiff argued that an injunction was necessary to prevent irreparable harm to plaintiff's business interests. The trial court denied the plaintiff's motion for an injunction, concluding that the plaintiff had failed to "carry its burden as to either success on the merits or irreparable loss." *Id.* at 345, 545 S.E.2d at 767. The plaintiff appealed the denial of its motion to this Court.

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[154 N.C. App. 508 (2002)]

On appeal, the Court held that, “as of the filing of this opinion, the twelve month prohibition imposed by the covenant has expired, thus rendering the issues raised by the plaintiff-appellant moot.” *Id.* at 344, 545 S.E.2d at 767. The Court noted, however, that “[a]lthough [the plaintiff] is foreclosed from injunctive relief, there remains the underlying cause of action in which [it] can seek damages for harm caused by [the defendant’s] alleged breach provided, of course, [it is] successful on the merits.” *Id.* at 346, 545 S.E.2d at 768.

This Court dismissed a similar argument as presenting moot issues in *Herff Jones Co. v. Allegood*, cited *supra*. In *Herff Jones Co.*, the plaintiff obtained a temporary restraining order against the defendants on the basis of evidence that the defendants violated their agreements with the plaintiff by “entering into competition with plaintiff within one year following the termination of the [employment] agreements.” *Herff Jones Co.*, 35 N.C. App. 476, 241 S.E.2d at 701. The defendants appealed to this Court the issuance of the temporary restraining order and its subsequent continuance, which were “in effect a preliminary injunction.” *Id.* at 478, 241 S.E.2d at 702. The Court held that, because “[t]he covenant not to compete which is the subject of this action was expressly limited in duration to one year following the termination of the employment relationship between plaintiff and defendants[,]” and because “[t]hat date having passed pending consideration of this appeal by this Court, the questions relating to the propriety of the injunctive relief granted below are not before us.” *Id.* at 478-79, 241 S.E.2d at 702.

In the instant case, defendant appeals from a preliminary injunction enjoining her from breaching a covenant not to compete. The terms of the non-compete covenant contained in the employment agreement between plaintiff and defendant expired on 15 December 2001, more than five months before this appeal was heard by this Court. Plaintiff may not seek to enforce the covenant past the period of time proscribed by the agreement. *See Rug Doctor*, 143 N.C. App. at 345, 545 S.E.2d at 767. Thus, the issues presented by defendant’s appeal have been rendered moot by the passage of time, a fact defendant herself recognized in her petition for writ of supersedeas. *See Herff Jones Co.*, 35 N.C. App. at 479, 241 S.E.2d at 702. We furthermore reject defendant’s argument that her appeal, although moot, nevertheless presents issues involving matters of public interest.

For the reasons set forth, we dismiss this appeal.

**ATKINS v. KELLY SPRINGFIELD TIRE CO.**

[154 N.C. App. 512 (2002)]

Appeal dismissed.

Judges MARTIN and CAMPBELL concur.

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DIANE ATKINS, PLAINTIFF V. KELLY SPRINGFIELD TIRE CO., AND  
THE TRAVELERS INS., CO., DEFENDANT

No. COA01-1460

(Filed 3 December 2002)

**Workers' Compensation— Form 21 agreement—failure to review medical records**

The Industrial Commission erred in a workers' compensation case by approving plaintiff employee's Form 21 compensation agreement without reviewing her medical records as required by N.C.G.S. § 97-82(a) and the case is remanded for a determination of whether the Form 21 agreement was fair and just, because: (1) the record showed the Commission relied only on the Form 25R physician evaluation for permanent disability; and (2) the Commission's substitution of the Form 25R for the statutory requirement of a full and complete medical report is impermissible.

Appeal by plaintiff from Opinion and Award of the North Carolina Industrial Commission filed 4 October 2001. Heard in the Court of Appeals 10 September 2002.

*Kathleen G. Sumner, Attorney for appellant.*

*Jonathan C. Anders and Jaye E. Bingham, Attorneys for Appellees.*

WYNN, Judge.

Under *Lewis v. Craven Reg'l Med. Ctr.*, 134 N.C. App. 438, 441, 518 S.E.2d 1, 3 (1999), the Industrial Commission's conclusion that compensation and compromise agreements are "fair and just must be indicated in the approval order [and] must come after a full review of the medical records filed with the agreement submitted to the Commission." The claimant in this case argues that the Commission erred by approving her compensation agreement without reviewing



**ATKINS v. KELLY SPRINGFIELD TIRE CO.**

[154 N.C. App. 512 (2002)]

her medical records. Because the record shows that the Commission relied only on the Form 25R Physician Evaluation for Permanent Disability, and not the “full and complete medical report” as required under N.C. Gen. Stat. § 97-82(a) (2001), we remand this matter to the Commission for further consideration.

The underlying facts show that claimant Diane Atkins sustained a compensable injury to her left arm on 3 November 1995 while working at Kelly Springfield Tire Company. Based on a 10% permanent partial disability rating to her left arm made by her treating physician, Dr. James H. Askins, the parties executed a Form 21 Agreement for Compensation for Disability for 24 weeks of permanent partial disability benefits. The Commission approved the agreement on 19 August 1996 and two days later, the Commission approved a lump sum award of \$11,472 to Ms. Atkins.

For the next three years, Ms. Atkins did not have any pain in her left arm nor did she receive any medical treatment for her compensable injury. However, after Ms. Atkins began experiencing pain in her left wrist in July 1999, she consulted with her former treating physician, Dr. Askins, who ultimately performed distal ulnar resection surgery on her hand. In October 1999, Ms. Atkins, through an attorney, filed a Form 18 Notice of Accident to Employer along with a request that the claim be assigned for a hearing. Following a hearing, Deputy Commissioner Amy Pfeiffer declined to set aside the Form 21 agreement and denied Ms. Atkins claim for additional benefits; Ms. Atkins appealed to the full Commission. From the full Commission’s affirmance, Ms. Atkins now appeals to this Court.

The North Carolina Workers’ Compensation Act, N.C. Gen. Stat. §§ 97-1 et seq., “does not prevent settlements made by and between the employee and employer so long as the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article.” N.C. Gen. Stat. § 97-17. If the employer and the injured employee reach an agreement regarding compensation, such agreement, “accompanied by a full and complete medical report, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.” N.C. Gen. Stat. § 97-82(a).

In addition to the statutory mandate that the agreement be “accompanied by a full and complete medical report”, N.C. Industrial Comm. R. 501(3) states “no agreement will be approved until all relevant medical, vocational and nursing rehabilitation reports known to

## ATKINS v. KELLY SPRINGFIELD TIRE CO.

[154 N.C. App. 512 (2002)]

exist in the case have been filed with the Industrial Commission." While Rule 503(3) does not define the term "relevant medical reports", reading 501(3) in light of N.C. Gen. Stat. § 97-82(a) leads us to conclude that relevant records include the full and complete medical records related to the work-related injury.

In this case, the Form 21 compensation agreement was submitted for approval with a Form 25R Evaluation for Permanent Disability stamped with the treating physician's signature.<sup>1</sup> Therefore, when the employer sought approval of the Form 21 agreement, no medical records were submitted to the Commission as required. Thus, the claimant argued before the full Commission that the Form 21 agreement must be set aside. In response, the full Commission concluded:

[T]he Commission was presented with a Form 25R that was stamped with the treating physician's signature. . . . While perhaps not advisable, the Commission sometimes approves from agreements based upon a review of the Form 25R if the Form 25R is signed by the treating physician.

We hold that the Commission's substitution of the Form 25R for the statutory requirement of a full and complete medical report is more than "not advisable; it is statutorily impermissible. Under *Lewis*, this Court recognized that the N.C. Gen. Stat. § 97-82(a) requires the Commission to indicate in its approval order that the agreement is fair and just; furthermore, the fair and just determination "*must come after a full review of the medical records filed with the Agreement filed with the Commission.*" *Lewis*, 134 N.C. App. at 441, 518 S.E.2d at 3 (emphasis added). "If the Commission approves an agreement without conducting the required inquiry and concluding the agreement is fair and just, the agreement is subject to being set aside." *Id.*

In this case, the Commission acknowledges that it substituted the Form 25R for the statutorily required "full and complete medical reports." Since we hold that this substitution is not permitted by our legislature, we must remand this matter for further consideration by the Commission to determine whether the Form 21 Agreement was fair and just. *Id.*

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1. The parties discuss a 3 July 1996 medical note from the treating physician which may have been submitted with the Form 21 agreement to the Commission. The Commission concluded in its 4 October 2001 order "it is unclear from the record whether the 3 July 1996 medical note was included." Therefore this Court will not consider this note in its analysis.

**STATE v. PETERSON**

[154 N.C. App. 515 (2002)]

On remand, “the Commission must determine the fairness and justness of the agreement from the medical evidence filed with the agreement at the time it was originally submitted to the Commission for approval.” *Id.* Since it appears from the record there were not any medical records submitted to the Commission with the Form 21 agreement for approval in 1995, the Commission is to review all medical, vocational and rehabilitation records and data related to the work-related injury existing at the time the Form 21 agreement was submitted for original approval. In determining whether the Form 21 agreement was fair and just, the Commission should be guided by the direction set forth in *Lewis*: “The agreement is fair and just only if it allows the injured employee to receive the most favorable disability benefits to which he is entitled.” *Lewis*, 134 N.C. App. at 441, 518 S.E.2d at 3.

Reversed and Remanded.

Judges GREENE and BIGGS concur.



STATE OF NORTH CAROLINA v. WAYNE DWIGHT PETERSON

No. COA02-107

(Filed 3 December 2002)

**Sentencing— basis—insistence on jury trial**

A statutory rape and indecent liberties defendant received a new sentencing hearing where there was a reasonable inference that defendant’s sentences were based in part on his insistence on a jury trial.

Appeal by defendant from judgments dated 27 April 2001 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 15 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Diane G. Miller, for the State.*

*Mary March Exum for defendant appellant.*

## STATE v. PETERSON

[154 N.C. App. 515 (2002)]

GREENE, Judge.

Wayne Dwight Peterson (Defendant) appeals from convictions and sentences imposed consistent with guilty verdicts following a jury trial. Defendant was convicted of three counts of statutory rape, five counts of taking indecent liberties with a minor, and two counts of participating in the prostitution of a minor and was also found to be a habitual felon. As a result of these convictions Defendant was sentenced to an active term of two life sentences, plus an additional 1,594 to 1,986 months, with all sentences running consecutively.

The evidence presented at trial tends to show Defendant picked up Roberta DaVila, her daughter, and two other girls aged fourteen and fifteen and drove them to a park. While driving to the park Defendant asked the girls if they wanted jobs and gave them details on pay and promised to supply them with clothes. At the park, Defendant, with the assistance of Roberta DaVila, had sexual intercourse with the fourteen and fifteen-year-old girls. Defendant subsequently invited the fourteen-year-old girl to his residence where he had sexual intercourse with her a second time, which formed the basis of the third count of statutory rape. Testimony from a third girl, aged sixteen, revealed Defendant invited girls to his apartment where they were taught to do modeling poses wearing only a shirt. While at the apartment, the girls were asked to have sexual intercourse with Defendant because Defendant's "boss needed to know if [the girls] were ready" and by telling Defendant they would have sexual intercourse with him they would "prove themselves ready."

At the sentencing hearing, the State tendered as an aggravating factor on two of the counts of statutory rape that Defendant joined with more than one other in committing the offenses and was not charged with conspiracy. As the only basis for this factor, the State argued Defendant had joined with Roberta DaVila in committing statutory rape. Defendant submitted as a mitigating factor that he had been honorably discharged from the United States Marine Corps. Neither party attempted to contradict the factors submitted. The trial court then addressed Defendant directly, stating Defendant had shown himself to be a "master manipulator and con artist" and Defendant "attempted to be a con artist with the jury." Further, the trial court stated Defendant had "rolled the dice in a high stakes game with the jury, and it's very apparent that [Defendant] lost that gamble." The court further stated the evidence against Defendant "was overwhelming and such that any rational person would never have

## STATE v. PETERSON

[154 N.C. App. 515 (2002)]

rolled the dice and asked for a jury trial.” The trial court concluded: “normally I will say that there’s a special place in hell reserved for villains like you. Meanwhile, it’s my intent that you will never walk in this society again as a free man because your crimes were deplorable and you’re going to get that type of sentence.”

At Defendant’s sentencing, the trial court found as an aggravating factor that Defendant joined with more than one other in committing the offenses and was not charged with conspiracy. As a mitigating factor, the trial court found Defendant had been honorably discharged from the Marine Corps. The trial court applied the factors to two of the counts of statutory rape, three counts of taking indecent liberties with a minor, and both counts of participating in the prostitution of a minor. Defendant was sentenced to a mitigated sentence of 107 to 138 months on each of the remaining two counts of taking indecent liberties with a minor based on Defendant’s honorable discharge. On the third count of statutory rape, Defendant was sentenced to 480 to 585 months, the maximum sentence within the presumptive range at Defendant’s prior conviction level. On all counts except for the three statutory rape convictions, Defendant was sentenced as a habitual felon. On the counts where the aggravating and mitigating factors applied, the trial court found the aggravating factor outweighed the mitigating factor.

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The dispositive issue is whether it can reasonably be inferred Defendant’s sentence was based, even in part, on Defendant’s insistence on a jury trial.<sup>1</sup>

A sentence within statutory limits is “presumed to be regular.” *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977). Where the record, however, reveals the trial court considered an improper matter in determining the severity of the sentence, the presumption of regularity is overcome. *Id.* It is improper for the trial court, in sentencing a defendant, to consider the defendant’s decision to insist on a jury trial. *State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990). Where it can be reasonably inferred the sentence imposed on a defendant was based, even in part, on the defendant’s insistence on a jury trial, the defendant is entitled to a new sentencing hearing. *Id.*

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1. Defendant asserts other assignments of error in his brief to this Court in support of his argument that he is entitled to a new trial. We reject those arguments as either not properly preserved for appellate review or on the grounds there has been no showing of prejudice.

## DANIELS v. WAL-MART STORES, INC.

[154 N.C. App. 518 (2002)]

In this case, Defendant was sentenced to the maximum sentence within the presumptive statutory range for the third count of statutory rape, within the mitigated statutory range for a habitual felon on two of the indecent liberties counts, and in the aggravated statutory range for the remainder of his offenses.<sup>2</sup> At sentencing, the trial court stated Defendant “tried to be a con artist with the jury,” and he “rolled the dice in a high stakes game with the jury, and it’s very apparent that [he] lost that gamble.” Further, the court stated the evidence of guilt was “such that any rational person would never have rolled the dice and asked for a jury trial with such overwhelming evidence.” Thus, the record reveals the trial court, while sentencing Defendant, improperly considered Defendant’s decision to exercise his right to a jury trial. From the trial court’s statements, it can reasonably be inferred the trial court based the sentences imposed on Defendant, at least in part, on Defendant’s insistence on a jury trial.<sup>3</sup> Accordingly, Defendant is entitled to a new sentencing hearing on all the convictions.

Trial: No error.

Sentencing: Vacated and remanded for a new sentencing hearing.

Judges MARTIN and BRYANT concur.

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DEAN DANIELS, PLAINTIFF V. WAL-MART STORES, INC., DEFENDANT

No. COA02-7

(Filed 3 December 2002)

### **Appeal and Error— briefs—type size**

An appeal was dismissed for not complying with an order requiring a substitute brief meeting the type size requirements of Rule 26(g) of the Rules of Appellate Procedure.

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2. The State concedes that the aggravating factor found by the trial court was error, as there was no evidence to indicate Defendant joined with more than one other person in the commission of his offenses. *See State v. Noffsinger*, 137 N.C. App. 418, 428, 528 S.E.2d 605, 612 (2000). Accordingly, this constitutes an alternative basis for remanding the cases in which this aggravating factor was applied for a new sentencing hearing.

3. There is nothing in the record showing Defendant rejected a plea offer from the State. The record, however, does show Defendant pleaded not guilty and insisted on a jury trial.

## DANIELS v. WAL-MART STORES, INC.

[154 N.C. App. 518 (2002)]

Appeal by defendant from order filed 23 August 2001 by Judge W. Allen Cobb, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 12 November 2002.

*Narron & Holdford, P.A., by B. Perry Morrison, Jr., for plaintiff appellee.*

*Brown, Crump, Vanore & Tierney, L.L.P., by Michael W. Washburn, for defendant appellant.*

GREENE, Judge.

Wal-Mart Stores, Inc. (Defendant) appeals from an order filed 23 August 2001 granting Dean Daniels (Plaintiff) a new trial. Defendant filed notice of appeal on 12 September 2001 and filed a brief in this Court on 15 April 2002.

On 23 July 2002, this Court entered an order striking Defendant's brief for failure to comply with Rule 26(g) of the Rules of Appellate Procedure and *Lewis v. Craven Regional Medical Center*, 122 N.C. App. 143, 468 S.E.2d 269 (1996) (briefs must contain no more than 65 characters and spaces per line, or 10 characters per inch, to comply with appellate rules); N.C.R. App. P. 26(g).<sup>1</sup> This Court further ordered Defendant to file a substitute brief complying with the appellate rules within ten days of the order. Defendant has not filed a substitute brief.

This Court may impose sanctions under Appellate Rules 25 and 34 for failure to comply with an order requiring a substitute brief. *Hilliard v. Hilliard*, 146 N.C. App. 709, 714, 554 S.E.2d 374, 378 (2001); N.C.R. App. P. 25, 34. Thus, Defendant is subject to sanctions, including dismissal of this appeal, for failure to comply with an order of this Court requiring a substitute brief. N.C.R. App. P. 34(b)(1). Accordingly, in our discretion we elect to dismiss Defendant's appeal.

Dismissed.

Chief Judge EAGLES and Judge MARTIN concur.

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1. Appellate Rule 26(g) was amended effective 7 October 2002 to require compliance with a new provision in Appellate Rule 28 that mandates briefs submitted in non-proportionally spaced type may not contain more than 10 characters per inch and briefs submitted in proportional type must be in at least 14 point type. N.C.R. App. P. 26(g); N.C.R. App. P. 28(j)(1)(B).

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 3 DECEMBER 2002

BASDEN v. BASDEN No. 01-1430	Duplin (00CVD432)	Affirmed
BOGER v. CURLEE MASORY, INC. No. 02-199	Ind. Comm. (I.C.969629)	Affirmed
DEMPSEY v. JOHNNY'S MOBILE HOME SERV. OF ASHEVILLE, INC. No. 02-245	Polk (00CVS160)	No error
DICKENS v. STEPHENSON No. 02-227	Halifax (01CVS747)	Affirmed
HOOD v. EDWARDS No. 01-1575	Union (99CVS1372) (99CVS1373) (99CVS1374)	No error
ICARDI v. CELERIS CORP. No. 01-988	Wake (00CVS936)	Affirmed in part; reversed and remanded in part
IN RE OLIVER No. 02-343	Mecklenburg (99J117)	Affirmed
IN RE SIMONE No. 01-1441	Moore (98J138)	Affirmed
OLD REPUBLIC SURETY CO. v. RELIABLE HOUSING, INC. No. 01-1021	Guilford (00CVS8477)	Affirmed
PARSONS v. MILNER No. 02-120	Wilkes (94CVS186)	Affirmed
RUSSELL v. FOOD LION, INC. No. 01-1563	Ind. Comm. (I.C.475786)	Affirmed
STATE v. BECTON No. 02-273	Wake (98CRS64472) (99CRS13) (99CRS1280) (99CRS63109) (99CRS63110)	Vacated and remanded in part; no error in part
STATE v. BEST No. 02-294	Wilson (00CRS58015) (00CRS58016)	Vacated in part, remanded for re-sentencing in part



STATE v. BILAL No. 02-182	Rutherford (01CRS3214) (01CRS3215) (01CRS3216) (01CRS3217) (01CRS3218) (01CRS5267)	No error
STATE v. BRYANT No. 02-144	Wake (93CRS45390) (93CRS45392)	Vacated and remanded for resentencing
STATE v. COOPER No. 02-62	Forsyth (00CRS40391) (00CRS57553) (00CRS57958) (01CRS4207)	No error in trial; remanded for resentencing
STATE v. CUNNINGHAM No. 02-70	Mecklenburg (97CRS20372)	Dismissed
STATE v. DURANT No. 02-73	Columbus (01CRS50410)	No error
STATE v. FARRAR No. 01-1569	Mecklenburg (00CRS34493) (00CRS34494) (00CRS153450)	No error
STATE v. HARRIS No. 01-1193	Forsyth (00CRS22020) (00CRS25307)	No error
STATE v. HONEYCUTT No. 02-213	Randolph (98CRS352)	No error
STATE v. JONES No. 02-307	Lenoir (00CRS5799) (00CRS5800)	No error
STATE v. LAWS No. 02-184	New Hanover (00CRS18452)	No error
STATE v. MARTIN No. 02-277	New Hanover (98CRS35222)	No error
STATE v. OWNBEY No. 01-1434	Cherokee (01CRS64) (01CRS65)	No error
STATE v. RATHBONE No. 02-224	Jackson (00CRS853) (00CRS854) (00CRS858) (00CRS859)	No error

	(00CRS860)	
	(00CRS861)	
	(00CRS862)	
	(00CRS863)	
	(00CRS864)	
	(00CRS865)	
	(00CRS866)	
	(00CRS867)	
STATE v. ROYALL No. 02-194	Yadkin (00CRS50472)	Remanded for a new sentencing hearing
STATE v. SMITH No. 02-288	Rutherford (95CRS3097)	No error
STATE v. ST. JOHN No. 01-1281	Caldwell (00CRS6135) (01CRS5189)	No error
STATE v. WIKE No. 02-287	Gaston (00CRS56887)	No error
STATE v. WILKINS No. 02-235	Forsyth (01CRS25589) (01CRS51908)	No error
TAYLOR v. K-MART CORP. No. 02-329	Ind. Comm. (I.C.824724)	Affirmed
THOMAS v. EVANS No. 01-1522	Lee (00CVS447)	Affirmed

**NUNN v. ALLEN**

[154 N.C. App. 523 (2002)]

DONALD RAY NUNN, PLAINTIFF v. CLAY ALLEN, DEFENDANT

No. COA01-1570

(Filed 17 December 2002)

**1. Alienation of Affections; Criminal Conversation— common law tort—recognized by North Carolina Supreme Court**

The Court of Appeals has no authority to abolish the torts of alienation of affection and criminal conversation even though defendant contends the torts are archaic, antiquated, and offensive to the concept of feminine equality, because: (1) neither tort is a statutory creation, and both emanate from the common law and have been recognized by our Supreme Court; and (2) the Court of Appeals has no authority to overrule decisions of our Supreme Court.

**2. Evidence— exclusion of statements made to defendant by plaintiff's wife—harmless error**

The trial court did not err in an alienation of affections and criminal conversation case by excluding testimony concerning statements made to defendant by plaintiff's wife concerning her relationship with plaintiff, because some of the excluded evidence was later admitted through the testimony of plaintiff's wife, rendering harmless its exclusion during defendant's testimony, and defendant made no offer of proof as to the other testimony.

**3. Appeal and Error— preservation of issues—failure to cite authority—general objections—failure to show prejudice**

Although defendant contends the trial court erred in an alienation of affections and criminal conversation case by permitting plaintiff to cross-examine defendant concerning property owned by defendant's father and to cross-examine plaintiff's wife concerning the pendency of charges against her for embezzlement from her place of employment, this assignment of error is dismissed because: (1) defendant did not preserve this issue for appeal by failing to cite any authority and by interposing only general objections at trial; and (2) defendant has neither argued nor demonstrated that he was prejudiced by the challenged cross-examinations.

## NUNN v. ALLEN

[154 N.C. App. 523 (2002)]

**4. Child Support, Custody, and Visitation— support—amount**

The trial court did not err in an alienation of affections and criminal conversation case by permitting plaintiff to elicit testimony from an employee in the child support section of superior court concerning the amount of child support which would have been required in 1997 of a person earning the same income as plaintiff's wife earned in 1996, because: (1) contrary to defendant's assertion that N.C.G.S. § 8C-1, Rule 702 was violated, the witness was neither offered nor accepted as an expert witness; (2) the witness testified that she had calculated the child support obligation by applying the applicable child support guidelines to the income as shown by the W-2 form of plaintiff's wife and by determining the presumptive amount of child support; and (3) defendant failed to show prejudice.

**5. Evidence— redirect examination—suitcase of drugs—harmless error**

The trial court did not commit prejudicial error in an alienation of affections and criminal conversation case by admitting plaintiff's testimony during redirect examination that his wife had told him she had seen a suitcase of drugs at defendant's residence because, although it does not appear that defendant's counsel opened the door for the challenged testimony and there is no other basis for its admission, in light of the other evidence this single statement would not have been likely to affect the jury's verdict or award.

**6. Alienation of Affections— directed verdict—judgment notwithstanding verdict—sufficiency of evidence—post-separation conduct admissible**

The trial court did not err by denying defendant's motion for a directed verdict and for judgment notwithstanding the verdict in an action for alienation of affection, because: (1) there was evidence that plaintiff and his wife had a loving marriage until 1996; (2) postseparation conduct is admissible and relevant to corroborate evidence of preseparation conduct, and the evidence of postseparation conduct here provided strong circumstantial evidence explaining and corroborating defendant's preseparation conduct; (3) defendant admitted to having sexual intercourse with plaintiff's wife in October 1997 and continuing a sexual relationship with her thereafter; and (4) a jury could find from all the evidence, without having to engage in speculation, that defend-

## NUNN v. ALLEN

[154 N.C. App. 523 (2002)]

ant's conduct was the effective cause of the wife's alienation of affection.

**7. Alienation of Affections— motion to set aside verdict— motion for new trial—sufficiency of evidence—preseparation misconduct**

The trial court did not abuse its discretion by denying defendant's N.C.G.S. § 1A-1, Rule 59 motion to set aside the compensatory damage verdict for alienation of affection and by failing to grant a new trial, because there was sufficient evidence of preseparation misconduct on defendant's part.

**8. Criminal Conversation— sufficiency of evidence—postseparation sexual relationship—separation agreement**

The trial court did not err by submitting the charge of criminal conversation to the jury, because: (1) plaintiff presented substantial evidence, and defendant admitted, that defendant had sexual intercourse with plaintiff's wife while she was married to plaintiff; (2) a claim for criminal conversation may be based solely upon postseparation sexual relations; (3) the existence of a separation agreement between plaintiff and plaintiff's wife does not shield defendant from liability for criminal conversation based on his postseparation sexual relationship with plaintiff's wife; and (4) the cited provision of the separation agreement does not, without evidence of plaintiff's prior knowledge and approval of defendant's sexual intercourse with plaintiff's wife while she was married to plaintiff, establish his consent to such intercourse.

**9. Criminal Conversation— motion to set aside verdict— motion for new trial—sufficiency of evidence**

The trial court did not abuse its discretion by denying defendant's N.C.G.S. § 1A-1, Rule 59 motion to set aside the compensatory damage verdict for criminal conversation and by failing to grant a new trial, because plaintiff presented substantial evidence from which a jury could have determined that he experienced mental anguish and humiliation due to the affair between his wife and defendant including: (1) the testimony of plaintiff's father as to plaintiff's depressed mental state; (2) plaintiff's own testimony that he began consulting with his pastor to help deal with his emotional turmoil; and (3) even up to the week before trial, plaintiff continually tried to contact his former wife by leaving notes on her car asking for a chance to speak with her again.

## NUNN v. ALLEN

[154 N.C. App. 523 (2002)]

**10. Alienation of Affections— punitive damages—sexual relationship—laughter about situation—knowledge affecting children**

The trial court did not err by awarding punitive damages for an alienation of affection claim, because: (1) evidence of sexual relations between defendant and plaintiff's spouse has been held to satisfy the necessary element of aggravation, and defendant admitted to sexual relations with plaintiff's wife during her marriage to plaintiff; (2) defendant's laughter about the situation has been held to be evidence of malice, and there was evidence that defendant laughed at plaintiff and his father when they spoke with defendant about his relationship with plaintiff's wife; and (3) knowledge that the relationship would harm plaintiff's children has been a factor showing malice, and there was evidence that plaintiff's son told defendant to stay away from his mother.

**11. Criminal Conversation— punitive damages—same sexual misconduct sufficient**

The trial court did not abuse its discretion by denying defendant's motion for a new trial on the punitive damages issue for a criminal conversation claim, because: (1) the same sexual misconduct necessary to establish the tort of criminal conversation may also sustain an award of punitive damages; and (2) there was sufficient evidence of defendant's sexual intercourse with plaintiff's wife during her marriage to plaintiff to support a verdict for plaintiff.

**12. Alienation of Affections— jury instructions—active role—preseparation misconduct**

The trial court did not err by instructing the jury on alienation of affection even though the court refused to give defendant's requested instruction that to be liable defendant must have had an active role in alienating the wife's affection and that any claim must be based on preseparation conduct, because: (1) the instruction given by the trial court established that there must exist some wrongful action on the part of defendant leading to the alienation; (2) there is no indication defendant ever specifically requested that the trial court instruct the jury it was only to consider preseparation conduct or that defendant presented the trial court with any authority in support of such a position; and (3) the fact that the jury had previously been given a different instruction is not grounds for asserting prejudice where the trial

## NUNN v. ALLEN

[154 N.C. App. 523 (2002)]

court in this case specifically instructed the jury that it was to disregard the prior instruction.

**13. Alienation of Affections— jury instructions—compensatory damages**

Although defendant contends the trial court erred by instructing the jury as to compensatory damages for alienation of affection that it could consider the degree to which plaintiff and his wife's relationship was destroyed in addition to plaintiff's mental anguish, shame, humiliation, loss of reputation and support, and any other adverse effect on the quality of the marital relationship, this assignment of error is overruled because: (1) the Court of Appeals previously rejected defendant's contentions as to the sufficiency of the evidence; and (2) defendant failed to cite any authority to support his argument that the trial court's instruction was otherwise erroneous.

**14. Criminal Conversation— jury instruction—waiver or consent**

The trial court did not err on the claim of criminal conversation by instructing the jury that it should not consider whether plaintiff and his wife had separated before the sexual intercourse occurred, because the plaintiff's separation agreement with his wife did not constitute a waiver or consent for sexual intercourse between the wife and another person.

**15. Criminal Conversation— jury instruction—factors**

The trial court did not err by instructing the jury on factors for determining an amount of compensatory damages to award on the criminal conversation claim, because: (1) there was evidence in the record from which the jury could find that plaintiff suffered loss of consortium, mental anguish, or humiliation as a result of defendant's sexual relationship with plaintiff's wife; (2) the instruction allowed the jury to award only nominal damages if the factors were not present; and (3) defendant cites no law supporting his attack on the instruction.

**16. Damages and Remedies— punitive damages—jury instruction**

The trial court did not err in an alienation of affections and criminal conversation case by instructing the jury on the issue of punitive damages, because: (1) the trial court instructed the jury that punitive damages were within its discretion to award and

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that the amount should bear a reasonable relationship to the sum reasonably needed to punish defendant and deter others; (2) defendant cited no authority for alleged violations of his constitutional rights or for why the standard articulated by the judge was not constitutionally adequate; and (3) there is no indication in the record that defendant objected to the instructions on punitive damages or submitted a proposed instruction on the issue.

Appeal by defendant from judgment entered 9 May 2001 by Judge F. Fetzter Mills in Richmond County Superior Court. Heard in the Court of Appeals 17 September 2002.

*Henry T. Drake for plaintiff-appellee.*

*Katherine E. Jean for defendant-appellant.*

MARTIN, Judge.

Plaintiff brought this action seeking compensatory and punitive damages from defendant, alleging that defendant had alienated the affection of plaintiff's wife and had engaged in criminal conversation with her. Defendant denied the allegations.

Briefly summarized, the evidence at trial tended to show that plaintiff Donald Nunn married Vickie O'Brien Nunn, now Vickie Woods (hereinafter "Mrs. Nunn"), on 1 July 1978; three sons were born to the marriage. Mrs. Nunn moved out of the couple's home in April 1997. Plaintiff and Mrs. Nunn signed a separation agreement on 8 September 1997, and were divorced on 17 August 1998.

Evidence regarding the state of the marriage prior to the couple's separation, as well as the cause and date of onset of the deterioration of the marriage, is conflicting. Mrs. Nunn had been employed for several years at Allen Brothers Timber Company ("Allen Brothers") as secretary of the corporation. Defendant is also employed by Allen Brothers; his father is president of the company and defendant is a vice-president. Plaintiff introduced evidence tending to show that defendant spent time with Mrs. Nunn at work, after work, and on the weekends before and during the couple's separation, and that the corporation helped Mrs. Nunn buy a new car and provided a residence for her grandmother, into which Mrs. Nunn moved after her separation from plaintiff. Plaintiff testified that in September 1997, he went, with his father and Herman Searcey, to defendant's residence and, looking into a window, observed Mrs. Nunn and defendant kissing; as



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he continued to watch, it appeared to him that Mrs. Nunn placed her head between the defendant's legs as though she was performing oral sex upon him. Mr. Searcey testified that he saw Mrs. Nunn performing oral sex upon defendant. The next day, plaintiff's attorney prepared a separation agreement which plaintiff and Mrs. Nunn signed on 8 September 1997.

Through the testimony of Mrs. Nunn and other witnesses, there was evidence that plaintiff had accused or suspected Mrs. Nunn of having affairs with other men during their marriage. Mrs. Nunn testified that "rumors" circulated that her youngest son, who was born in 1991, was, in fact, fathered by defendant's father Bruce Allen or his cousin Steve Allen, Jr. Plaintiff testified that when he confronted Steve Allen, Jr., about these rumors, Steve said, "Clay is your man."

Mrs. Nunn and defendant both testified that they had sexual intercourse for the first time in or about October 1997; Mrs. Nunn testified that it occurred after she and plaintiff had signed the separation agreement. In addition, plaintiff offered evidence that defendant, by his failure to respond to plaintiff's Request for Admissions dated 5 May 1999, had admitted to a sexual relationship with Mrs. Nunn "during the year of 1997" and that such relationship continued to the date of the Request for Admissions.

There was evidence that plaintiff had engaged in an extra-marital relationship with a co-worker in or about 1996. Although there was no evidence that the relationship was sexual, the two often had lunch together, and were seen by witnesses in physically close situations in plaintiff's truck and office. In the fall of 1996, Mrs. Nunn found greeting cards the co-worker had given to plaintiff. Mrs. Nunn and other witnesses testified that the cards appeared to be of a romantic nature and that Mrs. Nunn was upset by their discovery. Mrs. Nunn testified that she stopped sleeping in the same bed with her husband because he would not bathe after coming home from his job working on cars and before getting into bed, and that she was generally disgusted with him and other things going on in her life. She testified that defendant had nothing to do with her separation from plaintiff.

The jury answered the issues of alienation of affection and criminal conversation in favor of plaintiff and awarded compensatory damages of \$50,000 and punitive damages of \$50,000. Defendant's post-verdict motions were denied and the trial court entered judgment on the verdict. Defendant appeals.

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In his brief to this Court, defendant argues, in support of his twenty-eight assignments of error, (I) the common law claims for alienation of affection and criminal conversation should be judicially abolished; (II) the trial court erred in various of its evidentiary rulings; (III) the trial court erred in denying his motions for directed verdict, for judgment notwithstanding the verdict, for a new trial, and in entering judgment on the verdict, because the evidence was insufficient to support a judgment in plaintiff's favor on any theory; and (IV) the trial court erred in its instructions to the jury. After careful review of defendant's arguments, we decline to disturb the verdict or the judgment.

## I.

**[1]** Defendant asserts that the torts of alienation of affection and criminal conversation are "archaic, antiquated, and offensive to the concept of feminine equality," and asks that we abolish the torts in North Carolina. Neither tort is a statutory creation; both emanate from the common law and have been recognized by our Supreme Court. *See, e.g., Henson v. Thomas*, 231 N.C. 173, 56 S.E.2d 432 (1949). This Court has no authority to overrule decisions of the North Carolina Supreme Court. *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1984), *vacated on other grounds*, 313 N.C. 324, 327 S.E.2d 888 (1985); *Hutelmyer v. Cox*, 133 N.C. App. 364, 514 S.E.2d 554, *disc. review denied*, 351 N.C. 104, 541 S.E.2d 146 (1999).

## II.

**[2]** By six assignments of error, defendant contends the trial court erred in various rulings admitting or excluding evidence. First, defendant contends the trial court erred by excluding his testimony concerning statements made to him by Mrs. Nunn concerning her relationship with plaintiff. Defendant argues the evidence was relevant to show his state of mind and beliefs and, therefore, was relevant to the issue of the existence or absence of malice on his part, an element necessary to prove alienation of affection and also necessary for an award of punitive damages. However, some of the excluded evidence was later admitted through the testimony of Mrs. Nunn, rendering harmless its exclusion during defendant's testimony. *See State v. Richardson*, 341 N.C. 658, 462 S.E.2d 492 (1995) (any error in exclusion of evidence harmless where evidence of same import admitted through the testimony of other witnesses). Defendant made no offer of proof as to the other testimony he contends was erroneously excluded by the trial court. N.C. Gen. Stat. § 8C-1, Rule 103(a)(2)

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(error may not be predicated upon a ruling excluding evidence unless substance of evidence was apparent or made known to trial court by offer).

**[3]** Defendant also assigns error to the trial court's rulings permitting plaintiff to cross-examine him concerning property owned by his father and to cross-examine Mrs. Nunn concerning the pendency of charges against her for embezzlement from Allen Brothers Timber Company. On appeal, defendant argues, without citing any authority, the evidence was not relevant. At trial, however, he interposed only general objections and, as such, did not clearly present the alleged error to the trial court as required by G.S. § 8C-1, Rule 103(a)(1). The rulings, therefore, have not been preserved for appeal. *See State v. Reid*, 322 N.C. 309, 367 S.E.2d 672 (1988). In any event, defendant has neither argued nor demonstrated that he was prejudiced by the challenged cross-examinations. *See Dept. of Transportation v. Craine*, 89 N.C. App. 223, 226, 365 S.E.2d 694, 697 (1988) (appellant must show that erroneous admission of evidence "probably influenced the jury verdict"); *McNabb v. Town of Bryson City*, 82 N.C. App. 385, 346 S.E.2d 285, *review dismissed*, 319 N.C. 397, 354 S.E.2d 239 (1987).

**[4]** Defendant also assigns error to the trial court's rulings permitting plaintiff to elicit testimony from Vickie Daniel, an employee in the child support section of the Richmond County Clerk of Superior Court, concerning the amount of child support which would have been required in 1997 of a person earning the same income as Mrs. Nunn earned in 1996. His objections at trial were based upon relevance and lack of foundation; on appeal he argues only that there was an inadequate foundation for her testimony, citing G.S. § 8C-1, Rule 702 as the sole support for his argument. However, Ms. Daniel was neither offered nor accepted as an expert witness and the cited rule has no application here. Moreover, Ms. Daniel testified that she had calculated the child support obligation by applying the applicable child support guidelines to the income as shown by Mrs. Nunn's 1996 W-2 form and determining the presumptive amount of child support. She acknowledged that the presumptive amount would be affected by certain variables, about which she was extensively cross-examined by defendant's counsel. Defendant has shown no prejudice and this assignment of error is also overruled.

**[5]** Defendant next assigns error to the admission of plaintiff's testimony, during re-direct examination, that his wife had told him she "had seen a suitcase of drugs" at defendant's residence. The trial

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court overruled defendant's objection to the testimony, ruling that defendant had "opened the door" for such testimony during his counsel's cross-examination of plaintiff. Our review does not reveal any cross-examination by defendant's counsel which would have "opened the door" for the challenged testimony and we find no basis for its admission. However, in light of the other evidence, we do not believe this single statement would have been likely to affect the jury's verdict or award. See *Dept. of Transportation v. Craine, supra*. This assignment of error is overruled.

Defendant cites no authority and advances no legal argument in support of his remaining evidentiary assignment of error. It merits no discussion and is overruled.

## III.

In his primary argument, defendant assigns error to the denial of his motions for directed verdict, judgment notwithstanding the verdict, and for a new trial, because he contends the evidence was insufficient as a matter of law to sustain a verdict in plaintiff's favor (1) for alienation of affection, (2) for criminal conversation, and (3) for punitive damages.

A motion for directed verdict is appropriately granted only when by looking at the evidence in the light most favorable to the nonmovant, and giving the nonmovant the benefit of every reasonable inference arising from the evidence, the evidence is insufficient for submission to the jury. . . . 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. . . . A trial court's decision to grant or deny a motion for directed verdict or a motion notwithstanding the verdict will not be disturbed on appeal absent an abuse of discretion.

*Crist v. Crist*, 145 N.C. App. 418, 422, 550 S.E.2d 260, 264 (2001) (citations omitted).

Alienation of Affection

**[6]** Defendant contends plaintiff failed to produce sufficient evidence as to the existence of each element of the tort of alienation of affection to warrant submission of the issue to the jury. A claim for alienation of affection requires that plaintiff present evidence:

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“(1) there was a marriage with love and affection existing between the husband and wife; (2) that love and affection was alienated; and (3) the malicious acts of the defendant produced the loss of that love and affection.”

*Pharr v. Beck*, 147 N.C. App. 268, 271, 554 S.E.2d 851, 854 (2001) (footnote omitted). With respect to the first element, the plaintiff need not prove that he and his spouse had a marriage free from discord, only that some affection existed between them. *Brown v. Hurley*, 124 N.C. App. 377, 477 S.E.2d 234 (1996). In terms of proving that alienation of affection occurred, plaintiff need only show that his spouse's affection for him was “diminished or destroyed.” *Pharr*, 147 N.C. App. at 271 n.1, 554 S.E.2d at 854 n.1. The third element requires a showing of both “malice and proximate cause.” *Id.* at 271, 554 S.E.2d at 854. Malice is shown by evidence that defendant knew of the marriage and acted intentionally in a way likely to affect the marriage. *Id.* at 272, 554 S.E.2d at 854. Proximate cause does not require that defendant's acts be the sole cause of the alienation, as long as they were the “controlling or effective cause.” *Heist v. Heist*, 46 N.C. App. 521, 523, 265 S.E.2d 434, 436 (1980).

Plaintiff offered substantial evidence from which a jury could find the existence of the first element. There was evidence that plaintiff and his wife had a “loving marriage” until 1996. Plaintiff testified that between 1993 and 1995, Mrs. Nunn's attention to housework and preparing family meals, as well as her interest in sexual relations with him, began to decline. She stopped attending church with plaintiff and their sons and did not want to take family trips in 1995 and 1996. In November 1996, Mrs. Nunn began sleeping separately from plaintiff and their sexual relationship ended except for one isolated incident of sexual intercourse before April 1997. In April 1997, she moved out of the marital home.

With respect, however, to the element that defendant maliciously engaged in conduct which proximately resulted in the alienation of Mrs. Nunn's affection from plaintiff, defendant argues, citing *Pharr, supra*, that a claim for alienation of affection can only be based on pre-separation conduct by defendant, and the evidence shows that any wrongful conduct by defendant only occurred after Mrs. Nunn separated from plaintiff. We disagree. There was evidence tending to show that defendant and Mrs. Nunn worked together for a number of years prior to her separation from plaintiff and that she would occasionally go to defendant's brother's ranch on weekends to ride horses and defendant would be there. The evidence also showed that Allen

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Brothers Timber Company purchased a house for Mrs. Nunn's grandmother to rent and live in, and that Mrs. Nunn moved into that residence when she separated from plaintiff.

There was also evidence tending to show that after Mrs. Nunn separated from plaintiff, she would go to defendant's residence for drinks with defendant's brother and sister-in-law. Plaintiff testified that between April and September 1997, he observed Mrs. Nunn's car driving down the road to defendant's home in the late afternoon about half a dozen times. In September 1997, plaintiff and Mr. Searcey saw defendant and Mrs. Nunn hugging and kissing, and Mr. Searcey saw her performing oral sex on defendant. Under *Pharr, supra*, post-separation conduct is admissible and relevant to corroborate evidence of pre-separation conduct, and the evidence of post-separation conduct here provides strong circumstantial evidence explaining and corroborating defendant's pre-separation conduct. In addition, defendant admitted to having sexual intercourse with Mrs. Nunn in October 1997 and continuing a sexual relationship with her thereafter. We hold that a jury could find from all the evidence, without having to engage in speculation, that defendant's conduct was the effective cause of the alienation of Mrs. Nunn's affection from plaintiff, and the trial court did not err in denying defendant's motions for directed verdict and judgment notwithstanding the verdict.

[7] Defendant also assigns error to the denial of his G.S. § 1A-1, Rule 59 motion to set aside the compensatory damage verdict for alienation of affection and grant a new trial. He argues on appeal that there was no evidence to support the award of compensatory damages for alienation of affection and thus the trial court erred in its denial of the motion.

In a cause of action for alienation of affections . . . , the measure of damages is the present value in money of the support, consortium, and other legally protected marital interests lost by [plaintiff] through the defendant's wrong. In addition thereto, [plaintiff] may also recover for the wrong and injury done to [plaintiff's] health, feelings, or reputation.

*Sebastian v. Kluttz*, 6 N.C. App. 201, 219, 170 S.E.2d 104, 115 (1969). Defendant's argument again centers on the alleged timing of plaintiff's losses; he argues that plaintiff had already lost his sexual relationship with Mrs. Nunn, her companionship, household and family care, and financial support when defendant's relationship with Mrs. Nunn began. This argument, however, is premised on

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defendant's contention that there was insufficient evidence of pre-separation misconduct on his part, a contention which we have rejected for the reasons stated above. The trial court did not abuse its discretion by refusing to set aside the compensatory damages award and grant defendant a new trial on this issue. See *Horner v. Byrnett*, 132 N.C. App. 323, 328, 511 S.E.2d 342, 346 (1999) (appellate court will not reverse ruling on motion for new trial without showing of an abuse of discretion " 'resulting in a substantial miscarriage of justice' ").

Criminal Conversation

[8] Defendant also contends plaintiff failed to produce sufficient evidence to warrant submission of the issue of criminal conversation to the jury. The elements of the tort of criminal conversation "are the actual marriage between the spouses and sexual intercourse between defendant and the plaintiff's spouse during the coverture." *Brown v. Hurley*, 124 N.C. App. at 380, 477 S.E.2d at 237. The cause of action is based upon "the fundamental right to exclusive sexual intercourse between spouses." *Johnson v. Pearce*, 148 N.C. App. 199, 200, 557 S.E.2d 189, 190 (2001). Plaintiff presented substantial evidence, and defendant admitted, that he had sexual intercourse with Mrs. Nunn while she was married to plaintiff. Defendant argues, however, that the existence of the separation agreement between plaintiff and Mrs. Nunn provides him with at least two defenses.

First, defendant asserts there is no evidence that he had sexual intercourse with Mrs. Nunn until after she and plaintiff had executed the separation agreement in which he waived his "right to exclusive sexual intercourse" with his spouse. The separation agreement contained the following provision:

LIVING SEPARATE: Husband and Wife shall continue to live separate and apart, each at such place of residence as he or she may freely choose, free from all interference, authority and control, direct or indirect, by the other party, as fully as if each party were unmarried. Neither shall molest the other nor harass the other, nor compel nor endeavor to compel the other to cohabit or dwell with him or her.

In *Johnson v. Pierce*, *supra*, this Court held that a claim for criminal conversation may be based solely upon post-separation sexual relations. See also *Bryant v. Carrier*, 214 N.C. 191, 198 S.E. 619 (1938) (fact that intercourse occurs during separation of plaintiff and

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spouse does not bar action for criminal conversation). Defendant attempts to distinguish *Johnson*, however, because no separation agreement existed in that case. We decline to establish such an exception.

G.S. § 52-10.1 authorizes “any married couple . . . to execute a separation agreement not inconsistent with public policy . . .” See also N.C. Gen. Stat. § 52-10 (2002). Separation agreements are generally construed like any contract between two parties. See *Anderson v. Anderson*, 145 N.C. App. 453, 550 S.E.2d 266 (2001). Defendant was not a party to the separation agreement. Assuming, *arguendo*, that the provision at issue was intended by the parties to the agreement, plaintiff and Mrs. Nunn, to address their “right to exclusive sexual intercourse” with the other, the provision related only to the spouses’ rights against each other, for example, a spouse’s sexual relations with a third party can affect the legal rights of the spouses with respect to alimony. N.C. Gen. Stat. § 50-16.3A (2002). As a matter of law, the provision did not waive the parties’ rights, with respect to third parties for purposes of a criminal conversation claim, to exclusive sexual intercourse with each other during coverture. Criminal conversation is sexual intercourse with a plaintiff’s spouse during coverture. *Johnson, supra*. Notwithstanding their agreement of separation, plaintiff and his wife were still married at the time of defendant’s admitted sexual relations with Mrs. Nunn in October 1997. Therefore, we hold the existence of the separation agreement between plaintiff and Mrs. Nunn does not shield defendant from liability for criminal conversation based on his post-separation sexual relationship with Mrs. Nunn.

Defendant also argues the agreement was the equivalent of plaintiff’s consent for Mrs. Nunn to have sexual relations with another man, which is a viable defense to the claim of criminal conversation. See *Cannon v. Miller*, 71 N.C. App. at 465-66, 322 S.E.2d at 785-86, (plaintiff’s consent is the only substantive defense to a claim for criminal conversation); *Barker v. Dowdy*, 223 N.C. 151, 25 S.E.2d 404 (1943) (“connivance” of spouse in adultery of other spouse will bar action for criminal conversation). We are aware of no authority in North Carolina to support the defendant’s position and he has not provided any. Professor Reynolds suggests, in her treatise on family law, that to establish a plaintiff’s consent as a defense to an action for criminal conversation, a defendant would be required to show that before the sexual intercourse between the defendant and the plaintiff’s spouse occurred, the plaintiff “either encouraged the conduct or



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at least approved it.” Reynolds, *Lee’s North Carolina Family Law*, § 5.46(B), at 405 (5th ed., 1993). There is no evidence of such approval on plaintiff’s part here. Thus, we hold that the cited provision of the separation agreement does not, without evidence of plaintiff’s prior knowledge and approval of defendant’s sexual intercourse with Mrs. Nunn while she was married to plaintiff, establish his consent to such intercourse.

[9] Defendant also argues that the trial court erred in refusing to set aside the compensatory damage award for criminal conversation and grant a new trial as to that issue because there was no evidence in the record upon which the jury could have based an award of compensatory damages for criminal conversation. In particular, he asserts that any loss sustained by the plaintiff arose from the ending of the couple’s sexual relationship which occurred prior to defendant’s sexual involvement with Mrs. Nunn.

In *Sebastian v. Kluttz*, 6 N.C. App. at 220, 170 S.E.2d at 115-16, this Court held that:

In a cause of action for criminal conversation the measure of damages is incapable of precise measurement; however, it has been held, and we think properly so, that the jury in awarding damages may consider the loss of consortium, mental anguish, humiliation, injury to health, and loss of support by the wife.

Plaintiff presented substantial evidence from which a jury could have determined that he experienced mental anguish and humiliation due to the affair between his wife and defendant. In particular, we point to the testimony by plaintiff’s father as to his depressed mental state and plaintiff’s own testimony that he began consulting with his pastor to help deal with his emotional turmoil. There was also evidence that even up to a week before trial, plaintiff continually tried to contact his former wife by leaving notes on her car asking for a chance to speak with her again. The trial court did not abuse its discretion in failing to set aside the jury award or to grant a new trial.

Punitive Damages

Defendant also contends there was insufficient evidence to warrant submission of the issue of punitive damages to the jury or to support the jury’s award of punitive damages on either claim. We disagree.

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**[10]** With respect to claims for alienation of affection:

In order for the question of punitive damages to be submitted to the jury, . . . there must be evidence of circumstances of aggravation beyond the proof of malice necessary to satisfy the elements of the tort to sustain a recovery of compensatory damages. Specific circumstances of aggravation include “willful, wanton, aggravated or malicious conduct.”

*Ward v. Beaton*, 141 N.C. App. 44, 49-50, 539 S.E.2d 30, 34 (2000) (citations omitted), *cert. denied*, 353 N.C. 398, 547 S.E.2d 431 (2001). Evidence of “sexual relations” between defendant and plaintiff’s spouse has been held to satisfy this requirement. *Id.* Defendant admitted to sexual relations with Mrs. Nunn during her marriage to plaintiff.

In addition, directly after plaintiff saw his wife and defendant together through defendant’s kitchen window, plaintiff and his father went to the home of Bruce Allen and spoke with him and his wife about the relationship between Mrs. Nunn and defendant. During that conversation, defendant’s mother called defendant and he came over to their house. Both plaintiff and his father testified that defendant laughed at them during the meeting. There was also evidence which indicates that at some point in 1997, plaintiff and his son, Brandon, saw defendant and Mrs. Nunn at a restaurant and that Brandon told defendant to stay away from his mother, thus informing defendant that his actions were affecting the children. Both of these circumstances have been held to represent evidence of aggravation. *See Shaw v. Stringer*, 101 N.C. App. 513, 517, 400 S.E.2d 101, 103 (1991) (defendant’s laughter about situation held to be evidence of malice); *Hutelmeyer v. Cox*, 133 N.C. App. at 371, 514 S.E.2d at 560 (knowledge that relationship would harm plaintiff’s children listed as factor showing malice). There was substantial evidence on which the jury could base an award of punitive damages for alienation of affection.

**[11]** Proof of willful, wanton, or aggravated conduct is also required for an award of punitive damages for criminal conversation. *Horner*, 132 N.C. App. at 325, 511 S.E.2d at 344. However, “the same sexual misconduct necessary to establish the tort of criminal conversation may also sustain an award of punitive damages.” *Id.* at 327, 511 S.E.2d at 346. Where there is sufficient evidence to put the claim of criminal conversation before the jury, the jury may also consider the issue of punitive damages. *See id.* As we have decided above, there was sufficient evidence of defendant’s sexual intercourse with Mrs. Nunn dur-

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ing her marriage to plaintiff to support a verdict for plaintiff on the issue of criminal conversation; such evidence was also sufficient to support an award of punitive damages for criminal conversation. The trial court did not abuse its discretion in denying defendant's motion for a new trial on the punitive damages issue.

## IV.

[12] By his fourth argument, defendant argues the trial court erred in its instructions on (1) alienation of affection; (2) criminal conversation; and (3) punitive damages. We reject his arguments. Defendant first contends the trial court erred in instructing the jury on alienation of affection because the court refused to give defendant's requested instruction that to be liable, he must have had an active role in alienating Mrs. Nunn's affection, and that any claim must be based on pre-separation conduct.

We first reject defendant's contention that the trial court erred in refusing to instruct the jury that one cannot be liable for alienation of affection where the defendant becomes the object of the affection of the plaintiff's spouse which has been alienated from the plaintiff absent defendant's active participation, initiation, or encouragement in causing the loss of affection. Included in the trial court's instructions was an instruction that in order to be liable, a defendant must have "engaged in malicious and wrongful conduct with respect to th[e] marital relationship," malicious conduct being defined as that which is "intended to or is recklessly indifferent to the likelihood that it will destroy or diminish the genuine marital relationship," and that the defendant's conduct must have been the controlling or effective cause of the alienation of affection. This instruction sufficiently establishes that which defendant intended to convey through his requested instruction, that in order to be found liable, there must exist some wrongful action on the part of the defendant leading to the alienation. The jury instruction given by the trial court here is in accordance with the North Carolina Pattern Jury Instructions and the statements of law contained in *Hutelmyer, supra*, cited by defendant in support of his argument. We will not find error in the trial court's instruction simply because it was not given in the exact language and form proffered by defendant.

Defendant next asserts the trial court erred in failing to instruct the jury that a finding in favor of plaintiff on this claim could only be based on pre-separation conduct. However, in his proposed instructions, defendant did not propose that such a charge be included, but

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only that the court instruct that “[i]n determining whether a genuine marital relationship existed, you may consider whether a valid separation agreement existed before the malicious and wrongful conduct occurred.” In support thereof, defendant cited *Sebastian*, standing for the proposition that a valid separation agreement does not necessarily bar an action for alienation of affection occurring prior to the separation. See *Sebastian*, 6 N.C. App. at 214, 170 S.E.2d at 111. There is no indication defendant ever specifically requested that the trial court instruct the jury it was only to consider pre-separation conduct, or that defendant presented the trial court with any authority in support of such a position. Accordingly, we decline to review this argument for the first time on appeal. See, e.g., *Tomika Investments, Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 499, 524 S.E.2d 591, 595 (2000).

In any event, defendant argues the prejudice in the court’s failure to so instruct the jury lies in the lack of evidence of any wrongful pre-separation conduct, necessarily leading to the conclusion that the jury could only have based its finding on post-separation evidence. As we have already determined, however, there was sufficient evidence of defendant’s pre-separation conduct to support the jury’s finding.

Defendant also argues he is entitled to a new trial because, although the jury was initially instructed in accordance with his request, the trial court subsequently withdrew the instructions and re-instructed the jury, omitting defendant’s requested instructions. Defendant contends the trial court’s action emphasized to the jury that it could find in favor of plaintiff despite Mrs. Nunn’s affection having been alienated from plaintiff prior to her beginning a relationship with defendant.

We disagree that the trial court’s correction of its prior instruction constitutes error. Our Supreme Court has recognized that “[w]here a judge has erroneously instructed the jury, he undoubtedly has the right, in fact, it is his duty, when the error is called to his attention, to correct it by accurately informing the jury what the law is.” *Griffin v. Pancoast*, 257 N.C. 52, 58, 125 S.E.2d 310, 315 (1962). So long as the subsequent instruction sets forth the law in such a manner that the jury cannot be under any misapprehension as to the state of the law, any previous error does not warrant a new trial. *Id.*

In this case, the trial court’s subsequent instruction correctly and adequately set forth the law to be applied by the jury, and we discern

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no basis for concluding the jury was confused as to the law it was to apply. Further, the fact the jury had previously been given a different instruction is not grounds for asserting prejudice where the trial court in this case specifically instructed the jury that it was to “disregard” the prior instruction. A jury is presumed to follow the court’s instructions. See *Poole v. Copland, Inc.*, 348 N.C. 260, 264, 498 S.E.2d 602, 604 (1998); *Goble v. Helms*, 64 N.C. App. 439, 446, 307 S.E.2d 807, 813 (1983), *disc. review denied*, 310 N.C. 625, 315 S.E.2d 690 (1984). Thus, we must presume the jury simply disregarded the prior instruction and based its verdict solely on the subsequent instruction, which we have held to be a proper statement of the law.

**[13]** Next, defendant asserts the trial court erred in instructing the jury as to compensatory damages for alienation of affection inasmuch as the court informed the jury that in assessing plaintiff’s damages, if any, it could consider the degree to which plaintiff and Mrs. Nunn’s relationship was destroyed, in addition to plaintiff’s mental anguish, shame, humiliation, loss of reputation and support, and “[a]ny other adverse effect on the quality of the marital relationship.” Defendant contends the instruction was not supported by the evidence because, he contends, Mrs. Nunn was not providing plaintiff any support, company, or affection at the time she and defendant engaged in a romantic relationship, and that, due to previous rumors about Mrs. Nunn’s extra-marital affairs, defendant’s conduct could not have harmed plaintiff’s reputation. We have previously rejected defendant’s contentions as to the sufficiency of the evidence, and defendant has failed to cite any authority to support his argument that the trial court’s instruction was otherwise erroneous. These assignments of error are overruled.

**[14],[15]** Defendant also assigns error to the trial court’s instructions to the jury regarding the criminal conversation claim. Based on his theory that the separation agreement was either a waiver or consent for sexual intercourse between his wife and another person, defendant argues that the trial court erred in instructing the jury that it should not consider whether plaintiff and his wife had separated before the sexual intercourse occurred. As discussed above, we reject defendant’s assertions that the agreement constituted waiver and/or consent. Next, defendant argues that the trial court erred in instructing the jury on factors for determining an amount of compensatory damages to award on this claim. Similar to the argument defendant made with respect to the instruction for compensatory damages for alienation of affection, this argument fails for several

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reasons: (1) there was evidence in the record from which the jury could find that plaintiff suffered loss of consortium, mental anguish, or humiliation as a result of defendant's sexual relationship with his wife, (2) the instruction allowed the jury to award only nominal damages if the factors were not present, and (3) defendant cites no law supporting his attack on the instruction. Therefore, we hold there was no error in the trial court's instructions on the claim of criminal conversation.

**[16]** Lastly, defendant argues that the trial court erred in its instructions to the jury on the issue of punitive damages. With respect to defendant's arguments on the sufficiency of the evidence, we have already determined that the instruction was supported by the evidence. Defendant also alleges that the trial court did not provide the jury with any standards for the assessment of punitive damages, and that this omission violated his rights to due process and equal protection under the United States Constitution and similar rights under the North Carolina Constitution. First, the trial court did instruct the jury that punitive damages were within its discretion to award and that the amount should bear a "reasonable relationship to the sum reasonably needed to punish the defendant . . . and deter . . . others . . . ." Defendant cites no authority for these alleged violations of his constitutional rights or for why the standard articulated by the judge was not constitutionally adequate. N.C.R. App. P. 28(b)(6). Second, there is no indication in the record, and defendant points to none, that defendant objected to the instructions on punitive damages or submitted a proposed instruction on the issue. N.C.R. App. P. 10(b)(1). This assignment of error is overruled.

No error.

Chief Judge EAGLES and Judge THOMAS concur.

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RICHARD ALLEN OVERTON, PLAINTIFF v. WILLIAM ROBERT PURVIS, DEFENDANT

No. COA01-1520

(Filed 17 December 2002)

**Negligence—last clear chance—fox hunter struck while standing in road**

The trial court erred in an automobile accident case by instructing on last clear chance where plaintiff was struck while standing in a roadway trying to protect dogs which were crossing the roadway while chasing a fox. Plaintiff was facing defendant's approaching vehicle and chose to stay in the road until a collision was imminent; by so doing, he failed in the first element of last clear chance (that he could not have escaped his position of peril by reasonable care).

Judge THOMAS dissenting.

Appeal by defendant from judgment entered 18 June 2001 by Judge Quentin T. Sumner in Pitt County Superior Court. Heard in the Court of Appeals 14 October 2002.

*The Blount Law Firm, P.L.L.C., by Marvin K. Blount, III, for plaintiff-appellee.*

*Walker, Clark, Allen, Grice & Ammons, L.L.P., by Jerry A. Allen and Gay P. Stanley, for defendant-appellant.*

EAGLES, Chief Judge.

Defendant, William Robert Purvis, appeals from judgment entered in Pitt County Superior Court upon a jury verdict in favor of plaintiff, Richard Allen Overton, in a negligence action brought by plaintiff after he was hit by an automobile driven by defendant.

The evidence at trial tended to establish the following. During the early morning hours of 7 September 1996, plaintiff and several other individuals were fox hunting near Falkland, North Carolina. Shortly after 6:00 a.m., the hunters released approximately forty hunting dogs into a field, roughly one quarter of a mile south of Highway 222. The dogs subsequently began pursuing a fox in the direction of Highway 222. After realizing that the dogs would soon be crossing the highway, plaintiff and several other hunters drove to the area to guide the dogs across the road. At approximately 6:30 a.m., plaintiff saw the fox

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cross Highway 222 with several dogs in pursuit. Plaintiff drove off the roadway and onto the eastbound shoulder, near the spot where the fox and the first dogs had crossed the highway. Plaintiff got out of his truck, walked into the westbound lane of travel near the middle of the roadway and began calling the remaining dogs so they would all cross the highway at the same location.

This particular portion of Highway 222 runs roughly east to west, through a rural area in Pitt County. Despite the early hour, there was “plenty of daylight” and visibility was “good” on this particular morning. The highway where the dogs were crossing consisted of a relatively straight, flat, two-lane, paved road surface, with one eastbound lane and one westbound lane. The lanes were divided by a yellow line which was solid on the side for westbound traffic and broken on the side for eastbound traffic. The posted speed limit was 55 miles per hour.

A few moments after plaintiff pulled off the road and began calling the remaining dogs, he was joined by two other hunters, Jay Womble and Billy Clifton. Womble and Clifton parked their vehicles near plaintiff’s truck, so that there were vehicles parked on both shoulders of the road. Womble got out of his vehicle and stood in the westbound lane of the road. However, Womble stood slightly “behind” plaintiff and closer to the shoulder of the westbound lane. The dogs crossed the road intermittently over the next fifteen minutes.

At approximately 6:45 a.m., defendant, who was traveling west on Highway 222, rounded the curve and entered the long straight stretch where plaintiff and the other two hunters had pulled off the road. Plaintiff saw defendant’s truck as it came around the curve, approximately 1000 feet to the east of where plaintiff was standing in the road. Plaintiff, expecting defendant to slow down or stop, did not attempt to move out of the roadway. Instead, plaintiff remained in the westbound lane of travel in order to “protect the dogs” but plaintiff “kept watching” defendant’s vehicle as it approached him. Defendant continued approaching in the westbound lane at what appeared to be a constant speed of 45 to 50 miles per hour. When defendant’s truck was approximately 500 to 600 feet away, plaintiff began waving his hands and hat in order to attract defendant’s attention. Defendant continued to approach and still did not appear to be slowing down. When defendant’s truck was approximately 100 to 150 feet away, plaintiff “realized” that defendant “wasn’t going to stop.” To avoid being hit, plaintiff turned and ran across the yellow line into the eastbound lane of the highway. Plaintiff, expecting defendant to continue



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traveling in the westbound lane, anticipated that this action would safely remove him from the path of defendant's approaching truck and defendant would simply pass behind him. However, at the same moment that plaintiff ran into the eastbound lane of travel, defendant's vehicle also swerved into the eastbound lane where defendant's truck ultimately struck plaintiff.

Plaintiff testified that he had a clear view of defendant's truck as it came around the curve and entered the straight stretch and that he continued to watch the approaching truck for approximately "30 seconds." Plaintiff also testified that he "made a choice to stay in the road until [he] could stay no longer." Plaintiff further stated that once he started to run from the westbound to the eastbound lane, he momentarily diverted his attention from the approaching truck to see where he was going. However, as soon as plaintiff reached the eastbound lane, he stopped and again turned around to look for defendant's truck, only to find that the truck was upon him.

Defendant testified that he did not immediately notice the vehicles parked on the sides of the road when he came around the curve and entered the straight stretch. Defendant estimated he was about 500 feet away from the vehicles when he first noticed them parked along the sides of the road. Even then, defendant did not notice anyone standing in the road. It was only after defendant had gotten closer to the vehicles that he was able to discern anyone standing in the road. At first, defendant only saw Jay Womble standing on the right hand side of the road, waving his arms for defendant to stop or go to the other side of the road. Defendant said his attention was focused on Womble and that this was the reason he did not see plaintiff standing in the road. Defendant further stated that by the time he noticed plaintiff, it was too late to stop to avoid hitting him.

After hearing the evidence, the jury found that defendant was negligent; that plaintiff was contributorily negligent; and that defendant had the last clear chance to avoid the injury. The jury awarded damages to plaintiff in the amount of seven thousand dollars and the trial court entered judgment.

Following entry of judgment, plaintiff moved for attorney's fees and costs pursuant to N.C. Gen. Stat. § 6-21.1 (2001). Plaintiff further moved for additur or in the alternative, for a new trial on the issue of damages. Defendant consented to increasing the amount of the jury's verdict to \$10,564.05 and to the payment of costs and interest in the amount of \$4,129.85. Defendant also moved for judgment notwith-

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standing the verdict and in the alternative, for a new trial. The trial court denied defendant's motions and plaintiff's motions for additur and for a new trial, but awarded attorney's fees and costs in the amount of \$43,311.10. Defendant appeals.

On appeal, defendant assigns error and argues the following issues: (1) Whether the trial court erred in instructing on and submitting to the jury the issue of last clear chance; (2) whether the trial court erred in denying defendant's request for an instruction on the doctrine of sudden emergency; (3) whether the trial court erred in denying defendant's motion for judgment notwithstanding the verdict or in the alternative, for a new trial; (4) whether the trial court erred in denying plaintiff's motion for additur; and (5) whether the trial court erred in awarding attorney's fees and costs to plaintiff.

Defendant first argues that the trial court erred by instructing the jury on the doctrine of last clear chance. Specifically, defendant argues that an instruction on last clear chance was improper because plaintiff failed to establish the first element required to entitle him to the instruction. After careful review of the record, we agree.

A contributorily negligent pedestrian struck and injured by an automobile must establish four elements before he can invoke the doctrine of last clear chance against the driver of the automobile. These elements are:

(1) That the pedestrian negligently placed himself in a position of peril from which he could not escape by the exercise of reasonable care; (2) that the motorist knew, or by the exercise of reasonable care could have discovered, the pedestrian's perilous position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands; (3) that the motorist had the time and means to avoid injury to the endangered pedestrian by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian's perilous position and his incapacity to escape from it; and (4) that the motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian, and for that reason struck and injured him.

*Nealy v. Green*, 139 N.C. App. 500, 504-05, 534 S.E.2d 240, 243 (2000).

"The issue of last clear chance, 'must be submitted to the jury [only] if the evidence, when viewed in the light most favorable to

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the plaintiff, will support a reasonable inference of each essential element of the doctrine.’” *Culler v. Hamlett*, 148 N.C. App. 372, 379, 559 S.E.2d 195, 200 (2002) (quoting *Kenan v. Bass*, 132 N.C. App. 30, 32-33, 511 S.E.2d 6, 7 (1999)). “Unless all the necessary elements of the doctrine of last clear chance are present . . . the case is governed by the ordinary rules of negligence and contributory negligence.” *Clodfelter v. Carroll*, 261 N.C. 630, 634, 135 S.E.2d 636, 638 (1964).

“Cases discussing th[e] first element have consistently distinguished between situations in which the injured pedestrian was facing oncoming traffic and those in which the pedestrian was not.” *Nealy*, 139 N.C. App. at 505, 534 S.E.2d at 244. *Accord*, *Clodfelter v. Carroll*, 261 N.C. 630, 135 S.E.2d 636 (1964). Indeed, “[e]vidence that a plaintiff does not see an approaching vehicle or is not facing an oncoming vehicle will satisfy this element, ‘our courts reasoning that the pedestrian who did not apprehend imminent danger could not reasonably have been expected to avoid injury.’” *Womack v. Stephens*, 144 N.C. App. 57, 65, 550 S.E.2d 18, 23 (2001), *disc. review denied*, 354 N.C. 229, 555 S.E.2d 277 (2001) (quoting *Nealy v. Green*, 139 N.C. App. 500, 506, 534 S.E.2d 240, 244 (2000)). On the other hand, “where the injured party is at all times in control of the danger and simply chooses to take the risk,” the doctrine of last clear chance is inapplicable. *Culler*, 148 N.C. App. at 380, 559 S.E.2d at 201. Therefore, “an instruction on last clear chance . . . [is] not warranted when a pedestrian was facing traffic and, ‘by the exercise of reasonable care, could have extricated [him]self from the position of peril in which [he] had negligently placed [him]self.’” *Nealy*, 139 N.C. App. at 505, 534 S.E.2d at 244 (quoting *Williams v. Odell*, 90 N.C. App. 699, 704, 370 S.E.2d 62, 66, *disc. review denied*, 323 N.C. 370, 373 S.E.2d 557 (1988)).

Here, plaintiff was facing defendant’s approaching vehicle and first saw defendant’s vehicle as it rounded the curve approximately 1,000 feet away. Assuming defendant would stop, plaintiff remained in the roadway for approximately “30 seconds” where he “kept watching” as defendant’s vehicle steadily approached. Despite noting that defendant’s vehicle did not appear to be slowing down, plaintiff “made a choice to stay in the road” and thereby ignored the danger from which he had the power to extricate himself. Furthermore, plaintiff had ample time and opportunity to remove himself from the danger presented by defendant’s approaching vehicle and avoid the injuries he sustained. However, plaintiff, in full possession of his fac-

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ulties and in disregard for his own safety, took no action to remove himself from the path of defendant's oncoming vehicle until a collision appeared imminent.

Viewed in the light most favorable to the plaintiff, this evidence fails to support a reasonable inference that plaintiff, by the exercise of reasonable care, could not escape the position of peril in which he negligently placed himself. Since plaintiff has failed to establish the first element of the doctrine of last clear chance, we hold it was error for the trial court to instruct the jury on the issue of last clear chance. Accordingly, the judgment of the trial court is reversed and the case is remanded to the trial court for entry of judgment in accordance with ordinary principles of negligence and contributory negligence. We need not address defendant's remaining assignments of error.

Reversed and remanded.

Judge TYSON concurs.

Judge THOMAS dissents.

THOMAS, Judge, dissenting.

Because the evidence, when viewed in the light most favorable to plaintiff, supports a reasonable inference of each essential element of the doctrine of last clear chance, I respectfully dissent.

Last clear chance is one of our most agonizingly complex legal doctrines. In *Exum v. Boyles*, 272 N.C. 567, 158 S.E.2d 845 (1968), our Supreme Court addressed the nature of this doctrine as follows:

In *Gunter v. Wicker*, 85 N.C. 310, which appears to have been the first case applying the last clear chance doctrine in North Carolina, Smith, C. J., observed that "there is great difficulty in extracting from the numerous adjudications of the courts any clear and distinct principle or formula determining when the cooperating agency of the plaintiff so directly contributes to the result as to deprive him of remedy against the other party to whose negligence the injury is attributable." The passage of time has not removed this difficulty. In Prosser, *Law of Torts*, 3d Ed., § 65, it is said of the doctrine of the last clear chance:

"No very satisfactory reason for the rule ever has been suggested. \* \* \* The application of the doctrine has been attended

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with much confusion. \* \* \* It is quite literally true that there are as many variant forms and applications of this doctrine as there are jurisdictions which apply it. \* \* \* In such a general area of confusion and disagreement, only very general statements can be offered, and reference must of necessity be made to the law of each particular state.”

*Id.* at 574, 158 S.E.2d at 851.

“Much of the apparent confusion in the decisions applying this doctrine stems from the failure to observe that the respective cases involve different factual situations and, therefore, call into play different rules comprising parts of the doctrine.” *Id.* at 575, 158 S.E.2d at 852. The complexity of the doctrine’s application is certainly evident in the present case.

There are four elements which must be satisfied before a pedestrian struck and injured by an automobile can appropriately invoke the doctrine of last clear chance against the driver. The first element goes to the actions of the pedestrian, while the next three go to the actions of the motorist:

- (1) The pedestrian’s contributory negligence placed him in a position of helpless or inadvertent peril, or subjected him to a risk of harm, from which, *immediately preceding the accident*, he was unable to escape or avoid by the exercise of reasonable care;
- (2) The motorist discovered, or by the exercise of reasonable care could have discovered, the pedestrian’s position and his incapacity to escape from it before the endangered pedestrian suffered injury at his hands;
- (3) The motorist had the time and means to avoid injury to the endangered plaintiff by the exercise of reasonable care after he discovered, or should have discovered, the pedestrian’s position; and
- (4) The motorist negligently failed to use the available time and means to avoid injury to the endangered pedestrian.

*See Exum*, 272 N.C. at 574-75, 158 S.E.2d at 852-53 (citing with approval Restatement of the Law, Torts, Negligence, § 479); *Trantham v. Estate of Sorrells*, 121 N.C. App. 611, 613-14, 468 S.E.2d 401, 402-03 (1996) (citing with approval Restatement (Second) of Torts § 479 (1965)); *see also Nealy v. Green*, 139 N.C. App. 500,

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504-05, 534 S.E.2d 240, 243 (2000). The thrust of the last clear chance doctrine “is that a negligent plaintiff who is unable to avoid the harm placing her in helpless peril *immediately before the accident* which results in her injury may recover against a defendant who has the means and ability to avoid the accident but fails to do so.” *Trantham*, 121 N.C. App. at 614, 468 S.E.2d at 403 (emphasis in original). Last clear chance is applicable if, at the time of the accident, the plaintiff “is incapable of averting harm by the exercise of reasonable care,” even though this inability “is because of some antecedent lack of preparation, since he is required to exercise with reasonable attention, care, and competence only such ability as he then possesses.” *Id.* (quoting Restatement (Second) Torts § 479, comment to Clause (a)).

The majority concludes plaintiff failed to establish the first element of last clear chance because the evidence “fails to support a reasonable inference that plaintiff, by the exercise of reasonable care, could not escape the position of peril in which he negligently placed himself.” I disagree and conclude plaintiff was in helpless peril from which he could not escape by the exercise of reasonable care *immediately prior* to being struck by defendant’s vehicle.

Viewed in the light most favorable to plaintiff, the evidence shows he walked onto the road in an attempt to protect hunting dogs. He first observed defendant’s vehicle traveling toward him when it was approximately 1000 feet away. At that time, he had a reasonable expectation defendant would see him and the dogs in the road, slow down, and prepare to stop. A motorist using a highway, such as defendant, owes a duty to all other persons using the highway, including plaintiff in the present case, to keep a reasonable and proper lookout in the direction of travel and see what ought to be seen. *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 239, 311 S.E.2d 559, 568 (1984). It was reasonable for plaintiff to expect defendant to recognize and fulfill this duty.

Additionally, unlike in *Clodfelter v. Carroll*, 261 N.C. 630, 135 S.E.2d 636 (1964), and *Culler v. Hamlett*, 148 N.C. App. 372, 559 S.E.2d 192 (2002), the visual conditions here were more than adequate—it was daytime; there was no fog; the road was straight; and there was nothing to obstruct defendant’s view. Plaintiff, accordingly, did not act unreasonably, as a matter of law, by staying in the road and waving his hands and hat in an attempt to attract defendant’s attention, even when defendant’s vehicle was 500 to 600 feet

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away. Plaintiff still had a reasonable expectation that defendant, in maintaining a proper lookout, would see him, slow down and prepare to stop.

Plaintiff became contributorily negligent by waiting too long to abandon his efforts to stop defendant's vehicle. However, at that point, defendant's vehicle was 100 to 150 feet away and plaintiff was standing near the center line of the road. With defendant fast approaching, plaintiff attempted to extricate himself from danger by stepping out of defendant's path. He was much closer to the other lane of travel than the shoulder of the road. Thus, he acted reasonably in clearing defendant's path by stepping into the opposite lane of travel. Defendant, however, had continued to fail to maintain a proper lookout and, according to his testimony and the majority opinion, did not notice plaintiff in the road until "it was too late to stop to avoid hitting him." When defendant finally noticed plaintiff, he swerved into the opposite lane of travel and struck him. By staying in his own clear lane of travel, defendant could have avoided the accident. This evidence is sufficient to support a reasonable inference plaintiff was in helpless peril from which he could not extricate himself *immediately preceding* the accident. Thus, the first element of last clear chance is met.

Defendant fails to dispute the existence of the second and fourth elements of last clear chance. Therefore, we assume the evidence supports those two elements. *Hales v. Thompson*, 111 N.C. App. 350, 356, 432 S.E.2d 388, 392 (1993).

Defendant does, however, contest the third element of last clear chance. He contends the evidence is not supportive of a reasonable inference that he had the time and means to avoid the accident by the exercise of reasonable care after he discovered, or should have discovered, plaintiff's helpless peril. I disagree.

Viewed in the light most favorable to plaintiff, the evidence shows defendant did not notice the vehicles parked on the side of the road until he was approximately 500 feet away. Even then, he did not see the two people standing in the road. It was only after he had gotten closer to the vehicles that he noticed Jay Womble standing on the right-hand side of the road. Womble testified that when he realized defendant was not slowing, he stepped off the road and onto the shoulder. Despite then seeing Womble and the parked vehicles, defendant did not see plaintiff until "it was too late to stop to avoid hitting him." If defendant had maintained a proper lookout, he would

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have noticed plaintiff sooner and could have stayed in his own clear lane of travel, at whatever speed, and avoided striking plaintiff. Further, the evidence, taken in the light most favorable to plaintiff, shows defendant did not apply his brakes until after he hit plaintiff. This evidence is sufficient to support a reasonable inference that, had he exercised reasonable care, defendant had the time and means to avoid the accident. The jury had an adequate basis on which to return its verdict.

Because I find the evidence sufficient to warrant the trial court's instruction on last clear chance, it is necessary to also address defendant's remaining assignments of error.

Having carefully reviewed the record and briefs, I find the following assignments of error raised by defendant lacking in merit: (1) the trial court erred in denying his requested jury instruction on the doctrine of sudden emergency, *See Hairston*, 310 N.C. at 229, 311 S.E.2d at 568 (the sudden emergency must not have been created by the negligence of the party seeking protection of the doctrine); *accord Long v. Harris*, 137 N.C. App. 461, 528 S.E.2d 633 (2000); *Conner v. Continental Industrial Chemicals*, 123 N.C. App. 70, 472 S.E.2d 176 (1996); (2) the trial court erred in denying his motion for judgment notwithstanding the verdict or, in the alternative, for a new trial on the issue of last clear chance; (3) the trial court erred in denying plaintiff's motion for additur, *See Lazenby v. Godwin*, 40 N.C. App. 487, 496, 253 S.E.2d 489, 493 (1979) (a ruling on a motion for additur is within the discretion of the trial judge); and (4) the trial court abused its discretion in granting plaintiff's motion for attorneys' fees, *See Washington v. Horton*, 132 N.C. App. 347, 513 S.E.2d 331 (1999) (setting forth six factors to be considered by trial court in determining whether to award attorneys' fees under N.C. Gen. Stat. § 6-21.1); *Thorpe v. Perry Reddick*, 144 N.C. App. 567, 551 S.E.2d 852 (2001) (award of attorneys' fees will not be overturned absent an abuse of discretion); *Tew v. West*, 143 N.C. App. 534, 546 S.E.2d 183 (2001).

I would remand for a new hearing on plaintiff's motion for costs. The trial court is required to make more detailed findings of fact concerning (1) whether the costs alleged by plaintiff are allowable under Chapter 7A, Article 28 of the General Statutes or N.C. Gen. Stat. § 6-20; and (2) whether the costs are reasonable and necessary. *See Lewis v. Setty*, 140 N.C. App. 536, 537 S.E.2d 505 (2000); *Minton v. Lowe's Food Stores*, 121 N.C. App. 675, 468 S.E.2d 513 (1996).



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[154 N.C. App. 553 (2002)]

Accordingly, I respectfully dissent as to the trial court's instruction on last clear chance. I would affirm the trial court's judgment entered on the jury's verdict. I also would affirm the trial court's award of attorneys' fees but reverse and remand for a new hearing on the issue of costs.

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STATE OF NORTH CAROLINA v. GLENN HARRISON ANDREWS, DEFENDANT

No. COA01-1305

(Filed 17 December 2002)

**1. Criminal Law— defenses—automatism—unaware of significance of acts**

The trial court did not err in a prosecution for attempted first-degree murder and assault by refusing to instruct the jury on unconsciousness or automatism where defendant's expert testified that defendant's medications could cause a person to act "unknowingly." The doctor was referring to awareness of significance rather than awareness of actions and never testified that defendant was actually unconscious or incapable of controlling his actions at the time of these events.

**2. Criminal Law— transferred intent—attempted murder—running over estranged wife and companion**

The trial court did not err by instructing on transferred intent in a prosecution for attempted murder and assault where defendant ran down his wife with his car in a grocery store parking lot with the specific intent of killing her, injuring her friend in the process.

**3. Homicide; Assault— short-form indictments—constitutional**

Short-form indictments for attempted first-degree murder and assault with a deadly weapon inflicting serious injury were constitutional.

**4. Homicide— attempted murder—transferred intent**

There was sufficient evidence to convict defendant for the attempted first-degree murder of his estranged wife's friend where both the friend and the wife were run down by defendant in a grocery store parking lot; the court properly instructed the

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jury on transferred intent; defendant had threatened to kill his estranged wife; he drove his car directly at her; he got out after running them down and stabbed her at least three times, yelling “bitch” each time; and he said “I was trying to get her” after he was subdued by the friend and a bystander.

**5. Homicide— malice—sufficiency of evidence**

Malice toward an attempted murder victim could be inferred from evidence that defendant accelerated his car toward the victim (and defendant’s estranged spouse) in a grocery store parking lot.

**6. Homicide— attempted first degree murder—premeditation and deliberation—overt act—sufficiency of evidence**

There was sufficient evidence of both premeditation and deliberation and an overt act in an attempted first-degree murder prosecution where defendant ran down his estranged wife and the victim in a grocery store parking lot and there was no provocation by the victim, defendant had confronted his wife about her relationship with the victim, there was evidence that the same car had been seen driving slowly past the wife as she waited for the victim, and defendant aimed his car at both the wife and victim, accelerated, and knocked both down.

Appeal by defendant from judgments entered on 28 June 2000 by Judge Marlene Hyatt in the Superior Court in Buncombe County. Heard in the Court of Appeals 14 August 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Thomas O. Lawton, III, for the State.*

*David G. Belser, for defendant-appellant.*

HUDSON, Judge.

Defendant appeals judgments entered upon convictions by a jury of two counts of attempted first-degree murder, two counts of assault with a deadly weapon with intent to kill inflicting serious injury, and one count of violation of a domestic violence protective order. On appeal, defendant contends that the trial court erred in portions of its instructions to the jury, that the short-form indictments used here are unconstitutional, and that the trial court erred in denying defendant’s motion to dismiss based on insufficiency of the evidence. For the following reasons, we find no error.

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We begin with a summary of the State's evidence at trial. In October 1999, defendant separated from his wife, Kathy Andrews, and their two children, after 12 years of marriage. On 21 October 1999, Ms. Andrews applied for and received a domestic violence protective order directing defendant, among other specifics, to stay away from her residence and workplace, not to contact her, and not to possess a firearm. Ms. Andrews told the judge who issued the order that she was seeking the order "because [defendant] had been threatening to kill me for several months by splattering my brains all over the walls, and that he had threatened murder-suicide several times." Ms. Andrews also informed the judge that defendant had hit her "in the back of the head from behind" on a previous occasion.

At 6:30 p.m. on 10 November 1999, Ms. Andrews dropped her two children off at a Baptist church for a church program. Then she drove to Lake Tomahawk to meet her friend, Brian Evsich. While she waited for Mr. Evsich to arrive, Ms. Andrews observed a car drive slowly by the entrance to the lake. Ms. Andrews further testified that though she could not see the driver's face, she did observe the driver "craning" his neck to look at her. Mr. Evsich arrived at Lake Tomahawk a few minutes later. Ms. Andrews then got in Mr. Evsich's car, they drove together to a local grocery store, and parked the car.

Mr. Evsich and Ms. Andrews began to walk through the parking lot towards the store's entrance. As they were walking, they heard a car engine revving. Ms. Andrews testified that she "turned to look, and the next thing I knew I was coming down onto the hood of the car." Ms. Andrews landed on her back with her head inches away from the grocery store wall. The car struck Mr. Evsich in the left knee and threw him into the air. He landed on the asphalt. Ms. Andrews testified that the car that struck her was the same car she had seen earlier driving slowly by the entrance to the lake.

After the car came to a stop, defendant, who was driving the car, got out and approached Ms. Andrews, who was still lying on the ground. The driver then reached for his waist, withdrew a knife from a case on his belt and began stabbing Ms. Andrews. Defendant stabbed Ms. Andrews three times and with each stab of the knife repeatedly yelled the word "bitch."

Mr. Evsich got up and ran to help Ms. Andrews. Mr. Evsich "hit [defendant] in the head with [his] right knee and knocked [defendant] off of her." Mr. Evsich was able to get on top of defend-

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ant and hold him down, while defendant kept asking Mr. Evsich “Who the f— are you?”

Another man at the scene helped Mr. Evsich subdue defendant. While the two men held defendant on the ground and waited for the police, defendant was telling Ms. Andrews that “everything was going to be all right and that he loved her.” Another witness testified that defendant, while being subdued, said “Don’t worry, I won’t try to get away. I did what I wanted to do,” and also that “I was trying to get her.”

Paramedics took Ms. Andrews to the hospital where she was treated for injuries to her chest, back, and both ankles. Ms. Andrews’ doctors performed three separate surgeries including open heart surgery to repair a laceration of the right ventricle of her heart. Ms. Andrews underwent a second surgery to repair two wounds to her left lung as well an artery behind the lung that was lacerated by a stab wound to the back. The third surgery was to repair Ms. Andrews’ broken ankles.

Mr. Evsich was also taken to the emergency room, where he was treated for bruised ribs and shoulder blade, a black eye and a broken kneecap. Though Mr. Evsich’s injuries were not life threatening, he was discharged with pain medication and given crutches to use while his knee was immobilized. At the time of trial he still had recurring pain in his kneecap.

Defendant called two witnesses. The first was Dr. Don Marsh, a board certified pharmacotherapist. Dr. Marsh testified that on the day of this event, defendant was suffering from a condition known as serotonergic syndrome as a result of simultaneously taking both Effexor and Prozac, two drugs used to treat bipolar disorder, for at least one day prior to 10 November 1999.

Dr. Marsh testified that the symptoms of serotonergic syndrome include inability to concentrate, diarrhea, making poor judgments, not thinking clearly, clumsiness, impaired or slurred speech as well as amnesia, hyperthermia, loss of appetite and dehydration. He explained that serotonergic syndrome “can make a person have what’s termed anterograde amnesia; in other words, they go through something, they realize they have done it, and afterwards, they don’t realize, again, the weight of their actions.” In addition, Dr. Marsh testified that serotonergic syndrome can lead to “making poor judgments and realizing after the fact that these judgments were indeed poor.”

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[1] Defendant first argues that the trial court erred by refusing to instruct the jury on the defense of unconsciousness or automatism. Under the law of this State, unconsciousness or automatism can be a complete defense to a criminal charge, and the burden is on the defendant to establish the defense to the satisfaction of the jury. *State v. Caddell*, 287 N.C. 266, 290, 215 S.E.2d 348, 363 (1975). In determining whether an instruction on automatism is warranted, “[t]he test . . . is whether the evidence of defendant’s mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant has the ability to form the necessary specific intent.” *State v. Connell*, 127 N.C. App. 685, 692, 493 S.E.2d 292, 296 (1997), *disc. review denied*, 347 N.C. 579, 502 S.E.2d 602 (1998). The trial court is not required to give instructions that are not supported by a reasonable view of the evidence. *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 699 (1973). According to our Supreme Court, “evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury.” *State v. Clark*, 324 N.C. 146, 162, 377 S.E.2d 54, 64 (citations omitted). Indeed, in *Clark* the Supreme Court explained:

That “such facts and circumstances as raise only a conjecture or suspicion ought not to be allowed to distract the attention of juries from material matters,” is particularly pertinent when evidence of defendant’s mental condition at the time of the killing is implicated.

*Id.* at 162, 377 S.E.2d at 64 (citations omitted).

Here, defendant requested instructions on both automatism and involuntary intoxication. The trial court gave the latter instruction but declined to instruct on automatism. Defendant argues that the jury could have inferred from Dr. Marsh’s testimony that he was not “able to exercise conscious control” of his actions. We disagree.

While the evidence may have supported an inference that defendant’s medication for his mental condition impaired his ability to premeditate and deliberate, or to form the specific intent to kill on the night of the attempted murders, it did not support automatism. Dr. Marsh testified that in his opinion defendant suffered from a condition known as serotonergic syndrome caused by taking Effexor and Prozac, two drugs used to treat bipolar disorder, simultaneously for at least one day prior to 10 November 1999. Dr. Marsh based his opinion on his conversation with defendant one week prior to trial along

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with a review of defendant's medical and pharmacy records. Although Dr. Marsh described symptoms of serotonergic syndrome, he never testified that defendant was actually unconscious or incapable of controlling his actions at the time of these events. Defendant points to the following excerpt from Dr. Marsh's testimony:

Q: Can [serotonergic syndrome] cause a person to act unknowingly?

A: Yes. It can make a person have what's termed anterograde amnesia; in other words, they go through something, they realize they have done it, and afterwards, they don't realize, again, the weight of their actions.

We do not believe that this general testimony is sufficient to give rise to an inference that defendant's actions were unconscious or automatic. Although the doctor responded "Yes" to the question of whether the syndrome "can cause a person to act unknowingly," his testimony as a whole reveals that he was not referring to one's awareness or control of actions, but rather to awareness of the significance of the action. Under *Clark*, this evidence is not sufficient to create an inference that this defendant acted unconsciously or was unable to control his actions. For the foregoing reasons, we conclude that the trial court did not err when it refused to give the requested instruction.

**[2]** Defendant next argues that the trial court gave an improper instruction on transferred intent with regards to the attempted murder of Brian Evsich. Defendant contends that since he intended to harm and did harm Ms. Andrews as well as an unintended victim, the doctrine of transferred intent cannot be used to support the specific intent to harm the unintended victim. We disagree.

While defense counsel does demonstrate that some other jurisdictions might not apply the transferred intent doctrine in this case, our own Supreme Court has ruled that an instruction on transferred intent is appropriate where an unintended victim is harmed. *State v. Locklear*, 331 N.C. 239, 415 S.E.2d 726 (1999); *see also*, *State v. Christian*, 150 N.C. App. 77, 562 S.E.2d 568 (2002), *disc. review denied*, 356 N.C. 168, 568 S.E.2d 618 (2002).

In *Locklear*, the defendant shot and killed an estranged girlfriend. The woman's daughter, who was present in the apartment at the time of the shooting, was struck in the neck by a bullet. The defendant was convicted of first-degree murder of the woman, and assault with

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intent to kill inflicting serious injury on the daughter. Discussing an instruction on transferred intent very similar to the one here, the Court in *Locklear* noted that “[t]he instruction . . . did not have the effect of relieving the State of any part of its burden of persuasion on an essential element; instead, it merely stated the substantive law of this state.” *Locklear* at 245, 415 S.E.2d at 729.

Here, as in *Locklear*, the trial court simply explained the common law doctrine of transferred intent to the jury. “[U]nder the doctrine of transferred intent, it is immaterial whether the defendant intended injury to the person actually harmed; if he in fact acted with the required or elemental intent toward someone, that intent suffices as the intent element of the crime charged as a matter of substantive law.” *Id.* at 245, 415 S.E.2d at 730. Likewise, it is immaterial whether the intended victim is harmed or not.

Clearly, defendant intended to harm his estranged wife and did so when he ran her down with his car in a grocery store parking lot, and then got out of the car and stabbed her several times in the chest. Witnesses at the scene recounted defendant’s statements at the time, including “I was trying to get her.” Defendant also injured Mr. Evsich, by hitting him with the car. Because defendant acted with the specific intent to kill Ms. Andrews, evidence of that intent could properly serve as the basis of the intent element of the offense against Mr. Evsich.<sup>1</sup> The court did not err in so instructing the jury.

**[3]** Defendant next contends that the short-form indictments for attempted first-degree murder and assault with a deadly weapon inflicting serious injury do not adequately confer jurisdiction and are constitutionally insufficient under *Jones v. United States*, 526 U.S. 227, 143 L. Ed. 2d 311 (1999) and *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435 (2000). Neither of the indictments for attempted first-degree murder alleged premeditation and deliberation, and neither of the assault indictments alleged specific intent to kill.

Our Supreme Court has passed on this issue several times and has consistently held that the short-form indictments are “in compliance with both the North Carolina and United States Constitutions.” *State v. Braxton*, 352 N.C. 158, 174, 531 S.E.2d 428, 437 (2000), *cert. denied* 531 U.S. 1130, 148 L. Ed. 2d 797 (2001); *see also*, *State v. Lytch*, 142

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1. We will summarize evidence of defendant’s intent more completely in the discussion of the sufficiency of the evidence to support these convictions later in this opinion.

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N.C. App. 576, 579-80, 544 S.E.2d 570, 572 (2001), *affirmed*, 355 N.C.270, 559 S.E.2d 547 (2002). We are bound by the decisions of our Supreme Court and thus overrule this assignment of error.

Finally, defendant argues that there was insufficient evidence to convict him of attempted first-degree murder of Brian Evsich and Kathy Andrews. Defendant does not articulate a basis for his argument as pertaining to Kathy Andrews; thus we consider that assignment of error abandoned. This discussion will address only the argument pertaining to the charge of attempted murder of Brian Evsich.

In ruling on a defendant's motion to dismiss, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651 (1982). The issue of whether the evidence presented constitutes substantial evidence is a question of law for the court. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at 66, 296 S.E.2d at 652; *see also*, *State v. Mercer*, 317 N.C. 87, 343 S.E.2d 885 (1986). Our Courts have repeatedly noted that "[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. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (citations omitted); *see also*, *State v. Patterson*, 335 N.C. 437, 449-50, 439 S.E.2d 578, 585-86 (1994). "If all the evidence, taken together and viewed in the light most favorable to the State, amounts to substantial evidence of each and every element of the offense and of defendant's being the perpetrator of such offense, a motion to dismiss is properly denied." *Mercer* at 98, 343 S.E.2d at 892 (citations omitted).

The elements of an attempt to commit any crime are: (1) the intent to commit the substantive offense, and (2) an overt act done for that purpose which goes beyond mere preparation, but (3) falls short of the completed offense. *State v. Miller*, 344 N.C. 658, 667, 477 S.E.2d 915, 921 (1996). Specifically, this Court has stated that:

a person commits the crime of attempted first-degree murder if: (1) he or she intends to kill another person unlawfully and (2) acting with malice, premeditation, and deliberation does an overt act



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calculated to carry out that intent, which goes beyond mere preparation, but falls short of committing murder.

*State v. Gartlan*, 132 N.C. App. 272, 275, 512 S.E.2d 74, 77 (1999), *disc. review denied*, 350 N.C. 597, 537 S.E.2d 485 (1999).

The overt act required for an attempted crime must be more than preparation in that it “reach[es] far enough towards the accomplishment of the desired result to amount to the commencement of the consummation.” *State v. Price*, 280 N.C. 154, 158, 184 S.E.2d 866, 869 (1971). Premeditation is present where the defendant formed a specific intent to kill the victim some period of time, no matter how short, prior to perpetrating the actual act. *State v. Gainey*, 343 N.C. 79, 82-3, 468 S.E.2d 227, 229 (1996). Deliberation is acting in a cool state of blood and not under the influence of a violent passion. *Id.* at 83, 468 S.E.2d at 229-30. In *State v. Myers*, our Supreme Court held that in the context of attempted first-degree murder, circumstances that may tend to prove premeditation and deliberation include: (1) lack of provocation by the intended victim or victims; (2) conduct and statements of the defendant both before and after the attempted killing; (3) threats made against the intended victim or victims by the defendant; and (4) ill will or previous difficulty between the defendant and the intended victim or victims. *State v. Myers*, 299 N.C. 671, 677-78, 263 S.E.2d 768, 773 (1980).

**[4]** As to the attempted first-degree murder of Brian Evsich, defendant again argues that the jury instruction on transferred intent was erroneous and without such an instruction the evidence was insufficient to convict defendant on this count. Defendant contends that, as to Mr. Evsich, there is insufficient evidence of premeditation, deliberation or specific intent to kill Mr. Evsich or even of any “threats or ill will,” and that defendant did not even know Mr. Evsich. Since we have already determined that the court properly instructed on transferred intent, we review in more detail the evidence of intent to kill Ms. Andrews in order to determine what intent could have transferred.

As to Kathy Andrews, the State produced evidence which showed that defendant had recently separated from Ms. Andrews, his estranged wife; that he had previously threatened to kill her and previously threatened murder-suicide; that he drove his car directly at Ms. Andrews and hit her in a grocery store parking lot; that after he ran her down with the car, he got out of the car and stabbed her at least three times, repeatedly yelling the word “bitch” with every stab

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of the knife; and that after he was subdued he stated "I did what I wanted to do" and "I was trying to get her." This evidence was sufficient to give rise to the inference that defendant had the specific intent to kill Ms. Andrews and that he acted to carry out that intent. The same evidence gives rise to inferences of premeditation and deliberation.

**[5]** Defendant also argues that there was no evidence of malice toward Mr. Evsich. The evidence, in a light most favorable to the State, does not support this argument.

Malice can be inferred where a defendant intentionally assaults another person with a deadly weapon. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). An automobile driven in a reckless or dangerous manner can be a deadly weapon. *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000). Thus, defendant's malice towards Mr. Evsich can be inferred from the evidence that defendant accelerated his car toward Mr. Evsich and struck him in a grocery store parking lot.

**[6]** In applying the *Myers* factors to this case, defendant's premeditation and deliberation can be inferred from the lack of provocation by Mr. Evsich; the evidence that defendant previously confronted Ms. Andrews about her relationship with Mr. Evsich; the evidence that the same car that hit Mr. Evsich was seen driving slowly past Ms. Andrews as she waited at the lake; and from the evidence that defendant aimed his car at Ms. Andrews and Mr. Evsich, accelerated and knocked them both down.

Finally, this evidence was sufficient to establish an overt act by defendant, beyond mere preparation, in furtherance of his intent to kill. Therefore, the trial court properly denied defendant's motion to dismiss the attempted first-degree murder charges.

No error.

Judges WYNN and CAMPBELL concur.

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A. NEAL BRUMLEY, EXECUTOR OF THE ESTATE OF WILLIAM GLENN DELLINGER, DECEASED,  
PLAINTIFF V. MALLARD, L.L.C. AND BONN A. GILBERT, JR., A/K/A BONN GILBERT,  
DEFENDANTS

No. COA01-1060

(Filed 17 December 2002)

**1. Mortgages and Deeds of Trust— promissory note—anti-deficiency statute—purchase money note**

The trial court did not err by granting plaintiff's motion for summary judgment and by denying defendants' motion for summary judgment even though defendants contend the pertinent promissory note for the purchase of real property was a purchase money note and that plaintiff's action is barred by the anti-deficiency statute under N.C.G.S. § 45-21.38, because neither the deed of trust nor the promissory note contains any language indicating that they are purchase money instruments.

**2. Mortgages and Deeds of Trust— promissory note—failure to include purchase money statement—anti-deficiency statute—indemnification of buyer**

The holder of a promissory note was not obligated to indemnify the maker and guarantor for any loss resulting from a real estate purchase which the note financed under a provision of the anti-deficiency statute that requires a seller to indemnify a purchaser for any loss when the seller did not insert in a note prepared under the seller's direction a statement disclosing that it was for the purchase money of real estate where the holder-seller refused to sign the original documents as purchase money instruments; the holder-seller took no part in the preparation of the note and deed of trust; and the attorney for the maker and guarantor prepared the security documents according to the agreement of the parties at the closing.

**3. Mortgages and Deeds of Trust— agreement to amend security documents at closing—consideration**

The trial court did not err by granting plaintiff's motion for summary judgment and by denying defendants' motion for summary judgment even though defendants contend the agreement to amend at closing the security documents for the purchase of real property was not supported by consideration and are unenforceable, because: (1) both parties were present and agreed to change the language of the security documents and make defendant indi-

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vidual a guarantor of the note; (2) defendants' lack of protest at the time of closing precludes them from raising this defense after they have already accepted partial performance of the obligation and have performed partially in return; and (3) there was ample consideration including that plaintiff accepted a different buyer with different potential for liability than the original buyer.

Judge BIGGS dissenting.

Appeal by defendants from judgment entered 18 May 2001 by Judge James E. Lanning in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 August 2002.

*Richard H. Robertson for plaintiff-appellee.*

*Richard H. Tomberlin for defendant-appellants.*

EAGLES, Chief Judge.

Mallard, L.L.C., and Bonn A. Gilbert, Jr., ("defendants") appeal from the trial court's granting of summary judgment in favor of A. Neal Brumley ("plaintiff") and award of \$150,000 plus interest and attorneys' fees. On appeal, defendants have two assignments of error: (1) that the trial court erred in granting plaintiff's motion for summary judgment; and (2) that the trial court erred in denying defendants' motion for summary judgment. We discern no error and affirm.

The evidence tends to show the following. Plaintiff is the executor of the estate of William Dellinger. The estate owned two tracts of land. As executor, plaintiff contracted on 6 May 1996 with Bonn Gilbert ("Gilbert") to sell the two parcels of land. The total purchase price was \$532,000; \$354,666 of the purchase price was to be a promissory note secured by a purchase money deed of trust.

At the property closing on 31 December 1996, plaintiff was informed that Gilbert intended for plaintiff to convey the land to Mallard, L.L.C. ("Mallard") instead of conveying it to Gilbert personally. Mallard's articles of incorporation were filed in the North Carolina Secretary of State's office on 31 December 1996 as well. Plaintiff refused to convey land to Mallard unless the security instruments were amended to show they were "for consideration" instead of "purchase money" and unless Gilbert personally guaranteed the obligations. Gilbert's attorney, Jameson Wells, prepared the documents according to those specifications.

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This action only involves the sale of Parcel II. The purchase price was financed by a promissory note in the amount of \$150,000. Mallard defaulted on payment of the note. Plaintiff began this action on 7 July 2000 against Mallard as the maker and Gilbert as the guarantor of the note. Defendants allege that the note is a purchase money note and plaintiff's action is barred by the anti-deficiency statute. Defendants alternatively allege that they are entitled to indemnification, if the note is not a purchase money note. Defendants also allege there is a lack of consideration.

The parties' motions for summary judgment were heard in Mecklenburg County Superior Court on 30 April 2001. The trial court granted plaintiff's motion for summary judgment and denied defendants' motion for summary judgment. The trial court ordered that plaintiff recover \$150,000 plus interest. Defendants appeal.

## I

[1] On appeal, defendants argue that the trial court erred by granting plaintiff's motion for summary judgment. Defendants' argument is based on its contention that the promissory note here was a purchase money note. We disagree.

Summary judgment is appropriate when the only issues to be decided are issues of law. *Mortgage Co. v. Real Estate, Inc.*, 39 N.C. App. 1, 4, 249 S.E.2d 727, 729, *aff'd*, 297 N.C. 696, 256 S.E.2d 688 (1978). Here, the only issues contested are questions of law, namely the applicability of the anti-deficiency statute. The anti-deficiency statute reads:

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust, or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate.

G.S. § 45-21.38 (2001). This section of the anti-deficiency statute is only applicable if the "evidence of indebtedness" indicates on its face that it is a purchase-money transaction.

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Here, the promissory note states that it was “given for consideration,” while the offer to purchase and contract state that the note was to be “secured by purchase money deed of trust.” Defendants allege that the phrase “evidence of indebtedness” includes all documents surrounding the sale of the property. We disagree. Here, neither the deed of trust nor the promissory note contain any language indicating that they are purchase money instruments. Accordingly, the anti-deficiency statute cannot be applied to bar plaintiff’s suit against defendants.

The phrase “evidence of the indebtedness” in G.S. § 45-21.38 refers only to the promissory note and the deed of trust. *Gambill v. Bare*, 32 N.C. App. 597, 598, 232 S.E.2d 870, 870, *disc. rev. denied*, 292 N.C. 640, 235 S.E.2d 61 (1977). If there is no indication on the face of the promissory note or deed of trust that “the indebtedness is for the balance of purchase money,” the anti-deficiency statute cannot be applied by implication. *Gambill*, 32 N.C. App. at 598, 232 S.E.2d at 870; *see also Merritt v. Edwards Ridge*, 323 N.C. 330, 372 S.E.2d 559 (1988); *In re Foreclosure of Fuller*, 94 N.C. App. 207, 380 S.E.2d 120, *disc. rev. denied*, 325 N.C. 271, 384 S.E.2d 515 (1989); *Bigley v. Lombardo*, 90 N.C. App. 79, 367 S.E.2d 389 (1988). If there is language in the promissory note that denominates the transaction which does not appear in the deed of trust, the deed of trust is deemed to include the same language as the note. *See Bank v. Belk*, 41 N.C. App. 356, 365, 255 S.E.2d 421, 427, *disc. rev. denied*, 298 N.C. 293, 259 S.E.2d 911 (1979).

In *Green Park Inn, Inc. v. Moore*, 149 N.C. App. 531, 562 S.E.2d 53 (2002), this Court did not apply the anti-deficiency statute to a long-term lease followed by an option to purchase. “We hold that the Anti-Deficiency Statute does not apply to this transaction, in which there is neither an instrument of debt nor a securing instrument stating on its face that the transaction is a purchase money mortgage.” *Moore*, 149 N.C. App. at 537, 562 S.E.2d at 57-58. Accordingly, this assignment of error fails.

## II

[2] Defendants alternatively allege that plaintiff must indemnify them for any loss as a result of the transaction because the promissory note was prepared under the supervision of plaintiff as seller. Defendants argue plaintiff’s insistence that the words “purchase money” be removed from the promissory note before the sale, cou-

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pled with the addition of Gilbert as guarantor, created a responsibility to indemnify them according to G.S. § 45-21.38. We disagree.

Defendants rely on a portion of the anti-deficiency statute that reads, in pertinent part:

Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

G.S. § 45-21.38 (2001). This portion of the anti-deficiency statute has never been judicially interpreted. Plaintiff, the seller here, took no part in the preparation of the promissory note or deed of trust. His only involvement was his refusal to sign the original documents as purchase money instruments. Defendant Gilbert's attorney prepared the documents according to the agreement of the parties at the property closing. The above portion of the statute upon which the defendants rely anticipates a situation where the seller prepares security documents without the buyer's participation and consent, unlike the instant case. Here, defendants were present and represented by counsel when the security documents were amended. In fact, defendants' attorney prepared the amended documents. Accordingly, the provision of the anti-deficiency statute relied upon by defendants does not require plaintiff here to indemnify defendants for actions taken by their own attorney.

## III

**[3]** Finally, defendants allege that the agreement to amend the security documents at closing was not supported by consideration. Plaintiff was under a contractual obligation to sell to defendant Gilbert or his designee as a result of the offer to purchase. Defendants contend that Gilbert's agreement to personally guarantee the loan and the changing of the words "purchase money" to "for consideration" in the promissory note were not supported by additional consideration and are unenforceable. We disagree.

It is well-settled law that a contract must be supported by consideration in order to be enforceable. *Investment Properties v. Norburn*, 281 N.C. 191, 195, 188 S.E.2d 342, 345 (1972). A modification

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to a contract occurs if there is mutual assent to the terms of the modification and consideration supporting the modification. *Altman v. Munns*, 82 N.C. App. 102, 105, 345 S.E.2d 419, 422 (1986); see also *Lewis v. Edwards*, 147 N.C. App. 39, 49, 554 S.E.2d 17, 23 (2001). Here, both parties were present and agreed to change the language of the security documents and make defendant Gilbert guarantor of the note. Defendants' lack of protest at the time of closing precludes them from raising this defense after they have already accepted partial performance of the obligation and have performed partially in return.

In addition, there was ample consideration to support the modification of the contract at the property closing. Plaintiff accepted a different buyer (Defendant Mallard, L.L.C.), with different potential for liability than the original buyer (Defendant Gilbert). The new buyer Mallard had not even been created as a legal entity when the original contract was formed between plaintiff and Gilbert. In return, the language of the security instruments was amended and Gilbert agreed to guarantee the transactions. This exchange represents sufficient consideration to support the contract as modified.

For the foregoing reasons, we conclude that the trial court did not err in granting plaintiff's motion for summary judgment and denying defendants' motion for summary judgment. Accordingly, we dissolve the temporary stay preventing execution of summary judgment entered in plaintiff's favor on 30 May 2001.

Affirmed.

Judge WALKER concurs.

Judge BIGGS dissents.

BIGGS, Judge dissenting.

I agree with the majority that "the evidence of indebtedness" in the case *sub judice* fails to indicate on its face that the transaction is a purchase money transaction, as required by N.C.G.S. § 45-21.38. However, I do believe the evidence raises a genuine issue of material fact regarding whether the closing documents were "prepared under the direction and supervision of the seller." In addition, I do not agree that the modified agreement is supported by consideration. For these reasons, I respectfully dissent.



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[154 N.C. App. 563 (2002)]

Summary judgment is only proper if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.G.S. § 1A-1, Rule 56(c) (2001); *Dept. of Transportation v. Idol*, 114 N.C. App. 98, 440 S.E.2d 863 (1994). “Its purpose is . . . to permit the disposition of cases in which there is no genuine controversy concerning any fact, material to issues raised by the pleadings, so that the litigation involves questions of law only.” *Savings & Loan Assoc. v. Trust Co.*, 282 N.C. 44, 51, 191 S.E.2d 683, 688 (1972). Summary judgment should therefore “be cautiously used so that no one will be deprived of a trial on a genuine, disputed issue of fact. The moving party has the burden of clearly establishing the lack of triable issue, and his papers are carefully scrutinized and those of the opposing party are indulgently regarded.” *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). Moreover, “Rule 56 does not authorize the court to decide an issue of fact, but rather to determine whether a genuine issue of fact exists.” *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975). If issues of material fact are in controversy, summary judgment is not appropriate. *Dockery v. Quality Plastic Custom Molding, Inc.*, 144 N.C. App. 419, 547 S.E.2d 850 (2001).

As recognized by the majority, N.C.G.S. § 45-21.38 provides in pertinent part:

[W]hen said note or notes are prepared *under the direction and supervision of the seller* . . . [he] shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

The majority, however, in reaching its conclusion that plaintiff “took no part in the preparation of the promissory note or deed of trust” ignores the affidavit of the closing attorney, which states in relevant part:

3. I was employed by the buyer to conduct the closing and *also represented the seller to the extent of preparing some of the documents* in connection with the closing.

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4. . . . Since [plaintiff] acted as lender in this transaction, I prepared the security instruments subject to his review and approval.

. . . .

6. . . . This was a seller financed closing and Exhibit B is in reality a purchase money deed of trust[.]”

This affidavit, coupled with plaintiff’s insistence on the removal of the phrase “purchase money” from the promissory note and deed of trust creates a genuine issue regarding whether the security documents were prepared “under the direction and supervision of the seller,” and renders summary judgment improper.

Moreover, I disagree with the majority’s holding that the amendments to the security instruments—the replacement of the phrase “purchase money” with the phrase “for consideration” and adding Bonn Gilbert as guarantor—were supported by “ample consideration,” thereby removing the transaction from the scope of N.C.G.S. § 45-21.38. The general warranty deed, promissory note, deed of trust, and Federal Housing and Urban Development (HUD) settlement statement, were all executed on 31 January 1996, in a single real estate transaction. The general warranty deed transferred “3.85 acres Nevin Road” from plaintiff to defendant Mallard, Inc., (Mallard). The promissory note, executed by Mallard for \$150,000, is secured by the deed of trust for “3.85 acres, Nevin Road,” which was given by Mallard to plaintiff, to secure defendant’s indebtedness for \$150,000 “as evidenced by the Promissory Note.” Finally, the HUD statement, signed by all parties, states that plaintiff sold the Nevin Road property to Mallard and that plaintiff acted as lender, providing financing for the entire sale amount of \$150,000. This undisputed evidence establishes that this was a seller financed real estate sale evidenced by a purchase money promissory note and deed of trust and, thus, was the type of transaction addressed in N.C.G.S. § 45-21.38.

The majority, however, concludes that because plaintiff originally intended to finance a land sale to Gilbert, his acceptance of Mallard as the buyer was consideration for the execution of the promissory note, and that the promissory note for \$150,000 was executed in exchange for this consideration rather than for purchase money. I find the majority reasoning on this point unpersuasive.

First, as acknowledged in the majority opinion, the contract to purchase obligated plaintiff to sell to Gilbert “or his assignee.”

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Therefore, plaintiff's "acceptance" of Gilbert's assignee, Mallard, cannot be a consideration. *Virmani v. Presbyterian Health Services Corp.*, 127 N.C. App. 71, 76, 488 S.E.2d 284, 287 (1997) ("the promise to perform an act which the promisor is already bound to perform cannot constitute consideration to support an enforceable contract"). Further, even assuming, *arguendo*, that plaintiff's agreement to sell to Mallard represented some consideration to the defendant Gilbert, this would not alter the fact that, as part of the parties' overall agreement, plaintiff financed the sale of the property to Mallard, and plaintiff and Mallard executed a purchase money promissory note and deed of trust. "[S]o long as the debt of the purchaser of property is secured by a deed of trust on the property . . . given by the purchaser to secure payment of the purchase price the deed of trust is a purchase money deed of trust" notwithstanding the existence of "additional [terms] not directly arising out of the land sale transaction[.]" *Friedlmeier v. Altman*, 93 N.C. App. 491, 495, 378 S.E.2d 217, 219 (1989) (presence of additional features of agreement "does not remove this deed of trust and promissory note from the definition of a purchase money instrument").

Plaintiff was not obligated to act as lender for this transaction; if he was concerned about Mallard's financial solvency, he could have required defendants to obtain third party financing. However, having agreed to transfer the Nevin Road property in exchange for what is, in fact, a purchase money promissory note and deed of trust, the seller may neither require the buyer to waive the protections of N.C.G.S. § 45-21.38. *Merritt v. Edwards Ridge*, 323 N.C. 330, 336, 372 S.E.2d 559, 563 (1988) ("purchase money debtor cannot waive the protection of the anti-deficiency statute"), nor bring suit against a purported "personal guarantor" for the purchase money promissory note. *Crocker v. Delta Group, Inc.*, 125 N.C. App. 583, 481 S.E.2d 694 (1997).

This Court is obliged to "give proper weight to the intent of the General Assembly as construed by [the North Carolina Supreme Court]." *Merritt*, 323 N.C. at 335, 372 S.E.2d at 562. "[T]he legislature did not intend to allow suit upon the note in a purchase-money mortgage." *Realty Co. v. Trust Co.*, 296 N.C. 366, 372, 250 S.E.2d 271, 275 (1976). Transactions like the one in the instant case must be rigorously examined to ensure that they are not designed to circumvent the spirit and purpose of N.C.G.S. § 45-21.38.

For the reasons stated herein, I conclude that the trial court's grant of summary judgment was improper and should be reversed.

**STATE v. MAYS**

[154 N.C. App. 572 (2002)]

STATE OF NORTH CAROLINA v. KAWAME LLOYD MAYS

No. COA01-1388

(Filed 17 December 2002)

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

A short-form indictment for first-degree murder is constitutional.

**2. Jury— selection—peremptory challenges—*Batson* challenge**

The trial court did not err in a first-degree murder case by allegedly permitting the State to make racially-based peremptory challenges in violation of the Fourteenth Amendment of the United States Constitution and Article I, Sections 19 and 26 of the North Carolina Constitution, because: (1) the record revealed no racially motivated statements made by the prosecutor; and (2) although the prosecutor exercised nearly seventy percent of his peremptory challenges against African-American jurors, other factors supporting an inference of discrimination were not present.

**3. Homicide— felony murder—motion to dismiss—sufficiency  
of evidence**

The trial court did not err by failing to grant defendant's motion to dismiss the charge of felony murder, because: (1) a criminal defendant is presumed to intend the natural consequences of his act; and (2) the State presented sufficient evidence for a reasonable jury to find that defendant intended to shoot at the victim's truck as the victim drove away.

**4. Homicide— felony murder—failure to submit lesser-  
included charge—*involuntary manslaughter***

The trial court did not err in a felony murder case by failing to submit the lesser-included charge of involuntary manslaughter, because: (1) the trial court was not required to instruct the jury on a lesser-included offense unless the evidence also tended to show that the murder was not committed in the course of the commission of a felony; and (2) all the evidence supported the finding that defendant willfully and wantonly discharged a firearm into an occupied vehicle thereby causing the victim's death.

## STATE v. MAYS

[154 N.C. App. 572 (2002)]

Appeal by defendant from judgment entered 28 May 1998 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 21 August 2002.

*Attorney General Roy Cooper, by Assistant Attorneys General John G. Barnwell and Robert C. Montgomery, for the State.*

*Center for Death Penalty Litigation, by Robert Manner Hurley, for defendant-appellant.*

CAMPBELL, Judge.

Defendant was indicted by the Wake County Grand Jury on 4 August 1997 and charged with one count of murder in the death of Michael Walker (“Walker”) and one count of murder in the death of Paul Hale. The cases were joined and tried before a jury at the 4 May 1998 session of the Wake County Superior Court, Judge Donald W. Stephens (“Judge Stephens”) presiding. The jury was unable to reach a verdict in the death of Paul Hale, and the court declared a mistrial as to that charge.

The evidence regarding the charge of murder of Walker tended to show that defendant met Linda Bass (“Bass”), the only eyewitness to the murder, in early July 1997. After midnight on 11 July 1997, defendant arrived at Bass’ house to spend the night on Bass’ couch. While defendant slept, Walker arrived at Bass’ home. He stayed for a short time and then left with an unidentified man. Approximately an hour later, a fight broke out in the street and the noise awakened defendant and Bass. When Bass saw Walker was being beaten by two men she yelled for them to stop. The men fled and Walker ran to Bass’ porch for safety. Walker repeatedly stated he “wasn’t doing anything.” He asked Bass to walk him to his truck which was parked straight across the street, but Bass told Walker that he would be safe walking to his truck on his own. No words were exchanged between Walker and defendant. As Walker walked to his truck, defendant asked Bass why Walker had asked her to walk him to his truck and Bass explained that he must have been afraid the men who had just beaten him up would return.

As Walker got in his truck, started it, and began to pull away defendant began to shoot his gun. Bass testified defendant was approximately “50 feet” away from the truck, which was “straight across in front of him” when the defendant began shooting. The defendant “shot straight at the truck. And then when the truck was going up the street he took a step up, couple of steps up, and shot at

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[154 N.C. App. 572 (2002)]

the back of the truck straight ahead.” One of the bullets entered the left side window of the truck, fragmented, and struck Walker in the back of his head, killing him.

Walker’s truck then crashed into the back of James Hinton’s (“Hinton”) car which was parked on the side of the street in front of his home. When Bass asked defendant why he had shot his gun, defendant responded, “I’m sorry.”

Defendant testified that he shot from the same place and didn’t move, he couldn’t see the truck while he was shooting, he didn’t mean to shoot Walker, but he was shooting “in the direction of” the truck.

In the death of Michael Walker, the jury returned a verdict of guilty of murder in the first degree based upon the felony murder rule. The court imposed a sentence of life without parole upon the defendant.

Defendant appeals his conviction and contends the trial court erred by: (I) denying defendant’s motion to dismiss the indictment on the grounds that it failed to set forth each and every element of first degree murder in violation of the United States and North Carolina Constitutions; (II) permitting the State to make racially discriminatory peremptory challenges; (III) submitting the offense of felony murder to the jury without substantial evidence to support the charge; (IV) failing to submit the lesser included offense of involuntary manslaughter to the jury.

### I. Constitutionality of the Indictment

**[1]** Defendant contends, for preservation of the issue, that the short-form indictment violates his Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution and Article I, Sections 19, 22, and 23 of the North Carolina Constitution. However, defendant acknowledges the North Carolina Supreme Court has considered the issue and held the short-form indictment constitutional. *State v. Wallace*, 351 N.C. 481, 528 S.E.2d 326, *cert. denied*, 531 U.S. 1018, 148 L.Ed.2d 498 (2000). Thus, we hold accordingly.

### II. Constitutionality of Peremptory Challenges

**[2]** Defendant contends the court erred by permitting the State to make racially based peremptory challenges in violation of the Fourteenth Amendment of the United States Constitution and Article I, Sections 19 and 26 of the North Carolina Constitution.

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The constitutionality of the State's use of a peremptory challenge is determined by application of a three-step inquiry set forth by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986). The North Carolina Supreme Court recently explained the three steps as follows:

First, defendant must establish a *prima facie* case that the peremptory challenge was exercised on the basis of race. Second, if such a showing is made, the burden shifts to the prosecutor to offer a racially neutral explanation to rebut defendant's *prima facie* case. Third, the trial court must determine whether the defendant has proven purposeful discrimination.

*State v. Cummings*, 346 N.C. 291, 307-8, 488 S.E.2d 550, 560 (1997) (citations omitted). To properly establish a *prima facie* case, the "defendant need only show that the relevant circumstances raise an inference that the prosecutor used peremptory challenges to remove potential jurors solely because of their race." *State v. Quick*, 341 N.C. 141, 144, 462 S.E.2d 186, 188 (1995).

When the trial court rules against the defendant, and holds the defendant did not establish a *prima facie* case of racial discrimination, appellate review is generally limited to whether the trial court erred in that ruling. *State v. Williams*, 343 N.C. 345, 359, 471 S.E.2d 379, 386-87 (1996). This limitation applies even when the prosecutor has furnished the record with his explanation for the challenge. *Id.*, 343 N.C. at 359, 471 S.E.2d at 387. In such a case, the appellate court considers the prosecutor's reasons only if it determines the trial court erred. *Id.* When, however, the prosecutor volunteers his reasons to the trial court before the trial court rules, then, despite the trial court's ultimate ruling that defendant failed to establish a *prima facie* case, the appellate court proceeds as though the defendant had established a *prima facie* case and examines the prosecutor's explanations. *State v. Cummings*, 346 N.C. 291, 308, 488 S.E.2d 550, 560 (1997). In such a case, the appellate court considers the prosecutor's explanations pursuant to step two of *Batson*, and then proceeds to step three, inquiring whether the trial court was correct in its ultimate determination that the State's use of peremptory challenges did not constitute intentional discrimination. *Id.*

For each *Batson* challenge in this case, Judge Stephens ruled defendant had not adequately set forth a *prima facie* case of racial discrimination. Judge Stephens then offered the prosecutor the opportunity to state his reasons "for the record." With regard to the

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first *Batson* challenge the prosecutor declined the opportunity, but for all of the following challenges the prosecutor stated his reasons for the record.<sup>1</sup> Since the prosecutor's statements were made at the direction of Judge Stephens for the record and not to assist the trial court's ruling on the existence of a *prima facie* case, such statements are not considered by the appellate court unless the court determines that the trial court erred in its ruling that defendant failed to establish a *prima facie* case.

"Since the trial judge's findings . . . largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference." *Batson*, 476 U.S. at 98 n.21, 90 L. Ed. 2d at 89 n.21. Our appellate courts accord great deference in reviewing the trial court's ruling on the establishment of a *prima facie* case. *State v. Norwood*, 344 N.C. 511, 527, 476 S.E.2d 349, 355 (1996). The trial court's ultimate *Batson* decision "will be upheld unless the appellate court is convinced that the trial court's determination is clearly erroneous." *State v. Fletcher*, 348 N.C. 292, 313, 500 S.E.2d 668, 680 (1998).

To review defendant's claim that the trial court erred in ruling that he had failed to establish a *prima facie* case of intentional discrimination, we consider the following factors:

[(1)] whether the 'prosecutor used a disproportionate number of peremptory challenges to strike African-American jurors in a single case;' [(2)] whether the defendant is a 'member of a cognizable racial minority;' . . . [(3)] whether the state's challenges appear to have been motivated by racial discrimination; . . . [(4)] 'the victim's race[;]' [(5)] the race of the State's key witnesses[;]' and [(6)] 'whether the prosecutor made racially motivated statements or asked racially motivated questions of black prospective jurors . . . that raise[d] an inference of discrimination.'

*State v. Nicholson*, 355 N.C. 1, 22, 558 S.E.2d 109, 125, *cert denied*, 123 S. Ct. 178, — U.S. —, — L. Ed. 2d — (2002) (citations omitted).

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1. "Although we recognize that the State was not required in this case to come forward with neutral explanations for its challenges, we observe that it would often be of benefit to a reviewing court if those reasons were articulated in the record." *State v. Robinson*, 97 N.C. App. 597, 601, 389 S.E.2d 417, 420 (1990). Here, Judge Stephens encouraged the prosecutor to follow this advice by noting that while he may stand on his election not to speak, it would be "prudent" to provide, for the record, his reasons for peremptorily striking a juror.



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Here, defendant is African-American, Walker was white, the State's witnesses were both white and African-American, and the State's key witness, the only eyewitness, is African-American. The record reveals no racially motivated statements made by the prosecutor. At the conclusion of jury selection, when addressing the final juror challenged under *Batson*, Judge Stephens explicitly stated, "looking at the face of the entire record in these proceedings the Court cannot say that there has been a *prima facie* showing that race has been a motivating factor in the exclusion of jurors."

The prosecutor exercised nearly 70% (nine of thirteen) of his peremptory challenges against African-American jurors. In *State v. Smith*, 328 N.C. 99, 123, 400 S.E.2d 712, 725 (1991), "the State exercised 80% of the peremptories used to remove black potential jurors." There, the Court held defendant had established a *prima facie Batson* case by proving an inference of racial discrimination. In *Smith*, however, there was also a statement by the prosecutor that "tends to support . . . an inference of discrimination." *Id.* Moreover, the case "involved an interracial killing and attracted much attention," and the "racial emotions and publicity surrounding the case were substantial enough for the defendant to successfully seek a change of venue." *Smith*, 328 N.C. at 122, 400 S.E.2d at 725. As in *Smith*, defendant here was a young, African-American man, and the victims were both white. Unlike *Smith*, however, defendant's motion to change venue was denied, and publicity was such that many jurors had never heard of the case. Therefore, while the percentages of peremptory challenges were high in both cases, other elements supporting an inference are not present in the case at bar.

Since Judge Stephens was present to assess credibility, we will not overturn his judgment unless it was clearly erroneous. Considering all the factors, we cannot say the trial court erred in determining defendant failed to prove a *prima facie Batson* case.

### III. Submission of Felony Murder Charge to the Jury

[3] Defendant contends the trial court erred by failing to grant his motion to dismiss the charge of felony murder and instead submitting the charge to the jury because this charge was not supported by the evidence and therefore violated the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 19 and 23 of the North Carolina Constitution.

An appellate court reviewing such a motion to dismiss for lack of evidence must examine "the evidence adduced at trial in the light

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most favorable to the State, in order to determine whether there is substantial evidence of every essential element of the crime.” *State v. Pakulski*, 319 N.C. 562, 571, 356 S.E.2d 319, 325 (1987). Substantial evidence is defined as “relevant evidence that a reasonable mind might accept as sufficient to support a conclusion.” *State v. Allen*, 346 N.C. 731, 739, 488 S.E.2d 188, 192 (1997). “[T]he evidence need only give rise to a reasonable inference of guilt for the case to be properly submitted to the jury.” *State v. Barnett*, 141 N.C. App. 378, 383, 540 S.E.2d 423, 427 (2000), *disc. review denied*, 353 N.C. 527, 549 S.E.2d 552, *aff’d in part*, 354 N.C. 350, 554 S.E.2d 644 (2001).

The felony murder rule applies to this case through the interaction of N.C. Gen. Stat. §§ 14-17 and 14-34.1. The law provides that “[a]ny person who willfully or wantonly discharges or attempts to discharge . . . [a] firearm . . . into any . . . vehicle . . . while it is occupied is guilty of a . . . felony.” N.C. Gen. Stat. § 14-34.1 (2001). “A murder . . . committed in the perpetration or attempted perpetration of any . . . felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree.” N.C. Gen. Stat. § 14-17 (2001).

Defendant asserts the State failed to prove he intentionally shot into Walker’s truck. The State presented the testimony of Bass, the only eyewitness, to prove that defendant shot “straight at the truck” took a few steps and continued shooting at the truck. Defendant argues that this evidence is insufficient to prove defendant intended to shoot Walker in the truck, but rather “[t]he only credible inference that can be drawn from the evidence is that defendant was attempting to scare Walker away or discourage him from returning to Bass’ house.” We disagree.

“A criminal defendant is presumed to intend the natural consequences of his act. It is an inherently incredible proposition that defendant could have intentionally fired a shot ‘at’ the fleeing [automobile] without intending that the bullet go ‘into’ the vehicle.” *State v. Wall*, 304 N.C. 609, 617, 286 S.E.2d 68, 73 (1982). Moreover, “any rational trier of fact could find the defendant intended to fire into the vehicle from the evidence that the defendant pointed the pistol toward the vehicle and fired the pistol so that a bullet went into the vehicle.” *State v. Wheeler*, 321 N.C. 725, 727, 365 S.E.2d 609, 610 (1988). Therefore, we conclude that the State presented sufficient evidence to prove defendant committed the felony of intentionally firing a gun into an occupied vehicle. Since the State presented sufficient

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evidence for a reasonable jury to find that defendant intended to shoot at Walker's truck as Walker drove away, the crime of felony murder was properly submitted by the trial court to the jury.

IV. Submission of Involuntary Manslaughter to the Jury

**[4]** Defendant contends the trial court erred by not submitting the charge of involuntary manslaughter to the jury.

"The trial judge must charge on a lesser included offense if: (1) the evidence is equivocal on an element of the greater offense so that the jury could reasonably find either the existence or the nonexistence of this element; and (2) absent this element only a conviction of the lesser included offense would be justified." *State v. Whitaker*, 307 N.C. 115, 118, 296 S.E.2d 273, 274 (1982). There must be evidence to support a conviction of the lesser offense, "[t]he presence of such evidence is the determinative factor. . . . Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice." *State v. Hicks*, 241 N.C. 156, 159-60, 84 S.E.2d 545, 547 (1954). If the crime charged is felony murder, then the trial court need not instruct the jury on a lesser included offense unless the "evidence also tended to show that the murder was not committed in the course of the commission of a felony." *State v. Wilson*, 354 N.C. 493, 506, 556 S.E.2d 272, 281 (2001).

Felony murder requires (1) a felony and (2) a related killing. N.C. Gen. Stat. § 14-17. The felony, here, was "(1) the willful or wanton discharging (2) of a firearm (3) into any building [or vehicle] (4) while it is occupied." *State v. Jones*, 104 N.C. App. 251, 258, 409 S.E.2d 322, 326 (1991); N.C. Gen. Stat. § 14-34.1. Defendant contends he did not commit a felony because he did not act willfully or wantonly in discharging his gun into Walker's truck while Walker drove away.

[W]ilful as used in criminal statutes means the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of the law. Wantonness . . . connotes intentional wrongdoing. . . . Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others.

*State v. Casey*, 60 N.C. App. 414, 416-17, 299 S.E.2d 235, 237 (1983) (citations omitted).

Defendant's argument is similar to the argument asserted by the defendant in *Wall, Wall*, 304 N.C. at 620, 286 S.E.2d at 75. In *Wall*, the

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defendant was a convenience store clerk who shot into a car fleeing after one of the occupants stole beer from the store. Defendant appealed his conviction of first degree murder asserting manslaughter was the more appropriate charge. Defendant testified that he did not intend to shoot the victim, but rather fired his gun into the air intending to scare the thieves away. The Court held the trial court could have submitted only the charge of first degree felony murder to the jury, reasoning "all the evidence discloses that defendant killed the victim 'by discharging a firearm into occupied property.'" *Wall*, 304 N.C. at 620-1, 286 S.E.2d at 75 (quoting N.C. Gen. Stat. 14-34.1).

In *Wall*, the defendant asserted a more persuasive argument than in the case at bar. Defendant Wall offered the excuse that he shot over the car attempting to scare the thieves away. His excuse is more supportive of a finding that there was a justification or excuse and therefore lack of willfulness than this defendant's response that he does not know why he started shooting. Moreover, the fact that defendant Wall shot over the car would more strongly support a conclusion that he was not acting wantonly than the eyewitness' testimony in this case that defendant shot "straight at" the truck. Despite these arguments the North Carolina Supreme Court in *Wall* held that all the evidence supported the charge of felony murder, and therefore the trial court could have submitted only the charge of felony murder.

In both *Wall* and this case, all the evidence supports the finding that defendant willfully and wantonly discharged a firearm into an occupied vehicle thereby causing a death. Since all the evidence supports the finding of felony murder, defendant's assignment of error is overruled.

No error.

Judges WYNN and HUDSON concur.

**STATE v. MARCOPLOS**

[154 N.C. App. 581 (2002)]

STATE OF NORTH CAROLINA v. MARK W. MARCOPLOS, NANCY KATHERINE WOODS, PASCAL L. PITTS, LAURA WINBUSH VANDERBECK, JAMES EDWIN WARREN, AND RUTH C. ZALPH

No. COA01-1518

(Filed 17 December 2002)

**1. Trespass— second-degree—refusal to leave privately owned property held open to public for legitimate purposes only**

The trial court did not err by convicting defendants of second-degree trespass after defendants organized a group of people, after contacting the police, to go to CP&L headquarters to demand a meeting with the CEO in order to get him to sign a document agreeing to safety hearings and defendants were told three or more times that they could not see the CEO and were asked to leave but refused and were arrested, because: (1) a person may commit second-degree trespass by refusing to leave privately owned property, held open to the public for legitimate purposes only, once he no longer as a legitimate purpose on the premises and is asked to leave by a proper authority; and (2) although defendants were peaceful, the evidence sufficiently supported a finding that their continued presence disrupted the business atmosphere of the building.

**2. Criminal Law— findings of fact—document given to court clerk without defendant's knowledge—harmless error**

Although the trial court erred in a second-degree trespass case by making findings of fact based upon a document given to the court clerk by the prosecution without informing defense counsel of its existence or allowing defense counsel to respond, it was harmless error in light of the overwhelming evidence in this case.

Judge GREENE dissenting.

Appeal by defendants from judgments dated 9 August 2001 by Judge J.B. Allen, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 17 September 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Harriet F. Worley, for the State.*

*Glenn, Mills & Fisher, P.A., by Stewart W. Fisher, and George Hausen, for defendant appellants.*

## STATE v. MARCOPILOS

[154 N.C. App. 581 (2002)]

WYNN, Judge.

Defendants Mark W. Marcoplos, Nancy Katherine Woods, Pascal L. Pitts, Laura Winbush Vanderbeck, James Edwin Warren, and Ruth C. Zalph appeal from convictions of second-degree trespass. On appeal, we uphold defendants' convictions.

The State's evidence tends to show defendants entered during business hours the lobby of a building located at 411 Fayetteville Street Mall in Raleigh, known as the CP&L Building. Their stated intent was to address Carolina Power & Light, Inc.'s (CP&L) chief executive officer, William Cavanaugh, to protest the lack of open hearings about CP&L's storage of used nuclear fuel at the Shearon Harris nuclear power plant. The lobby of the CP&L Building is open during business hours in order to allow for public access to various stores and restaurants located contiguous to the lobby as well as CP&L offices located on other floors of the building. Upon entering the lobby of the CP&L Building, Russ Sweeney, Manager of Investigations and Physical Security for Progress Energy Service Company, Inc., the company that provides security for CP&L, accompanied by Raleigh police officers stopped defendants and asked defendants to leave after informing them the CEO was unavailable. Defendants refused to leave the lobby and were subsequently arrested.

At the close of the State's evidence and at the close of all evidence, defendants moved to dismiss the charges of second degree trespass. From the trial court's denial of those motions, defendants appeal.

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**[1]** The issue on appeal is whether a person may commit second degree trespass by refusing to leave privately owned property, held open to the public for legitimate purposes only, once he no longer has a legitimate purpose on the premises and is asked to leave by a proper authority. We answer yes, and therefore, uphold the defendants' convictions for second degree trespass.

As a general proposition, one is guilty of second degree trespass "if without authorization, [he] enters or *remains* on [the] premises of another: (1) after he has been notified not to enter or *remain* there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person." N.C. Gen. Stat. § 14-159.13 (2001). If, however, the premises are open to the public, the occupants of those premises have the implied consent of the

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owner/lessee/possessor to be on the premises, and that consent can be revoked only upon some showing the occupants have committed acts sufficient to render the implied consent void. *See State v. Winston*, 45 N.C. App. 99, 102, 262 S.E.2d 331, 333 (1980) (motion to dismiss unlawful entering charge should be granted where the defendant entered clerk's office, an office open to the public, during regular business hours and evidence failed to disclose the defendant, after entry, committed acts sufficient to render implied consent void *ab initio*). Under N.C. Gen. Stat. § 14-159.13, one who lawfully enters a place may be subject to conviction for trespass if he or she remains after being asked to leave by someone with authority. It follows that one who remains on privately owned property, without a legitimate purpose, after being asked to leave by someone with authority, may be convicted of second-degree trespass.<sup>1</sup>

The Supreme Court of Maine reached a similar conclusion in *State of Maine v. Armen*, 537 A.2d 1143 (1988) where the defendant as part of the Maine Coalition for Peace and Justice in Central America sought an appointment with United States Representative Olympia Snowe. After not receiving an appointment, the defendant went to Representative Snowe's district office, and refused to leave the office if significant progress was not made towards arranging a meeting. The defendant had earlier called the police because he anticipated the police may be called at the office. However, defendant still refused to leave after speaking with the administrative assistant to Representative Snowe in Washington, D.C. because he was reluctant to leave without some indication of a meeting in the future. Defendant was eventually arrested for trespass. On appeal, the defendant argued that he had further business to conduct at the district office, although he never conveyed those intentions to the district office staff. In his appellate argument, the defendant contended that "an order to leave property open to the public is lawful only when an authorized person has some justification for requesting removal [and that] because his actions were peaceful, [the defendant] contended there was no justification for his removal. The Supreme Judicial Court of Maine held:

Because of the public invitation, [defendant's] initial entry was not a trespass. Upon completion of his legitimate business, [defendant] was not privileged to remain. [Defendant] argues,

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1. We note further that other examples of conduct that may void implied consent include loitering, non-permitted solicitation, creating a public disturbance, public drunkenness, or other disorderly or criminal conduct.

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nevertheless, that Higgins arbitrarily ordered him to leave before he had the opportunity to complete his business. The record indicates and [defendant] concedes that he had not informed Higgins that he had additional matters to discuss. Because the evidence viewed in the light most favorable to the State supports a finding that [defendant] had completed his business and that his continued presence interfered with the operation of the district office, we conclude that the District Court was not compelled to entertain a reasonable doubt as to the lawfulness of Higgins' order.

537 A.2d at 1146.

Similarly, in this case, the defendants organized a group of people, after contacting the police, to go to the CP&L headquarters to demand a meeting with the CEO in order to get him to sign a document agreeing to safety hearings. After being met by a company representative outside of the building who informed them he would hear their requests, would accept any documents, and that they would not be able to meet with the CEO, a group of approximately 25 demonstrators went inside of the Progress Energy lobby. Also inside of the lobby were 12 Raleigh Police Officers, whom the defendants' organization had contacted prior to going to the building. The defendants separated themselves from the group and were met by a Progress Energy security officer. They requested to see the CEO. After being told they could not meet with the CEO and were asked to leave, they repeated their demand. Ultimately, the defendants were told three more times, once by the security officer and twice by the police sergeant, that they could not see the CEO and were asked to leave. They refused and were arrested.

On appeal, the defendants argue that because they were peaceful and were in an area held open to the public, CP&L and Progress Energy officials did not have sufficient justification for asking them to leave. However, the uncontroverted evidence shows Hawthorne Associates leased the entire building, including the lobby, to Progress Energy Services, L.L.C. and its subsidiary, CP&L. Although the lobby contained several businesses, CP&L and Progress Energy retained control over the lobby and held the lobby open to the public for certain legitimate purposes, which included patronizing the businesses located in the lobby. Assuming the defendants had implied consent to enter the lobby area held open to the public,<sup>2</sup> once they were made

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2. At trial, several defendants testified that their sole purpose was to demand a meeting with the CEO, not to patronize the other businesses in the lobby area. Consent, whether express or implied, must be based upon a good faith reasonable belief that



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aware they could not meet with the CEO and because they did not have any intention of patronizing the other businesses, the defendants no longer had a legitimate purpose for being in the lobby. Although the defendants were peaceful, the evidence sufficiently supports a finding that their continued presence disrupted the business atmosphere of the building. Indeed, there were 25 demonstrators along with at least 12 police officers in the middle of a small lobby area where other people were trying to come in and go out of the building.

In sum, we hold one with lawful authority may order a person to leave the premises of a privately owned business held open to the public when that person no longer has a legitimate purpose for being upon the premises. *See State v. Birkhead*, 48 N.C. App. 575, 269 S.E.2d 314 (1980); *State v. Clyburn*, 247 N.C. 455, 101 S.E.2d 295 (1958); *see also Smith v. State of Florida*, 778 So.2d 329, 330 (Fla. Dist. Ct. App. 2000) (where although the public had an invitation to shop a privately owned convenience store because it was quasi public property, the owner could still limit or revoke the invitation to come on his land); *People v. Nunez*, 431 N.Y.S.2d 650, 653 (N.Y. Crim. Ct. 1980) (where the court stated “one can bar an individual from a quasi-private building, such as a department store, so long as the exclusion is not founded on race, creed, color, or national origin [and that] to bar a person from a public building or facility, that is, one ‘maintained by the public for use by the public on public affairs and business’, there must be a greater showing than mere presence in violation of an order not to enter); *People v. Marino*, 515 N.Y.S.2d 162, 165-66 (N.Y. Justice Ct. 1986) (stating “privately owned premises which provide public accommodations may exclude individuals provided the exclusion is not based upon a violation of a civil right, such as race, color, creed, or national origin). We, therefore, conclude that the evidence presented at trial was sufficient to support defendants’ convictions for second-degree trespass.

**[2]** Defendants also argue on appeal that the prosecutor improperly communicated *ex parte* with the trial judge by giving a document to the court clerk, who in turn, gave the document to the judge.<sup>3</sup> Defense

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they were authorized to enter said premises. *See State v. Upchurch*, 332 N.C. 439, 458-59, 421 S.E.2d 577, 588 (1992); *see also State v. Tolley*, 30 N.C. App. 213, 226 S.E.2d 672 (1976).

3. After the trial ended, prior to sentencing, defense counsel was allowed to review the document, with the names Larry Macer, CP&L’s associate general counsel, and Kenneth Poston, CP&L’s senior public relations officer, at the top. Defense counsel asked that the document be included in the record, that the record reflect the occupa-

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counsel never saw the document and did not know the judge received the document until he ruled upon the necessity defense. As part of the order, the court found:

Number 5: . . . The Court will note, and the Clerk handed me this Internet yesterday, that a one—and I don't know who Kenneth Poston is—but a one Kenneth Poston caused a notice to be placed on the Internet Tuesday, July 31st, 2001, announcing these trials scheduled in the Wake County Superior Court, encouraging people to come to court and support the defendants who were arrested and demanding for nuclear safety. In the Internet message, it was stated that attorneys Stewart Fisher and attorney George Hausen planned to utilize a quote, necessity defense, end of quote.

Number 7: Also in the Internet message, it was stated that a renowned nuclear expert, a one David Lochbaum, would testify as to the risk of nuclear waste pool, fires, and terrorism at the Shearon Harris plant.

Number 8: The Internet message stated that there would be carpooling from Durham to Wake County Courthouse for this trial.

Although the trial judge made these findings of fact, none of this information was presented by the prosecution or defendants during their arguments as to the availability of the necessity defense. It appears from the record that the trial judge made findings of fact based upon the document given to the clerk by the prosecution without informing defense counsel of its existence or allowing defense counsel to respond. Moreover, during sentencing, the trial judge stated, referring to the defendants,

I have no fault whatsoever with your good intentions. In fact, you are to be admired for your deep concern about your safety and the safety of your fellow citizens. But as I have already indicated, I do fault you on your judgments. You wanted to be arrested. You wanted to come into this Court and put on a show. You wanted to do this because you thought it would help your cause, and in my opinion you have hurt your cause.

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tion of the two men mentioned in the document, and stated for the record their feeling that it was inappropriate for the CP&L officials to provide the document to the Court outside defendants presence. The prosecutor informed the court that he gave the document to the clerk when the clerk asked what case was being tried without the intention of the document being given to the judge.

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These statements make it clear that the trial judge considered the contents of the document handed to the Court by the prosecutor.

Under Rule 3.5(a)(3) of the North Carolina Rules of Professional Conduct: “A lawyer shall not communicate *ex parte* with a judge or other official except: (i) in the course of official proceedings; (ii) in writing, if a copy of the writing is furnished simultaneously to the opposing party; (iii) orally, upon adequate notice to the opposing party; (iv) or as otherwise permitted by law.” The clerk is a court official and the prosecutor should not have given the clerk the document without giving defense counsel a copy. Although the State contends the document was given to the clerk in response to her question about what case was being tried, the prosecutor could have responded by simply telling her the case numbers. However, in light of the overwhelming evidence in this case, we hold that this conduct constituted harmless error.

In sum, we find no error in defendants convictions for second-degree trespass.

No error.

Judges BIGGS concurs.

Judge Greene dissents.

GREENE, Judge, dissenting.

Because I disagree with the majority’s conclusion “the evidence presented at trial was sufficient to support defendants’ convictions for second-degree trespass,” I dissent.

As a general proposition, one is guilty of second-degree trespass if one remains on the premises of another after being asked to leave by an authorized person. *See* N.C.G.S. § 14-159.13(a) (2001). As the majority recognizes, if “the premises are open to the public, the occupants of those premises have the implied consent of the owner/lessee/possessor to be on the premises, and that consent can be revoked only upon some showing the occupants have committed acts sufficient to render the implied consent void.”<sup>4</sup> Thus, people in a public area may only be asked to leave for some cause. 87 C.J.S. *Trespass* § 183, at 813 (2000). Accordingly, the burden is on the State

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4. The majority lists several examples of acts, which if proven by the State, would render implied consent void.

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in a second-degree trespass prosecution, to prove defendants performed acts rendering implied consent void and giving the occupants or an authorized person cause to ask them to leave.

In this case, defendants were asked to leave a public place during a time it was open to the public. Although they expressed a desire to visit with CP&L's chief executive officer, whose office was located on a different floor in the building and not in a public place, they never made any attempt to enter that private office. Indeed, a "key card" was necessary to access that private space. As there is no evidence defendants had a "key card," they had no ability to enter that area of the building. Furthermore, there is no evidence defendants caused any disruption in the lobby, either before or after they were asked to leave.<sup>5</sup> Accordingly, there has been no showing defendants engaged in any act justifying their exclusion from the public space in the CP&L Building. Their stated intention to visit a place they could not in fact visit is not an act justifying their ouster. As the motions to dismiss should have been allowed by the trial court, the convictions must therefore be reversed.

I further disagree with the majority's conclusion the improper *ex parte* communication by the prosecutor "in light of the overwhelming evidence in this case . . . constituted harmless error." The evidence of defendants' guilt was not "overwhelming" as the majority suggests. Instead, as discussed above, it was insufficient to even reach a jury. Accordingly, this constitutes grounds for granting defendants a new trial.

The majority also ignores other assignments of error asserted by defendants.<sup>6</sup> This includes the trial court's failure to allow defendants to make an offer of proof on the defense of necessity, thereby pre-

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5. The majority relies on *Maine v. Armen*, 537 A.2d 1143 (Me. 1988) for the proposition as soon as defendants' were informed they would be unable to meet with the C.E.O. of CP&L, they necessarily had no other legitimate purpose for being in the public lobby. In *Armen*, however, the defendant entered the lobby of Representative Snowe's district office and prevented the office manager from performing any work while he was present. In this case, defendants did not enter CP&L's actual office space. Further, in *Armen*, the only legitimate business the defendant could conduct was visiting Representative Snowe or her staff. In this case, the evidence showed the CP&L Building's public lobby contained various businesses and restaurants and was available as a public walk through to access those businesses and restaurants.

6. Along with the assignment of error relating to the trial court's refusal to allow defendants to make an offer of proof, defendants also assert application of second-degree trespass violated their right of free speech under both the federal and North Carolina constitutions. As I would reverse the trial court's denial of the motions to dismiss the charges, I would not reach the constitutional issue.

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cluding appellate review of the trial court's grant of the State's motion *in limine* as to any evidence relating to the necessity defense. Failure to allow an offer of proof to preserve testimony for appellate review constitutes reversible error. See *State v. Silva*, 304 N.C. 122, 134-36, 282 S.E.2d 449, 456-58 (1981). In this case, once the trial court determined defendants would not be allowed to pursue the necessity defense at trial, defendants attempted to preserve the evidence for appellate review. The refusal to allow an offer of proof constituted prejudicial and reversible error warranting a new trial.<sup>7</sup>

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PIEDMONT TRIAD REGIONAL WATER AUTHORITY, PLAINTIFF v. LINDA H. UNGER  
AND WOLFY UNGER, DEFENDANTS

No. COA02-201

(Filed 17 December 2002)

**Eminent Domain—condemnation—regulatory taking—watershed protection ordinance—valuation of property**

The trial court erred by concluding that the Watershed Critical Area (WCA) ordinance designed to protect existing and proposed watersheds, as applied to defendants' property, was not caused by the Randleman dam reservoir project and therefore limited the value of defendants' property condemned by plaintiff regulatory agency as of the date of the taking, because: (1) the WCA ordinance has no definition or meaning with respect to defendants' property without reference to the proposed Randleman dam project; and (2) the Randleman dam project caused the passage of the WCA ordinance as it applies to defendants' property, and therefore, defendants are entitled to introduce evidence of the property's value before the development and density restrictions were adopted under N.C.G.S. § 40A-65.

Appeal by defendants from judgment entered 19 December 2001 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 14 November 2002.

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7. In addition, the failure to allow an offer of proof also shows the *ex parte* communication by the prosecutor was not harmless, as the document referenced defendants' intended necessity defense and the trial court, at least in part, based its denial of an offer of proof on concerns defendants would attempt to "put on a show."

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*Roberson Haworth & Reese, P.L.L.C., by Robert A. Brinson, for plaintiff-appellee.*

*Wyatt Early Harris Wheeler, LLP, by Scott F. Wyatt, for defendants-appellants.*

TYSON, Judge.

### I. Background

In 1984, the Guilford County Board of Commissioners (“Commissioners”) adopted its first countywide watershed protection ordinance. At the time, the following watersheds were designated: Greensboro, High Point, Jamestown, Lake Mackintosh, Reidsville, and Pole Cat Creek. In August 1985, the Commissioners designated the Randleman Dam watershed, whose boundaries included a portion of 94.11 acres of property owned by Linda H. and Wolfy Unger, (“defendants”). As of October 1985, Guilford County had also designated the Sandy Creek watershed. Of the nine watersheds so designated, five, Greensboro, High Point, Jamestown, Lake Mackintosh, and the proposed Randleman watershed, have reservoirs located within or a proposed reservoir to be located within Guilford County.

In April 1987, the Commissioners amended the 1984 watershed protection ordinance by creating the Watershed Critical Area ordinance (“WCA”) to protect existing and proposed watersheds. The proposed Randleman Dam watershed is specifically referred to in the WCA and is the only watershed that affects defendants’ property. The WCA ordinance established a four-tier development restriction on lands adjacent to or in close proximity to the actual and proposed lake reservoirs as follows:

- Tier 1— includes those lands within 200 feet of the normal pool elevation. This tier is intended for public ownership, and no development of any kind is allowed.
- Tier 2— includes those lands beyond Tier 1 but within 750 feet of the normal pool elevation. Development in Tier 2 is limited to one dwelling unit per five acres of land.
- Tier 3— includes those lands lying beyond Tier 2 but within 3,000 feet from the normal pool elevation. Development in Tier 3 is limited to one dwelling unit per three acres of land.

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Tier 4— includes those lands beyond Tier 3 but within the critical watershed area boundary. Development is limited to one dwelling unit per acre.

As applied to defendants' property, the "normal pool elevation" projects the average lake levels after construction of the proposed Randleman dam lake reservoir. The defendants' property lies within Tiers 1 through 3, and its density of development is restricted by measuring its proximity to the proposed Randleman dam watershed lake.

On 28 June 2000, Piedmont Triad Regional Water Authority, ("PTRWA") condemned approximately 19,513 acres of defendants' property located within Tier 1. Defendants, pursuant to N.C.G.S. § 40A-47, moved the court to judicially determine whether the application of the WCA to defendants' property was caused by the proposed Randleman Dam project. Plaintiff and defendants presented expert testimony to the court on 21 August 2001. The trial court found that the WCA ordinance, as applied to defendants' property, was not caused by the Randleman dam project. The trial court certified its ruling for appellate review. Defendants appeal.

Plaintiff moved to dismiss defendants' appeal contending it is premature and interlocutory in nature. We disagree. The trial court certified its order for appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Also, the issue affects a substantial right, the valuation of defendants' property.

## II. Issue

The question before us is whether the application of Guilford County's WCA ordinance to defendants' property was caused by the proposed Randleman dam reservoir project. If so, defendants would be allowed to present evidence of their property's value prior to adoption of the ordinance. If not, defendants are limited to the property's value as of the date of the taking.

## III. The Takings Clause

The power of eminent domain is inherent to the sovereign and recognized by all fifty states and the federal government. David A. Dana & Thomas W. Merrill, *Property: Takings* 3 (2002); *Kohl v. United States*, 91 U.S. 367, 371-75, 23 L. Ed. 449, 451-52 (1875). The Takings Clause is embodied in the Fifth Amendment of the United States Constitution and mandates the government pay "just compen-

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sation” to the owner when the government uses its power to take private property for a public use. U.S. Const. Amend. V. “The Fifth Amendment’s guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d. 1554, 1561 (1960).

The Fifth Amendment of the U.S. Constitution applies to the states through the Due Process clause of the Fourteenth Amendment. *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979 (1897). “[A]lthough the North Carolina Constitution does not contain an express provision prohibiting the taking of private property for public use without payment of just compensation, [the N.C. Supreme] Court has inferred such a provision as a fundamental right integral to the ‘law of the land’ clause in article I, section 19 of [the North Carolina] Constitution.” *Finch v. City of Durham*, 325 N.C. 352, 362-63, 384 S.E.2d 8, 14, *reh’g denied*, 325 N.C. 714, 388 S.E.2d 452-53 (1989) (citing *Long v. City of Charlotte*, 306 N.C. 187, 196, 293 S.E.2d 101, 107-08 (1982)).

Over the years, the Takings Clause has been extended to provide relief to private property owners whose property is regulated under the police power. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 326 (1922) (“if regulation goes too far it will be recognized as a taking.”)

Extensive litigation has occurred in the field of regulatory takings. The results of the litigation rest on “essentially ad hoc, factual inquiries.” *Tahoe Sierra P. Council v. Tahoe RPA*, 535 U.S. 302, —, 152 L. Ed. 2d. 517, 528 (2002) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 57 L. Ed. 2d 631, 648 (1978)). A property owner must show that a regulation deprives the owner of all economically beneficial or productive use of the land for the regulation to constitute a taking. *Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1019, 120 L. Ed. 2d 798, 815 (1992).

Because challenges to regulatory takings are difficult for property owners to mount, many states have enacted statutes to safeguard both property owners and condemners from the effect of property value fluctuation due to regulations, if these regulations were implemented for future condemnation. These statutes, known as “scope of the project” statutes, bar evidence of increases and decreases in



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property values that are caused by or resulted from the project from factoring into the valuation of the property. *See* N.C.G.S. § 40A-65(a).

IV. N.C.G.S. § 40A-65(a)

The N.C. General Assembly enacted N.C.G.S. § 40A-65 in 1981. The statute states:

Effect of condemnation procedure on value. (a) The value of the property taken, or of the entire tract if there is a partial taking, does not include an increase or decrease in value before the date of valuation that is caused by: (i) the proposed improvement or project for which the property is taken; (ii) the reasonable likelihood that the property would be acquired for that improvement or project; or (iii) the condemnation proceeding in which the property is taken.

(b) If before completion the project is expanded or changed to require the taking of additional property, the fair market value of the additional property does not include a decrease in value before the date of valuation caused by any of the factors described in subsection (a), but does include an increase in value before the date on which it became reasonably likely that the expansion or change of the project would occur, if the increase is caused by any of the factors described in subsection (a).

(c) Notwithstanding subsections (a) and (b), a decrease in value before the date of valuation which is caused by physical deterioration of the property within the reasonable control of the property owner, and by his unjustified neglect, may be considered in determining value.

N.C.G.S. § 40A-65 (2001).

N.C.G.S. § 40A-65 is a scope of the project statute intended to level the playing field and ensure that neither party receives a wind-fall as a result of the condemnation. Section (a) unambiguously requires that the value of the property taken not reflect increases or decreases in value caused by the project for which the property is taken or where there is the reasonable likelihood that the property would be acquired for that project.

V. Unity of Condemnor and Zoning Authority

The trial court concluded that “[t]here is no identity or unity between Guilford County as the zoning authority and PTWRA as the

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condemnor . . . , both the zoning authority and the condemnor being separate independent governmental entities". The trial court concluded that the lack of "identity or unity" between the regulating and condemning entities prevented the statute's applicability to the facts at bar.

N.C.G.S. § 40A-65 does not require unity between the condemnor and the entity adopting the regulation in order for the statute to apply. Prior cases addressing N.C.G.S. § 40A-65 did not reach the question of unity because the increases or decreases in value did not result from zoning changes. See *City of Durham v. Woo*, 129 N.C. App. 183, 497 S.E.2d 457, cert. denied, 348 N.C. 496, 510 S.E.2d 380-81 (1998); See also *Raleigh-Durham Airport Authority v. King*, 75 N.C. App. 57, 330 S.E.2d 622 (1985).

We review extra-jurisdictional case law in search of support for the trial court's rationale. Many states have enacted variations of N.C.G.S. § 40A-65, or scope of the project rules. Defendants cite a line of cases from courts in other states who examined similar laws. See *Paradise Valley v. Young Financial Servs.*, 868 P.2d 971 (Ariz. Ct. App. 1993), review denied (Ariz. Mar. 16, 1994); *Kansas City Power & Light Co. v. Jenkins*, 648 S.W.2d 555 (Mo. Ct. App. 1983); *Masheter v. Kebe*, 295 N.E.2d 429 (Ohio Ct. App. 1973), aff'd, 359 N.E.2d 74 (Ohio 1976); *Williams v. City & County of Denver*, 363 P.2d 171 (Colo. 1961).

The case of *Masheter v. Kebe* provides insight on the particular issue of condemnor/regulator unity. The property owner-appellant, Kebe, owned a 37-acre tract of undeveloped land on the northerly side of Detroit Road in Westlake, Ohio. *Kebe*, 295 N.E.2d at 430. Prior to 24 July 1970, the property was zoned in part for apartment use and in part for single family use. *Id.* On 24 July 1970, the City of Westlake adopted a zoning ordinance which zoned substantially all of the two residues of property for highway interchange services, such as gas stations and motels. *Id.* The Director of Highways condemned sixteen acres through the middle of the property for construction of Interstate highway 90, ("I-90") on 27 October 1970. *Id.* The trial court ordered the parties to value the property as of 27 October 1970 with the uses permitted by the zoning existing on that date. *Id.* at 431.

The Ohio Court of Appeals recognized that without the I-90 construction, the re-zoning would not have occurred and held that the "familiar rule that property taken by condemnation proceedings should be valued irrespective of the effects of the improvement upon

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it . . . applies to considering a zoning change connected with and brought about by the improvement.” *Id.* The court upheld the applicability of the scope of the project rule although the condemning entity and the zoning entity were separate and distinct. *Id.* at 430.

The more recent case of *City of Boulder v. Fowler Irrevocable Trust 1992-1*, 53 P.3d 725 (Colo. Ct. App. 2002), *cert. denied* (Colo. Aug. 26, 2002) is factually similar to the case at bar. The city of Boulder filed condemnation proceedings to take the trust's land for a flood control project. *Boulder*, 53 P.3d at 726. Most of the land “was designated on the flood insurance rate map of the Federal Emergency Management Agency (FEMA) as being in Zone A, the floodway of Goose Creek.” *Id.* at 726-27. The property was identified in Boulder's floodplain ordinances as being located in “a high flood hazard zone.” *Id.* at 727. The parties stipulated that property development was “essentially prohibited” because of these designations. *Id.* The trial court found that before the 1980s, the property was designated by FEMA as “being in Zone B, which meant that it was subject to some flooding but that the owner was free to develop and build on the property without significant limitation.” *Id.* The trial court found that the change in designation to Zone A was a direct result of Boulder's flood control project. *Id.* The Court of Appeals affirmed the trial court's holding that “because the designations reducing the value of the property resulted from the project for which the property was being taken, they could not be considered in valuing the property.” *Id.*

The *Boulder* court did not address the lack of unity between the condemning authority, the city of Boulder and the designating authority, FEMA. The court's holding shows that the lack of unity did not prevent the application of the scope of the project doctrine.

Plaintiff cites hornbook authority that the sole exception to collaterally attacking a zoning ordinance is “where the condemnor and the zoning authority are identical.” 4 Julius L. Sackman, *Nichols on Eminent Domain* § 12C.03[1] n.9 (rev. 3d ed. 2001). Large scale public improvement projects, such as the Randleman dam, require approvals and funding from a multitude of local, state, and federal entities. Expert testimony showed that the Randleman dam project had been active for at least 25 years. Although plaintiff is the sole condemning authority for the Randleman dam project, other governmental entities have been deeply involved in the planning, approval, and funding process. The unity rule could defeat the purpose of the statute and allow the condemnor to use the actions

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of another authority as a proxy to affect the value of the property through restrictions, and permit the condemnor to take the property at a potentially reduced value. We hold that N.C.G.S. § 40A-65 does not require unity of the condemning entity and the zoning entity for its applicability.

#### VI. Collateral Attack on Zoning

The trial court concluded as a matter of law that the defendants' motion for judicial determination collaterally attacked the Watershed Protection Ordinance, the Randleman Designation and the WCA Ordinance. We review conclusions of law *de novo* and disagree with the trial court's interpretation.

The motion filed by defendants relates strictly to the applicability of N.C.G.S. § 40A-65 to the valuation of condemned property. N.C.G.S. § 40A-65 becomes applicable only when condemnation proceedings have been initiated. The statute is not a device for property owners to escape timely seeking relief from zoning restrictions.

Because the statute requires an actual condemnation action to have commenced, the present action is not a belated attack on a prior zoning ordinance. Defendants did not attack the WCA zoning ordinance. Defendants have only asserted that the proposed Randleman dam project caused the zoning that influenced the value of their condemned property.

#### VII. Structure of WCA Ordinance

The critical issue is whether the proposed Randleman dam caused the WCA ordinance to be applied to defendants' property. The language of the WCA ordinance shows that but for the Randleman dam project, the WCA ordinance, as written, would not exist.

The WCA ordinance zones affected property according to a Tier system. The tiers are measured from a lake elevation pool. This pool is the proposed Randleman lake and not the Deep River that partially adjoins defendants' property. Tiers 1, 2, and 3 have no point of reference to defendants' property other than as measured by normal pool elevation of the proposed Randleman dam lake. Tier 1 provides that "no development of any kind is allowed" and that property located in "[t]his tier is intended for public ownership."

The trial court concluded a lack of causation existed based upon its factual finding that absent the adoption of the WCA ordinance, the State of North Carolina would have enacted its own minimum

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requirements for the protection of the designated watersheds' water supply. While there is substantial evidence in the record to support this finding, it does not support nor compel the conclusion of law reached by the trial court.

If the WCA ordinance had not been adopted, the State could have restricted land for the protection of the water supply. Defendants' property may or may not have been restricted under any state regulation. More importantly, defendants' property would not be restricted under the WCA's Tier system, without the proposed Randleman dam project.

The WCA ordinance has no definition or meaning with respect to defendants' property, without reference to the proposed Randleman dam project. Whether some other ordinance might have been passed regardless of the Randleman dam project is immaterial to whether the WCA ordinance, as it affects defendants' property, was caused by the Randleman dam project.

N.C.G.S. § 40A-65 excludes changes in the value of property caused by the condemnation project. At bar, the statute allows evidence of the value of defendants' property prior to the adoption of the WCA zoning ordinance to be introduced and considered.

### VIII. Conclusion

We hold that the Randleman dam project caused the passage of the WCA ordinance as it applies to defendants' property. Defendants are entitled to introduce evidence of the property's value before the development and density restrictions were adopted pursuant to N.C.G.S. § 40A-65(a). We reverse the order of the trial court and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges WALKER and McCULLOUGH concur.

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STATE OF NORTH CAROLINA v. JAMES MANDEL WHITE

No. COA01-1495

(Filed 17 December 2002)

**1. Evidence— fingerprints on stolen items—admissible**

The trial court did not err in a prosecution for first-degree murder and armed robbery by admitting evidence that defendant's fingerprints were on boxes of crackers and candy found in a trailer in which defendant was staying where there was testimony that defendant brought food home in a trash bag around the time of the murder, that the same brands were among the items disturbed in the victim's home, and that the trash bag used to carry the food came from the victim's home.

**2. Evidence— fingerprints on stolen items—not unduly prejudicial**

The probative value of fingerprints on cracker and candy boxes linked to a murder and robbery was not outweighed by the danger of unfair prejudice because the evidence does not provoke an emotional response or otherwise improperly influence the jury in its consideration of the evidence.

**3. Evidence— expert—implicit request—specific objection required**

Defendant did not preserve for appellate review the issue of whether a police lieutenant was properly qualified to testify about the meaning of a pillow found on the victim's face after a robbery and murder where the prosecutor implicitly elicited expert testimony by inquiring about the significance of the pillow "based on your training and experience" and defendant did not specifically object to the qualification of the lieutenant as an expert.

**4. Evidence— expert—significance of pillow on victim's face**

Testimony from a police lieutenant about the significance of a pillow found on a murder and robbery victim's face was properly admitted where the officer testified in the form of an opinion based on his expertise and the testimony was likely to assist the jury in making an inference from the circumstances of the crime.

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**5. Evidence— police officer's opinion—not an expert on this question—harmless error**

There was no prejudicial error in a first-degree murder and armed robbery prosecution, even though the court improperly allowed a police lieutenant to testify that a certain television was “more than probably” from the victim's residence, because substantial evidence linked defendant to the crime.

**6. Robbery— armed—evidence of taking**

There was sufficient evidence of a taking to support an armed robbery conviction where defendant went to kill a man who owed him money and returned covered in blood and bragging that he had killed the man; defendant left without a car, television, or groceries, and returned with those things; the victim's car was stolen and burned; the space for the television in the victim's entertainment center was empty, with instruction books being found for a television model which was not found in his house but which defendant sold; the victim's groceries were disturbed, with the same brands being found in the victim's house and being brought home by defendant; and the trash bag which defendant used to bring in the groceries came from a roll of bags in the victim's home.

Appeal by defendant from judgment entered 2 May 2001 by Judge Jack A. Thompson in Cumberland County Superior Court. Heard in the Court of Appeals 12 September 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Daniel P. O'Brien, for the State.*

*James R. Parish, for defendant-appellant.*

CAMPBELL, Judge.

Defendant was indicted on 26 June 2000 for first degree murder and robbery with a dangerous weapon of Ernest Odell Easom (“Easom”) and felonious burning of Easom's automobile. Defendant was tried before a jury on 16 April 2001, Judge Jack A. Thompson (“Judge Thompson”) presiding. On 2 May 2001, the jury returned verdicts of guilty of murder in the first degree under the felony murder rule, guilty of robbery with a dangerous weapon, and not guilty of burning personal property. Judge Thompson arrested judgment on the conviction of robbery with a dangerous weapon, and sentenced the defendant to life imprisonment without parole.

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The State's evidence tended to show that Easom was an elderly man who occasionally hired people to do his yard work. Easom paid for these services with a meal and cash. Defendant was hired by Easom in mid-November 1999 to trim tree limbs, and was paid in part with a meal. On 12 December 1999, defendant began staying approximately one quarter mile from Easom's home in the trailer of an acquaintance, Jeffrey Allen Gallier ("Gallier").

In the early evening hours of Monday, 13 December 1999, the defendant visited a friend, Andrea McKenzie ("McKenzie") and asked her for a knife sharpener, and explained he planned to "take care of" someone who owed him money. He obtained a long butcher knife with a brown handle. The knife appeared to be rusty. McKenzie testified the defendant said that if he wasn't paid he was going to kill the person who owed him money. At approximately 9 p.m. that evening, defendant returned to McKenzie's home driving a car. There was blood all over him and the knife. Defendant said, "I told you I was going to get him." He took a shower and left his clothes to be washed. Defendant then went back outside, brought a television into the house, and asked McKenzie if she wanted to buy it for \$165 or \$175. McKenzie accepted the television and told the defendant she would pay him in a few days. Later that week McKenzie sold the television to her relative Jovan Carter ("Carter") for \$40.

Gallier, the man with whom defendant was staying, testified that on either Monday or Tuesday, 13 or 14 December, defendant came in around midnight with a black trash bag with groceries including Bob's Candy Canes, Ritz Crackers, Carefree Gum, coffee, canned goods, macaroni with beef, and eggs and other trash bags. Gallier found this strange since defendant had no source of income or money. Defendant explained that a lady friend had given him the groceries. Around this time Gallier noticed that his foot-long, wooden-handled kitchen knife was missing. The knife was not rusty, but did give that appearance.

The day following the murder and robbery the Cumberland County Sheriff's Office was called regarding a burning car. The license plate revealed the car belonged to Easom. On Friday, 17 December 1999, Detective Bobby Horne ("Detective Horne") went to Easom's home to investigate the burning of the car. As he arrived, some of Easom's family also arrived and indicated they were worried because they hadn't seen Easom in a few days. Detective Horne approached the house, found it locked, but looked through a window and saw a body lying in the kitchen.



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Detective Horne called for assistance and an investigation began. There was no sign of forced entry. After prying the back door open with a crowbar, Officers entered and found Easom lying on his back with a pillow over his face. The pillow had a bloodstain from what appeared to be a long knife blade, as if the knife had been wiped off on the pillow. Coins were found on the floor around Easom's body, but no wallet or currency was found on his person. The kitchen cabinets were open and appeared to have been disturbed, and there were boxes of food on the floor. There were boxes of Bob's Candy Canes, Ritz Crackers, and Carefree Gum in the home. There was a box of white trash bags on the kitchen table and large black trash bags on the china cabinet. In the living room the entertainment center had a space where a television would normally go and a dust pattern consistent with there having been an item there. Instruction books for a Zenith Two Model television were found, but no such television was in the home.

An autopsy revealed Easom died from three stab wounds. One wound was to the left side of his abdomen. Another was to his upper right chest, penetrating his lung. The incision from the third indicated that it took at least three strokes to lacerate his right carotid artery. He had not been suffocated with the pillow.

Further evidence was developed during the investigation. An expert, who studied the trash bags' extrusion lines and the melt pattern that is part of the manufacturing process, testified that, in his opinion, based on markings from the manufacturing process, the trash bag defendant brought to Gallier's trailer was from the roll found in Easom's home. Defendant's fingerprints were on some of the groceries he brought into Gallier's trailer. The television recovered from Carter's home was a Zenith Two Model, the same brand and model as the instruction book found in Easom's home.

Easom's sister-in-law, who lived behind him, recalled the last time she saw Easom alive was the afternoon of 13 December 1999. That evening at approximately 8 p.m. she noticed the brake lights of Easom's car repeatedly going on and off. The car was then driven away. She noted this was unusual because Easom never left home so late at night.

Demarco Murphy ("Murphy"), a friend of defendant, testified he was with defendant a few days before the incident and defendant had threatened he was going to kill a man who owed him money. Jerome Banks ("Banks"), a cellmate of defendant, testified defendant admit-

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ted he had started robbing a man he knew and when the man resisted he stabbed the man and cut his throat because the man knew him. Banks testified defendant told him defendant had taken the man's television and left.

Defendant declined to submit evidence.

Defendant argues the trial court erred by: (I) admitting the fingerprint evidence; (II) allowing a police investigator to testify that the pillowcase placed over Easom's face indicated that Easom knew his attacker; (III) allowing the same investigator to testify the television recovered from Carter's residence was "more than probably" Easom's; (IV) failing to dismiss for insufficient evidence the charge of robbery and felony murder.

### I. Fingerprint Evidence

**[1]** Defendant asserts the trial court erred by admitting evidence of defendant's fingerprints on a box of Ritz Crackers and Bob's Candy Canes found inside Gallier's trailer. Defendant asserts that the evidence is not relevant, and alternatively, if it is relevant that its probative value was substantially outweighed by danger of unfair prejudice.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2001). "[I]n a criminal case every circumstance calculated to throw any light upon the supposed crime is admissible." *State v. Collins*, 335 N.C. 729, 735, 440 S.E.2d 559, 562 (1994). "[E]ven though a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991). Here, the fingerprint evidence tends to show defendant touched the food items. The evidence thereby tends to corroborate Gallier's testimony concerning these food items. When considered with Gallier's testimony that defendant brought the food home around the time of the murder, that the brands of food were the same as the disturbed items in Easom's house, and the expert's testimony that the trash bag used to transport the food came from Easom's home, the fingerprint evidence tends to "shed light" on the robbery. Therefore, the fingerprint evidence was relevant.

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[2] “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” N.C. Gen. Stat. § 8C-1, Rule 403 (2001). “Unfair prejudice has been defined as ‘an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.’” *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) (quoting Commentary to N.C. R. Evid. 403). Whether or not to exclude evidence as being unfairly prejudicial is a matter “within the sound discretion of the trial judge.” *Id.* “[H]is ruling may be reversed for an abuse of discretion only upon a showing that it ‘was so arbitrary that it could not have been the result of a reasoned decision.’” *Id.*, (quoting *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985)). While this evidence tends to support the finding that a robbery occurred, it does not provoke an emotional response or another improper basis influencing the jury in its consideration of the evidence. This evidence was not unfairly prejudicial, and therefore was properly admitted. Accordingly, we hold admission of this evidence was not error.

## II. Pillowcase Testimony

[3] Defendant argues the trial court erred in permitting Lieutenant Ray Wood (“Lieutenant Wood”) to testify that the pillow placed across Easom’s face was significant because it suggested he knew his attacker. Defendant argues that Lieutenant Wood was testifying as a lay witness, and as such could only testify to his personal observations. Since Lieutenant Wood did not personally observe the pillow over Easom’s face, he could not testify to the conclusions he drew from this fact. The State asserts Lieutenant Wood was testifying as an expert witness, and as such could testify that the pillow over Easom’s face indicated to him that Easom knew his attacker.

Generally an expert witness is tendered to the court for a ruling that the witness possesses the requisite skill.

While the better practice may be to make a formal tender of a witness as an expert, such a tender is not required. Further, absent a request by a party, the trial court is not required to make a formal finding as to a witness’ qualification to testify as an expert witness. Such a finding has been held to be implicit in the court’s admission of the testimony in question. Defendant must specifically object to the qualifications of an expert witness in order to preserve the objection.

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*State v. White*, 340 N.C. 264, 293-94, 457 S.E.2d 841, 858 (1995) (citations omitted). Therefore, “a mere general objection to the content of the witness’s testimony will not ordinarily suffice to preserve the matter for subsequent review.” *State v. Hunt*, 305 N.C. 238, 243, 287 S.E.2d 818, 821 (1982).

The prosecutor was implicitly eliciting expert testimony by inquiring, “[W]hat was the significance of that [the pillow over Easom’s face] to you based on your training and experience?” Defendant made a general objection. The court overruled defendant’s objection thereby implicitly accepting the witness as an expert. Since defendant made a general objection to the Lieutenant’s testimony, and did not specifically object to the qualification of the Lieutenant as an expert, the issue of whether Lieutenant Wood was properly qualified as an expert was not preserved for appellate review.

**[4]** The issue remains whether Lieutenant Wood’s expert testimony was “patently inadmissible and prejudicial” as asserted by defendant. Expert witnesses may testify regarding a fact in issue in the form of an opinion. N.C. Gen. Stat. § 8C-1, Rule 702 (2001). “The facts or data in the particular case upon which an expert bases an opinion or inference may be of those perceived by or made known to him at or before the hearing.” N.C. Gen. Stat. § 8C-1, Rule 703 (2001). Moreover, “expert testimony is properly admissible when such testimony can assist the jury to draw certain inferences from facts because the expert is better qualified.” *State v. Bullard*, 312 N.C. 129, 139, 322 S.E.2d 370, 376 (1984). “[T]he trial judge is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony.” *Id.*, 312 N.C. at 140, 322 S.E.2d at 376. Here, Lieutenant Wood had “training, and various courses and experience in working certain cases” which led him to conclude that “there are times that the significance of an object such as a pillow or a cloth being placed over somebody’s face can mean in a case that the perpetrator knew the victim and did not want to see their face or have their face appear either before, during, or after the crime.” Since Lieutenant Wood testified in the form of an opinion based on his expertise, and the testimony was likely to assist the jury making an inference from the circumstances of the crime, the trial court properly admitted the testimony.

## III. Television Testimony

**[5]** Defendant argues the trial court erred by permitting Lieutenant Wood to testify that in his opinion the Zenith Two Model television

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found in Carter's possession was "more than probably the television from Easom's residence."

Since the qualification of a witness as an expert depends upon their "knowledge, skill, experience, training or education," a witness may be an expert on some issues and classified as a layman on other issues. N.C. Gen. Stat. § 8C-1, Rule 702. There is no indication here of special training or other qualifications which would elevate Lieutenant Wood's conclusion regarding the original ownership of the television to that of an expert's opinion. There is also no indication of the court's acceptance of Lieutenant Wood as an expert on this matter.

As a layman, Lieutenant Wood's testimony must have been rationally based on his perception and helpful to the jury. *See* N.C. Gen. Stat. § 8C-1, Rule 701 (2001). Here, Lieutenant Wood's testimony that the recovered television was "more than probably" Easom's television was not based upon his perception. Moreover, Lieutenant Wood was in no better position than the jury to deduce whether the television found with Carter was Easom's television. The jury is charged with drawing its own conclusions from the evidence, and without being influenced by the conclusion of Lieutenant Wood. Therefore, we find the trial court erred in permitting this testimony.

The next issue, is whether or not this error was prejudicial. "In order to show prejudicial error, defendant must show that a different result would have been reached at trial if the evidence had not been admitted." *State v. Patterson*, 149 N.C. App. 354, 364, 561 S.E.2d 321, 327 (2002) (citing N.C. Gen. Stat. § 15A-1443(a) (1999)). Since there is substantial circumstantial evidence which links defendant to this crime, and the jury could have drawn the conclusion that defendant committed the crime without input from Lieutenant Wood, we hold defendant has not met his burden of demonstrating that he would not have been found guilty if Lieutenant Wood's testimony had not been permitted. Therefore, though the testimony was error, we hold it was not prejudicial error.

## IV. Insufficient Evidence of Robbery

**[6]** Defendant asserts there was insufficient evidence to prove he robbed Easom of Easom's car, television, or groceries because the only evidence submitted is circumstantial. Without sufficient evidence to prove the items were taken by defendant, defendant asserts the trial court erred by denying defendant's motion to dismiss.

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In reviewing a motion to dismiss this Court asks “whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense.” *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). “Substantial evidence is that which a reasonable juror would consider sufficient to support a conclusion that each essential element of the crime exists.” *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000). “In reviewing challenges to the sufficiency of evidence, the evidence must be viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences.” *State v. Payne*, 149 N.C. App. 421, 425, 561 S.E.2d 507, 509 (2002). Violation of N.C. Gen. Stat. § 14-87, robbery with firearms or other dangerous weapons, requires a person who “with use or threatened use of any . . . dangerous weapon . . . , whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another . . . either day or night.” N.C. Gen. Stat. § 14-87(a) (2001).

Defendant asserts there was insufficient evidence of a taking because the only evidence of the taking was circumstantial. We disagree. “Unquestionably circumstantial evidence is ‘essential and, when properly understood and applied, highly satisfactory in matters of the gravest moment.’” *State v. Adcock*, 310 N.C. 1, 28, 310 S.E.2d 587, 602 (1984) (citations omitted). For circumstantial evidence to support a conviction “the jurors must be convinced of the defendant’s guilt beyond a reasonable doubt.” *Id.*

Defendant left to kill a man who owed him money, and returned, covered in blood, and bragging he had killed the man. Defendant left without a car, television or groceries, and returned with those items. Eason’s car was stolen and found burned. The space in Eason’s entertainment center that would normally contain a television was empty. Eason had Zenith Model Two instruction books for a television not found in his house, but matching the television defendant sold to McKenzie. Eason’s groceries had been disturbed, and the same brand item groceries were brought home by defendant. The trash bag defendant used to bring in the groceries came from a roll of bags in Eason’s home. Taking this evidence in the light most favorable to the State a reasonable jury could have been convinced beyond a reasonable doubt that there was a taking. Therefore, the trial court properly denied defendant’s motion to dismiss for insufficient evidence of the taking element of the crime of robbery with a dangerous weapon.

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No prejudicial error.

Judges TIMMONS-GOODSON and HUDSON concur.

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STATE OF NORTH CAROLINA v. DONALD DEE LOWE

No. COA02-154

(Filed 17 December 2002)

**1. Sentencing— prior record level—method of proof**

There was no authority for defendant's contention that the State must produce a certified copy of the record of a prior conviction if defendant objects to the evidence used to establish the record. By statute, prior convictions may be proven by any method found to be reliable; moreover, defendant had sufficient points for the record level even without this conviction.

**2. Evidence— hearsay—excited utterance—child assault victim—statement to detective hours later**

There was no error in an assault prosecution in admitting as an excited utterance a statement given by a child who had been struck by his father with a pool cue where the statement was given at a hospital several hours after the attack. Children may react to startling experiences well after the events take place, and statements in response to a question do not necessarily lack spontaneity.

**3. Evidence— hearsay—child's statement—excited utterance—no showing that child unavailable**

The trial court did not err in an assault prosecution by admitting the child-victim's statement to a detective as an excited utterance without a showing that the child was unavailable and without the findings required for the residual exception.

**4. Assault; Child Abuse and Neglect— serious injury—serious physical injury—sufficiency of evidence**

Defendant was properly convicted of two counts of assault with a deadly weapon inflicting serious injury under N.C.G.S. § 14-32(b) and one count of felonious child abuse inflicting serious physical injury under N.C.G.S. § 14-318.4 without evidence of serious bodily injury as defined in N.C.G.S. § 14-32.4 because

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“serious bodily injury” requires proof of a more severe injury than that required for “serious injury” and “serious physical injury” in the statutes under which defendant was convicted, and the injuries suffered by all the victims clearly fell within the realm of injuries contemplated by the applicable statutes.

Appeal by defendant from judgment entered 26 September 2001 by Judge David Q. Labarre in Chatham County Superior Court. Heard in the Court of Appeals 17 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Anne Goco Kirby, for the State.*

*John T. Hall, for defendant-appellant.*

CAMPBELL, Judge.

On 6 March 2001, Donald Lowe (“defendant”) was charged with felonious child abuse of his son, Joshua Lowe (“Joshua”), assault with a deadly weapon inflicting serious injury on James Hendricks and assault with a deadly weapon inflicting serious injury on Nannie Hendricks. On 6 April 2001, defendant was indicted on these offenses and additionally charged with assault on a female and assault on a law enforcement officer. On 25 September 2001 these cases were tried before Chatham County Superior Court Criminal Session and the jury found defendant guilty on all charges. Defendant then appeared 3 December 2001 before Judge Gregory Weeks for correction of his sentence. On appeal, defendant assigns error to the following actions of the trial court: I. Sentencing defendant at a prior conviction level II; II. Overruling defendant’s objection to admission of Joshua’s out-of-court statement as an “excited utterance;” and III. Denying defendant’s motion to dismiss the allegations of inflicting serious injury in the assault charges in 01 CRS 1061, 1062 and 1064 due to the insufficiency of the evidence. By appealing, defendant seeks dismissal of the charges due to the insufficiency of the evidence, or alternatively, a new trial due to improperly admitted evidence or a new sentencing hearing. We hold that the evidence was sufficient to convict defendant on the charges against him and that all the evidence was properly admitted. We find no error in the trial court’s rulings and therefore, we affirm.

The State’s evidence showed that in the early morning of 6 March 2001, defendant began hitting, choking and kicking Melinda Phillips (“Melinda”), the mother of defendant’s children. While defendant had



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Melinda down on the floor choking her, their three children entered the room and started hitting defendant to get him off of their mother. Joshua, nine years old at the time, hit defendant on his back with a pool stick, causing the stick to break. Melinda ran out of the house and told the children to run. Cassie, eight years old, ran across the street to James and Nannie Hendricks' home. The Hendricks woke up when they heard Cassie enter and say, "Please help me. My daddy is beating my momma." Then defendant entered the Hendricks' home wielding the broken pool stick and threatened to kill them all. He hit James Hendricks in the head with the stick and Nannie in the nose with it and then he hit his son Joshua, who was standing in the doorway, in the head, causing a large laceration. Defendant later picked Joshua up and carried him to his grandmother's house and Joshua's uncle took him to the hospital.

As defendant's foremost request is that we dismiss his convictions, we apply the standard of review for a motion to dismiss. As recently stated by this Court:

When ruling on a defendant's motion to dismiss a criminal action, " 'the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense. If so, the motion to dismiss is properly denied.' " *State v. Earnhardt*, 307 N.C. 62, 65-66, 296 S.E.2d 649, 651-52 (1982) (citation omitted). Whether the evidence presented is substantial is a question of law for the court. (citation omitted). Substantial evidence is " 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). " 'If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion to dismiss should be allowed.' " *Earnhardt*, 307 N.C. at 66, 296 S.E.2d at 652 (citation omitted).

*State v. Siriguanico*, 151 N.C. App. 107, 564 S.E.2d 301 (2002).

### I. Prior record level II

**[1]** Defendant first assigns error to the trial court's sentencing him at a prior conviction level II. At the sentencing hearing, the State submitted a prior criminal record to the court and proposed that defendant be considered a level II for sentencing purposes. Thereupon, defendant's trial counsel told the court, "[M]y client does raise some

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issue with respect to the Rowan County matter. He just doesn't seem to recall that situation." Defendant's counsel, however, did not object to defendant having a prior record level II status. Defendant argues that an objection concerning *the evidence* of his prior criminal record demands a certified copy before the sentencing court may properly consider it. We disagree. Prior convictions can be proven by: "(1) Stipulation of the parties. (2) An original or copy of the court record of the prior conviction. (3) A copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts. (4) Any other method found by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f)(1)-(4) (2001). The trial transcript shows that the State submitted to the court a prior criminal record and that the court considered the record to be reliable. In *State v. Rich*, the defendant argued that the trial court erred "by accepting the State's offer of 'an unverified computerized printout not under seal' to prove defendant's prior criminal convictions." *State v. Rich*, 130 N.C. App. 113, 115, 502 S.E.2d 49, 51 (1998). This Court held that "[t]he computerized record contained sufficient identifying information with respect to defendant to give it the indicia of reliability." *Id.* at 116, 502 S.E.2d at 51. As was the case in *Rich*, the defendant here submitted no authority for his contention that the State must produce a certified copy of the prior conviction if defendant objects to the evidence used to establish his prior criminal record. The statute is clear that the court may use "[a]ny . . . method found by the court to be reliable." N.C. Gen. Stat. § 15A-1340.14(f)(4) (2001). Therefore, we defer to the trial court's finding that the criminal record submitted by the State contained sufficient evidence "to give it the indicia of reliability." *Rich* at 116, 502 S.E.2d at 51.

Under the Structured Sentencing provisions of the Criminal Procedure Act, the prior record level for felony sentencing is to be determined by N.C. Gen. Stat. § 15A-1340.14, which provides that a felony offender's prior record level is determined by calculating the sum of the offender's prior conviction points. The offender receives one point for each prior misdemeanor that falls under the statute and the offender's level is determined by his total number of points. For a prior record "Level II," the offender must have "[a]t least 1, but not more than 4 points." N.C. Gen. Stat. § 15A-1340.14(c)(2) (2001). Defendant had a total of three prior points and therefore, even without the "Rowan County matter," which was a conviction for driving under the influence of drugs, defendant would have still had two points. Thus, it would have been harmless error to include a point for

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the offense that defendant “just doesn’t seem to recall,” since only one point is needed to be a level II. See *State v. Smith*, 139 N.C. App. 209, 533 S.E.2d 518 (2000), *appeal dismissed*, 353 N.C. 277, 546 S.E.2d 391 (2000).

## II. Admission of Joshua’s out-of-court statement

[2] Defendant next assigns error to the trial court’s overruling defendant’s objection to the admission of Joshua’s hearsay statement as an “excited utterance” through the testimony of Detective Perry, who interviewed Joshua at the hospital. Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” N.C. Gen. Stat. § 8C-1, Rule 801(c) (2001). Under Rule 803(2) of the North Carolina Rules of Evidence, hearsay that fits the requirements of an excited utterance is admissible as an exception to the general rule against hearsay. For a statement to fall within the excited utterance exception, there must be: “‘(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication.’” *State v. Wright*, 151 N.C. App. 493, 496, 566 S.E.2d 151, 154 (2002) (quoting *State v. Maness*, 321 N.C. 454, 459, 364 S.E.2d 349, 351 (1988) (citation omitted)). Further, our Supreme Court has been more lenient with respect to the passage of time between the two essential elements of an excited utterance in cases involving statements made by children. By doing so, it has recognized that “the *stress and spontaneity* upon which the [excited utterance] exception [to the hearsay rule] is based is often present for longer periods of time in young children than in adults.” *State v. Smith*, 315 N.C. 76, 87, 337 S.E.2d 833, 841 (1985) (emphasis added). The statement, therefore, does not have to be contemporaneous with the startling event, but, as the *Smith* Court held, “[s]pontaneity and stress are the crucial factors.” *Smith* at 88, 337 S.E.2d 842.

In the case *sub judice*, the statement in dispute is the one made by Joshua to Detective Perry at the hospital after the incident in which defendant hit Joshua with a pool stick. Joshua did not testify at trial. Detective Perry testified that Joshua told him “that his dad and mom . . . were fighting, and when he went in that [his dad] was hitting his mom. . . . [And] when his dad entered Nannie’s residence, . . . he hit James and Nannie with the pool stick and then turned and hit [Joshua] with the pool stick.” Prior to this testimony being allowed, defense counsel objected, upon which a bench conference was held off the record, and the jury was excused temporar-

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ily. During the proceedings outside the jury's presence, the court decided that this case falls within the excited utterance exception under *State v. Thomas*, in which this Court held that the trial court properly admitted, as an excited utterance, hearsay testimony regarding a five-year-old victim's conversation with her classmates four to five days after the incident in which she was sexually abused by her father. The trial court in that case:

[S]pecifically found that A.'s statement to L. and B. was a spontaneous response to their questions, made while A. was under "obvious distress" precipitated by events which occurred "within a four to five day period at most." Reasoning that a child of five "is characteristic[ally] free of conscious fabrication for longer periods [of time] including . . . four or five days, the court concluded that A.'s assertions to L. and B. fell within the excited utterance exception to the hearsay rule."

*State v. Thomas*, 119 N.C. App. 708, 712, 460 S.E.2d 349, 352 (1995). Upon reviewing the trial court's findings, this Court held:

[T]he victim's conversation with L. and B. on the playground was of such a nature as to have been properly admitted under the excited utterance exception to the hearsay rule. Although the precise date of the alleged assault is unclear from the record, A. told her friends on the Wednesday after Thanksgiving that it occurred sometime during the previous weekend. As the trial court found, therefore, A.'s statement on the playground came "within a four to five day period at most" of the incident of which she spoke. In the circumstances of this case, we do not believe the passage of four or five days detracts from the "spontaneity" of A.'s response.

*Id.* at 713, 460 S.E.2d at 353. In the case before us, Joshua's statement to Detective Perry occurred several hours after the incident in which defendant was fighting with Joshua's mother, assaulted the Hendricks and hit Joshua with a pool stick. As our extensive case law on this issue supports the proposition that children may spontaneously react to startling experiences well after the events took place, we hold that the trial court was correct in finding that Joshua's statement to Detective Perry falls within the excited utterance exception. Further, our case law is clear that statements made in response to a posed question do not necessarily lack spontaneity. *See State v. Murphy*, 321 N.C. 72, 77, 361 S.E.2d 745, 748 (1987). Therefore, the fact that

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Joshua's statement was prompted by Detective Perry asking him what had happened, does not infer that Joshua may have made a statement as a result of "reflection or fabrication." *Smith* at 86, 337 S.E.2d at 841. As the State argued and the trial court held, Joshua "was still in an excited state when he got to the UNC ER. . . . [And] he [was] still suffering from the traumatic events of the morning and the passage of a couple of hours would not detract from the spontaneity of the statements he gave to Officer Perry when interviewed."

Additionally, defendant argues that the cases used to support the latitude given the time factor in cases where spontaneous statements were uttered by children are distinguishable from this case because Joshua did not witness a death or experience a sexual trauma. We find that this argument has no merit, as witnessing one's father cause serious physical injury to one's mother, friends and oneself is certainly a sufficiently traumatic experience for a child, to support this same latitude being given to the time span between the incident and the utterance.

**[3]** Moreover, Deputy Perry's testimony as to Joshua's statement was admissible as an exception to the rule against hearsay. Defendant argues that since the State did not call Joshua to testify, he became an unavailable witness; thus, pursuant to Rule 804(b)(5), the trial court must make findings that Joshua was unavailable as a witness. Upon doing so, the court, defendant argues, must follow the six steps set out in *Smith* to determine if hearsay testimony is admissible under the "residual" exception to the hearsay rule in Rule 803(24). On the contrary, we find that the trial court did not err in not making findings that Joshua was unavailable because Joshua's hearsay statement falls within the excited utterance exception. When hearsay evidence comes within a firmly rooted hearsay exception, unlike the "residual" or "catchall" exception of 803(24), "the Confrontation Clause of the North Carolina Constitution is not violated, even though no particularized showing is made as to the necessity for using such hearsay or as to its reliability or trustworthiness." *State v. Jackson*, 348 N.C. 644, 654, 503 S.E.2d 101, 107 (1998). Reversing this Court's initial holding in *Jackson*, our state Supreme Court held upon review of the case that the availability of a hearsay declarant does not preclude the admission of hearsay evidence under the "state of mind" exception in Rule 803(3). In *State v. Washington*, this Court applied the *Jackson* holding to affirm the admission of hearsay evidence under the excited utterance exception, which is at issue in the case before us. *State v. Washington*, 131 N.C. App. 156, 161-62, 506 S.E.2d 283,

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287-88 (1988), *cert. denied*, 352 N.C. 362, 544 S.E.2d 562 (2000). Thus, the trial court did not err by admitting the hearsay evidence as an excited utterance under Rule 803(2) without any showing that Joshua was unavailable and without making any findings required under the residual exception.

### III. Assault with a deadly weapon inflicting “serious injury”

[4] Finally, defendant argues that the trial court erred in denying his motion to dismiss the charges of assault with a deadly weapon inflicting serious injury due to insufficient evidence. Defendant was convicted of the charges in 01 CRS 1061 of felonious child abuse inflicting serious injury under N.C. Gen. Stat. § 14-318.4 and in 01 CRS 1062 and 1064 of assault with a deadly weapon inflicting serious injury under N.C. Gen. Stat. § 14-32(b). Defendant argues that under N.C. Gen. Stat. § 14-32.4, there is insufficient evidence to find him guilty of “serious bodily injury,” as defined by that statute. Defendant, however, was not convicted under that statute and his argument is without merit. Prior to defining “serious bodily injury,” § 14-32.4 states, “Unless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts serious bodily injury is guilty of a Class F felony.” N.C. Gen. Stat. § 14-32.4 (2001). Because defendant’s conduct was covered under statutes providing that he is guilty of a Class E felony, a greater punishment than Class F, the definition of “serious bodily injury” in § 14-32.4 does not apply.

First, under § 14-32(b), the elements of assault with a deadly weapon inflicting serious injury are: an assault, with a deadly weapon, inflicting *serious injury*, and not resulting in death. *State v. Uvalle*, 151 N.C. App. 446, 565 S.E.2d 727 (2002) (emphasis added) (citation omitted). Secondly, to prove felony child abuse under N.C. Gen. Stat. § 14-318.4, the State must show that “[a] parent or any other person providing care to or supervision of a child less than 16 years of age . . . intentionally inflict[ed] any *serious physical injury* upon or to the child or . . . intentionally commit[ted] an assault upon the child which result[ed] in any *serious physical injury* to the child[.]” N.C. Gen. Stat. § 14-318.4(a) (2001) (emphasis added).

By our recent holding that “assault inflicting *serious bodily injury* [under G.S. § 14-32.4] . . . is not a lesser-included offense of assault with a deadly weapon with intent to kill and inflict *serious injury* [under G.S. § 14-32(a)]” this Court has recognized that the definition of “serious bodily injury” in G.S. § 14-32.4 does not apply to the

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term “serious injury” under G.S. § 14-32(a) or (b). *State v. Hannah*, 149 N.C. App. 713, 716, 563 S.E.2d 1, 3 (2002), *review denied*, 355 N.C. 754, 566 S.E.2d 81 (2002). Furthermore, the *Hannah* Court stated, “Our Courts have declined to define “serious injury” for purposes of assault prosecutions, other than stating that “[t]he injury must be serious but it must fall short of causing death’ and that ‘[f]urther definition seems neither wise nor desirable.’” *Hannah* at 718, 563 S.E.2d at 4 (quoting *State v. Ramseur*, 338 N.C. 502, 507, 450 S.E.2d 467, 471 (1994)). By enacting a statute in 1997 to cover “assault inflicting serious bodily injury,” the legislature clearly intended to create a separate offense which has been found to require “proof of more severe injury than the element of ‘serious injury[.]’” *Hannah* at 719, 563 S.E.2d at 5; *see also* N.C.G.S. § 14-32.4 (2001). We agree with the *Hannah* Court that upon “review of the relevant statutes and case law, we conclude that “serious bodily injury” requires proof of more severe injury than the “serious injury” element of the indicted offense.” *Hannah* at 717, 563 S.E.2d at 4 (citation omitted).

In addition, the definition of “serious bodily injury” in G.S. § 14-32.4 does not apply to “serious physical injury” in G.S. § 14-318.4(a), under which defendant was found guilty of felonious child abuse, a Class E felony. In fact, G.S. § 14-318.4(a3) provides a separate offense of felonious child abuse if a parent, care provider or supervisor “intentionally inflicts any *serious bodily injury* to the child or who intentionally commits an assault upon the child which results in any *serious bodily injury* to the child.” N.C. Gen. Stat. § 14-318.4(a3) (2001) (emphasis added). The statute goes on to define “serious bodily injury” and holds that violation of this statute is a Class C felony. Moreover, the definition of “serious bodily injury” in this statute mirrors the definition of the same in G.S. § 14-32.4. Clearly, the legislature has intended the definition of “serious physical injury” and “serious bodily injury” in this statute to possess distinctly different meanings.

At any rate, the evidence was sufficient to find defendant guilty of “serious physical injury” to Joshua as charged in 01 CRS 1061 and of “serious injury” to James Hendricks and Nannie Hendricks as charged in 01 CRS 1062 and 1064, respectively. Without detailing the injuries to each, the injuries suffered by all the victims clearly fall within the realm of injuries contemplated by the applicable statutes.

Accordingly, we find no error in the trial court’s holdings.

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No error.

Judges WALKER and McCULLOUGH concur.



NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF-  
APPELLANT v. PHILLIP M. EDWARDS AND MARY B. EDWARDS, DEFENDANTS-  
APPELLEES

No. COA01-1207

(Filed 17 December 2002)

**1. Insurance— underinsured motorist—release—summary judgment**

The trial court did not err in an action arising out of an automobile accident by granting summary judgment in favor of defendant insureds on their claim for underinsured motorist (UIM) coverage even though defendants executed a limited release that neither contained a covenant not to enforce nor an express provision reserving their rights as against plaintiff insurance company, because: (1) the release embodied defendants' attention to and awareness of their right to seek UIM benefits from their insurer and their intent to exclude the liability of the UIM carrier from the release; and (2) there is no inconsistency between the alleged intent of the injured party and the language of the policy when the handwritten alterations contained in the release show defendants' intent to limit release of liability to that of the tortfeasor.

**2. Arbitration and Mediation— motion to stay arbitration— underinsured motorist coverage**

The trial court did not err in an action arising out of an automobile accident by denying plaintiff insurance company's motion to stay arbitration because defendants' claim for underinsured motorist (UIM) benefits was not barred by their execution of a limited release.

Appeal by plaintiff from judgment and order entered 18 June 2001 by Judge Raymond A. Warren in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 June 2002.



## N.C. FARM BUREAU MUT. INS. CO. v. EDWARDS

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*Caudle & Spears, PA, by Christopher J. Loeb sack, for plaintiff-appellant.*

*Battle, Winslow, Scott & Wiley, PA, by Marshall A. Gallop, Jr.; and Soles, Phipps, Ray, Prince & Williford, by R.C. Soles, Jr., for defendants-appellees.*

BRYANT, Judge.

This appeal arises out of an automobile accident that occurred on 15 April 1991 in Maryland between defendant Phillip Edwards and Mary Louise Hagggenmaker. At the time of the accident, defendant Phillip Edwards was insured under a personal auto policy issued by plaintiff North Carolina Farm Bureau Mutual Insurance Company [Farm Bureau or plaintiff]. The policy contained under-insured motorist [UIM] coverage in the amount of \$100,000 per person for bodily injury and covered Phillip Edwards' four personal vehicles, including the 1974 Volvo he was driving at the time of the accident.

Phillip Edwards and his wife, Mary Edwards [defendants], filed suit against Hagggenmaker for personal injuries and damages arising out of the accident. In May 1997, the Hagggenmakers' liability insurance carrier, State Farm, offered defendants the policy limit of \$100,000 to settle their claims against Hagggenmaker. By letter dated 15 May 1997, Farm Bureau elected not to advance defendants the \$100,000 policy limit<sup>1</sup> and asked defendants to notify Farm Bureau if they intended to pursue additional claims.

On 16 August 1997, defendants accepted the \$100,000 tender from the Hagggenmakers and State Farm, and executed a "Release" [the Edwards Release or the Release] in consideration of the \$100,000 payment. The Release stated, in pertinent part, with handwritten portions underlined and those portions marked-through stricken:

For the Sole Consideration of *One hundred thousand dollars* (\$100,000) Dollars, [sic] the receipt and sufficiency whereof is hereby acknowledged, the undersigned hereby releases and forever discharges

*Harry H. Hagggenmaker Mary Hagggenmaker*

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1. The insurer may elect to advance to its insured the liability limits of the tortfeasor's policy and thereby preserve its subrogation rights against the tortfeasor. N.C.G.S. § 20-279.21(b)(4) (2001).

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their heirs, executors, administrators, agents and assigns, ~~and all other persons, firms or corporations liable or who might be claimed to be liable, none of whom do not~~ admit any liability, ~~from~~ any and all claims, demands, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known and unknown, both to person and property, which have resulted or may in the future develop from an accident which occurred on or about *April 15, 1991* at or near *Old Crain Highway near School Lane*.

. . . .

Undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise adjustment and settlement of any and all claims, disputed or otherwise, on account of the injuries and damages above mentioned, and for the express purpose of precluding forever and further or additional claims arising out of the aforesaid accident against the above named individuals.

After settling with Haggemaker, defendant Phillip Edwards asserted a claim against Farm Bureau for benefits under his UIM coverage and demanded arbitration pursuant to the policy. From August 1997 to March 2000, the parties exchanged a series of correspondence regarding the legal implications of the Release, arbitration, and discovery prior to arbitration.

Ultimately, Farm Bureau denied Edwards' claim for UIM benefits under the policy based upon defendants' execution of the Release in favor of Haggemaker and its interpretation of a recent amendment to the North Carolina Motor Vehicle Safety and Financial Responsibility Act [MVSFRA]. See N.C.G.S. § 20-279.21(b)(4).

Farm Bureau filed a declaratory judgment complaint on 22 March 2000 requesting that the trial court determine the rights of the parties under the Edwards' UIM policy and the Release and that the court stay arbitration pending that determination. Farm Bureau and defendants filed cross-motions for summary judgment. On 18 June 2001, the trial court entered an order and judgment granting defendants' motion for summary judgment and ordering the parties to submit to arbitration. Farm Bureau has appealed.<sup>2</sup>

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2. On 18 July 2001, Farm Bureau filed a written notice of appeal. On 20 August 2001, Farm Bureau filed a petition for writ of supersedeas and a motion for temporary

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Farm Bureau argues that the trial court erred in: 1) granting defendants' motion for summary judgment because the Release barred defendants' claim for UIM benefits; and 2) denying Farm Bureau's motion to stay arbitration because defendants' claim for UIM benefits was barred. We disagree as to both issues and therefore affirm the Order of the trial court.

## I.

[1] Plaintiff first argues that the trial court erred in granting defendants' motion for summary judgment because defendants' claim was barred by the execution of the Release. Upon motion, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2001). An issue is material if "the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). An issue is genuine if it is supported by substantial evidence. *Id.* Our task is to determine, after reviewing the entire record: 1) whether a genuine issue of material fact exists; and 2) whether defendants were entitled to judgment as a matter of law concerning the effect of the Release on defendants' right to claim UIM benefits.

This Court has previously addressed similar issues in *Spivey v. Lowery*, 116 N.C. App. 124, 446 S.E.2d 835 (1994), and *N.C. Farm Bureau, Mut. Ins. Co. v. Bost*, 126 N.C. App. 42, 483 S.E.2d 452 (1997). Generally, a UIM carrier's liability to the insured is derivative of the tortfeasor's liability. *Buchanan v. Buchanan*, 83 N.C. App. 428, 429, 350 S.E.2d 175, 176 (1986). Based upon this well-established principle and, more importantly, the plaintiff/injured party's execution of a "general release", the *Spivey* Court held that the plaintiff was not entitled to bring a claim for UIM benefits. *Spivey*, 116 N.C. App. at 127-28, 446 S.E.2d at 838. Upon sustaining injury following a car accident, the *Spivey* plaintiff settled with the tortfeasor's insurer, executing a boilerplate, "general release", "releas[ing], acquiti[ng], and forever discharg[ing]" defendant tortfeasor, tortfeasor's insurer,

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stay of any arbitration proceedings. The temporary stay was granted by this Court on 20 August 2001, but the trial court entered an order denying the writ of supersedeas and dissolving the temporary stay on 30 August 2001.

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and “all other persons, firms, corporations, associations or partnerships of and from any and all claims of action, demands, rights, [and] damages . . . whatsoever, which the undersigned now has . . . or which may hereafter accrue . . . [as a result of] the accident.” *Id.* at 125, 446 S.E.2d at 836 (alterations in original). When the plaintiff then attempted to recover from her insurer, Hartford, under her UIM policy, Hartford raised the general release as a bar to the plaintiff’s recovery.

According to the *Spivey* Court, “because plaintiff signed a *general release*, plaintiff may not assert any claims arising out of the accident.” *Id.* at 126, 446 S.E.2d at 837 (emphasis added). Additionally, addressing plaintiff’s assertion that she did not intend to release the UIM carrier from liability, the *Spivey* Court stated that “whether or not plaintiff intended to release the UIM carrier is irrelevant. As long as plaintiff intended to release the tortfeasor, the UIM carrier is released as well.” *Id.* at 127, 446 S.E.2d at 838 (citing *Buchanan*, 83 N.C. App. at 430, 350 S.E.2d at 177).

This Court distinguished *Spivey* and clarified the law regarding a release’s effect on an injured party’s right to bring UIM claims in *Bost*, 126 N.C. App. 42, 483 S.E.2d 452. Pursuant to a settlement, the *Bost* plaintiff, who was injured when struck by the tortfeasor’s vehicle, executed a “Settlement Agreement and Limited Release” in favor of the tortfeasor in exchange for the \$100,000 policy limit under the tortfeasor’s liability policy. The *Bost* release stated the following, in pertinent part:

2. . . . [injured party, Carrie B. Bost] releases and discharges [tortfeasor, Ezzelle] from any personal liability whatsoever as a result of said incident and covenants to hold harmless [Ezzelle] and to enforce any judgment or order, in connection with any civil action hereafter filed, or judgment or order in any other action duly entered, only against . . . underinsured motorist carrier[s] for [the Bost family] . . . which may apply to the injuries and damages incurred by [Carrie Bost], and not to enforce any such judgment or order against [Ezzelle] personally.

3. Nothing herein shall be construed to release, acquit, or discharge [named UIM insurance carriers] or insurance carrier not referred to in this agreement from any obligation on account of, or in any way growing out of the aforesaid underinsured motorist coverage or any other coverage which may be applicable to the claims arising from the June 24, 1994, automobile collision. . . .

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The undersigned specifically preserves her underinsured motorist claims against [her UIM carriers] and retains her right to file and prosecute a lawsuit against [Ezzelle] to the extent necessary to recover said underinsured motorist coverages. . . .

*Id.* at 45-46, 483 S.E.2d at 455.

Based upon the above-cited release, this Court concluded that unlike the general release signed by the *Spivey* plaintiff, Bost executed a covenant not to enforce judgment against the tortfeasor, releasing only the tortfeasor from any personal liability. Furthermore, Bost retained her rights against the tortfeasor to the extent necessary to recover under the UIM coverage.

The “Settlement Agreement and Limited Release” in the present case, however, as distinguished from that in *Spivey*, specifically reserves Carrie Bost’s rights against Farm Bureau and Allstate, releasing only [the tortfeasor] from any personal liability. Moreover, Carrie Bost retained her “right to file and prosecute a lawsuit against [the tortfeasor] to the extent necessary to recover said underinsured motorist coverages,” and agreed “not to enforce any such judgment against” him. Therefore, Carrie Bost’s “Settlement Agreement and Limited Release” is a covenant not to enforce judgment and not a general release as contemplated by *Spivey*. Accordingly, Carrie Bost’s entry into a settlement agreement with [the tortfeasor] and his carrier does not bar her as a matter of law from recovering under Farm Bureau’s UIM coverage.

*Id.* at 46-47, 483 S.E.2d at 455-56 (emphasis added).

On 14 August 1997, shortly after our decision in *Bost*, the North Carolina General Assembly amended a portion of the MVSFRA, clarifying the effect of a covenant not to enforce judgment on an insured party’s right to seek UIM benefits. 1997 N.C. Sess. Laws ch. 396, § 2. Prior to the 1997 amendment, the MVSFRA provided that with notification to and subsequent action by the UIM carrier, an injured party could settle personal injury claims against tortfeasors, without the involvement of the UIM carrier. *See* N.C.G.S. § 20-279.21(b)(4) (1996) (amended 1997). In the absence of express language addressing how such a settlement should affect an injured party’s right to subsequently seek UIM benefits, confusion arose concerning the effects of covenants not to enforce judgments on UIM coverage. *See* George L. Simpson, III, *North Carolina Uninsured and Underinsured Motorist Insurance* §4:3, at 262-63 (2002).

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Responding to the confusion, our legislature enacted the above referenced 1997 amendment to section 20-279.21(b)(4), effective 14 August 1997. *See id.* Codifying our Court's holding in *Bost*, section 20-279.21(b)(4) now provides that individuals injured in car accidents may execute contractual covenants not to enforce judgment in favor of tortfeasors as consideration for payment of the liability policy limits and that the execution of such a covenant does not preclude the injured party from seeking any available UIM benefits. *Id.*

While our decisions in *Spivey* and *Bost* and the 1997 amendment to N.C.G.S. § 20-279.21(b)(4) are instructive, they are not dispositive of the issues presented by the case *sub judice*. The Edwards Release cannot be characterized squarely as a covenant not to enforce judgment, presented in *Bost* and now covered by N.C.G.S. § 20-279.21(b)(4). Likewise, it is obviously not a general release, as was the one in *Spivey*. The boilerplate language that would render the Release general—"and all other persons, firms or corporations liable or who might be claimed to be liable"—was marked-out by hand, such that the discharge was exclusive and limited to the Haggensmakers. This alteration was reinforced further by the handwritten addition precluding not simply all claims, but those claims "against the above named individuals."

Given that UIM coverage is the derivative of a tortfeasor's liability, it could be argued that the logical extension of the *Spivey* Court's decision is to bar recovery of UIM benefits where a release simply states that the named tortfeasor is released from all liability. Such a release, however, is simply not the subject of the present action. Rather, the Release, like the limited release in *Bost*, embodies defendants' attention to and awareness of their right to seek UIM benefits from their insurer and their intent to exclude the liability of the UIM carrier from the Release. Furthermore, unlike the situation presented by *Spivey*, there is no inconsistency between the alleged intent of the injured party and the language of the policy. Here, given the substantial, critical hand-written alterations contained in the Release, defendants' intent to limit release of liability to that of the tortfeasor is clear from the plain language of the Release.

We disagree with plaintiff's assertion that the 1997 amendment to N.C.G.S. § 20-279.21(b)(4) applies to the Release. The statute does not address the situation presented by the case *sub judice*. Rather, it applies only to those circumstances in which an injured party executes a covenant not to enforce judgment. Moreover, the Court does not find, by negative implication, that given the statute's reference

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only to covenants not to enforce judgments and not limited releases, the statute requires a settlement *must* contain a covenant to preserve the injured party's UIM claims. If anything, the 1997 amendment only strengthens the legislature's resolve to preserve the remedial purpose of the UIM statute—to "provid[e] coverage to motorists injured by underinsured motorists"—by allowing the injured party to take the necessary steps, including but not limited to executing a covenant not to enforce, to limit a release to the tortfeasor's personal liability. *Gurganious v. Integon Gen. Ins. Corp.*, 108 N.C. App. 163, 168, 423 S.E.2d 317, 320 (1992); *see also Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 296, 378 S.E.2d 21, 26 (1989) (noting that the MVSFRA "is remedial in nature and is to be liberally construed to effectuate its purpose").

Accordingly, we conclude that defendants' claims against their UIM carrier, Farm Bureau, are not barred by the execution of their limited release, even though it contained neither a covenant not to enforce nor an express provision reserving their rights as against Farm Bureau. We do not find our holding here to be contrary to our holding in *Spivey*, where we stated that the plaintiff's lack of intent to release the UIM carrier was irrelevant. Unlike in *Spivey*, defendants clearly intended the Release to be limited to the Haggensmakers, given the alterations therein. As such, Farm Bureau's first assignment of error is overruled.

## II.

[2] Plaintiff next argues that the trial court erred in denying plaintiff's motion to stay arbitration because defendants' claim for UIM benefits was barred by the Release. Based on our holding in the preceding assignment of error, this assignment of error is also overruled.

## Conclusion

For the reasons stated above, we affirm the trial court's order granting summary judgment in favor of defendants and denying Farm Bureau's motion to stay arbitration.

AFFIRMED.

Judges WALKER and McCULLOUGH concur.

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[154 N.C. App. 624 (2002)]

STATE OF NORTH CAROLINA v. LARRY GENE McRAE

No. COA02-21

(Filed 17 December 2002)

**Search and Seizure— cocaine—voluntarily given to officers—  
frisk following traffic stop**

The trial court did not err by denying defendant's motion to suppress cocaine which he voluntarily gave to officers during the course of a constitutionally reasonable frisk following a traffic stop. Defendant was seen in a well known drug area at night participating in a drug transaction; he was stopped for speeding; officers discovered that his license tags were fictitious and that his driver's license had been revoked; defendant was nervous; and defendant repeatedly moved his hands in and out of his pockets despite being asked not to do so. The totality of these circumstances provided reasonable grounds to frisk defendant even though he was otherwise cooperative and presented no obvious signs of carrying a weapon.

Appeal by defendant from order entered 15 May 2001 by Judge E. Lynn Johnson in Robeson County Superior Court. Heard in the Court of Appeals 14 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Rudy E. Renfer, for the State.*

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

THOMAS, Judge.

Defendant, Larry Gene McRae, appeals from the denial of his suppression motion. Following the trial court's decision, defendant pled guilty to felony possession of cocaine and misdemeanor possession of drug paraphernalia pursuant to a plea agreement in which he preserved his right to appeal the denial of his motion pursuant to N.C. Gen. Stat. § 15A-979(b).

By his sole assignment of error, defendant contends the trial court erred in concluding that the law enforcement officers had constitutionally reasonable grounds to justify the stop of his vehicle and subsequent search of his person. For the reasons herein, we affirm the trial court.



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The testimony at the suppression hearing tends to show the following: On 5 December 1997, at approximately 9:15 p.m., Corporal Bill Leggett and Sergeant David Prevatte of the Rowland Police Department were on patrol traveling north on Martin Luther King Boulevard. The officers observed defendant's vehicle, a gray Lincoln, parked in a private parking lot. The area is a "well known drug area" and a sign prohibiting trespassing after 8:00 p.m. was posted on the premises.

Leggett testified he observed defendant get in and out of the vehicle several times and "there [were] a lot of people gathering around." According to Leggett, during one of the times defendant was out of the vehicle, defendant was approached by a man in a blue jacket. Leggett noticed something being passed between the two men, leading him to suspect a sale of an item had occurred.

Prevatte, meanwhile, testified to merely observing a man approach the driver's side window of defendant's vehicle and have a conversation with defendant "for about a minute." The man then left and went back across the street. Prevatte did not testify to seeing anything pass between the two.

Following his encounter with the man in the parking lot, defendant drove his vehicle off the lot and turned right on Martin Luther King. The officers' suspicions had been roused due to the time of night and their knowledge that the area was a popular location for drug transactions, so they turned their patrol car around and followed defendant.

While continuing to trail him, they ran a license check, and eventually paced defendant traveling 45 mph in a 35 mph zone. After defendant made a right turn onto North Hine Street, the officers activated their blue lights and pulled him over for speeding. They then received word that the license tag on defendant's vehicle was assigned to another vehicle.

Prevatte approached defendant's vehicle and discovered defendant in the driver's seat and a female in the passenger seat. Prevatte asked defendant for his driver's license. Prevatte could not remember whether defendant had produced a driver's license when asked; however, Prevatte testified that a subsequent check indicated defendant's license was revoked. Prevatte asked defendant to step out and go to the front of the vehicle in order for the officers to inquire further about the vehicle's ownership.

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Defendant was “extremely nervous,” according to Prevatte, repeatedly placing his hands in his pockets and removing them. While defendant did not take out any objects, he continued to put his hands in and out of his pockets after being asked not to do so by Prevatte.

Concerned for the officers’ safety, Prevatte conducted a “pat-down” frisk of defendant and felt an “undetermined object” in defendant’s pocket. Prevatte asked defendant to remove the object and place it on the hood of the car. Defendant acquiesced, removing some copper and metal wiring. Prevatte then asked if defendant had anything else in his pockets and defendant responded by pulling out a rock of cocaine. Defendant, then placed under arrest, indicated he had purchased the cocaine to trade for sex with his female passenger. Defendant was later charged with possession of drug paraphernalia and possession of cocaine.

Defendant, meanwhile, testified at the suppression hearing that he had purchased cocaine at the corner store, but had done so in front of the store, not in the parking lot across the street. He said he obeyed all traffic laws after leaving the parking lot and did not speed. He further noted that he was not ticketed for speeding by the officers. Upon being pulled over, he was asked for his driver’s license and registration, produced his license, but could not find his registration. He was then asked to step from the car and was searched. He never consented to the search. According to defendant, the cocaine was found in the bill of his cap.

Following the suppression hearing, the trial court made the following findings of fact and conclusions of law:

Findings of Fact

1. That on December 5, 1997 at approximately 9:15 p.m., Corporal Lee Leggett, (now Chief of Police, Fair Bluff, N.C.) and Sergeant Daniel Prevatte, both of the Rowland Police Department observed the Defendant in a gray Lincoln.
2. That the Defendant was at a location that had been posted for “no trespassing” after 8:00 p.m., that the Defendant was parked in a well known drug area and the officers observed the Defendant participate in a “drug transaction”; that a female was in the passenger side of the gray Lincoln.

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3. That the officers fell in behind the gray Lincoln as it left the area and paced the vehicle exceeding the posted speed limit at 45 mph in a 35 mph zone.
4. That the officers checked the license tag and found that the tags were assigned to another vehicle.
5. That the vehicle was stopped and the Defendant was found to be the driver and that there was a female passenger.
6. That the Defendant was asked for identification and it was determined his license was in a state of revocation.
7. That the Defendant was asked to step to the front of the vehicle; that the Defendant was nervous moving his hands in and out of his pockets; that the Defendant was asked to remove the items from his pockets and the Defendant removed items that the officers recognized as drug paraphernalia; that the Defendant continued to empty his pockets and removed a rock of cocaine.
8. That the Defendant was then arrested and advised of his Miranda rights and he advised that he got the \$10 rock of cocaine to Trade for sex.

Conclusions of Law

1. That the officers had probable cause to stop the Defendant's vehicle for violation of the motor vehicle laws of this State, to wit, speeding and registration of the license plate.
2. That the officers thereafter determined that the Defendant's license was in a state of revocation giving the officers further probable cause to detain and arrest.
3. That the combination of the observed drug transaction and multiple violation occurring in the present [sic] of the officers, the conduct of the defendant, all gave the officers reasonable grounds to detain and frisk the Defendant.
4. That the purpose of the detention and the length of the detention was reasonable under the totality of the circumstances.

Based on its findings of fact and conclusions of law, the trial court denied defendant's motion to suppress.

Our review of a trial court's denial of a motion to suppress is limited to a determination of whether its findings are supported by competent evidence, and if so, whether the findings support the trial

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court's conclusions of law. *State v. Allison*, 148 N.C. 702, 704, 559 S.E.2d 828, 829 (2002). "This Court will not review a trial court's findings of fact when defendant merely makes a general contention that the trial court's findings are not supported by the evidence." *State v. Steen*, 352 N.C. 227, 238, 536 S.E.2d 1, 8 (2000), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001).

Here, defendant, in his sole assignment of error, has failed to specifically except to any of the trial court's findings of fact. Additionally, defendant failed to identify in his brief which of the trial court's findings of fact are not supported by the evidence. Because defendant has assigned error to the trial court's findings of fact only in a general fashion, the focus of our analysis is whether the trial court's findings overall support its conclusion that the stop and subsequent search of defendant was constitutional.

Article I, Section 20 of our North Carolina Constitution, as does the Fourth Amendment to the United States Constitution, protects against *unreasonable* searches and seizures. *State v. McClendon*, 350 N.C. 630, 636, 517 S.E.2d 128, 132 (1999). The temporary detention of a motorist upon probable cause to believe that he has violated a traffic law is not inconsistent with the prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist for the violation. *Id.* (officer had probable cause to stop station wagon driven by defendant because defendant was speeding); *see also Whren v. United States*, 517 U.S. 806, 135 L. Ed. 2d 89 (1996); *State v. Hamilton*, 125 N.C. App. 396, 400, 481 S.E.2d 98, 100 (1997) (officer had probable cause to stop vehicle in which defendant was a passenger based on officer's observation that neither the driver nor defendant passenger was wearing a seat belt). Probable cause exists where the facts and circumstances within the knowledge of the officer, when objectively viewed through the eyes of a reasonable, cautious officer, guided by his experience and training, are sufficient to warrant a prudent man's belief that the suspect has committed or is committing an offense. *See State v. Crenshaw*, 144 N.C. App. 574, 577, 551 S.E.2d 147, 149 (citing *State v. Munoz*, 141 N.C. App. 675, 682, 541 S.E.2d 218, 222 (2001)), *cert. denied*, 353 N.C. 454, 548 S.E.2d 534 (2001); *Hamilton*, 125 N.C. App. at 399, 481 S.E.2d at 100 (citing *State v. Streeter*, 283 N.C. 203, 207, 195 S.E.2d 502, 505 (1973) (citation omitted)).

Here, the facts found by the trial court conclusively establish that the officers had probable cause to stop defendant's vehicle for

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speeding. The trial court found that the officers paced defendant's vehicle "exceeding the posted speed limit at 45 mph in a 35 mph zone." We therefore conclude the officers in this case were justified in stopping defendant's vehicle. See *McClendon*, 350 N.C. at 636, 517 S.E.2d at 132.

Having established that the initial stop of defendant's vehicle was proper, we next address whether the subsequent search of defendant's person was constitutionally reasonable.

When an officer has lawfully detained a vehicle based on probable cause to believe that a traffic law has been violated, he may order the driver to exit the vehicle. See *State v. McGirt*, 122 N.C. App. 237, 239, 468 S.E.2d 833, 834-35 (1996) (citing *Pennsylvania v. Mims*, 434 U.S. 106, 111, 54 L. Ed. 2d 331, 337 (1977)), *aff'd per curiam*, 345 N.C. 624, 481 S.E.2d 288 (1997). The officer is permitted to conduct a "pat-down" frisk to discover a weapon or weapons once the defendant is outside the vehicle, "[i]f he reasonably believes that the person is armed and dangerous[.]" *State v. Pearson*, 348 N.C. 272, 275, 498 S.E.2d 599, 600 (1998); see also *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889 (1968); *State v. Butler*, 331 N.C. 227, 415 S.E.2d 719 (1992); *State v. Peck*, 305 N.C. 734, 291 S.E.2d 637 (1982). In determining that an individual might be armed and dangerous, the officer is entitled to formulate common-sense conclusions about "the modes or patterns of operation of certain kinds of lawbreakers." *Butler*, 331 N.C. at 234, 415 S.E.2d at 723 (quoting *United States v. Cortez*, 449 U.S. 411, 418, 66 L. Ed. 2d 621, 629 (1981)).

Here, the officers observed defendant's vehicle parked "in a well known drug area" in violation of a posted "No Trespassing" sign. Prevatte saw defendant engaged in a conversation with a man who had walked to the driver's side window of defendant's vehicle. This, coupled with the time of night and the area in which defendant was parked, roused Prevatte's suspicions that defendant was involved in drug trafficking. Additionally, Leggett testified that he saw something being passed from a man in the parking lot to defendant. Based on this evidence, the trial court found as fact that defendant participated in a "drug transaction."

After defendant exited the parking lot, the officers paced him traveling 45 mph in a 35 mph zone and lawfully stopped him for speeding. Prior to encountering defendant in his vehicle, the officers determined the license tags on the vehicle to be fictitious. Prevatte was thus entitled to inquire further regarding the vehicle's ownership.

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See *McClendon*, 350 N.C. at 637, 517 S.E.2d at 133. Accordingly, he asked defendant to step out and go to the front of the vehicle.

Defendant appeared “extremely nervous” to Prevatte, and repeatedly put his hands in and out of his pockets. Defendant continued doing so even after Prevatte told him to stop. Prevatte then conducted a “pat-down” search of defendant for weapons and felt what he described as an “undetermined object” in defendant’s pocket. He asked defendant to remove it. Defendant voluntarily complied, placed drug paraphernalia on the hood of the car, and, when asked if he had anything else in his pockets, pulled out a rock of cocaine. Prevatte did not reach into defendant’s pocket and the “pat-down” frisk was not otherwise unreasonably intrusive. Defendant simply voluntarily complied with Prevatte’s request to empty his pockets. Under the circumstances of this case, we find that defendant’s acquiescence to Prevatte’s request amounted to clear and unequivocal consent for the seizure of the contraband removed from defendant’s pockets.

When viewed from the common-sense perspective of a law enforcement officer performing his duties, these facts allowed Prevatte to form a reasonable belief that defendant was armed and dangerous. In sum, the trial court’s findings of fact reveal: (1) defendant was observed in a “well know drug area” at night participating in a “drug transaction,” see *Buller*, 331 N.C. at 234, 415 S.E.2d at 723 (in face-to-face encounter with person suspected of drug trafficking, officer could reasonably assume suspect might be armed); (2) he was stopped for speeding and the officers subsequently discovered the license tags on his vehicle were fictitious and his driver’s license had been revoked; (3) he appeared “extremely nervous” when he stepped out of his car, see *McClendon*, 350 N.C. at 638, 517 S.E.2d at 134 (nervousness, like all other facts, must be taken in light of the totality of the circumstances, and is an appropriate factor to consider when determining whether a basis for reasonable suspicion exists); and (4) he repeatedly put his hands in and out of his pockets after being asked not to. See *Hamilton*, 125 N.C. App. at 401, 481 S.E.2d at 101 (suspect reached toward his left side before exiting vehicle, which trial court found caused officer to believe suspect was reaching for a weapon; “pat-down” for weapons justified based on reasonable belief suspect armed and dangerous). The totality of these circumstances, even in the face of an otherwise cooperative defendant who presented no obvious signs of carrying a weapon, supports the trial court’s conclusion that Prevatte had reasonable grounds to frisk defendant. See *McGirt*, 122 N.C. App. at 240, 468 S.E.2d at 835.

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Because the evidence sought to be suppressed by defendant was voluntarily given to the officers during the course of a constitutionally reasonable “pat-down” frisk, the trial court did not err in denying defendant’s motion to suppress. Accordingly, we affirm.

Affirmed.

Chief Judge EAGLES and Judge TYSON concur.

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STATE OF NORTH CAROLINA v. ADRIAN DEVON MURRAY

No. COA02-157

(Filed 17 December 2002)

**1. Possession of Stolen Property— identity of owner—sufficiency of evidence**

The trial court did not err by refusing to dismiss a charge of felonious possession of stolen goods where the victim did not identify her automobile but a jury could reasonably conclude that the car found in defendant’s possession belonged to her. Moreover, defendant did not object at trial and the evidence was properly considered when determining sufficiency of the evidence.

**2. Attorneys— withdrawal—no motion—no ex mero motu duty**

The court was not required to remove defense counsel ex mero motu from a possession of stolen goods trial where defense counsel informed the court that he had been removed in all of defendant’s other pending cases but did not move to withdraw, and defendant made no request that his counsel be discharged.

**3. Constitutional Law— right to testify—duty to inform**

The trial court did not have an affirmative duty to ensure that a defendant had been adequately informed of his right to testify on his own behalf in a prosecution for possession of stolen goods.

**4. Criminal Law— reopening evidence—postverdict**

The trial court did not have the discretion to allow defendant to testify after a verdict of guilty of felonious possession of a

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stolen car where defendant indicated that his counsel had not allowed him to testify and that he had evidence that he could not have stolen the car. Additional evidence must be introduced prior to entry of the verdict; moreover, the additional evidence in this case was irrelevant because it related to whether defendant could have stolen the car rather than the charged offense of possessing the stolen car.

**5. Sentencing—habitual felon—indictment**

Defendant's habitual felon indictment complied with the Habitual Felons Act and case law even though it predated the indictment for the underlying felony of which he was convicted where he was originally indicted for felonious larceny of a motor vehicle and as an habitual felon, later indicted for possessing the stolen vehicle, and convicted of felonious possession and for being an habitual felon. These was a pending prosecution to which the habitual felon proceeding was ancillary; moreover, defendant was tried for felonious possession and for being an habitual felon at the same session of criminal court by the same jury, and the jury returned verdicts on successive days.

**6. Criminal Law—closing courtroom—defendant's threats**

There was no plain error in the trial court closing the courtroom and telling spectators to leave after a defendant with a history of attempting to escape and of injuring law enforcement officials threatened to hurt someone in the courtroom and to have someone help him escape.

Appeal by defendant from judgment entered 29 August 2001 by Judge Kimberly S. Taylor in Davidson County Superior Court. Heard in the Court of Appeals 17 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.*

*Brian Michael Aus, for defendant-appellant.*

CAMPBELL, Judge.

Adrian Devon Murray ("defendant") was indicted on 31 July 2000 for being an habitual felon and on 2 July 2001 on two counts of felonious possession of stolen goods. In August 2001, defendant was tried by a jury on the charges of felonious possession of stolen goods



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and misdemeanor possession of stolen goods. After being convicted of both charges, defendant was found to be an habitual felon. Defendant appeals the final judgment pursuant to N.C. Gen. Stat. § 7A-27(b). On appeal, defendant argues that the trial court erred: I. In denying defendant's motion to dismiss due to insufficient evidence; II. In not discharging his defense counsel; III. By not inquiring of defendant whether his failure to testify was an intelligent, knowing and voluntary waiver of his right to testify in his defense; IV. By proceeding with the habitual felon phase when the habitual felon indictment predates the indictment for the predicate felony; V. By ordering closure of the courtroom; and VI. In sentencing defendant due to the incorrect dates on the judgment and commitment and not providing credit for time served. Upon review of the record, we find that the trial court committed no error as to its final judgment. Accordingly, we affirm the judgment of the lower court. We do, however, remand for correction of the clerical error noted below.

Through the testimony of the victims, Deborah Wall ("Ms. Wall") and Michelle Martin ("Ms. Martin"), the State's evidence showed the following. Ms. Wall, who is from Virginia, was visiting a friend in Thomasville, North Carolina on 27 May 2000. Ms. Wall parked her 1985 Chrysler New Yorker near the back door of her friend's house, where she spent the night. When she went outside the next morning, 28 May 2000, Ms. Wall saw that her car was missing and reported the theft of her car to the police. Then, on 29 May 2000, Ms. Martin, who lived in Greensboro, went out to her 1990 Suzuki Sidekick and noticed that it had been broken into and vandalized. Nearly \$300 worth of textbooks and a black bookbag worth about \$100 were missing from inside the car. In addition, the car stereo and ignition switch were broken and the interior passenger side door was torn. Ms. Martin reported the incident to the High Point Police.

On 31 May 2000, Officer Donnie Rowe ("Officer Rowe"), who was assigned to investigate Ms. Wall's stolen car responded to an area of Thomasville in reference to a report of a vehicle matching a description of Ms. Wall's stolen vehicle. Officer Rowe saw "a blue Chrysler with Virginia license plates" parked in front of Apartment L at a complex on Liberty Drive. The door to that apartment was open and "a black male [was] standing in front inside the [storm] door." Officer Rowe testified, "I had already confirmed that the vehicle was stolen. I set up on the vehicle and later when the black male got into the vehicle I stopped the vehicle down the street." Inside the car, the assisting officers found textbooks with "the name of Michelle Martin

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[written] inside of the books.” Officer Rowe “contacted [the] High Point Police Department and later it was confirmed that they had a breaking and entering into a motor vehicle prior to this and [the books] belonged to the victim out of High Point,” Michelle Martin.

I. Denying defendant’s motion to dismiss

[1] Defendant first argues that the trial court’s refusal to dismiss the charge of felonious possession of stolen goods was error since the victim of the larceny did not identify the stolen vehicle that was in defendant’s possession. “In ruling upon a motion to dismiss, the trial court must determine if the State has presented substantial evidence of each essential element of the offense.” *State v. Reid*, 151 N.C. App. 420, 565 S.E.2d 747 (2002) (citation omitted). “Whether the evidence presented is substantial is a question of law for the court.” *State v. Siriguanico*, 151 N.C. App. 107, 564 S.E.2d 301 (2002) (citation omitted). “Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion.” *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002), *cert. denied*, — U.S. —, 123 S. Ct. 488, — L. Ed. 2d — (2002) (citation omitted). When considering a criminal defendant’s motion to dismiss, the trial court must view all of the evidence presented “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) (citation omitted). The trial court correctly denies a motion to dismiss “[if] there is substantial evidence of every element of the offense charged, or any lesser offense, and of defendant being the perpetrator of the crime.” *State v. Ramseur*, 338 N.C. 502, 507, 450 S.E.2d 467, 471 (1994) (citation omitted).

Applying this standard of review, we find that there exists substantial evidence of every element of felonious possession of stolen goods and that defendant was the perpetrator of the offense. Under N.C. Gen. Stat. § 14- 71.1, “[t]he essential elements of feloniously possessing stolen property are (1) possession of personal property, (2) valued at more than \$400.00, (3) which has been stolen, (4) the possessor knowing or having reasonable grounds to believe the property to have been stolen, and (5) the possessor acting with a dishonest purpose.” *State v. Davis*, 302 N.C. 370, 373, 275 S.E.2d 491, 493 (1981); *see* N.C. Gen. Stat. § 14-71.1 (2001). Defendant maintains that although Ms. Wall testified that her car was missing the morning after she parked it outside her friend’s house in Thomasville and as to the

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value of her car being \$1,995.00, she did not testify as to the color of her vehicle nor to any other identifying feature. Further, Officer Rowe's testimony that he confirmed with Ms. Wall that the Chrysler New Yorker he stopped was in fact her vehicle is inadmissible hearsay under N.C. Gen. Stat. § 8C-1, Rule 802. Therefore, no competent evidence exists to link defendant's possession of a blue 1985 Chrysler New Yorker to Wall's stolen vehicle.

Contrarily, the State argues that ample evidence existed from which a reasonable mind could infer that the car in defendant's possession was Ms. Wall's stolen vehicle. We agree. When viewed in the light most favorable to the State, a jury could reasonably conclude that the blue Chrysler New Yorker with Virginia plates found by Officer Rowe in defendant's possession belonged to Ms. Wall. In addition to testifying about his response to a sighting of the stolen car, Officer Rowe identified pictures of the blue Chrysler with Virginia plates that had been reported stolen and that defendant was driving. Moreover, our review of the transcript shows that defendant did not object to this testimony being admitted at trial and, therefore, it was properly considered in determining the sufficiency of the evidence. As this Court has held, "The [trial] court must consider all evidence which is admitted which is favorable to the State[.]" *State v. France*, 94 N.C. App. 72, 77, 379 S.E.2d 701, 703 (1989).

## II. Not discharging the defense counsel

**[2]** According to the record, before defendant was brought in for his trial, defense counsel informed the trial court that he had been removed as counsel for this defendant in all other pending cases involving defendant. Further, defense counsel stated, "I was not allowed to be removed from this case." The trial court made no inquiry into the matter and defense counsel did not move to withdraw from this case. In fact, the record reflects that defendant was then brought into the courtroom and defense counsel proceeded with another motion concerning defendant's case. Defendant argues that the trial court should have removed defense counsel from representation in this case *ex mero motu* and pursuant to Rule 1.16 of the Revised Rules of Professional Conduct. We disagree. Nowhere in North Carolina case law or our general statutes do we find any law requiring that a trial court remove counsel in cases such as this where the defendant does not make such a request. Rule 1.16 does not apply as it refers to cases where a lawyer is discharged from a case by his client. The rule does not require a court to discharge an attorney from

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all of a defendant's pending cases. Here, defendant made no motions prior to or during trial that his attorney be discharged. Defendant's reliance on *State v. Poindexter*, 69 N.C. App. 691, 318 S.E.2d 329, (1984), *cert. denied*, 312 N.C. 497, 322 S.E.2d 563 (1984) and *State v. McGee*, 60 N.C. App. 658, 299 S.E.2d 796 (1983) is misplaced as those cases involve situations highly unlike the one before us. We find defendant's contention to be without merit and, therefore, we overrule this assignment of error.

### III. Not inquiring of defendant regarding his failure to testify

[3] At the close of the State's evidence, defense counsel indicated that no evidence would be offered by defendant. Defendant argues that the trial court erred by not asking defendant whether he wished to present evidence or testify on his own behalf. While we agree with defendant that a criminal defendant has a constitutional right to testify on his own behalf, we do not find that the trial court must initiate an inquiry into defendant's failure to testify. Although defendant cites ample authority regarding a defendant's right to testify, he fails to cite authority supporting his contention that a trial court has an affirmative duty to ensure that a defendant has been adequately informed of his right to testify on his own behalf. In *State v. Poindexter*, the defendant argued that the trial court erred in not informing him of his right *not* to testify under the fifth amendment. This Court held:

The fifth amendment privilege, belatedly claimed by defendant, says no more than a person shall not be *compelled* to speak. It does not place upon the trial court the duty of informing a *pro se* defendant of his rights and privileges.

*Poindexter* at 694, 318 S.E.2d at 331. We find the *Poindexter* Court's analysis applicable here as defendant poses the same type of argument before us: that a trial court errs in failing to inform a criminal defendant of his constitutional rights. The Fourth Amendment to the United States Constitution and Article I, § 23 of the North Carolina Constitution provide a criminal defendant with the right to testify, but do "not place upon the trial court the duty of informing a *pro se* [or represented] defendant" of this right. *Id.*

[4] Furthermore, as did the defendant in *Poindexter*, defendant claims this constitutional right at a belated stage in the proceedings. After the jury returned the guilty verdicts, defendant, referring to his trial counsel, stated: "He wouldn't let me testify. He didn't go get the

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evidence. There's a ticket in High Point proving that I couldn't steal that car, proving my innocence." Defendant argues that the trial judge should have treated defendant's post-verdict statements as a motion to reopen the evidence. We disagree. First, N.C. Gen. Stat. § 15A-1226 states: "The judge in his discretion may permit any party to introduce additional evidence at any time *prior to verdict*." N.C. Gen. Stat. § 15A-1226(b) (2001) (emphasis added). In fact, our state Supreme Court "has long recognized that the trial court has the discretion to allow either party to recall witnesses to offer additional evidence, *even after jury arguments*." *State v. Goldman*, 311 N.C. 338, 350, 317 S.E.2d 361, 368 (1984) (citation omitted) (emphasis added). Yet, the applicable statute and case law are clear that any additional evidence must be introduced prior to entry of the verdict. Since defendant's statements alluding to his wish to testify were made after the verdict, the trial judge had no discretion to consider allowing defendant's testimony. Secondly, assuming *arguendo* that the trial judge had the duty to inform defendant of his right to testify on his own behalf, such a failure was harmless error, as it does not have any reasonable possibility of affecting the outcome of the trial. Defendant's statements after the verdict indicated that he wished to testify as to evidence that he "couldn't steal that car." Defendant was charged with felonious possession of a stolen car, not with stealing the car. Thus, defendant's statement as to what he would testify is irrelevant to the offense with which he was charged and of which the jury found him guilty.

IV. Proceeding with the habitual felon phase

[5] Defendant next assigns error to the trial court's proceeding with the habitual felon phase of the trial when the habitual felon indictment predates the indictment for the predicate felony. Thus, defendant argues, the habitual felon indictment is not ancillary to any predicate felony as required in *State v. Allen* because the habitual felon indictment predates the underlying felony for which defendant was convicted. In *Allen*, our Supreme Court held:

Properly construed [the Habitual Felons Act] clearly contemplates that when one who has already attained the status of an habitual felon is indicted for the commission of another felony, that person may then be also indicted in a separate bill as being an habitual felon. It is likewise clear that the proceeding by which the state seeks to establish that defendant is an habitual felon is necessarily ancillary to a pending prosecution for the "principal," or substantive, felony. The act does not authorize a proceeding

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independent from the prosecution of some substantive felony for the sole purpose of establishing a defendant's status as an habitual felon.

*State v. Allen*, 292 N.C. 431, 433-34, 233 S.E.2d 585, 587 (1977). In this case, defendant was originally indicted for felony larceny of a motor vehicle and as an habitual felon. Because felonious possession of stolen goods turned out to be an easier offense to prove at trial, defendant was later indicted for possessing the stolen vehicle. Merely because these events caused the date on the habitual felon indictment to predate that on the substantive felony indictment does not mean that there did not exist a pending prosecution to which the habitual felon proceeding was ancillary. In fact, defendant was tried at the same session of criminal court by the same jury on the predicate felonious possession of stolen goods charge and then on the habitual felon charge. Our review of the record shows that on 28 August 2001, the jury entered a guilty verdict on the underlying felony and on 29 August 2001, the jury entered a verdict finding defendant to be an habitual felon. Thus, defendant's habitual felon indictment complies with the Habitual Felons Act set forth in N.C. Gen. Stat. § 14-7.1, as well as with *Allen*. This assignment of error is overruled.

V. Ordering closure of the courtroom

[6] We find no merit in defendant's argument that the trial court erred in telling unidentified spectators to leave and closing the courtroom due to defendant's threats. N.C. Gen. Stat. § 15A-1034 states: "The presiding judge may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present." N.C. Gen. Stat. § 15A-1034(a) (2001). Contending that the disposition of criminal cases should be conducted before the public in open court, defendant argues that the trial court committed plain error by using broader limitations than necessary to protect the interest of public safety. *See State v. Moctezuma*, 141 N.C. App. 90, 96, 539 S.E.2d 52, 57 (2000). We find that the trial court's closing of the courtroom was a sound decision and one that had no effect on defendant's trial as it was done after the verdict was rendered. In no manner does the trial court's acting to protect spectators from defendant constitute plain error, where defendant threatened to hurt someone in the courtroom and to have someone help him escape and where defendant had a history of attempting to escape and injuring law enforcement officials. This assignment of error is overruled.

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VI. Incorrect dates on the judgment and commitment and not providing credit for time served

Defendant fails to establish that he deserves credit for time served when, during trial, he was serving time for other offenses. Defendant correctly maintains, however, that the judgment in this matter contains clerical errors. The judgment should reflect the date of the offense of felonious possession of stolen goods on the indictment as amended according to the State's motion to amend. Likewise, the date on the habitual felon judgment should be corrected.

No error in the trial. Remanded for correction of clerical errors.

Judges WALKER and McCULLOUGH concur.

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CABLE TEL SERVICES, INC., PLAINTIFF V. OVERLAND CONTRACTING, INC.,  
AND BLACK & VEATCH LLP, DEFENDANTS

No. COA01-1318

(Filed 17 December 2002)

**1. Appeal and Error— appealability—denial of motion to dismiss—jurisdiction selection clause—interlocutory order—substantial right**

Although the denial of a motion to dismiss is ordinarily not appealable, this matter is properly before the Court of Appeals because an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right.

**2. Contracts; Courts— breach—choice of law—refusal to apply**

The trial court did not err in a breach of contract action by refusing to apply Colorado law even though the contract provides that its validity, performance, and effect shall be determined in accordance with the internal laws of Colorado, because: (1) even though the choice of law provision indicated the contract was made in Colorado, the record reflects that the contract was actually entered into by plaintiff in North Carolina; (2) plaintiff has neither engaged in business of any kind in Colorado, is not licensed or registered to conduct business in the State of

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Colorado, and has never knowingly entered into any contracts with any person or entity in Colorado; (3) all work to be performed by plaintiff under the contract was to be performed in Missouri; and (4) there is no other reasonable basis for the parties or the Court of Appeals to apply Colorado law to this contract.

**3. Venue— forum selection clause—not mandatory**

The trial court did not abuse its discretion in a breach of contract action by denying defendants' motion to dismiss an action brought in North Carolina even though the contract provided that it shall be subject to the jurisdiction of the State of Colorado, because the language in the contract did not contain language to indicate that it was a mandatory forum selection clause.

Appeal by defendant from order entered on 23 July 2001 by Judge James Downs in Polk County Superior Court. Heard in the Court of Appeals 21 August 2002.

*Hamrick, Bowen, Mebane, Greenway & Lloyd, by David A. Lloyd, for plaintiff-appellee.*

*Moore & Van Allen, P.L.L.C., by Jeffrey J. Davis and Andrew S. O'Hara, for defendant-appellants.*

HUDSON, Judge.

The issue on this appeal is whether certain clauses in the parties' contract prohibit North Carolina courts from exercising jurisdiction over an action for a breach of that contract. The trial court ruled that they did not. For the following reasons, we affirm.

Plaintiff Cable Tel Services, Inc. (Cable Tel) and defendants Overland Contracting, Inc. (Overland) and Black and Veatch, LLP (Black and Veatch) entered into a contract in 1998 whereby plaintiff was to perform construction work on a television cable installation project. The following two clauses appeared in the parties' written agreement:

**9.0 COMPLIANCE WITH LAWS**

(paragraph 2)

This Subcontract shall be subject to the law and jurisdiction of the State of Colorado unless expressly designated otherwise in this Subcontract.



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15.0 CHOICE OF LAW.

Notwithstanding any provision in the Prime Agreement to the contrary, this Subcontract and the Prime Agreement have been made in and their validity, performance and effect shall be determined in accordance with the internal laws, without reference to conflict of laws, of Colorado.

On 13 December 2000, plaintiff filed suit against defendants in Polk County, North Carolina, seeking damages for breach of contract and negligent misrepresentation. On 24 May 2001, defendants filed a motion to dismiss plaintiff's complaint based on clauses 9.0 and 15.0 of the contract. The trial court denied the motion, and defendants appealed to this Court.

**[1]** Initially we note that, although an appeal from the denial of a motion to dismiss or motion for summary judgment is ordinarily not appealable, this matter is properly before this Court because North Carolina "case law establishes firmly that an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right that would be lost." *Mark Grp. Int'l, Inc. v. Still*, 151 N.C. App. 565, 566 S.E.2d 160, 161 n.1 (2002). *See also L.C. Williams Oil Co. v. NAFCO Capital Corp.*, 130 N.C. App. 286, 288, 502 S.E.2d 415, 417 (1998).

**[2]** On appeal, defendants argue that the case should have been dismissed because: (1) we should apply Colorado law; and (2) under Colorado law section 9 is a mandatory forum selection clause and as a result the case must be dismissed and heard in Colorado.

Parties often include in contracts one or more of three types of clauses to establish where jurisdiction lies and which state's laws will apply to the contract. First, a "choice of law" clause may provide that the substantive laws of a particular state govern the construction and validity of the contract. Second, under a "consent to jurisdiction" clause, the parties may agree to submit to the jurisdiction of a specific court or state. Third, a "forum selection" clause goes beyond a "consent to jurisdiction" clause, and designates a particular state or court jurisdiction as the one in which the parties will litigate any disputes arising out of their contract or contractual relationship. *See Mark Grp. Int'l, Inc.* at 566-67, 566 S.E.2d at 161, *Johnston County v. R.N. Rouse & Co., Inc.*, 331 N.C. 88, 92-93, 414 S.E.2d 30, 33 (1992).

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Paragraphs 9.0 and 15.0, respectively, are “consent to jurisdiction” and “choice of law” clauses. Whether paragraph 9.0 is a forum selection clause is an issue we must decide.

But first we must decide whether paragraph 15.0, the “choice of law” clause, is valid. Our Supreme Court has held that “the interpretation of a contract is governed by the law of the place where the contract was made.” *Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). In *Land Co.*, the Court applied Virginia law, since the parties had signed the contract in that state. The Court noted that “where parties to a contract have agreed that a given jurisdiction’s substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect.” *Id.*

In general, a court interprets a contract according to the intent of the parties to the contract. *Buettel v. Lumber Mut. Ins. Co.*, 134 N.C. App. 626, 631, 518 S.E.2d 205, 209 (1999), *disc. review denied*, 351 N.C. 186, 541 S.E.2d 709 (1999). In addition, “[i]f the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract.” *Id.* Thus, the Court in *Buettel* held that “following the logic of *Land Co.*, it is apparent that when a choice of law provision is included in a contract, the parties intend to make an exception to the presumptive rule that the contract is governed by the law of the place where it was made.” *Id.* The contract in the present case provides that its “validity, performance and effect shall be determined in accordance with the internal laws . . . of Colorado.”

However, under certain circumstances, North Carolina courts will not honor a choice of law provision. *See Behr v. Behr*, 46 N.C. App. 694, 266 S.E.2d 393 (1980) (citing Restatement (Second) of Conflict of Laws § 187 (1971)); *Torres v. McClain*, 140 N.C. App. 238, 535 S.E.2d 623 (2000). In *Behr*, the parties’ dispute involved their separation agreement, which they had executed in New York, and which “specifically provide[d] that it should be interpreted under the laws of that State.” *Behr* at 696, 266 S.E.2d at 395. Section 187 of the Restatement (Second) of the Conflict of Laws, cited and incorporated into our common law analysis of this issue by *Behr* and *Torres*, provides that:

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

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(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice,

or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187 (1971). Applying these principles, this Court in *Behr* followed New York law in accordance with the contract noting that the "parties' choice of law is generally binding on the interpreting court as long as they had a reasonable basis for their choice and the law of the chosen State does not violate a fundamental policy of the state of otherwise applicable law." *Behr* at 696, 266 S.E.2d at 395; *see also, Bundy v. Commercial Credit Co.*, 200 N.C. 511, 516, 157 S.E. 860, 863 (1931) (refusing to apply parties' choice of Delaware law because their contractual stipulation was "immaterial" in that the "record [did] not disclose that any transaction took place in Delaware or that the parties even contemplated either the making or the performance of the contract in said State."); *Torres v. McClain*, 140 N.C. App. 238, 535 S.E.2d 623 (2000); *Key Motorsports, Inc., v. Speedvision Network, L.L.C.*, 40 F.Supp.2d 344, 346 (M.D.N.C. 1999) (applying principles from *Behr* and *Bundy* in recognizing that "in limited circumstances, North Carolina courts will ignore the parties' choice of law and instead apply the law of the place where the contract is made"); *Broadway & Seymour, Inc. v. Wyatt*, 944 F.2d 900 (4th Cir. 1991) (recognizing that the application of the Restatement finds support in North Carolina in *Behr*).

Though the choice of law provision here (paragraph 15.0) indicates that the contract was "made" in Colorado, the record reflects that the contract was actually entered into by plaintiff in North Carolina. According to his affidavit, Robert Long, President of Cable Tel, received the written contract at his office in Polk County, North Carolina and executed the contract there by signing it and returning it to defendant in Kansas. Cable Tel has never engaged in business of any kind in Colorado, is not licensed or registered to conduct business in the State of Colorado and has never knowingly entered into

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any contracts with any person or entity in Colorado. In addition, all work to be performed by Cable Tel under the contract was to be performed in Missouri. Thus, in accordance with *Bundy* and *Behr*, we conclude from this record that Colorado has no relationship, let alone a “substantial relationship,” to this transaction. Finally, we can discern no other reasonable basis for the parties or for us to apply Colorado law to this contract. Thus, these authorities direct us to hold that Colorado law will not apply here.

**[3]** Defendant argues that paragraph 9.0 contains an enforceable forum selection clause under Colorado law. However, because we have held that the choice of law provision contained in paragraph 15.0 does not apply, we address instead whether paragraph 9.0 contains a forum selection clause enforceable under North Carolina law.

On review of the denial of the motion to dismiss based on a venue selection clause, we apply an abuse of discretion standard. *Cox v. Dine-A-Mate, Inc.*, 129 N.C. App. 773, 776, 501 S.E.2d 353, 355 (1998), *disc. review denied*, 349 N.C. 355, 525 S.E.2d 449 (1998) (holding that “because the disposition of such cases is highly fact-specific, the abuse-of-discretion standard is the appropriate standard of review”). “Under the abuse-of-discretion standard, we review to determine whether a decision is manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.” *Mark Grp. Int’l, Inc.* at 566, 566 S.E.2d at 161.

Generally in North Carolina, “when a jurisdiction is specified in a provision of contract, the provision generally will not be enforced as a mandatory selection clause without some further language that indicates the parties’ intent to make jurisdiction exclusive.” *Id.* at 568, 566 S.E.2d at 162. As recognized by our appellate courts, mandatory forum selection clauses “have contained words such as ‘exclusive’ or ‘sole’ or ‘only’ which indicate that the contracting parties intended to make jurisdiction exclusive.” *Id.* See also, *Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 403, 553 S.E.2d 84, 86 (2001) (holding that clause was a mandatory forum selection clause where clause provided that “The parties . . . stipulate that the State Courts of North Carolina shall have sole jurisdiction . . . and that venue shall be proper and shall lie exclusively in the Superior Court of Pitt County, North Carolina”); *Appliance Sales & Service v. Command Electronics Corp.*, 115 N.C. App. 14, 23, 443 S.E.2d 784, 790 (1994) (finding an enforceable forum selection clause existed

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where language in parties' contract provided that "the Courts in Charleston County, South Carolina shall have exclusive jurisdiction and venue"); *Perkins v. CCH Computax, Inc.*, 333 N.C. 140, 141, 423 S.E.2d 780, 781 (1992) (finding a mandatory forum selection clause existed where language in parties' agreement provided that "Any action relating to this Agreement shall only be instituted . . . in courts in Los Angeles County, California").

In contrast to the language in the cases cited above, the language in paragraph 9.0 of the present contract does not contain language to indicate that it is a mandatory forum selection clause. Paragraph 9.0 provides that the contract "shall be subject to the . . . jurisdiction of the State of Colorado . . ." but does not indicate that the state courts in Colorado shall have "sole" or "exclusive" jurisdiction.

In sum, because the record before us reveals no connection between these parties or the contract and the State of Colorado, we apply North Carolina law. Under North Carolina law, we find no abuse of discretion on the part of the trial court in denying the motion to dismiss.

Affirmed.

Judges WYNN and CAMPBELL concur.

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STATE OF NORTH CAROLINA v. ANTWANE ANDRE WALKER

No. COA02-335

(Filed 17 December 2002)

**1. Firearms and Other Weapons— possession of handgun by convicted felon—constructive possession—acting in concert**

The trial court did not err by failing to dismiss the charge of possession of a handgun by a convicted felon and by instructing the jury on constructive possession even though defendant contends the evidence is insufficient to show that he possessed a handgun during the commission of a burglary and armed robbery, because: (1) defendant acted in concert with three other men to commit burglary and armed robbery; and (2) possession of the gun found in the car that fits the description of one of the guns

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used by a coparticipant is imputed to defendant through his acting in concert.

**2. Burglary and Unlawful Breaking or Entering; Robbery—first-degree burglary—armed robbery—acting in concert—motion to dismiss—sufficiency of evidence**

The trial court did not err by failing to dismiss the charges of first-degree burglary and armed robbery and by instructing the jury on acting in concert in relation to these offenses even though defendant contends he was merely present at the crime scene and there was no evidence that defendant knew that any of the codefendants were armed, because: (1) there was sufficient evidence that defendant acted in concert with three other men to commit these crimes; and (2) possession of the gun found in the car that fits the description of one of the guns used by a coparticipant is imputed to defendant through his acting in concert.

**3. Burglary and Unlawful Breaking or Entering; Robbery—first-degree burglary—armed robbery—failure to instruct on lesser-included offenses**

The trial court did not err by refusing to instruct the jury on the lesser-included offenses of armed robbery and first-degree burglary, because: (1) the State presented ample evidence at trial of all seven elements of armed robbery so that a jury could find that defendant had knowledge that his accomplices had a gun; and (2) the State presented sufficient evidence to establish all the elements of first-degree burglary including that the dwelling was occupied.

**4. Joinder— offenses—motion to sever—possession of a handgun by a convicted felon—first-degree burglary—armed robbery**

The trial court did not commit plain error by failing to sever the possession of a handgun by a convicted felon offense from the first-degree burglary and armed robbery offenses and in admitting details of defendant's prior felony, because: (1) defendant has failed to show that the jury may have reached a different result or that the trial court not severing the trials *ex mero motu* was so fundamental an error as to deny him a fair trial; and (2) defendant cannot show that by failing to object to the joinder that his counsel was so deficient that it prejudiced his defense.

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**5. Sentencing— record level—miscalculation harmless error**

Although the trial court erred in a robbery with a firearm, first-degree burglary, and possession of a firearm by a felon case by determining that defendant had ten prior record level points when the correct number is nine, the miscalculation was harmless error because defendant remains a level IV offender which requires nine to fourteen points.

Appeal by defendant from judgment entered 12 September 2001 by Judge Benjamin G. Alford in New Hanover County Superior Court. Heard in the Court of Appeals 31 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General W. Wallace Finlator, Jr., for the State.*

*Jeffrey Evan Noecker, for defendant-appellant.*

CAMPBELL, Judge.

Defendant, Antwane Andre Walker (“Antwane”), appeals from a judgment entered 12 September 2001 convicting him of robbery with a firearm, first degree burglary and possession of a firearm by a felon. On appeal, defendant argues five assignments of error by the lower court: I. The trial court erred by failing to dismiss the charge of possession of a handgun by a convicted felon and in instructing the jury on constructive possession based on lack of sufficient evidence; II. The trial court erred by failing to dismiss the charges of first degree burglary and armed robbery and by instructing the jury on acting in concert in relation to these offenses based on lack of sufficient evidence; III. The trial court erred by refusing to instruct the jury as to the lesser included offenses of armed robbery and first degree burglary; IV. The trial court committed plain error by failing to sever the possession of a handgun case from defendant’s other cases and in admitting details of defendant’s prior felony; and V. The trial court committed plain error by determining that defendant had ten prior record level points.

The relevant facts to this appeal are as follows: On 9 May 2000, Sybreina Jones (“Ms. Jones”) and her three sons, Antonio, 13, Ricardo, 9, and Christian, 5, were all inside their Wilmington home when they heard a loud noise. Ms. Jones walked out of her room and saw three black men approaching her. All three men had guns and one of them asked, “Where’s the money? Where’s the jewelry? Where’s the drugs?” The men rummaged through the house, overturning furniture

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and looking through cabinets. Only three men were in the room where they told Ms. Jones and her boys to get down on the floor and stay. Ms. Jones testified, however, that she heard a great deal of noise in the back of the house, through which someone had rummaged. She testified that Ricardo told her, "Mommy, there's someone else in the house. . . . Mommy, it's Antwane." Ricardo told his mother that he recognized defendant's white Reeboks and baggy jeans. Ricardo said Antwane had "a pillowcase over his face." Defendant is Ms. Jones' nephew and the boys' cousin.

Captain David Smithey ("Captain Smithey"), of the New Hanover County Sheriff's Office, testified that when he arrived home from an outing the evening of 9 May 2000, he saw an unknown car in front of his house. He asked a neighbor about the car, but the neighbor knew nothing. While Captain Smithey was walking to ask a second neighbor, he saw a black male walk hurriedly towards the car and enter the car. Then three more black males did the same. Captain Smithey took down the license plate number on the car and called it in to 911. Detective Kevin Hargrove ("Detective Hargrove"), of the City of Wilmington Police Department, heard the call over his police radio regarding a suspicious vehicle. Detective Hargrove located the vehicle, a burgundy Ford Taurus, "occupied by four males . . . [with] the same tag that [he] heard over the radio." Detective Hargrove followed the car to an apartment complex and called for backup. Detective Hargrove observed as all four men entered an apartment. One of the men exited the apartment and left the area. Detective Hargrove looked in the Taurus and found a loaded "Cobray 9mm Mac 11 handgun." Captain Smithey and other backup arrived on the scene and went to the apartment door, where Diane Flemming allowed them to enter the apartment.

The officers found two men downstairs and defendant upstairs wearing baggy blue jeans and white Reeboks. The keys to the Ford Taurus were in a room across the hall from where defendant was sitting.

Detective Hargrove arrested the three men and took them to the Sheriff's Department, where he found a woman's Larex watch in one of the co-defendant's pockets. Detective Hargrove did not know about the burglary and robbery at the time he made the arrests. When he learned of the break-in at Ms. Jones' house, he returned a few days later to the apartment where he made the arrests, the Flemming residence, and recovered two handguns from upstairs that matched the



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description given by Ms. Jones, Antonio, and Ricardo of the guns used in the burglary.

Diane Flemming, who was babysitting her daughter's three children on 9 May 2000, testified that between 10:30 and 11:00 p.m., "[f]our young men came [into the residence] . . . [and] they were acting kind of nervous." Defendant was one of the men. About ten minutes later the police knocked on the door and asked to search the house.

We will consider defendant's five assignments of error in turn.

I. Failing to dismiss the charge of possession of a handgun by a convicted felon and in instructing the jury on constructive possession.

"In ruling upon a motion to dismiss, the trial court must determine if the State has presented substantial evidence of each essential element of the offense." *State v. Reid*, 151 N.C. App. 379, 565 S.E.2d 747 (2002) (citation omitted). "Whether the evidence presented is substantial is a question of law for the court." *State v. Siriguanico*, 151 N.C. App. 107, 564 S.E.2d 301 (2002) (citing *State v. Stephens*, 244 N.C. 380, 384, 93 S.E.2d 431, 433 (1956)). "Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion." *State v. Robinson*, 355 N.C. 320, 336, 561 S.E.2d 245, 255 (2002), *cert. denied*, — U.S. —, 123 S. Ct. 488, — L. Ed. 2d — (2002) (citing *State v. Vick*, 341 N.C. 569, 583-84, 461 S.E.2d 655, 663 (1995)). When considering a criminal defendant's motion to dismiss, the trial court must view all of the evidence presented "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) (citation omitted). The trial court correctly denies a motion to dismiss "[if] there is substantial evidence of every element of the offense charged, or any lesser offense, and of defendant being the perpetrator of the crime." *State v. Ramseur*, 338 N.C. 502, 507, 450 S.E.2d 467, 471 (1994) (citation omitted).

**[1]** Defendant moved to dismiss the charge of possession of a handgun by a convicted felon at the close of the State's evidence and at the close of all the evidence. Defendant does not challenge the evidence that establishes him being a convicted felon. Defendant's contention is that there is insufficient evidence to show that he possessed a handgun during the commission of the burglary and armed robbery of Ms. Jones. The handgun which defendant is charged with possessing is the 9 millimeter Mac 11 found by Detective Hargrove in the back-

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seat of the Taurus. Defendant argues that no evidence links him to having constructive possession of this handgun. We disagree. Our state Supreme Court has recently reaffirmed the doctrine of acting in concert as:

[I]f 'two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose . . . or as a natural or probable consequence thereof.'

*State v. Mann*, 355 N.C. 294, 560 S.E.2d 776, 784 (2002), *cert. denied*, — U.S. —, 123 S.Ct. 495, — L. Ed. 2d — (2002) (quoting *State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997), *cert. denied*, 522 U.S. 876, 118 S. Ct. 196, 139 L. Ed. 2d 134 (1997), and *cert. denied*, 523 U.S. 1024, 118 S. Ct. 1309, 140 L. Ed. 2d 473 (1998) (citations omitted)). Defendant concedes that there is substantial evidence that he was present at the scene of the burglary and robbery. Defendant contends, however, that the evidence is insufficient to connect him to a common plan or scheme to break into Ms. Jones' house and to commit armed robbery of the occupants. Defendant's argument is without merit. To find that the trial court erred in failing to grant defendant's motion to dismiss based on insufficient evidence, this Court would have to find that defendant's presence at Ms. Jones' house at the time of the burglary and armed robbery was coincidental to and ignorant of the co-defendants' presence. We find that defendant acted in concert with the other three men to commit burglary and armed robbery. Therefore, possession of the gun found in the Taurus that fits the description of one of the guns used by a co-defendant is imputed to defendant through his acting in concert to commit burglary and armed robbery. Accordingly, the trial court did not err, as defendant further argues, in instructing the jury on constructive possession. We dismiss this assignment of error.

II. Failing to dismiss the charges of first degree burglary and armed robbery and by instructing the jury on acting in concert.

[2] Defendant argues that there is insufficient evidence to convict him of first degree burglary and armed robbery because he was merely present at the crime scene and there is no evidence that defendant knew that any of the co-defendants were armed. Per the discussion above regarding acting in concert, we find this argument to be without merit.

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**III. Refusing to instruct the jury as to the lesser included offenses of armed robbery and first degree burglary.**

**[3]** Defendant argues that a trial court must instruct a jury as to the lesser included offenses of a charge against a defendant if the State fails to produce strong evidence of one or more of the elements of the offense charged. While this is true, we find it an inapplicable argument to this case. The State presented ample evidence at trial of all seven elements of armed robbery, such that a jury could find that defendant had knowledge that his accomplices had guns. *See* N.C. Gen. Stat. § 14-87 (2001). Defendant further raises issue with the requisite element of armed robbery that the life of the victim be threatened or endangered. Defendant contends that no threats of harm were ever communicated to Ms. Jones or her children. Antonio testified that his brother, Ricardo, “tried to run and the man grabbed him and put the gun to his head. . . . And he told him to be quiet and put a hand over his mouth.” Antonio said that he “screamed and told [the man] to get off [his] brother.” Then Antonio testified, another “little short guy came in, and he pushed me on the ground . . . and put my hands behind my back and put the gun on my back.” Ricardo testified, “I tried to run, and then [the man] grabbed me and put me under his leg and put the gun to my head.” This is sufficient evidence to satisfy the requisite element of armed robbery that the life of the victim be threatened.

The State also presented sufficient evidence to establish all the elements of first degree burglary. *See* N.C. Gen. Stat. § 14-51 (2001). Defendant contends that the trial court should have instructed the jury on second degree burglary because there was insufficient evidence of an intent on defendant’s part to commit armed robbery at the time of the breaking and entry. Having established that defendant was acting in concert with the co-defendants, he is guilty of the principal crime committed. Second degree burglary requires that the dwelling place be unoccupied at the time of the crime. As the house was occupied by four people, there was sufficient evidence of the elements of first degree burglary. This assignment of error is dismissed.

**IV. Failing to sever the possession of a handgun case from defendant’s other cases and admitting details of defendant’s prior felony.**

**[4]** Defendant argues that the trial court committed plain error by failing to sever the trial for the possession of a handgun by a convicted felon offense from the burglary and armed robbery offenses. We disagree. Defendant, as he concedes, did not object to the trial

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court's consolidation of the three charges and therefore, we can only consider this argument under a plain error standard. "Plain error is 'fundamental error' amounting to a miscarriage of justice or having a substantial and prejudicial impact on the jury verdict." *State v. Bartlett, Sr.*, 153 N.C. App. 680, — S.E.2d — (2002) (citing *State v. Parker*, 350 N.C. 411, 427, 516 S.E.2d 106, 118 (1999), *cert. denied*, 528 U.S. 1084, 120 S. Ct. 808, 145 L. Ed. 2d 681 (2000)). "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. O'Hanlan*, 153 N.C. App. 546, — S.E.2d — (2002) (citation omitted). Defendant has failed to show that the jury may have reached a different result or that the trial court not severing the trials *ex mero motu* was so fundamental an error as to deny him a fair trial.

Defendant argues, in the alternative to the trial court committing plain error by not severing the trials *sua sponte*, that he received ineffective assistance of counsel. We find that defendant cannot show that by failing to object to the joinder that his counsel was so deficient that it prejudiced his defense.

V. Determining that defendant had ten prior record level points.

[5] Defendant argues that the State mistakenly counted a prior class 2 misdemeanor as a point when only class A1 and 1 non-traffic misdemeanors should count as points. In turn, defendant's sentence was decided according to him having ten points instead of nine. The State agrees that it miscalculated defendant's prior points and the correct number is nine. The miscalculation, however, was harmless because defendant remains a level IV offender, which requires nine to fourteen points. Since defendant still has nine points after correcting the State's error and his sentence would remain the same, we dismiss this assignment of error.

No error.

Judges WALKER and McCULLOUGH concur.

**STATE v. TUCKER**

[154 N.C. App. 653 (2002)]

STATE OF NORTH CAROLINA v. JOSEPH EDWARD TUCKER

No. COA01-1480

(Filed 17 December 2002)

**1. Sexual Offenses— second-degree—evidence of force**

There was sufficient evidence in a prosecution for second-degree sexual offense to allow a jury to determine that a juvenile in a training school was forced to engage in a sexual act by force and against his will where the victim was thrown on his bed face down, held during the assault, and told that he would be beaten if he did not remain silent; he reported the incident immediately following the transfer of his assailants to another unit; and a subsequent physical exam showed corroborating trauma.

**2. Sentencing— prior record level—juvenile adjudication**

A defendant being sentenced for second-degree sexual offense should not have been assigned a sentencing point because he was in training school at the time of the offense. Juveniles in North Carolina are neither convicted, sentenced, nor imprisoned; adjudication of delinquency and commitment to a youth development center shall not be considered conviction of a criminal offense.

Appeal by defendant from judgment entered 13 July 2001 by Judge Anthony M. Brannon in Lenoir County Superior Court. Heard in the Court of Appeals 11 September 2002.

*Roy Cooper, Attorney General, by William W. Stewart, Jr., Assistant Attorney General, for the State.*

*Richard E. Jester for defendant-appellant.*

THOMAS, Judge.

Defendant, Joseph Edward Tucker, argues two assignments of error in his appeal. First, he contends there is insufficient evidence that he committed a second-degree sexual offense. Second, he argues the trial court erred in calculating his prior record level by equating his stay at a juvenile training school, now known as a youth development center, with a "sentence of imprisonment."

For the reasons herein, we find no error in the second-degree sexual offense conviction but reverse and remand for sentencing pur-

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poses. We note that defendant abandoned the part of his appeal challenging convictions of crime against nature and attempted crime against nature.

Defendant, fifteen years old at the time of these offenses, was initially under the jurisdiction of the juvenile court. Jurisdiction was transferred to the superior court under N.C. Gen. Stat. § 7B-2200 following findings of probable cause and a transfer hearing.

The State's evidence at trial in superior court tends to show the following: On the night of 12 July 2000, "Juvenile A" was accosted by defendant and another juvenile in Juvenile A's room at Dobbs Training School in Kinston, North Carolina. All three juveniles had earlier been committed to the Department of Juvenile Justice and Delinquency Prevention upon findings of delinquency and sent to Dobbs. Defendant and the other juvenile threw Juvenile A on his bed and instructed him to remain silent. The other juvenile then held Juvenile A down while defendant "stuck his penis in [his] butt." Juvenile A did not immediately report the incident but instead waited until defendant and the other juvenile were transferred to the "Segregation Unit" three days later for an alleged assault on another juvenile. The Segregation Unit is a section of the Training School where those who commit major infractions are isolated in individual cells. A subsequent physical examination of Juvenile A revealed trauma to his rectal area, including penetration, bruising, lacerations and abrasions, all of which were probably sustained three days prior to the examination.

On 26 August 2000, "Juvenile B" was in his cell in the Segregation Unit at Dobbs. Defendant entered Juvenile B's cell, which had been unlocked for cleaning, and began helping him clean. Defendant left, returned with some grease in his hand, and instructed Juvenile B to "bend over [and pull [his] jumpsuit down." Defendant then proceeded to have anal intercourse with Juvenile B, although he told defendant that it "hurt and to stop." Defendant eventually left the cell, but returned a few minutes later and again instructed Juvenile B to "bend over and pull [his] jumpsuit down." When defendant pulled down his own jumpsuit, however, Darnetta Kittrell, a staff member at Dobbs, entered the cell and confronted defendant and Juvenile B. Kittrell reported that Juvenile B was frightened, crying, and trembling when she discussed the incident with him in a nearby office.

Juvenile B testified that he complied with defendant's instructions because he was afraid of being beaten up by a group of juveniles

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at Dobbs who were referred to as the "Raleigh boys." Not only had defendant threatened Juvenile B the previous night with the use of the Raleigh boys, but Juvenile B had earlier been "jumped" by defendant and two other boys in January 2000.

Defendant's evidence, meanwhile, tends to show the following: No staff member at Dobbs saw defendant leaving or entering any of the rooms during the night of 12 July 2000. On 26 August 2000, William Harrison, the Segregation Unit supervisor, unlocked the cell doors of both Juvenile B and defendant in order for them to clean their cells. He noted that the boys were chatting as they worked and Juvenile B did not seem afraid of defendant. Harrison said he did not hear or see any unusual behavior before being summoned by Kittrell to Juvenile B's cell.

At the close of all the evidence, defendant moved to dismiss the charges based on insufficiency of the evidence. The trial court denied the motion.

The jury returned guilty verdicts of second-degree sexual offense and crime against nature involving Juvenile A and attempted crime against nature as to Juvenile B. Finding that the offenses were committed while defendant was serving a sentence of imprisonment, the trial court determined defendant to have a prior record classification of Level II under N.C. Gen. Stat. § 15A-1340.14. Defendant was sentenced to a minimum of 100 and a maximum of 129 months for second-degree sexual offense, a concurrent sentence of six to eight months for crime against nature and a consecutive sentence of seventy-five days for attempted crime against nature.

[1] By his first assignment of error, defendant contends the trial court erred in denying his motion to dismiss because there was insufficient evidence he committed second-degree sexual offense. The elements of second-degree sexual offense are: (1) a person engages in a sexual act; (2) with another person; and (3) the act is by force and against the person's will. *See* N.C. Gen. Stat. § 14-27.5(a) (2001). Defendant does not contest that ample evidence was presented of a sexual act between defendant and Juvenile A. However, defendant argues, the State failed to present sufficient evidence to demonstrate the act was against Juvenile A's will. Specifically, defendant asserts the testimony of security personnel at Dobbs did not corroborate Juvenile A's accusations of force or lack of consent, Juvenile A did not cry during the alleged assault, and Juvenile A did not immediately report the assaults.

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In reviewing a motion to dismiss, the court must determine whether there is both substantial evidence of each element of the offense charged and substantial evidence that the defendant is the perpetrator. *State v. Stroud*, 345 N.C. 106, 111, 478 S.E.2d 476, 479 (1996), *cert. denied*, 522 U.S. 826, 139 L. Ed. 2d 43 (1997). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Olson*, 330 N.C. 557, 564, 411 S.E.2d 592, 595 (1992). The evidence must be considered in the light most favorable to the State, drawing all reasonable inferences in the State's favor whether the evidence is direct, circumstantial, or both. *State v. Israel*, 353 N.C. 211, 539 S.E.2d 633 (2000).

Actual physical force is not required under North Carolina's sexual offense statute to satisfy the requirement of the sexual act being committed "by force and against the will" of the victim. *State v. Locklear*, 304 N.C. 534, 540, 284 S.E.2d 500, 503 (1981). "Fear of serious bodily harm reasonably engendered by threats or other actions of a defendant and which causes the victim to consent to the sexual act takes the place of force and negates the consent." *Id.*

In *Locklear*, the victim, a seventeen-year-old, had been arrested and placed in a cell with three other young offenders who threatened and assaulted him until he agreed to perform fellatio on all of them. *Id.* at 540, 284 S.E.2d at 503-04. The victim did not report the incidents until he was removed from jail two days later for a court appearance despite wardens being available during the interim. *Id.* Nonetheless, our Supreme Court held that since the victim was placed in a cell with strangers from which he could not escape, and was threatened with harm to his life, there was sufficient evidence to satisfy the element of "by force and against the will" of the victim. *Id.* at 540-41, 284 S.E.2d at 504.

Here, Juvenile A presented evidence of being thrown onto his bed, face down, by defendant and the other juvenile, and being held during the assault. He was told that if he did not remain silent they would "beat [him] down." Juvenile A immediately reported the incident after his assailants were transferred to another unit, then feeling safe enough to do so. A subsequent physical examination showed Juvenile A suffered trauma to his rectum, including penetration, lacerations, bruising, and abrasions.

This evidence of actual force, substantiated by physical evidence, and evidence of the threat of greater physical violence, were sufficient to allow a jury to determine whether Juvenile A was forced to



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engage in a sexual act by force and against his will. Defendant's assignment of error therefore lacks merit.

**[2]** By his second assignment of error, defendant contends the trial court erred by assigning a sentencing point because defendant was in training school at the time of the offense. He argues that he was not serving a sentence of imprisonment so as to make N.C. Gen. Stat. § 15A-1340.14(b)(7) applicable. We agree.

Under the Structured Sentencing Act, N.C. Gen. Stat. §§ 15A-1340.10 to 1340.23, the trial court must determine a defendant's prior record level by assigning points for previous convictions before imposing a sentence. N.C. Gen. Stat. § 15A-1340.14 (2001). An offender with one to four points is classified as Level II for sentencing purposes, whereas an offender with no points is classified as Level I. N.C. Gen. Stat. § 15A-1340.14(c) (2001). One point is assigned:

If the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment, or while the offender was on escape from a correctional institution while serving a sentence of imprisonment[.]

N.C. Gen. Stat. § 15A-1340.14(b)(7) (2001).

The Act "applies to criminal cases in North Carolina." N.C. Gen. Stat. § 15A-1340.10 (2001). Under our Juvenile Code, "[a]n adjudication that a juvenile is delinquent or commitment of a juvenile to the Department for placement in a youth development center *shall neither be considered conviction of any criminal offense* nor cause the juvenile to forfeit any citizenship rights." N.C. Gen. Stat. § 7B-2412 (2001) (emphasis added).

Further, the juvenile justice system is permitted to lack the full array of constitutional guarantees because it does not contain clearly criminal or civil proceedings, and provides for the possibility of an "intimate, informal protective proceeding." *McKeiver v. Pennsylvania*, 403 U.S. 528, 545, 29 L. Ed. 2d 647, HR7 (1971). For example, there is no right to bond in North Carolina's juvenile system, and no right to a jury trial. *See In re Whichard*, 8 N.C. App. 154, 174 S.E.2d 281 (1970), *cert. denied*, 403 U.S. 940, 29 L. Ed. 2d 719 (1971). The juvenile system is designed to protect both the welfare of the delinquent child as well as the best interest of the State. *Matter of Hardy*, 39 N.C. App. 610, 614, 251 S.E.2d 643, 646 (1979). As a result,

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the objectives of confinement under the Juvenile Code significantly differ from those for imprisonment under our criminal statutes.

The primary purposes of criminal sentencing are to “impose a punishment commensurate with the injury the offense has caused . . . ; to protect the public by restraining offenders; to assist the offender toward rehabilitation . . . ; and to provide a general deterrent to criminal behavior.” N.C. Gen. Stat. § 15A-1340.12 (1994). A juvenile disposition on the other hand, has as its primary purpose “to design an appropriate plan to meet the needs of the juvenile and to achieve the objectives of the State in exercising jurisdiction.” N.C. Gen. Stat. § 7A-646 (1995)

*Matter of Carter*, 125 N.C. App. 140, 141, 479 S.E.2d 284, 285 (1997). The Juvenile Code was modified effective 1 July 1999 with the following purposes and policies:

- (1) To protect the public from acts of delinquency.
- (2) To deter delinquency and crime, including patterns of repeat offending:
  - a. By providing swift, effective dispositions that emphasize the juvenile offender’s accountability for the juvenile’s actions; and
  - b. By providing appropriate rehabilitative services to juveniles and their families.
- (3) To provide an effective system of intake services for the screening and evaluation of complaints and, in appropriate cases, where court intervention is not necessary to ensure public safety, to refer juveniles to community-based resources.
- (4) To provide uniform procedures that assure fairness and equity; that protect the constitutional rights of juveniles, parents, and victims; and that encourage the court and others involved with juvenile offenders to proceed with all possible speed in making and implementing determinations required by this Subchapter.

N.C. Gen. Stat. § 7B-1500 (2001). Additionally, dispositions have the following purpose:

The purpose of dispositions in juvenile actions is to design an appropriate plan to meet the needs of the juvenile and to achieve

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the objectives of the State in exercising jurisdiction, including the protection of the public. The court should develop a disposition in each case that:

- (1) Promotes public safety;
- (2) Emphasizes accountability and responsibility of both the parent, guardian, or custodian and the juvenile for the juvenile's conduct; and
- (3) Provides the appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community.

N.C. Gen. Stat. § 7B-2500 (2001). While protection of the public has received new emphasis, and accountability has become an integral part of rehabilitation, the Juvenile Code remains far from a punitive system.

Accordingly, the State's argument that the plain language of section 15A-1340.14(b)(7), stating that an "offense . . . committed . . . while the offender was serving a sentence of imprisonment" clearly applies in all instances when an offender is detained against his will or restrained in some manner is too broad and, in the juvenile context, inapposite. A juvenile in North Carolina is not convicted in Juvenile Court of anything. Likewise, a juvenile is not sentenced by the Juvenile Court and there is no sentence of imprisonment. A juvenile may be adjudicated delinquent by the Juvenile Court and, where appropriate, committed to the Department of Juvenile Justice and Delinquency Prevention for placement in a youth development center. *See* N.C. Gen. Stat. § 7B-2506(24) (2001). There is a fundamental legal difference between these wording choices unrelated to mere delicacy of diction.

Therefore, while we find no error in defendant's conviction of second-degree sexual offense, we reverse that part of the order placing defendant in a Level II classification and remand for sentencing consistent with this opinion.

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

Judges WALKER and MCGEE concur.

**WHITAKER v. TOWN OF SCOTLAND NECK**

[154 N.C. App. 660 (2002)]

DONALD EARL WHITAKER AND THOMAS LEE WHITAKER, JR., CO-ADMINISTRATORS OF THE ESTATE OF CARLTON WHITAKER, DECEASED, PLAINTIFFS V. TOWN OF SCOTLAND NECK, C.T. HASTY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SAFETY DIRECTOR FOR THE TOWN OF SCOTLAND NECK, AND DOUGLAS BRADY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PUBLIC WORKS SUPERINTENDENT FOR THE TOWN OF SCOTLAND NECK, DEFENDANTS

No. COA02-22

(Filed 17 December 2002)

**Workers' Compensation— Woodson claim—town employee—summary judgment improper**

The trial court erred by granting summary judgment for defendant town on a *Woodson* claim for the death of a town employee who was killed when a dumpster partially detached from a garbage truck and struck the employee because of a defective latching device on the truck for the reason that a genuine issue of material fact exists regarding whether defendant's actions were substantially certain to cause death.

Appeal by plaintiffs from order entered 15 August 2001 by Judge Dwight L. Cranford in Halifax County Superior Court. Heard in the Court of Appeals 28 October 2002.

*Joynes & Gaidies Law Group, P.A., by Frank D. Lawrence, III, for plaintiff-appellants.*

*Cranfill, Sumner & Hartzog, L.L.P., by Patrick H. Flanagan and Donna R. Rascoe, for defendant-appellees.*

EAGLES, Chief Judge.

Donald and Thomas Whitaker ("plaintiffs") appeal from summary judgment in favor of the Town of Scotland Neck ("defendant"). Plaintiffs are co-administrators of the estate of Carlton Whitaker ("decedent"). Charles Hasty, the town's Safety Director, and Douglas Brady, the town's Public Works Superintendent, were also named as defendants. On appeal, plaintiffs assert one assignment of error: that the trial court erred in granting defendant's motion for summary judgment. After careful review of the record, briefs, and arguments by counsel, we agree and reverse and remand for further proceedings.

The evidence tends to show the following. Carlton Whitaker was employed by defendant Town of Scotland Neck before his death. On

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30 July 1997, decedent was assigned to a crew operating Scotland Neck's garbage truck Number 84. The other men on the crew were Danny Wood and Fred Shields. The truck's route included the dumpster at Hobgood Academy. Mr. Wood, who was driving Truck Number 84, used the mechanical arms of the truck to pick up the Academy's dumpster. While the dumpster was in the air being emptied into the back of the truck, it came partially detached from the truck's mechanical arms. The dumpster swung loose and pinned decedent against the side of the garbage truck. Decedent died from the resulting crush injury to his chest twenty-eight days later.

Defendant's Safety Director Hasty investigated the accident on the date it occurred. His report confirmed that the dumpster became loose while it was being lifted in the air because of a defective latching device on Truck Number 84. Several town employees also stated that the dumpster at Hobgood Academy previously had fallen to the side of a garbage truck in a similar fashion while being emptied approximately three weeks before the accident on 30 July 1997. According to several employees, the earlier incident had been reported to Public Works Superintendent Braddy, but he did not take action to fix the truck or the dumpster until after decedent's accident. Woods and Shields testified in depositions that they told Braddy the dumpster at Hobgood Academy was unsafe and that Truck Number 84 had a broken locking latch. Shields estimated that the latch had been broken for two to three months. Another town employee, Linwood Clark, stated the latch had been broken for six months. Braddy denied having knowledge of the earlier accident and denied knowledge of any defect in the truck or dumpster involved in decedent's death.

The North Carolina Department of Labor's Division of Occupational Safety and Health ("OSHA") performed an investigation of the accident, which began on 15 August 1997. OSHA found five "serious" violations by the Town of Scotland Neck stemming from the accident on 30 July 1997. These violations included citations for failure to train employees in a safe manner of operating the garbage truck equipment, failure to supervise employees in the operation of the equipment, failure to set up a program ensuring inspection of the equipment, operating unsafe equipment and operating equipment in an unsafe manner. The OSHA report stated that "defective equipment was the proximate cause of the accident" and "the accident . . . was a result of employment conditions that were not in compliance with the safety standards of OSHA." The report found that "with rea-

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sonable diligence and routine inspection employer could and should have known” of the broken latch on Truck Number 84. Defendant town was assigned a penalty of \$10,500 as a result of the violations found in the OSHA report.

Plaintiffs filed a claim in superior court on behalf of decedent’s estate alleging gross negligence and wanton misconduct and seeking compensatory and punitive damages. Defendant responded that plaintiffs’ claim was barred by the North Carolina Workers’ Compensation Act and that recovery under the Act was plaintiffs’ exclusive remedy against defendant. Defendant’s first motion to dismiss was denied by an order entered 26 April 2001. Defendant did not respond to plaintiffs’ request for admissions that were filed on 25 June 2001. Defendant renewed its motion for summary judgment, which was granted by order on 15 August 2001. From that order, plaintiffs appeal.

On appeal, plaintiffs argue that the trial court erred in granting defendant’s motion for summary judgment. Plaintiffs argue that decedent’s accident fits within an exception to the North Carolina Workers’ Compensation Act. Because a genuine issue of material fact exists regarding whether defendant’s actions were “substantially certain” to cause decedent’s death, we agree that summary judgment was not proper.

The North Carolina Workers’ Compensation Act is the sole remedy in most cases for employees who suffer from employment-related diseases and injuries. G.S. § 97-1 *et seq.* (2001). The Workers’ Compensation Act was created to “provide certain limited benefits to an injured employee regardless of negligence on the part of the employer, and simultaneously to deprive the employee of certain rights he had at the common law.” *Brown v. Motor Inns*, 47 N.C. App. 115, 118, 266 S.E.2d 848, 849, *disc. review denied* 301 N.C. 86, 273 S.E.2d 300 (1980).

In 1991, the North Carolina Supreme Court created an exception to the general rule that the Workers’ Compensation Act was the sole remedy for injured employees. The exception outlined in *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991), addresses intentional misconduct by employers:

We hold that when an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that

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misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer. Such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Act. Because, as also discussed in a subsequent portion of this opinion, the injury or death caused by such misconduct is nonetheless the result of an accident under the Act, workers' compensation claims may also be pursued. There may, however, only be one recovery.

*Woodson v. Rowland*, 329 N.C. 330, 340-41, 407 S.E.2d 222, 228 (1991). According to *Woodson*, if employers committed the equivalent of an intentional tort, employees would be allowed to step outside the bounds of the Workers' Compensation Act and sue employers for their injuries. *Woodson v. Rowland*, 329 N.C. 330, 341, 407 S.E.2d 222, 228-29 (1991).

Since creation of the *Woodson* exception, a number of employees have asked courts to apply the exception to allow their claims outside of the Workers' Compensation Act. Before this case, no claim has been brought successfully under the *Woodson* exception. In an attempt to clarify when the *Woodson* exception should be applied, this Court listed the factors to be used when determining whether an employer engaged in misconduct with substantial certainty of causing his employee harm. See *Wiggins v. Pelikan, Inc.*, 132 N.C. App. 752, 513 S.E.2d 829 (1999). The *Wiggins* case analyzed the cases following *Woodson* and created a list of six factors to use when defining substantial certainty:

(1) Whether the risk that caused the harm existed for a long period of time without causing injury. . . .

(2) Whether the risk was created by a defective instrumentality with a high probability of causing the harm at issue. . . .

(3) Whether there was evidence the employer, prior to the accident, attempted to remedy the risk that caused the harm. . . .

(4) Whether the employer's conduct which created the risk violated state or federal work safety regulations.

. . . .

(5) Whether the defendant-employer created a risk by failing to adhere to an industry practice, even though there was no violation of a state or federal safety regulation.

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(6) Whether the defendant-employer offered training in the safe behavior appropriate in the context of the risk causing the harm.

*Wiggins v. Pelikan, Inc.*, 132 N.C. App. 752, 756-58, 513 S.E.2d 829, 832-33 (1999) (citations omitted). Here, plaintiffs presented evidence of the existence of five out of these six factors by using several depositions. Defendant responded by denying plaintiffs' evidence and asking the court to measure plaintiffs' evidence against similar post-*Woodson* claims. The trial court then granted defendant's motion for summary judgment.

A motion for summary judgment should only be granted if "there is no genuine issue as to any material fact" and "any party is entitled to judgment as a matter of law." G.S. § 1A-1, Rule 56 (2001). Summary judgment should be used to "eliminate the necessity of a formal trial where only questions of law are involved and a fatal weakness in the claim . . . is exposed." *Hall v. Post*, 85 N.C. App. 610, 613, 355 S.E.2d 819, 822 (1987), *rev'd on other grounds*, 323 N.C. 259, 372 S.E.2d 711 (1988) (quoting *Foster v. Winston-Salem Joint Venture*, 303 N.C. 636, 642, 281 S.E.2d 36, 40 (1981)). "Summary judgment is a drastic remedy and should be exercised with caution." *Southern Watch Supply v. Regal Chrysler-Plymouth*, 69 N.C. App. 164, 165, 316 S.E.2d 318, 319, *disc. review denied*, 312 N.C. 496, 322 S.E.2d 560 (1984), *appeal after remand*, 82 N.C. App. 21, 345 S.E.2d 453 (1986). In a case where "there is any question that can be resolved only by the weight of the evidence, summary judgment should be denied." *In re Will of McCauley*, 356 N.C. 91, 101, 565 S.E.2d 88, 95 (2002) (citing *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979)).

Summary judgment was improper here because this case involves a question that can be resolved only by weighing the evidence presented. Plaintiffs presented some evidence regarding defendant employer's acting with "substantial certainty" of causing plaintiff's decedent serious bodily injury, by offering proof of the existence of most of the *Wiggins* factors. Plaintiffs' affidavits and pleadings tended to show that the risk that caused decedent's death had existed for a relatively short but significant amount of time. Conflicting deposition testimony places the defect in existence at least three weeks before decedent's accident and possibly as long as six months before the accident. Plaintiffs' evidence showed that the defective instrumentality, in this case equipment on Truck Number 84, created a risk with a high probability of injuring a town employee in the same man-



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ner that decedent was injured. The third factor of the *Wiggins* test was satisfied by plaintiffs' claim that the Town's Public Works Superintendent Braddy knew of the defect and did not attempt to repair the defective Truck Number 84 in order to prevent injury. Also, plaintiffs' evidence demonstrated that the employer's conduct created the risk. The conduct creating the risk violated state and federal workplace safety regulations and failed to adhere to industry safety standards. Plaintiffs cite five serious violations by defendant according to the OSHA report in addition to violations of standards contained within the Accident Prevention Manual, which is produced by the National Safety Council.

Evidence presented by defendant contradicted most of plaintiffs' proffered evidence. Defendant argued that there had been no similar accidents before the one that killed decedent, that Braddy had no knowledge of the defective truck and did not refuse to fix it, and that the OSHA citations were correctly denominated as "serious" violations instead of "willful" violations.

The parties here have essentially disagreed on several issues of material fact, most importantly, whether defendant employer, through its Public Works Superintendent Braddy, knew of the defective condition of Truck Number 84 before decedent was killed on the job. Even were we to find that all the factual matters were resolved, in a case where a balancing of factors is necessary, summary judgment is inappropriate. The question of whether defendant acted with substantial certainty that its actions would cause decedent's death must be resolved by weighing the facts presented to the court. Accordingly, we conclude that the trial court erred by granting defendant Town's motion for summary judgment. Because we find error and reverse the trial court's decision, we do not determine whether defendants Hasty and Braddy may be sued in their individual capacities. Hasty and Braddy's liability as individuals depends upon a factual finding by the trial court that they are public employees who are not entitled to governmental immunity for their actions. We reverse and remand to the trial court for further proceedings consistent with this opinion.

Reversed and remanded.

Judges TYSON and THOMAS concur.

**STATE v. SPENCER**

[154 N.C. App. 666 (2002)]

STATE OF NORTH CAROLINA v. ALLEN SPENCER

No. COA01-1607

(Filed 17 December 2002)

**1. Assault— deadly weapon with intent to kill inflicting serious injury—jury instruction—voluntary intoxication**

The trial court did not commit plain error in an assault with a deadly weapon with intent to kill inflicting serious injury case by failing to instruct the jury on voluntary intoxication, because: (1) assuming arguendo that the evidence was sufficient to show that defendant was intoxicated, defendant has not met his burden of presenting substantial evidence of being unable to reason; and (2) although impulsiveness and acting without thinking first are unwise behaviors, these actions do not equate to defendant being so intoxicated that he was utterly incapable of forming a specific intent.

**2. Sentencing— aggravating factor—offense committed while on pretrial release**

The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury case by finding as an aggravating factor that the offense was committed while defendant was on pretrial release for a charge of assault on a female, because: (1) rather than merely relying on the prosecutor's assertion, the trial court verified defendant's status by checking the clerk's records; and (2) based on these facts, the State proved by a preponderance of the evidence that an aggravating factor existed.

**3. Assault— deadly weapon with intent to kill inflicting serious injury—indictment—intent to kill element**

Although defendant contends the trial court erred in an assault with a deadly weapon with intent to kill inflicting serious injury case by failing to dismiss the indictment based on a failure to allege the element of the offense of specific intent to kill the victim, the indictment sufficiently alleged an intent to kill the victim.

Appeal by defendant from judgment entered 19 July 2001 by Judge William Z. Wood, Jr. in Guilford County Superior Court. Heard in the Court of Appeals 9 October 2002.

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[154 N.C. App. 666 (2002)]

*Roy Cooper, Attorney General, by Amy C. Kuntzling, Assistant Attorney General, for the State.*

*David G. Belser for defendant-appellant.*

THOMAS, Judge.

Defendant, Allen Spencer, was convicted of assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) was sentenced to 116 to 149 months in prison.

He appeals, assigning as error the trial court's: (1) failure to instruct the jury on voluntary intoxication; (2) finding as an aggravating factor that the offense was committed while defendant was on pretrial release; and (3) failure to dismiss the indictment for AWDWIKISI where it did not allege an element of the offense. For the reasons discussed herein, we hold the trial court did not err.

The State's evidence tends to show the following: Sharon Roberts had lived with defendant for the last eight of the thirteen years she had known him. Her ten-year-old daughter referred to defendant as "Daddy" although he is not her biological father. During the year 2000, however, Roberts talked with defendant numerous times about ending their relationship. During these discussions, defendant said they would "be together forever," and he would kill her if she were to leave. In July 2000, defendant bit the area around Roberts's eye and choked her.

Sometime around November 2000, Roberts asked defendant to leave her home. He did so for several weeks, going to Fairfield, North Carolina. A few days after defendant's return to Greensboro, North Carolina, he went to Roberts's home and said he wanted to speak with her in her bedroom. When Roberts complied, defendant locked the door. He asked her "to make love to him for the last time." Roberts refused. Defendant then put a knife to her throat and said he was going to kill her. Roberts pleaded with him to spare her. Defendant then put the knife to his own throat and said that he was going to kill himself. Roberts eventually persuaded defendant to accompany her to the local mental health center for treatment.

Defendant was hospitalized for several days. Upon his release, Roberts agreed to help him find a place to live, and arranged for him to stay with her sister, Alice "Annette" Roberts (Annette).

On the night of 11 January 2001, Roberts was at Annette's home "drinking and getting high." While there, she had consensual sex with

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defendant. The next day, 12 January 2001, Roberts saw defendant several times at Annette's. During the evening, Roberts and Annette went out for a couple of hours to visit some friends, returning around nine or ten o'clock with about twenty dollars worth of crack cocaine. They smoked some, with defendant smoking the majority of it. He also consumed three or four beers. Sometime earlier that day, Roberts joked in front of defendant about possibly being pregnant.

Upon receiving a phone call from a male friend, Roberts decided to leave Annette's home with her daughter. Defendant appeared agitated and insisted on walking Roberts to her car. Once there, defendant asked whether Roberts was seeing another man. She reminded defendant that her daughter was in the car, said they could talk later, and attempted to drive away. Defendant, however, was sitting on the door frame and said, "If I had a gun, I'd kill you." Defendant then struck her. Roberts later testified that she initially thought defendant hit her on the neck, but upon seeing blood, realized he had stabbed her. Defendant stabbed Roberts in the face, neck, and chest. As she tried to block the knife, her hand was also cut.

Annette ran to the car and jumped on defendant, who she heard say, "I'm going to kill you." Jack Jordan, Annette's boyfriend, pulled Roberts from inside the car. Defendant then said to Roberts, "I guess it's over now. That's what you get for not telling me who you're [sleeping] with."

Later that night, Deputy James Cuddeback of the Guilford County Sheriff's Department interrogated defendant. After waiving his *Miranda* rights, defendant admitted he stabbed Roberts. Defendant appeared shaken and intermittently cried.

Defendant's evidence tends to show the following: Dr. Gary Hoover, a forensic psychologist, tested and evaluated defendant. The Minnesota Multiphasic Personality Inventory test indicated defendant was mildly depressed and somewhat irritable. The Milan Clinical Multiaxial Inventory showed defendant had "rather severe anxiety problems that were set in the context of a dependent personality." Hoover, meanwhile, said he believes defendant is extremely dependent, and "tends to become anxious and fragmented in his thinking when placed in stressful, anxiety-producing situations." According to Hoover, when defendant finally understood his relationship with Roberts had ended, "he lost control, he blew up." In Hoover's opinion, the stabbing was an impulsive act, or "an act without thinking," rather than a thoughtful one.

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The jury returned a guilty verdict. The trial court found as an aggravating factor that defendant committed the offense while on pretrial release for a charge of assault on a female. It found as a mitigating factor that defendant acknowledged wrongdoing at an early stage of the proceedings. After the aggravating factor was found to outweigh the mitigating factor, defendant was sentenced to 116 to 149 months in prison.

[1] By his first assignment of error, defendant contends the trial court committed plain error in failing to instruct the jury on voluntary intoxication as a defense to AWDWIKISI. We disagree.

As defendant raises this argument for the first time on appeal, he correctly assigns plain error as the standard of review. See N.C. R. App. P. 10(c)(4). Plain error is “*fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done*’ . . . or it can be fairly said ‘the instructional mistake had a probable impact on the jury’s finding that the defendant was guilty.’” *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (emphasis in original) (quoting *U.S. v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), cert. denied, 459 U.S. 1018, 74 L. Ed. 2d 513 (1982)).

“Voluntary intoxication is not a legal excuse for a criminal act; however, it may be sufficient in degree to prevent and therefore disprove the existence of a specific intent such as an intent to kill.” *State v. Gerald*, 304 N.C. 511, 521, 284 S.E.2d 312, 318 (1981). To require an instruction on voluntary intoxication, there must be evidence that “defendant’s mind and reason were so completely intoxicated and overthrown that he could not form a specific intent to kill.” *Id.* at 511, 284 S.E.2d at 318-19. In resolving the question of whether defendant is entitled to an instruction on voluntary intoxication, we examine the evidence in the light most favorable to defendant. *State v. Boyd*, 343 N.C. 699, 713, 473 S.E.2d 327, 334 (1996), cert. denied, 519 U.S. 1096, 136 L. Ed. 2d 722 (1997).

The evidence here shows defendant consumed crack cocaine and beer on 12 January 2001. It is unclear precisely how much he consumed. Roberts and Annette both testified he smoked the majority of the crack they shared. Roberts, however, said they “didn’t have very much” crack; Annette estimated it was about twenty dollars worth. In addition, according to Roberts, defendant drank several beers, two earlier that day, and three or four that evening.

Further, shortly after the assault, defendant told police about the events leading to it. He recalled the phone call from Roberts’s male

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friend, the conversation she and defendant had at the car, Roberts's refusal to discuss their relationship at that moment, Roberts's threat to call the police, and his stabbing her in the neck.

Viewed in the light most favorable to defendant, this evidence does not establish that defendant was intoxicated to the degree of being incapable of forming an intent to kill. While it may be sufficient to show he was intoxicated, defendant has not met his burden of presenting substantial evidence of being "unable to reason." *See Gerald*, 304 N.C. at 521-22, 284 S.E.2d at 319 (holding no voluntary instruction required as defense to AWDWIKISI where defendant drank rum and wine prior to the shooting but was coherent and able to understand others).

We likewise reject defendant's contention that Hoover's opinion mandates an instruction on voluntary intoxication. Hoover's description of defendant's conduct as "impulsive" and "without thinking" does not equate to defendant being so intoxicated that he was "utterly incapable" of forming a specific intent. Impulsiveness and acting without first thinking are unwise behaviors; however, the degree is far different when heavy consumption of drugs or alcohol, "intoxicate[] and overthrow[]" a defendant's "mind and reason so that he could not form a specific intent to kill." *Gerald*, 304 N.C. at 511, 284 S.E.2d at 318-19. *See also State v. Brown*, 335 N.C. 477, 492, 439 S.E.2d 589, 598 (1994) (instruction not required where expert testified defendant was "acutely intoxicated" at time of crime); *Boyd*, 343 N.C. at 712-13, 473 S.E.2d at 333-34 (instruction not mandated where expert testified defendant was intoxicated at time of crime).

In *State v. Cheek*, 351 N.C. 48, 74-76, 520 S.E.2d 545, 560-61 (1999), *cert. denied*, 530 U.S. 1245, 147 L. Ed. 2d 965 (2000), the defendant had taken "two hits of acid" prior to the murder but was able to recall events both before and after the murder. Based on those facts, the Court held the defendant had not produced sufficient evidence from which a jury could conclude he was so intoxicated that he was "utterly incapable" of forming the specific intent to commit first-degree murder. *Id.* at 75-76, 520 S.E.2d at 561; *see also State v. Herring*, 338 N.C. 271, 274-76, 449 S.E.2d 183, 185-86 (1994) (no instruction required where defendant consumed forty to sixty ounces of fortified wine, four twelve-ounce malt liquor beers, and smoked three marijuana joints and testified he was in a state of intoxication at the time of the shooting but was able to recall the event).

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Accordingly, we hold there was no error. This argument, based on plain error, is without merit.

**[2]** By his second assignment of error, defendant contends there was insufficient evidence for the trial court to find as an aggravating factor that the offense was committed while defendant was on pretrial release. Specifically, defendant contends the trial court erred because it solely relied on the prosecutor's assertion that the factor existed. We disagree.

Section 15A-1340.16(a) of the North Carolina General Statutes provides:

(a) Generally, Burden of Proof.—The court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving by a preponderance of the evidence that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

N.C. Gen. Stat. § 15A-1340.16(a) (2001). The statute sets forth no instructions regarding the types of proof permissible for establishing an aggravating factor. It simply requires the State to prove it exists "by a preponderance of the evidence." *Id.*

Defendant correctly notes, however, that "a trial court may not find an aggravating factor where the only evidence to support it is the prosecutor's mere assertion that the factor exists." *State v. Swimm*, 316 N.C. 24, 32, 340 S.E.2d 65, 70-71 (1986). Here, however, after the prosecutor asserted he believed defendant was on pretrial release, the trial court instructed the Clerk of Court to "check on any criminal warrants on [defendant], when they were served." The Clerk verified that defendant was served for assault on a female on "9/22." The Clerk's statement was also consistent with Hoover's testimony of defendant having "a pending charge that was lodged in September of 2000." Rather than merely rely on the prosecutor's assertion, the trial court verified defendant's status by checking the Clerk's records. Based on these facts, we hold the State proved by a preponderance of the evidence that an aggravating factor exists. Defendant's assignment of error is overruled.

**[3]** By his third assignment of error, defendant contends the indictment against him failed to allege all of the elements of AWDWIKISI.

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Specifically, he argues it did not allege the element of specific intent to kill Roberts. We conclude otherwise. The indictment reads: “[D]efendant . . . did assault Sharon Renee Roberts . . . *with the intent to kill* and inflicting serious injury . . .” (Emphasis added.) This sufficiently alleges an intent to kill Roberts. The indictment “charges all essential elements of [the] alleged criminal offense to inform [defendant] of the accusation against him and enable[] him to be tried accordingly.” *State v. Surcey*, 139 N.C. App. 432, 434, 533 S.E.2d 479, 481 (2000). Defendant’s final assignment of error is therefore overruled.

NO ERROR.

Judges WALKER and BIGGS concur.



GENERAL MOTORS ACCEPTANCE CORPORATION, PLAINTIFF v. WILLIAM GUY  
WRIGHT AND JOYCE LEMONDS WRIGHT, DEFENDANTS

No. COA02-136

(Filed 17 December 2002)

**1. Contempt— civil—consent judgment—separation agreement not adopted or approved by court**

The trial court did not err by holding appellant wife in civil contempt for failing to honor her payment obligations pursuant to a consent agreement that was memorialized in a separation agreement on a debt she and her former husband owed jointly to plaintiff corporation for a car even though the separation agreement was not adopted or approved by the court, because: (1) appellant was held in contempt for failure to comply with the consent judgment and not the separation agreement, and the consent judgment required appellant to specifically perform her obligation created under the separation agreement; (2) if a spouse does not perform her part of a valid separation agreement, which has not been incorporated into a court order, the opposing spouse may obtain from the court a decree of specific performance of the separation agreement which is enforceable through contempt proceedings; and (3) the parties’ consent judgment was, in essence, a decree of specific performance and legally enforceable through contempt proceedings if it was adopted by the court.



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**2. Contempt— civil—consent judgment—presumption of adoption by trial court—waiver**

The trial court did not err by holding appellant wife in civil contempt for failing to honor her payment obligations pursuant to a consent agreement that was memorialized in a separation agreement on a debt she and her former husband owed jointly to plaintiff corporation for a car even though appellant contends the consent judgment was not adopted by the court based on the trial court not making any findings of fact, because: (1) appellant expressly waived her right to allow the court to make such findings of fact; and (2) there was no evidence rebutting the presumption of adoption of the judgment by the trial court.

**3. Contempt— civil—consent judgment—capability to comply with conditions**

The trial court did not err by holding appellant wife in civil contempt for failing to honor her payment obligations pursuant to a consent agreement that was memorialized in a separation agreement on a debt she and her former husband owed jointly to plaintiff corporation for a car even though appellant wife contends the trial court did not find that appellant was presently capable of complying with its conditions, because the trial court's finding was sufficient to support the conclusion that appellant could comply with the contempt order including the facts that: (1) she was gainfully employed and she had no dependents at her home; (2) her living expenses and other obligations would not have prevented her from making the payments she was ordered; (3) appellant received a \$10,000 insurance settlement from a house fire and she did not use the money to replace damaged or destroyed items in her home nor did she apply any of the proceeds to the pertinent loan obligation; and (4) appellant borrowed money from a commercial lending institution and used the money to repair another vehicle.

**4. Costs— attorney fees—civil contempt proceeding—specific performance of payment of marital debt**

The trial court did not err in a civil contempt proceeding by awarding attorney fees to appellee husband based on appellant wife's failure to honor her payment obligations pursuant to a consent agreement that was memorialized in a separation agreement on a debt she and her former husband owed jointly to plaintiff corporation for a car, because: (1) the parties agreed in their separation agreement that appellant would take possession of the

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vehicle and be responsible for the indebtedness owed to plaintiff on that vehicle; (2) the parties assigned this marital asset and the accompanying marital debt to appellant in the same manner as any other marital asset or marital debt would be assigned to a spouse for purposes of equitable distribution; (3) the parties and the court adopted the relevant provision of the separation agreement in the consent judgment; (4) when appellant failed to perform, the court only awarded such fees as were incurred by appellee in enforcing the original consent judgment by bringing appellant before the court for contempt; and (5) there is no recognizable distinction between a court awarding attorney fees through contempt proceedings when a spouse fails to honor a marital debt arising out of an equitable distribution award and when a spouse fails to specifically perform payment of a marital debt arising out of a consent judgment.

Appeal by defendant Joyce Lemonds Wright from an order entered 13 February 1998 by Judge Lillian O'Briant (nor Jordan) in Montgomery County District Court. Heard in the Court of Appeals 30 October 2002.

*Bell and Browne, P.A., by Charles T. Browne, for defendant-appellee.*

*Central Carolina Legal Services, by Stanley B. Sprague and Jerry L. Eagle, for defendant-appellant.*

HUNTER, Judge.

Defendant Joyce Lemonds Wright ("Appellant") appeals from an order holding her in civil contempt for failing to honor her payment obligations on a debt she and her former husband, defendant William Guy Wright ("Appellee"), owed to plaintiff General Motors Acceptance Corporation ("GMAC"). We affirm.

On or about 17 May 1989, Appellant and Appellee financed a vehicle with a lender that assigned its rights to GMAC. The following year, the parties separated and subsequently entered into a separation agreement that granted possession of the vehicle to Appellant. In the agreement, Appellant agreed to pay the outstanding indebtedness owed to GMAC on the vehicle. However, when Appellant defaulted on the payments, GMAC repossessed and sold the vehicle. The sale resulted in a deficiency to GMAC.

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GMAC filed a complaint on 10 December 1992 seeking a deficiency judgment jointly and severally against Appellant and Appellee. On 18 February 1993, entry of default was entered against Appellant for failure to timely plead, but a default judgment was never entered against her. Appellee filed an answer to GMAC's complaint on 29 June 1993 that included a cross-claim against Appellant. In his cross-claim, Appellee asked the court to enter an "order commanding [Appellant] to specifically perform her obligation under the separation agreement dated May 29, 1990 by paying the debt to the plaintiff as she obligated herself to do[.]"

Before the matter went to trial, all three parties entered into a consent judgment on 23 March 1994. Referencing the separation agreement, the consent judgment ordered Appellant to satisfy her and Appellee's joint indebtedness to GMAC by paying the sum of \$50.00 per month until the debt was satisfied. The consent judgment further provided that should Appellant not timely pay, "GMAC would be entitled to execute upon its monetary judgment against [Appellee and Appellant], and [Appellee] would be entitled to execute upon his monetary judgment against [Appellant]."

On 16 December 1996, Appellee filed a motion for contempt against Appellant in Montgomery County District Court. In the motion, Appellee alleged that Appellant had willfully failed and refused to pay the judgment to GMAC pursuant to the consent judgment. Appellee asked that Appellant be (1) held in willful contempt for failure to abide by the terms of the consent judgment and (2) ordered to pay for his attorney's fees incurred as a result of the action.

Following a show cause hearing on 26 November 1997, an order was entered on 13 February 1998 in which the court found that Appellant had willfully failed to pay her obligation to GMAC despite having the ability to do so. Thus, Appellant was held in civil contempt, as well as ordered to pay the sum of \$300.00 for Appellee's attorney's fees. On 26 February 1998, Appellant filed a motion asking the court to alter the 13 February 1998 order pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. That motion was denied by an order entered on 3 October 2001. Appellant appeals the 13 February 1998 order holding her in contempt. She does not appeal the 3 October 2001 order denying her motion to alter the 13 February 1998 order.

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## I.

[1] By her first assignment of error, Appellant argues the trial court erred in holding her in civil contempt based on her failure to comply with the terms of a separation agreement that were not adopted or approved by the court. Appellant contends that since the separation agreement was neither a part of the court file nor presented to the court prior to or at the time of the consent judgment, it is enforceable only as an ordinary contract and not through the court's contempt powers. See *Bunn v. Bunn*, 262 N.C. 67, 69, 136 S.E.2d 240, 242 (1964). Although we agree with Appellant's statement of the law, we disagree with its application to the present case.

Here, Appellant was held in contempt for failure to comply with the consent judgment, not the separation agreement. The consent judgment required Appellant to "*specifically perform* her obligation, created under a Separation Agreement executed by her and [Appellee], to satisfy their joint indebtedness" to GMAC. (Emphasis added.) In North Carolina, the law is clear that "if a [spouse] does not perform his[/her] part of a valid separation agreement, which has not been incorporated into a court order, the [opposing spouse] may obtain from the court a decree of specific performance of the separation agreement which is enforceable through contempt proceedings." *McDowell v. McDowell*, 55 N.C. App. 261, 262, 284 S.E.2d 695, 696-97 (1981) (citations omitted). The parties' consent judgment was, in essence, a decree of specific performance and legally enforceable through contempt proceedings if it was adopted by the court. Thus, Appellant's first assignment of error is overruled.

## II.

[2] By her second assignment of error, Appellant argues the court erred in holding her in contempt because the consent judgment was not adopted by the court. We disagree.

"[O]nce it is determined that a court has adopted [a] judgment, and the presumption favors adoption, the court may enforce its provisions upon a showing of willful failure to comply." *Henderson v. Henderson*, 55 N.C. App. 506, 512, 286 S.E.2d 657, 662 (1982). In the case *sub judice*, Appellant contends the consent judgment was not adopted as the court's determination of the respective rights and obligations of the parties because it contained no findings of fact. However, the consent judgment stated as follows: The parties "have each waived any recitation of such Findings of Fact and Conclusions of Law as might otherwise have been required to support the judg-

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ment herein[.]” Since Appellant expressly waived her right to allow the court to make such findings of fact, this Court will not now rule that adoption of the consent judgment did not occur because of that waiver. Therefore, in light of Appellant’s waiver and the absence of any evidence rebutting the presumption of adoption, we conclude the consent judgment was adopted by the court and enforceable through contempt proceedings.

## III.

**[3]** By Appellant’s third assignment of error she argues the court erred in finding her in civil contempt without first finding that she was presently capable of complying with its purging conditions. We disagree.

In North Carolina, a proceeding for civil contempt is one instituted to preserve and enforce the rights of a private party to an action, and to compel obedience to a judgment or decree intended to benefit such parties. *Blue Jeans Corp. v. Clothing Workers*, 275 N.C. 503, 508, 169 S.E.2d 867, 869-70 (1969). Failure to comply with a court order 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.*

N.C. Gen. Stat. § 5A-21(a) (2001) (emphasis added). This Court’s review of a trial court’s finding of contempt is limited to a consideration of “whether the findings of fact by the trial judge are supported by competent evidence and whether those factual findings are sufficient to support the judgment.” *McMiller v. McMiller*, 77 N.C. App. 808, 810, 336 S.E.2d 134, 136 (1985).

In the instant case, the trial court made the following finding of fact pertinent to Appellant’s ability to comply with the contempt order:

5. [Appellant] has at all times since the entry of the consent judgment been gainfully employed, and by her own testimony

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earned in excess of \$9.00 per hour on one of her jobs. Moreover, [Appellant] has no dependents and at one time after the consent judgment was entered was earning approximately \$1,240.00 per month gross income. During this period of time [Appellant's] living expenses and other obligations would not have prevented her from making the payments she was ordered to make in the March 23, 1994 judgment. The Court notes that in 1990 [Appellant] received a \$10,000.00 insurance settlement (paid as a result of a fire she experienced in her home), and not withstanding that she did not use the money to replace damaged or destroyed items in her home, she applied none of the proceeds to the GMAC obligation. In addition, since the consent judgment was entered, [Appellant] borrowed \$1,500.00 from a commercial lending institution and used the money to repair another vehicle.

This finding was based on evidence establishing as an affirmative fact that Appellant possesses the current ability to comply with the order. *See Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 574 (1990). Plaintiff does not contend the evidence was not competent. Thus, we conclude the court's finding was sufficient to support the conclusion that Appellant could comply with the contempt order.

## IV.

**[4]** By her final assignment of error, Appellant argues the court erred in awarding attorney's fees to Appellee.

Our state law generally does not allow for the recovery of attorney's fees as an item of damages or of costs absent express statutory authority. *Records v. Tape Corp. and Broadcasting System v. Tape Corp.*, 18 N.C. App. 183, 188, 196 S.E.2d 598, 602 (1973). In civil contempt actions, this Court has upheld an award of attorney's fees "where such fees were expressly authorized by statute as in the case of child support." *Smith v. Smith*, 121 N.C. App. 334, 339, 465 S.E.2d 52, 55 (1996). "[T]his Court has [also] upheld the awarding of attorney's fees under the court's broad contempt powers to enforce equitable distribution awards where attorney's fees were not expressly authorized by statute." *Id.* (citing *Hartsell*).

Here, Appellant contends the debt she owed on the vehicle was a *consumer* debt. As such, she argues there is no statutory authority expressly allowing for the award of attorney's fees in civil contempt actions for failure to pay this type of debt. Appellee essentially con-

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tends that the debt was actually a *marital* debt that Appellant promised to pay. He argues the debt is therefore analogous to an equitable distribution award, which permits an award of attorney's fees through the court's contempt powers. We conclude Appellee's analogy is meritorious.

The parties in the present case agreed in their separation agreement that Appellant would take possession of the vehicle and be responsible for the indebtedness owed to GMAC on that vehicle. In doing so, the parties assigned this marital asset, and the accompanying marital debt, to Appellant in the same manner as any other marital asset or marital debt would be assigned to a spouse for purposes of equitable distribution. Thereafter, the parties and the court adopted the relevant provision of the separation agreement in a consent judgment that ordered Appellant to specifically perform her payment obligation to GMAC. When Appellant failed to perform, the court only awarded such fees as were incurred by Appellee in enforcing the original consent judgment by bringing the Appellant before the court for contempt. *See Hartsell*, 99 N.C. App. at 390, 393 S.E.2d at 576. Under these facts, we hold there is no recognizable distinction between a court awarding attorney's fees through contempt proceedings when a spouse fails to honor a marital debt arising out of an equitable distribution award and when a spouse fails to specifically perform payment of a marital debt arising out of a consent judgment. Thus, having concluded the award was otherwise supported by proper findings of fact, the trial court did have the authority to award attorney's fees as a condition of purging contempt due to Appellant's failure to comply with the consent judgment.

For the aforementioned reasons, we affirm the trial court's order of civil contempt.

Affirmed.

Judges WYNN and TIMMONS-GOODSON concur.

**RICE v. CITY OF WINSTON-SALEM**

[154 N.C. App. 680 (2002)]

ERNEST RICE, EMPLOYEE-PLAINTIFF v. CITY OF WINSTON-SALEM, EMPLOYER, AND  
SELF-INSURED, CARRIER-DEFENDANT

No. COA01-1488

(Filed 17 December 2002)

**1. Workers' Compensation— disability—Form 21 agreement—presumption not rebutted**

The Industrial Commission did not err by concluding that defendant had failed to rebut plaintiff's Form 21 presumption of continuing disability where defendant failed to offer evidence that there were suitable jobs available and that plaintiff was capable of being hired, taking into account his physical and vocational limitations.

**2. Workers' Compensation— retirement disability plan—findings on nature of plan required**

A workers' compensation disability award was remanded for further findings on whether a retirement disability plan was a wage-replacement equivalent to workers' compensation benefits (so that defendant was entitled to an offset) or whether the plan entitled plaintiff to additional payments beyond workers' compensation benefits.

Appeal by defendant City of Winston-Salem from judgment entered 14 September 2001 by the North Carolina Industrial Commission. Heard in the Court of Appeals 11 September 2002.

*J. Kevin Morton for plaintiff-appellee.*

*Wilson & Iseman, L.L.P., by S. Ranchor Harris, III, for defendant-appellant.*

WALKER, Judge.

On 7 October 1993, plaintiff suffered a back injury while operating a backhoe. Plaintiff and defendant entered into a Form 21 agreement which was approved by the Industrial Commission (Commission) on 7 December 1993. The agreement noted that, due to the accident, plaintiff suffered a "Lumbar Sacral Strain" and compensation would be paid "continuing for necessary weeks."

Plaintiff attempted to return to work on numerous occasions between 8 October 1993 and 30 November 1995. However, with the



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exception of one four-month return to work, he was never able to continue for more than a few days at any one time. During the periods of time plaintiff was unable to work, he received total temporary disability benefits. Defendant was not able to provide plaintiff with suitable employment and was unable to locate any other suitable jobs in the relevant job market. On 30 November 1995, plaintiff retired under the defendant's Retirement Disability Plan (Plan), which fully funds plaintiff's retirement payments until he reaches the age of 62, at which point his contributions are utilized.

Defendant unilaterally terminated plaintiff's benefits on 1 December 1995, when he began receiving disability retirement benefits. Plaintiff then filed a request for a hearing to compel defendant to reinstate his benefits. On 14 September 2001, the Commission ordered defendant to pay "ongoing total disability compensation benefits from 1 December 1995. . . ." Defendant appealed contending (1) the Commission erred in finding plaintiff was disabled as a result of his 7 October 1993 accident and (2) defendant's disability retirement payments entitle it to credit against any total disability compensation benefits awarded.

We review these assignments of error to determine (1) whether any competent evidence in the record supports the Commission's findings of fact and (2) whether those findings support the Commission's conclusions of law. *McAninch v. Buncombe County Schools*, 347 N.C. 126, 131, 489 S.E.2d 375, 378 (1997); *Barber v. Going West Transp., Inc.*, 134 N.C. App. 428, 434, 517 S.E.2d 914, 919 (1999).

Here, the Commission found in part:

2. Plaintiff's treating physician took plaintiff out of work and gave him conservative medical care and treatment. An MRI was negative. On 4 April 1994, plaintiff was returned to his regular work duties without restrictions and continued his work duties with defendant until 18 August 1994, when his physician again took him out of work with defendant because of continued complaints of pain to his low back and left leg. Defendant resumed paying temporary total disability compensation benefits. Plaintiff received medical testing, including a bone scan, which was negative. On 4 December 4 [sic] 1994, plaintiff returned to his same work duties without restrictions. On 22 March 1995, plaintiff was again taken out of his work because of pain, and defendant again resumed temporary total disabil-

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ity benefits. Plaintiff was diagnosed as suffering from chronic pain syndrome, rated with a five percent disability to his back, and assigned restrictions of lifting no more than 25 pounds, with occasional bending, squatting, trunk rotation, and walking up to 25 yards. Plaintiff retired from his employment with defendant on November 30, 1995.

3. Plaintiff's chronic pain is the direct result of the 7 October 1993 injury. Plaintiff's preexisting conditions of hyperlordosis, or curvature of the spine, and obesity were aggravated by the 7 October 1993 injury, and have impeded plaintiff's recovery.
4. After 7 October 1993, plaintiff has continued to suffer from back and left leg pain for which there is no medical remedy other than medication and physical therapy. Plaintiff's condition has not improved and is chronic.
5. Without seeking Commission approval, defendant unilaterally terminated plaintiff's workers' compensation benefits on or about 1 December 1995, when plaintiff began receiving disability retirement benefits. Plaintiff filed a Form 33 request for a hearing in order to compel defendant to reinstate benefits. Defendant filed a Form 33R response which stated that plaintiff had been released to return to light duty work on a graduated basis and that defendant considered plaintiff eligible for disability retirement. The parties have stipulated that the light duty work was make work.
6. Plaintiff has contributed to the cost of the disability insurance and retirement plan sponsored by defendant. As stipulated by the parties, however, disability retirement benefits paid before plaintiff reaches age 62 are fully funded by defendant, and it is not until plaintiff reaches age 62 that his contributions are utilized under the plan.
7. Defendant has not provided plaintiff with suitable employment and has not located suitable jobs in the relevant job market.

**[1]** When a Form 21 agreement is entered into and approved by the Commission, it represents an admission of liability by the employer, entitling the employee to a continuing presumption of disability. *Watkins v. Central Motor Lines, Inc.*, 279 N.C. 132, 137-38, 181 S.E.2d 588, 592 (1971); *Dalton v. Anvil Knitwear*, 119 N.C. App. 275, 282-83, 458 S.E.2d 251, 256-57 (1995); *Radica v. Carolina Mills*, 113 N.C.

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App. 440, 447, 439 S.E.2d 185, 190 (1994). After the presumption attaches, the burden shifts to the employer to show that the employee is employable. *Dalton*, 119 N.C. App. at 284, 458 S.E.2d at 257.

The Commission determines whether an employer has presented sufficient evidence to rebut the presumption. *Kisiah v. W.R. Kisiah Plumbing, Inc.*, 124 N.C. App. 72, 81, 476 S.E.2d 434, 439 (1996). The burden is on the employer to show that (1) there are suitable jobs available and (2) the employee is capable of getting one. *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 33, 398 S.E.2d 677, 682 (1990); see also *Franklin v. Broyhill Furniture Industries*, 123 N.C. App. 200, 206, 472 S.E.2d 382, 386 (1996). The mere fact that an employee returns to work does not necessarily destroy the presumption. *Radica*, 113 N.C. App. at 447, 439 S.E.2d at 190; *Martin v. Piedmont Asphalt & Paving Co.*, 113 N.C. App. 121, 124-25, 437 S.E.2d 696, 698 (1993). Thus, absent waiver of the presumption by the employee or a hearing by the Commission, no change in disability benefits owed may occur. *Radica*, 113 N.C. App. at 447-48, 439 S.E.2d at 190; see also *Franklin*, 123 N.C. App. at 208, 472 S.E.2d at 388 (Walker, J., concurring).

Here, the Commission chose to accept plaintiff's evidence of his ongoing disability and the burden was on defendant to overcome the Form 21 presumption. Since defendant failed to offer evidence that there were suitable jobs available to plaintiff and that he was capable of getting one, taking into account his physical and vocational limitations, the Commission did not err in concluding that defendant failed to rebut plaintiff's presumption of continuing disability.

**[2]** Next, defendant contends it is entitled to "a credit for voluntary payments made to plaintiff." It argues that even though the Commission ultimately found plaintiff's injuries compensable, it should be allowed a credit for payments made pursuant to its Plan.

Under N.C. Gen. Stat. § 97-42:

Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation.

N.C. Gen. Stat. § 97-42 (1993). This Court has held that "due and payable" refers only to whether an employer has accepted an employee's injuries as compensable when payments for which credit

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is sought are made. *Estes v. N. C. State University*, 102 N.C. App. 52, 58, 401 S.E.2d 384, 387 (1991); *see also Foster v. Western-Electric Co.*, 320 N.C. 113, 357 S.E.2d 670 (1987); *Moretz v. Richards & Associates*, 316 N.C. 539, 342 S.E.2d 844 (1986). However, even where these payments were “due and payable,” and thus, no credit is allowed, an employee may not receive more in wage supplements than he is entitled to receive under the Workers’ Compensation Act. *Moretz*, 316 N.C. at 542, 342 S.E.2d at 845-46; *Estes*, 102 N.C. App. at 58, 401 S.E.2d at 387. Thus, where an employer makes payments to an employee under a wage-replacement program, that employer is not required to make duplicative payments but is entitled to an offset against the workers’ compensation benefits. *Estes*, 102 N.C. App. at 58, 401 S.E.2d at 387.

Here, since defendant had accepted plaintiff’s injury as compensable, the Commission correctly found that defendant’s payments under the Plan to plaintiff were due and payable when made. *Kisiah*, 124 N.C. App. at 82-83, 476 S.E.2d at 440; *Radica*, 113 N.C. App. at 447, 439 S.E.2d at 190. Therefore, defendant’s payments do not qualify for credit under § 97-42.

In *Moretz*, the parties stipulated the employee’s injury was compensable, and the employer paid workers’ compensation benefits for total disability for 362 weeks. *Moretz*, 316 N.C. at 540, 342 S.E.2d at 845. The employee later argued to the Commission that he should have been awarded additional compensation for that same period but for a separate work-related injury. *Id.* The Commission awarded the employee an additional 180 weeks of workers’ compensation benefits. *Id.* at 540, 342 S.E.2d at 845. Our Supreme Court affirmed this Court’s holding that, because the benefits previously allowed were due and payable when made, the employer was not entitled to a credit. *Id.* at 540, 342 S.E.2d at 846. However, the employer was not required to compensate the employee for 180 weeks for his additional injury in excess of the total disability benefits allowed for 362 weeks. *Id.* at 542, 342 S.E.2d at 846. Because the employee had already received workers’ compensation benefits for 362 weeks, the employer was entitled to an offset resulting in the employee not being entitled to further benefits. *Id.* at 542, 342 S.E.2d at 847.

The issue remaining in this case is whether defendant’s payments to plaintiff pursuant to its Plan constituted a wage replacement program such that it could form the basis of an offset against workers’ compensation benefits. Although the nature of the program by which

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the employee was paid wage supplements was not an issue in *Moretz*, in *Evans*, payments for which an employer was seeking an offset were made pursuant to the employer's sickness and accident disability plan. *Evans v. AT&T Technologies, Inc.*, 332 N.C. 78, 79, 418 S.E.2d 503, 504 (1992). That plan allowed for payments regardless of the cause of an employee's injury, *Id.* at 79, 418 S.E.2d at 504, and "operated as a wage replacement program tantamount to workers' compensation." *Estes*, 102 N.C. App. at 58-59, 401 S.E.2d at 386. Therefore, the Court held the employer was entitled to an offset as was necessary to avoid duplicative payments. *Evans*, 332 N.C. at 85, 418 S.E.2d at 508.

However, in *Estes*, payments for which the employer was seeking an offset were in the form of vacation and sick leave benefits provided by the employer. *Estes*, 102 N.C. App. at 53, 401 S.E.2d at 384. In holding the employee's accumulated sick and vacation leave could not be used by the employer to offset workers' compensation disability benefits, this Court reasoned that the employee's sick and vacation leave were earned benefits. *Id.* at 58, 401 S.E.2d at 387. Additionally, whereas workers' compensation benefits are available only for work-related injury, the employee's vacation and sick leave could have been taken for other reasons, such as "to renew physical and mental capabilities, for personal reasons, for absences due to adverse weather conditions, and for personal illness or illnesses in the immediate family." *Id.*

In the present case, the Commission correctly found that payments to plaintiff under the Plan were due and payable when made. However, the Commission failed to (1) make findings concerning the nature of the Plan and (2) determine whether the Plan was a wage-replacement benefit equivalent to workers' compensation benefits or whether the Plan served separately to entitle plaintiff to additional payments over and beyond the workers' compensation benefits. Therefore, this matter is remanded to the Commission to make additional determinations in accordance with this opinion.

Affirmed in part; vacated and remanded in part.

Judges McGEE and THOMAS concur.

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[154 N.C. App. 686 (2002)]

STATE OF NORTH CAROLINA v. JAMES WILSON, JR.

No. COA01-1485

(Filed 17 December 2002)

**1. Search and Seizure— photographs of defendant's shoes— defendant in custody—nontestimonial identification order not required**

Photographs of defendant's shoes taken without a nontestimonial identification order were admissible because defendant was in custody on another offense when the photographs were taken.

**2. Search and Seizure— photographs of defendant's shoes— defendant in custody—warrant not required**

A defendant's constitutional rights were not violated by an officer taking photographs of defendant's shoes without a search warrant because defendant was in custody at the time.

**3. Larceny— from person—reaching into cash register**

There was sufficient evidence of larceny from the person where defendant reached into cash registers and removed money which was in the immediate presence and protection of the cashiers, sometimes grabbing or touching the cashier's hands. Discrepancies in identification testimony were for the jury to resolve.

**4. Larceny— from the person—instruction on misdemeanor—no evidence of lesser offense**

The trial court did not err in a prosecution for larceny from the person by not charging on misdemeanor larceny because all of the evidence supports the charged offense and there was no evidence of the lesser offense.

Appeal by defendant from judgments entered 16 May 2001 by Judge Ronald E. Spivey in Forsyth County Superior Court. Heard in the Court of Appeals 14 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Meredith Jo Alcock, for the State.*

*Lisa S. Costner for defendant-appellant.*

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THOMAS, Judge.

Defendant, James Wilson, Jr., was convicted of seven charges of larceny from the person and pled guilty to being an habitual felon. He was sentenced to five consecutive terms of imprisonment, each running a minimum of 125 months with a maximum of 159 months. He now appeals.

By three assignments of error, defendant contends the trial court erred by (1) denying his motion to suppress two photographs taken of his shoes while he was in custody at the Forsyth County Jail; (2) denying his motions to dismiss the larceny from the person charges for insufficiency of the evidence; and (3) failing to instruct the jury on the lesser included offense of misdemeanor larceny. For the reasons herein, we find no error.

Defendant was initially charged with six counts of common law robbery and one count of larceny from the person. Prior to trial, the State elected to proceed on seven larceny from the person charges.

Defendant moved to suppress from evidence two photographs of his shoes. While defendant was in the Forsyth County Jail on an unrelated charge, a law enforcement officer investigating one of these charges took the photographs. Defendant, who had been appointed counsel in the unrelated matter, but not the instant cases because these charges had not yet been brought, requested that his attorney be present. The attorney was not contacted by law enforcement, however, and the photographs were taken.

Defendant argued to the trial court that his motion to suppress should be allowed because the photographs were taken (1) without a search warrant or court order, and (2) in violation of his right to counsel.

The trial court entered the following ruling:

The Court, after review of the statutory and case law, will deny the motion by the defense to suppress the use of the photographs taken on June the 4th based on case law. The Court would just further find that the motion is not supported by affidavit but in this Court's mind it was clear that the motion should be denied. That the taking of the photographs was certainly authorized in this case and will allow the State to use the photographs taken on June 4th.

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The State also presented evidence as to each of the seven alleged instances of larceny which took place in January, February, and March 2000. The State's evidence tends to show, on each occasion, defendant entered a store [Mailbox Pack and Ship, Big Lots (three occasions), K-Mart, Frauenhofer's Ice Cream and Christie's Hallmark], and posed as a customer. He approached the cashier about making a purchase or receiving change for a dollar. When the cashier opened the cash register, defendant forcefully reached into it and removed money, sometimes grabbing the hand of the cashier in the process. Defendant was positively identified as the perpetrator in each case by one or a combination of the following: identification in open court; identification in a photo lineup; identification in a store security video; identification of defendant's vehicle leaving the scene; identification of the shoes worn by defendant during the commission of the crimes.

Defendant's evidence, meanwhile, shows he was employed as an assistant manager for Goodwill Industries and was responsible for transporting other Goodwill employees. Goodwill's records indicate defendant worked on-site both February 22 and March 8, days on which two of the alleged offenses occurred. Defendant's evidence also tends to show the following: (1) fingerprints lifted from one of the crime scenes did not match defendant's; (2) in February 2000, defendant had an eye infection; (3) the victimized cashier at K-Mart was later charged and pled guilty to larceny from K-Mart; and (4) numerous witnesses had trouble identifying defendant in initial photo lineups.

**[1]** Defendant first contends the trial court erred by denying his motion to suppress the photographs of his shoes because the officer did not obtain a nontestimonial identification order pursuant to Chapter 15A, Article 14 of the North Carolina General Statutes prior to taking the photographs. We disagree.

"A nontestimonial identification order . . . is an investigative tool available in cases where there is not sufficient basis for making a lawful arrest." *State v. Welch*, 316 N.C. 578, 584, 342 S.E.2d 789, 792 (1986). Our Supreme Court has held that "Article 14 of Chapter 15A applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. The statute does not apply to an in custody accused." *State v. Irick*, 291 N.C. 480, 490, 231 S.E.2d 833, 840 (1977); *accord Welch*, 316 N.C. at 585, 342 S.E.2d at 793. This interpretation applies even to a defendant in custody on a charge or charges unre-



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lated to the offense being investigated by police. *See State v. Puckett*, 46 N.C. App. 719, 723, 266 S.E.2d 48, 51 (1980); *State v. Thompson*, 37 N.C. App. 651, 657, 247 S.E.2d 235, 239 (1978). Since defendant was in custody at the Forsyth County Jail when the photographs were taken, a nontestimonial identification order was not required. It does not matter that defendant was in custody on a charge unrelated to that being investigated by the officer. We conclude the learned and able trial judge did not err in denying defendant's motion to suppress.

**[2]** We further note that the officer's failure to obtain a search warrant prior to photographing defendant's shoes did not violate defendant's constitutional rights. "It is well settled in North Carolina that clothing worn by a person while in custody under a valid arrest may be taken from him for examination." *State v. Steen*, 352 N.C. 227, 241, 536 S.E.2d 1, 10 (2000) (quoting *State v. Dickens*, 278 N.C. 537, 543, 180 S.E.2d 844, 848 (1971)), *cert. denied*, 531 U.S. 1167, 148 L. Ed. 2d 997 (2001). Also, the United States Supreme Court has held that

once the accused is lawfully arrested and is in custody, the effects in his possession at the place of detention that were subject to search at the time and place of his arrest may lawfully be searched and seized without a warrant even though a substantial period of time has elapsed between the arrest and subsequent administrative processing, on the one hand, and the taking of the property for use as evidence, on the other.

*United States v. Edwards*, 415 U.S. 800, 807, 39 L. Ed. 2d 771, 778 (1974), *quoted in State v. Payne*, 328 N.C. 377, 396, 402 S.E.2d 582, 593 (1991)). In the instant case, defendant was in police custody pursuant to a valid arrest. If the clothing in his possession could be taken from him for examination, then the officer was well within his authority, and the bounds of the federal and state constitutions, to take a photograph of defendant's shoes.

**[3]** Defendant next contends the trial court erred in denying his motions to dismiss the charges of larceny from the person. 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 ade-

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quate 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 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). 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).

The essential elements of larceny are: (1) taking the property of another; (2) carrying it away; (3) without the owner’s consent; and (4) with the intent to deprive the owner of the property permanently. *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982); *State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983). The crime of larceny from the person is a felony regardless of the value of the property taken. N.C. Gen. Stat. § 14-72(b)(1) (2001); *see also State v. Buckom*, 328 N.C. 313, 317, 401 S.E.2d 362, 364 (1991). “As none of our statutes define the phrase ‘from the person’ as it relates to larceny, the common law definition controls.” *Buckom*, 328 N.C. at 317, 401 S.E.2d at 364.

In *Buckom*, our Supreme Court looked to the common law definition of larceny from the person and concluded:

Taken in the context of the foregoing common law principles, “[p]roperty is stolen ‘from the person,’ if it was under the protection of the person at the time. . . . [P]roperty may be under the protection of the person although not actually ‘attached’ to him.” R. Perkins & R. Boyce, *Criminal Law* 342 (3d ed. 1982) (footnotes omitted). For example, if a jeweler places diamonds on a counter for inspection by a customer, under the jeweler’s eye, the diamonds remain under the protection of the jeweler. *Id.* It has not been the general interpretation that larceny from the person “requires an actual taking from the person, and is not committed by a taking from the immediate presence and actual control of the person. . . . As said by Coke in the 1600’s: ‘for that which is taken in his presence, is in law taken from his person.’ ” *Id.* at 342-43 (quoting 3 Coke, *Institutes* \*69).

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*Id.* at 317-18, 401 S.E.2d at 365. Stated differently, "it is not necessary that the stolen property be attached to the victim's person in order for the theft to constitute larceny from the person as long as the property was within the victim's protection and presence at the time of the taking." *State v. Barnes*, 121 N.C. App. 503, 505, 466 S.E.2d 294, 296, *aff'd*, 345 N.C. 146, 478 S.E.2d 188 (1996).

In *Buckom*, our Supreme Court applied this broad definition of "from the person." It upheld a larceny from the person conviction based on evidence the defendant reached into a cash register and forcibly removed money while the cashier was in the process of making change. The money had not been attached to, or dislodged from, the cashier's person, but was within the cashier's protection and presence.

Here, the State's evidence is similar to that in *Buckom*. It shows defendant, on each occasion, forcefully reached into the cash register and removed money which was in the immediate presence and protection of the cashier. On at least three occasions, defendant grabbed or made contact with one of the cashier's hands in the process. This is substantial evidence of each of the essential elements of larceny from the person.

Nonetheless, defendant contends the evidence was insufficient to show he was the perpetrator. He claims: (1) many witnesses failed to identify him in early photo lineups; (2) the store security videotapes failed to show him taking money from the cash registers; (3) fingerprints found at one of the crime scenes were not his; and (4) at the time of the offenses, he had an eye infection, yet no witness testified that the perpetrator had an eye infection.

These discrepancies in the evidence were properly left for the jury to resolve and did not warrant dismissal of the charges against defendant. *See Jarrell*, 133 N.C. App. 264, 268, 515 S.E.2d 247, 250. Rather, when viewed in the light most favorable to the State, the evidence shows defendant was positively identified as the perpetrator of all seven larcenies. His argument to the contrary has no merit.

**[4]** By his final assignment of error, defendant contends the trial court erred by failing to include an instruction for the jury to consider the lesser included offense of misdemeanor larceny in each case. We do not agree.

Submission of a lesser included offense is only required when there is evidence from which the jury could find such crime was com-

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mitted. *State v. Jones*, 291 N.C. 681, 687, 231 S.E.2d 252, 255 (1977). Here, all of the evidence tends to show forcible reaching into cash registers and the removal of money from the immediate presence and protection of the cashiers. This constitutes larceny from the person. There is no evidence tending to show the lesser offense of misdemeanor larceny.

For the reasons discussed herein, we hold defendant received a fair trial free from error.

No error.

Chief Judge EAGLES and Judge TYSON concur.

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STATE OF NORTH CAROLINA v. KYJAHRE HASAN RILEY

No. COA02-138

(Filed 17 December 2002)

**1. Evidence— hearsay—excited utterance—time to fabricate statement**

Defendant's statement to an officer that he had been coerced was not admissible as an excited utterance in a prosecution for speeding to elude arrest because enough time passed between the wreck and the statement for defendant to fabricate the statement, even though the time wasn't indicated by the record.

**2. Criminal Law— defendant seen in custody—prompt inquiry and dismissal of juror—other jurors not questioned**

The trial court did not abuse its discretion by denying a mistrial after one juror saw defendant as he was taken to a holding cell where the court questioned deputies and the juror about whether other jurors had seen defendant in custody, questioned the juror about whether she had discussed what she had seen with other jurors, and dismissed the juror. The prompt inquiry and the dismissal of the juror cured any prejudice.

**3. Criminal Law— instructions—flight**

The trial court did not err by instructing the jury on flight in a prosecution for speeding to elude arrest where there was evidence that defendant fled on foot after crashing the vehicle.

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Furthermore, the court's instruction that flight alone is not sufficient to establish guilt corrected any prejudice.

**4. Criminal Law— duress—fear of death or injury—evidence not sufficient**

The trial court did not err by not giving an instruction on duress in a prosecution for speeding to elude arrest where defendant testified that a passenger threatened him with a gun, no gun was found and the passenger testified that he never pulled a gun or threatened defendant, and defendant had the opportunity to leave the vehicle shortly after the chase began. There was insufficient evidence that defendant's conduct resulted from his fear of death or serious bodily injury.

Appeal by defendant from judgment entered 19 July 2001 by Judge W. Osmond Smith, III in Durham County Superior Court. Heard in the Court of Appeals 17 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Jeffrey R. Edwards, for the State.*

*Thomas, Ferguson & Charns, L.L.P., by D. Tucker Charns, for defendant-appellant.*

WALKER, Judge.

Defendant was found guilty of felonious speeding to elude arrest and of being an habitual felon. He was sentenced to a minimum of 120 months and a maximum of 153 months in prison.

The State's evidence at trial tended to show the following: On 10 August 2000, Trooper Joel King of the North Carolina Highway Patrol received a request from the Durham Police Department to assist in apprehending Jamal Watson, who had outstanding warrants for armed robbery. Upon information from the Durham Police Department that Watson had fled with another person in a white Lexus, Trooper King pulled behind a vehicle matching this description and activated his blue lights and siren. The vehicle, driven by defendant, stopped for a moment, briefly traveled at the posted speed limit, then ran a red light and a stop sign before accelerating to about thirty miles per hour over the posted speed limit of thirty-five miles per hour.

Defendant then drove the vehicle onto the Durham Freeway while Trooper King continued the pursuit with his blue lights and

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siren activated. On the freeway, defendant accelerated to a speed of approximately 140 miles per hour. As he attempted to exit the freeway, the vehicle slid across the exit ramp onto a grassy area and struck a tree.

After coming to a stop, defendant and Watson got out of the vehicle and ran up a hill toward the woods on the other side of an entrance ramp while Trooper King followed them in his patrol vehicle. Defendant then turned and ran back across the exit ramp in the direction of the vehicle for another fifty feet with Trooper King still in pursuit before stopping and putting his hands in the air. While Trooper King handcuffed him, defendant stated that Watson told him not to stop the vehicle because Watson had warrants against him. Defendant further claimed that Watson had a gun.

At trial, Watson testified that he told defendant to “[g]et me to the projects and I’m going to jump out and run,” and defendant responded “I’m on probation.” Watson also testified that when he arrived at the police station after he was apprehended, he attempted to tell Trooper King that he had been driving the vehicle, but defendant stated that he admitted to being the driver and asked Watson to tell the police that he had made defendant drive. Watson further testified that he never pulled a gun on defendant and did not threaten or force him to drive.

Trooper King testified that, as he followed defendant and Watson, he did not see a gun being brandished inside the vehicle. He also testified that he never saw anything thrown from the vehicle and that he did not find a gun in the vehicle. On cross-examination, defendant attempted to ask Trooper King about defendant’s statement while being handcuffed. The trial court sustained the State’s objection to this question and ruled that the excited utterance exception to the hearsay rule did not apply to defendant’s statement to Trooper King at the scene.

During the trial, a juror inadvertently observed defendant in custody as he was being taken to a holding cell. The trial court questioned the two deputies, who were present when defendant was being moved to the holding cell, and one deputy testified that, to his knowledge, only one juror had observed defendant at that time. The trial court then asked this juror whether any other jurors had observed defendant in custody and whether she had discussed her observation with any other jurors in any manner. Having determined that no other juror had observed defendant in custody and that this juror had not

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discussed her observation with the others, the trial court dismissed her from the jury and denied defendant's motion for a mistrial.

During the charge conference, the trial court overruled defendant's objection to an instruction on flight. The trial court further denied defendant's request for a jury instruction on duress because there was insufficient evidence that his actions were caused by reasonable fear of immediate death or serious bodily injury.

**[1]** Defendant first contends the trial court erred in sustaining the State's objection to the admission of defendant's statement to Trooper King. Defendant argues his statement was admissible under the excited utterance hearsay exception in N.C. Gen. Stat. § 8C-1, Rule 803(2) (2001).

Rule 803(2) provides for the admission of an otherwise inadmissible hearsay statement "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." To be admissible under the excited utterance exception, "there must be (1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985). "[T]he modern trend is to consider whether the delay in making the statement provided an opportunity to manufacture or fabricate the statement." *Id.* at 87, 337 S.E.2d at 841 (citation omitted); *see also State v. Safrin*, 145 N.C. App. 541, 551 S.E.2d 516 (2001). If "the facts indicate a lapse of time sufficient to manufacture a statement and that the statement lacked spontaneity," the statement is inadmissible under this exception. *State v. Sidberry*, 337 N.C. 779, 783, 448 S.E.2d 798, 801 (1994).

Here, defendant had only minor injuries and did not require medical treatment. Although the record does not indicate the amount of time between defendant's crashing the vehicle and making the statement, the record is clear that a sufficient amount of time had lapsed to provide defendant with an opportunity to fabricate a statement. Based on this evidence, we conclude that defendant's statement lacked the spontaneity necessary to show that it was made free of reflection or fabrication. Therefore, we hold that the trial court did not err in sustaining the State's objection and finding defendant's statement inadmissible under Rule 803(2).

**[2]** Defendant next contends the trial court erred in denying his motion for a mistrial after it failed to conduct an inquiry of all the

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jurors regarding whether they had observed defendant in custody. “The decision whether to grant a motion for mistrial rests within the sound discretion of the trial judge and will not ordinarily be disturbed on appeal absent a showing of abuse of that discretion.” *State v. Boyd*, 321 N.C. 574, 579, 364 S.E.2d 118, 120 (1988) (citation omitted). This Court is limited to an abuse of discretion review “because the trial court is in the best position to determine whether the degree of influence on the jury was irreparable.” *State v. Hill*, 347 N.C. 275, 297, 493 S.E.2d 264, 276 (1997) (citation omitted), *cert. denied*, 523 U.S. 1142, 140 L. Ed. 2d 1099 (1998). A mistrial is not required based on the fact that a juror observed defendant in custody of the court. *See, e.g., State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986) (holding that the trial court did not err in denying defendant’s motion for mistrial where there was evidence a juror inadvertently observed defendant handcuffed and in custody because the trial court conducted an inquiry and found no misconduct or prejudice to defendant); *see also State v. Johnson*, 341 N.C. 104, 459 S.E.2d 246 (1995); *State v. Montgomery*, 291 N.C. 235, 229 S.E.2d 904 (1976).

After learning that a juror had observed defendant in custody, the trial court conducted an inquiry by first questioning the two deputies present when defendant was being taken to a holding cell. One deputy stated that he believed only one juror had observed defendant at that time. This juror was questioned as to whether other jurors had observed defendant in custody and whether she had discussed her observation with other jurors. The trial court then dismissed the juror who had observed defendant but did not conduct an inquiry of the remaining jurors, having been satisfied that no other jurors had seen defendant in custody and that this juror had not discussed the matter with the other jurors. Because the trial court promptly conducted an inquiry into the matter, any prejudice to defendant was cured by the dismissal of this juror. We hold that the trial court did not abuse its discretion in denying defendant’s motion for mistrial.

**[3]** In his next assignment of error, defendant contends the trial court’s instruction to the jury on flight was improper and unduly prejudicial. Defendant contends that the evidence does not demonstrate that he attempted to avoid apprehension. Our Supreme Court has held that:

in order to justify an instruction on flight there must be some evidence in the record reasonably supporting the theory that the defendant fled after the commission of the crime charged. Mere evidence that the defendant left the scene of the crime is not



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enough to support an instruction on flight. There must also be evidence that the defendant took steps to avoid apprehension.

*State v. Fisher*, 336 N.C. 684, 706, 445 S.E.2d 866, 878 (1994) (citation omitted).

Here, Trooper King described defendant's actions after the vehicle crashed. In its flight instruction, the trial court explained to the jury that:

[i]f you find from the evidence that the defendant did so flee, such evidence of flight may be considered by you together with all other facts and circumstances in this case in determining whether the combined circumstances amount to an admission or show a consciousness of guilt. However, proof of this circumstance is *not sufficient in itself to establish the defendant's guilt.*

(emphasis added). We find sufficient evidence in the record that defendant fled after crashing the vehicle in an attempt to avoid apprehension by Trooper King which supports the trial court's instruction. Further, we conclude that the trial court's explanation to the jury that defendant's flight alone was not sufficient evidence to establish guilt corrected any potential prejudice which could have resulted from the instruction. Therefore, we find no error in the trial court's flight instruction.

**[4]** Defendant further argues the trial court erred in denying his request for an instruction on duress. "A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence." *State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (citation omitted), *appeal dismissed and disc. rev. denied*, 354 N.C. 72, 553 S.E.2d 206 (2001). A defendant is not entitled to a duress instruction if he fails to present evidence that his conduct resulted from a reasonable fear that he would "suffer immediate death or serious bodily injury if he did not so act." *Id.* (citation omitted). Moreover, a duress instruction is improper if the defendant "had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm." *State v. Kearns*, 27 N.C. App. 354, 357, 219 S.E.2d 228, 231 (1975), *disc. rev. denied*, 289 N.C. 300, 222 S.E.2d 700 (1976).

At trial, defendant argued that the following evidence supports a duress instruction: (1) the Durham Police Department was attempting to apprehend Watson on warrants for armed robbery, (2) police searched the scene for a weapon, (3) Watson stated that he told

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defendant not to stop the vehicle and to drive him to the “projects” and (4) defendant stated that Watson threatened him with a gun and forced him to drive the vehicle. However, defendant failed to present evidence that he was in fear of immediate death or serious bodily injury. Moreover, evidence produced at trial shows that Watson never threatened or forced defendant to drive the vehicle but that defendant was driving of his own will. Further, defendant had the opportunity to exit the vehicle when he briefly stopped before getting onto the Durham Freeway. Based on the lack of evidence that defendant’s conduct resulted from his fear of immediate death or serious bodily injury, we hold that the trial court properly denied defendant’s request for a duress instruction.

We have carefully reviewed defendant’s remaining assignments of error and find them to be without merit.

No error.

Judges McCULLOUGH and CAMPBELL concur.

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SANDRA S. HUNTLEY, PLAINTIFF-APPELLANT v. HOWARD LISK COMPANY, INC.,  
DEFENDANT-APPELLEE

No. COA02-75

(Filed 17 December 2002)

**1. Workers’ Compensation— fall during job interview—subject matter jurisdiction**

The courts rather than the Industrial Commission had jurisdiction over a case involving a fall during a job interview because the Workers’ Compensation Act applies only when an employer-employee relationship exists. This plaintiff was on defendant’s premises to take a driving test that was part of the application process; there was no promise of employment or agreement between the parties.

**2. Negligence— duty of care—handholds on truck cab**

Defendant did not owe plaintiff a duty of care where plaintiff, an experienced truck driver applying for a job with defendant, fell when she reached for an exterior handle which did not exist on

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that model truck. The existence of handholds represented an open and safe condition which should have been apparent to someone exercising the proper level of care; rather than exercise ordinary care, plaintiff assumed that handholds existed on the outside of the cab.

Appeal by plaintiff from order entered 17 October 2001 by Judge Sanford L. Steelman, Jr., in Stanly County Superior Court. Heard in the Court of Appeals 29 October 2002.

*Egerton & Associates, PA, by Lawrence Egerton, Jr., for plaintiff-appellant.*

*Templeton & Raynor, PA, by Kenneth R. Raynor, for defendant-appellee.*

BRYANT, Judge.

Plaintiff, Sandra S. Huntley, appeals from the trial court's order granting defendant's motion for summary judgment.

Plaintiff had two years experience driving tractor-trailers manufactured by Freightliner, International, Volvo and Peterbilt when she applied for a position as a driver for defendant, Howard Lisk Company. On 10 May 2000, defendant asked plaintiff to take a road test. Before taking the test, defendant's safety director requested that plaintiff make a pre-trip inspection of a Freightliner eighteen-wheel tractor-trailer. Plaintiff asked for gloves to use during the inspection, and the director informed her that there were gloves in the cab of the truck. Plaintiff climbed into the driver's side of the truck cab using a handle on the outside of the driver's side door.

For the safety of the driver, tractor-trailers have handholds (a.k.a. "grab rails" or "safety bars") either on the outside or inside of the cab. The tractor-trailer plaintiff was to inspect had handholds on the inside of the cab, to the right of doorway. After retrieving the gloves, plaintiff attempted to exit the vehicle. Plaintiff, who had never driven a tractor-trailer without an outside handhold, descended the cab and reached out for an outside handhold as she was accustomed. Because there were no outside handholds on the tractor-trailer, plaintiff lost her balance and fell five feet to the ground, breaking her leg in three places.

On 27 November 2000, plaintiff filed a complaint alleging that defendant was negligent in failing to, among other things, inform her

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that the tractor-trailer did not have outside handholds. Defendant answered, denying its negligence and asserting that plaintiff was contributorily negligent. Defendant subsequently filed a motion for summary judgment, which was granted by the trial court in a 17 October 2001 order. Plaintiff now appeals.

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Plaintiff presents two questions for review: I) whether the injury she sustained during the preliminary employment inspection is compensable under the Workers' Compensation Act such that this Court lacks subject matter jurisdiction; and II) whether the trial court erred in granting defendant's motion for summary judgment.<sup>1</sup>

**I. Subject Matter Jurisdiction**

**[1]** By her first assignment of error, plaintiff contends that this Court lacks subject matter jurisdiction because plaintiff is deemed an employee under North Carolina's Workers' Compensation Act, and therefore, the North Carolina Industrial Commission, not the trial court, has exclusive original jurisdiction over plaintiff's claim. *See Nationwide Mut. Ins. Co. v. American Mutual Liability Ins. Co.*, 89 N.C. App. 299, 301-02, 365 S.E.2d 677, 679 (1988) (noting that Industrial Commission has original exclusive jurisdiction over Workers' Compensation claims). We disagree.

Plaintiff raises the issue of subject matter jurisdiction for the first time on appeal. Although our Rules of Appellate Procedure require an appellant to list assignments of error in the record on appeal, N.C.R. App. P. 10(c)(1), the issue of subject matter jurisdiction may be raised at any time, even on appeal. *McAllister v. Cone Mills Corp.*, 88 N.C. App. 577, 579, 364 S.E.2d 186, 188 (1988). Therefore, we must address the question of whether an interviewee performing a preemployment test is deemed an employee, such that she is subject to the Workers' Compensation Act. Our review of the relevant case law reveals that this is an issue of first impression in North Carolina. Plaintiff argues that we should adopt the holding of the West Virginia Supreme Court in *Dodson v. Workers' Compensation Div.*, 558 S.E.2d 635 (W. Va. 2001). The *Dodson* court found that an injury sustained during a pre-employment physical test was compensable under West Virginia's workers' compensation laws. *Id.* at 640-43. Although we find *Dodson* instructive, its relevant facts are distinguishable from, and therefore inapplicable to, the present case.

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1. Plaintiff raises two additional assignments of error on appeal. However, because plaintiff presents no argument in her brief concerning these alleged errors, we consider them abandoned. *See* N.C.R. App. P. 28 (b)(6).

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The *Dodson* court first distinguished between jurisdictions addressing the issue of whether preemployment injuries are compensable under workers' compensation laws. *Id.* at 642-43. The jurisdictions fall into two categories. Jurisdictions which generally find that preemployment injuries are not covered do so based on the nonexistence of an employment agreement or promise of employment between employer and employee at the time of the injury. *Id.* at 641. These courts find that the potential employee is taking the pre-employment test for her own benefit in seeking employment and not that of the potential employer. *Id.*

Jurisdictions which find that preemployment injuries are covered do not "mandate" the existence of an employer-employee relationship. *Id.* at 642. Rather, "[t]hese jurisdictions [] rely on the service aspect of the employer-employee relationship under the workers' compensation laws to conclude that preemployment tests requiring the performance of special skills which benefit the employer as well as the applicant qualify for workers' compensation coverage." *Id.* (citation omitted). Furthermore, the second category of courts focuses on the situs of the test, usually on the employer's premises, and who was in control of the test, again, normally the employer. *Id.*

The *Dodson* court found that while the above-cited approaches were necessary to its discussion, neither embraced the intersection of the facts before it and West Virginia law, which required that a contract for employment must exist for an employer-employee relation to attach. *Id.* The court concluded that the injury in *Dodson* was compensable under West Virginia workers' compensation laws because the *Dodson* employer had already extended an offer of employment to the plaintiff and that offer was conditioned on her completion of the test. *Id.* at 643.

Our review of relevant case and statutory law reveals that in North Carolina, the existence of an employment agreement is essential for the formation of an employer-employee relationship. It is well-established that our Workers' Compensation Act [the Act], N.C.G.S. §§ 97-1 to -200 (2001), applies only when an employer-employee relationship exists. *Hicks v. Guilford County*, 267 N.C. 364, 365, 148 S.E.2d 240, 242 (1966). The Act defines "employee" as:

every person engaged in an employment *under any appointment or contract of hire* or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment

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is both casual and not in the course of the trade, business, profession, or occupation of his employer . . . .

N.C.G.S. § 97-2(2) (2001) (emphasis added). Our Supreme Court has stated that two questions are critical to determining whether an employer-employee relationship exists: “(1) *What are the terms of the agreement—that is, what was the contract between the parties*; and (2) what relationship between the parties was created by the contract—was it that of master and servant or that of employer and independent contractor?” *Askew v. Leonard Tire Co.*, 264 N.C. 168, 172, 141 S.E.2d 280, 283 (1965) (emphasis added).

We find no evidence in the present record indicating that there was an employment contract between plaintiff and defendant. Plaintiff was on defendant’s premises to take a driving test that was simply part of the job application process. There was no agreement, written or oral, between the parties, or, for that matter, a promise of employment conditioned upon the preemployment inspection. Furthermore, plaintiff had no right to demand payment for the inspection. Allowing plaintiff to seek benefits under the Act would be akin to allowing *every person* who is injured in the course of a job interview to seek benefits. This is clearly not the purpose of the Act.

Because an employer-employee relationship did not exist between the parties in the case *sub judice*, plaintiff’s injury is not compensable under the Act. Therefore, the North Carolina courts of general jurisdiction, not the Industrial Commission, have subject matter jurisdiction over the present case. This assignment of error is accordingly overruled.

## II. Summary Judgment

[2] Summary judgment is appropriate only “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.R. Civ. P. 56(c). “The movant must clearly demonstrate the lack of any triable issue of fact and entitlement to judgment as a matter of law.” *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220, 513 S.E.2d 320, 324 (1999) (citation omitted). In ruling on a motion for summary judgment, the evidence of record must be considered in the light most favorable to the party opposing the motion. *Id.* “[A]ll inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the

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party opposing the motion.' ” *Id.* at 220, 513 S.E.2d at 325 (alteration in original) (citation omitted).

Plaintiff argues that defendant was negligent in failing to warn her that the tractor-trailer had handholds only on the inside of the cab. “Actionable negligence presupposes the existence of a legal relationship between parties by which the injured party is owed a duty by the other, and such duty must be imposed by law.” *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 897 (1955) (citation omitted). Therefore, our determination of whether defendant owed a duty of care to plaintiff under the existing circumstances is critical to the disposition of this appeal.

Whether defendant owes plaintiff a duty of care is a question of law. *Id.* Generally, owners and occupiers of land owe a duty of reasonable care toward all lawful visitors. *Nelson v. Freeland*, 349 N.C. 615, 617-18, 507 S.E.2d 882, 883-84 (1998). However, there is no duty to warn “against dangers either known or so obvious and apparent that they reasonably may be expected to be discovered” by a person exercising ordinary care. *Von Viczay v. Thoms*, 140 N.C. App. 737, 739, 538 S.E.2d 629, 631 (2000) (citations omitted), *affirmed*, 353 N.C. 445, 545 S.E.2d 210 (2001).

Our review of the evidence reveals that defendant did not owe plaintiff a duty of care. The existence of handholds inside the cab, as well as the lack of similar devices on the outside, represented an open and safe condition which should have been apparent to someone exercising the proper level of care. Plaintiff testified during her deposition that there was nothing obstructing her view or preventing her from seeing that there were no handholds on the outside of the cab. Rather than exercise ordinary care, plaintiff chose to ignore the obvious condition and just assumed that handholds existed on the outside of the cab. Given this and other relevant evidence, we find that defendant clearly did not owe plaintiff a duty of care. As no duty of care existed, the alleged negligence is not actionable as a matter of law. The trial court was therefore correct in granting defendant’s motion for summary judgment. Because no actionable negligence existed on the part of defendant, we need not address defendant’s contention that plaintiff was contributorily negligent.

For the reasons stated above, we affirm the 17 October 2001 order of the trial court.

## VOELSKE v. MID-SOUTH INS. CO.

[154 N.C. App. 704 (2002)]

AFFIRMED.

Judges GREENE and MARTIN concur.

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BRIAN VOELSKE, JOHN VOELSKE AND JUDY VOELSKE, PLAINTIFFS V. MID-SOUTH  
INSURANCE COMPANY, DEFENDANT

No. COA02-188

(Filed 17 December 2002)

**Pensions and Retirement— employee health insurance plan—  
applicability of ERISA—preemption of state claims**

An insurer' agreement with a business owner to provide health care insurance to employees who elected coverage was an "employee welfare benefit plan" governed by ERISA, and ERISA preempted claims against the insurer for unfair claims handling under N.C.G.S. § 58-63-15, where the owner paid the premiums for employees who elected coverage under the plan. Furthermore, the business owner was a participant in the plan where he was also an employee of the business and was listed on the certificate of insurance as an employee.

Appeal by plaintiffs from an order granting summary judgment entered 13 April 2000 by Judge Richard L. Doughton in Iredell County Superior Court. Heard in the Court of Appeals 17 October 2002.

*Jerry M. Smith for plaintiffs-appellants.*

*Teague, Campbell, Dennis & Gorham, L.L.P., by Melissa R. Garrell, for defendant-appellee.*

WALKER, Judge.

Plaintiff John Voelske (Mr. Voelske) is the majority owner and president of his family business, Voelske Foreign Car Service, Inc. On 17 November 1994, Mr. Voelske executed a Health Care Plan Participation Agreement (the subject plan) with defendant Mid-South Insurance Company (defendant). The subject plan provided health care insurance to eligible employees and their dependents who elected coverage. An insurance certificate summarizing the subject plan listed Voelske Foreign Car Service as the employer, Mr. Voelske



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as the employee, and Mr. Voelske's wife, Judy Voelske (Mrs. Voelske), as the beneficiary. The certificate did not mention any other employees or persons eligible for the plan.

In his deposition, Mr. Voelske stated that he originally applied for a plan with defendant because his family needed health insurance coverage and that defendant suggested he sign up for the subject plan since his employees also could be included in the coverage. Mr. Voelske further stated that Voelske Foreign Car Service had three employees at the time the subject plan became effective, namely his son Michael Voelske (Michael), Randall Perry and Jane Johnson. All three of these persons had health insurance with another company prior to his obtaining the subject plan. Mr. Voelske also stated that these employees could elect coverage under the subject plan and Voelske Foreign Car Service paid the premiums in full for the eligible employees who elected coverage.

In her affidavit, Mrs. Voelske stated that she was "responsible for maintaining employment and other business records for Voelske Foreign Car Service" and that the business had only two employees when they applied for the subject plan, namely Mr. Voelske and their son Michael, who then lived with his parents.

Brian Voelske (Brian), Mr. and Mrs. Voelske's minor son who lived in his parents' home, suffered a severe brain injury in February 1994 requiring significant medical care. Although Brian was covered under the subject plan, plaintiffs alleged that defendant failed to make payment on claims filed on Brian's behalf.

On 2 June 1998, plaintiffs sued defendant for unfair insurance claims handling under N.C. Gen. Stat. § 58-63-15 (2001), unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1 (2001), fraud and breach of contract. Defendant moved to dismiss plaintiffs' claims under N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2001) for failure to state a claim upon which relief may be granted, and the trial court denied the motion. Following discovery, defendant moved for summary judgment pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 (2001) on the grounds that the pleadings and evidence demonstrated that there were no genuine issues of material fact. Therefore, defendant was entitled to judgment as a matter of law on the issue of the applicability of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001, *et seq.* (2002), to the subject plan and ERISA's preemption of plaintiffs' claims. The trial court granted defendant's summary

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judgment motion on the issue of applicability of ERISA and dismissed plaintiffs' claims.

In their sole assignment of error, plaintiffs contend the trial court erred in granting defendant's summary judgment motion on plaintiffs' claims. Plaintiffs argue that there are genuine issues of material fact regarding whether the subject plan is governed by ERISA and whether Mr. Voelske is an employee "participant" under the ERISA definition.

We first note that 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). The moving party bears the burden of demonstrating the lack of triable issues of fact. *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972). Once the movant satisfies its burden of proof, the burden then shifts to the non-movant to present specific facts showing triable issues of material fact. *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982). On appeal from summary judgment, "[w]e review the record in the light most favorable to the non-moving party." *Bradley v. Hidden Valley Transp., Inc.*, 148 N.C. App. 163, 165, 557 S.E.2d 610, 612 (2001) (citing *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975)), *aff'd*, 355 N.C. 485, 562 S.E.2d 422 (2002).

For plaintiffs' claims to be preempted by ERISA, the subject plan must meet the definition of an "employee welfare benefit plan" set forth in 29 U.S.C. § 1002:

[A]ny plan, fund, or program which was . . . established or maintained by an employer . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, . . .

29 U.S.C. § 1002(1). ERISA preempts all state law claims that "relate to any employee benefit plan. . . ." 29 U.S.C. § 1144(a).

This Court has outlined the requirements for a health insurance plan to qualify as an employee benefit plan under ERISA: "'(1) a con-

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tractual arrangement between the employer and the insurance company for the provision of insurance to the employer's employees; (2) an eligibility requirement of being an employee . . . ; (3) the employer's contribution of some [or] all of the insurance premiums on behalf of its employees.' " *Freeman v. Blue Cross and Blue Shield of North Carolina*, 123 N.C. App. 260, 263, 472 S.E.2d 595, 597 (citation omitted), *disc. rev. denied*, 344 N.C. 630, 477 S.E.2d 39 (1996).

Here, there is undisputed evidence that an agreement was reached between Voelske Foreign Car Service and defendant to provide insurance for the employees of Voelske Foreign Car Service if the employees elect such coverage. In her affidavit, Mrs. Voelske admitted that Voelske Foreign Car Service had two employees at the time the business obtained the subject plan. Also, Mr. Voelske stated in his deposition that he had three employees, in addition to himself, who could elect coverage under the subject plan. Further, it is undisputed that Voelske Foreign Car Service, noted as the "employer" on the certificate of insurance, paid in full the premiums for the employees electing coverage under the subject plan. Thus, under this Court's analysis in *Freeman*, the subject plan is an employee benefit plan governed by ERISA.

Plaintiffs argue that because no employee of Voelske Foreign Car Service satisfies the ERISA definition of a "participant," the subject plan is not governed by ERISA. ERISA defines "participant" as "any employee or former employee of an employer, . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. § 1002(7).

To support their contention that Mr. Voelske is not an employee of Voelske Foreign Car Service and, therefore, is not a plan participant, plaintiffs rely in part on the following United States Department of Labor regulation: "[a]n individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated, which is wholly owned by the individual or by the individual and his or her spouse." 29 C.F.R. § 2510.3-3(c)(1) (2002). The Fourth Circuit Court of Appeals has held that although this regulation clarifies whether a plan is covered by ERISA, it "does not govern the issue of whether someone is a 'participant' in an ERISA plan, once the existence of that plan has been established." *Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444, 449-50 (4th Cir. 1993), *cert. denied*,

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511 U.S. 1019, 128 L. Ed. 2d 74 (1994). Further, the *Madonia* Court held that “a sole shareholder employed by the corporation and insured under the health policy provided by the corporation is a ‘participant’ in the company’s ERISA plan.” *Id.* at 445.

Because it has been established that the subject plan meets the definition of an employee benefit plan under ERISA, the Department of Labor regulation is inapplicable to a determination of whether Mr. Voelske is a participant in the subject plan, even though he is the majority owner of the business. We find instructive the *Madonia* Court’s decision holding that a business owner, who is also employed by that business, is an employee for purposes of the definition of “participant” under ERISA. Moreover, the certificate of insurance here lists Mr. Voelske as an employee for purposes of the subject plan. Therefore, Mr. Voelske is an employee and a “participant” under the ERISA definition.

Plaintiffs also contend that Michael Voelske was not eligible to participate in the subject plan as an employee. They point to the certificate of insurance definitions which limit employee eligibility to those full-time employees who regularly work at least 30 hours each week. (R18) Both Mr. Voelske’s deposition and Mrs. Voelske’s affidavit state that Michael was an employee of Voelske Foreign Car Service, and Mr. Voelske, in his deposition, indicated that Michael was included in the subject plan. There is no evidence in the record that Michael worked less than 30 hours per week or that he was not a full-time employee. Therefore, defendant satisfied its burden, and the burden of demonstrating a triable issue of fact on the question of Michael’s eligibility as an employee participant under the subject plan shifted to plaintiffs, who failed to produce evidence necessary to defeat summary judgment in favor of defendant.

Plaintiffs finally contend that their claim for unfair insurance claims handling practices should not be preempted by ERISA due to the “savings clause,” which provides that “nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, . . .” 29 U.S.C. § 1144(b)(2)(A). This Court recently held that a claim under N.C. Gen. Stat. § 58-63-15 for unfair claims handling practices is not protected by the ERISA savings clause, even though the statute was enacted to regulate the insurance industry. *Middleton v. Russell Group Ltd.*, 126 N.C. App. 1, 483 S.E.2d 727, *disc. rev. denied*, 346 N.C. 548, 488 S.E.2d 805 (1997), *appeal after remand on other grounds*, 132 N.C. App. 792, 514 S.E.2d 94 (1999). In holding that the state statutory claim was pre-

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[154 N.C. App. 709 (2002)]

empted, this Court reasoned “the law is well-settled that a state cause of action for improper claim processing or administration filed against an insurer does ‘not bear upon the “business of insurance” within contemplation of ERISA’s insurance savings clause and thus is not saved from pre-emption by ERISA.’ ” *Id.* at 28, 483 S.E.2d at 743. Therefore, in accordance with the ERISA preemption provision and this Court’s decision in *Middleton*, plaintiffs’ claim under N.C. Gen. Stat. § 58-63-15 for unfair insurance claims handling is preempted by ERISA.

We conclude that defendant satisfied its burden of demonstrating the lack of issues of fact. Further, we conclude that plaintiffs failed to come forward with evidence that the subject plan was not governed by ERISA. Thus, we hold that the trial court properly granted defendant’s summary judgment motion.

*Affirmed.*

Judges McCULLOUGH and CAMPBELL concur.

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ANGELA G. WILLIAMS, PLAINTIFF V. WAYNE E. POLAND AND NASH-ROCKY MOUNT  
BOARD OF EDUCATION, DEFENDANTS

No. COA02-353

(Filed 17 December 2002)

**1. Appeal and Error— appealability—interlocutory order— writ of certiorari**

Assuming arguendo that this appeal from the grant of plaintiff’s motion for voluntary dismissal without prejudice is an appeal from an interlocutory order, the Court of Appeals elects to consider the appeal by granting appellant’s petition for writ of certiorari under N.C. R. App. P. 21(a)(1).

**2. Civil Procedure— Rule 41(a) motion to dismiss without prejudice—Rule 12(b)(6) motion to dismiss**

The trial court did not err in an action arising out of an automobile accident by granting plaintiff’s motion to dismiss without prejudice under N.C.G.S. § 1A-1, Rule 41(a), because defendants’ N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss was not a

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request for affirmative relief that cancelled plaintiff's ability to voluntarily dismiss her case without prejudice.

Judge GREENE concurring in a separate opinion.

Appeal by defendants from order entered 3 October 2001 by Judge Quentin T. Sumner in Nash County Superior Court. Heard in the Court of Appeals 12 November 2002.

*Kellum Law Firm, by Douglas B. Johnson, for plaintiff-appellee.*

*Valentine, Adams & Lamar, L.L.P., by L. Wardlaw Lamar and Lewis W. Lamar, Jr., for defendant-appellants.*

EAGLES, Chief Judge.

Wayne E. Poland and the Nash-Rocky Mount Board of Education ("defendants") appeal from an order allowing Angela G. Williams ("plaintiff") to take a voluntary dismissal of her case against defendants without prejudice.

The evidence tends to show the following. Plaintiff was involved in an automobile collision with defendant Poland on 25 April 2000. Poland was an employee of the Nash-Rocky Mount Board of Education ("Board"). Plaintiff alleges that Poland was acting within the scope of his employment when he negligently caused the collision that resulted in injuries to plaintiff. Plaintiff contends that defendant Poland failed to stop his vehicle despite a steady red traffic light in Poland's direction. G.S. § 20-158(b)(2) (2001). As a result of the collision, plaintiff was injured and her car was damaged.

Plaintiff's complaint was served on both defendants on 6 June 2001. Defendants' answer was filed on 29 June 2001. The answer contained three pre-answer motions to dismiss as a result of lack of subject matter jurisdiction, lack of jurisdiction over the person, and failure to state a claim upon which relief can be granted. G.S. § 1A-1, Rule 12(b)(1), (b)(2), and (b)(6) (2001). Additionally, defendants' answer pled the defenses of governmental immunity and contributory negligence by plaintiff. Defendants then amended their pre-answer motions to move for dismissal as a result of lack of subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim upon which relief can be granted, based upon defendants' claim of governmental immunity. Plaintiff requested a hearing on her motion to amend the complaint as a result of defendants' amended motions

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to dismiss. The trial court dismissed plaintiff's case with prejudice before hearing plaintiff's motion to amend and defendants' motion to dismiss. Plaintiff requested a dismissal without prejudice but the trial court denied that request.

Plaintiff moved for relief pursuant to G.S. § 1A-1, Rule 60. The trial court reversed its previous order of dismissal with prejudice and granted plaintiff's motion for voluntary dismissal without prejudice. From this order, defendants appeal. After careful review of the record and briefs, we affirm.

**[1]** An interlocutory order is defined as "one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). "An appeal does not lie . . . from an interlocutory order of the Superior Court, unless such order affects some substantial right claimed by the appellant and will work an injury to him if not corrected before an appeal from the final judgment." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381. Assuming, *arguendo*, that the case here is an interlocutory appeal, we elect to consider the appeal by granting appellant's petition for writ of certiorari according to N.C.R. App. P. 21(a)(1). *See* N.C.R. App. P. 21 (a)(1). ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review . . . when no right of appeal from an interlocutory order exists.")

**[2]** Defendants contend that the trial court committed reversible error by allowing the plaintiff to enter a voluntary dismissal without prejudice. We disagree.

Rule 41(a) of the North Carolina Rules of Civil Procedure allows a plaintiff to voluntarily dismiss her own lawsuit without prejudice. G.S. § 1A-1, Rule 41(a) (2001). Our Supreme Court held that the only limitations on use of the voluntary dismissal are "that the dismissal not be done in bad faith and that it be done prior to a trial court's ruling dismissing plaintiff's claim or otherwise ruling against the party at any time prior to plaintiff resting his or her case." *Brisson v. Santoriello*, 351 N.C. 589, 597, 528 S.E.2d 568, 573 (2000). In addition, "a plaintiff may not dismiss his action by filing Notice of Dismissal if to do so would defeat the rights of a defendant who has theretofore asserted some ground for affirmative relief." *McCarley v. McCarley*, 24 N.C. App. 373, 376, 210 S.E.2d 531, 533 (1975), *modified on other grounds*, 289 N.C. 109, 221 S.E.2d 490 (1976).

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Defendants contend that their assertion of a Rule 12(b)(6) motion constitutes a ground for affirmative relief that prevents plaintiff from entering a voluntary dismissal without prejudice. We disagree. A request for affirmative relief has been defined by this Court as “relief for which defendant might maintain an action independently of plaintiff’s claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it.” *Kohn v. Mug-A-Bug*, 94 N.C. App. 594, 596, 380 S.E.2d 548, 550 (1989), *overruled on other grounds*, *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992). Here, the Rule 12(b)(6) motion to dismiss by defendants cannot survive independently without the plaintiff’s underlying claim. Therefore, the Rule 12(b)(6) motion to dismiss is not a request for affirmative relief that cancels plaintiff’s ability to voluntarily dismiss her case without prejudice. This assignment of error is overruled.

We hold that the trial court properly granted plaintiff’s motion for dismissal without prejudice. In addition, we deny defendants’ motion for extension of time to file the settled record on appeal. We also deny plaintiff’s motion to dismiss defendants’ appeal as interlocutory.

Affirmed.

Judge MARTIN concurs.

Judge GREENE concurs with separate opinion.

GREENE, Judge, concurring.

I agree with the majority as to merits of defendants’ appeal. I write separately, however, to point out that defendants did not appeal from an interlocutory order and, therefore, a writ of certiorari is not necessary to hear this appeal.

As stated by the majority, “[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.” *Veazey v. Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950); *see also Blackwelder v. Dept. of Hum. Res.*, 60 N.C. App. 331, 333, 299 S.E.2d 777, 779 (1983) (a ruling is interlocutory if it “directs some further proceeding preliminary to final decree”). When a case is dismissed, with or without prejudice, no further action is required of the trial court in order to settle or determine the controversy between the parties. *See Ward v. Taylor*,



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68 N.C. App. 74, 78, 314 S.E.2d 814, 818 (1984) (“[i]t is well established that where [the] plaintiff takes a voluntary dismissal pursuant to G.S. 1A-1, Rule 41(a)(1), no suit is pending thereafter on which the court could make a final order”); *Collins v. Collins*, 18 N.C. App. 45, 50, 196 S.E.2d 282, 286 (1973) (the plaintiff’s voluntary dismissal of a prior action “was a final termination of that action and . . . no valid order could be made thereafter in that cause”). Accordingly, the trial court’s order dismissing plaintiff’s case without prejudice is not interlocutory and defendants have a right to appeal from this order. *See Miller v. Ferree*, 84 N.C. App. 135, 136, 351 S.E.2d 845, 847 (1987) (holding appeal from an order dismissing action without prejudice was properly before this Court).

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STATE OF NORTH CAROLINA v. JAMES CLAYTON CORBETT

No. COA02-35

(Filed 17 December 2002)

**1. Sexual Offenses— constructive force—parental relationship**

There was sufficient evidence of constructive force in a second-degree sexual offense conviction where the victim was defendant’s step-daughter; the abuse in question began when she was twelve and continued until she was sixteen; and the victim testified that defendant acted like her father, disciplined her, and that she treated him as her father. Constructive force may be inferred from the circumstances surrounding the parental relationship.

**2. Sexual Offenses— prosecutor’s argument—constructive force**

In light of the evidence, there was no reasonable possibility of a different result in a second-degree sexual offense prosecution without the prosecutor’s closing argument that it was force if the defendant just said “I’m your daddy.”

**3. Sentencing— aggravating factors—abuse of trust—used to prove element of sexual offense**

The trial court erred in a second-degree sexual offense prosecution by finding as an aggravating factor that defendant took advantage of a position of trust after the State used the same evi-

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dence (circumstances surrounding the parental relationship) to prove the element of force.

Appeal by defendant from judgment entered 22 March 2001 by Judge Paul L. Jones in Wayne County Superior Court. Heard in the Court of Appeals 10 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Sarah Ann Lannom, for the State.*

*Barnes, Braswell & Haithcock, P.A., by Glenn A. Barfield, for defendant-appellant.*

CAMPBELL, Judge.

Defendant was convicted by a jury of second degree sexual offense and five other charges on 22 March 2001. Regarding the second degree sexual offense conviction the court found as an aggravating factor that defendant “took advantage of a position of trust” and as mitigating factors that “the defendant has been a person of good character or has a good reputation in the community in which the defendant lives,” and “the defendant supports the defendant’s family, the defendant has a support system in the community, he has a positive employment history.” The court found that the “factors in aggravation outweigh the factors in mitigation” and sentenced defendant to thirty years. The remaining convictions are not appealed.

The conviction for second degree sexual offense was for offenses against defendant’s stepdaughter, Jodi Coor West (“Jodi”), from on or about 12 December 1983, when Jodi was twelve, up to and including 11 December 1987, just before Jodi turned sixteen. The evidence tended to show that Jodi was born 12 December 1971 and lived with defendant from the age of five or six until she was twenty-four.

Jodi testified defendant “would come into my bedroom and he would get in the bed and he would begin fondling me. . . . [H]e inserted his fingers into my vagina with penetration.” He would fondle her bare breast and the penetration “was very uncomfortable.” Jodi testified that she didn’t know it was wrong, just “knew it was uncomfortable, but I mean I was only a young child and he was supposed to be my father figure.” Jodi further testified defendant “said let’s kiss like boyfriend and girlfriend” and “would insert his tongue into my mouth.” Jodi explained that defendant also would fondle her breasts, “I’d be washing dishes or vacuuming or doing different things

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and he'd come up behind me, run his hand up my shirt with or without a bra on, and if I had a bra on he'd push it up. . . . It seemed like an eternity but I'm sure it was just several minutes and he would kiss on my neck." Jodi elaborated that the fondling "was a lot more common occurrence than the penetration. He would get us<sup>1</sup>—get me on the couch or if I'd be sitting there he'd come up and sit beside me and do that also." Other than the penetration, Jodi testified defendant also would pinch at her vagina through her clothes.

During this time, Jodi testified, defendant acted as a father, and she treated him as such. When asked why she didn't know it was wrong, Jodi explained "I knew—I felt that it was wrong, but whenever he tells you that it's okay because he is your father figure and you're only a young child, I mean, what are you supposed to believe?"

Corroborating Jodi's testimony was the testimony of Sergeant Ronald Baker of the Wayne County Sheriff's Department, Jodi's husband, great-uncle, great-aunt, and sister, all of whom testified regarding prior consistent statements Jodi made detailing the abuse. Defendant testified that he never sexually abused Jodi. Three people testified to defendant's good character.

Defendant asserts the trial court erred by: (I) failing to dismiss for insufficient evidence charge one, of second degree forcible sexual offense; (II) overruling defendant's objection to the State's closing argument; (III) finding as an aggravating factor that defendant "took advantage of a position of trust."

## I. Motion to Dismiss Charge One

**[1]** To review a motion to dismiss for insufficient evidence, this Court asks "whether there is substantial evidence of each essential element of the offense charged and of the defendant being the perpetrator of the offense." *State v. Crawford*, 344 N.C. 65, 73, 472 S.E.2d 920, 925 (1996). "Substantial evidence is that which a reasonable juror would consider sufficient to support a conclusion that each essential element of the crime exists." *State v. Baldwin*, 141 N.C. App. 596, 604, 540 S.E.2d 815, 821 (2000). "In reviewing challenges to the sufficiency of evidence, the evidence must be viewed in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Payne*, 149 N.C. App. 421, 424, 561 S.E.2d 507, 509 (2002).

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1. Paula Corbett, defendant's biological daughter, was also a victim of defendant's abuse. For abuse of Paula, defendant was found guilty of indecent liberties with a child.

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The crime charged was second degree sexual offense. “A person is guilty of a sexual offense in the second degree if the person engages in a sexual act with another person: (1) [b]y force and against the will of the other person. . . . Any person who commits the offense defined in this section is guilty of a Class C felony.” N.C. Gen. Stat. § 14-27.5 (2001). “Sexual act means . . . the penetration, however slight, by any object into the genital . . . opening of another person’s body.” N.C. Gen. Stat. § 14-27.1(4) (2001).

Defendant asserts the State failed to prove the element of force. “The requisite force may be established either by actual, physical force or by constructive force in the form of fear, fright, or coercion.” *State v. Etheridge*, 319 N.C. 34, 45, 352 S.E.2d 673, 680 (1987). Usually, “[c]onstructive force is demonstrated by proof of threats or other actions by the defendant which compel the victim’s submission to sexual acts.” *Id.* The “[t]hreats need not be explicit so long as the totality of circumstances allows a reasonable inference that such compulsion was the unspoken purpose of the threat.” *Id.*

In the case of a parent-child relationship, however, “constructive force [may] be reasonably inferred from the circumstances surrounding the parent-child relationship.” *Id.*, 319 N.C. at 47, 352 S.E.2d at 681. “The youth and vulnerability of children, coupled with the power inherent in a parent’s position of authority, creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to effect the abuser’s purpose.” *Id.* “As one commentator observes, force can be understood in some contexts as the power one need not use. Estrich, *Rape*, 95 Yale L.J. 1087, 1115 (1986). In such cases the parent wields authority as another assailant might wield a weapon. The authority itself intimidates; the implicit threat to exercise it coerces.” *Id.*, 319 N.C. at 48, 352 S.E.2d at 682.

In *Etheridge* the element of force was implied from the circumstances surrounding the parent-child relationship, including: the fact that the victim was only eight years old when the abuse began, which “conditioned [the victim] to succumb to defendant’s illicit advances at an age when he could not yet fully comprehend the implications of defendant’s conduct;” and “[t]he [fact that the] incidents of abuse all occurred while the boy lived as an unemancipated minor in defendant’s household, subject to defendant’s parental authority and threats of disciplinary action.” *Id.*, 319 N.C. at 47-48, 352 S.E.2d at 681. In *State v. Hardy*, 104 N.C. App. 226, 232, 409 S.E.2d 96, 99 (1991), the

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Court found constructive force was inferred from the circumstances surrounding the parental relationship, including: “[t]he defendant, the victim’s step-father, began abusing the victim when she was only fifteen years old. Each episode of abuse occurred while the victim lived with the defendant as an unemancipated minor in the defendant’s trailer and subject to his parental authority.”

We now consider whether circumstances similar to *Etheridge* and *Hardy* are present in the case at bar. The abuse began when Jodi was approximately twelve years old. She testified, “I knew it was uncomfortable, but I mean I was only a young child” and “I felt that it was wrong, but whenever he tells you that it’s okay because he is your father figure and you’re only a young child, I mean, what are you supposed to believe?” Jodi further testified that defendant acted like her father, disciplined her, and that she treated him as her father. During the dates in question, Jodi was ages twelve through sixteen and was not emancipated and was subject to defendant’s parental authority. From the circumstances of the parental relationship, we find there is sufficient evidence from which a reasonable jury could conclude defendant used his position of power to force his stepdaughter to engage in sexual acts.

## II. Defendant’s objection to the State’s closing argument

**[2]** Defendant asserts the trial court erred in overruling his objection to the State’s closing argument in which the prosecutor said “[i]f [the defendant] just says ‘I’m your daddy’ that is force.” Without determining whether this statement was error, in light of the evidence discussed in section (I), we do not find a reasonable possibility exists that had this statement not been made a different result would have been reached by the jury. Therefore even assuming *arguendo* that there was error it was not prejudicial error.

## III. The aggravating factor

**[3]** Defendant asserts the trial court erred in finding as an aggravating factor that defendant “took advantage of a position of trust.” N.C. Gen. Stat. § 15A-1340.16(d)(15) (2001). “Evidence necessary to prove an element of the offense shall not be used to prove any factor in aggravation.” N.C. Gen. Stat. § 15A-1340.16(d) (2001). To prove the element of force, as discussed in section (I), the State used the evidence of the circumstances surrounding the parental relationship. This evidence is the same evidence used to prove that “defendant took advantage of a position of trust.” Therefore, the trial court erred

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in finding this aggravating factor and defendant must be re-sentenced without consideration of this element as an aggravating factor.

Affirmed in part, reversed in part, remanded for re-sentencing.

Judges TIMMONS-GOODSON and HUDSON concur.

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STATE OF NORTH CAROLINA v. LAWYER EDWARD GREGORY

No. COA02-278

(Filed 17 December 2002)

**1. Motor Vehicles— DWI—sufficiency of evidence—no intoxilyzer—no field sobriety test**

The failure of the State to present the results of intoxilyzer or field sobriety tests did not render the evidence insufficient for a DWI conviction where a deputy saw defendant make an abrupt lane change without signaling, speed, and jam on his brakes before stopping in the middle of traffic; the deputy noticed a strong odor of alcohol coming from the car and defendant had red, glassy eyes and slurred speech; defendant staggered when he walked to the patrol car and had to steady himself against his vehicle; defendant refused to submit to the intoxilyzer test; and both the deputy and the officer who attempted to give defendant an intoxilyzer test formed the opinion that defendant's faculties were appreciably impaired.

**2. Evidence— impeachment—prior DWI offenses**

The trial court properly denied a motion in limine to suppress prior DWI convictions. A careful reading of the applicable statutes indicates that a DWI conviction is a Class 1 misdemeanor and is admissible for impeachment purposes under N.C.G.S. § 8C-1, Rule 609(a).

Appeal by defendant from judgment entered 15 October 2001 by Judge Knox V. Jenkins, Jr. in Johnston County Superior Court. Heard in the Court of Appeals 14 November 2002.

## STATE v. GREGORY

[154 N.C. App. 718 (2002)]

*Attorney General Roy Cooper, by Special Deputy Attorney General Isaac T. Avery, III, for the State.*

*Samuel L. Bridges for defendant-appellant.*

WALKER, Judge.

Defendant was found guilty of habitual driving while impaired (DWI) and driving while license revoked (DWLR). He was sentenced to a minimum of 19 months and a maximum of 23 months for his habitual DWI conviction and to 120 days for the DWLR conviction. The trial court suspended defendant's DWLR sentence on the condition that he be placed on probation for 36 months with intensive probation for 6 months.

The State's evidence tended to show that in the early morning hours of 20 June 2001, Deputy Sheriff Brian Clifton of the Johnston County Sheriff's Department was on routine patrol traveling north on Brightleaf Boulevard in Smithfield when he observed a vehicle traveling in the same direction make an "abrupt" movement from the right lane into the left turn lane without signaling. Deputy Clifton pulled behind the vehicle and followed it as it made a left turn and accelerated to 50 miles per hour in a 25 mile-per-hour zone. After Deputy Clifton activated his siren and blue lights to initiate a stop, the vehicle "jammed on the brakes approximately three times, hard stops." The vehicle turned onto a side street and then stopped in the middle of the lane of traffic rather than pulling off the edge of the road.

Deputy Clifton testified that, as he approached the vehicle, the driver's side window was down, and he noticed a strong odor of alcohol coming from inside the vehicle. He also testified that after he determined defendant was the driver, he asked him if he had been drinking, and defendant responded "that he had a few beers about an hour ago." Deputy Clifton asked defendant if he had a driver's license, and defendant responded that he did not. Deputy Clifton then asked defendant to step back to the patrol car to determine the status of defendant's driver's license.

Deputy Clifton further testified that, as defendant began walking towards the patrol car, "[h]e staggered, [and] placed his left hand on the side of the van" to steady himself. When defendant got into the patrol car, Deputy Clifton noticed defendant had a strong odor of alcohol, red, glassy eyes and slurred speech. As Deputy Clifton administered two alco-sensor tests, he received a report that defend-

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ant's driver's license had been revoked. Deputy Clifton then informed defendant that he was going to be placed under arrest for DWI and DWLR and that the vehicle would be seized as a result of the incident. Deputy Clifton testified that, at this point, defendant became "belligerent" and "combative" and "didn't want to cooperate in any way." Deputy Clifton further testified that he did not request defendant to perform any field sobriety tests because he "didn't feel it was in his [defendant's] best interest . . . [since] it wouldn't be safe."

Deputy Clifton took defendant to the intoxilyzer room of the Smithfield Police Department, where Officer Greg Franklin began to read defendant his intoxilyzer rights. Deputy Clifton testified that defendant argued with Officer Franklin, cursed and became "very belligerent, uncooperative, [and] extremely combative . . . ." After Officer Franklin finished reading defendant his intoxilyzer rights, defendant refused to sign the intoxilyzer rights form or to submit to the intoxilyzer test.

Deputy Clifton read defendant his *Miranda* rights and asked him to answer questions for the alcohol incident report, but defendant refused. Deputy Clifton and Officer Franklin then took defendant to the magistrate to be charged.

At trial, Deputy Clifton testified that, in his opinion, defendant had consumed a sufficient quantity of an impairing substance to appreciably impair his mental and physical faculties. Officer Franklin similarly testified that, in his opinion, defendant was appreciably impaired based on his interaction with defendant in the intoxilyzer room.

**[1]** Defendant first contends the trial court erred in denying his motion to dismiss for insufficient evidence. Specifically, defendant argues that, because the State's evidence did not include an intoxilyzer test or any field sobriety tests, it failed to present sufficient objective evidence that he was appreciably impaired to sustain his conviction for DWI.

In ruling on a motion to dismiss for insufficient evidence, the trial court must determine whether substantial evidence of each element of the offense charged has been presented. *State v. Carr*, 122 N.C. App. 369, 470 S.E.2d 70 (1996). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 387 (1984) (citation omitted). The trial court must view all evi-



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dence in the light most favorable to the State and draw all reasonable inferences in the State's favor. *State v. Patterson*, 335 N.C. 437, 439 S.E.2d 578 (1994).

"A person commits the offense of habitual impaired driving if he drives while impaired as defined in G.S. 20-138.1 and has been convicted of three or more offenses involving impaired driving . . ." N.C. Gen. Stat. § 20-138.5(a) (2001). For a defendant to be guilty of driving while impaired under N.C. Gen. Stat. § 20-138.1 (2001), the State must prove "that defendant had ingested a sufficient quantity of an impairing substance to cause his faculties to be appreciably impaired." *State v. Phillips*, 127 N.C. App. 391, 393, 489 S.E.2d 890, 891 (1997) (citation omitted).

An intoxilyzer test and field sobriety tests are not required to establish a defendant's faculties as being appreciably impaired under N.C. Gen. Stat. § 20-138.1. *See, e.g., State v. Rich*, 351 N.C. 386, 527 S.E.2d 299 (2000). Further, "it is a well-settled rule that a lay person may give his opinion as to whether a person is intoxicated so long as that opinion is based on the witness's personal observation." *Rich, supra*, 351 N.C. at 398, 527 S.E.2d at 306 (*citing State v. Lindley*, 286 N.C. 255, 258, 210 S.E.2d 207, 209 (1974)). An officer's opinion that a defendant is appreciably impaired is competent testimony and admissible evidence when it is based on the officer's personal observation of an odor of alcohol and of faulty driving or other evidence of impairment. *Rich, supra; Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970); *State v. Hewitt*, 263 N.C. 759, 140 S.E.2d 241 (1965). The refusal to submit to an intoxilyzer test also is admissible as substantive evidence of guilt on a DWI charge. *State v. Pyatt*, 125 N.C. App. 147, 479 S.E.2d 218 (1997).

Here, Deputy Clifton testified that he observed defendant make an abrupt lane change without signaling, speed and "jam" on his brakes before stopping in the middle of a lane of traffic. He also testified that he noticed a strong odor of alcohol coming from defendant and that defendant had red, glassy eyes as well as slurred speech. Further, Deputy Clifton testified that defendant staggered when he walked to the patrol car and had to steady himself against his vehicle. Both Deputy Clifton and Officer Franklin testified that, in their opinions, defendant's faculties were appreciably impaired. Defendant also refused to submit to an intoxilyzer test after being read his intoxilyzer rights. Thus, based on this evidence of defendant's impairment, we hold the trial court did not err in denying defendant's motion to dismiss for insufficient evidence.

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[2] In his next assignment of error, defendant argues that the trial court erred in denying his *motion in limine* to suppress and bar the use of his prior DWI convictions. Defendant contends that N.C. Gen. Stat. § 8C-1, Rule 609 (2001) prohibits the use of prior DWI convictions for impeachment purposes when the convictions are “unclassified” misdemeanors.

We first note that Rule 609 permits impeachment by “evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor . . .” N.C. Gen. Stat. § 8C-1, Rule 609(a). The classification of a DWI conviction involves a review of applicable statutes. N.C. Gen. Stat. § 20-138.1(d) states that “[i]mpaired driving as defined in this section is a misdemeanor.” N.C. Gen. Stat. § 15A-1340.23(a) (2001) provides that “[i]f the offense is a misdemeanor for which there is no classification, it is as classified in G.S. 14-3.” The relevant portion of N.C. Gen. Stat. § 14-3 (2001) states that

[a]ny misdemeanor that has a specific punishment, but is not assigned a classification by the General Assembly pursuant to law is classified as follows, based on the maximum punishment allowed by law for the offense . . . (1) If that maximum punishment is more than six months imprisonment, it is a Class 1 misdemeanor . . .

N.C. Gen. Stat. § 14-3(a)(1). The maximum punishment permitted by statute for misdemeanor DWI is imprisonment for “a minimum term of not less than 30 days and a maximum term of not more than 24 months.” N.C. Gen. Stat. § 20-179(g) (2001). A careful reading of these statutes leads us to conclude that a DWI conviction is a Class 1 misdemeanor and, thus, is admissible for impeachment purposes under Rule 609(a). Therefore, we hold the trial court properly denied defendant’s *motion in limine* to suppress his prior DWI convictions.

We have carefully reviewed defendant’s remaining assignment of error and find it to be without merit.

No error.

Judges McCULLOUGH and TYSON concur.

**MAROLF CONSTR., INC. v. ALLEN'S PAVING CO.**

[154 N.C. App. 723 (2002)]

MAROLF CONSTRUCTION INC., PETITIONER V. ALLEN'S PAVING COMPANY,  
RESPONDENT

No. COA02-297

(Filed 17 December 2002)

**Arbitration and Mediation— caption of arbitration award—  
clerical error—service of process**

The trial court did not err in a construction case by denying respondent subcontractor's motions to dismiss based on lack of service of process and the fact that the original caption of arbitration award referred to petitioner as "Marolf Construction Company" instead of "Marolf Construction, Inc." without the error being corrected within the ninety days provided under N.C.G.S. § 1-567.14, because: (1) respondent was properly served in accordance with the American Arbitration Association's Construction Industry Arbitration Rules; and (2) the trial court may examine the record and correct a clerical error after the ninety-day limitation period has expired.

Appeal by respondent from order entered 16 November 2001 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 31 October 2002.

*Johnston, Allison & Hord, P.A., by Greg C. Ahlum and Alicia Almeida Bowers, for petitioner-appellee.*

*Gabriel, Berry & Weston, L.L.P., by Richard W. Gabriel and Robert A. Wells, for respondent-appellant.*

CAMPBELL, Judge.

Respondent appeals from an order entered 16 November 2001 denying respondent's motions to dismiss and confirming an arbitration award. Respondent, a subcontractor, entered into a contract with petitioner, a general contractor, on 23 July 1999.

A dispute arose between the parties, and petitioner chose to pursue a resolution through arbitration. On 6 December 1999, petitioner made a demand for arbitration. Thereafter, the case manager from the American Arbitration Association ("AAA") communicated with the parties by: a letter, sent through regular mail, of a postponement of a deadline; a letter, via facsimile, of appointment of an arbitrator; and a letter, via United Parcel Service ("UPS") overnight delivery, schedul-

## MAROLF CONSTR., INC. v. ALLEN'S PAVING CO.

[154 N.C. App. 723 (2002)]

ing a preliminary hearing. The case manager sent by certified mail and signed for by Allen Willett ("Willett"), for respondent, Allen's Paving Company, a letter confirming that a preliminary hearing had been held, and notifying respondent of the time and place for the arbitration hearing. Following the hearing, the case manager sent a letter, via certified mail and signed for by Willett for respondent, confirming the hearing was held, and notifying respondent that the arbitrator's decision was due within two weeks. Lastly, the case manager sent the arbitration award, via certified mail and signed for by Willett for respondent. Thereafter, respondent contacted the case manager and asked to have the case re-arbitrated. The AAA responded that it considered the matter closed.

On 22 February 2001, petitioner filed a petition for a confirmation of the arbitration award. Respondent timely filed a response to the petition. Thereafter, respondent filed a motion to dismiss because in the caption of the arbitration award petitioner was referred to as "Marolf Construction Company" and not Marolf Construction, Inc., and a motion to dismiss for lack of service of process and lack of jurisdiction. Petitioner filed a clarification by the arbitrator stating that "Marolf Construction Company" was error, and meant to refer to petitioner, Marolf Construction, Inc. A hearing on the matter was held on 14 November 2001. On 16 November 2001, Judge Marvin K. Gray ordered the arbitration award confirmed for Marolf Construction, Inc., and denied respondent's motions to dismiss. Respondent appeals.

Respondent asserts the trial court erred by (I) failing to vacate the arbitration award for lack of service of process and (II) confirming the arbitration award with correction of petitioner's name.

### I. Service of Process

Respondent asserts the trial court erred by failing to dismiss petitioner's petition for confirmation of the arbitration award due to lack of service of process. Respondent argues the Uniform Arbitration Act, codified in North Carolina General Statutes Chapter 1, Article 45A, controls. Regarding the hearing, the statute provides: "*Unless otherwise provided by the agreement:* (1) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five days before the hearing." N.C. Gen. Stat. § 1-567.6 (2001) (emphasis added). Regarding notification of the award, the statute provides:

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“The arbitrators shall deliver a copy to each party personally or by registered mail, or *as provided in the agreement.*” N.C. Gen. Stat. § 1-567.9 (2001) (emphasis added).

Petitioner asserts the contract provided for the rules of the AAA to govern service of process. The contract provided, in pertinent part, that if a dispute should arise between the parties, “then Contractor shall have the option to (a) litigate the matter in a court of competent jurisdiction in Mecklenburg County, N.C., or (b) settle the matter by arbitration in Mecklenburg County, N.C. in accordance with the American Arbitration Association’s Construction Industry Arbitration Rules, then in effect.”

The AAA’s Construction Industry Rule 40, as in effect during this time period, provided for service as follows:

*Each party shall be deemed to have consented that any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules; for any court action in connection therewith; or for the entry of judgment on any award made under these rules, may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party.*

*The AAA, the parties, and the arbitrator may also use overnight delivery, electronic facsimile (fax), telex, and telegram. Where all parties and the arbitrator agree, notices may be transmitted by electronic mail (E-mail), or other method of communication.*

Moreover, Rule 46 controls delivery of the award to the parties, and provides: “[p]arties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail addressed to a party or its representative at the last known address, personal service of the award, or the filing of the award in any other manner that is permitted by law.”

Petitioner is correct in his assertion that N.C. Gen. Stat. § 1-567.6’s language “[u]nless otherwise provided by the agreement” permits the parties to make an agreement to follow rules other than those provided in the statute. In this case, the parties agreed to follow the AAA rules for the construction industry. Therefore, the issue is whether or not petitioner and the case manager for the AAA properly

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served respondent in accordance with these AAA rules. The case manager for the AAA served respondent via facsimile, UPS overnight delivery, and certified mail to respondent's last known address, all of which are permitted by the AAA rule in effect at the time. Therefore, we find the trial court did not err in denying respondent's motion to dismiss for failure to properly serve respondent.

## II. Clarification of petitioner's name

Respondent asserts the trial court erred by confirming the award of the arbitrator in favor of petitioner, Marolf Construction, Inc. The arbitrator erred in the caption of the award by referring to petitioner as Marolf Construction Co. rather than Marolf Construction, Inc. Respondent argues that since the award was not corrected within ninety days, pursuant to N.C. Gen. Stat. § 1-567.14 (2001), the trial court should not have confirmed the award. Respondent is incorrect. This Court held recently that where the ninety-day limitation had expired, the trial court may nevertheless examine the record and interpret an ambiguous term in an arbitration award. *General Accident Ins. Co. of Am. v. MSL Enters., Inc.*, 143 N.C. App. 453, 460, 547 S.E.2d 97, 101, *disc. review denied*, 354 N.C. 217, 553 S.E.2d 402 (2001). We hold the trial court may likewise examine the record and correct a clerical error. A clerical error is “ ‘[a]n error resulting from a minor mistake or inadvertence, esp. in writing or copying something on the record, and not from judicial reasoning or determination.’ ” *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting Black's Law Dictionary 563 (7th ed. 1999)). Here, the arbitrator's reference to petitioner as Co. instead of Inc. is a clerical error and was properly corrected by the trial court.

Affirmed.

Judges WALKER and McCULLOUGH concur.

**STATE v. SAFRIT**

[154 N.C. App. 727 (2002)]

STATE OF NORTH CAROLINA v. HOWARD EUGENE SAFRIT, DEFENDANT

No. COA02-304

(Filed 17 December 2002)

**1. Sentencing— prior record level determination—collateral estoppel**

Collateral estoppel did not apply to determining a prior record level where the trial court considered two convictions which a previous jury had determined did not support violent habitual felon status. The issues litigated were not the same in that the burden of proof in determining prior record level is preponderance of the evidence while the burden in a violent habitual felon proceeding is beyond a reasonable doubt.

**2. Sentencing— evidence of prior convictions—court records and DCI printout**

The trial court did not err by basing its sentencing findings on the State's evidence where the prosecutor introduced a Division of Criminal Information printout and court documents. Although defendant points out minor clerical errors, these errors alone do not render the evidence incompetent.

Appeal by defendant from judgment entered 16 November 2001 by Judge Sanford L. Steelman, Jr. in Superior Court, Union County. Heard in the Court of Appeals 30 October 2002.

*Attorney General Roy Cooper, by Assistant Attorney General John G. Barnwell, for the State.*

*Office of the Appellate Defender, by Constance E. Widenhouse, Assistant Appellate Defender, for the defendant-appellant.*

WYNN, Judge.

On appeal from a sentence of imprisonment arising from his criminal convictions, defendant asserts he is entitled to a new sentencing hearing because (I) the court erred in determining his prior record level by considering two prior convictions that a previous jury had already determined did not support a habitual felon status, and (II) the trial court used unreliable and incompetent evidence to base its findings of defendant's prior convictions and record level. After carefully reviewing the record, we find no error and, therefore, uphold the judgment of the Superior Court, Union County.

## STATE v. SAFRIT

[154 N.C. App. 727 (2002)]

Defendant was convicted on 7 October 1999 of assault with a deadly weapon inflicting serious injury and, being a violent habitual felon. *See State v. Safrit*, 145 N.C. App. 541, 551 S.E.2d 516 (2001) (hereinafter “*Safrit I*”; setting forth the relevant facts giving rise to defendant’s convictions in this case). In *Safrit I*, we reversed defendant’s violent habitual felon conviction, and remanded for resentencing, because the “State was collaterally estopped from attempting to convict defendant of being a violent habitual felon based on the same two alleged prior violent felony convictions upon which a jury had already found defendant not guilty of violent habitual felon status.” *Safrit I*, 145 N.C. App. at 554, 551 S.E.2d at 525.<sup>1</sup> On 12 November 2001, at the resentencing hearing, the trial judge considered the same two prior convictions and found defendant had a prior record level VI and imposed a sentence of 59 to 80 months for a Class E felony. Defendant now appeals from this judgment.

**[1]** Defendant first contends the trial court erred in considering defendant’s prior convictions for felonious assault and armed robbery in determining his prior record level. He argues the State was collaterally estopped from presenting these convictions, because a jury in a prior proceeding (98 CRS 10003) acquitted him of having attained violent habitual felon status based upon these two felonies. We disagree.

N.C. Gen. Stat. § 15A-954(a)(7) (2001) requires dismissal of the charges stated in a criminal pleading if it is determined that “an issue of fact or law essential to a successful prosecution has been previously adjudicated in favor of defendant in a prior action between the parties.” The requirements of identity of issues, to which collateral estoppel may be applied, has been established by the North Carolina Supreme Court as follows:

(1) the issues must be the same as those involved in the prior action, (2) the issues must have been raised and actually litigated in the prior action, (3) the issues must have been material and relevant to the disposition of the prior action, and (4) the determination of the issues in the prior action must have been necessary and essential to the resulting judgment.

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1. The State indicted defendant for being a violent habitual felon based upon a 1 May 1973 conviction in Rowan County for armed robbery and a 8 December 1977 conviction in Caswell County for assault with a deadly weapon inflicting serious injury. At a prior trial, defendant was found not guilty by a jury of being a violent habitual felon based upon these same two underlying offenses.



## STATE v. SAFRIT

[154 N.C. App. 727 (2002)]

See *Safrit I*, 145 N.C. App. at 553, 551 S.E.2d at 524 (citations omitted). Therefore, as a threshold issue, we must determine whether the issues fully litigated by 98 CRS 10003 were the same issues before the trial court during resentencing in the case *sub judice*.

In *Safrit I*, this Court stated the issue in a violent habitual felon proceeding as “the State must prove *beyond a reasonable doubt* that the defendant has been convicted of two prior violent felonies, with both convictions occurring on or after 6 July 1967. *Id.* (emphasis added). However, at a sentencing hearing, “the State bears the burden of proving, *by a preponderance of the evidence*, that a prior conviction exists and that the offender before the court is the same person as the offender named in the prior conviction.” N.C. Gen. Stat. § 15A-1340.14(f) (emphasis added). Thus, the issues litigated by 98 CRS 10003 and during the resentencing are different in one substantial respect: The State’s burden of proving defendant’s involvement in the prior conviction changed from “beyond a reasonable doubt” to “by a preponderance of the evidence.”

“It is clear that the difference in the relative burdens of proof in the criminal and civil actions precludes the application of the doctrine of collateral estoppel.” *Dowling v. U.S.*, 493 U.S. 342, 349 (1990); see also *State v. Agee*, 326 N.C. 542, 391 S.E.2d 171 (1990). Here, like in a civil action, the burden of proof during a sentencing hearing to determine prior record level is “by a preponderance of the evidence” instead of the much more exacting burden of “beyond a reasonable doubt” required during the trial’s substantive phases. Accordingly, in the case *sub judice*, the issues litigated were not the same and collateral estoppel does not apply. Therefore, defendant’s first contention is without merit.

**[2]** Defendant also argues the trial court erred by basing its findings of defendant’s prior convictions and prior record level on unreliable evidence. Specifically, defendant argues the evidence presented—prior court records and a DCI printout—were unreliable because they erroneously stated an incorrect disposition date and incorrectly identified defendant as “Howard Safriet, W.M.” instead of “Howard Safrit.” Accordingly, defendant contends the State did not prove his alleged prior convictions with competent evidence. We disagree.

N.C. Gen. Stat. § 15A-1340.14(f) provides “a prior conviction shall be proved by any of the following methods: (1) stipulation of the parties; (2) an original or copy of the court record of the prior conviction;

## STATE v. SAFRIT

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(3) a copy of records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts; (4) any other method found by the court to be reliable.” In addition, “the original or a copy of the court records or a copy of the records maintained by the Division of Criminal Information, the Division of Motor Vehicles, or of the Administrative Office of the Courts, bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court, and that the facts set out in the record are true.” *Id.*

In the case *sub judice*, the prosecutor contended the defendant had a prior record level VI and provided the court with a prior record level worksheet. The prosecutor introduced a Division of Criminal Information computer printout, court documents from Rowan County file no. 73 CRS 3726 (armed robbery conviction), and court documents from Caswell County file no. 77 CRS 894 (assault with deadly weapon inflicting serious injury conviction). According to the statute, these documents are to be considered prima facie evidence that defendant is the same person that was convicted of those prior offenses.

Although defendant does point out minor clerical errors, these errors, standing alone, do not render the evidence incompetent. Furthermore, our analysis of the records before this Court indicates the Division of Criminal Information printout contains the same social security number and driver’s license number as those listed on the court documents for this current case. Likewise, the court file from Rowan County has the same spelling of defendant’s name as the person convicted for those charges. Accordingly, we hold the trial court did not err in considering and basing its findings on the State’s evidence of defendant’s prior convictions.

No error.

Judges TIMMONS-GOODSON and HUNTER concur.

**HOMEQ v. WATKINS**

[154 N.C. App. 731 (2002)]

HOMEQ D/B/A THE MONEY STORE, PLAINTIFF v. DANNY WATKINS, JR., DEFENDANT

No. COA02-106

(Filed 17 December 2002)

**Mortgages and Deeds of Trust; Unjust Enrichment—judicial foreclosure—equitable lien—upset bid period—unjust enrichment**

The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's claims for an equitable lien and judicial foreclosure arising out of plaintiff under the mistaken impression of ownership satisfying a first deed of trust on the pertinent property during the upset bid period of ten days under N.C.G.S. § 47-21.27 and defendant thereafter submitting an upset bid to become the new proposed owner, because: (1) plaintiff has failed to assert a claim for unjust enrichment since there is no legal or equitable obligation on defendant to pay plaintiff for satisfaction of the first deed of trust when defendant did not solicit or induce plaintiff's discharge of the first deed of trust; and (2) upon receiving notice of the upset bid and realizing its error, plaintiff had the opportunity to place its own upset bid within the new ten-day period.

Appeal by plaintiff from judgment entered 16 October 2001 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 10 October 2002.

*Hunton & Williams, by Matthew P. McGuire, for plaintiff-appellant.*

*Horack, Talley, Pharr & Lowndes, P.A., by Robert B. McNeill, and Johnson & Johnson, P.A., by W.A. Johnson, for defendant-appellee.*

CAMPBELL, Judge.

Plaintiff appeals the dismissal of plaintiff's claim for an equitable lien and judicial foreclosure. The court determined plaintiff's complaint failed to state a claim upon which relief may be granted, and therefore dismissed the claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (2001).

The case arises from plaintiff's payment of \$121,519.98 satisfying the indebtedness of a first deed of trust that encumbered a piece of

**HOMEQ v. WATKINS**

[154 N.C. App. 731 (2002)]

real property bought by defendant. The first deed of trust was created in May 1995 when Kevin and Laura Anzelone (“the Anzelones”) executed and delivered a first deed of trust to Central Carolina Bank and Trust Company (“CCB”) encumbering a piece of real property (“the property”) in the principal amount of \$93,350.00. A second deed of trust was created by the Anzelones in March 1997 in the principal amount of \$56,650.00, and was subsequently assigned to plaintiff. After the Anzelones defaulted on the second deed of trust, plaintiff began foreclosure proceedings.

On 14 September 2000, a foreclosure sale was conducted. Plaintiff submitted the highest bid, in the amount of \$45,000.00. Eight days later, on 22 September 2000, plaintiff paid CCB \$121,519.98 in satisfaction of the first deed of trust. On the same day, defendant filed an upset bid on the property in the amount of \$47,250.00.

Plaintiff appeals asserting the trial court erred in granting defendant’s motion to dismiss for failure to state a claim upon which relief may be granted pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Plaintiff asserts the payment of the first deed of trust was made under a mistake of fact and a proper cause of action for unjust enrichment was stated in the complaint.

First, we explain how this situation developed. The North Carolina General Statutes provide that the final bidder at a foreclosure sale is a mere proposed purchaser, and the sale cannot be finalized until the upset bid period of ten days has expired. *See* N.C. Gen. Stat. § 45-21.27 (2001); *Shelby Bldg. & Loan Ass’n v. Black*, 215 N.C. 400, 401-02, 2 S.E.2d 6, 6-7 (1939). During the ten-day period, an upset bidder may submit a higher bid<sup>1</sup>, along with a deposit, to the clerk of superior court with whom the report of sale was filed<sup>2</sup>. N.C. Gen. Stat. § 45-21.27(a). Once “an upset bid is made . . . the last prior bidder . . . shall be released from any further obligation.” N.C. Gen. Stat. § 45-21.27(f). During this upset period, plaintiff, apparently under the mistaken impression of ownership, satisfied the first deed

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1. The upset bid must exceed the prior bid by at least five percent (5%) or \$750.00, whichever is greater. In this case, plaintiff submitted a bid of \$45,000.00 and defendant submitted an upset bid of \$47,500.00. Defendant’s bid met the five percent requirement, and therefore constituted a proper upset bid.

2. The upset bidder simultaneously files with the clerk a signed notice of the bid stating the name, address and phone number of the upset bidder, the amount of the upset bid, and noting the upset period for this new bid shall remain open for ten days from the date of this new bid. N.C. Gen. Stat. § 45-21.27(e). The clerk must then “mail a written notice of the upset bid by first class mail to the last known address of the prior bidder.” N.C. Gen. Stat. § 45-21.27(e1).

## HOMEQ v. WATKINS

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of trust. Defendant, having submitted an upset bid, became the new proposed purchaser, and plaintiff was released from further obligation. Plaintiff now seeks, through a claim of unjust enrichment, to reverse its mistake and recover from defendant for its satisfaction of the debt which had encumbered the property in question.

“The doctrine of unjust enrichment was devised by equity to exact the return of, or payment for, benefits received under circumstances where it would be unfair for the recipient to retain them without the contributor being repaid or compensated. To invoke the unjust enrichment doctrine, however, more must be shown than that one party voluntarily benefited another or his property.” *Collins v. Davis*, 68 N.C. App. 588, 591, 315 S.E.2d 759, 761 (1984). “In order to properly set out a claim for unjust enrichment, a plaintiff must allege that property or benefits were conferred on a defendant under circumstances which give rise to a legal or equitable obligation on the part of the defendant to account for the benefits received.” *Norman v. Nash Johnson & Sons’ Farms, Inc.*, 140 N.C. App. 390, 417, 537 S.E.2d 248, 266 (2000). “Not every enrichment of one by the voluntary act of another is unjust. ‘Where a person has officiously conferred a benefit upon another, the other is enriched but is not considered to be unjustly enriched. The recipient of a benefit voluntarily bestowed without solicitation or inducement is not liable for their value.’” *Wright v. Wright*, 305 N.C. 345, 350, 289 S.E.2d 347, 351 (1982) (quoting *Rhyne v. Sheppard*, 224 N.C. 734, 737, 32 S.E.2d 316, 318 (1944)).

In this case, plaintiff has failed to assert a claim for unjust enrichment because there is no legal or equitable obligation on defendant to pay plaintiff for satisfaction of the first deed of trust. Here, defendant did not solicit or induce plaintiff’s discharge of the first deed of trust. Plaintiff, presumably believing it owned the property, did not wait for the upset bid period to end before satisfying the debt on the property. Upon receiving notice of the upset bid, and realizing its error, plaintiff had the opportunity to place its own upset bid within the new ten-day period. Instead, plaintiff asks the court to act in equity to reverse the result of plaintiff now having paid \$122, 519.98 to satisfy a mortgage on property owned by defendant. Where defendant did not induce plaintiff’s action, he is not responsible for plaintiff’s error. Though defendant is enriched, “[t]he mere fact that one party was enriched, even at the expense of the other, does not bring the doctrine of unjust enrichment into play.” *Williams v. Williams*, 72 N.C. App. 184, 187, 323 S.E.2d 463, 465 (1984).

**BOWEN v. MABRY**

[154 N.C. App. 734 (2002)]

Therefore, we hold the trial court did not err in dismissing plaintiff's claim of unjust enrichment.

Affirmed.

Judges TIMMONS-GOODSON and HUDSON concur.

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DIANE WILSON BOWEN, EXECUTRIX OF THE ESTATE OF BRUCE PICKETT WILSON,  
PLAINTIFF v. PAMELA Y. MABRY, EXECUTRIX OF THE ESTATE OF JOSEPHINE  
DOWNER WILSON, DEFENDANT

No. COA02-357

(Filed 17 December 2002)

**Divorce— equitable distribution—death of husband while  
action pending**

The trial court erred by dismissing plaintiff executrix's equitable distribution claim on behalf of decedent husband even though no divorce had been entered upon the death of the husband on 15 February 2001 and even though amended N.C.G.S. § 50-20 provides that it applies to actions pending or filed on or after 10 August 2001, because: (1) the General Assembly clarified its intent that N.C.G.S. § 50-20 did not mandate abatement of a pending equitable distribution action upon the death of a party; and (2) this clarification is entitled to retroactive application unless it impacts a vested right, and defendant would suffer no impairment of a vested right as no final determination of plaintiff's equitable distribution claim had occurred and the claim was still pending on the effective date of the statute.

Appeal by plaintiff from order dated 15 November 2001 by Judge Jimmy L. Myers in Davidson County District Court. Heard in the Court of Appeals 12 November 2002.

*Biesecker, Tripp, Sink & Fritts, L.L.P., by Max R. Rodden, for  
plaintiff appellant.*

*Jon W. Myers for defendant appellee.*

**BOWEN v. MABRY**

[154 N.C. App. 734 (2002)]

GREENE, Judge.

Diane Wilson Bowen (Plaintiff), as the executrix of the estate of Bruce Pickett Wilson (Mr. Wilson), appeals from an order dated 15 November 2001 dismissing Mr. Wilson's claims for divorce and equitable distribution against Josephine Downer Wilson (Mrs. Wilson).<sup>1</sup>

On 14 September 2000, Mr. Wilson filed a complaint against Mrs. Wilson setting out claims for absolute divorce and equitable distribution. This complaint alleged the date of separation of the parties to be 9 August 1999. On 27 October 2000, Mrs. Wilson filed an answer alleging the actual date of separation was 2 January 2000 and counter-claimed for divorce and equitable distribution based on the alleged 9 August 1999 date of separation. The parties later determined the actual date of separation was 2 January 2000 and amended their pleadings accordingly. Mr. Wilson thereafter voluntarily dismissed his divorce action on 6 December 2000, leaving the equitable distribution claim pending and on 8 January 2001, re-filed his divorce action. Upon discovering Mrs. Wilson was seriously ill and not alert, Mr. Wilson's attorney delayed service of the summons and complaint until after her condition improved. Consequently, Mrs. Wilson was not served with the summons and complaint until 30 January 2001.

Mr. Wilson died on 15 February 2001, and a consent order allowing Plaintiff to be substituted for Mr. Wilson was filed on 1 March 2001. Mrs. Wilson filed a motion to dismiss both the divorce and equitable distribution actions on 2 October 2001 based on Mr. Wilson's death prior to entry of judgment. The trial court, relying on *Brown v. Brown*, 353 N.C. 220, 539 S.E.2d 621 (2000), concluded Plaintiff's equitable distribution and divorce claims abated upon Mr. Wilson's death, were not governed by N.C. Gen. Stat. § 50-20(1) (the Act), and entered a dismissal of the case.

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The dispositive issue is whether the Act is to be applied retroactively so as to preclude the application of *Brown* to Plaintiff's claim.<sup>2</sup>

In *Brown* our Supreme Court held that an equitable distribution claim abated, if no divorce had been entered, upon the death of either

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1. Mrs. Wilson died during the pendency of this appeal. Pamela Y. Mabry (Defendant), as Executrix of the Estate of Mrs. Wilson, was substituted as a party to this case on motion of the Plaintiff. See N.C.R. App. P. 38.

2. Although Plaintiff appealed the trial court's dismissal of the divorce claim, she makes no assignment of error on this ground and does not argue this issue in her brief to this Court.

## BOWEN v. MABRY

[154 N.C. App. 734 (2002)]

husband or wife. *Id.* Subsequent to *Brown*, the North Carolina General Assembly amended section 50-20 to provide that “pending action[s] for equitable distribution shall not abate upon the death of a party.” N.C.G.S. § 50-20(1) (2001). The Act was titled: “An Act To Clarify That An Action For Equitable Distribution Does Not Abate Upon The Death Of A Party.” 2001 N.C. Sess. Laws ch. 364. The Act “applies to actions pending or filed on or after” 10 August 2001. 2001 N.C. Sess. Laws ch. 364, §7.

Defendant argues based on *Brown* that Plaintiff’s equitable distribution claim abated on 15 February 2001, the date of Mr. Wilson’s death, and thus was not pending at the time the Act became effective. It follows, Defendant contends, the Act does not apply so as to save Plaintiff’s claim. We disagree. The General Assembly “has the power to amend a statute that it believes has been misconstrued by the courts . . . and thereby undo any perceived undesirable past consequences of misinterpretation of its work product.” 82 C.J.S. *Statutes* § 411, at 568 (1999); *see also Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313, 128 L. Ed. 2d 274, 289 (1994). This act “declaring the proper construction of a former statute is given retroactive operation” unless such retroactive application impairs “vested rights.” 82 C.J.S. *Statutes* § 411, at 568-69; *see Gardner v. Gardner*, 300 N.C. 715, 718-19, 268 S.E.2d 468, 471 (1980) (statute cannot be applied retroactively if it “will interfere with rights that have ‘vested’ ”). A vested right is a right “which is otherwise secured, established, and immune from further legal metamorphosis.” *Gardner*, 300 N.C. at 718-19, 268 S.E.2d at 471. Thus, a lawfully entered judgment is a vested right. *See Dellinger v. Bollinger*, 242 N.C. 696, 698, 89 S.E.2d 592, 594 (1955).

In this case, the General Assembly in enacting the Act made clear its intent that section 50-20, as it existed before enactment of the Act, did not mandate abatement of a pending equitable distribution action upon the death of a party. *See Al Smith Buick Co. v. Mazda Motor of America*, 122 N.C. App. 429, 435-36, 470 S.E.2d 552, 555-56 (1996) (an amended statute can be used to clarify legislative intent of the statute that was amended). This intent is manifest in the title of the Act where the General Assembly notes its desire to “clarify” section 50-20. *Id.* Thus, the General Assembly declared the proper construction of its equitable distribution statute, rejecting the construction placed on section 50-20 by the *Brown* decision. This clarification is entitled to retroactive application unless it impacts a vested right.<sup>3</sup> In this case,

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3. Indeed, the General Assembly specifically noted its intent for the Act to be applied retroactively. 2001 N.C. Sess. Laws ch. 364, §7 (applies to pending cases).



## STATE v. CATES

[154 N.C. App. 737 (2002)]

Defendant would suffer no impairment of a vested right if the Act is applied retroactively: There has been no judgment dismissing Plaintiff's claim entered prior to the effective date of the Act, and the abatement of an action is not a right "immune from . . . legal metamorphosis."<sup>4</sup> As no final determination of Plaintiff's equitable distribution claim had occurred, the claim was still pending on the effective date of the Act. See *McFetters v. McFetters*, 219 N.C. 731, 734, 14 S.E.2d 833, 835 (1941) (a claim is pending from the time it is commenced until its final determination); see also 2001 N.C. Sess. Laws ch. 354, §7. Accordingly, the Act applies to preserve Plaintiff's claim and the trial court erred in dismissing Plaintiff's equitable distribution claim.

Reversed and remanded.

Chief Judge EAGLES and Judge MARTIN concur.

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STATE OF NORTH CAROLINA v. GEORGE LEWIS CATES, JR., DEFENDANT

No. COA01-1376

(Filed 17 December 2002)

**1. Appeal and Error— Court of Appeals—no en banc authority**

Neither the legislature nor the Supreme Court has established a procedure by which the Court of Appeals may sit en banc.

**2. Sentencing— rule of lenity—use of prior offenses—habitual felon status—statute not ambiguous**

The rule of lenity was not violated by the prosecutor's choice of prior offenses with lesser sentencing points for habitual felon status, so that defendant's sentence was enhanced more than if the prosecutor had selected the higher point offenses (prior offenses used for habitual offender status may not be used to determine prior record level). The rule of lenity forbids interpretation of a statute to increase a penalty beyond the legislature's intent only when the applicable statute is ambiguous.

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4. Because a final judgment had been entered in *Brown*, that decision is binding on the parties to that case and any other case where a final judgment has been entered dismissing the equitable distribution claim based on abatement.

## STATE v. CATES

[154 N.C. App. 737 (2002)]

**3. Sentencing— habitual felon—grant program—no financial incentive for prosecution**

The prosecutor did not have a financial incentive to indict defendant as an habitual felon where there was a federal grant program for the prosecution of habitual felons, but the grant prosecutor was not involved in defendant's case and there was no evidence of a relationship between the number of prosecutions and the continuation of the grant.

**4. Sentencing— habitual felon—not double jeopardy**

The combined effect of the Habitual Felon Act and the Structured Sentencing Act did not violate double jeopardy.

**5. Sentencing— habitual felon—relationship to underlying felony**

The trial court did not err by not dismissing an habitual felon indictment where defendant argued that he was not an habitual felon when he committed the principle felony.

**6. Sentencing— habitual felon—not cruel and unusual punishment**

An habitual felon sentence did not violate the constitutional prohibition on cruel and unusual punishment.

Appeal by defendant from judgment entered 9 July 2001 by Judge Orlando F. Hudson, Jr. in Durham County Superior Court. Heard in the Court of Appeals 21 August 2002.

*Attorney General Roy Cooper, by Assistant Attorney General Anne M. Middleton, for the State.*

*Bruce T. Cunningham, Jr., for the defendant-appellant.*

HUDSON, Judge.

On 24 March 1999, a jury found defendant guilty of possession of heroin and of the status of habitual felon. The court imposed a prison sentence of a minimum of 133 months and a maximum of 169 months. Defendant appealed his convictions to this Court, which found no error in *State v. Cates*, 137 N.C. App. 385, 533 S.E.2d 305 (Table), *disc. review denied*, 352 N.C. 151, 544 S.E.2d 230 (2000). Subsequently, defendant filed a Motion to Dismiss Habitual Felon Indictment and for other relief with the Superior Court in Durham County. The court recalculated defendant's sentence as a minimum of 80 months to a

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[154 N.C. App. 737 (2002)]

maximum of 105 months and denied his motion to dismiss the habitual felon indictment. Defendant appeals the denial of his motion to dismiss the habitual felon indictment.

**[1]** In addition to his appeal, defendant filed a Motion for Appropriate Relief with this Court, in which he contends (1) that his conviction violates his right to due process under the Fourteenth Amendment to the United States Constitution and (2) that he may not be punished for a crime of which he was acquitted. Defendant also filed a “Motion for En Banc Hearing, or in the Alternative, Second Motion for Appropriate Relief” with this Court requesting that the Court sit en banc to consider overruling one of its own previous decisions. Finding no merit in defendant’s contentions, we deny these motions and note that neither the legislature nor the Supreme Court by rule-making has established a procedure by which this Court may sit en banc, if indeed the North Carolina Constitution permits such sitting.

**[2]** In his first argument on appeal, defendant contends that “the prosecutor’s manipulation of the defendant’s prior record to increase the points used for structured sentencing purposes violated the [defendant’s] rights secured by the due process clause of the Fourteenth Amendment to the United States Constitution.” Pursuant to N.C. Gen. Stat. § 14-7.1 (2001), “[a]ny person who has been convicted of or pled guilty to three felony offenses in any federal court or state court in the United States or combination thereof is declared to be an habitual felon.” N.C. Gen. Stat. § 14-7.6 (2001) describes how an habitual felon shall be sentenced: “the felon must, upon conviction or plea of guilty under indictment as provided in this Article (except where the felon has been sentenced as a Class A, B1, or B2 felon) be sentenced as a Class C felon. In determining the prior record level [of the defendant], convictions used to establish a person’s status as an habitual felon shall not be used.” Defendant argues that the prosecuting attorney intentionally selected as the basis for the habitual felon status three prior offenses that carried only two sentencing points each. As a result, he contends, his sentence was unfairly enhanced more than if the prosecuting attorney had selected three higher point prior offenses to establish habitual felon, leaving offenses with a lower point total to determine his prior record level. *See* N.C.G.S. § 14-7.6. Defendant argues that this selection violated the “Rule of Lenity” and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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The rule of lenity is a principle of statutory construction that “forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention.” *State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 681 (1985); *see also Bell v. United States*, 349 U.S. 81, 99 L. Ed. 905 (1955) (defining the rule of lenity). The rule of lenity only applies when the applicable criminal statute is ambiguous. Defendant contends that the Habitual Felon Act is ambiguous because it fails to specify “which of the defendant’s prior convictions should be selected to obtain the indictment.” In *State v. Brown*, 146 N.C. App. 590, 592, 553 S.E.2d 428, 429 (2001), *disc. review denied*, 356 N.C. 306, 570 S.E.2d 734 (2002), the defendant argued that the Habitual Felon Act was ambiguous with regard to when a person becomes an habitual felon. Finding no ambiguity in that aspect of the statute, we held that the rule of lenity did not apply. *Id.*, 553 S.E.2d at 429-30. Similarly, here we see no ambiguity in the directive as to the use of prior convictions pursuant to N.C.G.S. § 14-7.6. By declining to place additional limits on the prosecutor’s choices among prior convictions, except to prohibit double usage, the legislature did not intend to limit the prosecutor’s discretion in making such choices. Defendant’s first assignment of error is overruled.

**[3]** In his second argument, defendant contends that the trial court erred in denying his motion to dismiss the habitual felon indictment because the prosecutor had a financial incentive to indict the defendant as an habitual felon. He bases his argument on the existence of a grant program for prosecution of habitual felon cases. Here, however, the “grant” prosecutor in Durham County had no involvement in defendant’s case, and there is no evidence of any relationship between the number of prosecutions and the continuation of the grant. Thus the record reveals no financial incentive for this prosecutor to have indicted this defendant as an habitual felon.

**[4]** In his third argument, defendant contends that the combined use of the Habitual Felon Act and Structured Sentencing constitutes double jeopardy in violation of the United States Constitution. In *State v. Brown*, this Court rejected this argument, and we are bound by the decision in that case. 146 N.C. App. 299, 301-02, 552 S.E.2d 234, 235-36 (2001), *cert. denied*, 122 S.Ct. 2305, 152 L. Ed. 2d 1061 (2002). Defendant’s third assignment of error is overruled.

**[5]** In his fourth argument, defendant contends that the trial court erred in denying his motion to dismiss the habitual felon indictment

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because he was not an habitual felon when he committed the principal underlying felony. Again, in *Brown*, we rejected this argument and are bound by that decision. *See* 146 N.C. App. at 593, 553 S.E.2d at 430. Defendant's fourth assignment of error is overruled.

**[6]** In his final argument, defendant contends that his sentence violates his right to be free from cruel and unusual punishment as secured by the Eighth and Fourteenth Amendments to the United States Constitution. Habitual felon laws have withstood scrutiny under the Eighth Amendment to the United States Constitution in our Supreme Court and in the United States Supreme Court. *Rummell v. Estelle*, 445 U.S. 263, 63 L. Ed. 2d 382 (1980); *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985).

Affirmed.

Motion for Appropriate Relief denied. Motion for En Banc Hearing, or in the Alternative, Second Motion for Appropriate Relief denied.

Judges WYNN and CAMPBELL concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

FILED 17 DECEMBER 2002

CHASE MANHATTAN MORTGAGE CORP. v. ROZELL No. 02-387	Mecklenburg (01CVS11911)	Affirmed in part; reversed in part, and remanded
IN RE MAYHEW No. 02-47	Mecklenburg (96J623)	Affirmed
IN RE RUSSELL No. 02-98	Alamance (01J21) (01J22)	Affirmed
IN RE SCHARFENBERGER No. 02-14	Rutherford (00J59)	Affirmed
IN RE WESTBROOK No. 01-1136	Mecklenburg (00J579)	Affirmed
MELTON v. CLINE No. 01-1604	Catawba (93CVD3051)	Vacated & remanded
MUSSELWHITE v. McNEILL No. 02-234	Robeson (00CVD4356)	Affirmed
OAKLEY v. LOWE'S FOOD STORE, INC. No. 02-203	Durham (98CVS4025)	Affirmed
ROBERTSON v. ROBERTSON No. 01-1239	Davie (01CVD398)	Affirmed
ROWAN CTY. DSS ex rel. HARRISON v. HAMILTON No. 02-358	Rowan (01CVD1119)	Affirmed in part; reversed in part, and remanded
STATE v. CAHILL No. 01-1581	Rockingham (01CRS93) (01CRS94)	No error
STATE v. CHAVIS No. 02-192	Robeson (00CRS7808)	No error
STATE v. CLEVELAND No. 02-155	Graham (00CRS55) (00CRS56) (00CRS57)	Affirmed
STATE v. GANT No. 02-393	Lenoir (00CRS9560) 00CRS50957)	No error in part; remanded for re-sentencing
STATE v. JACKSON No. 01-1511	Alamance (00CRS55005)	No error

STATE v. LOVE No. 02-238	Wilkes (01CRS50695)	No error
STATE v. MACIAS No. 02-340	Wake (00CRS68406) (00CRS68407)	No error
STATE v. OWENS No. 02-110	Cumberland (01CRS52973) (01CRS52974)	No error
STATE v. PEELER No. 01-1528	Rockingham (00CRS12046) (01CRS298)	No error
STATE v. SCOTT No. 02-226	Alamance (99CRS57105)	Affirmed
STATE v. THOMPSON No. 01-1586	Wayne (01CRS1597) (01CRS3379)	No error
STATE v. WALKER No. 02-86	Rowan (01CRS51707)	No error
STATE v. WIGGINS No. 02-148	Edgecombe (99CRS11124)	No error
WORLEY v. BAYER CORP. No. 02-196	Johnston (01CVS2305)	Affirmed

# **APPENDIXES**

**AMENDED ORDER ADOPTING  
AMENDMENTS TO THE  
NORTH CAROLINA RULES  
OF APPELLATE PROCEDURE**

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**ORDER ADOPTING AMENDMENTS  
TO THE GENERAL RULES OF  
PRACTICE FOR THE SUPERIOR  
AND DISTRICT COURTS**

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IN THE SUPREME COURT OF NORTH CAROLINA

**Amended Order Adopting Amendments to the  
North Carolina Rules of Appellate Procedure**

Rules 3, 4, 12, 13, 14, 26, and Appendix A of the North Carolina Rules of Appellate Procedure are hereby amended as described below:

Rule 3(b) is amended to update statutory references as follows:

(b) *Special Provisions.* Appeals in the following types of cases shall be taken in the time and manner set out in the General Statutes section noted:

(1) Termination of parental rights, G.S. ~~7A-280-34~~  
7B-1113.

(2) Juvenile matters, G.S. ~~7A-666~~ 7B-1001.

Rule 4(a)(2) is amended by the addition of a sentence as follows:

(2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within 14 days after entry of the judgment or order or within 14 days after a ruling on a motion for appropriate relief made during the 14-day period following entry of the judgment or order. Appeals from district court to superior court are governed by G.S. 15A-1431 and -1432.

Rule 12(c) is amended by deleting the second paragraph as follows:

(c) *Copies of Record on Appeal.* The appellant need file but a single copy of the record on appeal. Upon filing, the appellant may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the costs of reproducing copies of the record on appeal. The clerk will reproduce and distribute copies as directed by the court.

~~In civil appeals in forma pauperis the appellant need not pay a deposit for reproducing copies, but at the time of filing the original record on appeal shall also deliver to the clerk two legible copies thereof.~~

Rule 13(a)(1) is amended by deleting the second sentence as follows:

- (1) *Cases Other Than Death Penalty Cases.* Within 30 days after the clerk of the appellate court has mailed the printed record to the parties, the appellant shall file his brief in the office of the clerk of the appellate court, and serve copies thereof upon all other parties separately represented. ~~In civil appeals in forma pauperis, no printed record is created; accordingly, appellant's 30 days for filing and serving the brief shall run from the date of docketing the record on appeal in the appellate court.~~ Within 30 days after appellant's brief has been served on an appellee, the appellee shall similarly file and serve copies of his brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

Rule 13(b) is amended by deleting the second paragraph as follows:

(b) *Copies Reproduced by Clerk.* A party need file but a single copy of his brief. At the time of filing the party may be required to pay to the clerk of the appellate court a deposit fixed by the clerk to cover the cost of reproducing copies of the brief. The clerk will reproduce and distribute copies of briefs as directed by the court.

~~In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original brief shall also deliver to the clerk two legible photocopies thereof.~~

Rule 14(c)(2) is amended by deleting the last sentence as follows:

- (2) *Transmission; Docketing; Copies.* Upon the filing of a notice of appeal, the Clerk of the Court of Appeals will forthwith transmit the original record on appeal to the Clerk of the Supreme Court, who shall thereupon file the record and docket the appeal. The Clerk of the Supreme Court will procure or reproduce copies of the record on appeal for distribution as directed by the Court, and may require a deposit from appellant to cover the cost of reproduction. ~~In appeals in forma pauperis, the Clerk of the Court of Appeals will transmit with the original record on appeal the copies filed by the appellant in that Court under Rule 12(c).~~

Rule 14(d)(1) is amended by deleting the third paragraph as follows:

- (1) *Filing and Service; Copies.* Within 30 days after filing notice of appeal in the Supreme Court, the appellant shall file with the Clerk of the Supreme Court and serve upon all other parties copies of a new brief prepared in conformity with Rule 28, presenting only those questions upon which review by the Supreme Court is sought; provided, however, that when the appeal is based upon the existence of a substantial constitutional question or when the appellant has filed a petition for discretionary review for issues in addition to those set out as the basis of a dissent in the Court of Appeals, the appellant shall file and serve a new brief within 30 days after entry of the order of the Supreme Court which determines for the purpose of retaining the appeal on the docket that a substantial constitutional question does exist or allows or denies the petition for discretionary review in an appeal based upon a dissent. Within 30 days after service of the appellant's brief upon him, the appellee shall similarly file and serve copies of a new brief. If permitted by Rule 28(h), the appellant may serve and file a reply brief within 14 days after service of the brief of the appellee.

The parties need file but single copies of their respective briefs. At the time of filing a brief, the party may be required to pay to the Clerk a deposit fixed by the Clerk to cover the cost of reproducing copies of the brief. The Clerk will reproduce and distribute copies as directed by the Court.

~~In civil appeals in forma pauperis a party need not pay the deposit for reproducing copies, but at the time of filing his original new brief shall also deliver to the Clerk two legible copies thereof.~~

Rule 26(a)(1) is amended as follows:

- (1) **Filing by Mail:** Filing may be accomplished by mail addressed to the clerk but is not timely unless the papers are received by the clerk within the time fixed for filing, except that motions, responses to petitions, record on appeal, and briefs shall be deemed filed on the date of mailing, as evidenced by the proof of service.

Appendix A is amended as follows:

Filing appellant's brief (or mailing brief under Rule 26(a))	30	Clerk's mailing of printed record <del>—or from docketing record in civil appeals in forma pauperis</del> (60 days in Death Cases)	13(a)
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These amendments to the North Carolina Rules of Appellate Procedure shall be effective upon adoption by the Supreme Court.

Adopted by the Court in Conference this the 1st day of May, 2003. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practical on the North Carolina Judicial Branch of Government Internet Home Page (<http://www.nccourts.org>).

Edmunds, J.  
For the Court

**Order Adopting Amendments to the General Rules  
of Practice for the Superior and District Courts**

Rule 25 of the General Rules of Practice for the Superior and District Courts is hereby amended to read as follows:

**RULE 25. MOTIONS FOR APPROPRIATE RELIEF AND  
HABEAS CORPUS APPLICATIONS IN CAPITAL CASES**

When considering motions for appropriate relief and/or applications for writs of habeas corpus in capital cases, the following procedures shall be followed:

(1) All appointments of defense counsel shall be in accordance with G.S. 7A-451(c), (d), and (e) and rules adopted by the Office of Indigent Defense Services ~~should be made by the senior resident superior court judge in each district or the senior resident superior court judge's judicial designee;~~

(2) All requests for appointment of experts, *ex parte* matters, interim attorney fee awards, and similar matters arising made prior to the filing of a motion for appropriate relief and subsequent to a denial by the Director of Indigent Defense Services shall ~~should~~ be ruled on by the senior resident superior court judge or the senior resident superior court judge's designee in accordance with rules adopted by the Office of Indigent Defense Services;

(3) All requests for other *ex parte* and similar matters arising prior to the filing of a motion for appropriate relief shall be ruled on by the senior resident superior court judge or the senior resident superior court judge's designee in accordance with rules adopted by the Office of Indigent Defense Services;

(4) All motions for appropriate relief, when filed, shall ~~should~~ be referred to the senior resident superior court judge or the senior resident superior court judge's designee for that judge's review and administrative action, including, as may be appropriate, dismissal, calendaring for hearing, entry of a scheduling order for subsequent events in the case, or other appropriate actions; ~~and~~

(5) Subsequent to direct appeal, an application for writ of habeas corpus shall not be used as a substitute for appeal and/or a motion for appropriate relief and is not available as a means of reviewing and correcting nonjurisdictional legal error. If the

applicant has been sentenced pursuant to a final judgment issued by a competent tribunal of criminal jurisdiction (i.e., by a trial court having subject matter jurisdiction to enter the sentence), the application for writ of habeas corpus shall be denied. In the event the application for writ of habeas corpus raises a meritorious challenge to the original jurisdiction of the sentencing court, and the writ is granted, the judge shall make the writ returnable before the senior resident superior court judge of the judicial district where the applicant was sentenced or the senior resident superior court judge's designee. In the event the application for writ of habeas corpus raises a meritorious nonjurisdictional challenge to the applicant's conviction and sentence, the judge shall immediately refer the matter to the senior resident superior court judge of the judicial district where the applicant was sentenced or the senior resident superior court judge's designee for disposition as a motion for appropriate relief; and-

(6) All requests for and awards of attorney fees and other expenses of representation shall be made in accordance with rules adopted by the Office of Indigent Defense Services.

These amendments to the General Rules of Practice for the Superior and District Courts shall be effective upon adoption by the Supreme Court.

Adopted by the Court in Conference this the 1st day of May, 2003. These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals. These amendments shall also be published as quickly as practicable on the North Carolina Judicial Branch of Government Internet Home Page (<http://www.nccourts.org>).

Brady, J.  
For the Court

## **HEADNOTE INDEX**



## **WORD AND PHRASE INDEX**





# HEADNOTE INDEX

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**ADMINISTRATIVE LAW**

**Exhaustion doctrine—parallel action with distinct claim**—The exhaustion doctrine was not applicable where plaintiffs unsuccessfully petitioned the County Farm Service Agency (CFSA) for defendants' tobacco marketing cards under the Agricultural Code, did not appeal that decision, and brought a separate action for breach of a consent judgment. That action sought a contract remedy which was not available under the Agricultural Code. **Hemric v. Groce, 393.**

**Sufficiency of evidence—whole record test**—The superior court was required to perform a whole record test to determine whether there was substantial evidence to support demotion of a prison food service supervisor for not maintaining a sanitary and orderly kitchen. **Skinner v. N.C. Dep't of Corr., 270.**

**ADVERSE POSSESSION**

**Condemnation proceeding—findings of fact**—The trial court erred in a condemnation case by concluding that defendants failed to establish a claim of adverse possession to a tract adjoining their condemned property and this case is remanded for additional and adequate findings of fact. **Department of Transp. v. Byerly, 454.**

**AGENCY**

**Coordinator of family farm maintenance—voluntary family event—no agency**—Summary judgment for defendant Phillips on an agency claim was proper where six-year-old Justice Vares was injured during the family's "Farm Day" while his father cut a tree. Although Phillips organized and coordinated the Farm Day, it was a voluntary family event that took place each year for the benefit of the entire extended family and there was no evidence Vares or other family members acted on Phillips's behalf or that they were obligated to perform the specific tasks assigned to them. **Vares v. Vares, 83.**

**Injury during family farm day—activities not planned at owner's request**—Defendant Bennett had no liability based on agency where his grandson was injured by a falling tree on a day when Bennett family members performed maintenance on Bennett's farm. Bennett's daughter, defendant Phillips, planned activities for the family's "Farm Day," but there was no evidence that Phillips was acting on Bennett's behalf or at his request, or that Phillips's actions were subject to Bennett's control. **Vares v. Vares, 83.**

**AGRICULTURE**

**Tobacco allotments—lease—overproduction**—There were genuine issues of material fact in an action arising from tobacco allotments and the possession of marketing cards where defendant contended that the lease between the parties did not permit overproduction, but the lease contained language with respect to the applicability of the CFSA rules and regulations and it was not clear whether the lease sought to limit use of the marketing cards or whether it sought to hold plaintiffs liable for statutory penalties if plaintiffs overproduced. **Hemric v. Groce, 393.**

**Tobacco allotments—marketing cards—damages**—A claim for monetary damages for failure to deliver tobacco marketing cards was not barred by the fact

**AGRICULTURE—Continued**

that the tobacco allotments, which run with the land, were leased to a new tenant for the next year. Defendants, as the farm operators, had title to the cards under federal regulations; moreover, plaintiffs were not seeking (in this action) the delivery of the cards. **Hemric v. Groce, 393.**

**ALIENATION OF AFFECTIONS**

**Common law tort—recognized by North Carolina Supreme Court—**The Court of Appeals has no authority to abolish the torts of alienation of affection and criminal conversation even though defendant contends the torts are archaic, antiquated, and offensive to the concept of feminine equality. **Nunn v. Allen, 523.**

**Directed verdict—judgment notwithstanding verdict—sufficiency of evidence—postseparation conduct admissible—**The trial court did not err by denying defendant's motion for a directed verdict and for judgment notwithstanding the verdict in an action for alienation of affection because evidence of defendant's postseparation sexual relationship with plaintiff's wife explained and corroborated defendant's preseparation conduct toward plaintiff's wife. **Nunn v. Allen, 523.**

**Jury instructions—active role—preseparation misconduct—**The trial court did not err by instructing the jury on alienation of affection even though the court refused to give defendant's requested instruction that to be liable defendant must have had an active role in alienating the wife's affection and that any claim must be based on preseparation conduct where the court's instructions established that there must be some wrongful action on the part of defendant leading to the alienation. **Nunn v. Allen, 523.**

**Jury instructions—compensatory damages—**The trial court did not err by instructing the jury as to compensatory damages for alienation of affection that it could consider the degree to which plaintiff and his wife's relationship was destroyed in addition to plaintiff's mental anguish, shame, humiliation, loss of reputation and support, and any other adverse effect on the quality of the marital relationship. **Nunn v. Allen, 523.**

**Motion to set aside verdict—motion for new trial—sufficiency of evidence—preseparation misconduct—**The trial court did not abuse its discretion by denying defendant's N.C.G.S. § 1A-1, Rule 59 motion to set aside the compensatory damage verdict for alienation of affection and by failing to grant a new trial because there was sufficient evidence of preseparation misconduct on defendant's part. **Nunn v. Allen, 523.**

**Punitive damages—sexual relationship—laughter about situation—knowledge affecting children—**The trial court did not err by awarding punitive damages for an alienation of affection claim because malice was shown by evidence that defendant had sexual relations with plaintiff's wife while she was married to plaintiff, that defendant laughed at plaintiff and his father when they spoke to defendant about his relationship with plaintiff's wife, and that plaintiff's son had told defendant to stay away from his mother. **Nunn v. Allen, 523.**

## ANIMALS

**Domestic—cat—wrongful keeping of animal with knowledge of viciousness**—The trial court did not err in a wrongful keeping of animal with knowledge of its viciousness case by granting summary judgment in favor of defendants in an action by plaintiff to recover injuries inflicted by defendants' cat because plaintiff failed to establish that the cat exhibited vicious propensities in the past or that defendants had any reason to suspect that their cat might attack plaintiff. **Ray v. Young, 492.**

**Domestic—pit bull dog—wrongful keeping of animal with knowledge of viciousness**—The trial court erred in a wrongful keeping of animal with knowledge of viciousness case by denying defendants' motion for directed verdict at the close of plaintiff's evidence and in denying defendants' motion for judgment notwithstanding the verdict after a trial finding defendants liable for injuries inflicted upon plaintiff by a pit bull dog because the evidence showed that defendants were not the owners or keepers of the dog but only allowed their son to keep the dog on property owned by them. **Lee v. Rice, 471.**

## APPEAL AND ERROR

**Appealability—denial of motion to dismiss—interlocutory order—jurisdiction selection clause—substantial right**—Although the denial of a motion to dismiss is ordinarily not appealable, this matter is properly before the Court of Appeals because an appeal from a motion to dismiss for improper venue based upon a jurisdiction or venue selection clause dispute deprives the appellant of a substantial right. **Cable Tel Servs., Inc. v. Overland Contr'g., Inc., 639.**

**Appealability—interlocutory order—condemnation hearing—business damages**—Although defendants contend the State was required to compensate them for damages to their business based on a condemnation proceeding, this claim is an appeal from an interlocutory order because N.C.G.S. § 136-108 hearings do not finally resolve all issues when the issue of damages is to be determined in a later trial. **Department of Transp. v. Byerly, 454.**

**Appealability—interlocutory order—sovereign immunity affects substantial right**—Although the appeal from the denial of a motion to dismiss is not a final judgment and is generally not appealable, defendant county's appeal is properly before the Court of Appeals because it is based upon the defense of sovereign immunity. **Peverall v. County of Alamance, 426.**

**Appealability—interlocutory order—writ of certiorari**—Assuming arguendo that this appeal from the grant of plaintiff's motion for voluntary dismissal without prejudice is an appeal from an interlocutory order, the Court of Appeals elects to consider the appeal by granting appellant's petition for writ of certiorari. **Williams v. Poland, 709.**

**Appealability—partial summary judgment**—A partial summary judgment in a case that rose from the dissolution of a business was appealable where the order was final as to a breach of contract claim and the trial court certified the case for immediate appeal. **Porter v. American Credit Counselors Corp., 292.**

**Briefs—type size**—An appeal was dismissed for not complying with an order requiring a substitute brief meeting the type size requirements of Rule 26(g) of the Rules of Appellate Procedure. **Daniels v. Wal-Mart Stores, Inc., 518.**

**APPEAL AND ERROR—Continued**

**Court of Appeals—no en banc authority**—Neither the legislature nor the Supreme Court has established a procedure by which the Court of Appeals may sit en banc. **State v. Cates, 737.**

**Lack of jurisdiction—waiver of defense—first raised on appeal**—An argument concerning waiver of the defense of lack of personal jurisdiction was not addressed where it was first raised on appeal. **N.C. Farm Bureau Mut. Ins. Co. v. Holt, 156.**

**Mootness—contempt order—period of incarceration expired—subsequent damages action**—An appeal from a contempt order was not moot even though the period of incarceration had passed because the findings and conclusions made in the contempt order could be used in a damages action which plaintiffs subsequently filed. **Hemric v. Groce, 393.**

**Mootness—covenant not to compete—expiration while appeal pending**—An appeal from a preliminary injunction against breach of a non-compete agreement which expired while the appeal was pending was moot. **Artis & Assocs. v. Auditore, 508.**

**Mootness—expired non-competition agreement**—An appeal was dismissed as moot where petitioner sought an injunction to enforce a non-competition agreement which expired while the appeal was pending. **Corpening Ins. Ctr., Inc. v. Haaff, 190.**

**Preservation of issues—denial of evidence—failure to make offer of proof**—Although defendant contends the trial court erred in a felonious assault with a deadly weapon inflicting serious injury case by refusing to allow defendant to testify regarding past confrontations between defendant and the victim, this assignment of error is dismissed because defendant failed to make an offer of proof of the excluded testimony. **State v. Williams, 466.**

**Preservation of issues—failure to argue in brief**—Plaintiff has abandoned all theories alleged in its complaint other than its due process claim because its assignments of error and arguments in the brief failed to preserve these issues in accordance with N.C. R. App. P. 28(a). **Structural Components Int. Inc. v. City of Charlotte, 119.**

**Preservation of issues—failure to assign error**—The trial court did not abuse its discretion in a robbery with a dangerous weapon case by denying defendant's oral motion in limine regarding eyewitness confidence where defendant failed to assign error to the evidentiary rulings of the trial court on this issue. **State v. Lee, 410.**

**Preservation of issues—failure to cite authority—general objections—failure to show prejudice**—Although defendant contends the trial court erred in an alienation of affections and criminal conversation case by permitting plaintiff to cross-examine defendant concerning property owned by defendant's father and to cross-examine plaintiff's wife concerning the pendency of charges against her for embezzlement from her place of employment, this assignment of error is dismissed because defendant failed to preserve this issue for appeal by failing to cite any authority and by interposing only general objections at trial. **Nunn v. Allen, 523.**

**APPEAL AND ERROR—Continued**

**Preservation of issues—failure to object at trial**—An assault defendant's contention that the trial judge abused his discretion by denying his motion to sequester witnesses was not heard on appeal where defendant did not request to be heard or object to the trial court's ruling. *State v. Johnston*, 500.

**Preservation of issues—failure to object to instruction**—Plaintiff did not preserve for appeal the issue of whether the trial court erred by instructing the jury on contributory negligence where there was no evidence of plaintiff objecting to the instruction. *Alford v. Lowery*, 486.

**Preservation of issues—failure to request instructions—failure to object to omission**—A plaintiff in an automobile accident case waived any error in the court not instructing on last clear chance or gross negligence where there was no evidence that plaintiff requested those instructions or objected to their omission. *Alford v. Lowery*, 486.

**Preservation of issues—general objection**—A defendant in a prosecution for a first-degree murder (which began when a baby was called ugly) did not preserve for appellate review the State's cross-examination of defendant about bad acts and crimes he committed as a juvenile. Defendant made only two general objections, gave no basis for the objections, and the transcript does not clearly demonstrate grounds for the objections. *State v. Perkins*, 148.

**Preservation of issues—improper use of evidence—no assignment of error**—An issue concerning the improper use of evidence of prior acts of violence was not preserved for appeal where defendant did not make the argument the subject of an assignment of error. *State v. Taylor*, 366.

**Preservation of issues—juvenile delinquency—sufficiency of evidence—no motion to dismiss**—A juvenile waived his right to challenge on appeal the sufficiency of the evidence against him by failing to move to dismiss the petition at the close of evidence during the adjudicatory hearing. *In re Lineberry*, 246.

**Preservation of issues—plea agreement—failure to object to proceeding with trial**—Although defendant contends the trial court erred in a felonious assault with a deadly weapon inflicting serious injury case by refusing to allow defendant to enter a plea to a lesser offense of misdemeanor assault and by declining defense counsel's request to approach the bench after the jury was empaneled, this assignment of error is dismissed because there is no evidence in the record that a plea agreement was reached, and defendant made no objection to proceeding with the trial. *State v. Williams*, 466.

**Preservation of issues—questions regarding eyewitness memory—failure to develop argument**—Although defendant contends the trial court abused its discretion in a robbery with a dangerous weapon case by sustaining the State's objections to defendant's two questions regarding eyewitness memory during jury voir dire, this assignment of error is overruled because defendant failed to develop this argument. *State v. Lee*, 410.

**Preservation of issues—questions regarding publication—failure to develop argument**—Although defendant contends the trial court abused its discretion in a robbery with a dangerous weapon case by prohibiting defendant from cross-examining a detective about procedures in a publication from the U.S.

**APPEAL AND ERROR—Continued**

Justice Department, this assignment of error is overruled because defendant failed to develop this argument. **State v. Lee, 410.**

**Preservation of issues—right to argue plain error—failure to object when given opportunity**—A defendant in an armed robbery prosecution waived his right to argue plain error in the jury's use of a dictionary in its deliberations where defendant declined to object when given the opportunity by the trial judge. **State v. Poole, 419.**

**Record—failure to include depositions not submitted—no error**—The trial court did not err by not admitting into the record in a negligence action certain depositions where there was no evidence that plaintiff ever offered the depositions by physically conveying them to the judge or otherwise submitting them to the court's review. Moreover, the trial court did not rely on the depositions in ruling on the motions and the exclusion of the evidence from the record could not have prejudiced plaintiff. **Vares v. Vares, 83.**

**ARBITRATION AND MEDIATION**

**Caption of arbitration award—clerical error—service of process**—The trial court did not err in a construction case by denying respondent subcontractor's motions to dismiss based on lack of service of process and the fact that the original caption of arbitration award referred to petitioner as "Marolf Construction Company" instead of "Marolf Construction, Inc." without the error being corrected within the ninety days provided under N.C.G.S. § 1-567.14 because the trial court may correct a clerical error after the ninety-day period has expired. **Marolf Constr., Inc. v. Allen's Paving Co., 723.**

**Motion to stay arbitration—underinsured motorist coverage**—The trial court did not err in an action arising out of an automobile accident by denying plaintiff insurance company's motion to stay arbitration because defendants' claim for UIM benefits was not barred by their execution of a limited release. **N.C. Farm Bureau Mut. Ins. Co. v. Edwards, 616.**

**ARREST**

**Warrantless—probable cause—illegal gaming machines**—The trial court did not err in an illegal possession of video gaming machines and assault with a firearm on a law enforcement officer case by admitting the State's exhibits even though defendant contends they were tainted by defendant's warrantless arrest because the officers had probable cause for the arrest. **State v. Childers, 375.**

**ASSAULT**

**Contributory negligence instruction—refused**—The trial court did not err in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury by refusing defendant's requested instruction that the State must prove that the negligent acts of the victim were not the intervening cause of her injuries. Contributory negligence by a victim does not preclude consideration of defendant's culpable conduct. **State v. Taylor, 366.**

**Deadly weapon with intent to kill inflicting serious injury—indictment—intent to kill element**—Although defendant contends the trial court erred in an



**ASSAULT—Continued**

assault with a deadly weapon with intent to kill inflicting serious injury case by failing to dismiss the indictment based on a failure to allege the element of the offense of specific intent to kill the victim, the indictment sufficiently alleged an intent to kill the victim. **State v. Spencer, 666.**

**Deadly weapon with intent to kill inflicting serious injury—jury instruction—voluntary intoxication**—The trial court did not commit plain error in an assault with a deadly weapon with intent to kill inflicting serious injury case by failing to instruct the jury on voluntary intoxication. **State v. Spencer, 666.**

**Felonious assault inflicting serious bodily injury—motion to dismiss—sufficiency of evidence—serious bodily injury**—The trial court did not err by denying defendant's motion to dismiss at the close of all evidence the charge of felonious assault inflicting serious bodily injury under N.C.G.S. § 14-32.4 based on alleged insufficient evidence of serious bodily injury after defendant struck his eight-year-old daughter on the buttocks with a board multiple times while disciplining her for perceived misbehavior. **State v. Williams, 176.**

**Multiple count indictment—necessary element—no incorporation by reference**—A motion to arrest judgment on a conviction for assault with a deadly weapon inflicting serious injury was allowed where the applicable count of the indictment, Count III, did not mention the bottle which was the weapon and did not incorporate by reference the mention of the bottle in Count II, which charged armed robbery. However, the indictment sufficiently alleged assault inflicting serious injury, the jury was instructed on this offense, and the case was remanded for entry of judgment on that offense. **State v. Moses, 332.**

**Serious injury—serious physical injury—sufficiency of evidence**—Defendant was properly convicted of two counts of assault with a deadly weapon inflicting serious injury under N.C.G.S. § 14-32(b) and one count of felonious child abuse inflicting serious physical injury under N.C.G.S. § 14-318.4 without evidence of serious bodily injury as defined in N.C.G.S. § 14-32.4 because "serious bodily injury" requires proof of a more severe injury than that required for "serious injury" and "serious physical injury" in the statutes under which defendant was convicted, and the injuries suffered by all the victims clearly fell within the realm of injuries contemplated by the applicable statutes. **State v. Lowe, 607.**

**Short-form indictment—felonious assault—constitutional**—A short-form indictment for assault with a deadly weapon inflicting serious injury was constitutional. **State v. Andrews, 553.**

**ATTORNEYS**

**Ineffective assistance of counsel—civil action**—Ineffective assistance of counsel does not provide a basis for setting aside a jury verdict in a civil case. **Alford v. Lowery, 486.**

**Withdrawal—no motion—no ex mero motu duty**—The court was not required to remove defense counsel ex mero motu from a possession of stolen goods trial where defense counsel informed the court that he had been removed in all of defendant's other pending cases but did not move to withdraw, and defendant made no request that his counsel be discharged. **State v. Murray, 631.**

**BURGLARY AND UNLAWFUL BREAKING OR ENTERING**

**First-degree burglary—acting in concert—motion to dismiss—sufficiency of evidence**—The trial court did not err by failing to dismiss the charges of first-degree burglary and armed robbery and by instructing the jury on acting in concert in relation to these offenses even though defendant contends he was merely present at the crime scene and there was no evidence that defendant knew that any of the codefendants were armed. **State v. Walker, 645.**

**First-degree burglary—failure to instruct on lesser-included offenses**—The trial court did not err by refusing to instruct the jury on the lesser-included offenses of first-degree burglary. **State v. Walker, 645.**

**CHILD ABUSE AND NEGLECT**

**Defendant as perpetrator—sufficiency of evidence**—The State presented evidence in a felonious child abuse inflicting serious bodily injury prosecution sufficient for the jury to infer that defendant was the individual who intentionally abused the child where the evidence tended to show that defendant provided exclusive care to the child while the child's mother was at work; the child was injured during the time she was in defendant's care; and the injuries resulted in the removal of part of the child's pancreas, a perforation in his small intestine, blood clots, severe shock, injury to his bladder and kidneys, and a contusion to his liver. **State v. Chapman, 441.**

**Felonious child abuse—motion to dismiss—sufficiency of evidence—serious physical injury**—The trial court did not err by denying defendant's motion to dismiss at the close of all evidence the charge of felonious child abuse under N.C.G.S. § 14-318.4(a) based on alleged insufficient evidence of a serious physical injury after defendant struck his eight-year-old daughter on the buttocks with a board multiple times while disciplining her for perceived misbehavior. **State v. Williams, 176.**

**Mere presence—instruction not given**—There was no prejudicial error in the trial court's failure to instruct on mere presence in a prosecution for felonious child abuse where the court instructed on the State's burden of proving defendant's identity as the perpetrator of the crime, circumstantial evidence, accident, and misdemeanor child abuse. **State v. Chapman, 441.**

**Serious injury—serious physical injury—sufficiency of evidence**—Defendant was properly convicted of two counts of assault with a deadly weapon inflicting serious injury under N.C.G.S. § 14-32(b) and one count of felonious child abuse inflicting serious physical injury under N.C.G.S. § 14-318.4 without evidence of serious bodily injury as defined in N.C.G.S. § 14-32.4 because "serious bodily injury" requires proof of a more severe injury than that required for "serious injury" and serious physical injury" in the statutes under which defendant was convicted, and the injuries suffered by all the victims clearly fell within the realm of injuries contemplated by the applicable statutes. **State v. Lowe, 607.**

**CHILD SUPPORT, CUSTODY, AND VISITATION**

**Support—amount**—The trial court did not err in an alienation of affections and criminal conversation case by permitting plaintiff to elicit testimony from an employee in the child support section of superior court concerning the amount

**CHILD SUPPORT, CUSTODY, AND VISITATION—Continued**

of child support which would have been required in 1997 of a person earning the same income as plaintiff's wife earned in 1996. **Nunn v. Allen, 523.**

**Temporary custody—third party—relationship sufficient**—A district court had the authority to enter a temporary custody order while a legitimation action was pending in superior court even though plaintiff was a third party while the claim was pending because the child shared plaintiff's last name, plaintiff had visited the child since her birth, and the relationship between them was sufficient to give plaintiff standing as an "other person" under N.C.G.S. § 50-13.1(a) to seek custody. **Smith v. Barbour, 402.**

**Visitation action by putative father—husband a necessary party**—The trial court erred by entering a temporary visitation order involving a child's mother and a man claiming paternity where the presumed father (who was married to the mother when the child was born) was not notified. The husband is a necessary party in an action brought by a putative father or non-parent unless he has already been determined not to be the father. **Smith v. Barbour, 402.**

**CIVIL PROCEDURE**

**Breach of contract—warranty of suitability of lot to build home—summary judgment—pretrial discovery**—A de novo review revealed that the trial court did not err by granting summary judgment in favor of defendant real estate developer and the developer's manager on plaintiffs' breach of contract claim, regarding the warranties of the suitability of plaintiffs' lot to build a home, prior to the completion of pretrial discovery. **Shroyer v. County of Mecklenburg, 163.**

**Motion to dismiss—converted to motion for more definite statement**—The trial court did not err by treating a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b) as a motion for a more definite statement under N.C.G.S. § 1A-1, Rule 12(e). **Page v. Mandel, 94.**

**Rule 41(a) motion to dismiss without prejudice—Rule 12(b)(6) motion to dismiss**—The trial court did not err in an action arising out of an automobile accident by granting plaintiff's motion to dismiss without prejudice under N.C.G.S. § 1A-1, Rule 41(a) because defendants' Rule 12(b)(6) motion to dismiss was not a request for affirmative relief that cancelled plaintiff's ability to voluntarily dismiss her case without prejudice. **Williams v. Poland, 709.**

**Rule 12(b)(6) dismissal—outside matters considered**—There was no error in the dismissal of an employment harassment complaint where the order and judgment referred to Rule 12(b)(6) but an affidavit and a previous federal judgment were considered. Rule 12(b) expressly provides for the disposal of claims under Rule 56 when outside matters are considered and it was not necessary for the court to specifically refer to Rule 56. Furthermore, it is clear that the court used Rule 12(b) and Rule 56 interchangeably. **Beck v. City of Durham, 221.**

**CIVIL RIGHTS**

**Failure to state claim—red-light citation—civil rights violation—due process**—The trial court did not err in a negligence and violation of civil rights claim arising out of the issuance of a red-light citation to plaintiff based on the

**CIVIL RIGHTS—Continued**

Safelight program by ruling plaintiff's complaint failed to state a claim for civil rights violations including due process. **Structural Components Int. Inc. v. City of Charlotte**, 119.

**COLLATERAL ESTOPPEL AND RES JUDICATA**

**Prior federal claim—different issues**—A 42 U.S.C. 1983 claim for selective waiving of governmental immunity was not barred by res judicata even though a prior federal claim had been dismissed where the claims were based on different factual and legal issues. **Beck v. City of Durham**, 221.

**Res judicata—no final judgment—different issues**—A conversion action brought by decedent's children against decedent's wife, who was the administratrix of his estate, was not barred by res judicata based upon a petition filed by the children with the clerk of superior court in the estate proceeding alleging that decedent's assets had not been entirely accounted for and reported by the administratrix and the resulting consent order requiring the production of bank records because (1) the conversion claim could not have been brought before the clerk; (2) neither the final account nor the consent order was a final judgment on the conversion issue; and (3) the prior estate proceedings involved different issues. **State ex rel. Pilard v. Berninger**, 45.

**Tobacco allotment—CFSA ruling—breach of contract action**—A damages claim for not delivering tobacco marketing cards was not barred by res judicata based on a ruling by the County Farm Service Agency (CFSA) because the hearing before the CFSA involved an analysis of the Agriculture Code and the damages action turned on an interpretation of a consent judgment. **Hemric v. Groce**, 393.

**CONFESSIONS AND INCRIMINATING STATEMENTS**

**Custodial interrogation—invocation of right to counsel**—The totality of circumstances revealed that the trial court did not err in an attempted statutory rape of a person between the ages of thirteen and fifteen case by denying defendant's motion to suppress his statements to an officer concerning the sexual assault of defendant's daughter because the circumstances surrounding the interview did not constitute a custodial situation requiring that he be given Miranda warnings and defendant did not invoke his right to counsel by merely asking whether he needed an attorney. **State v. Barnes**, 111.

**Motion to suppress—traffic stop—not in custody**—The trial court did not err in a driving while impaired and habitual impaired driving case by denying defendant's motion to suppress his statement made during a traffic stop that he had a few alcoholic drinks over at a friend's house because defendant was not in custody and Miranda warnings were not required. **State v. Mark**, 341.

**Secure custody—custodial interrogation—absence of Miranda warnings—harmless error**—A defendant was in custody for Miranda purposes when he was ordered out of his vehicle at gunpoint, handcuffed, placed in the back of a patrol car, and questioned by detectives. Despite being told that he was in "secure custody" rather than under arrest, defendant's freedom of movement was restrained to the degree associated with a formal arrest. Therefore, the trial court erred by admitting a statement made by defendant in response to interrogation

**CONFESSIONS AND INCRIMINATING STATEMENTS—Continued**

without Miranda warnings, “So what if I threw the shotgun out,” but this error was harmless in light of the other overwhelming evidence of defendant’s guilt. **State v. Johnston, 500.**

**Voluntariness—use of false statements or trickery—intoxication at time of confession**—The totality of circumstances revealed that the trial court did not err in an attempted statutory rape of a person between the ages of thirteen and fifteen case by denying defendant’s motion to suppress his statements to an officer concerning the sexual assault of defendant’s daughter even though defendant contends the statements were made involuntarily and violated his due process rights allegedly based on the false information given to defendant by an officer about the pregnancy of defendant’s daughter and based on defendant’s prior consumption of prescription drugs and alcohol. **State v. Barnes, 111.**

**CONSTITUTIONAL LAW**

**Double jeopardy—possession of cocaine with intent to sell—trafficking by possession**—Convictions for possession of cocaine with intent to sell and distribute and trafficking in the same cocaine by possession did not violate double jeopardy. **State v. Boyd, 302.**

**Due process—equal protection—municipal payment of selective claims**—The trial court did not err by granting summary judgment for the City of Durham on due process and equal protection claims based on the City’s practice of paying damages on some tort claims but not others. The allegations were insufficient to establish that the City was arbitrary and capricious. **Beck v. City of Durham, 221.**

**Right to be present at trial—juvenile disposition—chambers conference call**—Although it was error to exclude a juvenile from a chambers conference call with a doctor who prepared an evaluation of the juvenile, the error was harmless beyond a reasonable doubt because the call occurred in the presence of the juvenile’s counsel, who cross-examined the witness; the substance of the call was placed on the record by the judge; the doctor’s opinion was reduced to writing and was available to all parties; and the juvenile made no objections to his absence from the conference. **In re Lineberry, 246.**

**Right to testify—duty to inform**—The trial court did not have an affirmative duty to ensure that a defendant had been adequately informed of his right to testify on his own behalf in a prosecution for possession of stolen goods. **State v. Murray, 631.**

**Self-incrimination—juvenile’s refusal to admit guilt—custody pending appeal**—A juvenile’s constitutional right against self-incrimination was violated where the court found that the juvenile’s consistent refusal to admit to the offenses diminished his amenability to treatment and ordered that he remain in custody pending appeal. **In re Lineberry, 246.**

**Testimony of defendant’s consulting experts—effective assistance of counsel—work product privilege**—The trial court violated a defendant’s right to effective assistance of counsel and the related work product privilege in a selling heroin, delivering heroin, and possessing heroin with intent to sell and deliver case by admitting testimony concerning laboratory tests and results of a

**CONSTITUTIONAL LAW—Continued**

testing facility retained by defendant to independently test the substance at issue, and defendant is entitled to a new trial. **State v. Dunn, 1.**

**CONSTRUCTION CLAIMS**

**Breach of contract—warranty of suitability of lot to build home—genuine issues of material fact**—A de novo review revealed that the trial court did not err by granting summary judgment in favor of defendant real estate developer and the developer's manager on plaintiffs' breach of contract claim regarding the warranties of the suitability of plaintiffs' lot to build a home even though plaintiffs allege there were genuine issues of material fact in dispute. **Shroyer v. County of Mecklenburg, 163.**

**Negligence—design and installation of septic system**—A de novo review revealed that the trial court did not err by granting summary judgment in favor of defendant subcontractor on plaintiffs' negligence claim against the subcontractor for failing to properly design and install plaintiffs' residential septic system based on statements in plaintiffs' pretrial memorandum that were never memorialized in a formal pretrial order. **Shroyer v. County of Mecklenburg, 163.**

**Third-party beneficiary breach of contract—design and installation of septic system**—A de novo review revealed that the trial court did not err by granting summary judgment in favor of defendant subcontractor on plaintiffs' third-party beneficiary breach of contract claim against the subcontractor for failing to properly design and install plaintiffs' residential septic system. **Shroyer v. County of Mecklenburg, 163.**

**CONTEMPT**

**Civil—consent judgment—capability to comply with conditions**—The trial court did not err by holding appellant wife in civil contempt for failing to honor her payment obligations pursuant to a consent agreement that was memorialized in a separation agreement on a debt she and her former husband owed jointly to plaintiff corporation for a car even though appellant wife contends the trial court did not find that appellant was presently capable of complying with its conditions because the trial court's findings were sufficient to support the conclusion that appellant could comply with the contempt order. **General Motors Acceptance Corp. v. Wright, 672.**

**Civil—consent judgment—presumption of adoption by trial court—waiver**—The trial court did not err by holding appellant wife in civil contempt for failing to honor her payment obligations pursuant to a consent agreement that was memorialized in a separation agreement on a debt she and her former husband owed jointly to plaintiff corporation for a car even though appellant contends the consent judgment was not adopted by the court based on the trial court not making any findings of fact, because: (1) appellant expressly waived her right to allow the court to make such findings of fact; and (2) there was no evidence rebutting the presumption of adoption of the judgment by the trial court. **General Motors Acceptance Corp. v. Wright, 672.**

**Civil—consent judgment—separation agreement not adopted or approved by court**—The trial court did not err by holding appellant wife in civil contempt for failing to honor her payment obligations pursuant to a consent

**CONTEMPT—Continued**

agreement that was memorialized in a separation agreement on a debt she and her former husband owed jointly to plaintiff corporation for a car even though the separation agreement was not adopted or approved by the court because appellant was held in contempt for failure to comply with the consent judgment and not the separation agreement, and the consent judgment was, in essence, a decree of specific performance that was enforceable through contempt proceedings. **General Motors Acceptance Corp. v. Wright, 672.**

**Non-domestic consent judgment—not enforceable by contempt**—A district court lacked authority to find a party in contempt for noncompliance with a non-domestic consent judgment, its orders were void, and the superior court erred by denying defendants' Rule 60 motion for relief from judgment. **Hemric v. Groce, 393.**

**CONTRACTS**

**Choice of law—refusal to apply**—The trial court did not err in a breach of contract action by refusing to apply Colorado law even though the contract provides that its validity, performance, and effect shall be determined in accordance with the internal laws of Colorado. **Cable Tel Servs., Inc. v. Overland Contr'g., Inc., 639.**

**Dissolution of business—transfer of assets—compliance with agreement—factual issues**—There were material issues of fact in an action that rose from the dissolution of a business where the expert appointed by the court concluded that the information transfer provisions of the dissolution had been complied with, but there were conflicting affidavits. Since the parties and the trial court are not bound by the expert's conclusions, there were viable issues of fact. **Porter v. American Credit Counselors Corp., 292.**

**CONVERSION**

**Business relationship—summary judgment**—The trial court erred by granting summary judgment in favor of defendants on plaintiffs' claim for conversion arising out of the parties' business relationship. **Southeastern Shelter Corp. v. BTU, Inc., 321.**

**Certificates of deposit—decedent's wife—sufficiency of evidence**—The evidence was sufficient to support the trial court's finding and conclusion that decedent's wife converted decedent's assets where it showed that the wife withdrew money from a joint account to purchase three certificates of deposit; that decedent thus owned a one-half interest in the certificates of deposit; and that the wife assumed control of the certificates of deposit without authorization. **State ex rel. Pilard v. Berninger, 45.**

**COSTS**

**Attorney fees—appellate services**—The trial court has discretion under N.C.G.S. § 6-21.1 to award attorney fees for services performed on appeal, and the case was remanded for findings and an award. **Furnick v. Miner, 460.**

**Attorney fees—civil contempt proceeding—specific performance of payment of marital debt**—The trial court did not err in a civil contempt proceed-

**COSTS—Continued**

ing by awarding attorney fees to appellee husband based on appellant wife's failure to honor her payment obligations pursuant to a consent agreement that was memorialized in a separation agreement on a debt she and her former husband owed jointly to plaintiff corporation for a car. **General Motors Acceptance Corp. v. Wright**, 672.

**Attorney fees—findings—sufficiency**—The trial court's findings in a personal injury action were sufficient to support an award of attorney fees under N.C.G.S. § 6-21.1 where the findings sufficiently referred to certain factors without being specific. **Furnick v. Miner**, 460.

**Attorney fees—offers higher than verdict**—The trial court did not abuse its discretion by awarding attorney fees to plaintiff where defendant's prejudgment offers were higher than the jury verdict, but the court considered both the amount of the verdict and the timing of the settlement offers. **Furnick v. Miner**, 460.

**Attorney fees—prejudgment interest**—There is no provision in N.C.G.S. § 6-21.1 for the assessment of prejudgment interest and the trial court erred in a personal injury action by including prejudgment interest in an award of attorney fees. **Furnick v. Miner**, 460.

**COURTS**

**Choice of law—refusal to apply**—The trial court did not err in a breach of contract action by refusing to apply Colorado law even though the contract provides that its validity, performance, and effect shall be determined in accordance with the internal laws of Colorado. **Cable Tel Servs., Inc. v. Overland Contr'g., Inc.**, 639.

**Overruling a prior judge—change in circumstances—not shown**—A second judge was without authority to rescind a prior judge's order where the first judge remanded a referee's report, the parties were not able to agree on the factual matters to be submitted, and the second judge rescinded the first judge's order. Although one judge may overrule another where there has been a substantial change of circumstances since entry of the prior order, there was nothing in the record to show the state of agreement or disagreement at the time of the original order and plaintiffs have not met their burden of showing the existence of new facts arising since the original order. Moreover, the original order gave the referee "sole discretion" to determine the information in question. **First Fin. Ins. Co. v. Commercial Coverage, Inc.**, 504.

**CRIMINAL CONVERSATION**

**Common law tort—recognized by North Carolina Supreme Court**—The Court of Appeals has no authority to abolish the torts of alienation of affection and criminal conversation even though defendant contends the torts are archaic, antiquated, and offensive to the concept of feminine equality. **Nunn v. Allen**, 523.

**Jury instruction—factors**—The trial court did not err by instructing the jury on factors for determining an amount of compensatory damages to award on the criminal conversation claim because there was evidence that plaintiff suffered



**CRIMINAL CONVERSATION—Continued**

loss of consortium, mental anguish and humiliation as a result of defendant's sexual relationship with plaintiff's wife. **Nunn v. Allen, 523.**

**Jury instruction—waiver or consent**—The trial court did not err on the claim of criminal conversation by instructing the jury that it should not consider whether plaintiff and his wife had separated before the sexual intercourse occurred, because the plaintiff's separation agreement with his wife did not constitute a waiver or consent for sexual intercourse between the wife and another person. **Nunn v. Allen, 523.**

**Motion to set aside verdict—motion for new trial—sufficiency of evidence**—The trial court did not abuse its discretion by denying defendant's N.C.G.S. § 1A-1, Rule 59 motion to set aside the compensatory damage verdict for criminal conversation and by failing to grant a new trial because plaintiff presented substantial evidence that he experienced mental anguish and humiliation due to the affair between his wife and defendant. **Nunn v. Allen, 523.**

**Punitive damages—same sexual misconduct sufficient**—The trial court did not abuse its discretion by denying defendant's motion for a new trial on the punitive damages issue for a criminal conversation claim because the same sexual misconduct necessary to establish the tort of criminal conversation may also sustain an award of punitive damages. **Nunn v. Allen, 523.**

**Sufficiency of evidence—postseparation sexual relationship—separation agreement**—The trial court did not err by submitting the charge of criminal conversation to the jury based upon defendant's post-separation sexual relationship with plaintiff's wife, and the existence of a separation agreement between plaintiff and plaintiff's wife does not shield defendant from a criminal conversation action. **Nunn v. Allen, 523.**

**CRIMINAL LAW**

**Closing courtroom—defendant's threats**—There was no plain error in the trial court closing the courtroom and telling spectators to leave after a defendant with a history of attempting to escape and of injuring law enforcement officials threatened to hurt someone in the courtroom and to have someone help him escape. **State v. Murray, 631.**

**Defendant's argument—someone else shot victim**—The trial court did not abuse its discretion in an attempted first-degree murder and possession of a firearm by a felon while being an habitual felon case by failing to allow defendant to argue during closing arguments that the victim's present husband shot the victim because there was no evidence presented that pointed directly or indirectly to the guilt of anyone other than defendant. **State v. Bullock, 234.**

**Defense of accident—submitted to jury**—The trial court submitted the defense of accident in an assault prosecution where the court told the jury that defendant had no burden to prove that there was an accident and that the State had the burden of proving that the injury was not accidental. **State v. Taylor, 366.**

**Defense of automatism—unaware of significance of acts**—The trial court did not err in a prosecution for attempted first-degree murder and assault by refusing to instruct the jury on unconsciousness or automatism where defend-

**CRIMINAL LAW—Continued**

ant's expert testified that defendant's medications could cause a person to act "unknowingly." The doctor was referring to awareness of significance rather than awareness of actions and never testified that defendant was actually unconscious or incapable of controlling his actions at the time of these events. **State v. Andrews, 553.**

**Duress—fear of death or injury—evidence not sufficient**—The trial court did not err by not giving an instruction on duress in a prosecution for speeding to elude arrest where defendant testified that a passenger threatened him with a gun, no gun was found and the passenger testified that he never pulled a gun or threatened defendant, and defendant had the opportunity to leave the vehicle shortly after the chase began. There was insufficient evidence that defendant's conduct resulted from his fear of death or serious bodily injury. **State v. Riley, 692.**

**Findings of fact—document given to court clerk without defendant's knowledge—ex parte communication—harmless error**—Although the trial court erred in a second-degree trespass case by making findings of fact based upon a document given to the court clerk by the prosecution without informing defense counsel of its existence or allowing defense counsel to respond, it was harmless error. **State v. Marcoplos, 581.**

**Instructions—flight**—The trial court did not err by instructing the jury on flight in a prosecution for speeding to elude arrest where there was evidence that defendant fled on foot after crashing the vehicle. Furthermore, the court's instruction that flight alone is not sufficient to establish guilt corrected any prejudice. **State v. Riley, 692.**

**Mistrial motion—defendant seen in custody—prompt inquiry and dismissal of juror**—The trial court did not abuse its discretion by denying a mistrial after one juror saw defendant as he was taken to a holding cell where the court questioned deputies and the juror about whether other jurors had seen defendant in custody, questioned the juror about whether she had discussed what she had seen with other jurors, and dismissed the juror. The prompt inquiry and the dismissal of the juror cured any prejudice. **State v. Riley, 692.**

**No formal arraignment on record—purpose achieved**—The trial court did not err in an illegal possession of video gaming machines and assault with a firearm on a law enforcement officer case by failing to grant defendant a new trial based upon the alleged material prejudice he suffered in not having a formal arraignment on the record. **State v. Childers, 375.**

**Reopening evidence—postverdict**—The trial court did not have the discretion to allow defendant to testify after a verdict of guilty of felonious possession of a stolen car where defendant indicated that his counsel had not allowed him to testify and that he had evidence that he could not have stolen the car. Additional evidence must be introduced prior to entry of the verdict; moreover, the additional evidence in this case was irrelevant because it related to whether defendant could have stolen the car rather than the charged offense of possessing the stolen car. **State v. Murray, 631.**

**Transferred intent—attempted murder—running over estranged wife and companion**—The trial court did not err by instructing on transferred intent in a

**CRIMINAL LAW—Continued**

prosecution for attempted murder and assault where defendant ran down his wife with his car in a grocery store parking lot with the specific intent of killing her, injuring her friend in the process. **State v. Andrews, 553.**

**Trial court asking witness questions—no expression of opinion—**A defendant is not entitled to a new trial in an attempted first-degree murder and possession of a firearm by a felon while being an habitual felon case because the trial court asked a doctor witness questions about the seriousness and the permanency of the victim's injuries. **State v. Bullock, 234.**

**DAMAGES AND REMEDIES**

**Punitive damages—jury instruction—**The trial court did not err in an alienation of affections and criminal conversation case by instructing the jury on the issue of punitive damages. **Nunn v. Allen, 523.**

**DECLARATORY JUDGMENTS**

**Standing—association—**The trial court did not err by concluding that plaintiff state employees association lacked standing to maintain a declaratory judgment action seeking to enjoin the State and certain of its officials from redirecting funds allocated to the State's retirement system to attempt to balance the budget rather than to fund the retirement systems. **State Employees Ass'n of N.C., Inc. v. State, 207.**

**DEEDS**

**Ambiguity in description—sufficiency of evidence—**There was competent evidence to support the trial court's finding of ambiguity in a deed where there was testimony from two professional surveyors that the terms in the original deed were inconsistent when applied to the contested boundary. **Baker v. Moorefield, 134.**

**Conflict in description—monument controls—**The trial court correctly used the brick wall of a store building as a monument in an action to establish a common boundary where the course and distance description in the deed was inconsistent with the monument. Where there is a conflict between course and distance and a fixed monument, the call for the monument will control. **Baker v. Moorefield, 134.**

**DISCOVERY**

**Laboratory protocols—drug testing—**The trial court erred in a selling heroin, delivering heroin, and possessing heroin with intent to sell and deliver case by failing to require the State to provide defendant discovery information under N.C.G.S. § 15A-903(e) pertaining to laboratory protocols, incidences of false positive results, quality control and quality assurance, and proficiency tests of the State Bureau of Investigation (SBI) laboratory when SBI chemists tested the substance that the State alleged to be heroin four times and only two of those tests returned a positive result for heroin, because allowing the discovery would enhance preparation for cross-examination and permit both sides to assess the strengths and weaknesses of this aspect of the evidence. **State v. Dunn, 1.**

**DISCOVERY—Continued**

**Scheduling order—failure to designate expert—sanction**—The trial court did not abuse its discretion in an action for not promptly treating a hemophilic inmate's nose bleed by denying plaintiff's motion for an extension of time to designate an expert witness where plaintiff did not comply with a consent discovery scheduling order. The fact that the defendants may have had notice of the expert witnesses from earlier depositions did not relieve defendant of the obligation to comply with the order. **Summey v. Baker, 448.**

**Testimony of defendant's consulting experts—effective assistance of counsel—work product privilege**—The trial court violated a defendant's right to effective assistance of counsel and the related work product privilege in a selling heroin, delivering heroin, and possessing heroin with intent to sell and deliver case by admitting testimony concerning laboratory tests and results of a testing facility retained by defendant to independently test the substance at issue, and defendant is entitled to a new trial. **State v. Dunn, 1.**

**DIVORCE**

**Equitable distribution—death of husband while action pending**—The trial court erred by dismissing plaintiff executrix's equitable distribution claim on behalf of decedent husband even though no divorce had been entered upon the death of the husband on 15 February 2001 and even though amended N.C.G.S. § 50-20 provides that it applies to actions pending or filed on or after 10 August 2001 because the legislature clarified its intent that § 50-20 did not mandate abatement of a pending equitable distribution action upon the death of a party, and this clarification is entitled to retroactive application. **Bowen v. Mabry, 734.**

**Equitable distribution—life insurance policy—Rule 60(b) motion**—The trial court did not abuse its discretion in an equitable distribution case by denying defendant's N.C.G.S. § 1A-1, Rule 60(b) motion for relief from the trial court's judgment giving plaintiff wife absolute ownership and exclusive possession of defendant husband's life insurance policy rather than only the surrender value of the policy. **Surles v. Surles, 170.**

**DRUGS**

**Cocaine—constructive possession in car**—There was sufficient evidence of constructive possession of cocaine where the cocaine was found under the driver's seat of a car; defendant was riding in the front passenger seat; the only other person in the car testified that defendant was the only person who could have put the drugs where they were found; defendant behaved suspiciously when stopped by the police, reaching under the seat, moving about, and making it difficult for the police to search him; and, at one point, defendant stood alone by the passenger door. **State v. Boyd, 302.**

**Constructive possession—no acting in concert instruction**—The State could rely on constructive possession in a prosecution for trafficking in cocaine by possession where the cocaine was discovered under the driver's seat of a car in which defendant was a passenger and the court did not instruct on acting in concert. **State v. Boyd, 302.**

**EMINENT DOMAIN**

**Condemnation—regulatory taking—watershed protection ordinance—valuation of property**—The trial court erred by concluding that the Watershed Critical Area (WCA) ordinance designed to protect existing and proposed watersheds, as applied to defendants' property, was not caused by the Randleman dam reservoir project and therefore limited the value of defendants' property condemned by plaintiff regulatory agency as of the date of the taking. **Piedmont Triad Reg'l Water Auth. v. Unger, 589.**

**EMOTIONAL DISTRESS**

**Intentional infliction—negative opinion of plaintiff—not outrageous**—The trial court did not err by dismissing plaintiff's claim for intentional infliction of emotional distress against a city manager where the city manager spoke negatively about plaintiff after plaintiff retired as a police officer and became a private investigator. Plaintiff did not demonstrate the necessary level of extreme and outrageous conduct. **Beck v. City of Durham, 221.**

**EMPLOYER AND EMPLOYEE**

**Constructive wrongful discharge—not generally recognized**—There was no error in dismissing a constructive wrongful discharge claim where there was no termination payment provision in an employment contract. This tort has not been recognized in North Carolina except in that context. **Beck v. City of Durham, 221.**

**ENFORCEMENT OF JUDGMENT**

**Defamation judgment—execution—future interest on pending equitable distribution proceeding—401(k) retirement account**—The trial court did not err by granting plaintiff former husband's motion under N.C.G.S. § 1-362 to collect a defamation judgment against defendant former wife by executing on defendant's future interest in the couple's pending equitable distribution proceeding including but not limited to defendant's claims to plaintiff's 401(k) retirement accounts even though defendant contends that the N.C.G.S. § 1C-1601(a)(9) retirement exemption applies. **Kroh v. Kroh, 198.**

**ENVIRONMENTAL LAW**

**Stormwater discharges—general permit—exclusion of new or expanding wood chip mills—aggrieved party**—The N.C. Forestry Association (NCFA) is not an "aggrieved party" and thus lacks standing to bring a contested case proceeding for review of a final agency decision of the Environmental Management Commission that the Division of Water Quality acted within its authority in excluding new or expanding wood chip mills from coverage under a general timber products industry NPDES permit for stormwater discharges because (1) NCFA is not entitled to a general permit under N.C.G.S. § 143-215.1(b)(3) and (b)(4), and (2) NCFA does not claim that it or any of its members has been denied a permit since the individualized permitting process went into effect. **N.C. Forestry Ass'n v. N.C. Dep't of Env't & Natural Res., 18.**

**ESCROW**

**Payment of sewer assessment—not within required period**—The trial court properly granted summary judgment for plaintiffs who were alleging breach of contract and of fiduciary duty arising from the payment of a sewer assessment from escrow after a real estate sale. Payment from the escrow agreement was limited to 16 months, the assessment was subject to modification until it was confirmed, and the assessment was not confirmed within 16 months of the closing. **Marcuson v. Clifton, 202.**

**ESTATES**

**Certificates of deposit—purchase by decedent's wife—half ownership by decedent**—The evidence in a conversion action against decedent's wife was sufficient to support the trial court's finding and conclusion that decedent owned a legal or equitable one-half interest in certificates of deposit at the time of his death and that such interest should have been included in his estate, even though the certificates were in only the wife's name, where it showed that the certificates of deposit were purchased with funds withdrawn from a demand deposit account of which decedent and his wife were co-owners and not from a 100% survivorship account. **State ex rel. Pilard v. Berninger, 45.**

**Necessary parties—conversion—breach of fiduciary duty—representative capacity as administratrix**—Neither decedent's estate nor his second wife in her representative capacity as administratrix were necessary parties in a conversion action brought by decedent's children against the wife in her individual capacity, although both may have been proper parties. However, the wife in her representative capacity was a necessary party to a determination of the children's claim against her for breach of fiduciary duty because it was only in that capacity that any fiduciary duty arose. **State ex rel. Pilard v. Berninger, 45.**

**Subject matter jurisdiction—tort claim against administratrix of estate**—A de novo review revealed that the trial court did not err in an action for breach of fiduciary duty and conversion arising out of the administration of an estate by denying defendants' motion to dismiss based on lack of subject matter jurisdiction because the claims were within the original jurisdiction of the trial division rather than the clerk of court. **State ex rel. Pilard v. Berninger, 45.**

**EVIDENCE**

**Another's guilt—emotion not shown at hospital—exclusion not prejudicial**—There was no prejudicial error in a felonious child abuse prosecution where defendant was denied an answer to a question as to whether the child's mother had shown emotion at the hospital. Defendant was allowed to solicit other evidence that the mother was the perpetrator and there was no reasonable possibility that the outcome would have been different if the question had been answered. **State v. Chapman, 441.**

**Bad acts as juvenile—admission not plain error**—The admission of bad acts and crimes committed by a first-degree murder defendant as a juvenile was not plain error where there was compelling evidence of guilt, defendant did not show that the jury probably would have reached a different result otherwise, and defendant did not show that the admission of the evidence resulted in a fundamental miscarriage of justice. **State v. Perkins, 148.**

**EVIDENCE—Continued**

**Bad acts as juvenile—not statutory plain error**—The General Assembly did not label the admission of juvenile convictions as plain error in N.C.G.S. § 8C-1, Rule 609(d), under which a defendant cannot be impeached by a juvenile adjudication, and there was no evidence that defendant was unfairly prejudiced by questions about his juvenile convictions. **State v. Perkins, 148.**

**Cross-examination—alibi witness—bias or prejudice**—The trial court did not abuse its discretion in an attempted first-degree murder and possession of a firearm by a felon while being an habitual felon case by denying defendant's objection on relevancy grounds to cross-examination questions by the State of a defense witness, defendant's girlfriend, that implied the witness had a previous altercation with the victim, defendant's former wife. **State v. Bullock, 234.**

**Exclusion—defendant's forgetfulness, hearing problem, and diminished capacity—invited error**—The trial court did not err in an illegal possession of video gaming machines and assault with a firearm on a law enforcement officer case by excluding evidence regarding defendant's forgetfulness, hearing problem, and diminished capacity, because: (1) assault with a firearm on a law enforcement officer is a general intent crime for which diminished capacity is not a defense; and (2) any error by the trial court in giving the jury an instruction characterizing an assault as a willful, overt act, for which the excluded evidence could have served as a defense, was invited by defendant when he did not object to the use of the word willful in the jury instruction and in fact encouraged its inclusion. **State v. Childers, 375.**

**Exclusion of expert testimony—eyewitness confidence, eyewitness memory, and showups**—The trial court did not err in a robbery with a dangerous weapon case by excluding expert testimony about eyewitness confidence, eyewitness memory, and showups. **State v. Lee, 410.**

**Exclusion of statements made to defendant by plaintiff's wife—harmless error**—The trial court did not err in an alienation of affections and criminal conversation case by excluding testimony concerning statements made to defendant by plaintiff's wife concerning her relationship with plaintiff because some of the excluded evidence was later admitted through the testimony of plaintiff's wife, and defendant made no offer of proof of the other testimony. **Nunn v. Allen, 523.**

**Expert—implicit request—specific objection required**—Defendant did not preserve for appellate review the issue of whether a police lieutenant was properly qualified to testify about the meaning of a pillow found on the victim's face after a robbery and murder where the prosecutor implicitly elicited expert testimony by inquiring about the significance of the pillow "based on your training and experience" and defendant did not specifically object to the qualification of the lieutenant as an expert. **State v. White, 598.**

**Expert—significance of pillow on victim's face**—Testimony from a police lieutenant about the significance of a pillow found on a murder and robbery victim's face was properly admitted where the officer testified in the form of an opinion based on his expertise and the testimony was likely to assist the jury in making an inference from the circumstances of the crime. **State v. White, 598.**

**EVIDENCE—Continued**

**Fingerprints on stolen items—admissible**—The trial court did not err in a prosecution for first-degree murder and armed robbery by admitting evidence that defendant's fingerprints were on boxes of crackers and candy found in a trailer in which defendant was staying where there was testimony that defendant brought food home in a trash bag around the time of the murder, that the same brands were among the items disturbed in the victim's home, and that the trash bag used to carry the food came from the victim's home. **State v. White, 598.**

**Fingerprints on stolen items—not unduly prejudicial**—The probative value of fingerprints on cracker and candy boxes linked to a murder and robbery was not outweighed by the danger of unfair prejudice because the evidence does not provoke an emotional response or otherwise improperly influence the jury in its consideration of the evidence. **State v. White, 598.**

**Hearsay—child's statement—excited utterance—no showing that child unavailable**—The trial court did not err in an assault prosecution by admitting the child-victim's statement to a detective as an excited utterance without a showing that the child was unavailable and without the findings required for the residual exception. **State v. Lowe, 607.**

**Hearsay—excited utterance—child assault victim—statement to detective hours later**—There was no error in an assault prosecution in admitting as an excited utterance a statement given by a child who had been struck by his father with a pool cue where the statement was given at a hospital several hours after the attack. Children may react to startling experiences well after the events take place, and statements in response to a question do not necessarily lack spontaneity. **State v. Lowe, 607.**

**Hearsay—excited utterance—time to fabricate statement**—Defendant's statement to an officer that he had been coerced was not admissible as an excited utterance in a prosecution for speeding to elude arrest because enough time passed between the wreck and the statement for defendant to fabricate the statement, even though the time wasn't indicated by the record. **State v. Riley, 692.**

**Impeachment—prior DWI offenses**—The trial court properly denied a motion in limine to suppress prior DWI convictions. A careful reading of the applicable statutes indicates that a DWI conviction is a Class 1 misdemeanor and is admissible for impeachment purposes under N.C.G.S. § 8C-1, Rule 609(a). **State v. Gregory, 718.**

**Other crimes or bad acts—marijuana sale—not relevant to veracity—not prejudicial**—There was no prejudicial error in an assault prosecution where the court erroneously allowed the State to cross-examine defendant about selling marijuana to his neighbor, which had no relevance to defendant's veracity as a witness, but defendant did not show a reasonable possibility of a different outcome had the question been excluded. **State v. Taylor, 366.**

**Police officer's opinion—not an expert on this question—harmless error**—There was no prejudicial error in a first-degree murder and armed robbery prosecution, even though the court improperly allowed a police lieutenant to testify that a certain television was "more than probably" from the victim's residence, because substantial evidence linked defendant to the crime. **State v. White, 598.**



**EVIDENCE—Continued**

**Prior crimes or bad acts—breaking mirror on truck—character for truthfulness**—The trial judge in an assault prosecution did not abuse his discretion by admitting on cross-examination evidence that defendant had previously become angry and broken the mirror on his truck. Defendant had given an equivocal answer when asked whether he was at a certain restaurant on a particular night and the mirror question was designed to demonstrate that he was present. Moreover, defendant did not show a reasonable possibility of a different outcome had the evidence of prior acts of violence been excluded. **State v. Taylor, 366.**

**Prior crimes or bad acts—impaired driving—malice—remoteness—harmless error**—The trial court did not err in a second-degree murder, driving while impaired and with a revoked license, and felonious hit and run/failure to stop for personal injury case by admitting defendant's conviction in 1978 for impaired driving for the purpose of proving malice. **State v. Vassey, 384.**

**Prior crimes or bad acts—unfair prejudice—outweighed by probative value**—In a assault prosecution for shooting his current companion, evidence from defendant's former spouse of prior bad acts, including threatening to kill their children if she did not sign a visitation agreement, was not overly prejudicial in violation of N.C.G.S. § 8C-1, Rule 403. **State v. Taylor, 366.**

**Prior crimes or bad acts—used to rebut defense—temporally proximate—limiting instruction**—There was no error in an assault prosecution in the testimony of defendant's former spouse about his prior bad acts, including chasing her through the house and placing a gun to her head, where the testimony rebutted defendant's defense of accident in the shooting of his current companion, defendant's actions in 1993 were sufficiently similar to be temporally proximate, and the court gave a limiting instruction. **State v. Taylor, 366.**

**Redirect examination—suitcase of drugs—harmless error**—The trial court did not commit prejudicial error in an alienation of affections and criminal conversation case by admitting plaintiff's testimony during redirect examination that his wife had told him she had seen a suitcase of drugs at defendant's residence because this single statement would not have affected the jury's verdict. **Nunn v. Allen, 523.**

**Telephone conversation—self-identification of caller—insufficient**—The trial court erred by admitting evidence of a telephone call in a juvenile delinquency hearing where the identity of the caller was based on the caller's self-identification. Such self-identification is not alone sufficient for admission of testimony regarding the contents of the conversation. **In re Rhyne, 477.**

**FALSE IMPRISONMENT**

**Civil contempt incarceration—ambiguous term**—The trial court did not err by granting summary judgment for defendants on a false imprisonment claim where plaintiff was arrested on 11 July and ordered released on 17 December on a 30 day civil contempt sentence. The sentencing court's order and the circumstances of plaintiff's incarceration did not provide a clear mandate to defendants for plaintiff's release date; a claim for false imprisonment cannot be established without defendants' knowledge of the wrongful restraint. **Emory v. Pendergraph, 181.**

**FIDUCIARY RELATIONSHIP**

**Breach of fiduciary duty—failure to show joint venture—summary judgment**—The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claim for breach of fiduciary duties arising out of the parties' business relationship because the claim was dependent on the existence of a joint venture, and plaintiffs failed to show the elements of a joint venture. **Southeastern Shelter Corp. v. BTU, Inc., 321.**

**FIREARMS AND OTHER WEAPONS**

**Assault with firearm on law enforcement officer—jury instructions—defendant's right to defend himself—pointing of firearm**—The trial court did not err by failing to give jury instructions that defendant had a right to defend himself with regard to an unlawful arrest and that the firearm he possessed at the time of his arrest was required to be pointed at or toward the alleged victims to find defendant guilty of assault with a firearm on a law enforcement officer. **State v. Childers, 375.**

**Assault with firearm on a law enforcement officer—motion to dismiss—sufficiency of evidence**—The trial court did not err by denying defendant's motion to dismiss the charge of assault with a firearm on a law enforcement officer. **State v. Childers, 375.**

**Possession by felon—constructive—acting in concert**—The trial court did not err by failing to dismiss the charge of possession of a handgun by a convicted felon and by instructing the jury on constructive possession, even though defendant contends the evidence is insufficient to show that he possessed a handgun during the commission of a burglary and armed robbery, where defendant acted in concert with three others to commit the burglary and armed robbery. **State v. Walker, 645.**

**Possession by felon—constructive—evidence sufficient**—The evidence was sufficient to show that defendant, a felon, constructively possessed a firearm where the gun was found under the front passenger seat of a car, where defendant was sitting; the only other person in the car was the driver; the driver and defendant did not have equal access to the gun; officers saw defendant reaching under the seat; the driver did not own the gun; and the gun had been seen at defendant's mother's house. **State v. Boyd, 302.**

**FRAUD**

**Constructive—relationship of trust and confidence—failure to show joint venture—summary judgment**—The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claim for constructive fraud arising out of the parties' business relationship where plaintiffs' claim was based on a joint venture, and plaintiffs failed to show the elements of a joint venture. **Southeastern Shelter Corp. v. BTU, Inc., 321.**

**GAMBLING**

**Ad valorem taxes—discovered property provision—illegal gaming machines**—The trial court did not err by presenting the charge of possession of illegal gaming machines to the jury even though defendant contends the discov-

**GAMBLING—Continued**

ered property provisions of N.C.G.S. § 105-312(e) do not require that the machines actually be listed for ad valorem property tax purposes prior to 31 January 2000. **State v. Childers, 375.**

**Possession of illegal gaming machines—motion to dismiss—sufficiency of evidence**—The trial court did not err by denying defendant's motion to dismiss the charge of possession of illegal gaming machines. **State v. Childers, 375.**

**HOMICIDE**

**Attempted first-degree murder—assault with a deadly weapon inflicting serious injury not a lesser-included offense**—The trial court did not err in an attempted first-degree murder case by failing to instruct on assault with a deadly weapon inflicting serious injury as a lesser-included offense of first-degree murder because it is not a lesser-included offense of attempted first-degree murder. **State v. Rainey, 282.**

**Attempted first-degree murder—instruction on attempted voluntary manslaughter not required**—The trial court did not err in a first-degree murder case by failing to instruct on the lesser-included offense of attempted voluntary manslaughter even though defendant shot at the victim for sleeping with defendant's thirteen-year-old sister because defendant did not act immediately under a heat of passion but rather under an indulgence of revenge or malice. **State v. Rainey, 282.**

**Attempted first-degree murder—premeditation and deliberation—overt act—sufficiency of evidence**—There was sufficient evidence of both premeditation and deliberation and an overt act in an attempted first-degree murder prosecution where defendant ran down his estranged wife and the victim in a grocery store parking lot and there was no provocation by the victim, defendant had confronted his wife about her relationship with the victim, there was evidence that the same car had been seen driving slowly past the wife as she waited for the victim, and defendant aimed his car at both the wife and victim, accelerated, and knocked both down. **State v. Andrews, 553.**

**Attempted first-degree murder—sufficiency of short-form indictment**—A defendant's attempted first-degree murder conviction is vacated and the case is remanded for sentencing and entry of judgment on attempted voluntary manslaughter based on insufficiency of the short-form indictment where it did not allege malice aforethought. **State v. Bullock, 234.**

**Attempted first-degree murder—transferred intent**—There was sufficient evidence to convict defendant for the attempted murder of his estranged wife's friend where both the friend and the wife were run down by defendant in a grocery store parking lot; the court properly instructed the jury on transferred intent; defendant had threatened to kill his estranged wife; he drove his car directly at her; he got out after running them down and stabbed her at least three times, yelling "bitch" each time; and he said "I was trying to get her" after he was subdued by the friend and a bystander. **State v. Andrews, 553.**

**Attempted voluntary manslaughter—recognized in North Carolina**—Attempted voluntary manslaughter is a recognized crime in North Carolina. **State v. Rainey, 282.**

**HOMICIDE—Continued**

**Felony murder—failure to submit lesser-included charge— involuntary manslaughter**—The trial court did not err in a felony murder case by failing to submit the lesser-included charge of involuntary manslaughter. **State v. Mays, 572.**

**Felony murder—motion to dismiss—sufficiency of evidence**—The trial court did not err by failing to grant defendant's motion to dismiss the charge of felony murder where defendant intended to shoot at the victim's truck as the victim drove away. **State v. Mays, 572.**

**Malice—sufficiency of evidence**—Malice toward an attempted murder victim could be inferred from evidence that defendant accelerated his car toward the victim (and defendant's estranged spouse) in a grocery store parking lot. **State v. Andrews, 553.**

**Second-degree murder—impaired driving—sufficiency of evidence**—The trial court did not err by failing to dismiss the charge of second-degree murder because there was substantial evidence that defendant's impaired driving caused the accident in which his girlfriend was killed. **State v. Vassey, 384.**

**Short-form indictment—attempted first-degree murder—constitutionality**—A short-form indictment for attempted first-degree murder is constitutional. **State v. Andrews, 553.**

**Short-form indictment—first-degree murder—constitutionality**—A short-form indictment for first-degree murder is constitutional. **State v. Mays, 572.**

**Voluntary manslaughter—failure to include possible verdict of not guilty by reason of self-defense**—The trial court erred in a voluntary manslaughter case by failing to include not guilty by reason of self-defense as a possible verdict in its final mandate to the jury and defendant is entitled to a new trial. **State v. Williams, 496.**

**IDENTIFICATION OF DEFENDANTS**

**Showup procedure—motion to suppress—suggestiveness**—The trial court did not err in a robbery with a dangerous weapon case by failing to suppress eyewitness identifications of defendant based on a showup procedure used at the restaurant where the crime occurred where defendant failed to demonstrate that the showup was impermissibly suggestive and created a substantial likelihood of irreparable misidentification. **State v. Lee, 410.**

**IMMUNITY**

**Governmental—affidavit that claims not insured—no forecast of coverage**—The trial court's dismissal of employment harassment claims against the City based on governmental immunity was proper where defendant presented the affidavit of a City employee that the City did not have insurance coverage for any of the matters in the complaint and plaintiff did not come forward with a forecast of evidence that immunity was waived. **Beck v. City of Durham, 221.**

**Governmental—intentional torts**—Determination of governmental immunity is unnecessary if an intentional tort is alleged, since neither public officials nor

**IMMUNITY—Continued**

public employees have immunity from suit in their individual capacities. **Beck v. City of Durham, 221.**

**Governmental—police chief and city manager—official capacity—**The Durham police chief and city manager were public officials immune from suit for tortious acts committed in their official capacity. **Beck v. City of Durham, 221.**

**Governmental—waiver—School Boards Trust—**Defendant board of education's motion for summary judgment should have been granted based on governmental immunity in an action that arose from plaintiff's fall down concrete steps at a high school football stadium. There was no issue of material fact as to defendant's waiver of immunity up to \$100,000 despite defendant's participation in the North Carolina School Boards Trust; the Department of Insurance's failure to take action against the Trust for the unauthorized provision of insurance does not make the Trust a qualified insurer under N.C.G.S. § 115C-42. **Lucas v. Swain Cty. Bd. of Educ., 357.**

**Governmental—waiver—School Boards Trust—excess insurance purchased—**A school board waived its immunity for claims between \$100,000 and \$1,000,000 where the school participated in the North Carolina School Boards Trust and the Trust purchased excess coverage for claims in this range from a commercial insurance company. N.C.G.S. § 115C-42 does not exempt from waiver a school board which contracts with an intermediary to procure insurance through the commercial market. **Lucas v. Swain Cty. Bd. of Educ., 357.**

**Sovereign—county employees—health and life insurance benefits—motion to dismiss—due process—claims under contract law—§ 1983 claim—**The trial court did not err by denying defendant county's motion to dismiss on the ground of sovereign immunity plaintiff's due process, breach of contract, impairment of contractual obligations, and 42 U.S.C. § 1983 claims based on the county's retroactive change in policy requiring county employees declared disabled to have completed twenty years of continuous service to receive health and life insurance benefits rather than the five years required when plaintiff became employed by the county and when he began disability retirement because: (1) defendant is not immune against the due process claim since it was brought pursuant to Article I, Section 19 of the North Carolina Constitution; (2) while sovereign immunity remains a valid defense in tort actions, it is not a proper defense in suits arising from contract law; and (3) defendant is not immune from plaintiff's § 1983 claim since the alleged federal violation occurred as a result of defendant's official action. **Peverall v. County of Alamance, 426.**

**INDICTMENT AND INFORMATION**

**Amendment of indictment—elevation of offense to felony—**A conviction for felonious operation of a motor vehicle to elude arrest was remanded because the indictment had been amended to add one of two necessary aggravating factors. N.C.G.S. § 15A-923(e) has been interpreted to mean that an indictment may not be amended to substantially alter the charge set forth in the indictment; a change which results in a misdemeanor being elevated to a felony substantially alters the original charge. The case was remanded for entry of judgment on the misdemeanor. **State v. Moses, 332.**

**INDICTMENT AND INFORMATION—Continued**

**Multiple count indictment—necessary element—no incorporation by reference**—A motion to arrest judgment on a conviction for assault with a deadly weapon inflicting serious injury was allowed where the applicable count of the indictment, Count III, did not mention the bottle which was the weapon and did not incorporate by reference the mention of the bottle in Count II, which charged armed robbery. However, the indictment sufficiently alleged assault inflicting serious injury, the jury was instructed on this offense, and the case was remanded for entry of judgment on that offense. **State v. Moses, 332.**

**INJUNCTION**

**Temporary restraining order hearing—jurisdiction to dismiss lawsuit in entirety**—The trial court did not err by denying plaintiff state employees association's motion for a temporary restraining order (TRO) and by dismissing its complaint for declaratory judgment seeking to enjoin the State and certain of its officials from redirecting funds allocated to the State's retirement system to attempt to balance the budget rather than to fund the retirement systems even though plaintiff contends the trial court lacked jurisdiction to dismiss the lawsuit in its entirety at the TRO hearing. **State Employees Ass'n of N.C., Inc. v. State, 207.**

**INSURANCE**

**Underinsured motorist—release—summary judgment**—The trial court did not err in an action arising out of an automobile accident by granting summary judgment in favor of defendant insureds on their claim for underinsured motorist (UIM) coverage even though defendants executed a limited release that neither contained a covenant not to enforce nor an express provision reserving their rights as against plaintiff insurance company. **N.C. Farm Bureau Mut. Ins. Co. v. Edwards, 616.**

**JOINER**

**Offenses—motion to sever—possession of a handgun by a convicted felon—first-degree burglary—armed robbery**—The trial court did not commit plain error by failing to sever the possession of a handgun by a convicted felon offense from the first-degree burglary and armed robbery offenses and in admitting details of defendant's prior felony. **State v. Walker, 645.**

**JOINT VENTURE**

**No joint sharing of profits—no fiduciary relationship**—The parties' business relationship was not a joint venture where defendants agreed to purchase the assets of plaintiffs' business only after a five-month period during which the individual plaintiff would work for defendants in a capacity that would enable defendants to learn the fireproofing business. **Southeastern Shelter Corp. v. BTU, Inc., 321.**

**JUDGMENTS**

**Consent—not domestic—not enforceable by contempt**—A district court lacked the authority to enforce a non-domestic consent judgment through con-

**JUDGMENTS—Continued**

tempt. A consent judgment is a contract enforceable by breach of contract, specific performance, or a declaratory judgment and not by contempt; plaintiffs here did not pursue those avenues. **Hemric v. Groce, 393.**

**Entry of default—setting aside—delay caused by insurance company—**The trial court did not abuse its discretion by setting aside an entry of default against defendant Phillips where her initial delay in answering the complaint was primarily due to negligence by the insurance company. Moreover, the delay from setting aside the default was short and caused no prejudice to plaintiff. **Vares v. Vares, 83.**

**Memorandum language omitted from consent judgment—judgment controls—**A consent judgment properly entered supercedes a memorandum of judgment, and contempt language in a memorandum of judgment which was not included in the subsequent consent judgment had no bearing on the case. **Hemric v. Groce, 393.**

**JURISDICTION**

**Long arm—insurance in North Carolina—vehicle in South Carolina—**Defendant's conduct was covered by North Carolina's long-arm statute in an action arising from an automobile accident in South Carolina involving a vehicle driven by a South Carolina resident, owned by a North Carolina resident, registered in North Carolina, and insured by plaintiff. Defendant ratified the services performed in North Carolina when her representative signed a form in North Carolina verifying the insurance coverage and mailed it to the South Carolina Department of Public Safety. Additionally, plaintiff processed and investigated defendant's claim in North Carolina. **N.C. Farm Bureau Mutual Insurance Co. v. Holt, 156.**

**Minimum contacts—South Carolina vehicle—insurance claim on North Carolina policy—**The defendant in a declaratory judgment action had sufficient minimum contacts with North Carolina for the exercise of jurisdiction even though she did not physically enter North Carolina where she was driving a truck in South Carolina which was licensed and registered in North Carolina, she mailed a written claim to plaintiff in North Carolina for UIM benefits under a North Carolina insurance policy, the policy was entered into in North Carolina and issued by a North Carolina insurer to the owner of the vehicle, and the owner was a North Carolina resident. **N.C. Farm Bureau Mut. Ins. Co. v. Holt, 156.**

**JURY**

**Selection—peremptory challenges—Batson challenge—**The trial court in a first-degree murder case did not permit the State to make racially-based peremptory challenges in violation of the Fourteenth Amendment of the United States Constitution and Article I, Sections 19 and 26 of the North Carolina Constitution because, although the prosecutor exercised nearly seventy percent of his peremptory challenges against African-American jurors, other factors supporting an inference of discrimination were not present. **State v. Mays, 572.**

**JUVENILES**

**Delinquency—evidence linking juvenile to crime—insufficient**—The trial court erred by denying a juvenile's motion to dismiss a delinquency petition that arose from the burning of athletic mats at a middle school where the only evidence linking the juvenile to the fire was testimony that the juvenile was one of the people seen on the mats about five to ten minutes before the fire started. **In re Rhyme, 477.**

**Hearing—interruption of counsel—no bias**—A trial judge did not exhibit improper bias in a juvenile delinquency hearing by interrupting counsel where the interruptions were inconsequential and revealed no predisposition toward either party. **In re Lineberry, 246.**

**Transcript of juvenile hearing—imperfect**—The transcript of a juvenile proceeding, while imperfect, was not so inaccurate as to prevent meaningful review. **In re Lineberry, 246.**

**LARCENY**

**From the person—instruction on misdemeanor—no evidence of lesser offense**—The trial court did not err in a prosecution for larceny from the person by not charging on misdemeanor larceny because all of the evidence supports the charged offense and there was no evidence of the lesser offense. **State v. Wilson, 686.**

**From the person—reaching into cash register**—There was sufficient evidence of larceny from the person where defendant reached into cash registers and removed money which was in the immediate presence and protection of the cashiers, sometimes grabbing or touching the cashier's hands. Discrepancies in identification testimony were for the jury to resolve. **State v. Wilson, 686.**

**MORTGAGES AND DEEDS OF TRUST**

**Agreement to amend security documents at closing—consideration**—An agreement to amend at closing the security documents for the purchase of real property was supported by consideration where plaintiff seller agreed to accept a different buyer with a different potential for liability than the original buyer. **Brumley v. Mallard, L.L.C., 563.**

**Judicial foreclosure—equitable lien—upset bid period—unjust enrichment**—The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's claims for an equitable lien and judicial foreclosure arising out of plaintiff under the mistaken impression of ownership satisfying a first deed of trust on the pertinent property during the upset bid period of ten days and defendant thereafter submitting an upset bid to become the new proposed owner. **HomeEq v. Watkins, 731.**

**Promissory note—anti-deficiency statute—purchase money note**—The trial court did not err by granting plaintiff's motion for summary judgment and by denying defendants' motion for summary judgment even though defendants contend the pertinent promissory note for the purchase of real property was a purchase money note and that plaintiff's action is barred by the anti-deficiency statute under N.C.G.S. § 45-21.38, because neither the deed of trust nor the promissory note contains any language indicating it is a purchase money instrument. **Brumley v. Mallard, L.L.C., 563.**



**MORTGAGES AND DEEDS OF TRUST—Continued**

**Promissory note—failure to include purchase money statement—anti-deficiency statute—indemnification of buyer**—The holder of a promissory note was not obligated to indemnify the maker and guarantor for any loss resulting from a real estate purchase which the note financed under a provision of the anti-deficiency statute that requires a seller to indemnify a purchaser for any loss when the seller did not insert in a note prepared under the seller's direction a statement disclosing that it was for the purchase money of real estate where the holder-seller refused to sign the original documents as purchase money instruments; the holder-seller took no part in the preparation of the note and deed of trust; and the attorney for the maker and guarantor prepared the security documents according to the agreement of the parties at the closing. **Brumley v. Mallard, L.L.C., 563.**

**MOTOR VEHICLES**

**Contributory negligence—automobile accident—sufficiency of evidence for verdict**—There was sufficient evidence to support a verdict of contributory negligence where plaintiff saw defendant's vehicle traveling toward her in her lane for one or two blocks, did not take evasive action until just prior to impact, the impact occurred while plaintiff's vehicle was completely in its own lane, and plaintiff made no attempt prior to the collision to catch defendant's attention. **Alford v. Lowery, 486.**

**Driving while impaired—motion to dismiss—sufficiency of evidence**—The trial court did not err by denying defendant's motion to dismiss the charge of driving while impaired (DWI) based on the State's alleged failure to present sufficient evidence that defendant was driving on a public street within North Carolina or that he was impaired. **State v. Mark, 341.**

**Driving while impaired—reasonable suspicion for investigatory stop**—The trial court did not err in a DWI action by denying defendant's motion to suppress evidence of the stop of his vehicle because there were sufficient articulable acts for a reasonable suspicion that defendant was committing a motor vehicle violation where officers observed defendant weave within his lane and the tires of his car touch the dividing line of the highway, and the officers observed defendant exceeding the speed limit. **State v. Thompson, 194.**

**Driving while impaired—sufficiency of evidence—no intoxilyzer—no field sobriety test**—The failure of the State to present the results of intoxilyzer or field sobriety tests did not render the evidence insufficient for a DWI conviction where a deputy saw defendant make an abrupt lane change without signaling, speed, and jam on his brakes before stopping in the middle of traffic; the deputy noticed a strong odor of alcohol coming from the car and defendant had red, glassy eyes and slurred speech; defendant staggered when he walked to the patrol car and had to steady himself against his vehicle; defendant refused to submit to the intoxilyzer test; and both the deputy and the officer who attempted to give defendant an intoxilyzer test formed the opinion that defendant's faculties were appreciably impaired. **State v. Gregory, 718.**

**Habitual impaired driving—reference to previous convictions**—The trial court did not err in a driving while impaired and habitual impaired driving case by denying defendant's motion to quash the indictment where count three of the

**MOTOR VEHICLES—Continued**

indictment alleging habitual impaired driving referenced defendant's previous convictions. **State v. Mark, 341.**

**Intoxilyzer—informing defendant of rights**—The trial court did not err in a DWI action by denying defendant's motion to suppress the Intoxilyzer test results where the officer put a copy of defendant's rights in front of defendant as the officer read the rights, defendant's signature was obtained, and defendant was provided with a copy of the rights form after the test. Nothing in the statutes or the case law mandated that the officer physically hand defendant a copy of his rights. **State v. Thompson, 194.**

**Stop and arrest—random driver's license checkpoint**—The trial court erred in an impaired driving case by granting defendant's motion to suppress evidence of his stop and arrest based on defendant's driving through a random driver's license checkpoint. **State v. Mitchell, 186.**

**NEGLIGENCE**

**Duty of care—handholds on truck cab**—Defendant did not owe plaintiff a duty of care where plaintiff, an experienced truck driver applying for a job with defendant, fell when she reached for an exterior handle which did not exist on that model truck. The existence of handholds represented an open and safe condition which should have been apparent to someone exercising the proper level of care; rather than exercise ordinary care, plaintiff assumed that handholds existed on the outside of the cab. **Huntley v. Howard Lisk Co., 698.**

**Injury to child—supervision by parent**—The trial court did not err by granting summary judgment for defendant Phillips on a negligence claim where Justice Vares was injured during the family's "Farm Day" while his father performed maintenance activities scheduled by Phillips. Justice was supervised by his father; there was no evidence that Phillips assumed supervision of Justice, owed a duty to Justice, or injured Justice by her actions. **Vares v. Vares, 83.**

**Last clear chance—fox hunter struck while standing in road**—The trial court erred in an automobile accident case by instructing on last clear chance where plaintiff was struck while standing in a roadway trying to protect dogs which were crossing the roadway while chasing a fox. Plaintiff was facing defendant's approaching vehicle and chose to stay in the road until a collision was imminent; by so doing, he failed in the first element of last clear chance (that he could not have escaped his position of peril by reasonable care). **Overton v. Price, 543.**

**PARTIES**

**Failure to name real party in interest—motion to amend complaint—misnomer—relation back rule—equitable estoppel**—The trial court erred by denying plaintiff's motion to amend her personal injury complaint under N.C.G.S. § 1A-1, Rule 15 after it was dismissed based on failure to name the real party in interest when plaintiff, who was unaware of defendant's death, named decedent who died from medical complications unrelated to the accident instead of his estate as the party-defendant. **Pierce v. Johnson, 34.**

**PATERNITY**

**Separate legitimation action—subject matter jurisdiction**—The filing of a legitimation action in superior court divested a district court of subject matter jurisdiction to decide paternity. Legitimation vests greater rights in the parent and child than a paternity order and should be given preference when separate actions are filed. **Smith v. Barbour, 402.**

**PENSIONS AND RETIREMENT**

**Employee health insurance plan—applicability of ERISA—preemption of state claims**—An insurer's agreement with a business owner to provide health care insurance to employees who elected coverage was an "employee welfare benefit plan" governed by ERISA, and ERISA preempted claims against the insurer for unfair claims handling under N.C.G.S. § 58-63-15, where the owner paid the premiums for employees who elected coverage under the plan. Furthermore, the business owner was a participant in the plan where he was also an employee of the business and was listed on the certificate of insurance as an employee. **Voelske v. Mid-South Ins. Co., 704.**

**PLEADINGS**

**Amendment to conform to evidence—contributory negligence—sufficiency of evidence**—The trial court did not abuse its discretion in an automobile accident case by allowing defendant's answer to be amended to include contributory negligence where plaintiff testified that she observed defendant's vehicle traveling toward her in her lane for at least one and possibly two blocks, plaintiff took no evasive action until just before impact, and plaintiff did not blow her horn prior to the accident. Moreover, plaintiff was not prejudiced by the amendment because her attorney stated that he had been on notice of defendant's intent to amend her answer for some time. **Alford v. Lowery, 486.**

**Order based on prior order—first order valid**—The trial court did not abuse its discretion in a medical malpractice action by dismissing an amended complaint based on plaintiff's violation of an allegedly improper prior order for a more definite statement. The first order did not result from an abuse of discretion. **Page v. Mandel, 94.**

**Sanctions—failure to consider lesser remedies**—The trial court abused its discretion in a medical malpractice action by granting defendant-hospital's motion to dismiss an amended complaint as a sanction for failing to comply with a prior order without considering lesser sanctions. **Page v. Mandel, 94.**

**Timeliness—amended complaint—filed during hearing on motion to dismiss**—An amended complaint was timely filed even though plaintiff filed his amended complaint four minutes after the beginning of the hearing on defendant's motion to dismiss where defendants did not present a record of objections or a transcript indicating whether the trial court took issue with the amended complaint. **Beck v. City of Durham, 221.**

**Vague allegations—amended complaint required**—The trial court did not abuse its discretion by requiring plaintiff to file a second amended complaint in a medical malpractice action where the court determined that plaintiff's allegations were not specific as to defendant Community Hospital and that a more definite statement would be the way to remedy this deficiency. **Page v. Mandel, 94.**

**POSSESSION OF STOLEN PROPERTY**

**Identity of owner—sufficiency of evidence**—The trial court did not err by refusing to dismiss a charge of felonious possession of stolen goods where the victim did not identify her automobile but a jury could reasonably conclude that the car found in defendant's possession belonged to her. Moreover, defendant did not object at trial and the evidence was properly considered when determining sufficiency of the evidence. **State v. Murray, 631.**

**PREMISES LIABILITY**

**Injured child—supervision by parent**—The trial court properly granted summary judgment to defendant Bennett on a premises liability claim where Bennett's grandson was injured while his father was cutting down trees on Bennet's land. The father was actively supervising his son and was performing the act which plaintiff asserts was inherently dangerous, and the duty of care to protect the grandson belonged to his father and not to Bennett. **Vares v. Vares, 83.**

**PRISONS AND PRISONERS**

**Hemophilic inmate's bleeding nose—promptness of treatment—summary judgment for defendants**—The trial court did not err by granting summary judgment for defendants in an action for not promptly treating a hemophilic inmate's nose bleed where defendant's forecast of evidence indicates that plaintiff was checked by a nurse upon his return from the courthouse and was not bleeding and that he was taken to the hospital immediately when he began bleeding; plaintiff did not timely designate his expert witnesses; and plaintiff did not bring forth countervailing evidence or make any arguments in opposition to defendant's motion for summary judgment. **Summy v. Baker, 448.**

**PUBLIC OFFICERS AND EMPLOYEES**

**Demoted food service supervisor—inconsistent explanations of conduct—immaterial**—Isolated erroneous findings regarding inconsistent explanations from a demoted prison food service supervisor were not material to the issue of unsatisfactory job performance. **Skinner v. N.C. Dep't of Corr., 270.**

**Demotion—racial discrimination—prima facie case**—The State Personnel Commission did not err by finding that there was no credible evidence of intentional racial discrimination in the demotion of a prison food supervisor where petitioner did not make out a prima facie case of discrimination. He was not replaced by a person who is not a member of a minority group, there was no evidence that non-minority supervisors were retained under similar circumstances, a Caucasian food service supervisor was also recommended for demotion and transfer on the same grounds, and the administrator who made the recommendations is African-American. **Skinner v. N.C. Dep't of Corr., 270.**

**Dismissal—disability discrimination—not proven**—In an action arising from the dismissal of petitioner as an assistant at a youth home for recording medications which were prepared but not administered, the trial court did not err by concluding that petitioner failed to prove that his termination resulted from disability discrimination where petitioner failed to fully inform respondent of his condition, failed to prove that the depression and sleep disorder qualified as physical or mental impairment, and did not show that either condition is perma-

**PUBLIC OFFICERS AND EMPLOYEES—Continued**

ment or long-term. **Leeks v. Cumberland Cty. Mental Health Dev'l Disab. & Sub. Abuse Facil.**, 71.

**Dismissal—falsification of medical records—unacceptable personal conduct**—In an action arising from the dismissal of petitioner as an assistant at a youth home for recording medications which were prepared but not administered, the trial court did not err by concluding that pre-writing notes describing medications not administered constituted unacceptable personal conduct. The North Carolina Administrative Code includes job-related conduct which violates state or federal law as improper personal conduct; falsification of medical records is a violation of state law. **Leeks v. Cumberland Cty. Mental Health Dev'l Disab. & Sub. Abuse Facil.**, 71.

**Dismissal—findings**—Certain of the trial court's findings had a rational basis in the evidence in an action arising from the dismissal of petitioner as an assistant at a youth home for recording medications which were prepared but not administered. **Leeks v. Cumberland Cty. Mental Health Dev'l Disab. & Sub. Abuse Facil.**, 71.

**Dismissal—findings—not supported by evidence—no reversible error**—In an action arising from the dismissal of petitioner as an assistant at a youth home for recording medications which were prepared but not administered, some of the trial court's findings concerning petitioner's sleep disorder were contrary to evidence in the whole record, but there was no reversible error because petitioner failed to prove a claim of disability discrimination. **Leeks v. Cumberland Cty. Mental Health Dev'l Disab. & Sub. Abuse Facil.**, 71.

**Due process—employment discipline**—A demoted prison food service supervisor was given the due process to which he was entitled where he received two detailed written warning letters; received a notice outlining the specific grounds for the proposed disciplinary action; attended a pre-demotion conference and was given the opportunity to respond to the charges of unsatisfactory job performance; and set forth no evidence that he would not have been demoted had he been given an action plan following the written warnings. **Skinner v. N.C. Dep't of Corr.**, 270.

**Food service supervisor demoted—dirty kitchen—inconsistent serving lines**—There was substantial evidence in the whole record to support the demotion and transfer of a prison food service supervisor for unsatisfactory job performance where the evidence included testimony about unsanitary conditions, deviation from posted menus, and inconsistent serving lines, which can cause problems with inmates. **Skinner v. N.C. Dep't of Corr.**, 270.

**Unsatisfactory job performance—prison food service**—The Department of Correction had just cause to demote a food service supervisor for unsatisfactory job performance where there was substantial evidence that petitioner did not satisfactorily meet his job requirements, which included supervising inmate workers and ensuring that the kitchen was kept in a clean and orderly fashion; petitioner received two written warnings about his poor job performance; and his ability to perform satisfactorily was particularly critical because seemingly innocuous incidents could cause security risks in the prison dining hall. **Skinner v. N.C. Dep't of Corr.**, 270.

**ROBBERY**

**Armed—acting in concert—motion to dismiss—sufficiency of evidence—**The trial court did not err by failing to dismiss the charges of first-degree burglary and armed robbery and by instructing the jury on acting in concert in relation to these offenses even though defendant contends he was merely present at the crime scene and there was no evidence that defendant knew that any of the codefendants were armed. **State v. Walker, 645.**

**Armed—dangerous weapon—handgun presumed dangerous—**The State's failure to produce the weapon used in an attempted armed robbery or to specify the model type of handgun used to threaten the victim did not require an instruction on common law robbery. The law presumes that a firearm used in a robbery threatens the life of the victim, and there was no evidence in this case to contradict that presumption. **State v. Poole, 419.**

**Armed—evidence of taking—**There was sufficient evidence of a taking to support an armed robbery conviction where defendant went to kill a man who owed him money and returned covered in blood and bragging that he had killed the man; defendant left without a car, television, or groceries, and returned with those things; the victim's car was stolen and burned; the space for the television in the victim's entertainment center was empty, with instruction books being found for a television model which was not found in his house but which defendant sold; the victim's groceries were disturbed, with the same brands being found in the victim's house and being brought home by defendant; and the trash bag which defendant used to bring in the groceries came from a roll of bags in the victim's home. **State v. White, 598.**

**Armed—failure to instruct on lesser-included offenses—**The trial court did not err by refusing to instruct the jury on the lesser-included offenses of armed robbery and first-degree burglary. **State v. Walker, 645.**

**Armed—felonious intent—ambiguous statement—**There was sufficient evidence of felonious intent to support an attempted armed robbery charge where defendant contended that his statement that the victim should "give it up" indicated merely that he wanted the return of a necklace stolen from him, but the victim understood the statement to mean that defendant intended to rob him, and even defendant testified that the phrase was subject to misinterpretation. **State v. Poole, 419.**

**Dangerous weapon—glass bottle across victim's head—**The trial court did not err by denying a motion to dismiss a prosecution for an armed robbery in which a bottle was used as the weapon where the evidence was sufficient to support a jury finding that the victim's life was endangered or threatened by use of the bottle. Although the evidence showed that an accomplice hit the victim with the bottle, the trial court properly instructed on acting in concert. **State v. Moses, 332.**

**Felonious intent—instruction—**The instruction on felonious intent in an armed robbery prosecution was adequate. **State v. Poole, 419.**

**Variance with proof not fatal—attempted armed robbery—type of property—**There was not a fatal variance between the indictment and the proof in an attempted armed robbery prosecution where the indictment alleged that defendant attempted to take currency from the victim, but the evidence was that

**ROBBERY—Continued**

defendant pointed a gun at the victim and said “give it up” without being specific. The gravamen of the offense is an attempted taking by force or by fear. **State v. Poole, 419.**

**SEARCH AND SEIZURE**

**Cocaine—voluntarily given to officers—frisk following traffic stop**—The trial court did not err by denying defendant’s motion to suppress cocaine which he voluntarily gave to officers during the course of a constitutionally reasonable frisk following a traffic stop. Defendant was seen in a well known drug area at night participating in a drug transaction; he was stopped for speeding; officers discovered that his license tags were fictitious and that his driver’s license had been revoked; defendant was nervous; and defendant repeatedly moved his hands in and out of his pockets despite being asked not to do so. The totality of these circumstances provided reasonable grounds to frisk defendant even though he was otherwise cooperative and presented no obvious signs of carrying a weapon. **State v. McRae, 624.**

**Driving while impaired—reasonable suspicion for investigatory stop**—The trial court did not err in a DWI action by denying defendant’s motion to suppress evidence of the stop of his vehicle because there were sufficient articulable acts for a reasonable suspicion that defendant was committing a motor vehicle violation where officers observed defendant weave within his lane and the tires of his car touch the dividing line of the highway, and the officers observed defendant exceeding the speed limit. **State v. Thompson, 194.**

**Intoxilyzer—informing defendant of rights**—The trial court did not err in a DWI action by denying defendant’s motion to suppress the Intoxilyzer test results where the officer put a copy of defendant’s rights in front of defendant as the officer read the rights, defendant’s signature was obtained, and defendant was provided with a copy of the rights form after the test. Nothing in the statutes or the case law mandated that the officer physically hand defendant a copy of his rights. **State v. Thompson, 194.**

**Photographs of defendant’s shoes—defendant in custody—nontestimonial identification order not required**—Photographs of defendant’s shoes taken without a nontestimonial identification order were admissible because defendant was in custody on another offense when the photographs were taken. **State v. Wilson, 686.**

**Photographs of defendant’s shoes—defendant in custody—warrant not required**—A defendant’s constitutional rights were not violated by an officer taking photographs of defendant’s shoes without a search warrant because defendant was in custody at the time. **State v. Wilson, 686.**

**Stop and arrest—random driver’s license checkpoint**—The trial court erred in an impaired driving case by granting defendant’s motion to suppress evidence of his stop and arrest based on defendant’s driving through a random drivers license checkpoint. **State v. Mitchell, 186.**

**SENTENCING**

**Aggravating factor—abuse of trust—used to prove element of sexual offense**—The trial court erred in a second-degree sexual offense prosecution by

**SENTENCING—Continued**

finding as an aggravating factor that defendant took advantage of a position of trust after the State used the same evidence (circumstances surrounding the parental relationship) to prove the element of force. **State v. Corbett, 713.**

**Aggravating factor—defendant on pretrial release when committed offenses**—The trial court did not err in a driving while impaired and habitual impaired driving case by finding as an aggravating factor that defendant was on pretrial release when he committed the charged offenses even though defendant contends the pending charge had been dismissed with leave based on defendant's failure to appear in court. **State v. Mark, 341.**

**Aggravating factor—joining with more than one other person—evidence insufficient**—Aggravated sentences for armed robbery, assault, and operation of a vehicle to elude arrest were remanded where the court found as an aggravating factor for each judgment that defendant joined with more than one person in committing the offense, but there was no evidence that more than one other person was involved. **State v. Moses, 332.**

**Aggravating factor—offense committed while on pretrial release**—The trial court did not err in an assault with a deadly weapon with intent to kill inflicting serious injury case by finding as an aggravating factor that the offense was committed while defendant was on pretrial release for a charge of assault on a female. **State v. Spencer, 666.**

**Basis—insistence on jury trial**—A statutory rape and indecent liberties defendant received a new sentencing hearing where there was a reasonable inference that defendant's sentences were based in part on his insistence on a jury trial. **State v. Peterson, 515.**

**Evidence of prior convictions—court records and DCI printout**—The trial court did not err by basing its sentencing findings on the State's evidence where the prosecutor introduced a Division of Criminal Information printout and court documents. Although defendant points out minor clerical errors, these errors alone do not render the evidence incompetent. **State v. Safrit, 727.**

**Habitual felon—grant program—no financial incentive for prosecution**—The prosecutor did not have a financial incentive to indict defendant as an habitual felon where there was a federal grant program for the prosecution of habitual felons, but the grant prosecutor was not involved in defendant's case and there was no evidence of a relationship between the number of prosecutions and the continuation of the grant. **State v. Cates, 737.**

**Habitual felon—indictment**—Defendant's habitual felon indictment complied with the Habitual Felons Act and case law even though it predated the indictment for the underlying felony of which he was convicted where he was originally indicted for felonious larceny of a motor vehicle and as an habitual felon, later indicted for possessing the stolen vehicle, and convicted of felonious possession and for being an habitual felon. These was a pending prosecution to which the habitual felon proceeding was ancillary; moreover, defendant was tried for felonious possession and for being an habitual felon at the same session of criminal court by the same jury, and the jury returned verdicts on successive days. **State v. Murray, 631.**



**SENTENCING—Continued**

**Habitual felon—not cruel and unusual punishment**—An habitual felon sentence did not violate the constitutional prohibition on cruel and unusual punishment. **State v. Cates, 737.**

**Habitual felon—not double jeopardy**—The combined effect of the Habitual Felon Act and the Structured Sentencing Act did not violate double jeopardy. **State v. Cates, 737.**

**Habitual felon—relationship to underlying felony**—The trial court did not err by not dismissing an habitual felon indictment where defendant argued that he was not an habitual felon when he committed the principle felony. **State v. Cates, 737.**

**Prior record level—collateral estoppel**—Collateral estoppel did not apply to determining a prior record level where the trial court considered two convictions which a previous jury had determined did not support violent habitual felon status. The issues litigated were not the same in that the burden of proof in determining prior record level is preponderance of the evidence while the burden in a violent habitual felon proceeding is beyond a reasonable doubt. **State v. Safrit, 727.**

**Prior record level—juvenile adjudication**—A defendant being sentenced for second-degree sexual offense should not have been assigned a sentencing point because he was in training school at the time of the offense. Juveniles in North Carolina are neither convicted, sentenced, nor imprisoned; adjudication of delinquency and commitment to a youth development center shall not be considered conviction of a criminal offense. **State v. Tucker, 653.**

**Prior record level—method of proof**—There was no authority for defendant's contention that the State must produce a certified copy of the record of a prior conviction if defendant objects to the evidence used to establish the record. By statute, prior convictions may be proven by any method found to be reliable; moreover, defendant had sufficient points for the record level even without this conviction. **State v. Lowe, 607.**

**Prior record level—miscalculation harmless error**—Although the trial court erred in a robbery with a firearm, first-degree burglary, and possession of a firearm by a felon case by determining that defendant had ten prior record level points when the correct number is nine, the miscalculation was harmless error because defendant remains a level IV offender which requires nine to fourteen points. **State v. Walker, 645.**

**Rule of lenity—use of prior offenses—habitual felon status—statute not ambiguous**—The rule of lenity was not violated by the prosecutor's choice of prior offenses with lesser sentencing points for habitual felon status, so that defendant's sentence was enhanced more than if the prosecutor had selected the higher point offenses (prior offenses used for habitual offender status may not be used to determine prior record level). The rule of lenity forbids interpretation of a statute to increase a penalty beyond the legislature's intent only when the applicable statute is ambiguous. **State v. Cates, 737.**

**Second-degree kidnapping—firearm enhancement penalty—failure to allege enhancement factors**—The trial court erred in its resentencing of defendant for second-degree kidnapping and the firearm enhancement penalty

**SENTENCING—Continued**

under N.C.G.S. § 14-2.2(a) by imposing a sentence exceeding the range authorized by N.C.G.S. § 15A-1340.17. **State v. Wilson, 127.**

**SEXUAL OFFENSES**

**Constructive force—parental relationship**—There was sufficient evidence of constructive force in a second-degree sexual offense conviction where the victim was defendant's step-daughter; the abuse in question began when she was twelve and continued until she was sixteen; and the victim testified that defendant acted like her father, disciplined her, and that she treated him as her father. Constructive force may be inferred from the circumstances surrounding the parental relationship. **State v. Corbett, 713.**

**Prosecutor's argument—constructive force**—In light of the evidence, there was no reasonable possibility of a different result in a second-degree sexual offense prosecution without the prosecutor's closing argument that it was force if the defendant just said "I'm your daddy." **State v. Corbett, 713.**

**Second-degree—evidence of force**—There was sufficient evidence in a prosecution for second-degree sexual offense to allow a jury to determine that a juvenile in a training school was forced to engage in a sexual act by force and against his will where the victim was thrown on his bed face down, held during the assault, and told that he would be beaten if he did not remain silent; he reported the incident immediately following the transfer of his assailants to another unit; and a subsequent physical exam showed corroborating trauma. **State v. Tucker, 653.**

**STATUTES OF LIMITATION AND REPOSE**

**Defense pled—amended, unverified complaint not sufficient**—An amended, unverified complaint was not sufficient to establish a genuine issue for trial where defendants had properly pled a statute of limitations defense. **Beck v. City of Durham, 221.**

**TAXATION**

**Ad valorem taxes—discovered property provision—illegal gaming machines**—The trial court did not err by presenting the charge of possession of illegal gaming machines to the jury even though defendant contends the discovered property provisions of N.C.G.S. § 105-312(e) do not require that the machines actually be listed for ad valorem property tax purposes prior to 31 January 2000. **State v. Childers, 375.**

**TELECOMMUNICATIONS**

**Audit—intrastate tariff**—The Utilities Commission did not err by failing to require plaintiff telecommunications company to conduct an audit that was allegedly required by the company's intrastate tariff. **State ex rel. Utils. Comm'n v. Thrifty Call, Inc., 58.**

**Back-billed charges—laches**—The Utilities Commission did not err by concluding that defendant long distance interexchange carrier company is obligated

**TELECOMMUNICATIONS—Continued**

to pay plaintiff telecommunications company for back-billed charges even though defendant contends the claim should have been barred under the doctrine of laches. **State ex rel. Utils. Comm'n v. Thrifty Call, Inc.**, 58.

**Monetary damages**—The Utilities Commission's order requiring defendant long distance interchange carrier to pay plaintiff telecommunications company for back-billed charges did not constitute the award of money damages in excess of its statutory authority. **State ex rel. Utils. Comm'n v. Thrifty Call, Inc.**, 58.

**TRESPASS**

**Second-degree—refusal to leave privately owned property held open to public for legitimate purposes only**—The trial court did not err by convicting defendants of second-degree trespass after defendants organized a group of people, after contacting the police, to go to CP&L headquarters to demand a meeting with the CEO in order to get him to sign a document agreeing to safety hearings and defendants were told three or more times that they could not see the CEO and were asked to leave but refused and were arrested. **State v. Marcoplos**, 581.

**UNFAIR TRADE PRACTICES**

**Failure to show joint venture—failure to show aggravating circumstances—summary judgment**—The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claim for unfair and deceptive trade practices arising out of the parties' business relationship where plaintiffs tied this claim to the existence of a joint venture, failed to show a joint venture, and failed to show aggravating circumstances. **Southeastern Shelter Corp. v. BTU, Inc.**, 321.

**UNJUST ENRICHMENT**

**Failure to show joint venture—contract between parties governs—summary judgment**—The trial court did not err by granting summary judgment in favor of defendants on plaintiffs' claim for unjust enrichment arising out of the parties' business relationship because the law will not imply a contract since a contract existed between the parties. **Southeastern Shelter Corp. v. BTU, Inc.**, 321.

**Judicial foreclosure—equitable lien—upset bid period—unjust enrichment**—The trial court did not err by dismissing under N.C.G.S. § 1A-1, Rule 12(b)(6) plaintiff's claims for an equitable lien and judicial foreclosure arising out of plaintiff under the mistaken impression of ownership satisfying a first deed of trust on the pertinent property during the upset bid period of ten days and defendant thereafter submitting an upset bid to become the new proposed owner. **HomEq v. Watkins**, 731.

**UTILITIES**

**Denial of application for natural gas expansion fund—alleged different treatment of natural gas suppliers**—The Utilities Commission did not treat petitioner natural gas supplier in a distinctly different and prejudicial manner

**UTILITIES—Continued**

compared to other cases before the Commission even though petitioner contends that another natural gas supplier was permitted to establish a natural gas expansion fund under substantively identical circumstances as those conditions in petitioner's case. **State ex rel. Utils. Comm'n v. NUI Corp., 258.**

**Denial of application for natural gas expansion fund—comparison to other counties**—The Utilities Commission did not err by comparing the pertinent county to other counties with inferior natural gas infrastructure in its determination of whether to deny or grant petitioner's application for the establishment of a natural gas expansion fund. **State ex rel. Utils. Comm'n v. NUI Corp., 258.**

**Denial of application for natural gas expansion fund—consistency with public interest**—The Utilities Commission did not err by denying petitioner natural gas supplier's application for the establishment of a natural gas expansion fund under N.C.G.S. § 62-158 for service to unserved areas based on it being inconsistent with the public interest. **State ex rel. Utils. Comm'n v. NUI Corp., 258.**

**Denial of application for natural gas expansion fund—findings—pipeline transverses county**—The Utilities Commission did not err by finding that a major interstate natural gas pipeline serving North Carolina transverses the middle of the pertinent county to support the Commission's conclusion that establishment of an expansion fund was not in the best interests of the public. **State ex rel. Utils. Comm'n v. NUI Corp., 258.**

**Denial of application for natural gas expansion fund—public interest factors**—The Utilities Commission's announcement and application of allegedly previously unarticulated public interest factors to petitioner natural gas supplier's case seeking an application for the establishment of a natural gas expansion fund for service to unserved areas did not amount to an unfair burden and surprise. **State ex rel. Utils. Comm'n v. NUI Corp., 258.**

**Denial of application for natural gas expansion fund—reducing gas costs more consistent with public interest**—The Utilities Commission did not err by concluding that, under the facts of the present case, reducing customer gas costs is more consistent with the public interest than applying supplier refunds toward further natural gas infrastructure in the pertinent county. **State ex rel. Utils. Comm'n v. NUI Corp., 258.**

**Long distance interexchange carrier—percent interstate usage—intrastate usage**—The Utilities Commission did not abuse its discretion by concluding that defendant long distance interexchange carrier company misreported its Percent Interstate Usage (PIU) and by characterizing the pertinent calls as intrastate in nature. **State ex rel. Utils. Comm'n v. NUI Corp., 258.**

**Number of panel members—resignation of panel member**—The Utilities Commission's order did not contravene N.C.G.S. § 62-76 even though the recommended order was decided by a panel of two commissioners after one of the panel members resigned. **State ex rel. Utils. Comm'n v. Thrifty Call, Inc., 58.**

**VENUE**

**Convenience of witnesses—discretion of court**—There was no abuse of discretion in the denial of a change of venue for the convenience of witnesses in a

**VENUE—Continued**

custody and legitimation case where the defendant moved to change venue from Wake County to Johnson County, where she and the child lived. **Smith v. Barbour**, 402.

**Forum selection clause—not mandatory**—The trial court did not abuse its discretion in a breach of contract action by denying defendants' motion to dismiss an action brought in North Carolina even though the contract provided that it shall be subject to the jurisdiction of the State of Colorado. **Cable Tel Servs., Inc. v. Overland Contr'g., Inc.**, 639.

**Motion for change denied—no abuse of discretion**—The trial court did not abuse its discretion in a wrongful death action by denying plaintiff administrator of estate's motion to change the venue to the county where plaintiff was pursuing a related medical malpractice action against decedent's doctors. **Taylor v. Interim Healthcare of Raleigh-Durham, Inc.**, 349.

**WITNESSES**

**Dissolution of business—agreement for referee—expert appointed instead**—There was no error in a breach of contract action that rose from the dissolution of a business where the parties had entered into a settlement agreement which provided for the appointment of a referee or special master and the court appointed an expert under Rule 706. The parties consented to the court's order appointing its own expert and are bound by that agreement. The expert could be called to testify or have his deposition taken by any party. **Porter v. American Credit Counselors Corp.**, 292.

**WORKERS' COMPENSATION**

**Basis for recovery—injury by accident—occupational disease—election of theory not required**—The Industrial Commission did not err in a workers' compensation case by determining a deputy commissioner did not violate defendants' due process or equal protection rights by allegedly becoming an advocate for plaintiff and abandoning her role as an impartial factfinder and decisionmaker when she changed plaintiff employee's theory of recovery ex mero motu from injury by accident to occupational disease. **Handy v. PPG Indus.**, 311.

**Deputy commissioner's formulation of questions and hypothetical—due process**—The Industrial Commission did not err in a workers' compensation case by determining the deputy commissioner did not violate defendants' due process rights by formulating questions and an essential factual hypothetical to be submitted to plaintiff's physician at a deposition. **Handy v. PPG Indus.**, 311.

**Deputy commissioner's formulation of questions and hypothetical—equal protection**—The Industrial Commission did not err in a workers' compensation case by determining the deputy commissioner did not violate defendants' equal protection rights by allegedly assisting plaintiff employee with his claim in a compensation hearing in violation of N.C.G.S. § 97-79(f) based on the deputy commissioner's action in preparing and submitting questions to plaintiff's physician. **Handy v. PPG Indus.**, 311.

**WORKERS' COMPENSATION—Continued**

**Deputy commissioner ordering deposition of witness—due process**—The Industrial Commission did not err in a workers' compensation case by determining the deputy commissioner did not violate defendants' due process or equal protection rights by ordering ex mero motu that plaintiff's physician who was not present at the hearing be deposed. **Handy v. PPG Indus.**, 311.

**Form 21 agreement—failure to review medical records**—The Industrial Commission erred in a workers' compensation case by approving plaintiff employee's Form 21 compensation agreement without reviewing her complete medical records as required by N.C.G.S. § 97-82(a) and the case is remanded for a determination of whether the Form 21 agreement was fair and just. **Atkins v. Kelly Springfield Tire Co.**, 512.

**Disability—Form 21 agreement—presumption not rebutted**—The Industrial Commission did not err by concluding that defendant had failed to rebut plaintiff's Form 21 presumption of continuing disability where defendant failed to offer evidence that there were suitable jobs available and that plaintiff was capable of being hired, taking into account his physical and vocational limitations. **Rice v. City of Winston-Salem**, 680.

**Fall during job interview—subject matter jurisdiction**—The courts rather than the Industrial Commission had jurisdiction over a case involving a fall during a job interview because the Workers' Compensation Act applies only when an employer-employee relationship exists. This plaintiff was on defendant's premises to take a driving test that was part of the application process; there was no promise of employment or agreement between the parties. **Huntley v. Howard Lisk Co.**, 698.

**Future medical compensation—competent evidence**—The Industrial Commission did not abuse its discretion in a workers' compensation case by awarding future medical compensation under N.C.G.S. § 97-25 to plaintiff employee. **Arnold v. Wal-Mart Stores, Inc.**, 482.

**Occupational disease—carpal tunnel syndrome**—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee did not suffer a compensable occupational disease based on the fact that her work did not place her at an increased risk of contracting carpal tunnel syndrome. **Hobbs v. Clean Control Corp.**, 433.

**Occupational disease—carpal tunnel syndrome—aggravation of pre-existing tendency**—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff employee did not suffer a compensable occupational disease even though plaintiff contends her employment may have aggravated a pre-existing tendency arising out of her earlier employment or medical problems if this employment did not cause her carpal tunnel syndrome. **Hobbs v. Clean Control Corp.**, 433.

**Permanent disability—date healing period ended—maximum medical improvement**—The Industrial Commission erred in a workers' compensation case by awarding permanent disability to plaintiff employee and the case is remanded for further findings as to disability because the commission failed to find the date the healing period ended or the date plaintiff reached maximum medical improvement. **Arnold v. Wal-Mart Stores, Inc.**, 482.

**WORKERS' COMPENSATION—Continued**

**Remanded hearing—additional issue**—The Industrial Commission did not exceed its authority in a workers' compensation action by resolving on remand plaintiff's entitlement to temporary total disability even though the issue was not addressed in the first appeal. Plaintiff had a rating of her permanent impairment and the Commission was required to address, if plaintiff desired, whether the scheduled benefit for her rating under N.C.G.S. § 97-31 was a more favorable remedy than temporary total disability under N.C.G.S. § 97-28. **Trivette v. Mid-South Mgmt., Inc.**, 140.

**Retirement disability plan—findings on nature of plan required**—A workers' compensation disability award was remanded for further findings on whether a retirement disability plan was a wage-replacement equivalent to workers' compensation benefits (so that defendant was entitled to an offset) or whether the plan entitled plaintiff to additional payments beyond workers' compensation benefits. **Rice v. City of Winston-Salem**, 680.

**Temporary total disability—end point**—Maximum medical improvement is not the point at which temporary total disability must end if the employee has not regained her ability to earn pre-injury wages. Temporary disability ends at the first point at which the employee may decide to exercise her discretion to select the more favorable remedy. **Trivette v. Mid-South Mgmt., Inc.**, 140.

**Total disability—sufficiency of evidence**—There was sufficient evidence to support the Industrial Commission's findings and conclusions of temporary total disability in a worker's compensation action where there was medical testimony that the combination of plaintiff's existing multiple sclerosis and the injury rendered her incapable of work. **Trivette v. Mid-South Mgmt., Inc.**, 140.

**Woodson claim—town employee—summary judgment improper**—The trial court erred by granting summary judgment for defendant town on a *Woodson* claim for the death of a town employee who was killed when a dumpster partially detached from a garbage truck and struck the employee because of a defective latching device on the truck for the reason that a genuine issue of material fact exists regarding whether defendant's actions were substantially certain to cause death. **Whitaker v. Town of Scotland Neck**, 660.

**WRONGFUL DEATH**

**Abandonment by spouse—surviving siblings—no surviving action**—A wrongful death action against a hospital and doctors could not survive with decedent's siblings as the only remaining beneficiaries where decedent's estranged wife had willfully abandoned decedent and was thus barred by N.C.G.S. § 31A-1(a)(5) from sharing in the proceeds of a recovery for the wrongful death of her husband because all of the wrongful death benefits would have been distributed to decedent's wife had she not abandoned him; the wife's abandonment of decedent did not mandate that she be treated as having predeceased her husband; when beneficiaries are precluded from recovery of wrongful death proceeds due to their bad acts, any remaining beneficiaries only receive their original percentage distribution; and there was no percentage share decedent's siblings could claim as remaining beneficiaries to keep the wrongful death action alive. **Locust v. Pitt Cty. Mem'l Hosp.**, 103.

**WRONGFUL DEATH—Continued**

**Pleadings—survival claim—delineation of theory required**—The trial court did not err by dismissing a portion of a wrongful death complaint which plaintiff contended was a survival claim (which belongs to the decedent as opposed to his heirs) where the damages sought were lumped together because they related to a single wrongful death claim. Plaintiffs should carefully delineate the theory under which they seek recovery. **Locust v. Pitt Cty. Mem'l Hosp.**, 103.

**Proximate cause—sufficiency of evidence—directed verdict**—The trial court erred in a wrongful death action by directing verdict in favor of defendant healthcare corporation at the close of plaintiff administrator of estate's evidence on grounds plaintiff failed to produce sufficient evidence of proximate cause between defendant's alleged breach of duty in its home nursing care of decedent after his leg surgeries and decedent's subsequent death. **Taylor v. Interim Healthcare of Raleigh-Durham, Inc.**, 349.

**WRONGFUL INTERFERENCE**

**Contract and prospective advantage—tortious interference—subjective view of plaintiff—not sufficiently malicious**—The trial court did not err by granting summary judgment for defendant city manager on claims for interference with prospective advantage and interference with contract where defendant told plaintiff's client that she "could do better." This simply expressed defendant's subjective view of plaintiff's abilities and did not express the required malicious motive. **Beck v. City of Durham**, 221.



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